Ius Gentium: Comparative Perspectives on Law and Justice 19

Murray Colin Alder

The Inherent Right of Self-Defence in International Law

Springer

The Inherent Right of Self-Defence in International Law

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 19

Series Editors

Board of Editors

For further volumes:
http://www.springer.com/series/7888

Murray Colin Alder

The Inherent Right of Self-Defence in International Law

Springer

Murray Colin Alder
Canning Vale, WA
Australia

ISBN 978-94-007-4850-7 ISBN 978-94-007-4851-4 (eBook)
DOI 10.1007/978-94-007-4851-4
Springer Dordrecht Heidelberg New York London

Library of Congress Control Number: 2012949337

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Foreword

On 11 February 1945, Churchill, Roosevelt and Stalin met at Yalta. A major consideration for their discussion was the seeds of a plan to prevent future war. The seeds had been planted the previous year at Dumbarton Oaks. The leaders resolved to establish a general international organisation to maintain peace and security. On 26 June 1945, delegates from 50 nations met at the San Francisco Opera House to adopt the *Charter of the United Nations*. Eleanor Roosevelt later described the *Charter* as the 'Magna Carta for all mankind'.

The preamble to the *Charter* recited one of its goals as being to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. Article 2(4) of the *Charter* was a cornerstone of the implementation of this goal. It broadly required that all members of the newly formed United Nations were to refrain from the threat or use of force against the territorial integrity or political independence of any state.

But the prohibition against the use of force was not absolute. An important exception was enunciated in Article 51. The opening words of that article are as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations…

This inherent 'right' or, perhaps more properly, this inherent privilege or liberty of self-defence was invoked in 1948 by Israel immediately upon its creation in the Arab-Israeli war. And since 1962, there have been at least 18 controversial instances of the threat or use of force. These include actions taken in 1962 by the United States during the Cuban Missile Crisis; in 1964 by the United Kingdom in Yemen; in 1965 by the United States in the Dominican Republic; in 1968 by Israel in Lebanon; in 1976 by Israel in Uganda; in 1979 by Tanzania in Uganda; in 1981 by Israel in Iraq; in 1983 by the United States in Grenada; in 1985 by Israel in Tunisia; in 1986 by the United States in Libya; in 1987 by the United States in Iran; in 1989 by the United States in Panama; in 1993 by the United States in Iraq; in 1998 by the United States in Sudan and Afghanistan; in 2001 by the United States, United

Kingdom, Australia and others in Afghanistan; in 2003 by the United States, United Kingdom, Australia and Poland in Iraq; in 2007 by Israel in Syria; and in 2010 by Israel in the Gaza Strip.

There is a great variance in international legal scholarship concerning the meaning of Article 51. The widely differing views have led to different conclusions concerning the legitimacy of each of these 18 controversial examples since 1962. These examples involve pre-emptive threats or use of force, and force as reprisals, protection of foreign nationals and other defensive responses. The uncertainty surrounding the question of the legality of these incidents undermines an international rule of law.

Dr Alder's book steps into this breach. He has provided a fresh insight into the meaning of Article 51. His approach is textual. It involves a close examination of the state practice and *opinio juris* of nations. But, most of all, his approach is historical. Dr Alder examines in detail the 18 controversial instances of the threat or use of force since 1962. He places those instances in the context of the development of the privilege of self-defence over several centuries. His ultimate conclusion is that Article 51 merely iterates the existing international law principles of self-defence, involving immediacy, necessity and proportionality, most famously stated in the early nineteenth century after the *Caroline* affair. An understanding of the history of the inherent privilege of self-defence is also essential to appreciation of the point in time when an armed attack commences as a question of law, which Dr Alder explains is at the time that a threat of armed force fulfils the customary law principles of immediacy and necessity.

Dr Alder urges at least three significant advantages to his approach. First, it reconciles the scholarly debate concerning the nature of a right to self-defence. Second, it avoids the counter-intuitive conclusion that Article 51 of the *Charter* requires that a nation can only defend itself once it has suffered the physical consequences of such an attack, consequences which might be catastrophic. Third, it provides an approach which achieves the right balance between the recognition and protection of sovereignty and the goal of preventing war.

A fourth advantage is the most important. Whether or not one ultimately accepts Dr Alder's approach, and whether or not the practical consequences are considered politically palatable, his approach provides a clear and comprehensible understanding of the circumstances in which a nation can invoke the privilege of self-defence. Such understanding provides a yardstick for the assessment of the legality of past threats and uses of force, and for future decision making. And that is a basic foundation for an international rule of law.

James Edelman

Acknowledgement

I have written this book with the belief that international law, since at least the sixteenth century, has clearly prescribed when a state can lawfully exercise its inherent right of self-defence. In this regard, the law's substantive rules have simply reflected the human defensive instinct of striking first in the face of an imminent threat of harm in order to avoid injury to self, or to others. International law, as does the criminal law on the municipal level, thereby fulfils its two fundamental purposes of distinguishing lawful from unlawful force and of protecting the threatened from attack while reducing the instance of force generally. Given the high stakes involved when a state is compelled to use force to defend itself, the necessity for such simplicity, in both understanding and application, is patent.

I also believe that the substantive rules of international law have always possessed the intrinsic flexibility to accommodate the continuous evolution of weapons and the emergence of new forms of aggressors and their tactics without impairing a state's authority to defend itself from being attacked. Changing these rules or advocating for their wider scope is, therefore, unnecessary for achieving the law's two fundamental purposes.

My book resurrects the simplicity of the law, something which has been obscured since the 1960s amid technical argument and divergent state practice.

Thank you, my dear wife Jacqueline, for your love, patience and sacrifice along the way.

Dr Murray Colin Alder
Perth, Western Australia, 2012
www.equanimityinternational.com

Contents

Introduction

This book answers a question of international law the essence of which has been long debated, but unsatisfactorily reasoned, by scholars and states since 1945. That question is: What is the earliest point in time at which the law authorises the inherent right of self-defence to be exercised under the *Charter of the United Nations 1945*? This book takes an historic approach to answering this question by tracing the evolution of the legal rights, rules and principles of international law which have governed the use of force since the sixteenth century. Its emphasis on self-defence provides the reader with a new understanding of the following four interconnected features of the law in 1945 which is essential to answering the question asked by this book:

1. The origin, nature and legal scope of the inherent right of self-defence
2. The origin and nature of anticipatory self-defence
3. The importance of the functions fulfilled by the international customary law principles of immediacy and necessity
4. A definition of the legal commencement of an armed attack for the purpose of Article 51 of the *Charter*

The existing scholarly debate, to its own detriment, asks a slightly different question to that answered by this book. That question is: Does anticipatory self-defence coexist with Article 51 of the *Charter*? Though misleadingly similar, the debated question and that answered by this book have an important difference. The debated question, as history shows, tends to restrict the legal reasoning used to debate it to Article 51 itself and manifests as a focus on the interpretation of the words 'if an armed attack occurs' in the article. Unfortunately, this focus neglects the historic purposes fulfilled by the customary law principles of immediacy and necessity, principles which continued to control the inherent right of self-defence at the time of the inception of the *Charter*. Some of these purposes are patent, but some, until now, have been latent.

In contrast, the question answered by this book demands an expansive consideration of all the rights, rules and principles of the international law of self-defence in 1945. This consideration cannot be grasped, however, without a foundational

understanding of the first three legal features of international law listed above. It is only then that the fourth legal feature can be reasoned. This is why this book commences in the sixteenth century.

It is helpful at this point to briefly describe the scholarly philosophies which dominate the existing debate. To understand them, it is first necessary to recite Article 51 of the *Charter*:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The first scholarly philosophy says that the article's precondition for the occurrence of an armed attack, which is constituted by the words 'if an armed attack occurs', extinguished anticipatory self-defence.[1] The second philosophy is opposed to the first because it says that its adoption would result in a state being required, as a matter of law, to first suffer the physical commencement of an armed attack before being entitled to defend itself.[2] The third philosophy acknowledges the bases of the

[1] This school of scholarly opinion is known as the 'positivist' philosophy. Its membership includes Hans Kelsen, *The Law of the United Nations* (2nd ed 1951); Hersch Lauterpacht, *Oppenheim's International Law* (7th ed, 1952) vol 2; Louis Henkin, *How Nations Behave* (2nd ed, 1979); Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (1992); Albrecht Randelzhofer, 'Article 51' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2004); Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005); Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005) and Stephen Hall, *International Law* (2nd ed, 2006).

[2] This school of scholarly opinion is known as the 'realist' philosophy. Its membership includes Philip Jessup, *A Modern Law of Nations* (1948); Derek W Bowett, *Self-Defence in International Law* (1958); Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958); Wolfgang Friedmann, *The Changing Structure of International Law* (1964); James Fawcett, *The Law of Nations* (1968); Donald Greig, *International Law* (1970); Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1978), 81 *Hague Recueil des Cours* 451; Timothy LH McCormack, 'Anticipatory Self-Defence in the Legislative History of the United Nations' (1991) 25 *Israel Law Review*; Ben Clarke, *International Law* (2003); Timothy LH McCormack, 'Anticipatory Self-Defence In The Legislative History of the United Nations Charter' in Donald K Anton, Penelope Mathew and Wayne Morgan (eds), *International Law: Cases and Materials* (2005); Timothy LH McCormack, 'The Use of Force' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005); Thomas M. Franck, *Recourse to Force – State Action Against Threats and Armed Attacks* (6th ed, 2005); Michael W Doyle, *Striking First: Preemption and Prevention in International Conflict* (2008); Myra Williamson, *Terrorism, War and International Law* (2009); James Green, *The International Court of Justice and Self-Defence in International Law* (2009); Matthew Waxman, 'The use of force against states that *might* have weapons of mass destruction' (2009) 31:1 *Michigan Journal of International Law*, 1–77 and Lindsay Moir, *Reappraising the Resort to Use Force – International Law, Jus Ad Bellum and the War on Terror* (2010).

other two, but adopts neither unconditionally.[3] The first philosophy has a specific parameter: the article's precondition created by the words 'if an armed attack occurs' should be literally applied with the effect described above. In contrast, the second philosophy has a wider parameter. Not only do all its scholars advocate that the first philosophy is wrong, but some also say that the right of anticipatory self-defence permits armed force to be used to prevent a threat from materialising.

The two opposing philosophies are more polarised than ever, and the debate has failed to discover a legal basis upon which its differences can be reconciled. The ravine that exists is dangerous, for if there is significant uncertainty in international law over the debated issue, there is arguably no law at all. There are a number of reasons for the debate's failure to reconcile its own division. One reason – asking the wrong question – has been mentioned, but perhaps an even more fundamental reason which has not been envisaged is that the mainstream of each philosophy is, in fact, correct. Was it possible with the creation of the *Charter* that states could continue to exercise their inherent right of self-defence against an imminent threat of armed force while simultaneously according with a literal application of Article 51? Yes it was, and this book explains why.

A significant and overlooked characteristic of the debate is that no scholar from the first philosophy expressly asserts that Article 51 required a state in 1945, *as a matter of law*, to first suffer the physical commencement of an armed attack before exercising its inherent right of self-defence. This oversight has, in turn, led many scholars in the other two philosophies to mistakenly assume that a state, if the first philosophy was adopted, would necessarily have to wait to be attacked before defending itself. Not only is this assumption incorrect, it has, until now, obscured the identification of the precise point where the first and second philosophies need to be reconciled. That point is when a threat of force becomes an imminent threat of force. It is at this point that a state may either defend itself to prevent being physically attacked or allow itself to be attacked before defending itself. Therefore, the underlying scholarly disagreement, in both fact and law, is over the earliest point in time at which the inherent right of self-defence could lawfully be exercised in 1945, not whether anticipatory self-defence coexisted with the *Charter*.

The usefulness of this new reasoning also provides a means for explaining why controversial instances of the use of force in alleged self-defence since 1945 may or may not have been authorised by international law with far greater legal precision.

---

[3] This book describes this school of scholarly opinion as the 'neutralist' philosophy. Its membership includes Leland Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd revised ed, 1949); Ian Brownlie, *International Law and the Use of Force between States* (1963); Stanimir Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996); Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th revised ed, 1997); Ian Brownlie, *Principles of Public International Law* (6th ed, 2003); Christine Gray, *International Law and the Use of Force* (2nd ed, 2004); Martin Dixon, *Textbook on International Law* (5th ed, 2005); Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005); Rebecca Wallace, *International Law* (5th ed, 2005); Antonio Cassese, *International Law* (2nd ed, 2005) and Gillian Triggs, *International Law: Contemporary Principles and Practices* (2006).

To provide a complete basis for answering the question asked by this book, it begins with the creation of the Law of Nations and the work of legal scholars in the sixteenth to eighteenth centuries. These scholars described the cornerstone of state sovereignty and why this concept manifested, inter alia, as a right to use war for offensive and defensive purposes before the law was created. They also described how the law recognised and incorporated this sovereign right by creating principles which controlled its exercise in both dimensions. The principles of immediacy, necessity and proportionality controlled the right's defensive exercise.[4] Importantly, the scholars explained how the sovereign right and these three principles reflected the human defensive instinct of defending one's self or another from imminent harm, such action being the essence of self-defence. Their work in Chapter 1 must be grasped before understanding how these principles formed the legal scope[5] of this right and how they continued to do so with the inception of the *Charter*.

Chapters 2 and 3 examine the continuing evolution of the Law of Nations (by then being called international law) in respect of the use of force from 1815 to 1939. These chapters show how the substantive rules of the law which governed self-defence before this period continued to do so during it. In the *Caroline* incident in 1837, the United States and Great Britain expressed their understanding of the legal scope of the inherent right of self-defence and of the functions fulfilled by the customary law principles of immediacy and necessity. Their understanding was identical to that expressed by early legal scholars: that a state could exercise this right against an imminent threat of armed force that was directed at its territory or that of an ally. This understanding was again expressed by states in 1928 during their negotiations for the *General Treaty for Renunciation of War as an Instrument of National Policy*, a treaty which prohibited war except in self-defence. Chapters 1, 2, 3, and 4 demonstrate that the international legal framework that governed self-defence remained unchanged from the sixteenth century to 1945.

Chapter 4 begins in 1945 and examines those parts of the *Charter* which relate to the use of force by states. This is an important point in history to the question answered by this book because it was then that the pre-existing international customary law principles of immediacy and necessity began their coexistence with the first multilateral treaty which expressly recognised and incorporated the inherent right of self-defence. The observations and conclusions made in Chapters 1, 2, and 3 in respect of the pre-1945 law of self-defence are applied to Article 51 free of the confusing characteristics of the subsequent scholarly debate. This approach is taken to demonstrate how and why this article can be interpreted as simply having recognised and incorporated the inherent right into the *Charter* without impairing the pre-existing legal scope of that right, an envisaged purpose evidenced by the article's *travaux préparatoires*.

[4] This book does not deal with the principle of proportionality to the same degree as the principles of immediacy and necessity because its focus is when a state may exercise its inherent right of self-defence.

[5] The term 'legal scope' in this book refers to when, why and against which conduct international law has permitted the inherent right of self-defence to be lawfully exercised throughout history.

Chapter 5 analyses the existing scholarly debate and begins by examining how differently scholars have, since 1945, viewed the three fundamental questions of law which underpin their debate. These issues are the origin of the inherent right of self-defence, the origin of anticipatory self-defence and the conduct which constitutes an armed attack for the purpose of Article 51. This chapter then provides a new legal basis for demonstrating that the article accommodates the essence of each of the two polarised scholarly views by allowing states to exercise their inherent right against an imminent threat of force while simultaneously according with the article's precondition of an armed attack. To conclude this chapter, decisions of the International Court of Justice in respect of self-defence since 1945 are considered concerning the three questions of law identified above. Regrettably, the Court has not been requested by states to consider the question debated by scholars or answered by this book.

In Chapter 6, controversial instances of the use of force since 1945 in which the justification of self-defence was asserted are examined in detail. This examination assesses the practice and *opinio juris* of states in relation to the legal scope of the inherent right of self-defence and divides the period from 1945 to 2011 into three. The first period, from 1945 to 1962, demonstrates that the practice and *opinio juris* of states largely conformed to the pre-1945 understanding of this legal scope. The second and third periods – from 1962 to 1986 and from 1986 to 2010, respectively – in contrast exhibit many controversial instances of the use of force in which the justification of self-defence was often rejected by large numbers of other states. In some instances, this justification was also rejected by the Court. The foregoing research is employed to provide a complete legal basis for measuring why the use of force in these instances was or was not in accordance with international law. This legal basis will therefore assist in measuring the lawfulness of future uses of force in alleged self-defence.

Chapter 7 concludes this book.

This book is a valuable and unprecedented source of historic materials and evaluation of state practice and scholarly commentary since the sixteenth century in respect of self-defence and the use of force in international law. It provides a complete legal framework for understanding the limitations of self-defence in contemporary times and for appreciating the law's unique flexibility to adapt to new weapons and threats without the necessity of changing its substantive rules. This book will therefore benefit universities, scholars and students who seek a new and simplified understanding of the international law of self-defence.

Chapter 1
The Use of Force Between States Before 1815 – The Sovereign Right to Use War

1.1 Introduction

The work of early legal scholars between the sixteenth and eighteenth centuries provides a valuable understanding of the rise of the sovereign state and its development of a system of law to regulate international relations (described by these scholars as the 'Law of Nations' and which became known generally as 'Public International Law' or 'International Law'). Of most relevance to this book is their description of the sovereign right to use war, the process of recognition and incorporation of this right into the Law of Nations, how this right was exercised for offensive and defensive reasons and how and why the law developed substantive rules to restrain the right's exercise.

The substantive rules created by the Law of Nations to restrain the defensive exercise of this right were the considerations of immediacy, necessity and proportionality (which would later become recognised as international customary law principles in *Caroline*). This chapter assesses the first two principles for insights as yet unexplored by the existing scholarly debate. The first insight is how they define the legal scope of the sovereign right and the second insight is how they provide a basis for defining the legal commencement of an armed attack in the Law of Nations.

1.2 The Origin of the Sovereign Right to Use War

Early legal scholars[1] described the origin for the sovereign right to use war during a period in which the sovereign was literally vested in a specific human being. This person, often a Prince, manifested the state until sovereign power gradually shifted

[1] 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,

M.C. Alder, *The Inherent Right of Self-Defence in International Law*, Ius Gentium: Comparative Perspectives on Law and Justice 19, DOI 10.1007/978-94-007-4851-4_1,

to the state itself. This created the nation-state. The scholars said that sovereignty, whether under a Prince or the state, manifested as the right to use war which was exercised for two primary reasons: for settling legal disputes with other states and for self-defence.

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 states and on religious and natural law. Hugo Grotius described 'war' as 'the condition of those contending by force'.[2] He said a 'public war' was waged by the sovereign and that a 'private war' was waged by private persons other than with the authority of the sovereign. A mixed war was a private war on one side and a public war on the other. Grotius further divided public war into 'formal' and 'less formal' war, based on the existence, or not, of certain formalities.[3]

Samuel 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.'[4] Christian Wolff described war as the preparation for, or the use of, force by way of arms against an enemy.[5] He used the terms 'war' and 'force' to describe armed force, whether between individuals or sovereign states.[6] Emer de Vattel described war as 'that state in which we prosecute our rights by force'.[7] The essence of the meaning of war did not alter in the centuries immediately after the early scholars.[8]

These descriptions of war were derived from, and in turn reflected, certain fundamental human instincts and behaviours. This influence is perhaps explained by the fact that sovereign power had originally been vested in and exercised by a Prince, thereby favouring a greater connection between sovereign power and human conduct. Thus, to explain the origin of a state's right to use war as being its sovereignty,

---

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 Perftractatum* (1764).

[2] Grotius (1625), 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* (9th 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.'

[3] Grotius (1625), 97. The limits of legal authority of private individuals during war are examined in Grotius' Book I, 92, Book II, 172–173 and Book III, 788–791.

[4] Pufendorf (1688), 9 [8].

[5] Wolff (1764), 405 [784]–[785].

[6] Ibid, for example 323 [632]. His division of war into public war, private war and mixed war was the same distinction made by Grotius; 311–312 [607]–[609].

[7] Vattel (1758), 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].

[8] For example John Westlake, *International Law* (1913) Part II, War, 1 who described war as 'the state or condition of government contending by force'.

early scholars described this right as an extension of man's natural right to use war (or force) to revenge wrongs committed against him personally, to settle his disputes and to defend himself.[9] 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.[10]

Pufendorf described 'particular' war as between men either within a state (a 'civil' war) or externally with another state. He rejected the notion of a common or universal war amongst all men, as such conduct would be one of 'beasts'.[11] Vattel also held this view, but if the sovereign was unable to protect its citizens from another's war, the right could properly be exercised by the individual against the invader.[12] Wolff considered a state's natural right to remain uninjured by another as identical as that possessed by man. The right of both state and man to defend itself from such injury was identical.[13]

Early scholars distinguished certain fundamental legal rights derived by the sovereign state from the law of nature from those legal rights derived from the positive Law of Nations. Wolff best described the positive Law of Nations as being constituted by the 'voluntary law', which was the presumed will of states. This law was drawn from the law of nature and 'stipulative law', the latter being formed through the express agreements between two or more states, such as a treaty, and international customary law formed by tacit agreements between two or more states evidenced by 'long usage and observed as law'.[14]

---

[9] Ayala (1582), vol II, 9–10, 18. See also Stephen Neff, *War and the Law of Nations* (2005) 31–40.

[10] Grotius (1625), 92, 102–137 and 164. '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. Natural law theory is not identical to international customary law, the constitutive elements of which are identified in footnote 48 and are further discussed in Chapter 3, but it will be shown that the inherent right of self-defence and the principles which have historically restricted its exercise are common to both theories.

[11] Pufendorf (1688), 9 [8]. Man's natural right to use war is discussed in Book VIII, 1292–1294 [880]–[881] and 1300 [885] and his restriction to do so with the establishment of the sovereign is examined at 1299 [885]. See Vitoria (1696), 167–168.

[12] Vattel (1758), 13–14, 235–236 [4]–[5] 235 [1].

[13] Wolff (1764), 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].

[14] Ibid 6, 17–18 [22]–[25] and 19 [26]. See also Pufendorf (1688), 8, 111–112, 193 and 226–230 and Westlake (1913), Part I, Peace, 11–13, 14–19.

The early scholars viewed the sovereign right to use war as a necessary aspect of a state's collective organisation. The right served the purpose of protecting the state and its citizens from armed force at a time when the state was establishing itself in the developing community of nations. Pufendorf considered that man's natural law was 'deducible from the requirements of human nature' and therefore the 'law of nature and the law of nations are one and the same thing'.[15] 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. This was especially evident in self-defence. For instance, Wolff considered the ability of a sovereign state to defend itself from armed force ultimately measured its power and ability to survive within the developing system of the Law of Nations.[16]

Some scholars saw the rise of the sovereign state and the formation of an international society as a natural continuum of man's development of municipal law.[17] Common to their work and to that of some who followed believed a new sovereign state,[18] upon inception, innately possessed the right to use war for certain offensive and defensive purposes[19] (the scope of these purposes will be described in Sect. 2.4).

In expressing this origin, 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 to use war. 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 course such a right belongs to a nation only because nature has given such a right to the individuals who constitute the nation.[20]

---

[15] Pufendorf (1688), Book II, 226 [156]; Book VII, 1118–1119 [3]–[4] and Book VIII, 1301 [885] and 1305 [889].

[16] Wolff (1764), 9–10 [3]–[4], 20 [28], 26 [38], 41–42 [69], 129 [252] and 313 [613]. See also Westlake (1913), 55–64.

[17] Especially Wolff (1764), for example, 28–30 [43]–[44] and 145 [285]. See Westlake (1913), 11–13.

[18] Grotius (1625), 14–15, 44, 102–103. Pufendorf (1688), 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 (1764), 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].

[19] For example Pufendorf (1688), Book VII, 1013 [5], 1055–1063 [722]–[727] and Book VIII, 1148 [784]; Wolff (1764), 11–13 [7]–[9] and 20–24 [28]–[34] and Vattel (1758), 235 [4]. For the views of subsequent scholars who shortly followed, see, for example, Westlake (1913), 111–121; William E Hall, *International Law* (8th ed, 1907) 82 and Oppenheim (1992), vol 1 [119].

[20] Wolff (1764), 15, 315 [617].

The world before the period of sixteenth to eighteenth centuries provides a fuller context for the scholarly observations. Powerful city-states, such as Athens and Rome, conquered other city-states and regions by war in order to expand their empires, raise taxes, subdue insurrections and to quell potential threats to their empires.[21] Such acts of war were usually resisted with responding acts of war by those sought to be conquered. This basic dynamic created the fundamental and enduring distinction between 'offensive' and 'defensive' war,[22] a distinction discussed below. Thus, a conflict in its totality was termed 'war' and each side provided its justification for its participation in it. This dynamic was reflected in the Law of Nations.

The early scholars also described the effect of state sovereignty within the territories of a state.[23] However, the sovereign right to use war was not the only aspect of the Law of Nations which functioned to protect and preserve sovereign power or to perfect the state or to preserve a state's independence.[24] Principles of the

[21] In respect of the bases for the Peloponnesian condemnation of Athenian aggression and expansion see Thucydides, *The Peloponnesian War* (1998) 15–31. The Peloponnesians, led by Sparta and Corinth, grew after the Athenian victory over King Xerxes of Persia at the battle of Salamis (56–60). It is clear the Lacedaemonian's decision to invade Attica in 431 B.C. was in preparation for what it claimed would be a defensive the war against Athens (60–61). However Athens also believed that it was fighting a defensive war against the Peloponnese armies when it responded to this invasion; see Pericles' speech to Athenians at the end of the first year of the war in which he described the 'aggression' of the Lacedaemonians (91–97). As to the use of war by Rome to expand its empire see Adrian Keith Goldsworthy, *The Roman Army at War 100 B.C.–A.D. 200* (1996) in which he describes the punitive wars launched by Rome between 53 B.C. by Julius Caesar, in 51 B.C. by Cicero and in A.D. 15 by Arminius against Germany and other European territories and peoples who might become allies of the Germans in the future (95–100). For the unique difficulties for Rome posed by using war against peoples not united by a central government see 102–103. Rome's wars of conquest were principally used for suppression of insurrection (79–95) and for economic expansion (100–105). For the latter motivation for launching wars of conquest against Britain see Theodor Mommsen, *A History of Rome under the Emperors* (1996) in which he traces the campaigns of Julius Caesar, Claudius, Nero, Vespasian and Severius against the 'semi-civilised tribes' of Britain by Rome's 'occupation force' (258–266). Mommsen explains that Rome's military expansion of its economic power in Britain was motivated by the latter's well developed system of commerce which provided for a sound taxation base for Rome, its rich agricultural land and mines and the fact that owners of landed estates pledged allegiance to Rome out of necessity of threat of force. For similar views of Rome's use of war for conquest see generally Thomas Burns, *Rome and the Barbarians, 100 B.C.–400 A.D.* (2003); Warwick Ball, *Rome in the East: the transformation of an Empire* (2000); Hedley Bull, Benedict Kingsbury and Adam Roberts, *Hugo Grotius and international relations* (2002) 177–179. While Rome imposed a system of law throughout its empire (*jus gentium*) it was not a consensual system of international law developed among independent sovereign states. *Jus gentium* is to be distinguished from the system of law (*jus civile*) within Rome proper which governed its citizens; Westlake (1913), 1–3 and Ahmed Sheikh, *International Law and National Behaviour*: *a behavioral interpretation of contemporary international law and politics* (1974) 53.

[22] The legal characteristics of offensive and defensive just war are discussed below in Sect. 1.3.

[23] Grotius (1625), 103–104 and 1137–138; Wolff (1764), 130–131 [255]–[256]; Oppenheim (1992), 119–123 and Westlake (1913), 20–21.

[24] Wolff (1764), 91 [174]. For the numerous other duties owed by nations to each other see Chapter II, 84–139. For those duties owed by nations to themselves, see Chapter I, 20–83.