

# THE ORIGIN IN INTERNATIONAL LAW OF THE INHERENT RIGHT OF SELF-DEFENCE AND ANTICIPATORY SELF-DEFENCE

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## Abstract

This article draws on the work of early legal scholars to identify the origin of the inherent right of self-defence and anticipatory self-defence in international law. The purpose of this examination is to identify how some contemporary scholars have misconceived the origin of anticipatory self-defence and, as a consequence, have confused whether anticipatory self-defence coexists with the *Charter of the United Nations 1945*.

## I THE ISSUE

The inherent right of self-defence and anticipatory self-defence are well-known features of international law, but what are their origins? Are they products of a formal source of international law, or are they intrinsic to the state? Are they different, or are they one and the same?

Article 51 of the *Charter of the United Nations 1945*<sup>1</sup> recognises the ‘inherent right of self-defence’ and preserved this right against impairment

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by anything in the treaty. The *Charter* was the first multilateral treaty to expressly recognise and preserve this right since the inception of international law.

However, this reference to the inherent right of self-defence was almost not made. The *travaux preparatoires* to Article 51 evince the debate among states as to whether such reference was necessary in order for the right to coexist with the treaty.<sup>2</sup> This was because the right was considered intrinsic and inviolable to all states.<sup>3</sup>

An identical debate occurred during negotiations for the *General Treaty for the Renunciation of War 1928*<sup>4</sup> which prohibited the use of war between states for any purpose other than self-defence. States did not consider it necessary to make express reference to the inherent right of self-defence in order to exempt it from the treaty's general prohibition of war. Further, Secretary Kellogg and the British Government referred to the right as being 'inherent' to every state and that the right was also 'implicit' in all treaties.<sup>5</sup>

The Secretary said:

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<sup>1</sup> *Charter of the United Nations 1945*, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945).

<sup>2</sup> *United Nations Conference on International Organisation, San Francisco 1945*, Committee III/4 23 May mtg 4 xxii and Committee III 13 June mtg 2 xxi. See also Institut de Droit International, *Present Problems of the Use of Force in International Law*, Rapporteur Emmanuel Roucouas, (2008) Session de Santiago, 67-165, 72 [2].

<sup>3</sup> *United Nations Conference on International Organisation, San Francisco 1945*, Amendments to Dumbarton Oaks Proposals, i 661, 693; iii 635 and vi 717, 720.

<sup>4</sup> *1928 General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 28 August 1928, 94 LNTS (1929) 57 (entered into force 24 July 1929).

<sup>5</sup> William E Borah, *Hearing before the Committee on Foreign Relations on the General Pact for the Renunciation of War, Signed at Paris 27 August 1928*, United States Senate, Seventeenth Congress, Second Session, Part 1, 7 and 11 December 1928, 1-12. The United States Senate Committee at the completion of its hearings described the immutability of the inherent right in similar terms; see *Report of the U.S. Senate*

It seemed to me incomprehensible that anybody could say that any nation would sign a treaty which could be construed as taking away the right of self-defence if a country was attacked. This is an inherent right of every sovereign, as it is of every individual, and it is implicit in every treaty. Nobody would construe the treaty as prohibiting self-defence. Therefore, I said it was not necessary to make any definition of “aggressor” or “self-defence”. I do not think it can be done, anyway, accurately. They have been trying to do it in Europe for six or eight years, and they never have been able to accurately define “aggressor” or “self-defence.”<sup>6</sup>

While the inherent right of self-defence was debated in the negotiations for each treaty, anticipatory self-defence was not. In fact, the term ‘anticipatory self-defence’<sup>7</sup> had not manifested in international law since its inception around the 15<sup>th</sup> century. Instead, the term has relatively recently been used by some scholars and states to describe a wide spectrum of allegedly defensive action, ranging from using force against an imminent threat of unlawful force to using force against a potential foe which may, at some time in the future, acquire the means of posing an imminent threat of force.<sup>8</sup>

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*Committee on Foreign Relations*, Congressional Record, vol 70, No 29, (1928) 1783-178 and Austen Chamberlain, *Further Correspondence with the Government of the United States Respecting the United States Proposal for the Renunciation of War*, Cmd. 3153 [in continuation of Cmd. 3109], London, 23 June 1928, 1 [3].

<sup>6</sup> Borah, above n 6, 2. At 15, the Secretary said he believed that the *General Treaty* would not have been negotiated between any states if defining ‘aggression’ or ‘self-defence’ had been attempted.

<sup>7</sup> That is, the legal authority in international law for a state to use armed force in self-defence before being physically attacked with armed force.

<sup>8</sup> For example, Matthew Waxman, ‘The use of force against states that *might* have weapons of mass destruction’ (2009) 1 *Michigan Journal of International Law*, 1-77, 3 and 26-30 and George W Bush Jnr, President of the United States of America, *The National Security Strategy of the United States of America* (2002) White House

While most scholars in the existing debate identify state sovereignty as the origin of the inherent right of self-defence,<sup>9</sup> there has been a near absence of a scholarly examination of the origin of anticipatory self-defence. Many contemporary scholars do not explain how anticipatory self-defence manifests, but rather simply describe it as ‘a right’ in international law.<sup>10</sup>

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Documents <<http://www.whitehouse.gov/nsc/nss.pdf> at 20 January 2004> at 16 July 2004.

<sup>9</sup> For example, Hersch Lauterpacht, *Oppenheim's International Law* (7<sup>th</sup> ed, 1952) vol 2, 153-155, 159 and 190-189 and 248; Henry Keith, *Wheaton's International Law* (6<sup>th</sup> ed, 1929) vol 1, 149-154; Charles Fenwick, *International Law* (2<sup>nd</sup> ed, 1934) 49, 52, 55-61, 146, 176, and 228-250; Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, 2003) 5-6, 8-13, 24, 41-42 and 47-48; Daniel O'Connell, *International Law* (2<sup>nd</sup> ed, 1970) vol 1, 315-317; Christine Gray, ‘The Use of Force and International Legal Order’ in Malcom D Evans (ed), *International Law* (2<sup>nd</sup> ed, 2006) 98-99, 589 and 598; Arend and Beck, *International Law & The Use of Force* (1993) 18 and 72; Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2<sup>nd</sup> revised ed, 1949) 106-107, 299; Stanimir Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996) 19-27; Ernst Puttkamer, ‘Versailles Peace Treaty (1919)’ (1982) 4 *Encyclopedia of International Law*, 276-282; Jonathon Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529, 532 and McCormack, ‘The Use of Force’ in Blay, Piotrowicz and Tsamenyi (eds), above n 6, 225; Timothy L H McCormack, ‘Anticipatory Self-Defence in the Legislative History of the United Nations’ (1991) 25 *Israel Law Review* 262-276; Thomas M. Franck, *Recourse to Force – State Action Against Threats and Armed Attacks* (6<sup>th</sup> ed, 2005); 3, 48-51 and Myra Williamson, *Terrorism, War and International Law* (2009) 82-97.

<sup>10</sup> For example, Philip Jessup, *A Modern Law of Nations* (1948); Derek W Bowett, *Self-Defence in International Law* (1958) 33; Wolfgang Friedmann, *The Changing Structure of International Law* (1964) 260; Fredrick Northedge, *The Use of Force in International Relations* (1974) 201; McCormack, above n 10, 35-40; Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (1992) 92; Alexandrov, above n 10, 149; Malcom Shaw, *International Law* (4<sup>th</sup> ed, 1997) 789-790; Edward McWhinney, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law* (2004) 34-6 and 52-53; Gray, *International Law and the Use of Force* (2<sup>nd</sup> ed, 2004) 130; Yoram Dinstein, *War, Aggression and Self-Defence* (4<sup>th</sup> ed, 2005) 182-187; Antonio Cassese, *International Law* (2<sup>nd</sup> ed, 2005) 357-363; Rebecca Wallace, *International Law* (5<sup>th</sup> ed, 2005) 284; Franck, above n 10, 97-108; Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2<sup>nd</sup> ed, 2005) 230; Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005) 96; Stephen Hall, *International Law* (2<sup>nd</sup> ed, 2006) 308 [9.28]; Gillian

This implies that anticipatory self-defence is a legal right separate to the inherent right of self-defence. Some suggest that anticipatory self-defence is a legal right which originated in international customary law.<sup>11</sup>

So, to begin with, what did early legal scholars write about the origin of the inherent right of self-defence?

## II THE INHERENT RIGHT OF SELF-DEFENCE

Early legal scholars<sup>12</sup> assist us to understand the origin of the inherent right of self-defence. They wrote at a time when international law, known then as the ‘Law of Nations’, was developing closely behind the evolution of the sovereign state. Prior to the formation of the sovereign state, sovereignty was vested in a single person, often a Prince or a Monarch. The scholars write that a fundamental aspect of the sovereign power of a Prince was his right to use war for the settlement of legal disputes with, and self-defence against, peoples outside his sovereignty. In time, this right was then assumed by the sovereign state as it emerged on the international plane as the principal entity of the developing Law of Nations.

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Triggs, *International Law: Contemporary Principles and Practices* (2006) 577 [10.16] and 578 [10.16]; Michael W Doyle, *Striking First: Preemption and Prevention in International Conflict* (2008) 11-15 and Waxman, above n 9 6-7.

<sup>11</sup> For example, Ian Brownlie, *International Law and the Use of Force between States* (1963) 42, 257-261, 366-368 and 429.

<sup>12</sup> For example, Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III* (1582); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625); Alberico Gentili, *Hispanicae Advocatiois Libri Duo* (1661); Francesco de Vitoria, *De Indis et de Ivre Belli Relectiones* (1696); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688); Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) and Christian Wolff, *Jus Gentium Methodo Scientifica Perfractatum* (1764).

The scholars described the sovereign right to use war by drawing on the laws and practices of powerful city states such as Athens and Rome, of contemporary European powers and religious and natural law.<sup>13</sup> ‘War’ to Grotius was ‘the condition of those contending by force’.<sup>14</sup> Pufendorf described war as ‘the state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them.’<sup>15</sup> Wolff described ‘war’ as the preparation for, or the use of, force by way of arms against an enemy<sup>16</sup> and de Vattel described ‘war’ as ‘that state in which we prosecute our rights by force’.<sup>17</sup> The essence of the meaning of war did not alter in the centuries immediately after the early scholars.<sup>18</sup>

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<sup>13</sup> ‘Natural Law’ theory is concerned with man’s obligations as a citizen, ethics and the bounds of lawful government action and evaluates the content of laws against moral principles. For contemporary views of the early scholars work in respect of this theory, see for example Ralph McInerny, ‘Thomistic Natural Law and Aristotelian Philosophy’ in John Goyette, Mark Latkovic and Richard Myers (eds) *St Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004) 25; Marett Leiboff and Mark Thomas, *Legal Theories in Principle* (2004) 54; Brian Bix, ‘Natural Law: The Modern Tradition’ in Jules Coleman and Schott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 61-66; David Lyons, ‘Moral Aspects of Legal Theory’ in Kenneth Himma and Brian Bix (eds) *Law and Morality* (2005) 109-114 and Vilho Harle, *Ideas of Social Order in the Ancient World* (1998) 99.

<sup>14</sup> Grotius, above n 12, 91-137. His definition purposefully excluded ‘justice’ because the investigation of what can be considered a ‘just’ war was the object of his work; 34. Lassa Oppenheim, *Oppenheim’s International Law* (9<sup>th</sup> ed, 1992) vol 1, 1 accepted Grotius’ definition of ‘war’. He wrote, in respect of the importance of recognising that it is governments that go to war for the purpose of the laws of war, that ‘the laws of war belong equally to insurgents not yet recognised as a state but recognised as having belligerent rights, which they would not be if they did not possess a government.’

<sup>15</sup> Pufendorf, above n 12, 9 [8].

<sup>16</sup> Wolff, above n 12, 405 [784]-[785].

<sup>17</sup> Vattel, above n 12, 235 [1]. He made the distinction between ‘public war’ ‘which takes place between Nations or sovereigns, which is carried on in the name of the public authority and by its order’ and ‘private war’ which takes place between individuals’; 235 [2]-[3].

<sup>18</sup> For instance, John Westlake, *International Law* (1913) Part II, War, 1 who described war as ‘the state or condition of government contending by force’.

The opinions of the scholars about war were also derived from, and in turn reflected, certain fundamental human instincts and behaviours. This influence is perhaps explained by the fact that sovereign power had been vested in and exercised by a Prince, thereby favouring a greater connection between sovereign power and human conduct. Thus, to explain his view that the right of a state to use war was derived from its sovereignty, Ayala described this right as an extension of man's natural right to use war to revenge wrongs committed against him personally, to settle disputes and to defend himself.<sup>19</sup> Grotius wrote:

Meanwhile we shall hold to this principle, that by nature every one is the defender of his own rights; that is the reason why hands were given to us.<sup>20</sup>

Vattel also held this view and added that if the sovereign was unable to protect its citizens from another's war, the right may properly be exercised by the individual against the invader.<sup>21</sup> Wolff considered a sovereign state's natural right to remain uninjured by another as identical as that right possessed by man and the right of each to defend itself from such injury was the same.<sup>22</sup>

The scholars viewed the sovereign right to use war as a necessary aspect of a state's collective organisation. Pufendorf considered man's natural law was 'deducible from the requirements of human nature' and therefore the

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<sup>19</sup> Ayala, above n 12, vol II, 9-10, 18.

<sup>20</sup> Grotius, above n 12, 92, 102-137 and 164.

<sup>21</sup> Vattel, above n 12, 13-14, 235-236 [4]-[5] 235 [1].

<sup>22</sup> Wolff, above n 12, 9 [3], 20 [28], 28-29 [43], 129-130 [252]-[254], 139 [273], 313 [613] and 314 [615]. This is because he regarded a sovereign state, as regards to another, as a free person living in a state of nature; 9 [2].

‘law of nature and the law of nations are one and the same thing’.<sup>23</sup> Wolff expressed the same view, however, he made a distinction between the fundamental principles of natural law, which apply equally to men and states, and their application to each object.

Underlying the scholars’ views is that they considered the formation of an international society as a natural continuum of man’s development of municipal law.<sup>24</sup> Their work and the work of others who followed considered that a new sovereign state,<sup>25</sup> upon its inception, innately possessed the sovereign right to use war.<sup>26</sup> In expressing this view, scholars did not simply analogise the sovereign right with man’s natural right to use war. Rather, they suggested that the sovereign right was a manifestation of man’s natural right. Wolff did so succinctly:

But the right of a nation [to use war] is only the right of private individuals taken collectively, when we are talking of a right existing by nature. Of

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<sup>23</sup> Pufendorf, above n 12, Book II, 226 [156]; Book VII, 1118-1119 [3]-[4] and Book VIII, 1301 [885] and 1305 [889].

<sup>24</sup> Especially Wolff, above n 12, for instance, 28-30 [43]-[44] and 145 [285]. See Westlake, above n 18, 11-13.

<sup>25</sup> Grotius, above n 12, 14-15, 44, 102-103. Pufendorf, above n 12, 984 described a sovereign state as a ‘compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.’ Wolff, above n 12, 5, 9[2] believed that a nation arose as a matter of the law of nature and regarded it as an individual free person living in a state of nature and was constituted by its individual citizens who united to form it. He described a nation succinctly at 91 [174] as ‘a number of men associated in a state.’ Sovereignty was exercised by the ruler of the state over all its land, but the principle of sovereignty was different to the principle of public or private ownership of parts of the land; 60 [102].

<sup>26</sup> For example, Pufendorf, above n 12, Book VII, 1013 [5], 1055-1063 [722]-[727] and Book VIII, 1148 [784]; Wolff, above n 12, 11-13 [7]-[9] and 20-24 [28]-[34] and Vattel, above n 12, 235 [4]. For the views of subsequent scholars who shortly followed, see, for instance, Westlake, above n 18, 111-121; William E. Hall, *International Law* (8<sup>th</sup> ed, 1907) 82 and Lauterpacht, above n 9, vol 1 [119].



course such a right belongs to a nation only because nature has given such a right to the individuals who constitute the nation.<sup>27</sup>

That early scholars believed the origin of a state's right to use war was sovereignty leads to the conclusion that this right pre-existed the Law of Nations. This is because the sovereign state must have first existed in order to create this body of law. The relevance of this conclusion is that the sovereign right to use war was not 'created' by any formal source of the Law of Nations (being primarily in this early era international customary law and treaty). Instead, the right was incorporated into the Law of Nations through recognition. The effect of this incorporation is discussed later.

Early scholars also categorised war as either offensive or defensive in nature. Vitoria described this division as forming the two dimensions of war within the Law of Nations. He believed war to be lawful under natural law and written law.<sup>28</sup> In his view, the right to use war offensively, or defensively, was equal. Offensive war included the avenging of a wrong done to the state by another and taking punitive action so that future wrongs would be discouraged.<sup>29</sup> Defensive war was for the protection of the sovereign state against armed force and was equally justified for an individual as it was for the state.<sup>30</sup>

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<sup>27</sup> Wolff, above note 12, 315 [617].

<sup>28</sup> Vitoria, above n 12, 164, point 31 and 166-167.

<sup>29</sup> Ibid 167.

<sup>30</sup> Ibid 167-168. The defence of property, Vitoria believed, required a person being attacked to flee if circumstances permitted. If circumstances did not so permit, force in defence of property was permitted. However, if defence was made for self in fear of physical harm, no obligation rested on the person attacked to flee. He may use force without considering alternative action.

In Vitoria's view, the only distinction in the scope of authority between an individual and a state in defensive war came immediately after an attack; it was only a state which could avenge force, or a wrong committed against it, if the immediacy of the situation passed.<sup>31</sup> His concept of defensive war was broad and not limited to reacting to the threat or use of external armed force, but of also retrieving dispossessed property of the sovereign state.<sup>32</sup>

Ayala made an identical division of the legal concept of war. He wrote that offensive war could only be declared by the sovereign power of the state (except in limited circumstances such as pressing necessity, or in the absence of the Prince) and that defensive war was 'open to any one by the law of nature'.<sup>33</sup> He saw the sovereign right of a state to use war defensively as having been derived from the right of self-defence provided to man by nature and that both rights could be exercised to ward off an attack to the extent the threat no longer existed.<sup>34</sup>

Pufendorf also considered the just causes of war to be naturally divided into offensive and defensive categories. He described offensive war to be 'those by which we extort debts which are denied us, or undertake guarantees for the future' and defensive war as 'those in which we defend and strive to retain what is ours'.<sup>35</sup> Wolff considered the ability of a sovereign state to defend itself from armed force was ultimately the factor which measured its power and ability to survive within the developing

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<sup>31</sup> Ibid 168.

<sup>32</sup> Ibid 169-170.

<sup>33</sup> Ayala, above n 12, vol II, 8-9, 11.

<sup>34</sup> Ibid 9-10, 18.

<sup>35</sup> Pufendorf, above n 12, Book VIII 1294 [881] and 1298 [884].

system of the Law of Nations.<sup>36</sup> He expressed his division of war in the following way:

A defensive war is defined as one in which any one defends himself against another who brings war against him. But that is called an offensive war which is brought against another who was not thinking of bringing a war, or when any one assails another with arms.<sup>37</sup>

Vattel attributed offensive war to that state which first took up arms and described the legitimate purpose of offensive war generally as for the enforcement or protection of certain rights. He described defensive war as an exercise of the 'right of self-defence against an offensive war, whether the latter was justified, or not.'<sup>38</sup>

The legal bases used by the scholars to categorise war as either offensive, or defensive, were intrinsic to the theory of 'just war'. This categorisation is important because the scholars appear to have used the various manifestations of 'law' as they applied to individuals at that time – that is, 'natural', 'moral', 'written' and 'Gospel' law – to form the basis for the same categorisation in the Law of Nations. In this way, 'law' defined the legal characteristics of offensive and defensive war in the Law of Nations. War, in order to be justified by this law, was in turn required to be motivated by the enforcement, or protection, of legal rights possessed by the sovereign state.

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<sup>36</sup> Wolff, above n 12, 9-10 [3]-[4], 20 [28], 26 [38], 41-42 [69], 129 [252] and 313 [613]. See also Westlake, above n 18, 55-64.

<sup>37</sup> Wolff, above n 12, 314 [615].

<sup>38</sup> Vattel, above n 12, 235 [3]-[5].

Thus, it seems evident from the work of early scholars that the sovereign right to use war defensively manifested a state's sovereignty and therefore pre-existed the Law of Nations. It will be seen below that the sovereign right became part of this developing body of law through the process of recognition and incorporation. The recognition of this right was made through the creation of the principles of immediacy and necessity which functioned to restrict when and why the right could lawfully be exercised.<sup>39</sup> It can therefore be assumed, in the absence of a treaty or other substantive law intervention, that the legal right of self-defence subsequently discussed in the negotiations for the *General Treaty* in 1928 and expressly recognised by Article 51 of the *Charter* in 1945 as the 'inherent right of self-defence' was the same legal right recognised by and incorporated into the Law of Nations centuries before.

If sovereignty was the origin of a state's right of self-defence, what was the origin of anticipatory self-defence?

### III ANTICIPATORY SELF-DEFENCE

The work of early scholars also assists us to identify the origin of anticipatory self-defence. However, this assistance arises indirectly in those works, as the term 'anticipatory self-defence' was not one used by them to describe the legal authority of a state to use armed force to repel a threat of armed force. The answer to this question instead lies in how the legal

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<sup>39</sup> These principles were recognised as international customary law principles in *Caroline* [1837] 30 B.F.S.P. 195, but the early scholars establish that they functioned in the Law of Nations long before that case.

scope<sup>40</sup> of the sovereign right to use war defensively was naturally formed by the substantive principles of the Law of Nations which restricted when and why the right was exercised.

Early scholars considered an exercise of the sovereign right to use war defensively against a threat or use of armed force as the purest form of self-defence under the Law of Nations. Grotius examined the justness of exercising this right against the threat of injury to a state by drawing legal principles from the right of self-defence derived by individuals from natural law. The two underlying principles evident in his logic were the immediacy of the threat of armed force and the necessity to repel that force with defensive force *before* the self-defending state was physically attacked:

The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.<sup>41</sup>

Grotius emphasised the importance of the imminence of a threat of armed force in this regard:

Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambush, or that

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<sup>40</sup> By 'legal scope', I mean the range of conduct against which the sovereign right was lawfully exercised within the law.

<sup>41</sup> Grotius, above n 12, Book II, 173-175 and 549.

he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any way be avoided, or if it is not altogether certain that the danger cannot otherwise be avoided.<sup>42</sup>

Grotius again:

Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger... But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.<sup>43</sup>

When Grotius' definition of war is recalled, it is evident from his concept of self-defence that if an individual or state was taken by surprise by the actual use of armed force, the ensuing hostilities were better described as 'war'. Thus, it might be concluded that self-defence under the Law of Nations was effected when the sovereign right to use war defensively was exercised against an imminent threat of armed force. This conclusion is supported by the work of other scholars.

Pufendorf<sup>44</sup> saw the occasion for exercising the sovereign right to use war defensively as arising before an actual injury was sustained by a self-defending state.<sup>45</sup> To Pufendorf, the very purpose of defensive war on the

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<sup>42</sup> Ibid Book I, 49, Book II 174-175 and 575.

<sup>43</sup> Ibid Book II, 184. See Westlake, above n 18, Part II, War, 19-25.

<sup>44</sup> Pufendorf, above n 12, Book II 264-294 [182]-[202].

<sup>45</sup> Ibid 275 [184] where he wrote, 'For self-defence does not require one to receive the first blow or only to elude or ward off the blows which are aimed.' However, he did believe that avoidance of impending force was preferable if it could be achieved, or

part of a sovereign state was to avoid such injury, just as it was for individuals under the law of nature.<sup>46</sup> He thought that defending one's self before suffering injury was a matter of reason<sup>47</sup> and that the natural instinct of a sovereign state to do so was because it was the natural instinct of man to do so.<sup>48</sup> If it was otherwise, it would mark the 'end of mankind':<sup>49</sup>

And so when a man, contrary to the laws of peace, undertakes against me such things as tend to my destruction, it would be a most impudent thing for him to demand of me that I should thereupon hold his person inviolate, that is, that I should sacrifice my own safety so that his villainy may have free play.<sup>50</sup>

Pufendorf thought the earliest point at which the sovereign right to use war defensively arose was when the threat had evolved to a point where injury could immediately be occasioned by the self-defending state if the aggressor decided to act:

The beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the

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even to endure a slight injury if doing so did not cause much detriment to the state; 267-269 [184]-[185]. The overriding motivation for exercising the right was to achieve effective defence, not revenge; 270 [186].

<sup>46</sup> Ibid 264 [182] where he wrote that the law of nature permits violence in self-defence in order to preserve safety.

<sup>47</sup> Ibid 283 [195] and Book VIII 1292 [880]. At Book II 585 and Book III 1314 [895], Pufendorf agreed with Grotius on the bases for defensive war enabling sovereignty to be gained over an aggressor's territory.

<sup>48</sup> Ibid Book VIII 1292-1294 [880]-[881]. The distinction between the legal right of self-defence in both jurisdictions and the substantive rules which regulated in each jurisdiction are consistently maintained by all the early scholars.

<sup>49</sup> Ibid Book II 265 [183].

<sup>50</sup> Ibid 265 [182]. See also 272-274 [188]-[189].

space being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.<sup>51</sup>

The reasoning used by Pufendorf demonstrates that the nature of the weapon possessed by the aggressor was a factor in determining when the principle of immediacy was fulfilled. This is because the range and power of the weapon were pivotal to a self-defending state's determination of when it was likely to suffer injury if those weapons were actually used.<sup>52</sup> He considered the right to use war defensively against a threat of armed force to be absolute and the exercise of this right was not determined by the nature of the threat having gained a certain degree of seriousness (in contrast to the imminence of the threat):

And this holds good not merely if an enemy has undertaken to use every extremity against me, but also if he simply wishes to injure me within certain limits, for he has no greater right to do me a slight injury than a severe one.<sup>53</sup>

Thus, in Pufendorf's opinion, the sovereign right to use war defensively against a threat of armed force permitted the self-defending state to cross the border with the threatening state and repel or destroy the threat as far as it manifested.<sup>54</sup> This right applied equally to the defence of allies, but only when they requested, so that 'the defensive war is in their name, not ours.'<sup>55</sup> Of such paramount importance was the sovereign right that it was

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid 276-277 [190]-[191].

<sup>53</sup> Ibid Book II 269 [185], Book III 1298 [884] and 1302 [885].

<sup>54</sup> Ibid Book II 270-271 [186], 356 [242], Book III 1294 [881] and 1296 [881].

<sup>55</sup> Ibid Book III 1305-1306 [889].



considered just even if exercised genuinely, but mistakenly, against another.<sup>56</sup>

Wolff also considered that the sovereign right to use war defensively functioned against a threat of armed force.<sup>57</sup> In his view, the likelihood of such a threat evolving into actual force was sufficient to trigger its exercise.<sup>58</sup> Vattel defined the legal scope of the sovereign right in the following manner:

We may say, therefore, in general, that the foundation or the cause of every just war is an injury, either already received or threatened. The justifying grounds of war show that a State has received an injury, or that it sees itself seriously enough threatened to authorize it to ward off the injury by force.<sup>59</sup>

Vattel illustrated the fundamental importance to self-defence of acting against an imminent attack:<sup>60</sup>

But suppose the safety of the State is endangered; our foresight can not extend too far. Are we to delay averting our destruction until it has become inevitable?... If an unknown man takes aim at me in the middle of a forest I am not yet certain that he wishes to kill me; must I allow him time to fire in order to be sure of his intent? Is there any reasonable casuist who would

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<sup>56</sup> Ibid Book II 272 [187].

<sup>57</sup> Wolff, above n 12, for example 315 [618], where he wrote that ‘a wrong done or likely to be done, the war that is brought without precedent or threatened wrong is not a just war, consequently it is unjust, nor has any one a right of war except the one to whom either a wrong has been done or is offered or threatened.’ At 319 [627] he considered it a just defensive war if a sovereign state was threatened by a war that was neither justifying or persuasive and that all states have a right to use defensive war for all their security against a state that threatens such a war. See also 320 [629].

<sup>58</sup> Ibid 314 [617].

<sup>59</sup> Vattel, above n 12, 248 [42].

<sup>60</sup> Even when exercised justifiably, but mistakenly; *ibid* 172-173.

deny me the right to forestall the act?... Must we await the danger? Must we let the storm gather strength when it might be scattered at its rising?<sup>61</sup>

Vattel also identified two factors which constituted such a threat: the ability to carry the threat into actual war and the ‘will to injure’.<sup>62</sup> He described exercising the sovereign right to use war defensively as a ‘duty’, but this right did not exist against offensive war which itself was just. In such circumstances, the state threatened with attack should ‘offer due satisfaction’ and, only if refused, did the right to use defensive war become just.<sup>63</sup>

In a broad sense, it is evident from the work of early scholars that the natural behaviour of a sovereign state to use armed force to repel an imminent threat of armed force reflects a deep human defensive instinct of striking first in self-defence. To so strike after being physically attack may reduce one’s ability to self-defence, or in the most serious circumstances, one’s own existence. Other disciplines in contemporary times also recognise the existence and operation of this instinct.<sup>64</sup>

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<sup>61</sup> Ibid 248-249 [44]. In a material deviation from Wolff, Vattel believed that the growing strength of a neighbouring state, if it in itself became disproportionately greater than another, justified defensive war. See also Westlake, above n 18, 120.

<sup>62</sup> Vattel, above n 12, 248-249 [44].

<sup>63</sup> Ibid 246 [35]-[36]. However, Vattel does not delineate between just and unjust in each conflict. He recognises the possibility both sides of a conflict can act with just cause in which the distinction between offensive and defensive war becomes unclear. In such uncertain circumstances, both are considered to have acted justly until the cause is decided. See also Brownlie, above n 11, 6-9.

<sup>64</sup> See, for example, Daniel Goleman, *Emotional Intelligence* (1995) 7, 60, 136, 205, 227; John E Warren, *Emotional Power* (2004) 225-227; John Ratey, *A User’s Guide to the Brain* (2001) 66, 88, 114, 161-162, 171, 228-229, 232; Robert Winston, *Human Instinct – How Our Primeval Impulses Shape Our Modern Lives* (2002) 37-42, 49, 61-62. For leading legal scholarly views which supports this observation, see Westlake, above n 18, 78-79 and Brownlie, above n 11, 261.

In a substantive legal sense, two principles are evident in the work of early scholars which restricted when the sovereign right to use war defensively could be exercised and which reflected the human defensive instinct. These principles were immediacy and necessity.<sup>65</sup> The principle of immediacy meant that the threat of armed force had gained such a temporal proximity to becoming a use of force that the threatened state needed to act immediately if it was going to defend itself. The principle of necessity meant that the threatened state had no viable means other than armed force to prevent the imminent threat of becoming a use of armed force.

The functions jointly fulfilled by the principles of immediacy and necessity can therefore be seen as having defined the ‘legal scope’ of the sovereign right to use war defensively in the Law of Nations. This scope was the imminent threat, or use, of armed force directed at the state. Some observations are made of this legal scope which, in turn, assists us to gain a better understanding of the origin of anticipatory self-defence than that exhibited in contemporary scholarly work.

The earliest point in time at which the sovereign right to use war defensively could lawfully be exercised in any conflict was when a threat of armed force fulfilled the principles of immediacy and necessity. For a state to have used armed force in the purported exercise of this right before these two principles were fulfilled would, as a question of law, have fallen outside the bounds of self-defence as determined by the Law of Nations. As

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<sup>65</sup> A third principle of proportionality which governed the extent to which the sovereign right to use war defensively could be exercised is also evident in the work of early scholars and remains a substantive international customary law principle in international law today. However, this principle is not relevant to this article.

a consequence of the division of war into its offensive and defensive categories, such force could only be described as offensive war.

#### IV CONCLUSION

It is clear that early scholars considered the origin of the right to use war defensively (which was eventually recognised by Article 51 of the *Charter* in 1945 as the ‘inherent right of self-defence’) to be state sovereignty. The scholars described a single right of a state to use war which manifested a state’s sovereignty and this right, as seen, was exercised for offensive and defensive purposes within the legal framework of the Law of Nations. The principles of immediacy, necessity and proportionality, in turn, were the means by which the Law of Nations restricted when, why and to what extent the sovereign right was exercised for defensive purposes.

It is also clear from the work of early scholars that they did not categorise anticipatory self-defence as a distinct legal right separate from the sovereign right to use war. In fact, they did not see anticipatory self-defence as a legal concept within the Law of Nations. Thus, insofar as ‘anticipatory self-defence’ is a term used now by some scholars to characterise a state’s legal authority to defend itself against an imminent threat of armed force before 1945, that authority was actually vested in the sovereign right. This was reflected in state practice in self-defence to 1945. Therefore, it is concluded that the origin of anticipatory self-defence is also state sovereignty by virtue of the origin of the sovereign right.

This article is relevant to identifying an important underlying question of law in the existing (and unresolved) scholarly debate about whether anticipatory self-defence coexisted with the *Charter* in 1945. Defining anticipatory self-defence is fundamental to this debate, but is neglected by it. As seen, some scholars in this debate view anticipatory self-defence as a distinct legal right in international law which is either intrinsically possessed by states, or is an international customary law right.

The view that anticipatory self-defence is a distinct legal right in international law in the existing scholarly debate confuses how many legal rights of self-defence are possessed by a state. This confusion (in combination with other factors beyond this article) has obfuscated the intent of Article 51 of the *Charter* in 1945 which was, in its relevant part, to recognise the inherent right of self-defence and protect that right from impairment by anything in the treaty.

