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## **THESIS**

**JUST STRIKE: A COMMANDER'S GUIDE TO  
PREEMPTIVE SELF-DEFENSE**

by

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June 2018

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**JUST STRIKE: A COMMANDER'S GUIDE TO PREEMPTIVE SELF-DEFENSE**

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## **ABSTRACT**

The imminence requirement for preemption can make all the moral difference in deciding to launch a lethal strike. Influenced by Michael Walzer's just war criteria for preemption, I provide three necessary conditions to strike first in self-defense. A commander must justifiably believe three things: that an unjust aggressor is poised to attack, that her capacity to avert an attack is constrained by an imminent decision point or last window of opportunity, and that preemption is part of a moral-risk proportionate strategy. In any event, a commander must decide to preempt or not preempt under conditions of uncertainty. As such, I incorporate and supplement Seth Lazar's rights-based expected utility approach to lethal action.

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## I. INTRODUCTION

What is the role of imminence in preemptive self-defense? From a task force perspective, self-defense strikes are not uncommon.<sup>1</sup> From a national perspective, true preemption is comparatively rare.<sup>2</sup> Yet, whether from a task force or a national perspective, how a commander conceptualizes imminence becomes critical to moral action.<sup>3</sup> A classic example of a preemptive strike occurred on June 5, 1967. Egypt posed an imminent threat against Israel and, in response to that threat, the state of Israel conducted its first wave of military attacks against enemy forces. Less well known, on March 7, 2016, a large formation of al-Shabaab fighters posed an “imminent threat” against U.S. forces and their African Union partners in Somalia.<sup>4</sup> As a result, a U.S. task force conducted a “self-defense” strike against this formation and killed over 150 people.<sup>5</sup> Across the globe, preemptive strike decision-makers command troops in both national and tactical arenas.

To begin this discourse, imminence must be seen as a necessary requirement for preemption, which is the term normative theorists use when an unjust aggressor poses an imminent threat of attack, and a defender strikes first in self-defense.<sup>6</sup> Insofar as a defender foresees an imminent threat and need not await her fate before taking action, preemption

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<sup>1</sup> The term “strike” can apply to all levels of war. The levels of war are typically divided into strategic, operational, and tactical. A popular comparison is that tactics win battles; operations win campaigns; and strategies win wars. The term strike as I use it means lethal and instrumental in purpose. Strikes can promote just, justified, or unjust ends.

<sup>2</sup> For an empirical study of interstate wars since 1816, see Dan Reiter, “Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen.” *International Security*; vol. 20, no. 2 (Fall 1995): 5–34.

<sup>3</sup> By “commander,” I mean a person with the legitimate authority to make a preemptive strike decision.

<sup>4</sup> “U.S. Strikes Al Shabaab Training Camp in Somalia, More than 150 Killed,” Reuters, March 8, 2016, <https://www.reuters.com/article/us-usa-somalia-dronestrike/u-s-strikes-al-shabaab-training-camp-in-somalia-more-than-150-killed-idUSKCN0W91XW>. This strike occurred in a non-combat zone; an area not designated or declared as a theater of armed conflict.

<sup>5</sup> The strike was conducted under a “Self-Defense and Collective Self-Defense” authority granted to them by President Barack Obama. “U.S. Strikes Al Shabaab Training Camp in Somalia, More than 150 Killed.”

<sup>6</sup> Henry Shue and David Rodin, Introduction, *Preemption: Military Action and Moral Justification* (New York: Oxford University Press, 2007).

can be just.<sup>7</sup> If preemption is just—if pre-strike conditions underwrite the other requirements of just war action (liability, necessity, and proportionality)—then a defender would not morally wrong an aggressor by striking first.<sup>8</sup>

Regrettably, outside of normative theory, when the conditions did not warrant a preemptive strike, past invocations of the term preemption have compromised our nomenclature. Since at least the time of the 2003 U.S. war in Iraq, preemption has suffered from a conceptual hangover. Due to wanton abuse by national leaders who eschewed a false narrative to justify war, preemption roiled in a dive bar of fear, conceptual conflation, and a consort of connotation. As a caricature of this narrative as a whole, which I draw to show how preemption can belie a derailment of ideas, imagine a U.S. political actor speaking in earnest:

When we say preemption, we mean prevention, and by prevention, what we really mean is a war that is aggressive, unnecessary, and unjust.<sup>9</sup> We accept this awful truth because the permanent threat of terrorism represents a vicious enemy, with a “murderous ideology,” who may soon acquire or who may soon unleash, as in the past, weapons of mass destruction.<sup>10</sup> Think of September 11<sup>th</sup>, 2001; the train bombing in Madrid, 2004; the killings in Nice, Bastille Day 2016; and the suicide attack in Manchester, 2017.<sup>11</sup> Such threats, no matter how unlikely, represent an unacceptable risk and must be

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<sup>7</sup> Whether one can morally judge a “war as a whole” is doubtful; the idea that wars are “morally heterogenous” is compelling: Saba Bazargan, “Morally Heterogeneous Wars,” *Philosophia* 41, no. 4 (2013): 959–975. For a justified act of preemption, however, I still choose to refer to the just side as defenders and the unjust side as aggressors in reference, if you like, to their *jus ad bellum* moral distinction.

<sup>8</sup> Since an aggressor has no right against a just attack, a defender’s just strike would not constitute a moral wrong.

<sup>9</sup> By “unnecessary,” I mean it fails to meet the necessity requirement of either *jus ad bellum* or *jus in bello*.

<sup>10</sup> For more on how “Preventive war short-circuits nonmilitary means of solving problems” see Neta C. Crawford. “The Slippery Slope to Preventive War.” *Ethics & International Affairs* 17, no. 1 (2003): 30–36. The “murderous ideology” reference is from George W. Bush, “Address before a Joint Session of the Congress on the State of the Union,” *Weekly Compilation of Presidential Documents* 38, no. 5 (January 29, 2002): 133–39, quoted in Michael W. Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton, NJ: Princeton University Press, 2008), 27.

<sup>11</sup> Brooke Singman. “Timeline of Recent Terror Attacks against the West.” Fox News, November 1, 2017. <http://www.foxnews.com/world/2017/11/01/timeline-recent-terror-attacks-against-west.html>.

destroyed without delay.<sup>12</sup> We are in a global state of emergency; ours is a war against evil.<sup>13</sup>

Citizens of the United States are not the only ones to have faced a collective need to disembark from such a dangerous train of thought. Israelis too had to overcome false narratives after the Second World War. For example, with the European catastrophe (*HaShoa*) in mind, Hanna Arendt confronted the Jewish mood in 1948 with respect to Arab-Israeli relations in Palestine. The Jewish mood then was similarly grave to what still exists today in the hearts of many Americans. Arendt's moral admonishment to her fellow Jews took the following form:

Now Jews from Palestine all seem to believe that "only a military decision can settle the issue" between us and the Arabs. Beneath this belief is an "ominous" presumption, that "Arabs, all Arabs, are our enemies." However, such an attitude is morally wrong. Mass belief in the need to fight an ill-defined enemy "at any cost" is "an expression of fanaticism and hysteria."<sup>14</sup>

A commander who preempts an attack in self-defense need not subscribe to an extreme or amoral position. The underlying premise of this thesis is that we must return preemption to its rightful place—onto the moral side of war. To do so, however, requires that we reframe our notion of imminence. If the concept of imminence is too broad, an individual or a nation may conduct a preventive strike under a false banner of

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<sup>12</sup> According to the 2002 U.S. National Security Strategy, "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries" (p. 15). However, on that same page is an example of the conflation between preemption and prevention: "To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively." White House, *The National Security Strategy of the United States of America* (Washington, DC: September 2002), 15. <https://www.state.gov/documents/organization/63562.pdf>. Vice President Dick Cheney believed that the U.S. must treat even a 1% chance that Pakistan was helping al-Qaeda build a weapon of mass destruction "as a certainty" in terms of its response. Micah Zenko and Michael A. Cohen, "Clear and Present Safety: The United States Is More Secure Than Washington Thinks," *Foreign Affairs* 91, no. 2 (April 2012): 79–93; Ron Suskind, *One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon and Schuster, 2006).

<sup>13</sup> For a study on evil as a rhetorical tool post-9/11, see Robert L Ivie. "Evil Enemy versus Agonistic Other: Rhetorical Constructions of Terrorism." *The Review of Education, Pedagogy & Cultural Studies* 25, no. 3 (2003).

<sup>14</sup> Hannah Arendt. "To Save the Jewish Homeland: There Is Still Time." *Commentary; New York* 6 (January 1, 1948): 400–406.

preemption.<sup>15</sup> If the concept of imminence is too narrow, a moral audience may wrongly blame a preemptive defender for committing an act of aggression. Henceforth, I define preemption as self-defense in the face of imminence—an action that is necessary to avert an unjust and credible threat.

I claim that imminence determines a decision point, which means a commander's decision to preempt cannot be postponed. Rather than characterize the temporal aspect of imminence in reference to when a strike will land or when an attack will hit its target, a commander must regard imminence in reference to a crucial decision: Either to strike first in self-defense or prepare to cope with an unjust attack.

Imminence requires two conditions. A commander must justifiably believe that:

1. An unjust aggressor is poised to attack, which I cover under the *Credible Threat Condition*.
2. Her capacity to avert an attack is constrained by an imminent decision point, which I cover under the *Temporal Necessity Condition*.

In the face of imminence, a commander is triggered to make a decision.<sup>16</sup> However, to justifiably take action, to strike first, a third condition must also be met:

3. The commander must justifiably believe that preemption is part of a moral-risk proportionate strategy, which I cover under the *Proportionate Strategy Condition*.

Implicitly, a good-faith commander shall not attack if any of these three conditions are false (i.e., she is not disingenuous in her role as a defender). I provide these three necessary conditions—*Credible Threat*, *Temporal Necessity*, and *Proportionate Strategy*—as a set of analytic tools that commanders may wield in case they are ever faced with a preemptive strike decision.

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<sup>15</sup> Although all preemption is, in a non-operative sense, preventive, if an act is merely preventive (not in response to an imminent threat), then it is not preemption. “Preventive self-defense” is equivalent to “aggressive self-defense,” which is a contradiction in terms, see Susan Uniacke, “On Getting One’s Retaliation in First” in *Preemption: Military Action and Moral Justification*, ed. David Rodin and Henry Shue (New York: Oxford University Press, 2007).

<sup>16</sup> To the extent possible, when I use the term imminent, I refer merely to temporal necessity. By imminence or imminent threat, I refer to the combination of temporal necessity and a credible threat.

## II. A WEAK CONCEPT OF IMMINENCE

The imminent unknown is not to be avoided, but embraced.

—Tom Maxwell<sup>17</sup>

To help motivate this venture into conceptual analysis, I illustrate how a weak concept of imminence can give rise to a practical and combat-related concern. Then, within the context of preemption, I focus on the theoretical groundwork required to strengthen our understanding of imminence.

Commanders lack clear, legal guidance for preemptive action. In general, ambiguity can translate into operational flexibility; however, in the balance between clarity and ambiguity, current guidance on imminence falls apart, which I shall demonstrate. Two main sources of official guidance on lethal action include the Law of Armed Conflict (LOAC) and Rules of Engagement (ROEs). Since LOAC and ROEs diverge in terms of their respective criterion for preemptive force, service members from other nations depend upon drastically different legal authorities to launch a preemptive strike.<sup>18</sup> Article 51 of the UN Charter affirms “the inherent right of individual or collective self-defense.”<sup>19</sup> Pursuant to that article, and in accordance with Customary International Law (CIL), the use of force in self-defense is justified “in anticipation of an imminent armed attack.”<sup>20</sup> However, with respect to ROEs, some soldiers are constrained by imminence, while others are constrained by the concept of hostile intent to justify individual, unit, or collective self-defense. For example, U.S. forces are authorized and, in some cases, even obligated, to use “necessary and proportional force in self-defense in response to hostile acts or

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<sup>17</sup> Tom Maxwell, “Alan Watts and the Eternal Present,” *Longreads* (blog), February 8, 2018, <https://longreads.com/2018/02/08/alan-watts-and-the-eternal-present/>.

<sup>18</sup> Official authorization is different from an order or a mandate, but without it, service members are not permitted to apply discretion in the use of force.

<sup>19</sup> Department of Defense, *Law of War Manual* (Washington, DC: Department of Defense, 2016), 47.

<sup>20</sup> Department of Defense, *Law of War Manual*, 47 (note 229). Furthermore, the right of self-defense against non-state actors is reflected in UN Security Council Resolutions 1368 and 1373 from 2001. “Security Council Resolutions – 2001” United Nations, accessed May 17, 2018, <http://www.un.org/Docs/scres/2001/sc2001.htm>.

demonstrated hostile intent.”<sup>21</sup> On the other hand, the United Kingdom, France, and Germany require “imminence” which “is understood to be a temporally bound concept that means ‘immediate.’”<sup>22</sup> Thus, a weak concept of imminence can translate into a real-world, practical concern for modern warfighters and defenders. Consider the following example.

Imagine a coalition soldier in Afghanistan observes an Afghan man “digging a hole” adjacent to a road.<sup>23</sup> The location of that hole is along a common path of ISAF (International Security Assistance Force) convoys, but there is no convoy currently approaching. Imagine also that this coalition soldier is limited due to her distance and sight-angle in discerning the exact purpose of the Afghan. She believes, however, that he is setting up an IED (improvised explosive device). Despite the possibility that digging a hole in certain contexts may satisfy hostile intent, this threat is not immediate and, for some countries, an immediate threat is what is meant by imminent. Thus, in a matter of self-defense, country of origin could determine if that soldier’s discretion may apply or if she is forbidden from using force. In this scenario, a U.S. soldier could fire at her discretion whereas a service member from the United Kingdom, France, or Germany could not. At a critical juncture, when self-defense is at stake, such a disparity can undermine interoperability in a coalition environment.

To highlight just how broad the concept of imminence can be, consider current U.S. guidance. The Chairman of the Joint Chiefs of Staff has published standing ROEs, which list the following definitions:

**Hostile Intent.** The threat of **imminent use of force** against the United States, U.S. forces, or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

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<sup>21</sup>“Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.” Department of Defense, *Law of War Manual*, 233, note 257.

<sup>22</sup> E. L. Gaston, “Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege,” *Harvard National Security Journal* 8 (2017): 299.

<sup>23</sup> A similar hypothetical is in Gaston, 287.

**Imminent Use of Force.** The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. **Imminent does not necessarily mean immediate or instantaneous.**<sup>24</sup>

These two definitions provide very broad guidance, which, as stated, opens up the possibility that a commander may conduct a preventive strike under a false banner of preemption. Further, U.S. ROEs make clear only what imminence does not mean. What imminence does mean or should mean is not covered. If the circumstances that satisfy imminence depend upon everything, “an assessment of all facts and circumstances,” then those circumstances might as well depend upon nothing. To understand what would cause the facts and circumstances to constitute imminence in one case but not in another is to ask, what do we mean by imminence?

In 1842, U.S. Secretary of State Daniel Webster provided an early characterization of imminence, which we know as the *Caroline* doctrine.<sup>25</sup> Still in legal use today, the requirement for imminence is a circumstance “where the necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>26</sup> While the *Caroline* doctrine has been scrutinized for generations in both academia and jurisprudence, it is important to focus on the timeless purpose of a legal right of self-defense—“to afford States a self-help mechanism by which they may repel attackers.”<sup>27</sup>

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<sup>24</sup> U.S. Army, *Operational Law Handbook*, 17th ed. (Washington, DC, 2017), 79 (emphasis added).

<sup>25</sup> Thomas M. Nichols, *Eve of Destruction: The Coming Age of Preventive War* (Philadelphia, PA: University of Pennsylvania Press, 2008): 2.

<sup>26</sup> Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), quoted in 2 *Int'l L. Dig.* 412, § 217 (John Bassett Moore, ed., 1906), quoted in E. L. Gaston, “Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege,” *Harvard National Security Journal* 8 (2017): 283–332.

<sup>27</sup> Michael N. Schmitt, “Counter-terrorism and the Use of Force in International Law,” *The Marshall Center Papers*, No. 5 (Nov. 2002), 23. [http://www.marshallcenter.org/mcpublicweb/mcdocs/files/College/F\\_Publications/mcPapers/mc-paper\\_5-en.pdf](http://www.marshallcenter.org/mcpublicweb/mcdocs/files/College/F_Publications/mcPapers/mc-paper_5-en.pdf).

With this purpose in mind, imminence cannot lack operational utility.<sup>28</sup> Of all the elements in Webster's criterion, "no moment for deliberation" seems the least useful and is entirely too strict as an action-guiding principle.<sup>29</sup> Given that a decision to take a preemptive action is a moral decision, one cannot expect a commander to make the right decision if there is no time for deliberation. Time to deliberate is essential for this kind of moral action, and so Webster's characterization of imminence can be seen as too narrow.

Michael Walzer concurs that the *Caroline* doctrine is too narrow and cannot accommodate preemption. In his critique, Walzer views the *Caroline* account as akin to "a reflex action, a throwing up of one's arms at the very last minute."<sup>30</sup> He writes, "Even the most presumptuous aggressor is not likely to insist, as a matter of right, that his victims stand still until he lands the first blow."<sup>31</sup> A commander requires not only time to deliberate but also adequate time to maneuver. A reflex action may dampen an aggressor's blow, but that action is inadequate to avert an unjust harm.

Beginning with Webster's account, the *Caroline* doctrine, I see three plausible options to best understand imminence and preemption: 1) Imminence should apply to

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<sup>28</sup> To address the "paucity" of *jus ad bellum* guidance for "self-defense against an imminent or actual armed attack by non-state actors," Daniel Bethlehem published 16 relevant principles, which he offers "for debate without any accompanying explanatory memorandum or commentary" (p. 774). He notes that his principles neither reflect the law or the practice of any State (p. 775). Although my approach is completely different, it is in the same spirit: to help inform operational thinking about these issues. Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," *The American Journal of International Law*; *Washington* 106, no. 4 (October 2012): 770–77. In principle 8, "whether an armed attack may be regarded as imminent," Bethlehem lists the following: "(a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent" (775–76).

<sup>29</sup> Only in fiction can a commander order, "Shields Up" and thus save his ship and crew in the span of a moment (e.g., *Star Trek, The Motion Picture*, from 2009).

<sup>30</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4<sup>th</sup> Edition (New York: Basic Books, 2006), 75.

<sup>31</sup> Walzer, 75.



something other than when an attack will land; 2) A new account of preemption is needed; 3) Both options one and two, which would reframe our notion of imminence.<sup>32</sup>

In this thesis, I will take on option three: namely, I argue that imminence should not apply to the timing of when an attack will land but to when a commander must make a decision. Additionally, a new account of preemption is needed, for which I argue.

To help build my support for this new account, I use Walzer's criteria for preemption as a point of departure. Although Walzer does not describe it in these terms, he himself picks option two in his approach to Webster: namely, Walzer does not attempt to alter Webster's notion of imminence, but he does broaden the criteria for preemption in comparison to Webster's legal precedent.<sup>33</sup> In Walzer's view, three "sufficient threat" factors justify a preemptive strike (which should not be confused with the three necessary conditions for which I argue): 1) A manifest intent to injure; 2) A degree of active preparation that makes that intent a positive danger; 3) A general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.<sup>34</sup>

To illustrate each item in his list, Walzer covers the three weeks leading up to the 1967 Arab-Israeli War. Egypt had announced its political goal to destroy Israel in the case of war, begun a massive troop buildup in the Sinai, closed the Straits of Tiran to Israeli shipping, and formed a military alliance with Jordan, Syria, and Iraq.<sup>35</sup> These events expressed the "manifest intent" and "positive danger" features necessary to satisfy sufficient threat factors one and two. To exemplify factor three, Israel was physically vulnerable to the increased risk of harm from an unjust attack. After Egypt's troop buildup

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<sup>32</sup> A fourth approach is to claim that since imminence is so restrictive, instead of preemption, there may be cases of justifiable prevention. Both Randall Dipert and Michael Doyle proceed on this route. Randall R. Dipert, "Preventive War and the Epistemological Dimension of the Morality of War," *Journal of Military Ethics* 5, no. 1 (March 1, 2006): 32–54, <https://doi.org/10.1080/15027570500465728>. Doyle, *Striking First*. Of Doyle's four standards for prevention (p. 43)—lethality, likelihood, legitimacy, and legality—the one that I do not address is legality: has the aggressor violated international law and has the defender sought authorization from the UN Security Council? Even though I wholeheartedly agree with this legal standard, I focus mainly on morality.

<sup>33</sup> Walzer, *Just and Unjust Wars*, 81.

<sup>34</sup> Walzer, 81.

<sup>35</sup> Walzer, 82–84.

in the Sinai, Israel had responded by fully mobilizing its reserve units to take up defensive positions along its border.<sup>36</sup> As part of the “magnified risk” of not fighting, a “basic asymmetry in the structure of forces” was in place.<sup>37</sup> While Egypt could have kept its army on Israel’s border “indefinitely,” an outcome Egypt might have considered as a win, Israel could not sustain full reserve-unit activation.<sup>38</sup> This put a “time limit” on Israel’s ability to avert an unjust attack. According to Walzer, an “intense fear spread in the country,” which he later describes as “a just fear.” This “just fear” existed because it was based both on intent and a real danger. Due to these factors, Israel’s preemptive strike was, in Walzer’s view, morally legitimate.<sup>39</sup>

Prior to looking at his three sufficient threat factors, I wish to bracket Walzer’s extraneous addendum of fear as it may detract from a substantive justification for preemption. The relationship between fear and war cannot be resolved here. Millennia ago, Thucydides attributed fear to what we now call aggressive wars—wars fought for “fear, honor, and interest.”<sup>40</sup> While fear may accompany an apprehension of imminence, it is unclear how fear alone can add justificatory weight to an act of preemption.<sup>41</sup> On one hand,

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<sup>36</sup> Walzer, 82–84.

<sup>37</sup> Edward Luttwak and Dan Horowitz, *The Israeli Army* (New York, Harper & Row, 1975), 212, quoted in Walzer, *Just and Unjust Wars*, 84.

<sup>38</sup> Walzer, 84.

<sup>39</sup> Walzer, 83–85. In contrast to the general treatment of the Six-Day War as a justified or textbook case of preemption, the moral legitimacy of Israel’s decision to strike first is still open to debate: John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (New York: Cambridge University Press, 2013); Tom Ruys, “Armed Attack” and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (New York: Cambridge University Press, 2010), 272–280.

<sup>40</sup> Thucydides, *The Landmark Thucydides: A Comprehensive Guide to The Peloponnesian War*, Robert B. Strassler ed. (New York: Free Press, 1996), p. 43, quoted in Colin S. Gray, *The Implications of Preemptive and Preventive War Doctrines: A Reconsideration* (Carlisle Barracks, PA: Army War College Strategic Studies Institute, 2007). For other fear-based accounts of preventive war, see James D. Fearon, “Rationalist Explanations for War,” *International Organization* 49, no. 3 (1995): 379–414; and Shiping Tang, “Fear in International Politics: Two Positions,” *International Studies Review* 10, no. 3 (September 1, 2008): 451–71. In contrast, fear-based accounts of preemption can also be found. For example, the “fear of immediate attack” is cited as a motivating reason for preemption in Dan Reiter, “Exploding the Powder Keg Myth,” 7. Also, the so-called preemptive occupation of the Philippines and Hawaii was attributed to fear by George H. Quester in “Two Hundred Years of Preemption,” *Naval War College Review*, Washington 60, no. 4 (Autumn 2007): 23.

<sup>41</sup> Walzer probably holds the view that fear alone cannot add justificatory weight, given his “just” qualifier, but Susan Uniacke is ultra-clear on this point in “On Getting One’s Retaliation in First,” 77–9.

fear is an emotion. Fear tends to create stress, impair judgment, and exaggerate risk.<sup>42</sup> On the other hand, psychologist Richard Lazarus holds that cognition and emotion are intricately tied: how an individual cognitively appraises a situation gives rise to a subsequent emotion; how events or behaviors are perceived either positively or negatively is part of a cognitive appraisal and re-appraisal process, which can both generate and attenuate emotion.<sup>43</sup> Thus, it may be possible to generate a rational fear. However, since fear alone is susceptible to highly subjective factors, I hold that fear is unnecessary and insufficient to justify preemption.

Fear aside, I analyze Walzer's three sufficient threat factors for preemption in the following form. Walzer's first two factors constitute a *Credible Threat Condition*. Due to its complexity, I divide my analysis of Walzer's third factor between two different sections. To wit, its indistinct temporal feature can be replaced by a *Temporal Necessity Condition*. Additionally, its consideration of risk, while incomplete, can be included as part of a broader *Proportionate Strategy Condition*. For clarity, the *Credible Threat* and *Temporal Necessity Conditions* are necessary to assign imminence to a situation. The *Proportionate Strategy Condition* is necessary to strike first in preemptive self-defense.

These three conditions—*Credible Threat*, *Temporal Necessity*, and *Proportionate Strategy*—reframe and better express the role of imminence in preemption. Furthermore, they are designed to help commanders abide by the moral demands inherent to preemptive self-defense.<sup>44</sup> The first condition necessary to assign imminence to a situation is the *Credible Threat Condition*.

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<sup>42</sup> David Ropeik, *How Risky Is It, Really?* (New York: McGraw-Hill, 2010), 188–197.

<sup>43</sup> Richard S. Lazarus, "Thoughts on the Relations between Emotion and Cognition.," *American Psychologist* 37, no. 9 (1982): 1019–1024. Similarly, Aristotle believed that emotions "share in some way" with reason as a child may listen to and obey his parents. Aristotle. *Nicomachean Ethics*. Translated by Christopher Rowe. Oxford: Oxford University Press, 2002, 102b26-32, quoted in Nancy Sherman, *Stoic Warriors: The Ancient Philosophy Behind The Military Mind*. Oxford: Oxford University Press, 2005, 72

<sup>44</sup> Moral preparation for war is critical to mitigate the risk of moral injury—in this case, an action or omission that evokes a sense of haunting regret. See Robert E. Meagher and Douglas A. Pryer, eds., *War and Moral Injury: A Reader* (Eugene, OR: Cascade Books, 2018). As Jonathan Shay prescribes, ethics training is essential to "force protection in the mind and spirit" (p. 301).

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### III. CREDIBLE THREAT CONDITION

***Credible Threat Condition:*** A commander must justifiably believe that an unjust aggressor is poised to attack.<sup>45</sup> This belief is subject to the following: the aggressor has both the resolve and the capability to attack and therefore represents a credible threat; the aggressor is morally liable to defensive harm.<sup>46</sup>

#### A. RESOLVE AND CAPABILITY

Walzer's first two factors—manifest intent, and a positive danger—operate in parallel to a common understanding of resolve and capability. Enemy resolve and enemy capability are two critical areas of focus within the intelligence community.<sup>47</sup> If an entity has the “irreconcilable will” to attack, then this resolve is morally equivalent to manifest intent.<sup>48</sup> If an entity has the means and readiness to pose a serious quantum of harm, then this capability is morally equivalent to a positive danger. In any event, I assume that commanders have an intelligence directorate at their disposal or within their organizations. Intelligence analysts collect from various sources of information to judge, although not in name, whether Walzer's first two sufficient threat factors—enemy resolve and enemy

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<sup>45</sup> To act in self-defense, a defender must judge and anticipate that the enemy is “literally poised to attack.” Rodin, *War and Self-Defense*, 144.

<sup>46</sup> In this section, one topic that I do not discuss, but hold firm, is that the burden of proof for a justifiable belief in the *Credible Threat Condition* falls upon a prospective defender: namely, a commander. Specifically, a commander cannot presume that an aggressor is liable to defensive harm—a lack of evidence for non-liability does not count as evidence for liability. While burden of proof is pertinent to small-unit self-defense, counter-terrorist operations, and even national defense, this is too large of a topic to adequately cover here. One might find it obvious that defenders should justify their belief that an entity is poised to attack, but group-think dynamics can be pernicious. For instance, labels such as terrorist or “rogue state” become problematic when there is a presumed perpetual state of imminence. Even in a global war on terror, which can never be won, it is wrong to assume, either implicitly or explicitly, that all members of a non-state terrorist organization constitute a perpetual threat. Based on various cases of unjust police targeting against black males, research into the domestic problem of implicit bias has shown that stereotyping in police practices can occur behind the scope of conscious awareness. See Katherine B. Spencer, Amanda K. Charbonneau, and Jack Glaser, “Implicit Bias and Policing,” *Social and Personality Psychology Compass* 10, no. 1 (2016): 50–63. However, in war, if hostile intent is attributed to an entire group by an appropriate authority due to an ongoing threat of attack, then follow-on military actions would fall outside of the scope of preemption.

<sup>47</sup> Joint Chiefs of Staff, *Joint Intelligence*, JP-2-0, (Department of Defense, 2013), 71.

<sup>48</sup> C. C. Krulak and A. M. Gray, *Warfighting*, MDCP-1 (Department of Defense, 1997), 3.

capability—are met.<sup>49</sup> Through this directorate, commanders track their adversaries’ activities, signals, and warnings to assess whether an aggressor constitutes a credible threat.

To support their belief in a credible threat, commanders must understand enemy resolve, which presumes personal or organizational familiarity with the enemy. A commander may gain or borrow upon this familiarity only after long hours of observation, collection, or interaction. As an example, reconnaissance is a functional responsibility of command—to learn enemy patterns of life and to discover enemy tactics as they evolve. Through this understanding, commanders are expected to recognize indications of resolve as actions unfold.

In addition to resolve, a commander’s appreciation of enemy capability is no less dynamic. A narrow definition of capability is in terms of means, composition, disposition, and strength to attack.<sup>50</sup> By comparison, a broad definition of capability would add “design acumen” as a conceptual element.<sup>51</sup> A commander’s appreciation of enemy capability could also include the cyber realm—the ability of an enemy to conduct a Stuxnet-like

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<sup>49</sup> Information collection is divided into unique disciplines: geospatial intelligence, human intelligence, signals intelligence, measurement and signature intelligence, open-source intelligence, technical intelligence, and counterintelligence. Joint Chiefs of Staff, *Joint Intelligence*, 115. To process this data, an analyst must understand the “operational environment,” which is the “composite of the conditions, circumstances, and influences that affect employment of capabilities and bear on the decisions of the commander. It encompasses physical areas of the air, land, maritime, and space domains; the information environment (which includes cyberspace); the [electromagnetic spectrum]; and other factors.” Joint Chiefs of Staff, *Joint Operations*, JP 3–0 (Department of Defense, 2017), 102. As a warning, such idealized doctrinal descriptions may over-sell what is within the realm of possibility.

<sup>50</sup> The SALUTE report, which U.S. commanders learn in basic training, captures this notion well. SALUTE stands for size, activity, location, unit, time, and equipment.

<sup>51</sup> Warfare as a “design competition” entails an “alignment of doctrine, information, technology, and organizational structure,” which are the keys to achieve a strategic advantage. See John Arquilla and Nancy Roberts, *Design of Warfare*, Monograph (Monterey, CA: Naval Postgraduate School, 2017). For example, during World War II, part of the evil genius of the German blitzkrieg was the German alignment of tanks, aircraft, and mobile radios to their organizational structures, doctrine, and “information flows” in a design meant to bring those new technologies to bear. At the time, this new capability enabled the Germans to cripple and overwhelm a much larger and better equipped French force beginning in 1939 and a similarly ‘superior’ Russian force through 1941 (pp. 18–20).

attack, as in 2009 against the Natanz uranium enrichment facility in Iran.<sup>52</sup> Depending on its scope, there can be great breadth to the concept of military capability itself.

Primarily, a commander should appreciate the unique relationship between resolve and capability: the absence of either implies that a threat lacks credibility. Resolve without capability is like the black knight in the farcical comedy, *Monty Python and the Holy Grail*.<sup>53</sup> While guarding a small bridge that crosses a waterless gully, a knight bellows, “None shall pass.” King Arthur claims, “But I must cross this bridge.” The knight responds, “Then you shall die.” A less than epic sword fight ensues, wherein King Arthur triumphs and the knight suffers the loss of both his arms and legs. Relentlessly, the knight goads the king: “I’ll bite your legs off!” King Arthur continues on his way, and thus ends the scene. The black knight has an irreconcilable will to attack and his last line is ‘threatening.’ Nonetheless, since he is incapable of inflicting any physical harm to the king, he lacks credibility. In contrast, capability without resolve is like a heavily armed Fred Rogers from *Mister Rogers’ Neighborhood*.<sup>54</sup> If Mister Rogers starts a massive arms buildup, say he develops or acquires some new weapons technology, then he would have the capability to attack. Rogers would have the means and, due to his proximity, he would be in a powerful state of readiness to attack his neighbors with virtually no warning. However, since Mister Rogers is a friendly neighbor, since he presumably will not manifest aggressive intent, his threat is also non-credible.

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<sup>52</sup> T. M. Chen, “Stuxnet, the Real Start of Cyber Warfare?,” *IEEE Network* 24, no. 6 (November 2010): 2–3, <https://doi.org/10.1109/MNET.2010.5634434>; Irving Lachow, “The Stuxnet Enigma: Implications for the Future of Cybersecurity,” *Georgetown Journal of International Affairs; Washington*, Fall 2011, 118–26. It is unclear whether a nation can preempt a cyber-attack. Attribution aside, once a program designed to inflict physical damage to critical infrastructure is released, the attack is past—to avert the subsequent harm requires network defense, which is different from preemption. Punishment or actions taken to deter future cyber-aggression is also a separate matter from preemption. The Chatham House interpretation of what is necessary for preemption or anticipatory self-defense is an imminent threat of “armed attack,” not “mere economic damage” as perhaps sanctions or a computer virus might inflict. Chatham House, “The Chatham House Principles of International Law on the Use of Force in Self-Defence,” *The International and Comparative Law Quarterly* 55, no. 4 (2006): 965. See also, Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge, MA: Cambridge University Press, 2017); John Arquilla, “Twenty Years of Cyberwar,” *Journal of Military Ethics* 12, no. 1 (April 1, 2013): 80–87, <https://doi.org/10.1080/15027570.2013.782632>.

<sup>53</sup> *Monty Python and the Holy Grail*, directed by Terry Gilliam and Terry Jones (1975; UK: Michael White Productions, 1975) DVD.

<sup>54</sup> Fred Rogers (March 20, 1928 – February 27, 2003) was the iconic “friendly neighbor” from the popular PBS kids program, see <https://www.fredrogers.org/media/mister-rogers-neighborhood/>.

Resolve and capability are not only required for a credible threat; they may be interdependent. Although asked in a different context, this notion is captured well in Madeleine Albright's famous question, "What's the point of having this superb military you're always talking about if we can't use it?"<sup>55</sup> With respect to covert or clandestine operations capability, perhaps there is truth to the idea that certain enemy capacities can lower the threshold of an enemy's willingness to attack.<sup>56</sup> The following is a common complaint against the capacity to employ remotely piloted aircraft (RPAs): Since RPA operations present such a light footprint in terms of physical risk to friendly forces, they do not press hard upon that belligerent state's public conscience; therefore, RPA operations can increase a state's propensity to use force.<sup>57</sup> Despite such complaints, how capability affects enemy resolve shall depend upon the enemy.

However, even if certain capabilities could lower the threshold for resolve, can a high level of resolve lower the threshold for capability? I think not. Regardless of resolve, if a commander justifiably believes that an entity cannot attack, but may be able to in some distant future, then he cannot attest to the existence of either a credible threat or, by extension, an imminent threat. This is true even if a resolute enemy is in the process of developing or acquiring some new weapons technology. However, when does an emerging threat transition into a credible threat? Such a question cannot elicit a general answer, but we can imagine an entity who, in terms of resolve, is similar to *Monty Python's* black knight. This knight is working to attain, but currently lacks, the means to attack. Even so, King Arthur would not be justified in using lethal force against an ill-wisher that can do no harm. Or, consider the situation in Syria in 2007 when that country was in the process of

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<sup>55</sup>"What's the Point of Having This Superb Military If You Can't Use It?," *The Economist*, March 11, 2011, <https://www.economist.com/democracy-in-america/2011/03/11/whats-the-point-of-having-this-superb-military-if-you-cant-use-it>.

<sup>56</sup> This concern is not new because the ability to conduct special operations or covert paramilitary operations has always existed. For more on interdependence, see Lucia Retter et al., *The Moral Component of Cross-Domain Conflict* (RAND Corporation, 2016).

<sup>57</sup> For a comprehensive account of RPA operations that addresses these concerns in detail, see Bradley Jay Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (New York: Oxford University Press, 2013); Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9, no. 4 (December 1, 2010): 342–68.



developing weapons-grade plutonium.<sup>58</sup> Aware of Syria's covert program, U.S. officials had deliberated on whether to conduct an attack against Syria's nuclear reactor in al-Kibar, which Syria had modeled after and built with some assistance from North Korea.<sup>59</sup> At the time, Michael Hayden, Director of the CIA, briefed President George W. Bush that the al-Kibar reactor was part of a "nuclear weapons program."<sup>60</sup> Yet, since the CIA "could not identify other essentials (a reprocessing plant, work on a warhead, etc.)" they had "low confidence" in Syria's nuclear weapons capability.<sup>61</sup> Without capability, a preemptive strike was off the table.<sup>62</sup> Thus, a future threat is not necessarily a credible threat. To be imminent, a threat must be credible, which means confidence in an aggressor's capability must be greater than, or far greater than, low.

## **B. NEAR CERTAINTY AS A JUSTIFIABLE BELIEF**

Of course, it is possible for a person to have confidence in an unjustified belief or no confidence in a justified belief. However, in the context of national or small-unit self-defense, 'confidence' is an institutionalized expression of the strength of a myriad of reasons in support of a belief, and its underlying logic. A commander's relevant beliefs, partly based on intelligence estimates, could be either that a credible threat is present, that a threat is imminent, or that a first strike is the best course of action. But in contrast to the stochastic language that is often used, intelligence estimates are generally not the result of

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<sup>58</sup> Leonard S. Spector and Avner Cohen, "Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime," *Arms Control Today; Washington* 38, no. 6 (August 2008): 15–21. See also the video and data released by the Nuclear Threat Initiative in 2011: <http://www.nti.org/learn/facilities/461/>.

<sup>59</sup> David Makovsky, "The Silent Strike," *The New Yorker*, September 17, 2012, <https://www.newyorker.com/magazine/2012/09/17/the-silent-strike>.

<sup>60</sup> Michael V. Hayden, "Correcting the Record about That Syrian Nuclear Reactor," *Washington Post*, September 22, 2011, sec. Opinions, [https://www.washingtonpost.com/opinions/correcting-the-record-about-that-syrian-nuclear-reactor/2011/09/22/gIQA1xZtoK\\_story.html](https://www.washingtonpost.com/opinions/correcting-the-record-about-that-syrian-nuclear-reactor/2011/09/22/gIQA1xZtoK_story.html).

<sup>61</sup> Hayden.

<sup>62</sup> On September 6, 2007, after it was clear that the U.S. would not conduct an attack, an eight-ship formation of Israeli fighter aircraft dropped "seventeen tons of explosives" on the al-Kibar reactor, but I would argue that theirs was an act of prevention, not preemption. Makovsky, "The Silent Strike." Aaron Kalman, "Israel Used 17 Tons of Explosives to Destroy Syrian Reactor in 2007, Magazine Says," *The Times of Israel*, September 10, 2012, <http://www.timesofisrael.com/israel-uses-17-tons-of-explosives-to-destroy-syrian-reactor/>. Barbara Opall-Rome, "Declassified: How an Israeli Operation Derailed Syria's Nuclear Weapons Drive," *Defense News*, March 21, 2018, <https://www.defensenews.com/global/mideast-africa/2018/03/20/just-declassified-how-an-israeli-operation-derailed-syrias-nuclear-weapons-drive/>.

statistical analysis. Correlations to percentages based on terms like “near certainty” are merely approximations.<sup>63</sup> Since an approximation is subject to different analytic frameworks and experience, dependent on the analytic team, the evidence is open to interpretation.

As former CIA director Hayden has pointed out, “When the facts speak for themselves, intelligence has done its job and there is no need for analysis.”<sup>64</sup> Intelligence does not exactly convey facts or truth. Rather, intelligence is better viewed as a “proximate reality.”<sup>65</sup> To give a sense of how close to reality an intelligence estimate might be, analysts sometimes attribute a level of confidence to their assessment. Confidence merely communicates how well the “scope and quality” of collected information aligns with good intelligence tradecraft.<sup>66</sup> For example, in the Department of Defense, “high confidence” implies that a judgment is based on “well-corroborated information from proven sources; minimal assumptions; strong logical inferences and methods; and that no gaps or only minor intelligence gaps exist.”<sup>67</sup> Analysts express the strength of their confidence in an estimate in a matter of degrees (low, medium, or high).

In the executive branch, similar estimative language is in U.S. guidance for the use of force abroad.<sup>68</sup> When targeting suspected terrorists outside “areas of active hostilities”—areas such as Somalia in 2016 for example—the United States must have

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<sup>63</sup> Office of the Director of National Intelligence, *Background to “Assessing Russian Activities and Intentions in Recent U.S. Elections”: The Analytic Process and Cyber Incident Attribution* (Washington, DC: Director of National Intelligence, 2017), 13. [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

<sup>64</sup> Jack Davis, “Why Bad Things Happen to Good Analysts” *Studies in Intelligence* 60, no. 3 (September 2016), 14–24, 15.

<sup>65</sup> Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 7th Edition (Los Angeles: CQ press, 2017), 38.

<sup>66</sup> Lowenthal, 272.

<sup>67</sup> Joint Chiefs of Staff, *Joint Intelligence*, 114. Careful examination of dissenting opinions has been emphasized in post-2003 Intelligence Community reforms.

<sup>68</sup> White House, *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, (Washington, DC, White House, 2016). [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf).

“near certainty” that the “imminent threat” is present.<sup>69</sup> The United States must also have “near certainty” that “non-combatants will not be injured or killed.”<sup>70</sup> Analysts express the likelihood of a future event using terms such as remote, likely, and nearly certain.

With this institutionalized epistemic criterion in mind, I view an attribution of near certainty as a placeholder, or worthy substitute, for a justifiable belief. Within the description of each necessary condition for preemption—*Credible Threat*, *Temporal Necessity*, and *Proportionate Strategy*—a commander could substitute ‘justifiably believes’ with the phrase: has near certainty. Although just war theorists might prefer the former description, a commander of a nation or of a task force might prefer the certainty lexicon. It matters not. What does matter is that a commander’s approach to preemptive self-defense is grounded in the immutable bedrock of just war literature: necessity, liability, and proportionality.

### C. JUST WAR REQUIREMENTS

Two sides exist to each of the following just war requirements: necessity, liability, and proportionality. Individually, each requirement constrains all military action in war, but collectively, they can motivate a commander to take action. Commanders who recognize that their response to a situation satisfies all three just war requirements collectively, thereby discover a morally preferred action. If a situation is such that preemption is a morally preferred action, then a commander has a positive, impersonal, and moral reason to strike first in self-defense.

The beauty of the necessity requirement lies in the fact that it interconnects with nearly all aspects of just war literature. For a just war, by definition, necessity requires that

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<sup>69</sup> White House, 24–26. Designated conflict zones include Iraq, Afghanistan, Syria, parts of Libya, and recently (post the al-Shabaab strike mentioned earlier), parts of Somalia. Regarding which terrorists to target abroad, the 2001 Authorized Use of Military Force applies only to “al-Qa’ida, the Taliban, or associated forces.” White House, 3–8. Public release of post-2016 U.S. presidential guidance for the use of force abroad is pending. In October of 2017, news reports indicated that President Donald Trump replaced President Barack Obama’s Presidential Policy Guidance (PPG) with a document titled “Principles, Standards, and Procedures” (PSP). Peripheral details regarding this document—including the downgrade from near certainty to reasonable certainty (p. 5)—may be found in the ACLU’s legal complaint against the Departments of Defense, Justice, and State. [https://www.aclu.org/sites/default/files/field\\_document/1.\\_aclu\\_complaint\\_against\\_dod\\_doj\\_dos\\_12.21.17.pdf](https://www.aclu.org/sites/default/files/field_document/1._aclu_complaint_against_dod_doj_dos_12.21.17.pdf).

<sup>70</sup> White House, “Report on the Legal and Policy Frameworks,” 24–26.

an entity resort to war only if necessary and pursuant to a just cause.<sup>71</sup> To fight justly in war, necessity requires that an entity only select military objectives that are necessary to achieve a just war aim. However, in a case of preemption, the military objective is itself a just war aim—to avert an unjust harm (e.g., national or small-unit self-defense). Notably, in cases of preemptive self-defense, the necessity requirement consists of three elements:

1. (Who) Only defend against those that are necessary, that is, only attack targets that are liable to be harmed.
2. (When) Only use defensive force when necessary, that is, only attack when temporally constrained by an imminent decision point.
3. (How) Only use the amount or intensity of force necessary, that is, only use proportionate force.<sup>72</sup>

One can draw a parallel between these three elements and the three necessary conditions I listed earlier for preemption: respectively, (1) *Credible Threat*, (2) *Temporal Necessity*, and (3) *Proportionate Strike*. As mentioned, the first two of these conditions—*Credible Threat* and *Temporal Necessity*—are themselves necessary, in a conceptual sense, to assign imminence to a situation. Similarly, David Rodin recognizes that imminence is “the application of the necessity requirement subject to epistemic limitations.”<sup>73</sup> Since no one can have complete certainty that an entity will attack—a topic relevant to moral risk, which I later cover—it is in this sense that we are epistemically limited. For an illustration of how this maelstrom of ideas relate to one another, see Figure 1.

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<sup>71</sup> *Jus ad bellum* necessity assumes that all reasonable peaceful alternatives, likely to avert an attack, have been exhausted. Chatham House, “The Chatham House Principles of International Law on the Use of Force in Self-Defence,” 967.

<sup>72</sup> In addition to necessity, proportionality also depends on liability. Specifically, the extent of harm an aggressor is “liable to bear” depends on the “stringency” of the rights that the aggressor threatens to unjustly violate. Jonathan Quong, “Proportionality, Liability, and Defensive Harm,” *Philosophy & Public Affairs* 43, no. 2 (March 1, 2015): 144–73, <https://doi.org/10.1111/papa.12056>.

<sup>73</sup> Rodin references George Fletcher who writes, “A preemptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late. Legitimate self-defense must be neither too soon or too late.” Fletcher, G., *Basic Concepts of Criminal Law*, Oxford: Oxford University Press, 1998: 133, quoted in Rodin, *War and Self-Defense*, 41.

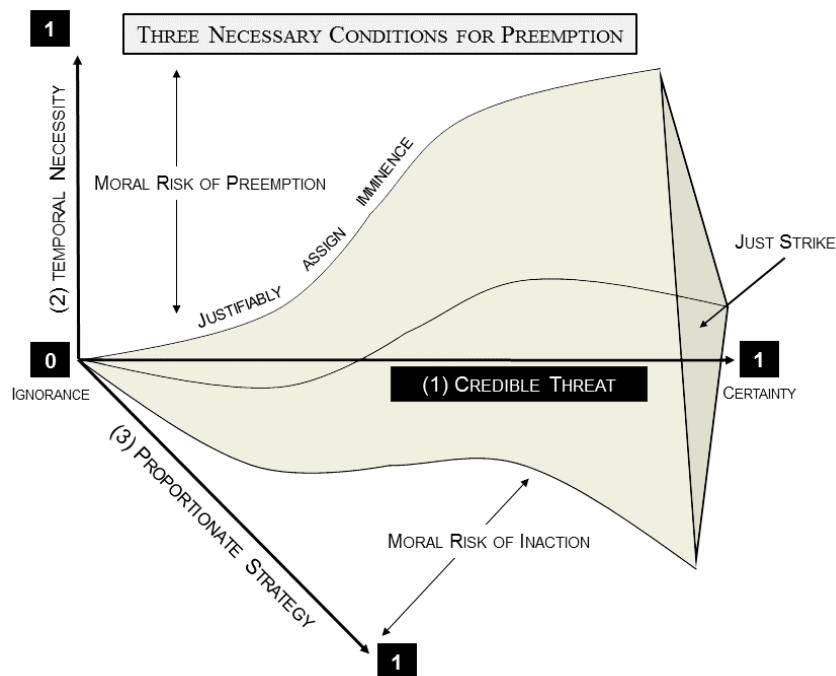


Figure 1. Necessary Requirements for Preemption<sup>74</sup>

#### D. LIABILITY TO DEFENSIVE HARM

From a right-based point of view, if an aggressor poses an unjust credible threat, and is morally responsible for that threat, then he is liable to defensive harm. Traditionally, the question of who or what is a legitimate target of war is covered under the rubric of discrimination. According to International Humanitarian Law, legitimate targets include combatants or people directly engaged in hostilities, military vehicles, weapon systems, command centers, and other military objectives.<sup>75</sup> Illegitimate targets include non-

<sup>74</sup> This three-dimensional figure has a few features. The x-, y-, and z-axes are scaled in a matter of degrees: 0 is complete ignorance, and 1 is complete certainty.  $0 \leq x, y, z < 1$ . Imminence is a function of the x and y variables. Preemption is a function of all three variables. In the two non-shaded areas, as a commander's collective degree of certainty increases toward 1: the moral risk of preemption decreases toward 0; conversely, the moral risk of inaction increases toward 1—this is difficult to discern due to the figure's three-dimensional character. At some point along the z-axis—the degree of certainty that a commander may attribute to her justifiable beliefs per the *Proportionate Strategy Condition*—the moral risk of inaction outweighs the moral risk of preemption.

<sup>75</sup> For reference, see Additional Protocol II, Geneva Conventions, and “Chapter 1: Distinction between Civilian and Combatants” and “Chapter 2: Distinction between Civilian Objects and Military Objectives.” In the International Committee of the Red Cross International Humanitarian Law (IHL) Database (originally published by Cambridge University Press), accessed May 17, 2018, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

combatants or people not engaged in hostilities, farms, towns, hospitals, places of worship, schools, and other civilian objects.<sup>76</sup> Rather than discuss the legitimacy of a target in terms of discrimination, which relies on labels such as combatant and non-combatant, I shall speak to the legitimacy of a target in terms of liability, which is based on human rights. In Walzer's view, enemy combatants pose a lethal threat and thereby "force men and women to risk their lives for the sake of their rights."<sup>77</sup> Given that humans are social creatures and have human rights, when an entity violates his duty not to unjustly harm others, he becomes liable to defensive harm.<sup>78</sup> An aggressor is liable to be harmed by a defender because the latter must protect herself. In contrast, a defender, opposing an aggressor, is not liable to be harmed because a defender's threat is just. Hence, the moral asymmetry between a just and an unjust strike is inextricably grounded in liability.

An aggressor's degree of liability depends on his degree of moral responsibility.<sup>79</sup> Contrary to Walzer, Jeff McMahan rejects merely "posing a threat" as a criterion for killing.<sup>80</sup> In his view, "moral responsibility for an unjust threat" generates liability to harm.<sup>81</sup> Moral responsibility presumes moral agency, which implies that a moral actor can

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<sup>76</sup> International Committee of the Red Cross International Humanitarian Law (IHL) Database.

<sup>77</sup> Walzer, *Just and Unjust Wars*, 51.

<sup>78</sup> The extent of her liability depends also on the necessity (including temporal necessity) and proportionality of defensive harm. For a discussion on Wesley Hohfeld's Classification of Rights and Duties, including the author's discussion on common areas of confusion, see Arthur Corbin, "Rights and Duties," 33 *Yale Law Journal*, 501 (1924).

<sup>79</sup> This is despite the fact that lethal harm is indivisible.

<sup>80</sup> Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15, no. 1 (2005): 386–405. And Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009). McMahan also rejects the moral equality of combatants (MEC) doctrine (pp. 38–95), but that is not critical to imminence.

<sup>81</sup> Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (New York: Oxford University Press, 2008), 21. See also McMahan, *Killing in War*, 157. For a critique of the responsibility requirement to liability, Seth Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38, no. 2 (2010): 180–213; In defense of the responsibility requirement, Bradley Jay Strawser, "Walking the Tightrope of Just War," *Analysis* 71, no. 3 (2011): 533–44; Jeff McMahan, "Who Is Morally Liable to Be Killed in War," *Analysis* 71, no. 3 (2011): 544–59. For a liability-based account not grounded in responsibility, but on collective complicity, Saba Bazargan, "Complicitous Liability in War," *Philosophical Studies* 165, no. 1 (2013): 177–195. For an evidence-based view of liability to harm, Bradley Strawser, *The Bounds of Defense: Killing, Moral Responsibility, and War* (forthcoming). For background analysis on moral culpability as a "triggering condition" for the right of self-defense, Jeff McMahan, "Self-Defense and Culpability," *Law and Philosophy* 24, no. 6 (2005): 751–74.

act in an otherwise justified, or less unjustified, way. A volunteer soldier, for example, who can elect not to fight for an unjust cause is, to some degree, morally responsible for the threat she poses.<sup>82</sup> Conversely, an innocent man who is thrown down a shaft and thereby poses an involuntary threat, due to his mass and the force of gravity, against a person standing one-thousand feet below would not be morally responsible for an unjust threat.<sup>83</sup> Since liability hinges on moral responsibility, a volunteer soldier is liable but the falling man would not be liable to be killed.<sup>84</sup> Moreover, even if the person standing below the falling man had a “ray gun” and could disintegrate the man in mid-air, to do so would be unjustifiable on the grounds of liability.<sup>85</sup>

As presented, from the perspective of a commander, whether of a nation or of a small unit, a rights-based approach to preemption starts with the question of liability. Thus, far, I have largely talked around the *jus in bello* and the *jus ad bellum* distinction.<sup>86</sup> Perhaps one cannot speak to the justice of killing in war without speaking to the justice of the war itself, but commanders who conduct military operations outside of a combat zone are implicitly held to both sets of moral and legal codes. Besides, it makes little moral difference whether a commander considers liability in terms of discrimination or in terms of a just cause. Discrimination is ultimately a question of who is liable to defensive harm.<sup>87</sup> Similarly, a just cause—given the inherent right of self-defense—can be rephrased into an albeit awkward question of who is liable to a defensive war. By no means is this required

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<sup>82</sup> While McMahan grants that liability can rest on the “bad luck of serving a government that is plotting aggression,” his view is that moral responsibility rests first or is ultimately based on both individual “choice and action.” Jeff McMahan, “Commentary,” in Doyle, *Striking First*, 142–143.

<sup>83</sup> His falling body is what poses the lethal threat. David Rodin, “Justifying Harm,” *Ethics* 122, no. 1 (2011): 74–110, <https://doi.org/10.1086/662295>. Robert Nozick, *Anarchy, State, and Utopia* (New York: Oxford-Blackwell, 1974), 34–35.

<sup>84</sup> This aligns with McMahan’s views on “Nonresponsible Threats,” McMahan, *Killing in War*, 167–173.

<sup>85</sup> Rodin, “Justifying Harm,” 84.

<sup>86</sup> Reductionist approaches, which base liability on individual moral responsibility, use liability to answer both *jus in bello* and *jus ad bellum* questions such as “who can be killed in war” or “when is entering a war justified.” Jovana Davidovic, “Should the Changing Character of War Affect Our Theories of War?” *Ethical Theory and Moral Practice*; *Dordrecht* 19, no. 3 (June 2016): 604.

<sup>87</sup> McMahan, *Killing in War*.

for my argument, but since both of these questions turn on liability, perhaps they may each share in their respective “division of moral labor.”<sup>88</sup>

Forging ahead, I explore the *Temporal Necessity Condition*, which is the second necessary condition to assign imminence to a situation.

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<sup>88</sup> Adil Haque who holds that even though the law governing *jus in bello* cannot prohibit killing in pursuit of an unjust cause, “this prohibition resides” in the law governing *jus ad bellum*. In his view, these two bodies of the law share “a division of moral labor.” Adil Haque, *Law and Morality at War* (New York: Oxford University Press, 2017), 3. See also Yitzhak Benbaji, “The War Convention and the Moral Division of Labour,” *The Philosophical Quarterly* 59, no. 237 (October 1, 2009): 593–617.



## IV. TEMPORAL NECESSITY CONDITION

### A. TWO NECESSARY CONDITIONS FOR IMMINENCE

Walzer's third sufficient threat factor for preemption provides no clear measure to judge whether a situation is temporally necessary to avert aggression. He does, however, provide an indistinct temporal feature: "A general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."<sup>89</sup> In terms of timing, I interpret Walzer's third factor as a situation where unless a commander preempts now or at least soon, instead of waiting, his prospects will continue to degrade. Further, a commander must fight before it is too late. Based on these temporal considerations, Walzer does create an important sense of moral urgency. However, his standard lacks a framework to recognize the circumstances under which preemption is temporally necessary. Hence, I argue for the *Temporal Necessity Condition*.

**Temporal Necessity Condition:** A commander must justifiably believe that his or her capacity to avert an attack is constrained by an imminent decision point: her last window of opportunity is closing.<sup>90</sup> This window to preempt may be closing due to enemy action, anticipated action, or operational constraints.<sup>91</sup> Regardless, the commander's decision to preempt or not preempt cannot be postponed.<sup>92</sup>

Given that *Temporal Necessity* is the second necessary condition to assign imminence to a situation, how can a commander use both the *Temporal Necessity* and

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<sup>89</sup> Walzer, *Just and Unjust Wars*, 81.

<sup>90</sup> By "last window of opportunity," I do not imply that self-defense is opportunistic in the same sense that belligerents sometimes strike targets of opportunity. My view is closer to that of Michael Schmitt who writes, "Imminency [sic] is not measured by the objective time differential between the act of self-defense and the attack it is meant to prevent, but instead by the extent to which the self-defense occurred during the last window of opportunity." One difference between his and my view is that I focus specifically on the window of time that a commander must make a decision whereas Schmitt's window is to complete an action. Schmitt, "Counter-terrorism and the Use of Force in International Law," 65.

<sup>91</sup> Bureaucratic constraints should not fall under the rubric of operational constraints. However, bureaucratic obstacles may hinder the perception of a last window of opportunity; this is different problem. For a detailed study on some of the organizational obstacles, "structural blocks to perception" (p. 176), that can lead to a surprise attack, see Ephraim Kam, *Surprise Attack* (Cambridge, MA: Harvard University Press, 1988).

<sup>92</sup> Although a decision is necessary, the full necessity of preemption also depends on the *Proportionate Strategy Condition*.

*Credible Threat Conditions* as a litmus test for whether he truly faces an imminent threat?<sup>93</sup> To illustrate, I offer two examples with hypothetical details to show how the *Credible Threat* and the *Temporal Necessity Conditions* each play an essential role in a commander's assignment of imminence. One example is a negative case of imminence and the other is a positive case of imminence:

*Negative Case of Imminence:* The time of this example is 1983. Imagine a Soviet commander's satellite-based, early-warning system indicates that the U.S. has launched five nuclear missiles towards her nation.<sup>94</sup> If she waits until the missiles are close enough to corroborate her data with ground-based radar, she will not have enough time to complete her own launch sequence before those five missiles reach their targets. Worse still, if the enemy destroys her command center, she will be unable to attack in self-defense to avert a follow-on attack.<sup>95</sup> This Soviet commander has no time to delay, her capacity to avert an unjust attack is constrained by an imminent decision point. However, based on the Soviet commander's understanding of U.S. tactics, she views five missiles as too few to be credible.<sup>96</sup> She believes that true enemy aggression would entail a massive attack of at least fifty missiles, ten times more than the number indicated on her screen. The commander also believes that no early-warning system is perfect. She reasons that since the enemy would never launch a surprise attack with so few of missiles, her system's indications must be false. The commander assesses her situation: Since her capacity to avert an attack is constrained by an imminent decision point, she satisfies the *Temporal Necessity Condition*; however, since she distrusts the evidence that would otherwise support her belief that the U.S. is poised to attack, she does not satisfy the *Credible Threat Condition*. As such, this commander **may not** assign imminence to his situation.

*Positive Case of Imminence:* The time of this example is just prior to the 2016 U.S. strike in Somalia, discussed earlier. The U.S. task force

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<sup>93</sup> By "imminent," I mean *temporally necessary*, and by "threat," I mean a *credible threat*. Combined, imminent plus threat is equivalent to my notion of imminence. Likewise, by "imminence," I mean a situation where a commander satisfies both the *Temporal Necessity* and the *Credible Threat Conditions*.

<sup>94</sup> This hypothetical is loosely based on the Soviet-American "War Scare" on September 26, 1983, when Soviet Lieutenant-Colonel Stanislav Petrov's detectors picked up a five-missile ICBM launch from the U.S. Len Scott, "Intelligence and the Risk of Nuclear War: Able Archer-83 Revisited," *Intelligence and National Security* 26, no. 6 (December 1, 2011): 770.

<sup>95</sup> Hypothetically, perhaps her nation lacks a command mechanism to defend against further aggression after a successful decapitation strike.

<sup>96</sup> This point actually matches closely with the actual 1983 case: Despite the warnings, since Petrov "had been trained to expect a massive ICBM assault rather than a handful of missiles," he decided not to verify that "an attack was in progress." Scott, "Intelligence and the Risk of Nuclear War," 770.

commander believes a formation of al-Shabaab fighters is poised to attack, not immediately, but in the following way.<sup>97</sup> The fighters are currently massed together, yet he anticipates that they will soon splinter into small teams to achieve great tactical surprise in a coordinated and unjust attack. In his view, this is his last window of opportunity because once the formation splits, he will no longer have the capacity to protect his coalition or partner forces. The commander assesses his situation: Since his unjust enemy is poised to attack, he satisfies the *Credible Threat Condition*; since his capacity to avert an attack is constrained by an imminent decision point, he satisfies the *Temporal Necessity Condition*. As such, this commander **may** assign imminence to his situation.

## **B. IMMINENCE AS A LAST WINDOW OF OPPORTUNITY**

Temporal necessity implies that a commander cannot withhold or reserve judgment. Such commanders lack the luxury of time and are faced with an unjust moral deadline—derived from the unjust threat of an aggressor. By extension, such commanders cannot wait for more evidence.<sup>98</sup> To see how temporal necessity translates into a moral deadline, consider the following two cases:

*Ship Sink 1:* Suppose that a merchant crew—one captain, and five crewmembers—embark on an Arctic journey.<sup>99</sup> Just after leaving port, they discover that their ship is leaking and *rapidly* sinking. If they do not return to port in the next *five minutes*, all six members will drown. Given that the captain in charge refuses to change course, the only way to save the crew is

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<sup>97</sup> This is not to speculate on what the real-world commander actually believed or to answer any moral subtext-related questions regarding U.S. operations in Somalia in general. These hypothetical details are meant only to provide realistic reasons for a justifiable preemptive strike.

<sup>98</sup> The inability to wait for more evidence can affect the problem of epistemic uncertainty, which is an inexorable problem of the human condition. In any situation, a commander must deliberate future action within a sphere of knowledge that exists somewhere between complete ignorance and complete certainty. Although I cover this topic in greater detail in the next section, temporal necessity does add a unique perplexity. Suppose a commander lacks overwhelming evidence to decisively point one way or another in terms of the other two conditions—*Credible Threat* or *Proportionate Strategy*. On one hand, it seems that the existence of a moral deadline could only further challenge his epistemic standing—not only does he lack decisive evidence, but now he has no time to increase his evidentiary support. On the other hand, since a commander is not morally responsible for his moral deadline, given that temporal necessity is derived from the unjust threat of an aggressor, perhaps his epistemic burden would decrease. This may create a whole new line of inquiry, but either way, commanders lack the ability to expand their sphere of achievable knowledge.

<sup>99</sup> This thought experiment is loosely based on an example given by Paul Robinson, *Criminal Law Defences*, Vol 2, (Minnesota: West Publishing Co., 1984), 56–57, referenced in Onder Bakircioglu, “The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement,” *Indiana International & Comparative Law Review*. 19 (2009): 20.

to kill the captain (i.e., his disposition on the bridge precludes any non-lethal alternative).

*Ship Sink 2*: Suppose the same crew is on the same journey, but with the following exception. Long after leaving port, the crew discovers that their ship is leaking and *slowly* sinking. If they do not begin their 48-hour return journey in the *next hour*, all six members will drown. As before, the only way to save the crew is to kill the captain.

The situation in *Ship Sink 1* matches the traditional temporal understanding of imminence—the infliction of an unjust harm is imminent. If the crew does not kill the captain in the next five minutes, everyone on board will die. In this case, both the threat and the crew’s decision to kill the captain are imminent. As such, on the grounds of temporal necessity, the crew can justifiably kill the captain in self-defense.

The situation in *Ship Sink 2*, however, does not match the traditional temporal understanding of imminence—the infliction of harm is not imminent because the crew still has a couple of days before the ship will sink. Should this preclude the crew from justifiably acting in self-defense? I think not. Although the infliction of an unjust harm is not imminent, the extremity of their situation seems morally equivalent to *Ship Sink 1*. In *Ship Sink 2*, the crew has comparatively more time to deliberate (an hour versus five minutes) and significantly more time before they will suffer from the infliction of an unjust harm (a couple of days as opposed to five minutes). However, those temporal elements seem to make little moral difference. What matters more is that the crew’s last window of opportunity to avert an unjust harm is closing in an hour.<sup>100</sup> That sounds imminent; once that window closes, there is no opportunity for recourse. Even though the harm is not imminent, the deadline for their decision is imminent. This distinction is the basis for my claim that we must modify our notion of imminence. If an imminent decision is the temporal component of imminence, and I claim that it is, then the crew in *Ship Sink 2* could justifiably kill the captain in self-defense.

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<sup>100</sup> According to the Chatham House, the concept of imminence entails “a circumstance of irreversible emergency” Chatham House, “The Chatham House Principles of International Law on the Use of Force in Self-Defence,” 967.

Ultimately, commanders must bear in mind that the temporal aspect of imminence is not relative to when an unjust attack will land or when a victim will suffer from the infliction of an unjust harm. Rather, they must hold that imminence is temporally linked to a crucial decision: Given that an unjust aggressor is poised to attack, a commander must decide whether to strike first in self-defense or prepare to cope with an unjust attack. In both *Ship Sink 1* and 2, the moral deadline for the crew's decision to strike first, as opposed to drowning in an Arctic sea, is imminent. Thus, to kill the captain is temporally necessary to avert an unjust threat.

Imminence is necessary for preemption; however, it is not sufficient. A third necessary requirement for preemptive self-defense is the *Proportionate Strategy Condition*.

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## V. PROPORTIONATE STRATEGY CONDITION

### A. PROPORTIONALITY AND MORAL RISK

A first strike may not necessarily be the best course of action. Even in the face of imminence, the moral costs of a nuclear first strike, for example, are so prohibitive that it is difficult to imagine a circumstance wherein such an option can ever be considered morally conscionable.<sup>101</sup> In addition to imminence, a commander must also consider the balance of moral risks, which entails a proportionality assessment of expected moral costs. In general, to satisfy the proportionality requirement, the stakes of war must be sufficient (the positive effects must outweigh the negative), and the costs of war cannot be prohibitive (the negative effects cannot outweigh the positive).<sup>102</sup> Specific to preemption, the moral costs of striking first cannot be disproportionate to the moral stringency of the harms averted.<sup>103</sup> Based solely on the grounds that a commander can justifiably assign imminence to her situation, it does not follow that she can justify preemption.

If the moral risk of preemption is disproportionate to the moral risk of inaction, then preemption would not be morally conscionable. Walzer's third sufficient factor for preemption only points to the risk of inaction: "A general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."<sup>104</sup> In terms of risk, I interpret Walzer's third factor as a scenario where inaction (or non-preemption) will result in a very-high-level rise in risk. While the risk of inaction is an important consideration, it

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<sup>101</sup> Because, even in the face of imminence, a commander cannot be completely certain that an enemy will actually attack. This is not to say that nuclear capability is not relevant to preemption. As a deterrent, nuclear capabilities can effectively lower enemy resolve. Furthermore, ballistic missile defense systems can lower an aggressor's capacity to launch a successful attack (at least until new counter-counter-measures are developed). As Kevin Payne writes, "Active defenses may extend decision-making time and reduce the impact of not preempting early, helping to keep a lid on conflicts." Keith B. Payne, *Deterrence in the Second Nuclear Age* (Lexington, KY: University Press of Kentucky, 1996), 145.

<sup>102</sup> Both perspectives suffer from the same problem of developing good metrics for which to measure positive versus negative effects. Bradley Strawser and Russell Muirhead. "Assessment, Proportionality, and Justice in War." In *Assessing War: The Challenge of Measuring Success and Failure*, ed. Leo Blanken, et al. (Washington, DC: Georgetown University Press, 2015), 255–65.

<sup>103</sup> As Jonathan Quong writes, "The more stringent the right that is threatened, the greater the degree of defensive harm that is proportionate." Quong, "Proportionality, Liability, and Defensive Harm," 145.

<sup>104</sup> Walzer, *Just and Unjust Wars*, 81.

is not the only relevant measure of risk necessary to justify preemption. A commander must also consider the comparative moral risk of preemption itself.

$$\text{Risk} = \text{Probability} \times \text{Severity}^{105}$$

Risk analysis is based on a function of probability and severity. Based on this function, given the product relationship between the two elements that make up risk, if the severity of an event rises, even if the probability of that event remains constant, then the level of risk still increases. This is important because a commander cannot base her decision to preempt on the risk of inaction alone; otherwise, a mere rise in risk can lead to disaster. Consider the Cuban Missile Crisis in October 1962: The Soviet Union deploys nuclear weapons to Cuba.<sup>106</sup> In this action, the severity of a possible Soviet attack against the United States increases for two reasons: The missiles in Cuba add to the number of nuclear-armed ballistic missiles the Soviet Union has in its arsenal; plus, the missiles in Cuba, given Cuba's proximate location to the United States, decrease U.S. warning time in the event of a Soviet attack. With respect to probability, imagine that the likelihood of a Soviet attack remains constant. Despite their deployment of weapons to Cuba, suppose the Soviet Union does not change in its resolve to attack (i.e., the Soviets are unwilling to strike first). Nonetheless, there is still the potential for disaster. Based on the risk function, since the Soviet deployment of missiles to Cuba increases the severity of an attack, even when the likelihood of such an attack is constant, the United States still faces a rise, perhaps a greatly magnified rise, in risk (i.e., Walzer's third sufficient threat factor).

Is a high level of risk that results from inaction the only risk worth considering? No. If the United States launches an airstrike, for example, such an event is likely to result in a global nuclear war—an outcome far worse than having an enemy at the door.<sup>107</sup> The death of millions of innocents is too great a moral cost. To be morally conscionable, a

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<sup>105</sup> Louis Anthony Cox, Jr. "What's Wrong with Risk Matrices?," *Risk Analysis* 28, no. 2 (2008): 501.

<sup>106</sup> Graham Allison, "The Cuban Missile Crisis at 50: Lessons for U.S. Foreign Policy Today," *Foreign Affairs* 91, no. 4 (August 2012): 11–16.

<sup>107</sup> If President John F. Kennedy did not have "days in secret to deliberate," by his own admission, he might have opted to command an air strike. Allison, "The Cuban Missile Crisis at 50."



commander must compare the moral risk of inaction with the moral risk of preemption. Hence, contra Walzer, I argue for the *Proportionate Strategy Condition*.

**Proportionate Strategy Condition:** To strike first, a commander must justifiably believe that preemption is part of a moral-risk proportionate strategy—that the moral risk of preemption is not disproportionate to that of non-preemption.

## B. COMMANDER UNCERTAINTY

A commander cannot know with complete certainty what the enemy will do or what action is best.<sup>108</sup> In any preemptive strike decision, the total array of possible outcomes and relevant factors are unknown, which means a commander's beliefs per any of the three necessary conditions are, to some degree, uncertain.<sup>109</sup> Even if a commander's team of analysts and experts are adept at discovering patterns, building models, assessing risks, and studying the relationship between variables, it is inevitable that anomalies will emerge. Epistemic uncertainty is an inevitable component of life and in war.<sup>110</sup>

In spite of epistemic uncertainty, a commander may take a prospective view with respect to her decision; her preemptive act is morally permissible only if her justifiable beliefs per the three conditions—*Credible Threat*, *Temporal Necessity*, and *Proportionate Strategy*—are prospectively true. A prospective view is an attempt to reconcile the epistemic gap, based on uncertainty, between what is objectively right and what is subjectively apparent. To know what is “actually best” from an objective standpoint is impossible, but to prefer what is “apparently best” is too broad to be counted as good

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<sup>108</sup> Epistemic uncertainty is a type of “friction” (pp. 113–119), an added danger, and a great mental strain on all commanders in war. Furthermore, epistemic uncertainty is merely amplified by the “fog of war” (p. 193). Carl Von Clausewitz, *On War*, ed. & trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976).

<sup>109</sup> Mark F. Cancian, “Coping with Surprise in Great Power Conflicts,” *Center for Strategic & International Studies*, (February 2018). <https://www.csis.org/analysis/coping-surprise-great-power-conflicts>.

<sup>110</sup> Richard K. Betts, “Analysis, War, and Decision: Why Intelligence Failures Are Inevitable,” *World Politics* 31, no. 1 (October 1978): 61–89, <https://doi.org/10.2307/2009967>. Daniel Kahneman and Amos Tversky, “Prospect Theory: An Analysis of Decision under Risk,” *Econometrica* 47, no. 2 (1979): 263–91, <https://doi.org/10.2307/1914185>. Muhammet A. Bas and Robert Schub, “Theoretical and Empirical Approaches to Uncertainty and Conflict in International Relations,” *Oxford Research Encyclopedia of Politics*, September 26, 2017, <https://doi.org/10.1093/acrefore/9780190228637.013.537>.

normative guidance.<sup>111</sup> Instead, a commander can do what is “prospectively best” or “probably best” based on the evidence available.<sup>112</sup> A variant to the *Proportionate Strategy Condition* is that a commander ought to preempt if and only if it is her prospectively best option.<sup>113</sup> At first glance, this may not seem a worthwhile improvement, but the subtlety lies in the fact that what is prospectively best appeals to a non-subjective epistemic standard. In its original formulation, the *Proportionate Strategy Condition* (in addition to the two conditions that substantiate imminence) is qualified by a justifiable belief. A justifiable belief also appeals to a non-subjective epistemic standard. What is prospectively best or what counts as a justifiable belief implies that a commander’s grip on the truth is based on sound evidence, a good-faith assessment of any counter-evidence, and a good-faith assessment of any counter-interpretations of the evidence. A justifiable belief also implies that her belief is, to the maximum extent possible, independent of personal bias and non-relevant factors.

Approaching her decision point for preemption, given that the first two conditions are preconditions for the third, I assume that a commander justifiably believes she is in a kill or let die situation. This entails that she justifiably believes, or has near certainty, that a foe is poised to attack and that unless she strikes first, a friend will be unjustly killed.<sup>114</sup> However, a commander is still faced with an insurmountable moral danger: A prospective aggressor may, contrary to the evidence, not actually attack. The probability of non-aggression might be 1%, 5%, or even more. There is no fixed threshold of probability that a commander must assess based on a justifiable belief. To preempt requires moral courage insofar as a commander must accept some degree of moral risk.<sup>115</sup> If an aggressor will not attack, if a prospective aggressor’s actual intent falls short of aggression, then, in an objective sense, that enemy is not liable to be killed. Objectively, in a choice between

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<sup>111</sup> Michael J. Zimmerman, *Ignorance and Moral Obligation* (New York: Oxford University Press, 2014), 7–8.

<sup>112</sup> Zimmerman, 7–8.

<sup>113</sup> Zimmerman, 92.

<sup>114</sup> By friend, I mean a fellow citizen, soldier, partner, or any person who she has a duty to defend.

<sup>115</sup> How much risk a commander is willing or should be willing to accept will depend on many factors that are beyond our scope here.

killing someone or allowing someone to die, when both are non-labile, it is worse to kill.<sup>116</sup> However, in spite of this moral danger, a commander may still justifiably preempt from a prospective point of view. In a prospective sense, as paradoxical as it may sound, an evidence-based moral asymmetry still exists. For a commander who justifiably believes that a friend is non-labile and a prospective foe is liable to be harmed, it is prospectively worse to allow an unjust harm than to kill.

### C. EXPECTED VALUE AND MORAL RISK

In a first-strike decision, commanders should consider their course selection in terms of two different strategies: the best of all worst-case outcomes (maximin) and expected value (EV). Maximin—to choose that which maximizes the minimum or worst-case outcome—highlights potential risk, whereas EV calculates cold-blooded utility.<sup>117</sup> Commanders should compare strategies because neither a risk-averse strategy (maximin) or a utility maximization strategy (EV) is always better than the other. A commander may generally prioritize risk aversion over utility maximization, however, he may then find himself in a situation where the risk of a negative outcome is so low that utility considerations prevail. Likewise, another commander may generally prioritize utility maximization but find herself in a situation where the risk of a negative outcome is too grave to ignore. I suggest that a cost/benefit comparison of each strategy outcome is best to enable commanders to deliberate in terms of both moral utility and moral risk.

This section builds off of the sinking ship case introduced earlier to illustrate the unique advantages gained from a maximin strategy. I assume a general familiarity with utility maximization. In this analysis, I will compare two strategies—EV, and maximin—and look at the same problem using two different value systems: moral and non-moral. In

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<sup>116</sup> Haque, *Law and Morality at War*, 10–14, 183; Victor Tadros, “Duty and Liability,” *Utilitas: Cambridge* 24, no. 2 (June 2012): 271–77.

<sup>117</sup> How I apply maximin is distinct from the principle of social justice used by John Rawls. Rawls considers maximin as a principle to maximize the welfare of the least well-off members in a society. He argues that there are certain things, such as liberty, with which it is irrational to gamble. John Rawls, *A Theory of Justice* (revised edition), Cambridge, MA: Harvard University Press, 1999 (original 1971). See also, Kenneth J. Arrow, “Some Ordinalist-Utilitarian Notes on Rawls’s Theory of Justice,” *The Journal of Philosophy* 70, no. 9 (1973): 245–63.

this sinking ship example, the course selection with the greatest EV is not the same as the action with the maximin value. What the crew stands to lose in an impersonal moral sense is greater than what they stand to gain, which could drive them to select a maximin strategy as opposed to an EV strategy. Meanwhile, if we assume the crew works for Company X, which is only driven by short-term profit, we can evaluate the crew's course selection based on non-moral considerations. Perhaps, financially, what Company X stands to gain is much greater than what they stand to lose, which could drive the crew to select an expected value strategy. I isolate non-moral considerations to financial values as a heuristic for national or small-unit commanders—financial values are simply easier to quantify than other elements of military or grand strategy. At any rate, I aim to show that a commander's approach to preemption will depend on his or her willingness to accept both moral and non-moral risks.

*Ship Sink 3:* Suppose that Company X tasks a crew—one captain, and five crewmembers—to embark on an Arctic journey. Long after leaving port, the crew discovers that their ship is leaking and *slowly* sinking. Fortunately, they turn on an onboard bilge pump and their ship's buoyancy returns to normal, despite the leak. The likelihood that the pump will continue to function for the next several weeks until they are within reach of their destination is 80%. However, if they do not begin their 48-hour return journey in the *next hour AND the pump fails*, they will be beyond the reach of any port and all six members will drown. The likelihood that the pump will fail is 20%. Just as in the first two cases, the only way to save the crew is to kill the captain.

### **1. Moral Lens**

Within this hour, in their last window of opportunity, the crew must decide on a course of action: either to press ahead (inaction, in this sense, is a kind of action) or to kill the captain in order to save the crew.<sup>118</sup> If they press ahead, there is no opportunity for recourse. If they kill the captain, there is no reset option either. The crew is factually uncertain of what will happen, but they realize that there is a total of four possible outcomes (Figure 2). Each course selection presents two possibilities: either the bilge pump fails and the ship begins to slowly sink (20%), or the pump does not fail and the ship does not sink (80%). Ultimately, I show that it is morally permissible for the crew to kill the captain.

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<sup>118</sup> When inaction or caution is the result of moral deliberation, and not the result of dilated indecision, then it can be a moral action too.

	Pump Fails	Pump Does Not Fail
Press Ahead (Inaction)	A Sink (20%)	B Not Sink (80%)
Kill the Captain (Preemption)	C Sink (20%)	D Not Sink (80%)

Figure 2. Four Possible Outcomes

Is the captain liable to be killed based on his refusal to turn the ship around? By refusing to turn the ship around, the captain exposes his crew to the risk of lethal harm. Can the imposition of risk, on its own, make someone liable to be killed? Yes, in some cases, and perhaps in a matter of degrees.

Consider a game of Russian Roulette. One round of this game entails that Player 1 has a partially-loaded gun, aims it at Player 2, and pulls the trigger. Player 1 is about to ‘play’ one round, but Player 2 wants to quit. Earlier, they were playing with a one-million-shot revolver, but that incredulous gun broke. Now, they can only play with a five-shot revolver. Player 2 thinks that is crazy, but Player 1 is irreconcilable. He is going to pull the trigger against Player 2, regardless. In a five-shot revolver, the probability that the bullet is in the active cylinder, that a ‘play’ will result in a kill, is 20%. This game has two possible futures: in future A, Player 1a kills Player 2a (20%); in future B, Player 1b does not kill Player 2b (80%). This game is not unlike the *Ship Sink 3* case.

By playing such a game, Player 1 commits a moral crime of “culpable risk creation” regardless of whether the gun fires or dry-fires.<sup>119</sup> To pull the trigger is a needless and “egregious” risk to Player 2’s life.<sup>120</sup> One view is that exposure to an “unwanted risk” is

<sup>119</sup> Sanford H. Kadish, “The Criminal Law and the Luck of the Draw,” *Journal of Criminal Law & Criminology*; Chicago 84, no. 4 (Winter 1994): 681.

<sup>120</sup> Kadish, “The Criminal Law and the Luck of the Draw,” 682.

itself a kind of harm.<sup>121</sup> As a result of his exposure to an unwanted risk, Player 2b's "baseline welfare" decreases and he thereby suffers a "risk-based harm" that is as real as an "outcome harm."<sup>122</sup> If we accept this view, then both Player 1a and Player 1b would each be morally responsible for an unjust harm and thus morally liable.

But there is a difference in the respective harms for which Player 1a and Player 1b are each responsible—after all, Player 1a kills and Player 1b does not kill. While the uncertainty of the situation, until Player 1 pulls the trigger, makes the future A and B outcomes equally unknown, it does not follow that both Player 1a and Player 1b are equally liable to be killed or liable to be killed to the same degree. From a prospective or evidence-relative point of view, the fact that one cannot know with any certainty whether future A or future B will actually occur does not alter the fact that, from an objective or fact-relative point of view, outcomes matter too. After Player 1 pulls the trigger, there is a moral difference. Player 1a's crime of killing is morally worse than Player 1b's imposition of risk. If a court judge could somehow try both cases, in both future A and B, Player 1b would receive less punishment because "different degrees of wrongdoing deserve different punishments."<sup>123</sup> Given that Russian Roulette is an evil game of pure chance, however, a difference in moral treatment between the two versions of Player 1 might seem unfair. But the law does recognize, at least implicitly, that a criminal may benefit from "outcome luck"—due to factors over which he has no control.<sup>124</sup>

How can a punishment or moral desert consideration relate back to liability?<sup>125</sup> Moral desert is retrospective in that it is tied to a past crime or moral violation. Then again, moral liability is prospective insofar as it is tied to a current threat or future unjust harm.

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<sup>121</sup> Claire Finkelstein, "Is Risk a Harm?," *University of Pennsylvania Law Review* 151, no. 3 (2003): 966. <https://doi.org/10.2307/3312883>.

<sup>122</sup> Finkelstein, 966.

<sup>123</sup> Leo Katz, "Why the Successful Assassin Is More Wicked Than the Unsuccessful One," *California Law Review* 88, no. 3 (2000): 794–795; 807.

<sup>124</sup> Katz, 807.

<sup>125</sup> Kimberly Ferzan argues that desert and self-defense reasons can "aggregate" to justify harm (p. 3). She stipulates that, as a defense justification, liability is a "form of limited forfeiture or suspension of rights." Kimberly Kessler Ferzan, "Defense and Desert: When Reasons Don't Share," (July 18, 2017) *San Diego Law Review*, Forthcoming, 7.

In a case like *Ship Sink 3*, although the crew does not have access to retrospective facts, they can certainly forecast potential outcomes and reason backwards. If the crew is convinced, for instance, that both aggressors and defenders may benefit from outcome luck, this can be reflected in their course selection analysis.<sup>126</sup> Specifically, they can associate different moral values to the life and death of their captain, and to the life and death of themselves, that vary as a result of chance, which I will now discuss.

For illustration, I assume the captain in *Ship Sink 3* is morally liable to be killed. However, his degree of liability can shift due to factors over which he has no control. The captain has no control of whether the ship will sink or not sink. However, I assume that it is worse to kill the captain of a non-sinking ship (quadrants B and D) than it is to kill the captain of a sinking ship (quadrants A and C). For real-world application, commanders need not make analogous assumptions in their own proportionality calculations, nor do they need to subscribe to the view that liability can change by Fortune's wheel.<sup>127</sup> The important thing is that commanders assess whether the moral risk of preemption is disproportionate to the moral risk of inaction.

Regarding the crew of *Ship Sink 3*, no matter what they choose, to press ahead or to kill the captain, their choice can lead to morally disastrous results. The worst-case outcome for each course selection is as follows (see Figure 3). Quadrant A: If the crew decides to press ahead and the pump fails, then all six individuals (the crew plus their captain) will die. Quadrant D: If the crew decides to kill the captain and the pump does not fail, then in a fact-relative sense, killing the captain was an unnecessary wrong.

Since the morally right decision is not clear, the stakes are high, and the risks are significant, the crew should compare the moral utility and moral risk between each possible outcome. None of the four possible outcomes are good, but the crew may still rank them in terms of moral value. In rank-order, the first-preferred outcome is the one where nobody

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<sup>126</sup> The corollary to the idea that an aggressor's degree of liability is subject to chance is that a defender's degree of immunity is also subject to chance. If Player 2 justifiably acts in self-defense, perhaps his degree of immunity is contingent on whether Player 1's gun would have fired.

<sup>127</sup> For instance, instead of appealing only to liability, perhaps one can appeal, at least in part, to a lesser-evil justification. Saba Bazargan, "Killing Minimally Responsible Threats," *Ethics* 125, no. 1 (October 1, 2014): 114–36, <https://doi.org/10.1086/677023>.

dies—the crew presses ahead and the ship does not sink (quadrant B). The crewmembers, who suffer a certain moral anonymity or deprivation through their inaction, are poor sods who directly benefit from outcome luck. The second-preferred outcome is where the crew kills the captain and the pump fails (quadrant C). The fact that the pump would have failed seems to vindicate the crew’s action because otherwise they too would have died. If a justifiable preemptive act is morally courageous, worthy of admiration, and if the crew’s actions prove to have been fact-relatively necessary, then even more admiration from an impartial moral judge would befall them. The third-preferred outcome is where the crew kills the captain and the pump does not fail (quadrant D). While the captain’s imposition of an unjust risk is condemnable in itself, as discussed, his act is either less condemnable if nobody actually dies or more condemnable if everybody dies. I know of no writer who argues that moral luck exculpates blame completely. The fourth and least-preferred outcome is where the crew presses ahead, the pump fails, the ship sinks, and all six individuals die (quadrant A). This, of course, is the most tragic outcome of all.

	Sink (20%)	Not Sink (80%)
Press Ahead (Inaction)	A Everyone Dies (#4: Worst)	B Everyone Lives (#1: Preferred)
Kill the Captain (Preemption)	C Captain Dies (#2: Still Bad)	D Captain Dies: (#3: Worse)

Figure 3. Outcomes by Rank Order

## 2. Strategy Comparison

For a one-time decision under uncertain conditions, perhaps a commander should select the course of action that will amount to the highest expected moral value—over the



long run.<sup>128</sup> Seth Lazar holds this view. He thinks the risk of a one-time decision can be balanced by selecting the “subjectively permitted” course of action that maximizes expected moral utility.<sup>129</sup> By his account, subjective moral permissibility may be derived from the fact that “the objective right determines the objective ‘good,’ the probability-weighted expectation of which determines the subjective right.”<sup>130</sup> To calculate expected utility or EV, a commander must weigh the moral utility of each outcome based on how well that outcome accords with an objective moral theory. A deontological objective theory can thus create a “deontological moral utility function.”<sup>131</sup> In anticipation of consequentialist cheers and deontologist groans in response to his proposal—given that a deontological utility function might appear to be one step towards capitulation or conformity with consequentialism—Lazar notes that a utility function can “accommodate” a rights-based moral system insofar as what is morally good will depend on and is preceded by what is morally right.<sup>132</sup>

The application of a utility-based approach, whether deontological or consequentialist, creates a unique set of challenges based on its underlying computational assumptions. As John von Neumann and Oskar Morgenstern recognized in 1945, utility theory assumes commanders are “completely informed about the physical characteristics of the situation in which they operate and are able to perform all statistical, mathematical, etc., operations which this knowledge makes possible.”<sup>133</sup> Furthermore, utility theory assumes a commander can array all possible courses of action, anticipate all enemy courses

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<sup>128</sup> At their decision point, the ship’s crew cannot know with certainty if the captain is liable to lethal harm (narrow proportionality) or if his death will result in the greatest moral good (wide proportionality). For more on the narrow and wide proportionality distinction, see McMahan, *Killing in War*, 20–32.

<sup>129</sup> Seth Lazar, “In Dubious Battle: Uncertainty and the Ethics of Killing,” *Philosophical Studies*, March 28, 2017, 1–25, <https://doi.org/10.1007/s11098-017-0896-3>.

<sup>130</sup> Lazar, 13.

<sup>131</sup> Lazar, 14. Adil Haque defends a hybrid view (deontological targeting). This view combines the benefits of a “deontic expectabilist standard” and a liability-focused “reasonable belief threshold.” Haque, *Law and Morality at War*.

<sup>132</sup> Instead of treating each one-time decision in isolation, a moral agent can calculate the subjective permissibility of an action as if the same situation were repeated over one-hundred or one-thousand iterations. Lazar, “In Dubious Battle,” 13–15.

<sup>133</sup> John Von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton, NJ: Princeton University Press, 1945), 30.

of action, produce “joint probability distributions,” and calculate for each a predictive numerical value.<sup>134</sup> However, even if a commander had access to a series of cutting-edge, machine-learning supercomputers, he could not compute, in any last window of opportunity, “the whole panorama of the future.”<sup>135</sup> While I see no better alternative to compare expected moral values than utility theory, a commander will always be “bounded” by time, human experience, individual attention, computational power, and rationality.<sup>136</sup>

For *Ship Sink 3*, to calculate the expected moral value of both inaction and preemption, which are both subject to probabilities, I attribute a numerical value to a selection of rights-based outcome considerations. Perhaps it is possible to convert non-moral value considerations into moral ones, but I keep things simple.<sup>137</sup> That said, any attempt to quantify a moral value, albeit unavoidable, is an error-prone affair. One must keep in mind that the specific numbers in Table 1 matter less than the rank-ordered qualitative ideas behind them. In this payoff matrix (Figure 4), the numerical values for each outcome are less important than the rank-ordered moral preferences detailed in Figure 3.<sup>138</sup> Undoubtedly, no matter how commanders select what they consider to be an appropriate payoff matrix, an EV comparison can help frame a moral solution to the demands of proportionality.

In vis-a-vis EV, for a one-time decision under uncertain conditions, perhaps a commander should select the course of action that avails the best of all worst-case outcomes—as part of a risk-conservative strategy. For example, imagine a highly stylized

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<sup>134</sup> Herbert Simon, *Reason in Human Affairs* (Stanford, CA: Stanford University Press, 1983), 13.

<sup>135</sup> Simon, 13.

<sup>136</sup> Simon, 17–27. Lazar addresses similar concerns in his section titled “Who brings a calculator to a gunfight?” Lazar, “In Dubious Battle,” 19–21.

<sup>137</sup> I do not attempt to combine all relevant moral and non-moral values, principles, and preferences (including military, political, and economic preferences) into a single utility function. Perhaps it is possible to convert political or economic considerations into a common currency based on human rights: to connect, for instance, the power to pursue political self-determination—which requires a minimum level of non-moral resources such as money, land, access to trade, and the like—to an economy of moral values. But such an effort is beyond this scope.

<sup>138</sup> As Lazar prescribes, “We should take the implied precision of numbers with a pinch of salt.” Lazar, 4.

“Let’s Make a Deal” or Monty Hall problem.<sup>139</sup> A player can either walk away with \$400K or spin a wheel such that her odds of winning \$1million or nothing are 50/50. In this example, the EV of walking away is \$400K and the EV of spinning is \$500K. Since \$500K is greater, one might argue that the player should spin because, over the long run, that action avails the most profit. However, EV calculations do not adequately account for risk. The worst-case outcome in a spin is to gain nothing, but the worst-case outcome, the only outcome, from walking away is to gain \$400K. I imagine most people would then choose to walk away. On the other hand, if the difference between spinning and walking away was only \$1, if a spin entailed a 90% probability of winning \$399,999 and a 10% probability of winning \$1.4 million, then I imagine most people would instead choose to spin.<sup>140</sup> Comparative risk makes a big difference in terms of how we shall prefer one strategy over another.

Since EV and maximin are both rational strategies, a decision maker should consider each.<sup>141</sup> In the Monty Hall example, who could fault a billionaire who chooses to spin because she is willing to accept great risks? Perhaps she often risks hundreds of thousands of dollars on matters of chance and is just an incorrigible winner. But then, if the risk includes a loss of life or liberty—if the moral stakes are great enough—perhaps she should prefer a maximin strategy. Then again, if the likelihood of a worst-case outcome is negligible, perhaps not.<sup>142</sup> I see no clear reason why a commander should always prefer one strategy over another. The moral stakes of war warrant a combination of maximin and EV analysis.

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<sup>139</sup> For more on the relevance between EV and one-time decisions, see Paul K. Moser and D. Hudson Mulder, “Probability in Rational Decision-Making,” *Philosophical Papers* 23, no. 2 (August 1, 1994): 109–2; and Terence Horgan, “Let’s Make a Deal,” *Philosophical Papers* 24, no. 3 (November 1, 1995): 209–22.

<sup>140</sup>  $EV(\text{spin}) = \$399,999.00 (90\%) + \$1,400,009.00 (10\%) = \$500,000.00$ . Mathematically, the number of possibilities to attain an EV of \$500K are endless.

<sup>141</sup> I do not assume that EV and maximin are the only available strategies. For example, Laplace, maximax, and the coefficient of optimism methods are also available, though not considered here.

<sup>142</sup> One could argue that there should be a threshold between negligible and non-negligible risk. How to define such a line, however, runs into the same problem as, say, defining the threshold for proportionality. Perhaps it is simply easier to use a negative descriptor such as not disproportional or not risk intolerant. Theoretically, a maximin strategy with a threshold floor would consider only non-negligible risk.

To compare these two decision-making strategies: in Table 1, I assign a notional numerical value to each rights-based moral consideration and list to whom each value applies; in Figure 4, I circle the crew action that leads to the greatest EV in green and the crew action that minimizes the most risk in blue.<sup>143</sup>

Table 1. Notional Moral Values

Rights-Based Moral Considerations	Value	To Whom This Applies
The crew lives after averting an unjust harm (12 pts each)	60	The crew in quadrant C
The crew and captain live as a result of luck (10 pts each)	60	The crew & captain in B
The crew commits an objectively unnecessary wrong <sup>144</sup>	0	The crew in D
The captain of the sinking ship dies or is killed <sup>145</sup>	-5	The captain in A & C
The crew dies as a result of chance (-10 pts each)	-50	The crew in A
The captain of the non-sinking ship is unnecessarily killed	-50	The captain in D

<sup>143</sup> In Figure 4, the sum in each quadrant matches the moral preferences discussed such that:  $A < D < C < B$ . In other words, the greater than or less than relationship between each interval-scaled value matches the rank-ordered ordinal scale in Figure 3. This assumes that moral relations are transitive, which I do not claim. I also do not claim that interpersonal comparisons of utility can be made—these values are meant to represent objective moral utilities. By design, if the probability of pump failure was 50%, then the expected moral value of each decision would be equal. In other words, the absolute best and the absolute worst-case outcomes ( $A + B$ ) is weighted to match the moral value of the two intermediate outcomes ( $C + D$ ) such that an odds of 50/50 would bear an equal EV of 2.5.

<sup>144</sup> Notwithstanding, the crew's act, in quadrant D, is justifiable from an evidence-relative point of view.

<sup>145</sup> I assume that there is a moral price tag for every strike or kill, even when the target is fully liable. Some theorists consider harms to unjust attackers as morally negligible or “wholly discounted,” (see Lazar, “Necessity in Self-Defense and War,” 41.), but I disagree. Unjust combatants are often valued members of a community. Furthermore, from the other side, one cannot discount psychological harms from the act of killing (see Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Little, Brown and Co., 2009)).

		<u>Possible Outcomes</u>		<u>Decision Strategies</u>	
		Sink (20%)	Not Sink (80%)	Expected Value	Best Worst-Case
Press Ahead (Inaction)	A	Everyone Dies Moral Value: -55	B Everyone Lives Moral Value: 60	37	A -55
	C	Captain Dies Moral Value: 55	D Captain Dies: Moral Value: -50		D -50
Kill the Captain (Preemption)				-29	

Figure 4. Decision Strategies Based on Moral Values<sup>146</sup>

The expected moral value in pressing ahead is positive 37 whereas to kill the captain equates to a moral value of negative 29. From a moral lens, an EV strategy pick is to press ahead. However, the best worst-case outcome between the two possible crew actions is negative 50, which corresponds to killing the captain. As such, if the crew compares the logical EV strategy outcome (the green circle in Figure 4) and the maximin strategy outcome (the blue circle), positive 37 versus negative 50, respectively, then they would realize that, morally, they have more to lose than to gain in their decision-strategy selection: To press ahead entails a disproportionately high-level of moral risk.<sup>147</sup> Given this disproportionate split in moral risk, the crew should select the action that maximizes the minimum moral value—kill the captain.<sup>148</sup>

<sup>146</sup> To calculate the expected value of an act, multiply the moral utility of each outcome by its probability of occurrence:  $EV(\text{press ahead}) = (\text{quadrant A})(\text{probability of sink}) + (\text{quadrant B})(\text{probability of not sink})$ . Thus,  $EV(\text{press ahead}) = -55(.2) + 60(.8) = 37$ . The worst-case outcome that can result from this act, to press ahead, is that everyone dies (quadrant A), which has a moral value of negative 55.

<sup>147</sup> If the probability of sink was 8% or less, then the EV of press ahead would be greater than 50 (i.e., the crew would not have more to lose than to gain in their moral decision-strategy selection).

<sup>148</sup> In light of maximin, this conclusion might seem at odds with Lazar's statement that "an act is subjectively permissible if its expected moral utility is no lower than any other's" (p. 13). By that standard, to press ahead is subjectively permissible, but does that mean that to kill the captain is not? In his paper, Lazar admits that his work "is only a starting point" (p. 22). By shaping decision theory into a useful tool for deontologists, Lazar provides a monumental start.

### 3. Non-moral Lens

Since non-moral considerations are also relevant to a commander's decision, I explore the crew's decision based on an EV and maximin comparison using non-moral values. To compare these two decision-making strategies: In Table 2, I assign a notional numerical value to an arbitrary selection of non-moral financial considerations and list to whom, or to which quadrant, each value applies; in Figure 5, I circle the crew action that leads to the greatest non-moral EV in green and the crew action that minimizes the most financial risk in blue.

Table 2. Notional Non-moral Values

Non-moral Considerations	Value (\$K)	To Whom This Applies
Commercial goods delivered to their destination	2000	Quadrant B
Goods recovered but not delivered to their destination	1500	Quadrant D
Training cost to replace the crew (10K each)	-50	Crew in A
Life Insurance payout for the captain	-100	Captain in A, C, D
Training cost to replace the captain	-100	Captain in A, C, D
Insurance deductible to repair or replace the ship	-150	Quadrants A, C
Life Insurance payout for the crew (50K each)	-250	Crew in A

	<u>Possible Outcomes</u>		<u>Decision Strategies</u>	
	Sink (20%)	Not Sink (80%)	Expected Value	Best Worst-Case
Press Ahead (Inaction)	A Everyone Dies Value: -\$650K	B Everyone Lives Value: \$2000K	<span style="border: 2px solid green; border-radius: 50%; padding: 5px;">\$1470K</span>	A -\$650K
Kill the Captain (Preemption)	C Captain Dies Value: -\$350K	D Captain Dies: Value: \$1300	\$970K	D <span style="border: 2px solid blue; border-radius: 50%; padding: 5px;">-\$350K</span>

Figure 5. Decision Strategies Based on Non-Moral Values

The expected non-moral value in pressing ahead is to profit \$1.47 million whereas to kill the captain equates to a gain of \$970 thousand. Since \$1.47 million is greater, an EV strategy pick is to press ahead. However, the best worst-case outcome between these two possible crew actions is negative \$350 thousand, which corresponds to killing the captain. As such, if the crew compares the logical EV strategy outcome and the maximin strategy outcome, a gain of \$1.47 million versus a loss of \$350 thousand, respectively, they would realize that Company X has more to gain than to lose, financially, by pressing ahead. Given this split, based only on their fiduciary responsibilities to Company X, the crew should press ahead because that action maximizes their expected non-moral utility.

In sum, commanders should consider the *Ship Sink 3* case as an example of how they might compare moral risk as part of their *Proportionate Strategy* analysis. While *Ship Sink 3* is meant to act as an easy example, it still presents something of a conundrum. As presented, if the crew analyzes their situation only in terms of moral values, their results would support preemption. If the crew analyzes their situation only in terms of non-moral values, their results would support inaction. However, impetus for moral action, deliberation on whether preemption is part of a moral-risk proportionate strategy, requires that commanders prioritize moral over non-moral value considerations. Thus, based on the three conditions—*Credible Threat*, *Temporal Necessity*, and *Proportionate Strategy*—the crew in *Ship Sink 3* may justifiably kill the captain in preemptive self-defense.

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## VI. CONCLUSION

This thesis explores critical decision-making criteria for preemptive self-defense. Its purpose is to seek greater clarity on the role of imminence in cases of preemption. We began by first positioning preemption in its rightful place, onto the moral side of war. We held that in contrast to prevention, the imminence requirement can make all the moral difference. Despite the shadow cast by high-level rhetoric that preceded the 2003 U.S. invasion of Iraq, we recognized a collective need to combat a false narrative and to efface preemption's shameful vestiges. Next, we noted an interoperability challenge that exists between NATO partners—a divergence in ROEs that stems from a weak concept of imminence. This combat-related concern helped to propel us into a crucible of conceptual immersion—to steel imminence with elemental ideas found within just war literature: liability, necessity, and proportionality.

I argued that imminence requires two conditions. A commander must justifiably believe both that an unjust aggressor is poised to attack (i.e., the *Credible Threat Condition*), and that her capacity to avert an attack is constrained by an imminent decision point (i.e., the *Temporal Necessity Condition*). Equally important, imminence is necessary but not sufficient for preemption. To strike first in self-defense, a third condition is required: The commander must justifiably believe that preemption is part of a moral-risk proportionate strategy (i.e., the *Proportionate Strategy Condition*). The moral risk of preemption cannot be disproportionate to the moral risk of inaction.

Such is the conceptual role of imminence. Insofar as lethal decisions must be grounded in one's conscience, and honor, this has predominantly been a commander's guide to preemptive self-defense. With an imminent decision looming, a commander can satisfy all three conditions as laid out and be justified in striking first. While it is beyond anyone's power to know, in an objective sense, whether those three conditions are true, a commander's fortitude may nevertheless precipitate a just strike.

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