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Anticipatory action in self-defence: The law of self-defence - past, presence and future

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3 Self-defence as a measure short of war

The aim of this chapter is to analyse the views adopted during the seventeenth to nineteenth centuries regarding the natural-law concept of self-defence and to assess whether the status and limits of anticipatory action were altered during that period. As it has been concluded in the previous chapter, the natural right of self-defence was intrinsically anticipatory; its temporal dimension pertained to the time before and during an attack. Furthermore, the elements that limited the exercise of self-defence (existence of an attack, immediate need to respond and moderation) automatically served as limits of anticipatory action. It remains to be seen whether the positivist influence on legal thinking of the seventeenth to nineteenth centuries changed that perception.

Starting with the seventeenth century, the doctrine of just war and the old Christian conception of natural law were gradually confined to the realm of ethics, while realist and positivist considerations gave voluntary (positive) law a dominant role in state affairs. From the middle of the seventeenth century onwards, the sovereign became the sole authority entitled to resort to war and the limits of this right concerned the formalities of force rather than its underlying motives.

In the following paragraphs, attention will be given to the way war and warfare were understood by the realist-positivist approach in order to map out the normative framework in which the right of self-defence was acknowledged. Apart from relying on authoritative and representative writings, this chapter will also discuss a few instances of state practice relevant for self-defence. Nonetheless, the extensive state practice of privateering, pacific blockades and special reprisals of the seventeenth-nineteenth centuries will not be discussed. The chapter will focus on the way the content and temporal dimension of self-defence were understood during this period. The concluding remarks of this section will assess whether the status and limits of anticipatory action were altered during this period.

It is important to note at this point that Chapter 3 does not aim to offer a comprehensive portrayal of realism and legal positivist approaches. It merely puts the subject of self-defence within the context of these developments that shaped the legal paradigm of the age.

3.1 The rise of positive law

From the middle of the seventeenth century onwards, realist thinking quickly developed to characterize national and foreign policy in Europe. Jurists gradually left behind the Christian just war doctrine and adopted a more positivist view in their legal writings about war. Although natural law was still featured in the works of certain prominent thinkers of the seventeenth and eighteenth centuries, its Christian understanding was either challenged or reinterpreted to accommodate realist views.

The move to realism brought new ideas regarding the status of states and the rights of the sovereign. These ideas influenced the approach to war as well. The Peace of Westphalia (1648) reconfigured contested boundaries as well as recognized – in some cases the already factual – independence of numerous states (such as the Dutch Republic and Switzerland). According to Baylis and Smith, the Peace of Westphalia was based on three principles. The first was ‘*rex est imperator in regno suo*,’ in other words ‘the king is

emperor in his own realms,' This meant that sovereigns were recognized as not being subject to any higher authority. From this principle stemmed the idea of sovereign equality. The second principle was the *cuius regio, eius religio*, according to which the sovereign chose the religion of his country. The function of the third principle was to prevent any hegemon from arising and dominating other states and later it became known as the 'balance of power'.¹

These concepts have changed over time and their scope has widened much beyond the aims of those present at Westphalia. Nonetheless, they were the initial form of the ideas that later shaped Western European politics and which were often reiterated by the Concert of Europe until 1914.²

In this framework, war was seen as an absolute prerogative of the sovereign, who had no other legal superior and who could decide on efficient action when the state's vital interests were at stake. This position became to be known as *raison d'état* (reason of state, national interest), which put the survival and interests of states before any other consideration of foreign policy. According to Baylis and Smith, *raison d'état* was seen as a set of maxims that leaders had to follow on how to conduct their foreign affairs so as to ensure the security of state.³

As mentioned above, this approach 'downgraded' old Christian natural law arguments about 'just causes' of war to the sphere of morality and ethics. As it will be shown below, some clearly challenged the tenets of Christian natural law, others tried to reinterpret it to fit the realist paradigm.

3.1.1 The departure from the Christian concept of natural law

Until about the middle of the seventeenth century, the Christian just war framework dominated legal writing in Western Europe. The concept of just war was intrinsically linked to the law of nature, according to which the state of nature was fundamentally peaceful and war was an unfortunate necessity through which natural justice was sought.⁴ The seventeenth century brought important challenges to this perspective. Thomas Hobbes challenged the very definition of the state of nature.⁵ Other writers, such as Pufendorf and Wolff, while confirming the classic state of nature, believed that natural law was suspended during war and only voluntary law applied.⁶

¹ Baylis and Smith, p. 43.

Realist, neo-liberal and nationalist theories view the Peace of Westphalia as the foundation of the modern European state system. For such an opinion and for addressing the criticisms brought to the model, see S.D. Krasner, 'Compromising Westphalia', 20 *International Security* (No. 3, 1995-1996) p. 115. Recently, some international relations scholars expressed the view that the Westphalian sovereignty principle and state-system model is the result of a laborious mythification process brought about by 19th- and 20th-century nationalist historians. See A. Osiander, 'Sovereignty, International Relations and the Westphalian Myth', 55 *International Organization* (2001) pp. 264-265. See also S. Beaulac, 'The Westphalian Legal Orthodoxy: Myth or Reality?', 2 *Journal of the History of International Law* (2000) pp. 148-177.

² The Concert of Europe (the 'Congress System') was a series of meetings between the old great powers of Europe between 1815 and 1914. Its founding members were Britain, Austria, Russia and Prussia.

³ Baylis and Smith, p. 142.

⁴ See Aquinas' definition of natural law in Lisska, pp. 263-266, 272-278.

⁵ Reichberg et al., pp. 441-442.

⁶ Neff, pp. 132, 138.

A contemporary of the Thirty Years' War and the English Civil War,⁷ Thomas Hobbes (1588-1679) is acknowledged today as one of the most important founders of modern Western political philosophy. In his most famous work, *Leviathan* (published in 1651), Hobbes portrayed his idea on the structure of society.

Hobbes believed that the 'state of nature' was one of constant war, in which the principle of self-preservation – stemming from natural law – was the most important. Since there was no international supreme ruler, who could adjudicate disputes among nations, it was natural that states were also in a constant state of conflict.⁸ The 'state of nature' Hobbes was referring to clearly departed from the one formulated by Christian theologians; it was one based on self-preservation and voluntary contracts, by which human beings decided what was the best way to survive and what could bring about their enemies' destruction.⁹ Hobbes' arguments were similar to those of Machiavelli, as both concurred that when it came to survival, moral concerns would only have a prudential character.

Although Hobbes promoted a new understanding of the state of nature, some jurists of the time still followed Gentili's and Grotius' ideas and tried to accommodate their views with the realist approach. One such author was Samuel von Pufendorf (1632-1694), German jurist and statesman. In accordance with the Christian approach, Pufendorf believed that natural law stemmed from God and commanded humans to be sociable and friendly to each other, by obeying certain natural duties. In his treatise published in 1673, *On the Duty of Man and Citizen*, he asserted that nature had created a kind kinship among people. Humans were capable of imposing such kinship on themselves and the emerging state system was capable to preserve such sociability between citizens.¹⁰ Pufendorf departed from natural law precepts inasmuch as he saw war as exclusively regulated by voluntary (positive) law.¹¹

In line with his predecessors, Pufendorf divided wars into defensive and offensive ones:

'The just causes of engaging in war come down to the preservation and protection of our lives and property against unjust attack, or the collection of what is due to us from others but has been denied, or the procurement of reparations for wrong inflicted and of assurance of the future. Wars waged for the first of these causes are said to be defensive, for the other cases, offensive.'¹²

Nonetheless, his views were strongly influenced by the contemporaneous balance-of-power ideas. He saw the right to wage war as the prerogative of the sovereign and a powerful tool to preserve the state and its interests. In other words, 'that country is considered happy which even in peace contemplates war.'¹³ Such a view was very much

⁷ The English Civil War (1642-1651) was a series of armed conflicts between Parliamentarians (Puritan supporters of the Parliament) and Royalists (supporters of King Charles I).

⁸ T. Hobbes, *Leviathan*, ch. 13 (12), in L. May et al., *The Morality of War: Classical and Contemporary Readings* (Upper Saddle River, N.J., Pearson Prentice Hall 2006) p. 82.

⁹ *Ibid.*, pp. 80-83.

¹⁰ S. von Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (Cambridge, Cambridge University Press 1991), Bk. II, ch. 1 (11), pp. 118-119.

¹¹ S. von Pufendorf, *De jure naturae et gentium libri octo*, Vol. 2 (Oxford, Clarendon Press 1934), Bk. VIII, ch. 6 (7), p. 1325.

¹² Pufendorf 1991, Bk. II, ch. 16 (2), p. 168.

¹³ *Ibid.*, Bk. II, ch. 1 (11), p. 119.

the product of Pufendorf's age, when states not only had to be prepared to go to war, but, perhaps more importantly, they had to be *seen* as capable of going to war. Pufendorf thus inserted in his work beliefs that were widely accepted by statesmen at that time and which bore the symbols of realist thought. This was true also regarding his views on moderation in war. He believed that it was not always unjust:

'[T]o return a greater evil for a less, for the objection made by some that retribution should be rendered in proportion to the injury, is true only of civil tribunals, where punishments are meted out by superiors. But the evils inflicted by right of war have properly no relation to punishments. Since they neither proceed from a superior as such, nor have as their direct object the reform of the guilty party or others, but the defence and assertion of my safety, my property and my rights.'¹⁴

After such a passionate exposé of his arguments against proportionality, Pufendorf nonetheless advised that 'so far as it is possible, and as our defence and future security allow, we suit the evils inflicted upon an enemy to the process usually observed by a civil court' and he made reference to Grotius' discussion of moderation.¹⁵ Consequently, Pufendorf endorsed the absolute prerogative of states to use force whenever it was deemed necessary for safety and future security, but he recommended humane behaviour during the hostilities and after victory.

A successor of Pufendorf in the natural law school was Christian von Wolff (1679-1754), who did not depart from the precepts of his precursor, except where the issues of moderation in war were concerned. Accordingly, Wolff held that 'so much is allowable in a just war against the person of the enemy as is sufficient to ward from us and our property the force used by him.'¹⁶

These challenges made the weaknesses of the natural law theory apparent as regards the realities of the seventeenth century Europe. Although subsequent legal writers acknowledged natural law as the moral standard to which voluntary law should relate, they began to focus more on customs and treaties in their analysis of inter-state relations.

3.1.2 Positive law and war in due form

Although natural law was still regarded as the primordial source of many duties and rights, from the eighteenth century onwards, positive law was viewed as a more usable basis for law enforcement. Many contemporary lawyers considered that the law of nations was predominantly voluntary in character, although certain rights stemmed from natural law.

The Swiss diplomat Emerich de Vattel (1714-1767) was one of such lawyers. His most famous work, *Le Droit de Gens*, published in 1758, is acknowledged as being at the crossroads of the centuries' old tradition of just war and the emergent international law of the eighteenth century.¹⁷ *Le Droit de Gens* was widely circulated after its publication and

¹⁴ Pufendorf 1934, Bk. VIII, ch. 6 (7), p. 1298.

¹⁵ *Ibid.*, Bk. VIII, ch. 6 (7), p. 1298 (referring to chs. 11-16 of Bk. III of Grotius' *De jure belli* treatise).

¹⁶ C. Wolff, *Jus gentium methodo scientifica pertractatum* (Oxford, Clarendon Press 1934) section 791.

¹⁷ Reichberg et al., p. 504.

was used as a handbook by statesmen and diplomats until the beginning of the First World War.¹⁸

Vattel did not denounce natural law as such. He rather asserted that natural law ‘recommends for the common advantage of Nations the observance of the voluntary law of nations.’¹⁹ In other words, in order to see the aims of the law of nature achieved, positive law was necessary to regulate the affairs of states. Accordingly, a sovereign, when deliberating upon the steps to take to fulfil his duty, he could never ‘lose sight’ of the necessary (natural) law, which was always ‘binding in conscience’.²⁰ Nonetheless, when it was a question of determining what he could demand from other states, he had to take into consideration the voluntary (positive) law of nations and ‘restrict even his just claims within the bounds of a law whose principles are consecrated to the safety and welfare of the universal society of Nations.’²¹ Consequently:

‘[L]et us [...] leave to the conscience of the sovereigns the observance of the natural and necessary law in all its strictness [...]. But as regards the external effects of that law in human society, we must necessarily have recourse to certain rules of more certain and easy application, and this in the interest of the safety and welfare of the great society of the human race.’²²

As many thinkers before him, Vattel also distinguished between defensive and offensive wars. Defensive war stemmed from the right of resisting by force any attack upon a state or its rights. Offensive war was based upon the right to use force to obtain justice, if it could not otherwise be secured, or to follow up one’s rights by the force of arms.²³

The preservation of the state, in Vattel’s view, was the obligation of the sovereign bestowed on him by natural law and therefore, any action that was necessary for its survival was allowed, including the use of force, as long as war was conducted in due form.²⁴

The requirement to conduct war in due form applied to both sides, regardless of the justice of the cause.²⁵ Vattel believed that:

‘[T]he rights founded on the state of war [...] in no way depend on the justice of the cause. They depend rather on the legitimacy of the means, [...] on the presence of the elements constituting a war in due form.’²⁶

Vattel took thus further the tradition started by Vitoria and developed by Grotius to treat the rules concerning conduct of war separately from the principles relating to the right to make war. Although he did not use any specific term to distinguish between the two, Vattel emphasized the importance of the differentiation by saying:

¹⁸ E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (New York, Oceana 1964) pp. xxix-xlii.

¹⁹ *Ibid.*, Bk. III, ch. 12, § 189, pp. 304-305.

²⁰ *Ibid.*, p. 305.

²¹ *Ibid.*

²² *Ibid.*, p. 304.

²³ *Ibid.*, Bk. II, ch. 5, §§ 67-68, p. 135, and Bk. III, ch. 1, § 5, p. 236.

²⁴ *Ibid.*, Bk. I, ch. 2, §§ 16 and 18, pp. 13-14.

²⁵ *Ibid.*, Bk. III, ch. 11, § 187, p. 303, and ch. 12, §§ 191-192, pp. 305-306.

²⁶ *Ibid.*, ch. 12, § 190, p. 305.

‘What we have said thus far relates to the right to make war. Let us now proceed to the law which should govern war itself, to the rules which nations should mutually observe, even when they have taken up arms for the settlement of their disputes.’²⁷

On the basis of this delineation, Vattel went on to discuss rules of conduct in war throughout chapters 8-18 of Book III of *The Law of Nations*. His approach greatly contributed to the two major innovations of the era: the even-handed treatment of both belligerents, regardless of the justice of the cause, and the establishment of a fixed set of rules governing conduct of war.²⁸ Vattel’s approach was adopted by subsequent authors and currently forms part of the principle of equal application of the laws of war in international humanitarian law.²⁹

3.1.3 ‘Perfect’ wars

In the seventeenth and eighteenth centuries, waging a full-fledged war was the exclusive prerogative of the sovereign. Although just war explanations were still used in deciding when a state could go to war, the emphasis was much more on the formalities surrounding it, rather than on the justice of the cause.

Wars were still divided into public and private, defensive and offensive. Public wars had to be ordered by the public authority, be initiated after a formal declaration and carried out in accordance with the voluntary rules of war.³⁰ If all conditions applied, a ‘state of war’ was instituted and the war was a ‘perfect’ one.³¹ Perfect wars offered the sovereign the full panoply of right to commence an offensive or a defensive armed action.³²

In case of defensive ‘perfect’ wars the limits extended to preventive action as understood by Gentili.³³ Hobbes maintained that preventive war was the best way to prepare against one’s foes. Either by force or by wiles, one had to master his own enemies, until he saw ‘no other power great enough to endanger him.’ Hobbes believed that if one attacked preventively, the enemy could not both defend itself and pursue its invasion plans. For that reason, Hobbes stated that preventive wars were the best defence a state could have.³⁴ In *De jure naturae et gentium libri octo*, Pufendorf also defended preventive war:

‘[N]ot only may I use force against an enemy until I have warded off the peril with which he threatened me, or have received or extorted from him what he had unjustly robbed me of, or refused to furnish, but I can also proceed so far as to secure guarantees for the future.’³⁵

²⁷ Ibid., ch. 8, § 136, p. 279.

²⁸ Neff, pp. 111-115.

²⁹ Roberts, p. 938.

³⁰ Vattel, Bk. III, ch. 4, pp. 254-258.

³¹ One famous case in which the formalities concerning the declaration of war and the commencement of hostilities were not observed was the Japanese surprise attack on Port Arthur in February 1904 opening the Russo-Japanese War of 1904-1905. For more details, see: Neff, pp. 182-183.

³² Ibid., ch. 2, pp. 237-242, especially § 6, p. 237.

³³ Gentili, Bk. I, ch. 14, p. 62.

³⁴ T. Hobbes, *Leviathan* (Cambridge, Cambridge University Press 1991) ch. 13, p. 88.

³⁵ Pufendorf 1934, Bk. VIII, ch. 6 (7), p. 1298.

For the preservation of the state, Vattel also supported preventive war. While he agreed that a nation must have received an injury or be threatened with one to use force as last resort, he asked the following questions:

‘Must we await the danger? Must we let the storm gather strength when it might be scattered at its rising? Must we suffer a neighbouring State to grow to power and await quietly until it is ready to enslave us? Will it be time to defend ourselves when we are no longer able to?’³⁶

In answering these questions, Vattel first noted that:

‘[I]t is a sacred rule of the Law of Nations that the aggrandizement of a State cannot alone and of itself give any one the right to take up arms to resist it.’³⁷

By distinguishing between sheer power and the will to injure, Vattel emphasized that the two are not inseparable and a state had to notice that its neighbour had non-peaceful intentions and only then could it contemplate war. The non-peaceful intentions, however, received a considerably permissive definition:

‘As soon as a State has given evidence of injustice, greed, pride, ambition, or desire of domineering over its neighbours, it becomes an object of suspicion which they must guard against. They may hold it up at the moment it is about to receive a formidable addition to its power, and demand securities of it; and if it hesitates to give these, they may impede its designs by force of arms.’³⁸

Besides this, Vattel also emphasized the importance of alliances ‘to counterbalance the sovereign who excites their alarm.’³⁹ Without a doubt, Vattel was placing his arguments on preventive war in the wider context of European politics, dominated by the balance of power concept.

Natural law thinkers and positivist lawyers not only took further the Gentilian definition of preventive war, but also strengthened it and acknowledged it as part of the balance-of-power system.

3.1.4 ‘Imperfect’ wars

When a declaration of war was missing, the war was deemed irregular or imperfect. These wars became to be excluded from the overall category of wars and treated as something different. The right (or even duty) of self-preservation was seen by Vattel as ‘imposed by nature’ and giving rise to both a right of resistance and a right of obtaining redress, none of which were necessarily linked to perfect wars.⁴⁰ These irregular or ‘imperfect wars’ – based on the duty to preserve the state – did not give the sovereign the full panoply of belligerent rights that a ‘perfect’ war would entail.⁴¹

³⁶ Vattel, Bk. III, ch. 3, § 42, p. 248.

³⁷ Ibid.

³⁸ Ibid., § 44, p. 249.

³⁹ Ibid., § 46, p. 250.

⁴⁰ Ibid., Bk. II, ch. 4, § 49, p. 130.

⁴¹ Neff, p. 156.

Although Vattel denounced wars launched without observing these formal requirements, the seventeenth and eighteenth centuries saw a myriad of armed conflicts undertaken without an official ‘state of war’ being instituted.⁴²

Contemporary state practice was abundant in armed actions connected to privateering. Such a conflict was the 1798-1801 naval conflict between the United States and revolutionary France. France was eager to take punitive measures against the United States, for conferring certain privileges to Great Britain which France had previously enjoyed. Although French soldiers and privateers committed numerous depredations on American vessels, and American citizens on board were beaten and imprisoned, the French and the US government never considered that a state of war existed between them. It was viewed as an ‘imperfect war’ or a ‘limited’ or ‘partial’ war.⁴³

Special reprisals – permitted under the right to obtain redress as a corollary of the duty of self-preservation – were also very frequent in seventeenth- and eighteenth-century state practice.⁴⁴ General reprisals became to be equated with perfect wars, so they were treated under a different heading.⁴⁵

The right of self-preservation could also permit an ‘imperfect war’ in self-defence. In its ‘imperfect’ form, self-defence was the result of transferring the content of the *stricto sensu*, private self-defence to the state. Without a state of war instituted by an official declaration, the belligerent right of the sovereign was restricted in the instance of such imperfect, irregular conflicts.⁴⁶ It was necessary to provide a legal justification on which an armed action – outside a state of war – could be based.

For that reason, an ‘imperfect’ war in self-defence was closest in its meaning to the *stricto sensu* self-defence applicable to individuals. Nonetheless, in this transfer of meaning, a slight change was applied to the limits of *stricto sensu* self-defence, dictated by the realities of inter-state conflict.⁴⁷ This alteration was already explained by Grotius, who limited public defensive wars to armed action against immediate dangers as well as imminent or prepared attacks.⁴⁸

The availability of *stricto sensu* self-defence to private persons was further restricted during the seventeenth to nineteenth centuries. Hobbes’ view was that war waged by individuals should become obsolete and the creation of a social contract should offer enough security to private persons that in case of injury, they would be protected or compensated by the public authority.⁴⁹ As a result, although individuals retained the right of self-defence, such a right flowed from, and was limited by, positive law and it was the incipient form of the present-day right to self-defence, permitted by criminal law. Vattel

⁴² Vattel, Bk. III, ch. 4, § 67, p. 257. See also: Grewe, pp. 525-530.

⁴³ Brownlie 1963, p. 30.

⁴⁴ Vattel, Bk. II, ch. 18, §§ 343-347, pp. 228-229. See also: Grewe, pp. 525-527.

⁴⁵ Consult for difference between special and general reprisals: Neff, pp. 122-126; T. Twiss, *Law of Nations Considered as Independent Political Communities*, Vol. 2 (Oxford, Oxford University Press 1863) pp. 30-31.

⁴⁶ Neff, p. 156.

⁴⁷ Vattel also draws a parallel between the right of individuals and nations to resist attack and asserts that the content of that right stems from the same source. Vattel, Bk. II, ch. IV, §. 49, p. 130.

⁴⁸ Grotius, Bk. II, ch. 2 (xvi), p. 184.

⁴⁹ Hobbes, *Leviathan*, ch. 13 (8), ch. 14 (3), (6)-(7), and ch. 15 (5), in May et al., pp. 81-87.

expressed a similar opinion, although he still allowed for private war in self-defence ‘if the police force was lacking,’ because such a right was given to individuals by nature.⁵⁰

Although quite blurry in the seventeenth and eighteenth centuries, the ‘imperfect’ form of self-defence was to survive under the auspices of the right to self-preservation and be known in the nineteenth century as a measure short of war. The Gentilian preventive wars would become part of the absolute rights of the sovereign to wage official war.

3.2 War as an instrument of policy

Early positivist approaches were further developed by subsequent state practice in the eighteenth and nineteenth centuries further increasing the gap between the old Christian thinking about war and the new ‘balance-of-power’ approach.

The French Revolutionary Wars and the Napoleonic Wars (between 1792-1802 and 1805-1815, respectively) saw the enrolment of huge masses of people into the army as opposed to the relatively small sized forces employed in wars prior. This innovation made a new method of waging war possible: the devastating defeat of the enemy army with a single blow, a method which, according to Neff, became the hallmark of the Napoleonic Wars.⁵¹ These developments were coupled with the system of ‘total war’, which referred to the French and British practice of large-scale blockading and the manipulation of neutral commerce.⁵² As Neff observed, the Napoleonic Wars did not bring any revolutionary changes to international law, thus the nineteenth century was still dominated by the same positivist and realist concepts of the unrestricted right to war, although modest moves towards restriction of this right were made.⁵³ Consequently, Vattel’s statement that the right to resort to war was a question of morality outside the sphere of law was widely reiterated by public officials and state practice throughout the nineteenth century.

3.2.1 Positive Law and War as a Legal Institution

The nineteenth century realist approach produced one of the most famous military strategy treatises of all times: Carl von Clausewitz’s *Vom Kriege* (On War).⁵⁴ In his treatise, Clausewitz defined war as ‘an act of force to compel our enemy to do our will.’ Force, he stated, was the means of war, whereas to impose one’s will on the enemy was the object of war.⁵⁵ As regards the means of warfare, Clausewitz believed that ‘the

⁵⁰ Vattel, Bk. III, ch. 15, § 223, p. 318.

⁵¹ Neff, pp. 92-93.

⁵² Ibid. See also Nussbaum’s definition of total war: Nussbaum, p. 246.

⁵³ Neff, p. 93.

⁵⁴ Clausewitz was not a jurist, but a soldier and a military theorist. Born in the Kingdom of Prussia in 1780, Clausewitz was enrolled in the Prussian army at the age of twelve and served as a soldier in the Napoleonic Wars against France. He was held prisoner in France from 1807 to 1808 and upon his liberation, he decided to leave the Prussian army (forced to forge an alliance with France) and served in the Russian army against Napoleon. After the end of the Napoleonic Wars, Clausewitz returned to Prussia and was promoted to Major-General in 1818 and appointed director of the Prussian War Academy. His famous work was thus based on his impressive experience in military affairs.

⁵⁵ C. von Clausewitz, *On War* (Princeton, Princeton University Press 1976) Bk. I, ch. 1, § 2, pp. 75-76.

maximum use of force is in no way incompatible with the simultaneous use of the intellect.’ Kindness could lead to grave mistakes in war, so war had to be accepted as it was, distressful and brutal.⁵⁶

The most famous assertion of Clausewitz, the one that characterized, if not directly affected, the foreign policy of many European governments, was that:

‘[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means [...]. The political objective is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.’⁵⁷

Thus war was nothing more than an exercise of will on the part of the state based on rational and strict calculations of strategic advantages and disadvantages. Consequently, nineteenth century state practice employed a subjective notion of ‘war’ and an equally interpretable concept of ‘measures short of war’. States were entitled to judge on their own whether they found themselves in a state of war or not. Certainly, as Brownlie observed, most of the governments could find substantial reasons of policy for avoiding a state war, while still being able to exert coercion, if necessary. Each declaration of war had to be preceded by ample preparation on a military, financial and society level, which necessitated great efforts from the executive of every country.⁵⁸ Therefore, resorting to small-scale coercive measures (‘imperfect wars’), proved to be a less costly, less iniquitous and more time-efficient choice. These measures came in all shapes and sizes: blockades, naval demonstrations, armed interventions, defensive measures and reprisals – all were seen as justified by the interest of the state and all had their own particular place within nineteenth century state practice.

3.2.2 State practice and ‘measures short of war’

Measures short of war were those small-scale conflicts – ‘imperfect wars’ of the seventeenth and eighteenth centuries – that were justified on the basis of the principle of self-preservation. Legal authors of the nineteenth century all gave the principle of self-preservation a privileged place in the system of the law of nations. Sir Robert Phillimore, English judge and politician, saw the principle of self-preservation as an exception to territorial inviolability that allowed both the preclusion and the repelling of an attack.⁵⁹ Sir Travers Twiss, English lawyer, called self-preservation ‘the primary duty of national life’ – implying this way its natural law origins.⁶⁰ Another English jurist, William Edward Hall asserted that ‘almost the whole of the duties of states are subordinated to the right of self-preservation.’⁶¹

Under the aegis of the right or duty of self-preservation, a whole range of armed actions qualified as ‘interferences’, ‘interventions’ or ‘measures short of war’.⁶²

⁵⁶ Ibid., § 3, pp. 75-76.

⁵⁷ Ibid., § 24, p. 87.

⁵⁸ Brownlie 1963, pp. 45-47.

⁵⁹ R. Phillimore, *Commentaries upon International Law*, Vol. 1 (London, W. Benning 1854) p. 225.

⁶⁰ Twiss, Vol. 2, p. 3.

⁶¹ W.E. Hall, *International Law* (Oxford, Clarendon Press 1880) p. 226.

⁶² Ibid., pp. 240-250, 306-314; Phillimore, Vol. 1, pp. 225-235; R. Phillimore, *Commentaries upon International Law*, Vol. 3 (London, W. Benning 1857) pp. 1-35; Twiss, Vol. 2, pp. 1-42.

Accordingly, contemporaneous authors identified a category of ‘interferences’ or ‘interventions’ that were directly connected to the principle of self-preservation: self-defence, securing obligations of treaty stipulations, intervention on humanitarian grounds, intervention to preserve the balance of power, invitation of contending parties in a civil war.⁶³ Not all of these measures were equally sustained. Securing obligations of treaty stipulations, participation in civil wars and interventions to preserve the balance of power were gradually renounced as obsolete or giving rise to dangerous situations and by the beginning of the twentieth century they were seen as illegal.⁶⁴

A separate category of armed action was that of retorsion, retaliation and reprisal. These were characterized as ‘amicable’ or ‘compulsive’ methods of dispute settlement which did not amount to war and were treated separately from ‘measures short of war’.⁶⁵ Reprisals were permitted when justice had been plainly denied or most unreasonably delayed.⁶⁶ These measures were still accepted at the beginning of the twentieth century. Moreover, Oppenheim asserted that reprisals were allowed ‘in every case of an international delinquency for which the injured state cannot get reparation through negotiation.’⁶⁷

Two measures belonging to the ‘interventions’ category survived into the twentieth century under different forms: armed interventions on humanitarian grounds and self-defence.

Armed interventions on humanity grounds or for community interests was a category that was favourably viewed by lawyers and statesmen alike, although concerns over its abuse were often expressed.⁶⁸ The collective intervention in China in 1900-1901 serves as example. The measure was undertaken to stop the Boxer Rebellion, an anti-imperialist uprising that targeted Christian missionaries and foreigners. Between 1900 and 1901, several armed interventions took place, involving forces from American, French, German, British and Russian war vessels amongst others. The international forces were put under a single command and, until April 1901, the force made several incursions into North China in order to rescue European nationals from insurgent action and to suppress the Boxers. Again, the governments concerned did not admit the existence of a state of war; rather they viewed it as an *armed intervention*, meant to eradicate the local militia which targeted foreigners.⁶⁹

Measures of self-defence were seen as ‘a primary right of Nations’⁷⁰ that could be exercised against serious and immediate dangers.⁷¹ Primary rights were seen as stemming from natural law, thus self-defence continued to be viewed as a natural prerequisite of the state.⁷²

⁶³ Phillimore, Vol. 1, p. 434; H.W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* (San Francisco, H.H. Bancroft 1861) p. 83; Hall, pp. 242-250; L. Oppenheim, *International Law: A Treatise*, Vol. 1 (New York, Longmans, Green and Co. 1905) pp. 181-183.

⁶⁴ Halleck, pp. 83-84; Hall, pp. 242-250; Oppenheim, Vol. 1, pp. 181-183.

⁶⁵ Phillimore, Vol. 3, pp. 10-13; Halleck, p. 297; Hall, p. 306; Twiss, Vol. 2, pp. 18-20; L. Oppenheim, *International Law: A Treatise*, Vol. 2 (New York, Longmans, Green and Co. 1906) pp. 34-35.

⁶⁶ Halleck, p. 297; Hall, p. 308.

⁶⁷ Oppenheim, Vol. 2, pp. 34-35.

⁶⁸ Phillimore, Vol. 3, p. 434; Hall, p. 245.

⁶⁹ Brownlie 1963, pp. 33-34.

⁷⁰ Twiss, Vol. 1, p. 11.

⁷¹ Hall, pp. 227, 232.

⁷² Phillimore, Vol. 3, p. 225; Twiss, Vol. 1, p. 11.

During this period, other, necessity-related measures were also linked to self-preservation, such as hot pursuit, punitive expeditions or rescue of nationals.⁷³ A good illustration of hot pursuit and punitive expeditions is the 1916-1917 Pershing Expedition in pursuit of Francisco 'Pancho' Villa, one of the main leaders of the 1910-1921 Mexican Revolution. Between November 1915 and March 1916, Villa ordered his Mexican raiders to carry out several cross-border attacks against American settlements, culminating in the raid on Columbus (New Mexico) on 9 March 1916.⁷⁴ The raids were organized as a reaction to the US government's official recognition of the opponent regime in Mexico. In the Columbus attack, the raiders attacked a detachment of the US Cavalry, killed 17 US citizens and torched buildings in the town.⁷⁵ Despite the standing order prohibiting commanders from sending troops across the international boundary, a cavalry detachment pursued the raiders into Mexican territory and killed between 75 and 100 Mexicans. Although the incursion was unauthorized, US senior army officials quickly deemed it as 'hot pursuit'. The same attitude was adopted by US President Woodrow Wilson.⁷⁶

Plans were set in motion for a larger expedition to pursue Villa's raiders. Before launching the operation, the US and the Mexican governments agreed to a protocol providing for reciprocal crossing in pursuit of bandits. Nevertheless, the US expedition ignored several aspects of this protocol, which resulted in the Mexican government annulling the agreement.⁷⁷ The first elements of the expedition nevertheless crossed the border a week after the Columbus raid. The Mexican government, although in conflict with Pancho Villa, refrained from offering any assistance to the US force.⁷⁸ Tensions between the Pershing expedition and the Mexican government and army increased throughout the following weeks, with the prospect of capturing Villa becoming more and more improbable. Negotiations concerning the withdrawal of the expedition started as early as May 1916 and went on for several months. Finally, between November 1916 and February 1917, the Pershing Expedition was withdrawn, without Pancho Villa being found.

Hot pursuit differed thus from the natural-law concept of self-defence inasmuch as it concerned action in the immediate aftermath of the attack rather than in the face of it. The attacked had the right to pursue the attacker in the territory of another state, without its action being considered as a hostile act against that state as long as it was made to address a great and immediate danger and it was not excessive.⁷⁹ As the example of the Pershing expedition shows, punitive expeditions required more preparation, thus more time elapsed between the initial attack and the response.

⁷³ Phillimore, Vol. 3, pp. 225-231; Twiss, Vol. 1, pp. 143-145.

⁷⁴ L.B. Hall and D.M. Coerver, *Revolution on the Border: The United States and Mexico 1910-1920* (Albuquerque, University of New Mexico Press 1990) pp. 35-36.

⁷⁵ *Ibid.*, p. 60.

⁷⁶ *Ibid.*, pp. 60-61.

⁷⁷ *Ibid.*, p. 62. The protocol provided that crossing would be permitted only if another raid took place, pursuant to the principle of 'hot pursuit'. Consequently, the Mexican government did not agree in the protocol to admit the crossing of a force clearly bigger than small detachments six days after an incident took place. A division composed of more than five thousand men with plans to venture deep inside Mexican territory launched well after the raid took place went well beyond the characteristics of 'hot pursuit'.

⁷⁸ Hall and Coerver, pp. 61, 64.

⁷⁹ Hall, pp. 227, 229.

Self-defence, hot pursuit, punitive expeditions and rescue of nationals were all measures short of war under the wider umbrella of the principle of self-preservation. The demarcation line between these measures was often blurred in nineteenth century state practice and the notions of self-defence and self-preservation were often used interchangeably.⁸⁰ Nonetheless, defensive action as a measure short of war – regardless of its denomination – was made conditional upon the existence of a danger ‘serious and imminent’.⁸¹ Moreover, armed action could not go beyond what was necessary to ward off the danger.⁸²

Known today as the incident that triggered the formulation of the customary law standard for ‘anticipatory self-defence’, the *Caroline* incident is worth to be thoroughly analysed, because it prompted an essential legalistic discussion among statesmen about the limits of self-defence.

3.2.2.1 The *Caroline* incident (1837)

During the insurrection in Canada in 1837, small, sympathetic disturbances occurred at various places in the United States, especially along the Canadian border. The Government of the United States adopted active measures for the enforcement of the neutrality laws, but the difficulty of the situation was increased by the insurgents, who, when defeated, sought refuge in the United States, where they resumed recruiting their forces. The *Caroline*, a Great Lakes steam vessel, was owned by some American sympathizers of the insurgents and was used for transporting aid supplies for the rebel forces. To put an end to this practice, on 29 December 1837, British forces crossed into American territory, without the consent of the American government, took possession of the *Caroline* and sent it over the Niagara Falls, with some loss of life in the process.⁸³ The case was settled in 1842 and friendly relations were not interrupted, even though the incident was seen as prone to ‘justify reprisals or even general war.’⁸⁴

The *Caroline* incident bears importance because of the correspondence that ensued between the parties. The first complaint of the destruction of the vessel was the Note of 5 January 1838 addressed by John Forsyth, the American Secretary of State, to Henry Fox, British Minister at Washington. In this note, Forsyth asserted that the lamentable incident was to be made the subject of a demand for redress. The British Minister replied a month later and invoked, *inter alia*, the principles of self-defence and self-preservation as justifying the action of the British forces.⁸⁵ One year later, in an official report, the Law Officers of the Crown confirmed that justification and characterized the action of the British forces as ‘absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past.’⁸⁶

After another two years, the discussion was renewed as a result of the arrest of British citizen Alexander McLeod by the American authorities. McLeod claimed that he took

⁸⁰ R.Y. Jennings, ‘The *Caroline* and McLeod Cases’, 32 *American Journal of International Law* (1938), p. 82.

⁸¹ Hall, p. 232.

⁸² *Ibid.*, pp. 229, 232.

⁸³ Jennings, pp. 82-84.

⁸⁴ Webster, *BFSP*, p. 1140.

⁸⁵ Jennings, p. 85 nn. 8 and 9.

⁸⁶ *Ibid.*, p. 87 n. 14 (Law Officers’ Report of 25 March 1839).

part in the destruction of the *Caroline* and was consequently arrested and charged with murder. On 24 April 1841, the new American Secretary of State, Daniel Webster addressed a letter to Henry Fox, in which it addressed both the issue of *Caroline* and McLeod's arrest. Webster discussed each and every point of justification that was brought up by the British government in early January 1838. On the issue of self-defence, Webster asserted that:

‘A just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification.’⁸⁷

With a formula which has become famous, Webster further defined absolute necessity as a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’⁸⁸ On this basis, Webster looked in detail at the circumstances of the *Caroline* incident in order to demonstrate that there was no absolute necessity to justify the destruction of the vessel. Accordingly, Webster called upon the British government to show that the legal authorities of Canada ‘did nothing unreasonable and excessive’⁸⁹ and that a seizure of the vessel during daylight was impossible, that detaining the vessel as opposed to destroying it was not enough and that attacking the crew on board, killing some and injuring others ‘was a necessity, present and inevitable.’⁹⁰

Webster's discussion of the *Caroline* incident was a true legal analysis conducted in order to examine whether the requirements of absolute necessity really applied. This formula was adopted by many subsequent commentators and statesmen as the classic customary standard for ‘anticipatory self-defence’.

Four important notes need to be made. First of all, Webster's analysis had no immediate effect on contemporaneous state practice. Many commentators still discussed *Caroline* as a case of ‘self-preservation’. Phillimore, for instance, characterized the British justification as a ‘sufficient answer and a complete vindication’ of the incident under the right of self-preservation.⁹¹ Similarly, Hall was of the opinion that there was no difficulty for the British to satisfy the requirements of Webster, because the act was indeed in the limits of necessity of self-preservation.⁹² Although the British-American correspondence referred to the limits of self-defence, the overall discussion was still dominated by the principle of self-preservation as the overarching concept.

Secondly, the British-American correspondence confirmed the contemporary requirement of providing legal justification for armed actions outside a state of war. As with ‘imperfect wars’, measures short of war needed to be justified on the basis of a legal

⁸⁷ Webster, *BFSP*, pp. 1132-1133.

⁸⁸ *Ibid.*, p. 1138.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Phillimore, Vol. 3, p. 228.

⁹² Hall, pp. 227-229.

norm or principle.⁹³ States did not have a *carte blanche* to engage in such an armed action without providing a legal justification.

Thirdly, there is nothing in Webster's analysis that would suggest that the action of the British forces was seen as 'anticipatory self-defence'. As a matter of fact, Webster defines absolute necessity as a trigger of the right of self-defence *as such* – he does not emphasize on any special anticipatory aspect. The fact that the destruction of the *Caroline* was a 'measure of precaution for the future'⁹⁴ was not challenged by anybody. It was evident that self-defence *per se* justified such an action. The controversy surrounded the specific circumstances of the act and the lack of justification for destroying the vessel. Consequently, the existence of a *necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation* was the condition under which self-defence could be invoked. The fact that this involved anticipatory action was seen as obvious. This understanding of self-defence was the same that the early and medieval Christian thinkers, the Spanish scholastics and Grotius saw as the natural right to wage wars to ward off injuries. The concept is best traced if one looks at the circumstances allowing private war in self-defence. From Augustine and Aquinas all the way to Gentili and Grotius, just war theorists allowed individuals to defend themselves in the face of a present or imminent attack. A slightly more permissive interpretation of this *stricto sensu* self-defence – best described by Grotius⁹⁵ – was transferred to 'imperfect wars' waged by sovereigns without officially declaring war between each other. As a measure short of war, self-defence retained the same characteristics: it was an armed action undertaken in the face of an immediate attack or an imminent, prepared threat. It was not 'anticipatory self-defence'. It was self-defence with an intrinsic anticipatory aspect. That is what the Webster-formula also confirms.

Fourthly, the arguments of Webster highlight the same three elements of self-defence that could be discerned in the natural-law concept of self-defence. First of all, there had to be an attack, immediate or imminent. It is essential to note here that there was no discussion of the authorship of the attack; it was accepted by both sides that self-defence could be invoked against insurgents and rebels who did not belong to the regular forces of a state. Secondly, the danger posed by that attack had to create an immediate need for action. As Webster put it, there had to be 'a necessity, present and inevitable'⁹⁶ for self-defence to be exercised. Thirdly, the use of self-defence could not include anything 'unreasonable or excessive',⁹⁷ thus it had to be exercised with moderation.

The Webster-formula thus vindicated the centuries' old understanding of the natural-law concept of self-defence. Anticipatory action was not only part of this concept, but pertained to its basic understanding. Accordingly, the elements that limited the exercise of self-defence also served as limits of anticipatory action.

Unfortunately, not all nineteenth century state practices that invoked the right of self-defence ended in such a ground-breaking juridical differentiation between self-defence and self-preservation. Another case that concerned the limits of self-defence was the *Virginius* affair involving the United States and Spain (then proprietor of Cuba). This

⁹³ Neff, p. 156.

⁹⁴ Jennings, p. 87 n. 14 (Law Officers' Report of 25 March 1839).

⁹⁵ See *supra* 2.3.3.2. Grotius, Bk. II, ch. 1 (xvii), p. 184.

⁹⁶ Webster, *BFSP*, p. 1138.

⁹⁷ *Ibid.*

incident is a good illustration of how the concept of self-defence was employed to justify actions that went well beyond its limits and how the principle of self-preservation was used as a corollary.

3.2.2.2 The *Virginus* affair (1873)

The *Virginus* was an ex-Confederate blockade runner that was used by Cuban rebels (and their American sympathizers) during the Ten Years' War between Cuban insurgents and Spain (1868-1879).⁹⁸ From 1870 to 1872, the *Virginus* was used to transport arms and men to aid the insurgency. Spain became aware of the mission of the steamer and regarded it as a pirate ship. After several narrow escapes, the *Virginus* was finally captured on 31 October 1873 by the Spanish man-of-war *Tornado* and hauled with its crew to internment at Santiago.⁹⁹ A few days later, three dozen of the crew members were executed after swift military trials. Spain first justified its action by claiming that the expedition or voyage undertaken by the *Virginus* from the port of New York 'was not of purely commercial nature [...], but that in view of the articles which she carried, her character was an essentially military one.' Hence, the Spanish government claimed that, according to the law of nations, the acts pertained to the crime of piracy.¹⁰⁰ During the long diplomatic correspondence between the two sides, Spain further characterized the acts as 'a breach of international law to the injury of Spain,' which permitted self-defence:

'Neither natural law, nor the law of nations, can authorize [...] that the enemies of a sovereign state can, with impunity, navigate the high seas, carrying soldiers and resources to the hosts of an enemy without the country menaced by such an invasion having the privilege of disturbing them.'¹⁰¹

An unconditional and absolute prohibition to act in such circumstances 'would restrict, if not completely annul, the right of self-preservation and of self-defence, which is a right with respect to other countries, and one of the most solemn and sacred of the duties of any state with relation to its citizens.'¹⁰² The US did not accept this justification. Even before Spain resorted to invoking self-defence, both the US and the British government considered that such defensive action would have entailed the capture of the vessel and

⁹⁸ The Ten Years' War (1868-1878) was the first of three wars that Cuba fought against Spain for its independence. The second occurred between 1879 and 1880, whereas the third between 1895 and 1898, the last three months of which are known as the Spanish-American War.

⁹⁹ Protocol of the Conference Held at the Department of State, at Washington, on 29 November 1873, between Hamilton Fish, Secretary of State, and Rear-Admiral Don José Polo de Bernabé, Envoy Extraordinary and Minister Plenipotentiary of Spain, in *Message from the President of the United States, Transmitting, in Answer to the Resolution of the Senate of the 12th instant, a Report from the Secretary of State, with Accompanying Correspondence, with regard to the Claim of Indemnity from Spain for the Execution at Santiago de Cuba of Persons who Were on Board the Virginus*, US Senate Doc. No. 165 (54th Cong., 1st Sess. 1896) p. 3 (hereafter, *Virginus Correspondence*).

¹⁰⁰ *Ibid.*, p. 21 (No. 18, Admiral Polo de Bernabé to Mr. Fish, Washington, 30 December 1873). For details on the way piracy was defined at that time, see: A.P. Rubin, *The Law of Piracy* (Newport, RI, Naval War College Press 1988), pp. 238-245.

¹⁰¹ *Ibid.*, p. 108-109 (No. 46, Mr. Cushing to Mr. Fish, Madrid, 5 December 1874).

¹⁰² *Ibid.*

the detention of the crew, but not the execution of the crew members. The same opinion was expressed by contemporary lawyers such as Hall, who was of the opinion that an imminent necessity under the principle of self-preservation did exist, but it only justified the capturing of the vessel and not the execution of its crew.¹⁰³ The summary executions were viewed as a massacre ‘which shocked the public sense of Europe as well as of America.’¹⁰⁴

The *Virginus* affair illustrates the growing tendency in the nineteenth century state practice to view self-defence not only as a measure to fend off attacks, but also as a method of securing the non-repetition of such acts (after an attack had occurred).

In this case, both the pre-emptive and the remedial side of self-defence were recognized. The remedial aspect of self-defence was acknowledged by medieval Christian publicists, but only for the purpose of precluding the repetition of attacks.¹⁰⁵ No time of preparation was allowed between the attack suffered and the defensive action, because that would have qualified as revenge.¹⁰⁶ These restrictions were applied to the *stricto sensu* self-defence, which was the natural right of the individual to defend himself. During nineteenth century state practice, the remedial aspect of self-defence acquired more importance due to the myriad of measures short of war justified by self-preservation. As the *Virginus* affair shows remedial action was meant to ward off the repetition of injuries. Preparation for and resort to such an action was allowed as long as it was confined ‘within the narrowest limits consistent with obtaining the required end.’¹⁰⁷ The reason why the self-defence claim of Spain could not be maintained was not because of the partly remedial nature of their action, but because of the excessiveness thereof. The execution of the *Virginus* crew went well beyond the necessary precaution that moderation in self-defence allowed.

The nineteenth century state practice thus carried on the narrow understanding of self-defence (with the alterations dictated by the realities of public warfare) in the form of measures short of war. The temporal dimension of that understanding traditionally pertained to the time before and during the attack and increasingly related also to the time after the attack, but only to ward off future attacks from occurring. Self-defence, whether in its anticipatory or remedial form, was limited by three elements: the occurrence or threat of an attack, the immediate need to take action and moderation.

3.3 Concluding remarks

The aim of this chapter was to analyse the views adopted during the seventeenth to nineteenth centuries regarding the natural-law concept of self-defence and to assess whether the status and limits of anticipatory action were altered during that period. Due to the realist and positivist influences, starting with the middle of the seventeenth century, the issue of war was seen as outside religious and moral considerations. Instead of a substantive analysis of ‘just causes’, positivist jurists and realist philosophers across the

¹⁰³ Hall, pp. 232-234.

¹⁰⁴ *Virginus Correspondence*, p. 90 (No. 31, Mr. Cushing to Mr. Fish, Madrid, 22 July 1874).

¹⁰⁵ See, for instance, Gratian, question I, in Reichberg et al., p. 110; Pisan, Part III, ch. 12, in Reichberg et al., p. 219.

¹⁰⁶ See *supra* 2.2, 2.3 and 2.4.

¹⁰⁷ Hall, p. 229.

European space focused more on the procedural aspects of recourse to war (preparations, declaration, conduct during hostilities). Against this background, the old Christian conception of natural law lost its dominant position and the just war doctrine was gradually replaced by balance-of-power ideas. Thus war was seen as the absolute prerogative of the sovereign, who could alone decide when it was necessary, for the sake of the state. Moreover, with the famous work of Clausewitz, war became ‘an instrument of policy’ that had to be used when state interests commanded it.

The body of law that received more attention than before was the one concerning conduct of hostilities. Lawful conduct of war was viewed as an autonomous category regardless of the justice of the cause.

Needless to say, the positivist normative framework was also ‘international’ in character, even more so than its Christian natural-law predecessor. Interrelations of states in the Western tradition made the tenets of this normative framework known and accepted across jurisdictions. Moreover, building on the work of Grotius, several positivist lawyers (with Vattel deserving special attention) laid the basis of a more modern conception of the law of nations in which treaty law was increasingly dominant.

Public war had to follow all the formalities prescribed by voluntary law in order to be lawful and ‘perfect’. As regards the rights to make war, the sovereign had full prerogatives to resort to offensive or defensive armed action. Defensive ‘perfect’ war also allowed preventive action against possible dangers and was thus close in its *rationale* to preventive war as described by Gentili.

During this period, state practice was abundant in special reprisals, pacific blockades and privateering.¹⁰⁸ Further, a full array of measures short of war – the descendants of ‘imperfect wars’ – was permitted under the principle of self-preservation. This principle was viewed as imposed on society by nature and self-defence was seen as a ‘primary’ right incidental to it. In this form, self-defence was indeed still seen as a right given to all by nature.

In nineteenth century Western-hemisphere state practice, self-defence as a measure short of war was acknowledged across jurisdictions as a customary rule.¹⁰⁹ That rule did not allow preventive action.¹¹⁰ Self-defence as a measure short of war was a concept inherited from medieval scholars and just war theorists and originated from the *stricto sensu* self-defence for individuals, although it had slightly more permissive limits accommodated to the realities of inter-state conflicts. Accordingly, it allowed action against an imminent, prepared threat or an ongoing attack. It also allowed a strike after an attack, if the purpose was to fend off ensuing attacks. The *Caroline* incident confirmed these limits and later served as a basis for clarifying the differences between self-defence and self-preservation. The arguments put forward by Daniel Webster also shed light on the three elements of self-defence: existence of an attack, immediate need to respond and moderation. The importance of the Webster-formula became more obvious in the

¹⁰⁸ Grewe, pp. 525-530.

¹⁰⁹ According to Webster, the law of nations acknowledged a right of self-defence for the preservations of nations and individuals alike. Webster, *BFSP*, pp. 1132-1133.

¹¹⁰ Hall, pp. 227, 233. Nonetheless, Twiss continued Gentili’s and Vattel’s tradition and acknowledged self-defence as a right that could be exercised not only against immediate assault, but also ‘threatened aggression’ which was not necessarily imminent. Twiss, Vol. 1, pp. 11-12.

beginning of the twentieth century, when the international trend to restrict war started to gain ground.

It is important to conclude at this point that the natural-law concept of self-defence surfaced in seventeenth- to nineteenth-century state practice as 'imperfect war' and later, as a 'measure short of war'. The temporal dimension of this concept pertained to the time before and during the attack. Due to the myriad of measures short of war justified by self-preservation, self-defence increasingly related to the time after the attack, but only if the aim was to preclude the repetition of attacks. The anticipatory nature of this concept of self-defence has stood its ground against the test of time, so did its limits (occurrence or threat of an attack, immediate need for action and moderation). This concept of self-defence did not allow preventive action. That was a prerogative that could be used only in a 'perfect' war that respected all the formalities required to institute an official state of war.