

Chapter 9

Preventive War and the Killing of the Innocent

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The 'Bush Doctrine'

The United Nations Charter prohibits states to use force against other states except in 'individual or collective self-defence if an armed attack occurs'.¹ In the past, it may have seemed reasonable to insist that permissible defence must await the actual occurrence of an armed attack. Because war is usually disastrous for all concerned and to be avoided if at all possible, and because successful defence has often been at least *possible* against a military attack, it may not be imprudent for a state threatened with attack by another state to make every effort to avoid war by diplomatic means and thus to defer military action until its adversary actually strikes the first blow. It is also possible to *deter* the attack by threatening the potential aggressor both with military defeat and with the destruction, if war occurs, of assets that the aggressor values – for example, in the case of a tyrannical regime, military assets on which it depends for control of its own population.

But terrorist threats that many states now face cannot be dealt with in these traditional ways. Traditional forms of military defence are ineffective, indeed irrelevant, in confronting threats from small bands of terrorists operating covertly, often within the cities of those they hope to intimidate and coerce. And because terrorists often operate independently of targetable military or political centres and usually are not representative of any clearly identifiable or delimited group, they are not easily deterred by threats of reprisal, retaliation, or destruction of valued assets. Thus, where terrorist threats are concerned, deterrence is difficult, and once 'an armed attack occurs', it is already too late for 'individual or collective self-defence'.

Concerns similar to these were expressed in a speech given by George W. Bush at West Point in June 2002. On that occasion, Bush asserted that 'the war on terrorism will not be won on the defensive. We must take the battle to the enemy ... and confront the worse threats before they emerge.'² The Bush administration's rejection of UN doctrine was stated even more explicitly in its National Security Strategy, issued in September 2002:

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the

immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first. ... For centuries, international law recognized that nations need not suffer from 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. 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 greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.³

The doctrine advanced in this document – which has become known as the 'Bush doctrine' – was soon acted on in March 2003, when the USA launched its second war against Iraq, this time explicitly claiming self-defence as a justification.

The National Security Strategy states that legal scholars have 'often' made the legitimacy of pre-emption conditional on the presence of an *imminent* threat, thereby implying that legal scholars have sometimes accepted that pre-emptive attack can be legitimate even in the absence of an imminent threat. But this is a distortion, both factually and conceptually. The debate in contemporary international law concerns whether even an imminent threat justifies the resort to force. For many legal scholars take the implication of Article 51 of the UN Charter at face value, and therefore contend that pre-emption is never legitimate.

To see how the administration's claim involves conceptual distortion, we must note some familiar distinctions. The use of force to repel an attack *in progress* is *defence, simpliciter*: no qualifier is required. Defence is *self-defence* when the agent that repels the attack is also its target, and *other-defence* when the agent is a third party acting to repel an attack against another. The use of force to prevent an *imminent* attack is *pre-emptive defence*. And the use of force to prevent a perceived future threat that is not imminent is *preventive defence*. A war initiated in preventive defence is a *preventive war*.

As noted, the dispute in international law is about whether pre-emptive defence can be justified. It is uncontroversial that preventive war is illegal. It is unsurprising, therefore, that the authors of the National Security Strategy present themselves as 'adapting' the notion of imminence to contemporary conditions, thereby enabling themselves to declare that the USA will 'act pre-emptively' to threats of attack that are uncertain 'as to ... time and place'. They are, in short, asserting a right to preventive defence under cover of the less contentious category of pre-emption. As the legal scholar Kimberly Kessler Ferzan rightly observes, they are not revising the notion of imminence, but instead repudiating its significance.⁴ This emerged quite

clearly in a speech given by Vice President Cheney in October 2003 in defence of the second Iraq war. Cheney observed with scorn that ‘some claim we should not have acted because the threat from Saddam Hussein was not imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?’⁵ This concedes the obvious point that Iraq posed no imminent threat to the USA, but treats that fact as irrelevant.

Jus ad Bellum

While the legal status of preventive war is at present uncontroversial, it remains an open question whether preventive war can ever be justified *morally*. My concern in this chapter is to explore that moral question. My argument will be rather dialectical in structure, moving back and forth on the question of whether preventive war can be just. The conclusion I reach is that while preventive war can in principle be just, it is subject to extremely stringent moral constraints that make it only very rarely justifiable in practice. The arguments will appeal at key points to parallels with preventive defence by one individual against another, or by a group of individuals against others within the same society.

Many people feel intuitively that preventive war would be morally justified if the following three conditions were to obtain:

- 1 There is compelling evidence that a certain state or organisation *will* unjustly attack us at some point in the future.
- 2 It is possible to eliminate the threat now, but would be impossible to defend ourselves against it when the attack would occur – *or*, even if it would be possible to defend ourselves later, our efforts then would be significantly less effective or more costly, or both.
- 3 Peaceful means of addressing the threat have proved (or promise to be) ineffective.

In considering whether it could be permissible to conduct a preventive attack (that is, launch a preventive war) in these conditions, most contemporary moralists have recourse to the traditional theory of the just war – in particular, the part of the theory that governs the resort to war (the doctrine of *jus ad bellum*). The first and principal question that just war theory poses is whether the prevention of future aggression can be a just cause for war: a just cause being an aim of a *type* that is capable of justifying an activity – war – that involves killing and destruction on an enormous scale. The one aim that, except among pacifists, is universally recognised as a just cause for war is self-defence against armed aggression. So one crucial question is whether preventive war can count as an instance of self-defence within the terms of just war theory. In other words, does preventive defence share the features that make defence against an actual attack a just cause for war?

There is good reason to think that just war theory should recognise the prevention of future unjust aggression as an instance of self-defence, and thus as a just cause for war. The reason is that there is a clear sense in which *all* defence is preventive. One can defend oneself only against *future* harm. There is no defence against harm that one has already suffered or that one is already suffering. One can, of course, defend oneself against the *continuation* of harm that is being caused by an attack in progress, but it is still only harm that one *will* otherwise suffer that one can defend oneself against. Any harm that has already occurred or is occurring *now* is a *fait accompli*. It seems, indeed, a conceptual truth that successful defence consists in *preventing* harm from occurring.

If, however, genuine instances of the prevention of future aggression count as self-defence in the relevant sense, why have most moral and legal theorists insisted that for the use of force to be justified, there must be an actual attack in progress, or at least an imminent threat of attack? It is noteworthy that this insistence is not confined to the use of force by states, but applies also to defensive force by individuals. In the law, while a threat of imminent attack may justify an individual's resort to force in self-defence, there is no right to use force to prevent attacks that are not imminent. There have, for example, been various cases in which a woman with a history of being severely beaten by her husband has reasonably believed that her life would soon have been at grave risk from him unless she killed him in his sleep. When such women have acted on that belief, they have been denied a justification of self-defence, even when the court has conceded that their belief was reasonable.⁶ In order to be legally entitled to that justification, they would have had to wait until they were actually attacked, or at least until an attack was imminent – even if at that point defence might not have been possible.

What, then, is the significance of an actual or imminent attack? The obvious answer is that an actual attack provides compelling evidence that there is a very high probability that the attacker will inflict unjust harm, or further unjust harm, unless stopped; and, though an imminent threat of attack offers weaker evidence and a somewhat lower probability of future harm, it is nevertheless above the threshold for meeting the burden of evidence. According to this view, the objection to preventive war within the theory of the just war is not that there is no just cause, but that, in the absence of an actual or imminent attack, there is insufficient evidence to establish a high enough probability of attack or harm to make the resort to war necessary and proportionate. When a perceived threat is still speculative, it is difficult to know or to demonstrate that war is necessary to avert it; and because the magnitude of the threat has to be discounted for probability, it is also difficult to establish that the resort to war could be proportionate.

These considerations, however, cannot ground a sharp moral distinction between self-defence against an actual or imminent attack, and preventive defence. For even an attack in progress does not make it certain that the victim will suffer harm in the absence of defensive action. For the sake of illustration, let us focus on cases at the individual level. Even a person who is in the process of attacking you may be

incompetent as an attacker, or may suddenly repent, or be incapacitated by vertigo or the unexpected but excruciating pain of a kidney stone. Your risk of harm from an attack could be higher even in a case in which there was no actual or even imminent attack. Here, for example, is a hypothetical case in which the expected harm (the magnitude of the harm times the probability) to you from a future attack is very high in the absence of preventative defence.

The Paralysis Case

You have a condition similar to Guillain-Barré Syndrome that will, in about a week's time, cause you gradually to become fully though temporarily paralysed. Your long time enemy, whom you have suspected of being criminally insane, learns of your predicament and tells you, with a mad, malicious gleam in his eye, that he intends to kill you while you are incapacitated. Soon afterwards, you overhear him confiding his scheme to a confederate, and, on searching his house, you find diary entries in which his plans are meticulously worked out and in which he notes that he will not be deterred by – indeed, that he is even self-destructively motivated by – the high probability that he will afterwards be captured and punished. Foolishly neglecting to take the diary, you go to the police, but they, on interviewing your enemy, who was once a practising psychiatrist, become persuaded by him that you are suffering from paranoid delusions as a side-effect of your condition. There is, moreover, nowhere for you to go: there is only one hospital that has the life support systems necessary to keep you alive during the period of total paralysis.

Let us assume that, for whatever reason, there are no other options, such as hiring a bodyguard, so that preventive killing seems genuinely necessary to defend your life from an unjust threat. If so, it seems intuitively that killing your enemy would be justified.

One reason that individual preventive defence is not a justification in the law is that in domestic society, the police and the penal system are supposed to render it unnecessary. If you have reason to fear an unjust attack in the future, you should seek protection by the police or the courts. Although they too are forbidden to engage in preventive defence on your behalf, they may seek to deter or to restrain in certain ways the person or people who threaten you, and may also make preparation for your defence should the need arise. *Pre-emptive* defence, by contrast, may be legitimate precisely because the imminence of the threat precludes the operation of these established mechanisms of social protection. But in the Paralysis Case, those mechanisms have failed for reasons other than insufficient time.

Another reason why the law prohibits individual preventive defence is that it is always possible that the potential attacker will repent or change his mind. The law may seek to extend maximal respect for individual autonomy by allowing every opportunity for a change of heart. But, as I noted earlier, the possibility of such a change is present as well in the case of an imminent attack, and even in the case of an attack in progress. The difference is one of probability, which normally varies with the temporal proximity of the threatened harm. But, in principle, the probability of harm from a non-imminent threat could be greater than that from an

imminent attack or an attack in progress, and certainly, as I noted earlier, the *expected harm*, which is a function of the magnitude of the harm and the probability of its occurrence, may be greater from a non-imminent threat than from either an imminent threat or an attack in progress.

It seems, in summary, that there can be a strong case, in a restricted range of circumstances, for the moral permissibility of individual preventive defence. And it seems reasonable to suppose that the same kind of case can be made for preventive war when relevantly analogous conditions obtain in relations between states, or between a state and a terrorist organisation. The case may be very hard to make, but that will be because there may yet be ways of addressing the threat other than resorting to war, or because the probability of future attack is insufficiently high or the evidence insufficiently strong. In the language of just war theory, the principal constraints on preventive war may seem to have more to do with the requirements of necessity and proportionality than with the requirement of just cause.

Consistency and Consequences

There are, of course, additional objections to preventive war. One is that the justifications for preventive war as they are actually asserted tend to be overly permissive in their implications. For example, when the Bush administration sought to justify the second war against Iraq as a war of self-defence (as well as an instance of humanitarian intervention and an enforcement of an earlier UN resolution), it appealed primarily to three claims: that Iraq possessed weapons of mass destruction, that it had a recent history of aggressive war, and that it had indulged in bellicose rhetoric directed against the USA. But, as critics immediately observed, all of these claims were also true, *mutatis mutandis*, of the USA itself, with the Bush administration particularly noisy in issuing threats against Iraq, Iran and North Korea. But no one in the administration would have conceded that any of those states had a right to attack the USA in preventive self-defence. So the challenge is to formulate conditions in which preventive war is permissible that, when applied universally, have implications that one can accept.⁷

One response that is open to the Bush administration is to claim that preventive war is justifiable only when a state must defend itself against a threat of *unjust* attack. It could then be argued that whereas Iraq, Iran and North Korea pose (or, in the case of Iraq, posed) a threat of unjust aggression, whatever threats the USA might pose are not unjust or aggressive, but 'reactive' (to borrow the term used by the authors of the National Security Strategy).

It is clearly right that, if preventive war can ever be justified, it can only be in response to an *unjust* threat. But this cannot help the Bush administration to evade a charge of inconsistency, for there are a great many states that have been victims of unjust American intervention (Cuba, Chile, Guatemala), American military aggression (Vietnam, Laos, Cambodia), American terrorism (Libya) and

American-sponsored terrorism (Nicaragua, El Salvador) in recent decades. Nevertheless, the pious notion that the USA never poses an unjust threat does point to a second obvious objection to preventive war, which arises from the fact that Americans are not alone in thinking that whatever threats they face must be unjust, while any threats they pose must be just. For most citizens of most countries cherish the same patriotic delusions about their own country. And this means that, even if we could identify a plausible doctrine of preventive war that would specify the precise conditions in which such a war could be justified, the doctrine would be bound to be regularly misapplied. Acknowledgement of the permissibility of preventive war would, in practice, as Michael Walzer has argued, be likely to encourage the initiation of wars wrongly believed or claimed to be necessary for national self-defence.⁸

There are thus objections to preventive war that focus on considerations of consistency and consequences. Although in principle states may occasionally have compelling evidence that a future attack is sufficiently probable to make preventive war both necessary and proportionate, in practice it is likely that states would appeal for justification to criteria they could not rationally universalise and that a general acceptance of the permissibility of preventive war would encourage unnecessary wars or even provide a cover for wars of aggression.

Justice

While these considerations are important, they seem to leave out something significant. Thus far I have been assuming that the significance of present aggression is merely evidentiary, and therefore that preventive war can be genuinely defensive and that the prevention of future aggression comes within the scope of self-defence as a just cause for war. I have been assuming, in short, that preventive war can in principle be *just*. But there are objections to that assumption. The fundamental problem with defences of preventive war, such as that given in the National Security Strategy, that focus on the concerns of the state that perceives a need for preventive action is that they omit any mention of what the target of preventive action must have done to make it morally *liable* to military attack, so that it would not be *wronged* by the use of force against it. If those attacked are not liable to attack but are innocent in the relevant sense, preventive war may be prudentially rational, but may not be *just*.

It may be helpful in understanding what is at issue here to consider a parallel with punishment.⁹ One major justification for punishment – perhaps the most widely accepted and least controversial justification – is that punishment protects innocent people from further harm by the criminal. One of the major functions of imprisonment, for example, is to keep criminals away from other people, where they are unable to cause further harm. One function of punishment, in other words, is preventive defence.

Suppose we were to decide that preventive social defence is the *only* legitimate aim of punishment. Suppose, that is, that we were to become convinced that the other rationales for punishment – those concerned with retribution, deterrence, reform and so on – are mistaken. Punishment, in our view, would then be entirely a matter of preventive defence. But it could still be rational to retain our insistence that punishment is *just* only when applied to those who have actually committed a crime. For it could be held that only by committing an actual offence can people become morally *liable* to punishment, even when the sole aim of punishing people would be to protect society from them in the future.

It is not merely coincidental that the same administration that has claimed a right to conduct preventive wars is also working to undermine the traditional prohibition of preventive detention. Yet the sense that preventive detention is unjust remains pervasive. It is true, of course, that the law lets certain instances of preventive action in through the back door even in the absence of a genuinely harmful offence. It does this by declaring that certain forms of preparation to commit a crime are themselves crimes. Thus conspiracy to commit a certain crime may itself be a crime. But even the conspiracy laws are confirmation of rather than counter-examples to the claim that certain specific forms of wrongful *action* are necessary for liability to punishment. The justification for punishment in any given instance – even when the sole aim of punishment is preventive defence – has to include more than just evidence that a future offence is likely. In insisting that there must be an actual offence, we reveal a concern with more than just the evidentiary significance of the criminal act.

Suppose that there were certain forms of evidence of future criminal action that were statistically *more* reliable than actual instances of criminal behaviour. In the *Future Killer Case*, for example:

we discover a rare combination of genes whose possessors have a greater than ninety-nine percent probability of becoming serial killers, even after they have been subjected to the most effective forms of psychiatric and pharmaceutical therapy. This gene combination is identified in a child of five who has been brought in for testing by his parents because he already shows a morbid fascination with serial killers, torments animals, bullies his playmates, keeps a collection of animal bones, and so on. Yet so far he has committed no actual criminal offense.

Would it be permissible to lock this child up for the remainder of his life in order to prevent him from later killing innocent people?¹⁰

Some people, perhaps many, will reluctantly concede that this case is an exception. They will accept that it could be permissible to keep the child away from others if that were the least harmful way we could effectively protect ourselves from the child's predictable tendency to kill people. Those who take this view would, of course, be reluctant to accept that to lock the child away would be an instance of *punishment* – even if, as we are imagining, the sole function of punishment is preventive defence. They might instead regard the forced sequestering of the child

as a case of restraining the dangerously insane. But suppose the child is fully rational, and indeed unusually clever, which makes him all the more dangerous. It is not obvious that a powerful disposition to kill people is necessarily a manifestation of mental illness. So perhaps it would be better to view preventive action taken against the child as a lifelong *quarantine*.

But notice that our concern with the labelling of the action reflects an implicit recognition that there are two general forms of justification for forcibly keeping a dangerous person away from other people: one that focuses on the overwhelming necessity of protecting innocent people, and another that appeals to the claim that the person has done something that makes him morally liable to preventive action. The justification for subjecting a person to quarantine is normally of the former sort, while the justification for anything we are willing to call punishment must be of the latter. If we reject retributivism, the relevant form of liability will not be *desert*, but the insistence on some form of liability reflects our sense that anything describable as *punishment* must be held to standards of justice, and not merely, as in the case of quarantine, to standards of utility.

If, therefore, we were to accept that it would be permissible forcibly to keep the child away from other people, we would have to concede that our treatment of the child would be in an important sense unjust. It would wrong the child by inflicting on him a grave and enduring harm to which he had done nothing to make himself liable, and it would do this as a means of protecting or reducing risks to *other* people. The child would be innocent in the relevant sense; he would, as some would say, have done nothing to lose those rights he has by virtue of being a person. (I will, at any rate, *assume* that locking the child away would harm him. It could be argued, however, that locking him away would actually be best for him, even if it would in a sense be against his interests. If he were my child, I would want what would be best for him. I would want, *for his sake*, that he not become a murderer. Even putting aside the interests of his potential victims, I would want him to be locked away.)

When a person commits an actual offence, the constraint against harming him or restricting his liberty is weakened or removed by his own action. This is what is implied by the claim that he makes himself liable to preventive action. In the Future Killer Case, by contrast, the constraint remains in place but (*if* it is permissible, all things considered, to quarantine the child) is *overridden* by the necessity of protecting the innocent. (Considerations of proportionality still apply, of course; thus, while it is perhaps permissible to quarantine the child, it would not be permissible to kill him, even if killing him promised a higher probability of preventing him from ever killing anyone. If we were to change the case by stipulating that the *only* effective way to prevent the child from killing innocent people was to kill him, then killing might be proportionate.)

Because our action would be unjust to the child, we would owe him forms of compensation that would not be owed to those whom we had imprisoned because they had committed an actual offence. We would, perhaps, be obliged to go to considerable lengths to make the child's life as normal and happy as possible.

Preventive war raises the same issue of justice that is raised by preventive action taken against a person who is extremely dangerous but has nevertheless committed no actual offence. For it seems that to wage preventive war is to attack those who are innocent in the relevant sense – that is, who have done nothing to make themselves morally liable to attack.

According to the traditional theory of the just war, what makes a person non-innocent, or morally liable to attack in war, is *actively posing a threat to others*. This is how traditional just war theory can assert an equivalence between the category of the non-innocent and the category of combatants. Combatants are non-innocent because they are by definition engaged in actively posing a threat to others, while non-combatants are innocent because they do not pose such a threat. Preventive war is therefore ruled out by traditional just war theory because those against whom it would have to be waged do not actively pose a threat. If they did, the war would not be preventive. Preventive war, in other words, cannot be waged against those whom the traditional theory of the just war recognises as legitimate targets. Thus Michael Walzer, the most eminent contemporary theorist in the just war tradition, contends that if we go to war in response to ‘hostility [that] is prospective and imaginary ... it will always be a charge against us that we have made war upon soldiers who were themselves engaged in entirely legitimate (non-threatening) activities’.¹¹

For reasons I will not rehearse here, I reject the traditional theory’s criterion of liability.¹² I believe that the criterion of liability to attack in war is moral responsibility for an unjust threat, or, more generally, for any grievance that provides a just cause for war. According to this view, the objection to preventive war is that it is waged against those who are not, at least as yet, responsible for an unjust threat or other grievance that provides a just cause for war.

Stated in more general terms, the central objection to preventive war is that it is necessarily *indiscriminate* – that is, it is war waged in the absence of legitimate targets. And the absence of legitimate targets seems to imply the absence of a just cause. If there are no threateners, there cannot be a threat. And, unless there can be acts by states for which no one is responsible at all, there can be no just cause if there is no one who is *responsible* for a grievance that provides a just cause. Thus, if it is right that preventive war, of its nature, targets those who have as yet done nothing to make themselves liable to attack, it follows, contrary to what I suggested at the end of the section on *jus ad bellum* above, that prevention of future aggression cannot be a just cause for war.

It may seem, therefore, that if there is a justification for preventive war, it must be sought outside the domain of just war theory. It must appeal, for example, to considerations of consequences. Perhaps preventive war can occasionally be justified in a way that parallels the justification for quarantining the boy with a genetic disposition to kill people. On this view, although preventive war would violate a constraint against attacking and killing soldiers and others who had done nothing to make themselves into legitimate targets, the constraint would be overridden by the necessity of protecting ourselves from predictable aggression by

the state these people serve. (There is, however, this difference from the case of the boy: that many of those attacked in the course of preventive war might not have been involved in any way in later aggression, even if that aggression would in fact have occurred in the absence of preventive war. Among the various reasons why this is so is that there is a high rate of turnover among personnel in the military.)

If it is right that the justification for preventive war requires overriding the constraint against deliberately attacking the innocent in order to avert harms that are as yet speculative or hypothetical, then the burden of justification must be exceedingly stringent. There are comparatively few forms of evidence, other than the occurrence of actual aggression, that are sufficient to establish a probability of future aggression high enough to warrant overriding the constraint against launching a military assault against innocent people. This is especially clear when we also take into account the effect that an instance of preventive war, and the efforts to legitimise it, might have in weakening respect for the principles and conventions that constrain the resort to war.

Liability and Risk

The case against preventive war is strong. I have presented arguments that purport to show that preventive war is opposed by considerations of justice, and, in many if not most cases, by considerations of consequences as well. Yet I think we should reconsider the claim that preventive war is necessarily indiscriminate, and therefore unjust. The argument for that claim appealed to an analogy with the Future Killer Case. And many cases at the international level may indeed be relevantly analogous to that. But there are other cases at the individual level in which preventive defence seems justified and does *not* seem to be unjust – cases in which it does *not* seem that the constraint against attacking the innocent holds, but is overridden by considerations of consequences. For, in these cases, the individual attacked in preventive defence is not innocent in the relevant sense.

The ‘relevant sense’ is, however, not the sense of traditional just war theory. Because in just war theory the criterion of liability to attack is actively posing a threat to others, it is simply not possible for that theory to acknowledge the permissibility of any instance of preventive war. I believe that this is one of the traditional theory’s many shortcomings. For there *are*, at least in principle and probably in practice, conditions in which preventive war would be just and perhaps even morally required. Because the traditional theory of the just war cannot recognise this, I believe we should reject the theory’s criterion of liability – which would, in effect, be to reject the theory.

I will distinguish three types of case in which preventive attack may be just, beginning with the type in which the liability of the person attacked is most obvious, and concluding with the type in which it is most contentious. My initial examples

will be of preventive defence at the individual level, but in at least the first two cases I will suggest that there can be parallels at the international level.

Case Type 1

In some cases of individual preventive defence, the potential attacker commits an initial offence that is not itself an actual attack, but offers compelling evidence that there is a high probability that he will attack in the future. Consider, for example, those battered women for whom preventive defence seems necessary because retreat (that is, simply fleeing the threatening situation) is effectively impossible because their husbands have credibly threatened to track them down and kill them if they leave. Some legal theorists have argued that these women are entitled to a justification of self-defence even if an attack is not imminent, because there is an *ongoing* offence – namely, kidnapping or hostage-holding – that itself justifies a lethal defensive response.¹³ On this view, the threat of future attack is no part of the justification for defensive violence at the time.

The idea that defensive killing may be justified by the captivity alone seems to me to be right, though it is only part of the truth. In some cases of this sort, the captivity may be sufficiently harmful or wrongful to justify self-defensive killing on its own. But this is not true in all such cases. Imagine a variant in which in two days' time the husband will be shipped overseas for a year's tour of military duty. Suppose he has a history of jealous rages that culminate in extreme violence, that he is currently consumed by the delusion that his wife will be unfaithful while he is away, that he is continuously drunk and increasingly menacing and verbally abusive (he has threatened to beat her if she tries to leave the house), but has not yet actually attacked her. The woman's captivity can last only two days. Yet, although there is no imminent threat, she reasonably believes that her life is seriously at risk.

Killing her husband would be a disproportionate response to the threat of being held captive for only two days. So the captivity alone is insufficient to justify killing. Yet I believe she could be justified in killing her husband while he sleeps. For killing *is* a proportionate response to the combined threats of continued captivity and death; therefore, the non-imminent threat to her life contributes to the justification for her act of killing, which would be an act of preventive defence as well as an act of liberation. (In cases in which a woman's captivity is indefinite and thus sufficient on its own to justify killing, the justification for killing is *overdetermined*: killing is justified both to end the captivity and, independently, to avert the threat to her life.)

The husband's actual offence of holding his wife captive triggers her right of preventive defence. The initial offence makes him *liable* to defensive action, and the two threats he poses – the immediate threat to continue to hold her captive and the non-imminent threat to kill her – combine in gravity to make killing him a *proportionate* response.

Of course, not just any offence would be sufficient to trigger a right of preventive defence. The initial offence must be of the right sort. If, in the intervals between his fits of rage, the husband were entering false claims on his income tax returns, that bit of wrongdoing would not be the right sort of offence to make him liable to preventive defence. The kind of offence that *would* be sufficient to make the husband liable to preventive defence must be one that can in principle justify defensive action and that establishes the husband's *responsibility* now for a risk, or an increased risk, of an unjust attack by him in the future. In the clearest case in which a present offence establishes liability to preventive defence, the future threat is, in effect, inherent in the present offence, in that the future attack would be part of the same threatening sequence as the present offence, which therefore provides evidence for and makes a causal contribution to the potential future attack. In the case of the battered wife, the husband's holding her captive itself puts her at greatly increased risk of a lethal attack by him in the future. It makes a causal contribution to his ability to kill her in the future, and provides evidence for the lethal threat he in fact poses.

Note that what I have offered is a characterisation of the connection between an initial offence and a threat of future attack that is sufficient to make a person liable to preventive defence. I suspect that what I have suggested as a sufficient condition of liability to preventive defence may be a necessary condition as well. But some may find it too stringent. I leave it an open question whether there might be a weaker connection that would be sufficient for liability to preventive defence.

The parallel at the international level is that a country may be liable to preventive attack or preventive war by virtue of having committed an offence that is itself of a *kind* that can provide a just cause for war *and* that creates or increases the risk that the country will in the future conduct an unjust attack. The initial offence makes the country liable to preventive defence because it makes that country responsible for wrongfully imposing a risk of unjust attack on its potential victims. It may well be that the initial offence is not on its own sufficiently grave to make the resort to war a proportionate response. But war may be proportionate to the combination of the initial offence and the threat of future aggression.

Suppose, for example, that in 2003 Iraq had possessed a formidable arsenal of weapons of mass destruction (WMD), as the Bush administration falsely claimed it did. Its possession of those weapons would have been wrongful; it would have been a violation of the ceasefire agreement that ended the Gulf War in 1991, and an act of defiance of the legitimate authority of the UN. Such an offence could arguably have been a just cause for renewed war against Iraq, though it is implausible to suppose that war would have been a necessary or proportionate response to the violation of the ceasefire agreement, considered on its own. Iraq's wrongful possession of WMD might, however, have also triggered a right of preventive defence on the part of those countries that the weapons would have put at risk. The possession of illicit weapons would have been an offence of the right type to establish Iraq's liability to preventive action, for the existence of the weapons would have been a causal

condition of, as well as serious evidence for, a threat of future unjust aggression by Iraq. But there were, of course, no such weapons; nor was there any good reason to suppose they existed.¹⁴

Another actual case to which this form of reasoning might have been applied – and with greater plausibility than in the case of the Iraq War – is actually a case of pre-emptive rather than preventive war: namely, the Six Day War of 1967.¹⁵ It is at least arguable that Egypt's closing of the Straits of Tiran, an international waterway, to Israeli shipping was a belligerent act that violated Israel's rights and therefore provided a just cause for war. Although war would not have been a proportionate response to that act alone, it could be argued that that act made Egypt liable to pre-emptive attack by virtue of its causal and evidential connection with a threat of future unjust attack by Egypt. And war may well have been a proportionate response to the blockade *together* with the threat of future attack.

Case Type 2

A second type of case in which preventive defence may be permissible in relations between individuals is that covered by the conspiracy laws. In the Paralysis Case, for example, your enemy has carefully planned his strategy for killing you, recording the details in his diary. He has engaged in action that is the initial phase of a planned sequence of co-ordinated acts intended to culminate in his killing you. Not only does this action provide compelling evidence that there is a high probability that he will attack you in the future, but it also, and at least equally importantly, constitutes a basis for holding him liable to preventive defence. The Paralysis Case, in short, is relevantly different from the Future Killer Case, in which the child has done nothing to make himself liable to preventive action.

It is, moreover, easy to imagine analogues of the Paralysis Case at the international level – cases in which intelligence reveals an enemy's strategic planning for a surprise attack that can be averted by preventive action, but against which there can be no effective defence if it is allowed to occur. One actual case that approximates this description is Israel's destruction of Iraq's Osirak nuclear reactor in 1981. Although Iraq claimed that the reactor was being built to generate electricity, this was implausible given that Iraq's vast oil reserves offered a cheaper source of electrical power for the indefinite future. Moreover, after Iran had unsuccessfully attempted to destroy the reactor in September of 1980, shortly after the beginning of the Iran–Iraq War, an official newspaper in Baghdad had stated that 'the Iranian people should not fear the Iraqi nuclear reactor which is not intended to be used against Iran, but against the Zionist enemy'.¹⁶ While Israel had no reason to fear a particular attack at a specific time or for a specific reason, it did have reason to fear that Iraq, which, unlike various other Arab states, had refused to sign the armistice agreements in 1949 and therefore remained officially in a state of war with Israel, would at some point use nuclear weapons against it, potentially annihilating both the state and its inhabitants. Iraq's subsequent firing of missiles

into Israeli population centres during the Gulf War, in which Israel was not a participant, offers retrospective confirmation of the rationality of Israel's fear. Because the reactor was soon to become active, after which it could not have been attacked without a catastrophic release of radioactive materials, Israel reasonably believed that if it did not act immediately, it would have lost its only realistic chance to eliminate this threat to its own continued existence. It attacked the reactor on a Sunday, when French engineers who were building the plant were absent, thereby destroying it without causing casualties. It is, indeed, an important feature of this example that there were no illegitimate human targets and thus no attacks, whether intended or unintended, on the innocent. Although this preventive attack (which, though technically an act of war, did not progress to full-scale war) was clearly illegal and was universally condemned at the time, a very strong case can be made that it was an instance of legitimate prevention.

Case Type 3

I turn now to the third kind of case in which preventive defence at the individual level may not be unjust. Suppose that, in a variant of the Paralysis Case, your enemy has formulated no plans; he has done nothing other than to form the intention to kill you once you are paralysed. But, as with so many fictional villains, he wants not merely to kill you, but to prove to you that he can *defeat* you. He therefore wants you to know that you are being defeated; so he notifies you of his intention, and you are certain that he is not bluffing. In this case, there is no attack, no immediate threat of attack, no preparatory action that initiates a threatening sequence, no actual offence or wrongful action of any sort. All your enemy does is to form the intention to kill you at a time when you will be utterly defenceless.

Intuitively, there seems to be sufficient justification for preventive defence in this case – even for preventive killing if killing your enemy is the only way you can reliably prevent him from later killing you. But the justification does not seem to be merely a matter of consequences or self-preference. This does not seem to be a case in which the constraint against killing the innocent is overridden by a claim of necessity. Your enemy is not innocent in what must be the relevant sense. Although he does not pose a threat – at least in the sense deemed necessary for liability by just war theory – and although he is not responsible for any act that establishes an unjust threat to you, he cannot be considered innocent: that is, he cannot be regarded as retaining his full moral immunity to attack. But if this is right, it seems that merely forming or having certain intentions can be a sufficient basis for moral liability to attack.

Many will contend that we can evade this latter claim by recognising that even in this case your enemy *does* something to threaten you: he communicates his intention to kill you. This is precisely what we mean by one sense of 'threaten': to issue a threat. But one can threaten in this sense without posing a threat (when one's threat is a bluff), and it is posing a threat that is considered necessary for liability by

just war theory. (I believe, by contrast, that bluffs, too, may be a basis for liability, but that is another topic.¹⁷) I believe that in this variant of the Paralysis Case, your enemy's act of *revealing* his intention adds nothing of moral significance to his merely *having* it, other than providing evidence of its existence. The significance of his revealing his intention, in short, is merely evidential.

I believe, therefore, that the mere formation and retention of a certain intention – both of which are *mental* acts – can be a sufficient basis for moral liability to preventive action. This should not be an altogether surprising or mysterious claim, since mental acts and mental states are considered crucially relevant to responsibility and liability, both in the law and in commonsense morality. It is, however, an unorthodox claim, at least in domestic and international law, where intention alone is not a basis of criminal liability, and in mainstream just war theory, where an actual attack or imminent threat of attack is necessary for liability to defensive force. (In Catholic moral theory, which is the principal historical source of just war theory, the formation or possession of certain intentions can be morally wrong independently of any action that may issue from them. But I am unaware of any endorsement by Catholic theorists of the idea that the formation or possession of a wrongful intention can itself make a person non-innocent in the relevant sense – that is, liable to defensive force.) The claim, suggested by the modified Paralysis Case, that intention alone can be a basis for liability to preventive defence, challenges the orthodox assumption that some kind of act – an overt act, not just a mental act – is necessary for a person to be non-innocent, or morally liable to defensive force.

In the previous section on justice, I asserted that the criterion for liability to force or violence in war is responsibility for an unjust threat or for some other grievance that provides a just cause for war. But the conclusion I have drawn from the modified Paralysis Case seems doubtfully compatible with that claim. For what can someone who as yet has done nothing more than to form an intention to conduct an unjust attack in the future be responsible *for*?

The answer is that your enemy in the modified Paralysis Case is morally responsible for a threat to your life. This is a weaker sense of 'threat' than that recognised by traditional just war theory, which understands 'posing a threat' as, in effect, equivalent to 'being a combatant' or having combatant status. It is clear, however, that your enemy's forming the intention to kill you significantly affects the objective probability of your being unjustly killed in the near future. So what your enemy is morally responsible for *now* is your being at greatly increased *risk* of being unjustly killed (by him) in the near future. You therefore face an unavoidable choice imposed on you by his mental act: either you must kill him now, or you must remain exposed to a high risk of his wrongfully killing you. Because your enemy is morally responsible for the existence of this state of affairs, it can be permissible, as a matter of justice, to kill him to eliminate the risk of his killing you, provided that the risk is sufficiently high to make killing a proportionate response.

Perhaps surprisingly, then, reflection on the three foregoing types of case seems to re-establish the suggestion I made at the end of the section on *jus ad bellum*, but

challenged in the section on justice, that the fundamental objection to preventive defence and, by implication, preventive war is not that it necessarily targets the innocent, but that, in practice, matters of evidence and probability are virtually never such that the effort at justification can succeed. For example, because intentions are private and not directly accessible to others, the evidence for the presence of a wrongful intention in another person is *always* fallible and contentious, and is *almost always* insufficiently conclusive to provide an adequate basis for preventive action. If we possessed an *intentionometer* that would infallibly detect other people's intentions and gauge their strength, the moral and legal status of preventive defence would be profoundly different.

These epistemological and evidential problems are greatly exacerbated when we move from relations between individuals to relations between states, nations or other collectives. In our cases involving individuals – the Future Killer Case and the two variants of the Paralysis Case – there are various quite reliable forms of evidence of future attack: evidence of a powerful genetic predisposition, overheard conversations, diary entries, overt threats uttered by a person whose character is well understood. In all three cases, the apparent threat is posed by a single individual whose future action can be predicted with reasonable confidence on the basis of these sorts of evidence. In the case of states, by contrast, there are usually numerous individuals in positions of power and authority whose values, goals, interests and intentions may conflict. And each is likely to be subject to potentially conflicting pressures and constraints from a variety of different institutions and constituencies. In these conditions, how reliable can even the best forms of evidence be in predicting outcomes that will be determined by the complex interactions of so many forces? To answer this question, look back at last year's newspapers, or even last month's, and calculate the ratio of correct to incorrect predictions about the behaviour of states. The results will not be very encouraging to the belief that evidence of future aggression can be sufficiently compelling to justify action so grave as the initiation of war.

The Liability of Unmobilised Military Personnel

I will conclude by noting one further difference between preventive defence by one individual against another and preventive war. I have conceded that the former can in principle be discriminate, even in the absence of any overt offence by the target. It is possible, though not likely, that an individual may be liable to preventive action and that others can know this, even when the individual is not yet guilty of any overt wrongful action. In practice, however, the risk is high that what seems to the agent to be preventive defence will not in fact be defensive at all – because the person attacked did not in fact pose a threat, at least not of the kind perceived – so that the attack will be objectively unjust. In the case of preventive war, there is a further problem. Not only is there a grave risk of misperception or other error, but even

when a future threat is correctly perceived, it may be impossible to target those, or only those, who are morally responsible for the risks that ostensibly justify preventive action. For when unjust aggression is only at the planning stage, those who would later *implement* the plans – the military personnel who would do the actual fighting, launch the weapons and so on – may have done nothing to increase the risks to others relative to what those risks were before the plans for aggression were conceived. They might not as yet even have knowledge of the plans. Yet these are the people who would have to be targeted in a preventive war. For the planners – usually political leaders and high-ranking military officers – are not normally feasible or, for reasons of a pragmatic nature, suitable targets for preventive military attack. (An attack on a country's political leadership would be likely to be counterproductive and would also threaten to undermine respect for the useful convention prohibiting political assassination.) Most of the people who would be targeted in a preventive war would, therefore, have a moral status analogous to that of the boy with a genetic predisposition to murder. They would be people who would be likely to participate in an unjust attack in the future, but who would as yet have done nothing – not even form a wrongful intention – to make themselves liable to attack. And, as I noted earlier, there would be some of whom it would not even be true that they would have later participated in the aggression. So many, or even most, of the people targeted would be, as Walzer says, people engaged in wholly legitimate activities.

Thus, while preventive war could in principle be discriminate and therefore not unjust, *in practice* it is far more likely than preventive defence at the individual level to require deliberate attacks on people known to be innocent in the sense that they have done nothing to make themselves liable to attack. In practice, therefore, the considerations favouring preventive war will have to be sufficiently strong to override the constraint against intentionally attacking the innocent in order for preventive war to be justified. If this is right, my earlier claim still stands: the presumption against the permissibility of preventive war is, in practice, extremely strong. And since, for reasons given earlier, considerations of consequences usually oppose rather than favour preventive war, it follows that the burden of justification can rarely be met.

This conclusion might be challenged by seeking to extend the grounds for liability to attack even further. It might be argued that the military personnel who would be attacked in a preventive war are liable to attack by virtue of its being true of them that they will engage in unjust aggression if ordered to by their superiors.

The problem with this suggestion arises from the fact that *liability* to attack is necessarily a consequence (though not a causal consequence) of a person's having *done* something, even if the action is only mental (as in the modified Paralysis Case). So the challenge is to identify something that such people have *done* that makes them liable. It could, perhaps, be suggested that most of them will, as part of what is involved in being in the military, have formed – forgive the jargon – a dispositional, conditional, wrongful intention: that is, they will have made

themselves disposed to participate in any war, whether just or unjust, that they are ordered to participate in. But the idea that persons make themselves liable to preventive attack *now* simply by virtue of being disposed to obey an order to act unjustly is clearly far too permissive. Virtually all soldiers at all times have been strongly disposed to obey orders to go to war irrespective of whether the war has been just or unjust. Indeed, as Stanley Milgram's experiments in the 1960s showed, most *people* are strongly disposed to obey an order to inflict unjust harm on others, provided that the order is issued by someone they perceive to be a legitimate authority.¹⁸ We should not conclude that most people are therefore liable to preventive defence.

A more promising defence of preventive war appeals to the claim that by voluntarily enlisting in the military, even those soldiers who are presently unmobilised have acted in a way that conditionally commits them to obey orders to participate in a future unjust attack. This act, it might be argued, is sufficient to make them liable now, *if* there will in fact be such an attack unless it is forestalled by preventive action.

This view has considerable plausibility. The prior action of these unmobilised soldiers cannot, of course, make them responsible for an unjust threat when in fact there *is* no threat; but as soon as their government begins to plan an unjust attack or unjust war, a threat arises to which the soldiers' prior voluntary act of enlisting now makes a substantial contribution. By having enlisted, they now share responsibility for the unjust threat their country poses, even if they are at present entirely unaware of their government's plans.

Let us assume for the sake of argument that this is true, and that merely by enlisting, soldiers can in principle be liable to preventive attack. This leaves open the status of those who were conscripted. It can, of course, be argued that even by allowing themselves to be conscripted, they share in the responsibility for any unjust threat their government poses. There is, again, some plausibility to this, but it also helps to bring out the fact that responsibility is a matter of degree. Conscripts who have no idea that their government is planning to initiate an unjust war surely bear very little responsibility for the threat their country poses to the potential victims of their government's planned action. If the degree of a person's liability varies with the degree of his responsibility, then unmobilised conscripted soldiers bear only a very low degree of liability to attack. What this means in practice is that the proportionality requirement with respect to a preventive attack against them must be very stringent indeed.

There is, moreover, a further question about the status of those in the military, whether enlisted personnel or conscripts, who will have left the military by the time that any planned unjust action by their country would occur. It is hard to see how they could be responsible now for a potential attack in which they would have no part.

Even, therefore, if we grant the controversial assumption that unmobilised soldiers may be liable to attack simply by virtue of having become part of the

military, it still seems that preventive war inevitably involves intended attacks both on people whose degree of liability to attack is very low and on those who bear no liability at all and thus are innocent in the relevant sense. If the assumption is false, most of those attacked in a preventive war will be innocent. In order for the moral constraint against deliberately attacking the innocent to be overridden, the consequences of failing to go to war would, when considered impartially, have to be disastrous. If my earlier claim that considerations of consequences generally oppose rather than favour preventive war is correct, the burden of justification for preventive war will in practice be very difficult – though not impossible – to meet.

Acknowledgements

I am deeply grateful for extremely perceptive written comments on this paper by Larry Alexander, Thomas Hurka, David Rodin and Alec Walen. I have also benefited from discussions with audiences at Lund University, the Swedish Collegium for Advanced Study in Uppsala, Pomona College and Canisius College.

Notes

- 1 See Articles 2(4) and 51.
- 2 Quoted in Singer, Peter (2004), *The President of Good and Evil: The Ethics of George W. Bush*, New York: E. P. Dutton, 179.
- 3 'The National Security Strategy of the United States of America' <<http://www.whitehouse.gov/nsc/nss.pdf>>, 15. It is unclear what the authors could be referring to, other than Pearl Harbor, in suggesting that in the past the USA has relied on a 'reactive posture' in its use of force against other states.
- 4 Ferzan, Kimberly Kessler, 'Defending Imminence: From Battered Women to Iraq', *Arizona Law Review*, Vol. 46, 213, 2004, 215.
- 5 'Cheney Lashes Out at Critics of Policy on Iraq', *New York Times*, 11 October 2003.
- 6 See Ferzan, 'Defending Imminence' Section II.C, and the many references cited there.
- 7 David Luban argues convincingly that this argument is not as straightforward as it may seem, for the presumption of equality among persons that underlies the insistence that moral principles apply universally does not obviously hold among states. See his 'Preventive War', *Philosophy and Public Affairs*, Vol. 32, 2004, 241–2.
- 8 Walzer, Michael (1977), *Just and Unjust Wars*, Harmondsworth: Penguin, 77.
- 9 Some theorists in the just war tradition have explicitly characterised justified warfare as a form of punishment, and have accordingly held that even pre-emptive war is impermissible. Francisco De Vitoria, for example, wrote in 1539 that 'a prince cannot have greater authority over foreigners than he has over his own subjects; but he may not draw the sword against his own subjects unless they have done some wrong; therefore he cannot do so against foreigners except in the same circumstances'. Vitoria therefore concluded that 'the sole and only just cause for waging war is when harm has been inflicted'. To wage war in the absence of a prior injury would be to make war against the innocent, and 'to kill the innocent is prohibited by natural law'; Vitoria, Francisco De,

'On the Law of War', in Pagden, Anthony and Lawrence, Jeremy (eds) (1991), *Political Writings*, Cambridge University Press, 303–4. In my view, whether punishment can be a just cause for war depends on what comes within the scope of the concept of punishment. While many writers have insisted that punishment and self-defence are wholly distinct and do not overlap, I believe that the central aims of punishment are essentially defensive, and that the best justification for punishment appeals to the same principles that govern the morality of self-defence. In this belief I have been greatly influenced by the work on punishment by Daniel Farrell. For a representative example of this important work, see his 'The Justification of Deterrent Violence,' *Ethics*, Vol. 100, 1990, 301–17.

- 10 The general question is raised, but not answered, by Joyce Carol Oates in her fascinating essay on serial killers. She asks: 'Should these "damaged" individuals [that is, serial killers] be detected ... and their condition diagnosed before they kill, how exactly would they be treated? ... Every commentator I have ever read on the subject ... makes the point that the serial killer is virtually impossible to "reform" ... Short of locking these "damaged" people up permanently, or implanting electrodes in their brains, it is difficult to imagine what can be done to prevent them from killing, in a democratic society in which civil liberties are honored. Can, and should, *the potential for violence* be, in effect, punished?' Oates, "I Had No Other Thrill or Happiness": The Literature of Serial Killers', Oates, Joyce Carol (1999), *Where I've Been, and Where I'm Going: Essays, Reviews, and Prose*, New York: Plume, 249, emphasis in the original. In an earlier novel, Oates' narrator refers to 'murderers yet to commit their sins': Oates, Joyce Carol (1984), *Mysteries of Winterthurn*, New York: E. P. Dutton, 380.
- 11 Walzer, *Just and Unjust Wars*, 80. I take it that his description of a threat as 'imaginary' implies only that it has so far not materialised, not that it is a mere figment.
- 12 See McMahan, Jeff, 'The Ethics of Killing in War', *Ethics*, Vol. 114, 2004, Sections VI–VIII.
- 13 See, for example, Ferzan, 'Defending Imminence', 254.
- 14 For a moral analysis of the Iraq War, see McMahan, Jeff (2004), 'Unjust War in Iraq', *The Pelican Record*, Corpus Christi College, Oxford. This paper may also be found at <<http://webapp.utexas.edu/blogs/bleiter/archives/002121.html>> or may be obtained from the author by request. Bush has subsequently begun to appeal to a basically consequentialist defence of the Iraq war. On various occasions during the election campaign, he has taken the same line: 'Knowing what I know today, I would have made the same decision. The world is safer with Saddam in a prison cell', Sanger, David E., 'A Doctrine Under Pressure: Pre-emption Is Redefined', *New York Times*, 11 October 2004. Again, there are problems in universalising this argument. There are many people of whom it is true that the world would be safer if they were in prison, but that is no justification for imprisoning them.
- 15 For a brief discussion, see Walzer, *Just and Unjust Wars*, 82–5. I am grateful to Thomas Hurka for pointing out to me that this case is susceptible to an analysis that parallels that which I have given of the case of the battered wife.
- 16 My account of the Osirak raid draws on that given by David Mellow in his doctoral dissertation, 'A Critique of Just War Theory', University of Calgary, 2003, which in turn is based primarily on reports in the *New York Times* in the days following the attack. The quotation is from that source. My conclusions agree with Mellow's.
- 17 Suppose X unjustifiably issues a credible threat against Y but is in fact bluffing. Y, reasonably believing X's threat to be genuine and therefore reasonably anticipating an imminent unjust attack, begins to take defensive action against X. X now faces an

unavoidable choice: either harm Y in self-defence, or allow himself to be harmed. I believe that even if Y is not justified in posing a threat to X but is merely excused, it is nevertheless X who bears primary responsibility for the fact that either X or Y must be harmed. Because of this, X is not permitted to act in self-defence (unless, perhaps, Y's defensive action is disproportionate to the threat he reasonably perceives). X is liable to suffer those harms made likely by his own wrongful action. (If Y's action is wrongful – though excused – because he in fact faced no real threat, it is possible that X might be permitted to force him to share the harm made inevitable by their combined wrongful action. But the greater share of the harm should still go to X because of his greater responsibility.)

- 18 Milgram, Stanley (1983), *Obedience to Authority*, New York: HarperCollins.