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*(Article begins on next page)*

## War for the Wrong Reasons: Lessons from Law

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In Chapter 3 of *Ethics for Enemies*, Frances Kamm offers a characteristically thoughtful and provocative discussion of how intentions should figure in determining whether a nation's act of war is morally permissible. From within a deontological conception of morality, she aims to establish that a nation can rightly commence a war for the wrong reasons. More precisely, she argues that a war launched for a morally inadequate reason is nonetheless morally permissible if: (1) initiating and properly prosecuting the war will achieve a goal that would be a just cause for war; (2) the nation that initiates the war knows that the goal will be achieved through the war; and (3) the nation acts on the condition that the goal will be achieved.<sup>1</sup>

What would such a case look like? Here is Kamm's primary example. Germany launches a genocidal war against Norway. Leaders of the imagined nation of Weden in turn launch a war against Germany that defeats the German invasion. Weden's leaders knew at the outset that their intervention would prevent the genocide. Moreover, if the intervention did not promise to halt the genocide, they would not have intervened. Still, they did not launch the war for this purpose. Their goal was instead to obtain access to cheap oil that would otherwise be unavailable to them, or to kill certain civilians whom they would otherwise not be entitled to kill. The cessation of genocide mattered to them only because it provided a fig leaf that would spare Weden from suffering adverse consequences in the international arena.

Kamm maintains that Weden's leaders have acted in a morally permissible manner because the cessation of genocide is a just cause for war, because the leaders knew that their act of war would halt the genocide, and because the cessation of the genocide was a necessary condition of their decision to go to war.<sup>2</sup> To cast

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<sup>1</sup> Frances M. Kamm, *Ethics for Enemies: Terror, Torture and War* (2011), 119–20.

<sup>2</sup> *Ibid.*, 122. Kamm adds a further condition to render Weden's war morally permissible, namely that civilians not be killed by Weden

Weden as a wrongdoer, Kamm suggests, is to confuse moral permissibility with virtue. Weden's leaders deserve no plaudits or parades,<sup>3</sup> but they have done nothing wrong.

Kamm's aspiration, we gather, is to offer an account of the morality of war that avoids two extremes. One is a too-crude ends-justifies-the-means consequentialism. The other is a too-exacting deontology that ties acceptable conduct to pristine intentions of a sort one is unlikely to encounter in decisions to go to war. We sympathize with the posited aspiration to locate this middle ground. Still, we are not yet convinced that Kamm has found the moral sweet spot, and in this comment we will try to articulate the basis for our doubts. As our expertise is law, not moral philosophy, our aim is modest. We seek to show how certain facets of domestic and international law might pose challenges to Kamm's argument. We will first consider how domestic law addresses individual behavioral analogs to the kind of state behavior with which Kamm is concerned. We then turn to state behavior and the law of war.

Our analysis proceeds on the assumption that law has the potential to shed light on morality in two opposing ways. Legal rules and principles governing the use of force are frequently shaped by the same considerations that undergird moral rules and principles governing the use of force – for example, considerations of liberty of action and security against harm. The illegality of uses of force subject to legal rules of this sort can thus support an inference as to their immorality. But it is also the case that legal rules are sometimes deliberately crafted to assess conduct independently of considerations that would ordinarily figure in moral deliberation. In such instances, the legality of conduct might tell us little about its moral permissibility, or might even point toward its moral impermissibility.

### **I. Individual Analogs: Criminal and Tort Law**

Kamm's discussion is obviously focused on states. And it may be that her account of morally permissible conduct better fits state action than individual action (though she does not press this point). Yet her assessment of states' conduct turns on the attribution of intentions to them. As intentions are most naturally attributed to individuals, it is appropriate to consider analogs in

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in any other manner or to any greater degree than would occur as a side-effect of a well-intentioned and properly executed military intervention.

<sup>3</sup> Ibid., 121 (noting in relation to a variant on this example that "Weden may be entitled to no gratitude for intervention").

individual behavior to the sort of state behavior with which Kamm is concerned.

### 1.1 Intentionality and the Legality of Violence among Individuals.

Suppose that Roger and Rafa are fierce rivals on the tennis court. Indeed, Roger harbors an intense hatred for Rafa because Rafa consistently defeats Roger. One evening, Roger happens to see Rafa assaulting a third person, whom Roger does not know. No one other than Roger is in a position to intervene. Although Roger is uninterested in the stranger's well-being, he recognizes that he has been provided with a perfect opportunity to debilitate his rival. In the reasonable belief that doing so is necessary to protect the stranger, Roger grabs a nearby plank of wood and slams it into Rafa's ankle. Roger's entire purpose is to lame Rafa, though he knew that, by acting as he did, he would save the stranger. And Roger would not have struck Rafa had not the circumstances permitted him also to save the stranger, thus providing Roger with the cover he needed to get away with injuring Rafa. We take this example to be analogous to the scenarios Kamm has in mind as permissible acts of war for the wrong reasons. Roger acted out of an evil intention, but he did so knowing that he would also accomplish a goal that would justify his harming Rafa, and on the condition that this other goal would be achieved.

What does the law have to say about this case? The answer is unclear. Criminal and tort law both contain prohibitions against the intentional infliction of bodily harm. However, both bodies of law also recognize certain justifications that overcome these prohibitions – justifications that are commonly characterized as privileges. Particularly relevant is a universally recognized extension of the privilege of self-defense known as “defense of another.” It grants an actor a privilege intentionally to inflict bodily harm on another to defend an innocent third party from being killed or suffering serious injury at the hands of the other. If Samaritan (*S*) witnesses Assailant (*A*) attacking Victim (*V*), *S* is privileged to inflict physical harm on *A*, so long as *S* does so in the reasonable belief (or, in some jurisdictions, the good-faith belief) that doing so is necessary to protect *V* from imminent physical harm at the hands of *A*, and so long as *S* uses force in proportion to the threat posed to *V*. If *S* harms *A* under these conditions, *S* is not subject to criminal punishment or tort liability.<sup>4</sup>

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<sup>4</sup> The Model Penal Code and the Restatement of Torts are legal treatises that do not have the force of law, but are commonly invoked

Does the privilege to defend another extend to a case like Roger's, in which the defendant acts out of a desire to harm the person against whom he uses force, but would not have acted unless he also knew that his use of force would protect a third party? Or is such a case an unprivileged attack that would subject Roger to punishment and/or liability? So far as we are aware, neither legislation nor judicial decisions provide a clear-cut answer to this specific question.<sup>5</sup> Criminal punishment, if any, would probably be left to prosecutorial discretion (as to whether to pursue the case) and juror discretion (as to whether the attack falls within the privilege).<sup>6</sup> Tort liability probably likewise would

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by courts applying criminal and tort law, respectively. Subject to certain limitations omitted below, the Model Penal Code states that the use of force upon the person of another is justifiable to protect a third person when: "(a) the actor would be justified ... in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and (c) the actor believe his intervention is necessary for the protection of such other person." Model Penal Code § 3.05(a) (1962). In a similar fashion, the Second Restatement of Torts provides that if *S* reasonably believes that *V* would be privileged to use a certain degree of force to defend himself against *A*'s attack, then *S* is privileged to use the same degree of force against *A* to defend *V*, so long as *S*'s use of force is necessary for the protection of *V*. Restatement (Second) of Torts § 76 (1965).

<sup>5</sup> The absence of relevant decisions is hardly surprising. See Lawrence Crocker, *Justification and Bad Motives*, 6 Oh. St. J. Crim. L. 277, 277 (2008) (observing that the issue is not likely to arise in real-world litigation because evidence as to a defendant's motivations is unlikely to be available).

<sup>6</sup> Commentators have disagreed over whether and when an actor should be spared criminal punishment when reasons are present that suffice to render otherwise criminal conduct privileged, but the reasons are not those for which the actor acted. Compare Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite to Criminal Liability*, 23 UCLA L. Rev. 266, 285–87 (1975) (arguing that bad motives do not undermine otherwise justified acts) with George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. Rev. 293, 320–21 (1975) (arguing that an actor's being motivated by the reasons that would privilege his otherwise criminal act is necessary to render his act not merely "just" but "justified") with Crocker, *supra* note 5, at 297 (arguing that it is unfair to convict a defendant who is aware of reasons justifying his

turn on juror discretion in determining the precise scope of the defendant's privilege. We will therefore consider both the possibility that the privilege does and the possibility that it does not extend to such a case.

### 1.1.1 *The Gap Between Legal and Moral Permissibility*

Suppose the law were to deem Roger's attack on Rafa permissible, thus deeming legally permissible individual conduct that meets Kamm's test for the moral permissibility of a war such as Weden's. The law's doing so might seem to support Kamm's judgment that analogous state action is morally permissible. Yet one must be cautious about inferring moral permissibility from legal permissibility. Imagine that the saving of the stranger from Rafa's attack was *not* a necessary condition for Roger's actions – that Roger's bitterness toward Rafa was so great that he would have attacked Rafa even if no occasion to do so had presented itself. The presence of the occasion was, from Roger's perspective, mere icing on the cake. This is a point at which, for Kamm, Roger's actions might cross the line from morally permissible to impermissible, because the right reason for acting (saving the stranger) is no longer operating as a necessary condition of Roger's action – he would have done it anyway. Yet so long as Roger used proportionate force and acted in the reasonable belief that the victim would be injured by Rafa's attack if Roger did not intervene, Roger (we are presently supposing) is entitled to invoke the defense-of-others privilege. Thus, relative to the terms of Kamm's moral analysis, the presumed legal permissibility of Roger's attack might prove too much. The same laws that permit a use of force by Roger that meets Kamm's stated conditions of moral permissibility would also permit uses of force that do not.

Why would the law extend the defense-of-another privilege to give actors a license to act immorally? In fact, there are a variety of reasons that might justify legislatures and courts in refraining from rendering certain forms of immoral conduct illegal. They must worry, for example, about whether legal rules are stated in such a way as to require judges and jurors to draw speculative

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actions but was not motivated by those reasons, primarily on the ground that the actor deserves credit for undertaking a justified act that he could have declined to undertake) *with* R.A. Duff, *Rethinking Justifications*, 39 *Tulsa L. R.* 829, 848–49 (2004) (arguing that ill-motivated invocations of privileges should not be criminalized if the underlying conduct was required, but can fairly be criminalized if the underlying conduct was merely permissible). Thanks go to Ken Simons for pointing us toward this literature.

inferences. Thus although the law regularly requires judges and jurors to make determinations about actors' intentions, the counterfactual inquiry into whether an actor's knowledge of certain facts served as a necessary condition for his action, which Kamm regards as important to the determination of moral permissibility, might plausibly be deemed beyond their capacity. This is especially so for issues of self-defense and defense-of-another, which tend to involve strangers making spur-of-the-moment decisions under difficult conditions. Whereas lawmakers might fairly expect decision-makers to draw reasonably reliable inferences about certain mental states from circumstantial evidence, including inferences as to whether the defendant actually and reasonably believed his actions were necessary to defend another against imminent harm, it may be asking too much to expect them to infer reliably whether the defendant would have used force, even absent his ability to hide behind an adequate reason for using force.

It is also common for judges to fashion legal rules with at least an eye on instrumental considerations. Courts might thus reject a too-fine inquiry into the role that certain reasons played in an actor's decision-making out of a concern to encourage (or at least not discourage) acts in defense of others. In other words, the law might for consequentialist reasons err on the side of withholding punishment or liability for certain acts in defense of others that are in fact morally impermissible.

In sum, even if the law were to grant Roger a privilege intentionally to injure Rafa on facts comparable to Kamm's Weden example, it might nonetheless do so on terms and for reasons that run counter to Kamm's judgment that such conduct is morally justified. Depending on the law's justification(s) for granting the defense-of-another privilege, the (presumed) legal permissibility of Roger's actions might tell us nothing about moral permissibility, or might attest to the *immorality* of an attack carried on terms comparable to those that would meet Kamm's test of moral permissibility. This possibility – that legal permissibility actually points to moral impermissibility – will figure more prominently below in our discussion of the law of war.

### 1.1.2 *Provocation and Pretext*

Although we have been supposing until now that Roger's attack is legally permissible, criminal and tort law recognize restrictions on the defense-of-another privilege that arguably point toward the rejection of its invocation in a Weden-like case. Most salient is the *provocation* exception to self-defense, which we

presume has equal application to cases of defense-of-another. (This is a plausible presumption, given that defense-of-another is generally understood as a special application of self-defense.<sup>7</sup>) An actor who first provokes an altercation, then, in the midst of it, uses force to defend himself against the other, often cannot claim self-defense as a justification for his use of force.<sup>8</sup> Extending the same idea to the defense-of-another scenario, if Roger had somehow provoked Rafa into attacking the stranger, Roger might be ineligible to claim that his subsequent attack on Rafa would be privileged as the defense of another.

This last variant on the Roger-Rafa example adds an element – the provocation – that is missing from the initial rendering of the Roger-Rafa example and Kamm’s Weden examples, and that could affect her assessment of the moral permissibility of Weden’s initiation of war.<sup>9</sup> Even so, the provocation exception may not sit comfortably with Kamm’s analysis. Much depends on how “provocation” is defined in criminal law, and on why criminal law treats provocation as undermining the self-defense and defense-of-another privileges.

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<sup>7</sup> Model Penal Code §3.05(1)(a).

<sup>8</sup> The Model Penal Code regards provocation as defeating the privilege of self-defense only in cases in which the defendant claiming self-defense uses *lethal* force. Model Penal Code § 3.04(2)(b)(i). Many states apply the provocation rule to any instance of self-defense, whether involving lethal or non-lethal force. See, e.g., Texas Penal Code § 9.31(b)(4) (an actor is not justified in using physical force against another “if the actor provoked the other’s use or attempted use of unlawful force”). For application of the provocation exception to self-defense in a tort case, see *Gortarez v. Smitty’s Super Valu, Inc.* 680 P.2d 807, 816 (Ariz. 1984).

<sup>9</sup> Even assuming that the law of provocation pertaining to the use of force by one person against another tracks plausible moral principles, it would not cut against Kamm’s position if Kamm could distinguish cases of provocation from cases in which a nation cynically takes advantage of a situation not of its own creation. For example, suppose Weden’s leaders somehow provoked Germany to launch a genocidal war against Norway just so that Weden would have the occasion to use military force against Germany to achieve an evil end such as the killing of German civilians, but that the leaders also knew that Weden’s intervention would prevent the genocide, and that they would not have intervened but for the fact that the intervention would prevent genocide. Would Kamm conclude that Weden’s cynical engineering of a just cause for war render the war morally impermissible?



One can imagine various ways in which a person might provoke a physical encounter. In ordinary usage, at least, the concept of provocation seems broad enough to encompass actions that are designed to induce a hostile response to actions that unintentionally and unforeseeably induce such a response.<sup>10</sup> Moreover, state criminal codes tend not to define with specificity what will suffice as the sort of provocation that undermines the self-defense privilege.<sup>11</sup> But there is a particular kind of provocation that all courts probably regard as sufficient to undermine the privilege to use force to defend self and others,<sup>12</sup> and that some state laws explicitly treat as more significantly undermining the self-defense privilege than others.<sup>13</sup> This is the kind of provocation that is intended by the provocateur to serve as a pretext for the use of force against the person being provoked. The Texas courts, for example, have interpreted that state's criminal code – which provides simply that self-defense is unavailable to an actor “if the actor provoked [the victim's] use or attempted use of unlawful force” – to focus on this special kind of provocation. According to them, a defendant “forfeits his right of self-defense” in cases in which he “provoked another to make an attack on him, *so that the defendant would have a pretext for*

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<sup>10</sup> Merely glancing at another in the ‘wrong way’ might provoke the other. It hardly follows, of course, that this sort of provocation should count against the provocateur when, for example, it comes to assessing her claim of self-defense. *See* Kimberly Kessler Ferzan, *Provocateurs*, 7 *Crim. L. & Phil.* 597, 610–13 (2013) (identifying different forms of provocation with differing implications for the justifiability of a provocateur's subsequent use of force).

<sup>11</sup> Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 *Va. L. Rev.* 1, 4 n.11 (1985) (noting variations among states' laws).

<sup>12</sup> Robinson, *supra* note 11, at 12 (noting that “many jurisdictions bar self-defense where the actor ‘provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant’”) (quoting Georgia's criminal code). For its part, the Model Penal Code states that provocation will undermine self-defense only for persons who provoke an occasion for the use of force “with the purpose of causing death or serious bodily injury.”). MPC § 3.04(2)(b)(i).

<sup>13</sup> Robinson, *supra* note 11, at 4 n.11 (pointing out that Illinois, Iowa, and Kansas treat pretextual provocations as more substantially limiting the provoker's subsequent use of force than other forms of provocation).

*killing the other under the guise of self-defense ....*<sup>14</sup> In short, criminal law (in Texas and elsewhere) seems to treat *pretextual* provocations as paradigmatic of the sort of provocation that defeats an invocation of the privilege of self-defense. This feature of criminal law in turn at least suggests that pretextual acts of self-defense, as well as pretextual acts in defense of another, are morally suspect.

We do not want to overstate the point. Even if there is a moral analog to the law's provocation exception to the privilege to defend another, Kamm can distinguish the case of ill-motivated war with which she is concerned. As noted above, the provocation exception turns in part on the provoker's actions having created the necessity for use of force, whereas Kamm's examples involve situations in which the ill-intentioned nation merely takes advantage of, rather than manufacturing, a need for military intervention. Still, insofar as the courts' focus on pretextual provocation is part of a broader inclination to deny the defense-of-others privilege to those who invoke the privilege for self-serving reasons, it cuts against the general tenor of Kamm's argument for the moral permissibility of actions such as Weden's. And in fact there is some evidence in criminal and tort law of this broader concern.

### **1.2. *Law's Levels: Duty, Privilege, and Abuse of Privilege***

The criminal and tort law of self-defense and defense of others operates within a three-step framework that sometimes shows up elsewhere within these bodies of law. Under this framework, the law first sets out relatively broad directives prohibiting certain forms of interaction with others. These directives generate legal duties to refrain from engaging in such interactions. For example, as noted above, both criminal and tort law contain directives specifying, roughly, that one may not intentionally touch another in a harmful manner. At the second level, the law identifies certain conditions under which an actor who breaches the relevant legal duty is spared liability or punishment (e.g., self-defense or defense of others). This is the inquiry into whether an actor is privileged to act in the way that he did. Finally, there is the third step – exemplified by the provocation doctrine – in which the law

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<sup>14</sup> *Smith v. State*, 965 S.W.2d 509, 512 (Tex. Crim. App. 1998) (emphasis added) (interpreting Texas Penal Code § 9.31(b)(4)). *Smith* extends the same line of reasoning to uses of non-deadly force. *Ibid.* at 512–13.

deems an otherwise applicable privilege unavailable to a particular actor, typically because of misconduct on the part of that actor. In this step, the question is whether the actor who claims privilege has “abused” the privilege, such that he forfeits his claim to it.

This three-level structure is sometimes buried in the concepts and the categories of criminal and tort law.<sup>15</sup> But it is also sometimes explicit. We can start with an example that is somewhat far afield, though still relevant.

Suppose an employer asks a professor for a reference on a former student. The employer explains to the professor that the job is quite important, and that the well-being of many others hinges on the job being done well. Based on the professor’s misinterpretation of statements made by a colleague who also worked closely with the former student, the professor in her reference letter states her sincerely held belief that the former student is not qualified for the job because the former student has a drinking problem. In fact, the student has no such problem.

The professor has libeled the student by falsely stating to the employer that the student has a drinking problem.<sup>16</sup> The professor, however, will likely be spared liability. In the interest of promoting candid evaluations, defamation law has long recognized the so-called “common interest” privilege. It allows recommenders a certain margin for error with respect to defaming those whom they recommend.<sup>17</sup> Even if the professor was careless as to the

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<sup>15</sup> Cf. George P. Fletcher, *The Right and The Reasonable*, 98 Harv. L. Rev. 949, 951–53 (1985) (observing that, in the U.S., criminal law often collapses into a general inquiry into “reasonableness” considerations that other legal systems would address under the heading of “abuse of right”). Although Fletcher’s article focuses on claimed justifications for use of force, it fails to note that criminal codes often isolate provocation as a distinct ground for deeming an actor’s use of force unjustified (apart from any unreasonableness on the part of the actor), and thus misses an instance in which U.S. law more closely tracks the multi-level framework he attributes to other systems. For an argument that abuse of right is embedded in a range of common-law doctrines, see Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L.J. 37 (1995).

<sup>16</sup> Roughly speaking, a statement is defamatory of a person if it attributes to a person attributes or actions that would tend to lower the esteem in which others hold that person. Restatement (Second) of Torts § 559 (1965).

<sup>17</sup> See, e.g., *Erickson v. Marsh & McLennan Co., Inc.*, 569 A.2d 793, 805 (N.J. 1990) (discussing the qualified privilege to defame in a

truth of her statement that the former student has a drinking problem, the student would not be entitled to recover in a suit against the professor because writers of references are privileged to defame as part of a good faith effort to provide a candid reference.

Now change the facts of the case to bring it closer to the kind Kamm has in mind. Suppose the professor, who has always found the student irritatingly self-satisfied, knows the student is extremely keen to get the job. The professor also knows that the student is not qualified for it. However, rather than explaining in his letter to the employer why the student is unqualified, the professor knowingly and falsely writes that the student has a drinking problem. The professor does so for the malevolent satisfaction of seeing the student taken down a peg. But the professor would not have done so if she did not also know that the student was unqualified for the job, and that her letter would ensure that the student would not get the job. If the student were to sue the professor, a court following the law should reject the professor's claim of a privilege to defame. This is because the privilege to defame another in the context of a recommendation is a "conditional" or "qualified" privilege. To say that it is conditional or qualified, as opposed to absolute, is to say that it is defeasible. Specifically, it is defeasible upon a showing that the person who seeks to invoke it has abused it.<sup>18</sup> A quintessential form of abuse of privilege is a defamatory statement made knowingly, and out of malice toward the defamed person. A libel contained in a reference that is not part of a good faith effort to provide a reference is not privileged. The defendant will face liability because she violated her duty not to defame, and because her bad faith blocks her from establishing that she was privileged to defame.<sup>19</sup>

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recommendation provided to a prospective employer of the defamed person).

<sup>18</sup> Ibid. at 806. James Goudkamp suggests that judicial decisions vacillate between treating non-maliciousness as an element of the privilege and treating it as a ground for defeating what would otherwise be a properly invoked privilege. James Goudkamp, *Tort Law Defences* (2013) 32–33.

<sup>19</sup> That the professor knew that the former student was not qualified for the job would have no bearing on the issue of the professor's liability for defamation. However, the fact that the student was not qualified for the job might bear on the size of the student's award of damages, in that the student arguably would not be entitled to claim that the professor's defamation caused her to lose the financial upside of the new job.

As a related example of the same three-level framework, consider the so-called “paradox” of blackmail.<sup>20</sup> Some have suggested that the criminal offense of blackmail involves a bit of alchemy, because it takes two perfectly permissible acts and somehow, by combining them, generates a wrongful act. In many instances, the blackmailer is at liberty to reveal damning true information about another person. And, the thought continues, there is nothing wrong with inviting another person to engage in a mutually beneficial transaction. So how can it be a crime for the blackmailer to invite his victim to pay the blackmailer in exchange for the blackmailer declining to exercise his ‘right’ to reveal the damning information?

The answer may reside in attending to the duty / privilege / abuse-of-privilege framework.<sup>21</sup> There is in fact no paradox. Defamation law starts with a duty to refrain from saying or writing things about another that tend to harm a person’s reputation. However, out of recognition of the value to society of true information being shared, the law privileges speakers to defame another through true statements. (True defamatory statements, are still defamatory in that they tend to harm reputation.) Still, the privilege to speak the truth is conditional or qualified – it can be lost for being abused. Exploiting the threat advantage one gains from possessing true defamatory information about another is an abuse of the privilege. There is no ‘right’ to spread true defamatory information about another, only a qualified privilege. Hence there is no mystery as to why blackmail is punishable as a crime – it involves an abuse (and loss) of privilege.

A third example of the three-level framework involves the privilege to enforce one’s right to exclude others from one’s land. Although one is not ordinarily permitted intentionally to use force against another, one can use reasonable force in an effort to expel

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<sup>20</sup> See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 Colum. L. Rev. 670, 670–71 (1984) (stating the paradox); see also Mitchell Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. Chi. L. Rev. 795 (1998) (reviewing attempts to dispel the paradox, and offering an alternative ground for doing so); Henry Smith, *The Harm in Blackmail*, 92 Nw. U. L. Rev. 861 (1998) (arguing that blackmail is criminalized because of the relatively high likelihood that blackmail victims will otherwise resort to violent forms of self-help).

<sup>21</sup> Perillo, *supra* note 15, at 93 (suggesting that blackmail is an abuse of the right of free speech, though without drawing on the law of defamation).

unpermitted entrants onto one's property. Yet there are limits to the privilege, and it can be lost for being abused. A landowner who treats an innocent trespass – such as a trespass by mistake – as an occasion to engage his anti-social proclivities, might well find his claim of privilege denied.<sup>22</sup> The law similarly gives landowners leeway to set up certain kinds of defenses to ward off anticipated trespassers. But a landowner who injures even a criminal trespasser by setting up a potentially deadly trap on his land merely to protect his land (as opposed to his person) will be deemed liable for having exceeded the scope of the privilege.<sup>23</sup>

We have emphasized the duty / privilege / abuse-of-privilege framework because it helps to articulate some of our concerns about Kamm's approach to the morality of initiating armed conflict. In her treatment of the *Weden* case and other cases, Kamm in effect collapses the three steps, treating the issue of intentions versus necessary conditions as going to the question of whether *Weden* has acted wrongfully. In doing so, she arguably runs together issues that are more appropriately addressed within a sequence.

The premise of the three-level framework is that when one engages in certain kinds of actions – prototypically, intentionally injurious actions – one has some explaining to do. Under this framework, an action such as Roger's attack on Rafa might well be deemed legally impermissible. There is, after all, a prohibition on the books against the sort of conduct in which the actor has engaged. It is only in this defensive context – not in the initial articulation of the relevant behavioral norms – that the issue of good and bad intentions is being addressed. The onus is on Roger to justify his presumptively wrongful conduct. Although the law offers a stock of privileges that actors can invoke to do so, when actors invoke them on grounds that don't jibe with the reasons for having these privileges, they are unavailable. Again, in the language of the law, there has been an abuse of privilege. *Prima*

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<sup>22</sup> *Cf.* *Ploof v. Putnam*, 71 A. 188 (Vt. 1908) (the plaintiffs moored their boat at the defendant's private dock to gain shelter from a storm; even though their doing so was a trespass, and even though a landowner enjoys some leeway to use physical force to expel a trespasser who refuses to leave the owner's property, the defendant was liable for exceeding the scope of the privilege by forcibly ejecting the plaintiffs so as to expose them to the storm).

<sup>23</sup> *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971) (property owner subject to punitive damages for using deadly force to fend off the plaintiff-trespasser).

facie wrongful conduct that cannot be justified is simply wrongful conduct.

Of course Kamm does not maintain that the opportunistic manipulation of rules by an individual such as Roger, or the leaders of a nation such as Weden's, is irrelevant to an assessment of their actions. It does not bear on the permissibility of their actions, she maintains, but it does bear on their character. Hence in her view we are entitled to think less of Roger and of Weden's leaders, even though we cannot condemn their actions as wrongful. So what is to be said in favor of our suggestion, derived from the legal examples provided above, that opportunism bears on moral permissibility rather than character?

One advantage is that it allows us to distinguish two hypotheticals that Kamm seems to regard as morally equivalent, but that strike us as calling for different treatment. Sweden, unlike Weden, starts a war against Germany for the purpose of halting genocide. However, it does so only because its leaders know that they will gain access to cheap oil that will help defray the cost of their efforts to stop the genocide. Kamm seems to think that Sweden and Weden are comparable instances of morally permissible conduct.<sup>24</sup> Our judgment is that Sweden's actions are quite different, precisely because Sweden's actions do not involve an abuse of privilege in the senses mentioned above. Sweden is not opportunistically seizing on an excuse to do something that it knows would be wrongful except for the presence of a fortuity that enables it to clothe its wrongful act in the mantle of permissibility. Sweden is sincerely searching for a way to do the right thing.

More generally, we would speculate that the duty / privilege / abuse-of-privilege framework may have certain structural advantages over Kamm's 'flatter' moral framework. Insofar as legal and moral rules governing interpersonal interactions are meant to guide conduct, they probably do better to start with relatively clear and broad directives, then introduce qualifications and exceptions as such. A parent aiming to teach a child about impermissible ways of interacting with others presumably will do better by instructing the child not to hit others, rather than delving into how the existence of reasons that would justify hitting another might in fact justify hitting that other if they figure in certain ways in the child's decision-making. Relatedly, a scheme of conduct-guiding rules probably stands a better chance of succeeding if persons subject to the rules internalize them. If the rules themselves endorse opportunistic forms of compliance such

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<sup>24</sup> Kamm, *Ethics for Enemies*, at 123.

as Roger's or Weden's, they might well inculcate an opportunistic attitude that renders the scheme of rules generally less efficacious.<sup>25</sup>

We readily concede that these last points are speculative. Less speculative is our claim that criminal and tort law pertaining to an individual's infliction of injury on another often adopts a framework in which legal permissibility requires not merely that good reasons for injuring exist, and not merely that those reasons play a causal role in the injurer's decision to inflict injury, but further that the reasons figure in the actor's decision-making in the right way. Insofar as legal rules of this sort are grounded in and attest to common moral sentiments – and admittedly contestable assumption – they probably cut against Kamm's conclusion that Weden-like behavior is morally permissible.

## **2. Intentions and Permissible Use of Force in International Law**

### **2.1 *Just War Theory and the Requirement of Right Intention***

The conditions which make war between polities permissible have been the subject of inquiries dating back to the Bible, the law of Manu, the Hamurabi Code, and Greek and Roman law. Most influential on modern thought has been Catholic Just War Theory (JWT), first developed by St. Augustine in the fifth century as Christianity became the official religion of the Roman Empire, and further expounded by St. Thomas Aquinas in the thirteenth century. The Canonists, Scholastics, and early modern writers (including the Protestants among them) all followed and developed the JWT tradition, and it remained the predominant framework for evaluating the permissible use of force between states (or their political equivalent of the time) until the eighteenth century. The JWT specified the conditions for morally permissible violence between states, and while a theological framework that was originally designed to make war compatible with Christian teachings, its tenets came to be viewed over time as a form of natural law and even positive law – the *jus ad bellum*.

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<sup>25</sup> Kamm allows that a given actor's conduct might be deemed wrongful if his opportunistic behavior demonstrates a propensity to further rule-breaking and hence the possibility of further bad consequences following from the behavior. *Ibid.*, 120. Our point does not concern the assessment of an individual actor's conduct, but rather the viability of a scheme of legal or moral rules, understood as a scheme that aims to guide conduct.



JWT received different articulations by different writers, who often infused the doctrine with their own moral views or political inclinations. However, it is possible to summarize JWT's requirements for permissible wars as follows: A war is morally just if it is 1) initiated by a proper authority (possibly with a public declaration); 2) fought for a just cause; 3) fought with the right intention; 4) has a reasonable prospect of success in achieving the just cause; 5) will do no more harm than is justified under the just cause; and 6) was taken as a last resort.<sup>26</sup>

Views within JWT as to what counts as a just cause for war changed over time, and included causes ranging from defending against aggression, avenging an injury to the sovereign or his nationals, responding to a violation of international law, or collecting a debt. The requirement of right intention, too, received various formulations. Both Augustine and Aquinas equated right intention with Christian love for the enemy, and contemporary Christian writers, such as Paul Ramsey, continue this tradition. For others, right intention need not amount to love, but it does go to the mental state of the aggressor. A nation waging war must do so only for the sake of pursuing the just cause. Having a just cause is not enough if it is pursued for reasons such as cruelty, revenge, humiliation of the enemy, self-aggrandizement, or any other purpose that could not be considered just. The principle of just intention goes to the motivations of those prosecuting the war; and while it may well be that several motivations are at play, the right intention must be dominant if not exclusive.

Clearly, Kamm's Wenden examples would not meet the criteria of traditional JWT. Even granting that prevention of genocide counts as a just cause for war, the predominance of Wenden's self-interested reasons for intervention would violate the requirement of "right intention." This result is hardly surprising, for Kamm is quite self-consciously aiming to depart from JWT by separating moral permissibility from good intentions.

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<sup>26</sup> In some formulations, there is a seventh condition of relative justice, according to which the just cause of one side exceeds any just claim of the other; in yet others, there is a requirement of striving for peace, distinct from the just cause. For more on the traditional JWT, see *Just War Theory* (Jean Bethke Elshtain, ed. 1992); Paul Ramsey, *The Just War: Force and Political Responsibility* (1968); James Turner Jonson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts* (1981), 1200–1740; James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981).

## 2.2 *Use of Force Under International Law*

Starting in the eighteenth century and continuing to the present time, the law of war has been reshaped in a ‘positivistic’ spirit that potentially draws a sharp divide between legality, on the one hand, and morality and justice, on the other. According to the now dominant framework, the legality of the use of military force no longer tracks the requirements of JWT, though some elements of JWT theory arguably still bear on legality. The explanations for this shift are various, but ultimately, wars came to be seen as matters of *realpolitik*: of a self-interested execution of politics through violence rather than actions subject to moral evaluation. Wars of expansion and self-aggrandizement were treated much the same as wars for self-defense. Efforts to regulate the resort to force among states remained sparse and limited. It was only in the 1928 Kellogg-Briand Pact that wars were deemed an unlawful instrument of politics.<sup>27</sup>

With the failure of the Kellogg-Briand Pact and the lessons of the two World Wars, the United Nations Charter sought to once again articulate the conditions for permissible wars among states, to offer a modern *jus ad bellum*. The Charter set out a three-tiered regulation of the use of force: a general prohibition on any threat or use of force against the political independence or territorial integrity of another state (Article 2(4)); conferral on the Security Council, as the guardian of international peace and security, of the power to authorize the use of force, notwithstanding Article 2(4) (Article 42); and an exceptional permission for unilateral action by a state exercising its “inherent right of individual or collective self-defence if an armed attack occurs against a [Member state]” (Article 51).

The exact scope of the general prohibition on the use of force, the reach of the Security Council’s power to authorize the use of force, and the boundaries for a permissible unilateral exercise of self-defense by a state have all been hotly debated by scholars and policymakers ever since the adoption of the UN Charter. What is fairly clear, however, is that the Charter abandons several of the JWT’s requirements for a morally just war.

In fact, the only explicit condition of the JWT criteria that survives in the Charter is a narrow version of the just cause requirement – individual or collective self-defense in the face of an armed attack – and even then, only until the Security Council

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<sup>27</sup> General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

“has taken measures necessary to maintain international peace and security.”<sup>28</sup> Given this narrow statement of a just cause, it is small wonder that even the right to intervene on behalf of persecuted minorities within another state – Kamm’s premise of a just cause in the Weden case – has been hotly contested, with a majority of General Assembly members voting to prohibit such interventions absent a Security Council authorization.<sup>29</sup>

One could argue that certain other features of JWT are given implicit recognition in the Charter. The general prohibition in Article 2(4), combined with the narrow exception in Article 51, can be understood as replicating the requirement that war be a last resort. And the International Court of Justice has stated that the requirement of proportionality is a customary norm that complements the language of Article 51 and remains a condition for any lawful war.<sup>30</sup> The condition that the war be waged under the proper authority of a leader perhaps can be implied through its reference to sovereign state action.

Clearly, however, the conditions of right intention and the probability of success have been abandoned under the Charter’s formulation of *jus ad bellum*. With regard to the latter, the right to self-defense under the Charter is seen as inherent to any state, and Article 51 suggests that a country facing aggression is permitted to use force even if it stands no chance of repelling the attack.<sup>31</sup> As far as right intention goes, the Charter is conspicuously silent on the intention of the state acting in self-defense or in the defense of others, and we are unaware of any case law that has added it to the language of Article 51 as a customary requirement. Even with regard to the general prohibition, stated in Article 2(4), which prohibits the threat or use of force “against the territorial integrity or political independence” of another state, most commentators agree that there does not need to be a specific intention to harm the territorial integrity or political independence of the target state, and that the prohibition encompasses any and all armed attacks on another state, whatever their motivation.<sup>32</sup> Similarly, the

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<sup>28</sup> U.N. Charter, Article 51.

<sup>29</sup> General Assembly Resolution on the Responsibility to Protect.

<sup>30</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J., para. 176. (June 27).

<sup>31</sup> On the moral justification for war in self-defense by weak states, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1991) [1977].

<sup>32</sup> These terms then are meant only for emphasis, with the latter part of the Article – “or in any other manner inconsistent with the

United Nations General Assembly's definition of "aggression" does not include any element of intention and focuses only on the purely objective question of whether a state is in fact under attack or threat of attack.<sup>33</sup> To the extent intentions matter at all, they are useful only as a means to ascertain the existence of a just cause (for example, in evaluating the American invasion of Iraq in 2003), or otherwise to ensure that a war was in fact necessary or proportionate, not as an independent legal condition.<sup>34</sup>

In sum, even though Weden's actions would be unjustified under JWT, they may be permissible under current international law. Indeed, if Weden's war on Germany were held to be illegal under international law, it would be because the legality of unilateral humanitarian interventions is in doubt, not because of Weden's ulterior motives in intervening.

### **2.3 Humanitarian Interventions**

Humanitarian interventions have long been discussed in legal, moral, and political theory, but came to the fore with the 1999 NATO Operation Allied Hope for Kosovo. Not having been authorized by the Security Council, the NATO operation sparked a heated debate over the right to intervene on behalf of an oppressed population. The legal challenge resided in the language of the Charter, which suggests that, unless a state is itself attacked or is coming to the aid of another state that is attacked, any lawful use of force must be authorized by the Security Council. Those advocating a right to intervene argued for a purposive reading of the Charter, by which "collective self-defense" should be understood not only to encompass aiding in the defense of another member state but also aiding a persecuted population within another state.

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Purposes of the United Nations" – controlling. See Yoram Dinstein, *War, Aggression, and Self-Defence* 87 (4th ed., 2005).

<sup>33</sup> See G.A. Res. 3314 (XXIX), 29th Sess., Art. 3, (Dec. 14, 1974).

<sup>34</sup> In the application brought by Nicaragua against American armed intervention in its territory, the ICJ sought to ascertain the intentions of the United States in its support for the Contras for the purposes of establishing whether there was in fact an armed intervention by the U.S. in Nicaragua's internal affairs and whether such intervention could have been justified under the cause of self-defense; see *Nicar. v. U.S.*, *supra* note 30, para. 241. It is also possible that intentions play a role in determining the permissible employment of armed reprisals. Because the legality of armed reprisals is subject to much controversy, we bracket this issue.

In response to the UN Secretary General's challenge, the Canadian government sponsored an expert study which yielded the 2001 Report of the International Commission on Intervention and State Sovereignty. The Report found that the Kosovo operation was "illegal but legitimate" and sought to lay out the conditions for future humanitarian interventions, or in its new language, the exercise of the "Responsibility to Protect."<sup>35</sup> Giving clear priority to interventions under the umbrella of the Security Council, the Report nonetheless left the door open to other interventions (preferably, multilateral) in cases in which the Security Council failed to act, provided such interventions meet a number of conditions. Among them, the Report listed "right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering."<sup>36</sup> The Report later explained that obviously, there may well be more than one intention at play, and then added:

Moreover, the budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive might actually be. Apart from economic or strategic interests, that self-interest could, for example, take the understandable form of a concern to avoid refugee outflows, or a haven for drug producers or terrorists, developing in one's neighbourhood.<sup>37</sup>

Note that under this formulation, the act of war in Kamm's Weden case would still be legally impermissible, whereas the act of war in Sweden's case would pass muster.

For all its good intentions, the International Commission's Report was subsequently rejected by the UN General Assembly. In its 2005 World Summit Outcome Resolution, the General Assembly considered the Responsibility to Protect as a justification for armed intervention, and held that any external intervention must be subject to a Security Council's

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<sup>35</sup> *International Commission on Intervention and State Sovereignty, The Responsibility to Protect* (2001), XII, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>36</sup> *Ibid.*, 35.

<sup>37</sup> *Ibid.*, 36.

authorization.<sup>38</sup> The category of “illegal but legitimate” was thus rejected by the Member States in favor of the strict regime for the use of force as set out by the Charter.

We see therefore that a war, such as a humanitarian intervention, which is genuinely pursued for the sake of the persecuted population, may be just under the traditional JWT, but illegal under international law. There may also be cases in which a lawful war would be deemed unjust under the JWT, such as when a state exploits an armed attack by the adversary to fulfill ambitions other than its most immediate security interests.

What is important in the present context is that if the humanitarian plight of an oppressed population is considered a just cause for the unilateral use of force (Kamm’s Weden case), the Charter – unlike the International Commission’s Report – would not require that the motivations of the intervening state be pure. In this sense, the Charter and Kamm are perfectly aligned in their departure from the JWT and the requirement of right intention.

#### **2.4 *The Law and Morality of War***

Why is it the case that the modern *jus ad bellum* has abandoned the requirement of right intention? What might explain a possible discrepancy between the law and ethics of war?

One possible reason for relying on a relatively objective just-cause criterion – the existence of an attack – rather than on the intentions of those using force, lies in the difficulty of ascertaining intentions. States do not act; individuals do, and their intentions are frequently difficult to gauge. Even for an individual actor, multiple intentions may be at work. With respect to political decisions to use military force, a complex of intentions held by multiple persons in positions of power will have to be assessed. And matters only get more complicated when the use of force is carried out not by one state alone, but by a coalition of states, such as in the case of the 2003 invasion of Iraq. Evidentiary explanations of this sort appear regularly in the literature discussing modern international law’s jettisoning of the requirement of right intention under JWT.<sup>39</sup>

While there is surely something to the evidentiary explanation, we do not believe it is the entire story. As others have

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<sup>38</sup> 2005 World Summit Outcome, GA Res. 60/1 ¶¶ 138–139. (Oct. 24, 2005).

<sup>39</sup> See the entry “war” in the Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/war/#2> (“International law does not include [the rule of right intention], probably because of the evidentiary difficulties involved in determining a state’s intent.”)

observed, “[i]ntentions are neither infinitely redescribable nor irreducibly private.”<sup>40</sup> They can and ought to be deduced from a careful examination of publicly available information and logical inference. Indeed, in numerous other instances international law does concern itself with states’ intentions (for instance, in determining responsibility for international wrongful acts). In short, the evidentiary problem is a challenge, but not an insurmountable one.

A more convincing explanation, we believe, is the modern *jus ad bellum*’s preference for peace over justice, i.e., for the overall stability of the international system over change that justice may demand.<sup>41</sup> The UN Charter’s preference for peace and stability is evident from the significant constriction of what amounts to a just cause for war (absent Security Council Authorization), from the absolute protection given to existing international boundaries, and from the Charter’s Preamble that states as its purpose “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>42</sup> To fulfill the mission of international peace, so the drafters of the Charter believed, some sacrifice of justice is inevitable, including authorization of use of force for any purpose other than fending off aggression, regardless of the good intentions behind it.

By the same token, the inherent right to self-defense was elevated to a paramount state interest. If stability on the international system is to be maintained, absent a central adjudicating or enforcing power, state sovereignty must be ensured through some measure of self-help. Just as there is no requirement that the defense against aggression stands a reasonable prospect of success, so too the defending state need not justify its actions by reference to its reasons for acting; it is enough that it is defending itself against an attacker. The *jus ad bellum* thus creates something akin to a strict liability regime, where only the acts of the attacker and defender count, not their intentions. In so doing, it seeks to reduce the incentives for any first attack, allowing the target state to exploit the opportunity and engage in a counteroffensive for whatever reasons it wishes to.

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<sup>40</sup> Brian Orend, *Michael Walzer on Resorting to Force*, 3 *Canadian J. Pol. Sci.* 523, 532 (2000).

<sup>41</sup> On the UN Charter’s preference for peace over justice, see Gabriella Blum, *States’ Crime and Punishment*, 38 *Yale. J. Int’l L.* 57, 62–92 (2013).

<sup>42</sup> *UN Charter*, Preamble.

Ignoring intentions for the sake of peace and stability may or may not be a legitimate tradeoff and may or may not promote peace in practice. We do not engage these questions here. The important point is that, unlike the JWT, the Charter never set out to offer a moral prescription for war, only a legal consequentialist framework for the goal of peace. The fact that the Weden case might be considered lawful under the Charter (if the plight of oppressed populations was considered an “armed attack”) tells us little about the justness of the war. And Kamm, after all, is interested in justice, not peace.

In sum, the modern law of war presents something of a paradox. A well-intentioned humanitarian war might well be illegal, whereas an ill-intentioned war will be legal so long as the objective conditions for a just war (i.e., an attack or perhaps even a threat of attack<sup>43</sup>) are present. One might suppose this paradox cuts in favor of Kamm’s analysis of the moral permissibility of war, given that modern law seems prepared to deem permissible some wars born of bad intentions. But the inference is unwarranted, for two reasons. First, and more narrowly, the terms of legal permissibility likely do not track Kamm’s account of moral permissibility. As just noted, the compelling humanitarian reason for intervention in which Weden’s leaders clothe their self-interested attack would not actually suffice to render it legally permissible. Second, and more generally, international law’s focus on criteria other than states’ intentions – particularly when considered in light of its self-conscious refusal to incorporate the principles of JWT – suggests that it prioritizes the maintenance of peace and stability over the determination of right and wrong. This brings us back to a point raised earlier, in our discussion of individuals’ use of force. Sometimes the law deems actions permissible on institutional and pragmatic grounds. That it might for these sorts of reasons permit persons and nations to engage in ill-intentioned uses of force does not give rise to an inference as to the moral permissibility of those uses. Indeed, because the law in these instances is regulating conduct on terms that indicate it will tolerate immoral conduct for the sake of advancing other goals, legal permissibility might even point toward moral impermissibility.

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<sup>43</sup> The legality of preemptive use of force in the face of an imminent attack is subject to at least as much debate as the legality of humanitarian interventions, and turns on many of the same considerations, including the language of the Charter and the goals of peace and stability of the international system.