Preventive War in the Rearview Mirror: The Ambiguities of the Just War Tradition

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The just war tradition is considered a source of wise inspiration that should guide the politics of war. This paper has a different view. I argue that the just war tradition has perpetuated a highly ambiguous ethical vision of war that has major political and legal consequences in contemporary international relations. This paper examines the question of the preventive use of force within several texts of its major authors.

The just war tradition is more the problem than the solution to the enigma of preventive war. Ambiguities from the just war tradition pave the way for different controversial interpretations of the law, of morality and politics. Ambiguities over the definition of self-defense open the door to military intervention in the name of "anticipatory self-defense".

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The use of force is shaped by the ideas that legitimate it, accompany it, support it. As a result, the just war tradition is both a mirror and a compass with respect to how in "the West" war has been waged and how "we" have thought about the question of when and how it should be waged. This is particularly true of preventive war making; the major texts in the just war tradition are valuable indicators of the tensions and contradictions that have arisen in these last few years, when prevention became a crucial issue in the public realm of Western democracies. The intention is not to trace a history of ideas in order to map the encyclopedic evolution of the notion of prevention. Rather, my purpose is to identify specific questions in the reading of the major texts that will reveal certain contemporary approaches and their contradictions, and that will enable a better understanding of the ideas that animate those approaches.

Prevention has a long history that is sometimes complex to outline. It is a similarly complicated task to define the breadth of its reach, the date of its origin and the

[1] This paper is an adaptation of chapter II of *Le Pari de la guerre – guerre preventive guerre juste ?* (Paris, Denoël, 2009). This text has been translated from French by Sara Dadush (Institute for International Law and Justice, NYU Law School), whom I wish to thank as well as Rob Howse for helping with the translation and inviting me to this presentation.

states of its development. The meaning of anticipation changes. It takes place in distinct legal and moral frameworks, depends on the structures of the international system, the state of military strategy, and on the techniques of war and weaponries technology.

Exploring classic texts better highlights these nuances, as well as the logic and the pitfalls of the idea of prevention. Indeed, it is worth asking the questions: from which implicit or explicit sources did contemporary political rulers, and those responsible for justifying the adoption of certain policies, draw their inspiration? How can the re-interpretation of those sources and references be traced?

Preventive war is interesting in that it represents a synthesis of the offensive and the defensive. It is usually viewed as a disguised offensive war, and as a result, as infringing the rules of law and of morality. This text recommends turning the traditional just war outlook on its head by examining the ambiguous character of the offensive. First, I introduce certain delimiting concepts on the notion of the offensive in strategy. The texts relating to just war will then be considered as a starting point for deeper analysis, and used as reflections of the law and ethics of war.

The political traditions of the offensive and the defensive

Choosing war depends in the first instance on making a decision. What attitude should be adopted in the face of danger? Should one wait or make the first move? The history of strategic thinking is heavily marked by a fundamental tension between these two inclinations, between a valuing of the offensive and a respect for the defensive. It is common to associate the soldier with the combatant who above all loves to engage in battle by privileging the offensive; he would be "naturally" predisposed to do so (historically savvy readers will also recall that the Prince is quick to the draw).

Several 18th century texts are particularly informative on this point. One year apart, in 1784 and then in 1785, in two neighboring countries, two aristocrats - Marc-René de Montalembert and Wilhelm de Schaumburg- published their works; the first was

a treaty "The art of the defensive superior to the art of the offensive"[2]. After Vauban, Montalembert praises fortification as supplying a crucial military advantage. When he expresses the view that "leading a war offensively is to be enslaved to negative passions, whereas devoting oneself to the defensive is to work toward the happiness of humanity"[3], Schaumburg is taking a stance that is both psychological and moral. The choice between the offensive and the defensive is thereby associated with subjective considerations. The offensive and the defensive are, as much in one case as in the other, values or ideas that one can promote or defend and around which both individual and collective initiatives can take shape.

What is the contemporary academic interpretation of this alternative? The related debates have mainly taken place among the realist community. The theoretical allegiances characterizing these debates reflect differing visions of the world, as well as different ontologies and psychologies; they are organized around a dividing line between the offensive and the defensive. The most classic form of realism, exemplified by Hans Morgenthau, who is one of the first authors of this tradition, is offensive. States are motivated by a need to maximize power; they are fundamentally determined to maximize their gains. The balance of power is defined by the will of the strongest, and by realizing ambitions in proportion to capacity; other States have no choice but to bend to that will. The contemporary spokesperson for such an approach is John Mearsheimer[4].

These initial conclusions are disputed by the "structural" realists, or neo-realists, one leading figure among whom is Kenneth Waltz[5]. The international system structures the behavior of States that seek to minimize their losses and maximize their security (as opposed to their power). Possibilities for cooperation exist in an otherwise lawless

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[2] Alfred Vagts, *Defense and Diplomacy: the Soldier and the Conduct of Foreign Relations*, New York, King Crowns Press, 1956, p.278

[3] Id.

[4] John Mearsheimer, *The Tragedy of World Politics*, New York, Norton, 2001

[5] Kenneth Waltz, *Theory of International Politics*, New York, Mc Graw Hill, 1979

international system where the concern for survival and the “security dilemma”[6], is prevalent. In short, it is a “defensive” realism.

International relations theory is deeply marked by the tension between these two positions, which reflect different views of human nature and morality (the notion of man as naturally aggressive as opposed to a natural inclination towards reasonable prudence that would suggest restraint). There is also a third alternative: “contingent realism”, a more “optimistic” vision of realism, which is traditionally rather somber[7]. The offensive or defensive posture of States would here be dictated by their relative military power. There would no longer be an intrinsic theory of the offensive or of the defensive that depends either on a particular premise of political psychology or morality or on a structural analysis (defensive realism). For supporters of this third way, this is an occasion to rejoice. Even in a context of rivalry between States, cooperation can be contemplated as an option.

Technology also plays an important role[8]. The availability of canons reduces the cost of attacking fortresses[9]. Nuclear weapons favor the offensive, while forcing the State to invest in the “defense” of its civil population (by developing anti-ballistic missiles). Certain weapons are both offensive and defensive: tanks are used both to open fire in battle and also to strike back[10]. Technology tilts the unstable equilibrium between the two sides, namely, strategy and tactic. Certainly, technological innovations modify the outcome in a particular manner; however, other variables can trigger the will to make the first move or, alternatively, to be more restrained. An explanation of the causes of prevention illustrates this phenomenon. Materiality matters: the sophistication of the air-

[6] Robert Jervis, “Cooperation under the Security Dilemma”, *World Politics*, 30, January 1978, p.167-214

[7] Charles Glaser, “Realists as Optimists”, *International Security*, vol. 19 n.3, winter 1994-1995, p.55-90

[8] Sean M. Lynn-Jones, “Offense-Defense Theory and its Critics”, *Security Studies*, vol. 4 n.4, Summer 1995, p.660-691

[9] Id., p.667

[10] Id., p.672

force encourages preventive strikes. It is, however, within a specific context, such as the fight against terrorism, that a strong official doctrine of prevention is developed.

The border between offensive realism and a revolutionary vision of the world – wanting to shape the universe according to one's image – is sometimes almost imperceptible[11]. The example of two former counselors to Ronald Reagan is an illustration of this. Lee Casey and David Rivkin rallied to the camp of George W. Bush and were (are) strong advocates of prevention[12]. Their intellectual references are the "*classic*s", an elegant choice. Specifically, their references include classic authors that realists like referring to, such as Clausewitz or Thucydides. Often, Reagan's counselors, a family to which neo-conservatives have belonged, claimed to be realists. The strategy of preventive war is the contemporary incarnation of this shift away from the offensive realist side toward a grandiose revolutionism. As a result of certain major historical transitions – the shift from bipolarity to unipolarity, transnational terrorism and the rise to power of neo-conservativism-, these experts have modified the orientation of their advice. They have nevertheless not put into question their strong penchant for the offensive and for coercing those who resist America, and for supporting a belief in the clear superiority of the Western and American model, as compared with other cultures.

Realism has a normative component which, depending on its version, can be more or less dominant. The primary purpose of realism is to explain international behaviors. Realism also has a prescriptive dimension when, as in the example of offensive realism, Hans Morgenthau incites States to maximize their power and to pursue their international interest. The more this dimension is affirmed, the more realism approaches revolutionism. This demonstrates an indissoluble link between politics, morality, and law.

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[11] Martin Wight, *International Theory the Three Traditions in International Politics*, Leicester University Press, 1991 (new ed.), p.47

[12] Lee Casey, David Rivkin, "Leashing the Dogs of War", *The National Interest*, n. 73, Fall 2003, p.57-69

The question of the offensive in the just war tradition

"One must therefore bring together justice and strength, and to do so, one must ensure that what is just be strong, or that what is strong be just".

Pascal

It is common to associate the just war tradition –a tradition whose supporters date back to Augustine, extending to the present day with Michael Walzer – with valuing defensive war. Among the classic and contemporary authors of this large and sometimes heterogeneous tradition, a just war would be, *par excellence,* understood as a defensive war. By inference, many commentators hold that the *only* just war is a defensive war.

This is a mistake. Starting from the claim that a defensive war may be a just war, it does not follow that only defensive wars are just. Certain authors are clear: offensive wars can be just. These authors make explicit reference to preventive attacks and base their considerations on the tenets of *natural law*. For Gentili[13] and Vattel[14], preventive war is justified when the potential enemy increases its power and manifests a clear hostile intention to invade a State, which in turn has no choice but to make the first move. Both authors give a lot of importance to discretionary power. The subjectivity of the decision is not an issue in the *a priori* justification of war. These authors do not, however, apply either sufficient detachment or objective criteria in contemplating the evaluation of the choice of preventive war. This problem has not been solved and creates today great tensions.

Can a decision to go to war be based on a calculus? Such a process would indeed free up a number of initiatives; there would simply be more wars than if restraint and especially principles (which must be observed and which would come at a cost) were safeguards against pulling the trigger. This is true even leaving aside the fact that the

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[13] Alberico Gentili, *De Jure Belli Libri Tres,* Oxford, Clarendon Press, 1933 (1612), Book I, Ch. XIV, & 103, p.65. "It is better to provide that men should not acquire too great power, than to be obliged to seek a remedy later, when they have already become too powerful".

[14] See Emerich de Vattel, *Le Droit des gens ou principes de la loi naturelle*, Buffalo, William S. Hein, 1995 (éd. 1758), Livre I, Chap. XX, § 250 and Livre III, chap. III, & 42. A State becomes a potential target of a preventive action if it increases its military strength and if it has shown rapacious behavior in the past.

calculation is sometimes subjective, especially when it takes place *ex ante*. And yet, the just war tradition is home to theologians who did little to conceal their tolerance of offensive war and of the preventive calculus. Such is the case of the 17th century Spanish Jesuit, Francisco Suarez[15]. Suarez demonstrates a surprising pragmatism. In judging the need for intervention, he privileges the criteria of utility, measuring the effect on the well-being of the State carrying out the intervention, despite it being offensive in nature. Offensive war is not bad *per se*[16]*;* it is sometimes necessary for a State "in order to ward off acts of injustice to hold enemies in check"[17]. It is possible, and in certain instances even desirable to attack in order to defend oneself. By establishing this rule, which today overlaps with the neo-conservative doctrine, Suarez fails to consider its consequences on a system of collective security that can authorize and justify such behavior.

Suarez contributes to the ambiguity of the just war tradition. He merely pushes the just war tradition to its limit, while its other supporters seek to erase its less attractive features. By considering the criteria of proportionality, and by espousing an interpretation of self-defense that tolerates the possibility of defending against a potential threat, offensive intervention, -said to be preventive-, becomes justifiable, if not acceptable. Suarez goes further by considering the *damages* that are the *motive* of prevention. Offensive war is acceptable when the assets of the Prince are seized, when the rights accorded to nations are denied him, when a grave assault is levied on his reputation and his honor[18]. The first two scenarios fit into a classical contemporary juridical framework (which does not mean, however, that these assaults on legality justify the recourse to arms). The third scenario is more interesting: it reveals a certain tolerance vis-à-vis striking first. This scenario certainly seems fundamentally outdated: it would be difficult for a decision-maker to prevail using such an argument. It could nevertheless provide a reason to act. It is important to take such reasoning into account. The war between States

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[15] Francisco Suarez, *A Work on the Theological Virtues Faith, Hope and Charity*, Oxford, Clarendon Press, 1944 (1621). See « Disputation XIII », in *On Charity.*

[16] Id., p.803

[17] Ibid., p.804

[18] Ibid., p.817

is not only considered by analogy with individual relationships. It is considered in reference to a very specific *face à face*, namely, the duel[19]. The anthropologic foundation for prevention is the valuing of the offensive's virile posture, destined to preserve the reputation of the Prince who fights for his honor.

Suarez is better known for his reflections on the calculus, the execution of which falls to the Prince, whether in matters of war or peace. It is now a classic notion: to be just, war must in principle have a considerable likelihood of success[20]. It is unwise to launch oneself into a military intervention the outcome of which might be too costly. This statement does not adequately sum up Suarez's thinking on the matter. In his eyes, it is important to distinguish the offensive and the defensive. With respect to defense, when an attack is clearly identified the attacked has no choice but to respond to the aggression. It is not required to calculate whether the response is an effective one in order to justify it. This is not the case with respect to offensive war[21]. In the case of offensive war, if the expectation of victory is weaker than that of defeat, the Prince should not engage with such an adventure: "defensive war is a matter of necessity, offensive war is a matter of choice"[22].

With respect to offensive war, Suarez favors assessing the consequences of a State's decision that is aimed at ensuring the safety of its political community. What is the basis of this calculation? Suarez reiterates the duel analogy. When Suarez evokes the duel, by analogy he discusses it as a private war[23]. He sees error in the duel participants' fighting to the death without there being a reason for making the recourse to arms the only choice (for either or both fighters). Reason authorizes recourse to the offensive if

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[19] There is in the Renaissance an ample literature on the political, legal and ethical significance and implications of duels. Among other texts, see Paris de Puteo, *Duello Libro de Re*, Venetiis, 1540. For a historical account of the analogies between duels and wars in the just war tradition: Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, PUF, 1983, p.426-441

[20] Francisco Suarez, op. cit., p.822

[21] Id., p.823

[22] Ibid.

[23] See "Last Section (Section IX) Is a Private War, That is to Say, a Duel, Intrinsically Evil?", p.855-865

one's life or one's assets are in danger[24], but it is useless to die when one has the choice to preserve one's life[25]. Suarez does not condemn the principle of the duel anymore than he condemns offensive war; he merely adds a principle of reason to postures which, to the eyes of some, seem adventurous or transgressive, whereas Suarez views them through the eyes of cold reason.

Suarez cannot avoid confronting another question. What degree of certainty is needed to launch a war when such a war is not a strict response to an identified aggression[26]? His vision of the State is interesting. It is made up of three strata: the Prince, his generals and the officers who take an active role both in the combat and in its planning, the soldiers. Suarez defends the importance of identifying the deliberation process that would shed the most light on justifying the intervention. Is it just to follow blindly the Prince's decision to retake by force what was unjustly taken even though it runs against the views of his adversaries and sometimes even of those of his own military and advisers? Suarez refers to "good men"[27], meaning the protagonists of these deliberations which we hope and want to be fruitful. It would be preferable for the opponents of the Prince to recognize the value and wisdom of these individuals. We see three visions of the world outlined: a theory of democracy (the role of experts in public space and the taking of decisions in the name of the "best justification"), the granting of an authoritative function attributed to wisdom, a cosmopolitan vision of the settlement of international disputes (let us imagine that these respectable men adopt a position that is opposed to the State.)

The responsibility for war rests with the Prince. Generals are required, by the "charity" principle, to inquire about the justness of war in any given circumstance. With

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[24] Killing is then acceptable. Id., p.860

[25] Id., p.858

[26] See Section VI "What Certitude as to the Just Cause of War is Required in Order that War May be Just?", p.828 and ff.

[27] Id., p.832

respect to soldiers, they are in no position to assume such a role. Nevertheless, if they do have doubts, they are required to raise them in order to diffuse them.

Suarez says either too much or not enough and the history of wars remains no more than an echo of this confusing silence. The just war tradition is instrumental when it emphasizes self-defense as a pre-condition for conflict. The Prince is required to report on any attack that might render his State a victim. This circumstance is quite different from one in which offensive war is at issue, where the Prince's discretionary power is immense. He becomes the gambler in *his own* war. Calling on the good will of wise men is not enough, as Suarez says himself: they are not necessarily appointed to judge decisions of a state given that their opinion cannot be enforced. With respect to acknowledging their impartiality, in the absence of a higher authority to impose and guaranty such impartiality, this question is left without answer. Without a strong civil society and a legislative body with broad powers, there is little possibility that a balanced decision will be reached. Furthermore, the supranational institution that would charge experts with the task of shedding light on the just nature of a State decision would need to be endowed with very broad powers and be in a position to use force in order to implement *its* international law. Suarez' thinking on this matter is interesting for two reasons. First, it demonstrates that the just war tradition is not an antidote for contemporary problems. Second, it reveals its imprecision: the weaknesses in Suarez' thinking and its contradiction with the more general principle of self-defense generate fertile ground for breeding the very ambiguities that underlie the disputes concerning preventive war.

Grotius' position is more complex and just as, if not more, instructive. Grotius is well known for having touted the merits of caution. Indeed, in case of doubt, meaning, where there is uncertainty concerning the threat posed by a State against which war could be declared, Grotius advises not to strike. War must be a last recourse. However, preventive war represents the intervention of a "now or never" reasoning. If one procrastinates, it will be too late to destroy the threat that the attacker, who is preparing to harm you, embodies. Preventive war is essentially a war of choice; among the different kinds of war, it is the one that can most feasibly be avoided (as opposed to defensive

war). Preventive war decidedly sets diplomacy aside, taking away its mediative power. There is an "urgent" need to not allow distancing to occur: the useless blabber of diplomats achieves nothing more than wasting time.

In spite of the scruples which in part reflect his humanist orientation –wanting to establish an international society of States where violence is both circumscribed and mitigated by caution, thereby producing collective security- Grotius nevertheless discusses the case of prevention. He is clear on one point, but then allows for a large gray area, and finally seems to contradict himself. Preventive war would not, in and of itself, be considered a just war[28]. Grotius brings an additional dimension to this view. He considers that in the event of an attack "which is not an actual attack but which appears to threaten from a distance", it is possible for a State, which either perceives or believes it perceives such danger, to prevent the attack "not directly" (meaning, by declaring war), but "indirectly, by punishing a crime that has been initiated but not completed"[29].

This legal distinction is critical. Its political consequences must be inferred. Such observations can be subject to different interpretations. How can one punish a crime committed by a State that launches a manufacturing campaign for weapons of mass destruction while either implicitly or explicitly manifesting its intention to make use of such weapons one day? And what if military intervention is the only recourse for administering such a punishment? Military intervention would then become the *means* for punishing a criminal. Would it be viewed as preventive?

There are two possibilities. One, war is a simple means for administering justice; much like a policeman who, in order to make an arrest, shoots an escaping criminal, injures him in the process, and catches him. In this instance, there is no intent to kill, but there is an obligation to apprehend the criminal in order to bring him to justice. Here, war is not preventive; rather, it is a means for administering a deserved punishment. Justice

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[28] Grotius, *De Jure Belli ac Pacis Law of War and Peace*, (1625), Book II, Chapter I, XVI et XVII

[29] Id.

permits this because there is no other way to enforce the rule of law, which is the State's intention.

There is, however, another way to read this text, or rather, there is another way to draw inspiration from it by taking a risk or by trying to twist its meaning. When a State becomes threatening, its designated rival may decide to engage in preventive war by arguing for the *need to punish* the deviant actor. Punishment thus becomes both the objective *and* the intention of a war that has a preventive form. A new ambiguity of preventive war is that it sometimes becomes very difficult to distinguish from *punitive war*. This ambiguity can be found in Suarez' work, though with him it is fully accepted, since both the offense and the act of derogating from a rule, such as a rule prohibiting arms build up, are punishable. The decision to engage in punitive war rests on the assessment of the reported danger of a State or of its leader – crimes have already been committed, precedents have been set – from here on out, it is imperative to avoid further crimes being committed. This is the function of punishment. In this case, war is a means of punishing in order to prevent a danger from being realized. Over the course of the last conflict in Iraq, George W. Bush or Tony Blair, much as intellectuals would[30], argued (often in later phases of the conflict) in support of the humanitarian agenda of the intervention, which was allegedly designed to bring Saddam Hussein and his aides or accomplices to justice.

Grotius does not bring a clear answer to the preventive question. He condemns it from a legal perspective, but this juridical response does not resolve the whole enigma of preventive war. A State arming itself is not itself a cause that legally justifies war. For a war to be just, one would need "certainty" concerning the hostile intention of the State which has given itself the means to be aggressive, but this is where we enter into the

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[30] Tom Cushman (ed.), *A Matter of Principle: Humanitarian Arguments for War in Iraq*, Berkeley, University of California Press, 2005. See also Fernando Tesón, "Ending Tyranny in Iraq", *Ethics & International Affairs*, vol. 19 n. 2, 2005, p.1-20. One objection to this critique is the need to make a distinction between a war declared because of the atrocities committed by a regime (humanitarian intervention) and a war against a regime that has committed these atrocities (punitive war). See Stéphane Courtois, « La guerre en Irak peut-elle être justifiée comme un cas d'intervention humanitaire? », *Les ateliers de l'éthique*, vol. 1 n. 1, printemps été 2006, p.4-20. http://www.creum.umontreal.ca/Les-ateliers-de-l-ethique-la-revue.html

territory of “moral things”[31]. This distinction is useful as it protects the coherence of the law. However Grotius does little more than displace the problem. In his great work, Grotius only falsely resolved a problem that was clearly evident in his earlier, less well known treatise, dated 1604[32]. *De Jure Praede* was discovered in 1864. It is far more succinct and less elaborate than the work of 1625. It is nevertheless very instructive to the extent that it reveals all of the difficulties involved in the just war tradition that are partially resolved or glossed over by those who refer to it.

Prevention is addressed in a chapter on the acceptable nature of wars[33]. In this passage, Grotius focuses on an act that upsets the course of justice. What is the appropriate response to such an infraction and what is its status? The use of force would be appropriate and would take place outside of the realm of the legal system. In the face of outlaws, the use of force would not require the support of the law to be acceptable[34]. But, if a particular act does not require legal support to be found to be acceptable, can it nevertheless be found legitimate? Such an act, while lying beyond the legal realm, would likely be legitimate in the political realm. It is no longer a question of shifting the decision to strike preventively from the law to morality. Grotius adopts a conciliatory approach toward the law: he speaks of permissible action where the latter does not rely upon the negative intention of the adversary to determine whether force should be used[35].

Prevention brings to the surface all of the ambiguities and indecisions intrinsic to the definition of war, as juxtaposed against the definition of peace. Grotius dedicates a chapter of his earlier and less developed writing to these ends, where he takes up a

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[31] Grotius, op. cit., Livre II, Chapitre XXII, V. – 1

[32] Hugo Grotius, *De Jure Praede Commentarius – Commentary on the Law of Prize and Booty*, Oxford, Clarendon Press, 1950

[33] Id., Chapter VIII “Concerning the Forms to be Followed in Undertaking and Waging War”, p.85 and ff.

[34] Id., Chapter VIII, & 44., p.95-96. The Prince has the right to repel “public enemies” and there is no need of announcement (id., § 46). He has the right to attack those who “resist the execution of (his) rights” (id., & 48) and to attack those who “compel (him) to submit to fresh losses” (id., & 49).

[35] Id., & 48, p.809. “In so far as bodily attack is concerned, it is permissible – in accordance with the laws of the first order (laws I and II), which do not take into account the intent of one’s adversary – to make an attack upon all enemy subjects who resist, whether knowingly or in ignorance, the execution of our rights.”

definition by Cicero: ideally, wars must be carried out "so as to ensure that we may live in peace, and free from assault"[36]. Grotius also makes use of another definition by Crispus according to which wise men carry out wars "in order to achieve peace, and endure hardship in order to taste the pleasures of leisure"[37]. Peace would not only be the absence of war, or a modest and objective way to conceive of this ephemeral moment; rather, peace would be an ideal of life, to be pursued through effort, without excluding the use of force and the recourse to arms as means for attaining it. These two classic visions can lead States to the battlefield, feeding the desire for preventive war. Certainly, international law has since evolved, but it is not surprising that the bases for the ambiguities of prevention persist, given that it build on this reflection.

An ethos of virility

The policy of prevention is ambitious, making sentiments of grandeur and omnipotence rise to the surface. It reveals anthropological preferences. Prevention is a choice which communicates a preference for the offensive, its primary inclination rather than for the defensive. These two possibilities, these two stances, these two preferences are inseparable, and each is defined in opposition to the other. The classic texts are very broadly instructive: the inclination toward one, or the choice between one or the other, is revealing of distinctive personality traits.

Two visions of the world collide, each founded on an anthropological and psychological base that is antagonistic to that of the other. On the one hand, for he or she who favors foresight, what matters most is to not let oneself succumb[38]. On the other hand, for he or she who favors a defensive stance, caution is the best compass and there is no benefit in adventuring down a risky path.

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[36] Id., p.125

[37] Ibid.

[38] Avoiding being "the sitting duck" is crucial.

The work of Giovanni da Legnano, the Italian 15th century jurist, predates a rather well defined division of orders – the normative distinction between the offensive and the defensive - and reflects certain features of the contemporary debate[39]. Giovanni de Legnano writes with a frankness in contrast with the cautious treaties of war that follow. This Milanese individual is a man of letters, an erudite, and a professor, he also assumed political and diplomatic roles and negotiated relations between Bologna and the Papacy. As a true "Renaissance man", his expertise extends to astrology (his first love), theology, civil law, politics and philosophy. Legnano also discusses matters of justice in warfare, though he is not included in the traditional just war tradition anthologies. This is likely because his ideas are not in line with the attachment to caution and temperance displayed by jurists such as Grotius. It is also likely because, for Legnano, defensive war is not the just war *par excellence*. Revisiting his writing is profitable. Initial attempts at outlining a complex idea are more direct and less smooth than later formulations that may be more detailed, but also sometimes more obscure: the latter tend to conceal unresolved questions by glossing over the complicated aspects.

In his view, prevention is a question of contextual appreciation. Legnano on principle refuses to apply abstract justice-related criteria[40]; rather, the determination must be made on a context-specific basis. Given that there will always be bold actors who are predisposed and ready to make the first move, it is best not to wait for them to give in to their tendencies. The opposite is true with respect to those who are more timid; here prudence is recommended. Finally, prevention resembles a game of mirroring: it is appropriate to be on the offensive with those who are inclined to aggression, and to be on the defensive with those who are best distinguished by their passivity. In this game of projection, actors mirror one another, and prevention becomes the anticipatory mimicking of the other, where the latter is imagined and/or guessed. Supported by a negative ontology and a pessimistic psychology, the content of which is best communicated by

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[39] Giovanni da Legnano (1383), *Tractatus de Bello, de Represallis et de Duello,* Buffalo, W. S. Hein, The Classics of International Law, 1995.

[40] Chapt. CXVI, "Whether I ought one who is await to strike me or to anticipate him?", p.304.

Hobbes (man is a wolf to other men) or Freud (the primacy of aggression and patricide), it is easy to understand why and how preventive is such a longstanding doctrine.

Legnano explains the terms of a choice that is largely discretionary and subjective. The warrior scrutinizes his adversary; he cannot be held back by the rules of justice that would, in principle, disqualify aggression. Legnano goes further. In every way, he stands as a defender of a "virile" posture toward the activity of war, and sings the praises of the noble art of the duel. Certainly, as a matter of common sense, the soldier does not simply give in while in battle. He does not wait to be struck before attacking his adversary. On the contrary, a good dose of strategy and ruse are permitted in war, and the essence of that ruse is prevention, which in turn is the fruit of intelligence. Officers, noblemen commissioned by the State, and of course, at the head, the Prince, are men of honor; they take bold initiatives which set them apart from the cowards and the weak. The offensive is valued; Legnano's thinking is not new in this regard. Nevertheless, his perception is of interest to the extent that it unfolds in the context of an elaborate discourse and echoes the political and juridical thought of his time (about Machiavelli, of course).

Going to war preventively is the mark of martial virtue, or warrior morality, the trait of the soldier and of the Prince. This trait is always defined by consistently being coupled with its opposite, namely, effeminate passivity. Its substance is otherwise undefined, it serves as a foil, that haunts classic texts of strategy and treaties on the law of war[41].

Legnano brings to bear another idea, which should also be highlighted because it too reappears in contemporary justifications. It certainly currently assumes a different form today, but one can still trace its origins to Legnano's writing. The duel is not the only prism through which Legnano studies the art of war; he also standing in favor of "reprisals".

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[41] The origin of the ban on the use of poison is inspired by the same anthropological vision of warfare. Some forms of ruse are associated to the treachery power of women. Men are active and fight openly whereas women are passive and disguise themselves. Gentili, op. cit., "Of Poisoning", Book II, Chapter 6.

In the image of the God who reigned over the origin of humanity, the Emperor who was powerful enough to embody the will of the divine punished the transgressors of the law of God. In the absence of God and such mighty Prince, disorder prevails and individual initiatives must fill the gaping hole that is left in the wake of this retreat. Doing justice on one's own is a principle that Legnano weighs favorably. In order to avoid being struck, the soldier is authorized to kill; similarly, the Prince is granted the right to legitimately defend his State. That is not all. A ruler works to preserve a "mystical body"[42], meaning to protect the members of his political and religious community from danger. The mystical body is the Christian community broadly understood. A war may be declared in the absence of an actual attack by a State, justified by a threat that hangs over members of the mystical body that is defended by the State. Needless to say, such a view allows for a very large spectrum of discretionary recourse to the use of force.

The exploration of these different texts – and without doubt, Legnano and Suarez are extremely interesting in this regard- reveals an architecture of preventive war, which, while it may no longer be directly visible in contemporary doctrine, remains in the backdrop. The terms used by these classics might be alien to us or outdated but the argument structure is not necessarily so. Prevention rests on three pillars: the *duel*, *reprisals* and *punishment.* In each case, depending on the modality, prevention rectifies past offenses and attempts to discourage future attacks. A preventive strike may come in response to an antecedent, but the more serious the offense, the more the Prince is authorized to take bold initiatives. The duel is the response to the provocation of a peer, which authorizes the offended party to make the first move in a violent confrontation. Certainly, there is something naive and archaic about this view of human relations. It is nonetheless the way relations are being portrayed by offensive realism. Why do States go to war? To preserve their reputation and because they seek prestige[43], claims Hans Morgenthau at the end of the Second World War. Reprisals are a more precise category,

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[42] Legnano, op. cit., The Fifth Treatise of the Third Principal Part, Chapter CXXII, "Treating of Particular War which is Waged in Defence of the Mystical Body and Called Reprisals", p.307

[43] Hans Morgenthau, op. cit., p.51

to the extent that the list of offenses that authorize a reprisal is made explicit. Provocations are precedents that accumulate over time; they both induce and authorize a State to launch an attack against a possible troublemaker. If a State (or a non-State actor) regularly exhibits hostility toward your nation, your infrastructure or your population, then, taking into account the proportionality criteria, striking or engaging in war seems just. Following this reasoning, the 2006 Israel – Lebanon war was well-justified. It is not surprising that when the hostilities began, this conflict was the object of an implicit agreement which was elaborated in the context of the "society of States" (then many critiques were addressed at Israel because of what was considered to be a lack of proportionality of means during the intervention). Finally, punishment is a classic dimension of the just war tradition (for Augustine and Thomas, a just war is aimed at punishing the sinner), and is indistinguishable from reprisals, though it is different from the duel. Preventive war has a deterrence dimension and can lean toward punishment: sanctioning a State that represents a danger for the Prince, but equally, to deter other States from emulating a transgressive conduct. While the duel presupposes an equal playing field, punishment is not bound by such an imperative.

Legnano makes sense of the warrior virtues and his contempt for passivity by applying a certain idea of justice. Legnano values the offensive: this is actually a good sign of his frankness taking into account that he defended this view at a time when it was certainly less improper to do so than it is today. The offensive guides a noble intuition that is founded on a code of honor; it represents a point of equilibrium for inter-State relations modeled by the image of the relationships between "good men". This captures an essential difference from our current reality. It is certainly true that virility is highly regarded among neo-conservative, as evidenced by the high-profile publication of a recent book on the subject by a Machiavelli specialist; the work is soberly titled, *Manliness*[44]. Yet, any Western power would find it difficult to enter into a war and cause the deaths of hundreds of thousands of people *in the name* of virility. "Compassionate

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[44] Edward Mansfield, *Manliness*, New Haven, Yale University Press, 2006

conservatism"[45] resolves this problem. In the face of suffering victims, George W. Bush's Republican administration ties its conservatism, which in point of fact encompasses the defense of virility, to compassion.

The struggle for justification

> "A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks . . . . The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the rights of states to use force in exercise of their right of individual or collective self-defense. *The UN Charter is not a suicide pact*."
>
> George Schultz, U.S. Secretary of State on the bombings in Libya in the 1980s[46].

Legnano is a good introduction to the analysis of contemporary debates, in which the desire for power features so prominently. Which preventive policy? What arguments provide the grounds for its justification? International law, its foundations and its jurisprudence make up the backdrop of this debate. Prevention amounts to anticipatory self-defense[47], a notion that generates violent debate. These disputes are not limited to academics, tucked away in their ivory towers. On the contrary, these legal theorists often take a public position, and are asked to express their opinion in their capacity as experts. Where they have access to powerful circles, some also assist leaders in formulating their policies.

It must be underlined that with approval from the Security Council, even though it is preventive, a war becomes legal. A decision to unilaterally engage in preventive

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[45] The term was coined by Marvin Olasky. Marvin Olasky, *Compassionate Conservatism: What It Is, What It Does, and How it Can Transform America*, New York, Simon and Shuster, 2000.

[46] Quoted in John Yoo, "Using Force", *University of Chicago Law Review*, Vol. 71, Summer 2004, p.27. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530022 (emphasis added).

[47] In the context of the war against Iraq, see: John Yoo, "Why Iraq's Weapons Don't Matter", *Legal Times*, August 4, 2003. http://www.aei.org/publications/pubID.18962,filter.all/pub_detail.asp

warfare, however, is illegal[48]. The United Nations Charter, and Article 51 in particular, which mentions the natural right to self-defense, and Article 39, which addresses the threat to peace leave a lot of room for interpretation, an avenue that is often taken by reformist jurists who advocate for anticipatory self-defense. More generally, and beyond these partisan positions, those familiar with the law note that the jurist community has yet to reach a consensus concerning the interpretation of Article 51, particularly when it comes to addressing the following question. At what point can a response to an attack be authorized? The very term of "attack" lends itself to a certain ambiguity because it has at least two meanings. An attack refers to a specific use of force that reaches your territory. An attack can also refer to mobilizing of forces (men and weaponry) with the goal of using them against your territory. There is no absolute consensus in international law on this subject[49]. This issue also arose at a panel called by the Secretary General in 2004[50], the report takes good note of the threat posed by the acquisition of nuclear weapons-making capability with hostile intent. Very cautiously and not surprisingly, it suggests not to reform article 51, in such a case a decision ought to be reached within the Security Council (whether to strike against this potential threat or not)[51]. Still, the issue is being raised and given proper attention.

The interpretation of self-defense, as a passive or an active form, also involves shifting the tension between praising the defensive and the preference for the offensive that is associated with the ethos of virility, into the legal domain. This is a matter of choice. In 1986, the British clearly adopted a position in favor of an "offensive" interpretation of the law of self-defense when they commented on the American strikes against Libya, which were motivated by that country's involvement in terrorist activities:

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[48] These issues are being discussed in Michael Doyle's work where he defines criteria and guidelines that would help defining an appropriate policy of preemption. Michael Doyle, *Striking First Preemption and Prevention in International Politics,* Princeton, Princeton University Press, 2008

[49] Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense", *American Society of International Law Task Force on Terrorism*, August 2002, p.8. www.asil.org/taskforce/oconnell.pdf

[50] http://www.un.org/secureworld/

[51] *A More Secure World, Our Shared Responsibility, Report of the Secretary-General's High Level Panel on Threats Challenge and Change*, New York, United Nations, &188.

"Self-defense *is not a completely passive right.* It includes the right to destroy the assailant's infrastructure or to reduce its capabilities, to diminish its resources and weaken its will in order to discourage or prevent future attacks."[52]

How is this issue traditionally tackled? The main challenge that the definition of just war and more specifically, that the justification for a preventive war runs up against, is the understanding of self-defense. The international realm is most often considered by analogy to relations between individuals. This anthropomorphism is at the heart of the self-defense question, where the latter is understood as a direct response to a direct aggression. It is not hard to see that this analogy is not only conceptually problematic, but that it also leads to further complications. Indeed, how can one conceive that a collective as abstract as a State "thinks", "feels" and "acts" *like* an individual?

The case that is most often mentioned in evaluating the appropriateness of an act of self-defense, and in drawing a line between licit and illicit warfare, is the incident involving the Caroline in 1837. This ship, which was used by rebels in their fight against the British and Canadian authorities, secured the delivery of weapons transiting through the United States. In order to beat their adversaries, the British decided to stage an intervention within the United States, and to sink the ship. Two American citizens died in the attack. The American response came in short delay. Then Secretary of State Daniel Webster filed a petition request with the United Kingdom, demanding that it demonstrate "necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . even supposing the necessity of the moment authorized [British forces] to enter the territories of the United States at all, [they] did nothing unreasonable or excessive"[53]. The British government replied that its response to the assailants complied with these criteria. Secretary Webster disagreed, pointing out that the

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[52] UK 41 UN SCOR (2679th Mtg) UN DOC. S/PV 2679. Quoted in Thimothy L. H. McCormack, *Self-Defense in International Law – The Israeli Raid on the Nuclear Reactor*, New York, St Martin's Press, 1996, p.234

[53] Quoted in John Yoo, "Using Force", *Chicago Law Review,* vol. 71, Summer 2004, p.7-8. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530022

British attack was not necessary and that it was disproportionate. Great Britain then extended an apology to America, which was accepted.

Does this case provide appropriate criteria for assessing self-defense, and are these applicable for reaching a determination as to whether a preventive act does or does not qualify as valid? It is often referred to, both by States and by tribunals, such as in Nuremberg in 1945, where the attack on Norway by Germany in 1940 was deemed illegitimate because it was not found to be necessary to prevent an "imminent" attack by the Allies[54].

Similarly, the United States' attempt to defend an anticipatory attack failed when it sought to justify its actions against Nicaragua on the grounds that that country was providing assistance to the non- governmental El Salvadoran Marxist entity known as the FMLN, which is hostile to the United States. In 1986, the International Court of Justice delivered an opinion ruling against the United States where the latter tried to call on the principle of self-defense. In the eyes of the Court, Nicaragua was not "attacked" by El Salvador; as a result, there was no justification for a military intervention or for financing the activities of the Contras.

Neo-conservative law

"For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. (…) The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather."

George W. Bush, 2002[55]

[54] Id., p.8

[55] *National Security Strategy of the United States of America*, September 2002, Washington D.C. Government Printing Office, 2002, p.15. My emphasis.

How are we to interpret the approach of American jurists who stand in favor prevention? The "Caroline" remains steadfastly at the heart of these debates. At what point does self-defense become imminent without there being no more time in which to defend oneself? The law advocated by George W. Bush supporters comes in response to traditional views and to the most recent interpretation of *Caroline,* which recommends restraint and prudence, and which faults England for having acted without consideration by choosing to attack. Running parallel to the "neo-conservative revolution", there is also a body of thought, the originality and importance of which should be underscored, which in large measure defends the positions of the Bush administration, emphasizing the government's right to declare preventive war[56] according to its own interpretation of the jus ad bellum. This body of thought is shaped by law professors or by legal practitioners such as Lee Casey and David Rivkin. Several of them are affiliated with the University of Chicago, which, in certain areas such as the humanities (the Committee on Social Thought where Leo Strauss was a huge presence), and in certain disciplines, such as economics (the department where Milton Friedman taught), and political science (where realist John Mearsheimer is the Chair), distinguishes itself from the other, more progressive, large American academic institutions. Those who are not at Chicago tend to be politically isolated at their respective universities. This is the case of John Yoo, who is a law professor at the University of California at Berkeley's Boalt Hall, which is anything but a bastion of conservatism.

Could there be a "nationalist school of international law"[57]? Starting by looking at the networks tied to the new conservative law is helpful. As a discipline, law is both conservative (due both to the training of its practitioners and their role in society) and evolving, in that it is responsive to changes in the environment in which it unfolds. In this regard, what can be said of international law since September 11th? Several jurists

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[56] For an attempt to justify the preventive use of force grounded on natural law, see: William Bradford, « A Natural Law Justification for the Bush Doctrine of Preventive War », *Notre Dame Law Review*, Vol. 79, 2004, p.1365-1492. Available at: http://www.comw.org/qdr/fulltext/04bradford.pdf

[57] Alejandro Lorite Escorihuela, "Cultural Relativism the American Way: The Nationalist School of International Law in the United States", *Global Jurist Frontiers*, vol. 5, issue 1, 2005, article 2. Available at: http://www.bepress.com/gj/frontiers/vol5/iss1/art2/.

pointed out in their academic writing or in the positions they defend in the press, that America is bound to remain wary of international law as understood by "idealists", "cosmopolitans" or even human rights defenders. What is at issue initially reads as a tautology: "the internationalism of international law". The principles underlying their interpretation are simple. These specialists adopt a dualist position, in which, national law is stronger than international law and international law acquires the force of law only once it is adopted into national law. The originality of their approach can be boiled down to a peculiar interdisciplinarity, which associates law and normative thought to social science explanations that are mainly developed in terms of rational choice theory and realism. Their analysis leads them to judge international law, as incarnated in the United Nations Charter, negatively. This internationalist artifice is *de facto* unsuited to the current situation, and in particular to the conflict that sets the United States in opposition to its enemies. It is no longer effective. In such a situation of incompleteness, both in terms of deeds and in terms of the law, America works alone to protect its interests, and eventually it would save humanity.

For some theorists, such as Eric Posner, political decisions must not only be free of the restrictions of the law but also free of morality. In other words, States "do not have a moral obligation to obey international law"[58]. They live in a fierce universe in which international law has no place. Nevertheless, the moral question remains ambiguous. Posner himself evokes utility as a criteria, while denouncing the ineffectiveness and non-utility of juridical decisions that impose themselves on the political (even though rational policy would suggest otherwise). These considerations on utility reflect Posner's commitment to rational choice theory, but they could also feed into moral questioning (utilitarianism).

Leaving Posner aside, there are many theorists for whom morality is at the very heart of politics. The neo-conservative movement is largely idealistic. The hawks wish to change the world in the name of an ideal that is intertwined with strategic considerations.

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[58] Eric Posner, "Do States Have a Moral Obligation to Obey International Law?", *Stanford Law Review*, May 2003, vol. 51, p.1901-1919

American universalism rises up against the dangers of relativism and endows itself with the mission of imposing its democratic model, and the price tag attached to this mission is that of coercive action[59]. It is hard to conceive of a moral vision that is more moralizing.

Regarding preventive war, their point of departure is simple. The Prince has no choice but to be constantly on his guard, he cannot simply wait to be attacked. For John Yoo, choosing not to enter into preventive war is both a political and a moral failing, and no juridical interpretation should lead to such a poor decision. At a time of weapons of mass destruction, blindly following the jurisprudence established by the Caroline would be suicidal[60].

Yoo holds that the American intervention in Afghanistan and Iraq satisfy the proportionality criteria. To support his argument (hotly contested at the time of the intervention but especially after the arrival of U.S. troupes), Yoo highlights that technological innovation and development directly affect the calculus of proportionality as well as the definition of what constitutes an "emergency". In his view, the proliferation of weapons of mass destruction and the possibility for America's enemies to form networks that entangle States in their transnational movements require America to adopt pre-emptive[61] defense as its stance with respect to the use of force. This reasoning is disturbing in many ways. On the one hand, and this is the case for many jurists, this view dismantles the contemporary model of international law, which is founded on a cautious interpretation of self-defense. On the other, the shift from the empirical to the normative realm is very abrupt: suggesting that law depends on a "reality" that is in turn attached to a particular moment in history. To the extent that weapons of mass destruction are in fact available to a large number of America's enemies (the Soviet Union and China are no longer the only threat), the world could be suspended, waiting with baited breath, in anticipation of a series of preventive wars, triggered by hasty oppositional provocations

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[59] Jean Betkhe Elshtain, "The Responsibility of Nations: a Moral Case for Coercive Justice", *Daedalus*, Winter 2003, vol. 132 n. 1, p.64-72

[60] John Yoo, "Using Force", p.17

[61] Pre-emption is the terminology used in US official documents. It is preferred to preventive war mainly for legal reasons.

or statements, the strategy of which is often to draw Western States, and in particular, the American watchdog, into war. The degree of instability has increased sharply in recent history. During the Cold War, the triggering of a nuclear conflict depended on a power game between a small number of States. Today, nuclear power –once considered as a stabilizing factor due to the presumed rationality of those holding nuclear weapons- has become a reason to enter into war. There are more players and there is more suspicion as a result of America's reluctance to attribute rationality to its new enemies because of their large numbers and the fact that they are so scattered.

Utility leads to a vision of extreme urgency. And this urgency presupposes the adoption of a political principle, the juridical implications of with are significant. In the event of war, the President must be endowed with broad powers. John Yoo emphasizes that contrary to what detractors argue, this solution is no way inconsistent with the spirit of the American constitution[62]. A number of neo-conservatives insist that applying the law as they recommend doing would not constitute a upheaval of the current system, but rather, a rectification of a misreading of the spirit of the law, and its philosophy and on a more basic level, of the text of the law. These views were heavily criticized in the community of lawyers where they triggered hostile reactions. In the view of his numerous opponents, Yoo was not only interested in negotiating power relationships in order to draft legislation that could legitimize abusive practices, he was also seeking to fundamentally transform the American system and to alter the very shape of its democracy.

That being the case, Yoo's views are consistent with a policy framework of prevention: preventive wars are declared by countries that have a strong executive branch, such as empires, dictatorships, autocracies, and strong presidential regimes. The larger the collective that is in charge of deciding whether or not to launch a preventive intervention, the more numerous the institutions involved in these decisions, the greater the risk that the actual declaration of war will be delayed. Measuring the opening in the

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[62] John Yoo, *The Powers of War and Peace the Constitution and Foreign Affairs after 9/11*, Chicago, Chicago University Press, 2005

window of opportunity for prevention is a delicate matter and findings often diverge, resulting in the decision being blocked. In a sense, this principle also has a moral significance: it vests supreme authority within a rigid framework of secular transcendence.

John Yoo's interpretation has a special resonance. It merges into a troubling lineage of thought that echoes Carl Schmitt. The latter, who was strongly influenced by Hobbes and his concept of the strong State, holds the view that when it comes to exceptional situations, the decision should rest with the sovereign. The moment is one of solemnity. Political concepts, such as sovereignty are seen as theological concepts that have been secularized. In this regard, the decision carries with it transcendental implications. Carl Schmitt draws legitimate negative criticism because he supported the Nazi regime during the 30s. His thinking does indeed favor strong executive power and in this regard, he does not dispute the principles that would underlie the exercise of power by a totalitarian regime. Carl Schmitt is also subject to other criticisms that are equally well-founded. He openly expressed anti-Semitic sentiments in one of his books on Hobbes[63]. These sentiments were relayed in the context of lamenting a certain breach of verticality or of transcendence that results from a lack of allegiance to the State, a trait which is identified with the Jews.

The particularity of Yoo's thinking is that he associates a principle of transcendence to another approach, namely, a truly prosaic calculation. When Yoo refers to the Caroline incident, he mentions that the proliferation of weapons of mass destruction modifies the prevention calculus. Intervention is more urgent under this circumstance: prevention would in this case be easily confused with pre-emption and proportionality would have to be determined by comparing the costs of action with those of inaction. How is the principle of proportionality being used[64]? Indeed, of what use is a

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[63] Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, Chicago, Chicago University Press, 2008

[64] I discuss proportionality in the book and make the case that it is extremely difficult if not impossible to use the proportionality of ends criteria (chapter 3 and 4).

comparison of the benefits of war, discounted for the damage incurred in the process? In the eyes of the supporters of prevention, these measurements are necessarily relative to other circumstances, a world in which the State that could act in a preventive manner elects not to. The consideration of proportionality becomes also tied to the likelihood of success of an offensive war, as described by Suarez. Therefore, the Prince makes a counterfactual claim and uses proportionality and the likelihood of success in order to justify both ex ante and ex post his decision.

Yoo does not venture into a prolonged discussion on proportionality other than to state that America is coherent with the teachings of the Caroline episode. In order to secure firmer juridical ground for his argument, Yoo states a second principle (the first being the transcendence of a presidential authority empowered to assume legislative powers in times of crisis), namely, the pursuit of the "common good". Here then, is a secular interpretation of one of the oldest criteria of the just war tradition. For Augustine, a just war restores the order of God. For Legnano, war protects the "mystic body", a community isolated as a result of the retreat of the transcendent and of empires. America must be vested with maximum powers because it is operating in a time of crisis and no other entity can take on the task of saving the civilized world, this "mystic body" of which Legnano speaks, and protecting it from barbarians.

Yoo's belliquous idealism echoes another ambiguity. What definition should be given to peace? If the world is at peace when it is free from provocation and danger[65], Yoo's position and his immoderate ambition are all the more intelligible. Here too, the just war tradition has stirred hopes that are the source of much confusion. The demand for peace sets the gun powder on fire. Preventive war, an incommensurate vision of war, is also a form of collateral damage, resulting from an incommensurate vision of peace.

[65] Hugo Grotius, *De Jure Praede*, op. cit., p.125