

# 13

## International Law

*This is online Chapter 13 of the second edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy (2d ed. 2017). The printed book, by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, and Michael P. O'Shea, consists of Chapters 1 through 11. More information and additional materials are available at <https://www.wklegaledu.com/johnson-firearms-law-2>. The printed book may also be purchased from Amazon.com and Barnes & Noble (bn.com). The companion website for the book is [firearmsregulation.org](http://firearmsregulation.org).*

*The online chapters, by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, and E. Gregory Wallace, are available at no charge from either <https://www.wklegaledu.com/johnson-firearms-law-2> or from the book's separate website, [firearmsregulation.org](http://firearmsregulation.org). They are:*

- 12. Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*
- 13. International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues. (This chapter.)*
- 14. Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*
- 15. In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*
- 16. Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

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This online chapter covers international-law principles and documents involving self-defense and firearms control. International law traditionally dealt with relations between nations but has expanded to cover interactions between states and individuals.<sup>1</sup>

The Chapter is divided into the following Parts:

- A. United Nations
- B. Regional Human Rights and Arms Control Conventions
- C. Classical International Law
- D. Resistance to Genocide
- E. International Law and the Second Amendment

Part A covers the leading international legal conventions on the right of self-defense or gun control: the Universal Declaration of Human Rights, the UN Programme of Action against the illicit trade in small arms, the Firearms Protocol and International Tracing Instrument, the Arms Trade Treaty, and the UN’s International Small Arms Control Standards (ISACS). Part A also covers the work of various UN bodies, such as the Human Rights Council.

Part B focuses on major regional firearms agreements. These include the Inter-American Convention Against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; the European Firearms Directive; and the Nairobi Protocol.

Part C steps back from current issues to examine the foundations of international law and the individual and collective rights of self-defense. This Part presents the writings of Suarez, Grotius, Pufendorf, Vattel, and other founders of international law. From the sixteenth through eighteenth centuries, these geniuses created what we today call “classical international law.”

Part D addresses the most important international law problem of the last century: genocide. To what extent, if any, does international law provide for forceful resistance to mass murder? For forceful resistance to other violations of human rights?

Lastly, Part E presents arguments for whether and how international gun control should be implemented. The Part also examines how “norms entrepreneurs” use international law in service of gun control or gun rights.

First, some basic international-law vocabulary is helpful for understanding the material in this chapter:

When an international agreement involves many parties, the agreement is typically called a *convention*. Defined most narrowly, a *treaty* is a type of bilateral agreement between nations. *Treaty* is also sometimes used in a broader sense, as in the U.S. Constitution. The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. Const., art. II, § 2. The general rules of treaties

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1. The authors would like to thank Vincent Harinam (M.A. Criminology, U. Toronto 2017), who contributed substantially to the second edition of this chapter.

and conventions are codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.<sup>2</sup>

*Customary international law* emerges from the behavior of nations. When nations consider a custom to be legally binding, then the custom can be said to be part of international law. The classic example of customary international law is ambassadorial immunity. Long before there were any treaties about how ambassadors should be treated, nations considered themselves to be legally obliged not to criminally prosecute ambassadors from foreign countries.

Closely related to customary international law are *norms*. In the international law context, a *norm* is an internationally accepted standard of conduct, even if that standard has not yet become a well-established custom. Ordinary customary law can always be changed; for example, a new convention might change the rules for ambassadorial immunity. *Peremptory norms*, however, are said to be always and everywhere binding and unchangeable. As Part C discusses, the Classical Founders of international law described Natural Law in similar terms. Since the late twentieth century, international policy entrepreneurs (discussed in Part E) have been attempting to argue that their favorite policies are peremptory norms of international law.

Mere custom is *not* in itself sufficient to create customary international law; the custom must be accompanied by *opinio juris sive necessitatis* (“an opinion of law or necessity,” commonly shortened to *opinio juris*). In other words, a nation must be adhering to the custom because the nation believes that it is legally required to do so, or is compelled to by the nature of things, as denoted by “necessity.”

Another source of international law is the set of general principles common to the domestic law of many nations. General principles of international law may be drawn from standards that are common to the major legal systems of the world.

International organizations play an important role in the development of international law. The United Nations is the most prominent international organization, but there are many others. The United Nations Charter establishes the International Court of Justice (a/k/a “the World Court”) as the organization’s primary judicial mechanism.

Section 38(1) of the [Statute of the International Court of Justice](#) provides a standard definition of the sources of international law: (a) international conventions; (b) customary international law; (c) “the general principles of law recognized by civilized nations”; and (d) “judicial decisions and the teachings of the most highly qualified publicists [legal scholars] of the various nations, as subsidiary means for the determination of rules of law.” So items (a), (b), and (c) are considered *formal sources*, while (d) lists *subsidiary sources*.

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2. The U.S. has signed but not ratified the Vienna Convention. The State Department considers many of its provisions to constitute customary international law. U.S. State Dep’t, [Vienna Convention on the Law of Treaties](#).

## A. *The United Nations*

### 1. Universal Declaration of Human Rights

The 1948 [Universal Declaration of Human Rights](#) was most of all the work of Eleanor Roosevelt, America’s first Ambassador to the United Nations.<sup>3</sup> She was also the first Chair of the United Nations Human Commission on Human Rights, serving from 1946 to 1950. She used her position as Chair to lead the creation of the Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948.

Ambassador Roosevelt explained that the Declaration is “not a treaty” and “does not purport to be a statement of law or legal obligations.” 19 Dept. of State Bull. 751 (1948); *see also Sosa v. Alvarez Machain*, 542 U.S. 692, 734-35 (2004) (quoting Roosevelt). However, four countries have explicitly adopted the Declaration into their own constitutional law. The Constitution of the Principality of Andorra art. 5; Mauritania Constitution, pmb.; *Constitucion de la Republica Portuguesa*, art. 16(2); Constitution of Romania, art. 20.<sup>4</sup> In addition, some consider the Universal Declaration a source of customary international law norms.

The Universal Declaration’s Preamble recognizes a right to resist tyranny:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. . . .

### NOTES & QUESTIONS

1. The *travaux* (drafting history) of the Universal Declaration show that the preamble was clearly intended to recognize a preexisting human right to revolution against tyranny. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* 300-12 (1999). Since the Declaration treats the right of resistance as preexisting, what is the source of that right? When you read *infra* Section C, on classical international law, consider how the classical authors discerned the existence of such a right.
2. During negotiations, the resistance language was inserted at the insistence of Ambassador Roosevelt. The Soviet bloc, which was controlled by Josef Stalin, was opposed to any recognition of justified resistance to tyranny. Since Stalin purported to support human rights and self-government for all nations, why would he object to the right of resistance?

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3. She was the widow of President Franklin Roosevelt (d. 1945). During her time as First Lady (1933-45), first U.S. Ambassador to the UN (1947-53), and until her death in 1962, she was a very influential activist and author, the *beau ideal* of American liberalism.

4. Constitutions of most nations can be found at [Constitute](#). Online Chapter 14.A explores national constitutions in detail, covering topics such as rights to arms, rights to resist tyranny, and rights of self-defense.

3. Does the “tyranny” mentioned in the Universal Declaration of Human Rights encompass the tyranny that Americans claimed to be resisting in the Revolutionary War against Great Britain? Chs. 3.E-F. That the English resisted in their Glorious Revolution of 1688? Ch. 2.H.
4. As First Lady (1933-45) and until her death in 1962, Mrs. Roosevelt was well-known as a civil rights advocate and political liberal. She began carrying a revolver for protection in 1933 and continued to do so for the rest of her life, including when she traveled alone to dangerous parts of the American South, in order to speak out for civil rights. See Dave Kopel, Paul Gallant & Joanne Eisen, *Her Own Bodyguard*, Nat’l Rev. Online, Jan. 24, 2002.
5. Is the preamble to the Universal Declaration similar to paragraph two of the United States Declaration of Independence? Similar principles are found in France’s 1789 Declaration of the Rights of Man, adopted in the early days of the French Revolution: “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” National Assembly of France, [Declaration of the Rights of Man](#) art. 2 (Aug. 26, 1789). Or as a similar 1793 declaration put it: “When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties.” National Assembly of France, [Declaration of the Rights of Man and Citizen](#) art. 35 (1793).

## 2. Resolution on the Definition of Aggression

The UN General Assembly (GA) has no ability in itself to create international law. While no GA resolution is law, a GA resolution may sometimes be considered a persuasive source of international norms. The 1974 GA Resolution on the Definition of Aggression seems to recognize a right to fight for self-determination, freedom, and independence:

Nothing in this definition...could in any way prejudice the right to self-determination, freedom and independence. . .particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support.

Resolution on the Definition of Aggression, GA Res. 3314 (XXIX), Annex, art. 7 (Dec. 14, 1974).

Another General Assembly resolution recognizes “man’s basic human right to fight for the self-determination of his people.” *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*, GA Res. 2787 (XXVI), Supp. No. 29, UN Doc. A/8543 (Dec. 6, 1971). A similar resolution recognizes peoples’ “inherent right to struggle by all necessary means at their disposal against colonial powers and alien domination in exercise of their self-determination.” *Basic principles of the legal status of*

*the combatants struggling against colonial and alien domination and racist régimes*, GA Res. 3103 (XXVIII) (Dec. 12, 1973).

### NOTES & QUESTIONS

1. Whose rights of forcible resistance are encompassed by the text of the above resolutions? Can you name some current situations where the above right does or does not apply?
2. According to the Resolution on the Definition of Aggression, is the right to resist limited to persons fighting colonial, racist, or alien regimes?
3. Other than one's sympathy for (or opposition to) particular resistance forces, are there any neutral rules for the legitimacy of forcible resistance?
4. Although the 1974 Resolution on the Definition of Aggression was written in general language, in practice at the UN the resolution was used rhetorically to justify violence in three particular situations: the war of Robert Mugabe's forces to overthrow the white government in Rhodesia (today, Zimbabwe), the war of the African National Congress to overthrow the apartheid government in South Africa, and the efforts by various nations and terrorist organizations to eradicate the state of Israel. The prior 1971 resolution mentioned these situations, as well as the revolts against Portuguese colonialism in Africa. Starting in the 1970s, and thereafter, Israel has been *sui generis* at the United Nations, the only member state for which the General Assembly and other UN bodies consistently side with terrorists whose stated objective is the destruction of the member state and the extermination of the people therein. Reading the 1971-74 resolutions based on original intent shows that they would support only resistance against regimes allied with the West. On the other hand, a purely textualist reading would support forcible resistance against any regime that denies self-determination. This would encompass the many dictatorships whose UN delegations voted for the resolutions. Today, how should the resolutions be understood?

### 3. Programme of Action

In 1992, the [United Nations Register of Conventional Arms](#) was established. It called for nations voluntarily to submit to the UN annual reports on their imports and exports of conventional arms; it covered weapons such as battle tanks, combat aircraft, artillery over 75mm, warships, and so on. Despite the wishes of some advocates, the register did not cover firearms, or other small arms and light weapons (SALW), such as grenades, portable anti-tank weapons, or small mortars. The register was not successful in achieving its objective of reducing armaments globally.

The attention of the United Nations first turned to gun control at a 1995 conference of the UN Office on Drugs and Crime, where the Japanese

delegation introduced a resolution calling for strict international gun control. *Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, 29 April-8 May 1995, A/CONF.169/16, May 12, 1995. A series of regional conferences ensued over the next several years. Indisputably, there was (and is) a serious problem of international arms traffic that supplies warlords, organized crime, terrorists, and other bad actors with small arms and light weapons (SALW).

An immediate concern was a large new supply of arms that were entering global markets. After World War II, the Soviet Union (Union of Soviet Socialist Republics) had taken over much of Eastern and Central Europe, imposing neo-colonial rule through local Communist puppets. The military alliance of the U.S.S.R. and its satellites was called the Warsaw Pact.<sup>5</sup> The Warsaw Pact nations were a constant arms supply source for terrorists, dictatorships, and other criminals around the world—but only to the extent that they advanced communist interests. Following the collapse of European communism in 1989-90, the arsenals of some of the former communist nations entered the international black market on a massive scale, with no strategic filters.

Something similar took place after the end of World War I. The period of 1916-28 in China is known as the Warlord Era. Then, as in some previous times in Chinese history, numerous warlords contended for power. When World War I ended in 1918 and armies demobilized, the armies had many more weapons than they needed for peacetime. In addition, the arsenals of the defeated nations, including Germany and Austro-Hungary, were seized by the victors. Meanwhile, arms makers who had been producing at high capacity for a global war suddenly found the demand for their products had shrunk. So Chinese warlords bought, and the rest of the world readily supplied, arms for the Chinese warlords. The arms came from the West, the Soviet Union, and Japan—notwithstanding the Arms Embargo Agreement that some of the supplying nations had agreed to on May 5, 1919. Anthony B. Chan, *Arming the Chinese: The Western Armaments Trade in Warlord China, 1920-1928* (1982).

A new surge of arms into the global market taking place in the early 1990s, with former Warsaw Pact arsenals being supplemented by production from state-controlled Chinese companies and various other vendors ready to sell anything to any Third World warlord, drug cartel, or other evildoer.

Meanwhile, in 1997, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Treaty) was established. It has been ratified by 164 UN member nations, and not adopted by 33 other members, including the United States, Russia, China, and India. A principal U.S. objection was the prohibition on the use of land mines on the South Korean border, to deter or impede invasion by North Korea. For extensive history of the process, and the text of the convention, see Stuart Casey-Maslen, [Convention on the Prohibition of the Use,](#)

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5. Created in 1955 and dissolved in 1991, the Warsaw Pact comprised the Soviet Union and seven of its satellite regimes in Europe: Poland, East Germany, Hungary, Czechoslovakia, Bulgaria, Rumania, and Albania. Albania withdrew in 1968, because the Albanian regime favored China in the growing rivalry between the Soviet Union and communist China. Yugoslavia, under a communist dictatorship established in 1945 by Josip Broz Tito, never joined the Warsaw Pact.

[Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction](#), Audiovisual Library of International Law (UN).

Many of the advocates involved in the Mine Ban Treaty next turned their attention to the UN’s nascent gun control projects. Professor Kenneth Anderson described what happened next:

I was director of the Human Rights Watch Arms Division, with a mandate to address the transfer of weapons into conflicts where they would be used in the violation of the laws of war, and small arms were the main concern. I was astonished at how quickly the entire question morphed from concern about the flood of weapons into African civil wars into how to use international law to do an end run around supposedly permissive gun ownership regimes in the US. . . .

I dropped any personal support for the movement when it became clear, a long time ago, that it is about controlling domestic weapons equally in the US (or, today, even more so) as in Somalia or Congo.

Kenneth Anderson, *International Gun Control Efforts?* OpinioJuris.org, July 19, 2008. For more on the origins of United Nations gun control, see Professor Harold Koh’s essay in Part E, *infra*.

In 2001, the UN convened a global gun control conference. The conference adopted the [Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects](#) (PoA), UN doc. A/CONF.192/15; *see also* UN Office of Disarmament Affairs, [Programme of Action on small arms and its International Tracing Instrument](#) (clearinghouse for documents about PoA implementation).<sup>6</sup> The PoA sets out measures that are political commitments, but not legally binding. In general, the PoA urges states to cooperate in suppressing international illicit trade in small arms. In some nations, such as New Zealand, the PoA has been cited by domestic gun control advocates as obliging the enactment of new laws.

Since 2001, there have been meetings every two or three years to present views on the PoA. The most important of these were in 2006 and 2012. Efforts to make the PoA more restrictive or turn it into a binding convention were defeated because of opposition from the United States and several other nations.

However, in 2013, the UN General Assembly created the Arms Trade Treaty (ATT), which is discussed below. Unlike the PoA, the ATT is legally binding among ratifiers. In theory, the ATT is about conditioning the licit international trade in SALW, whereas the PoA is about suppressing the illicit trade.

Accordingly, the PoA process continues, with periodic UN conferences. The United Nations’ manifold gun control programs, discussed below, have drawn their primary authority from the PoA.

**NOTES & QUESTIONS**

1. *Defining “small arms.”* As part of the compromise that led to the adoption of the PoA, the document applies to “small arms and light weapons,” but does not define them. The issue was deliberately left open. In military parlance,

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6. “Program” is spelled “programme” because the UN, like most of the world, adheres to British rather than American spelling of the English language.



“light weapons” includes portable items such as mortars, bazookas, or rocket launchers, and excludes “heavy weapons” such as tanks or wheeled artillery. “Small arms” would include a soldier’s firearms. Some advocates argue that “small arms” in the PoA should mean only fully automatic military weapons (such as the AK-47 or M-16 rifles). Others define the term more broadly, to include any military firearms (such as the pistol that an officer would wear as a sidearm), but not to include firearms that are rarely used by the military (e.g., most shotguns). Still others say that the term should include any firearm. As the PoA has been implemented since 2001 by the United Nations, and by any government that has cited the PoA as a justification for acting, the overwhelming approach has been to treat “small arms” as encompassing all firearms. If the UN finally decided that the PoA should define “small arms” and chose you to prepare the definition, what would you write? The 2005 International Tracing Instrument, discussed below, does define SALW, although this definition is not formally part of the PoA.

2. *Registration.* Whatever “small arms” are, the PoA calls for their registration. Nations implementing the PoA are urged:

To ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction. These records should be organized and maintained in such a way as to ensure that accurate information can be promptly retrieved and collated by competent national authorities.

PoA II.9.

What are the potential positives and negatives of central recording of groups and individuals who possess firearms? What might happen to political dissidents and freedom fighters in illegitimate regimes? How might registration help legitimate state actors attempting to combat organized crime groups and career criminals?

3. *UN Charter and self-defense.* The PoA preamble reaffirms “the inherent right to individual or collective self-defense in accordance with Article 51” of the United Nations Charter. PoA I.9. That article of the UN Charter provides:

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.

**UN Charter** art. 51. For years, autocracies that were targeted by arms embargos have claimed that the embargos violate article 51; they argue that the national self-defense right recognized in article 51 includes an implicit right to import arms. Is the implication reasonable? Can the text be read to recognize the right of individual persons to self-defense, or to acquire arms?

Part C, *infra*, examines the Classical view of international law, as it developed in the Middle Ages and thereafter. In the Classical view, the inherent right of national self-defense is derivative of the personal right of self-defense. Why do you think the PoA was careful to mention national self-defense, but not personal self-defense?

4. *Nonstate actors.* An important phrase that did not appear in the final version of the PoA is “nonstate actors.” As originally drafted, the PoA would have forbidden all arms transfers to “nonstate actors.” For example, the 2001 Statement by the PoA President, at the end of the UN’s official summary, blamed the U.S. for a failure to control “private ownership” and to prevent sales to “non-State groups.”

At the least, a “nonstate actors” ban would apply to domestic groups that the government does not want to have arms. As the U.S. delegation, led by John Bolton, pointed out, a nonstate actors ban would have outlawed arms sales to the American Revolutionaries (who at the start of the war did not have diplomatic recognition). *Cf.* Chs.3.E.5, 3.F.7 (discussing American arms imports during the Revolution). A nonstate actors ban would also have prohibited arms supplies to anti-Nazi partisans during World War II, and to any modern rebel group attempting to overthrow a dictatorship.

The ban would also seem to forbid U.S. arms sales to Taiwan, since the UN asserts that Taiwan is merely a province of China. *See* Ted R. Bromund & Dean Cheng, *Arms Trade Treaty Could Jeopardize U.S. Ability to Provide for Taiwan’s Defense*, Heritage Found. (June 8, 2012). Similarly, bans to any other group seeking to achieve or maintain independence from the territorial claims of a UN member would be illegal. This would include aid to the rebels in Syria and would have included aid to the Bosnians resisting Yugoslav genocide in the years before Bosnia’s independence was widely recognized diplomatically (*infra* Part D). What are the best arguments for and against outlawing arms transfers to nonstate actors?

For further reading, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by “Non-State Actors”: the Question of Sovereignty*, 8 *Tex. Rev. L. & Pol.* 373 (2004).

5. The PoA’s title phrase “in All Its Aspects” is a hook by which gun control advocates argue that domestic possession of firearms is a proper subject of action for addressing “Illicit Trade.” The PoA and its follow-up conferences express a preference for state control of small arms. Is this preference sound? Some commentators have argued that organized state violence is a greater problem, and has claimed far more lives, than individual violence. *See, e.g.*, Don B. Kates, *Genocide, Self Defense and the Right to Arms*, 29 *Hamline L. Rev.* 501 (2006); online Ch. 14.D.2. Should government have a monopoly on arms? Is there a compelling distinction between state and individual violence? Is the PoA, whose title refers to “illicit trade” a proper means for addressing private gun violence in the U.S.?
6. *Particular types of guns.* Within the PoA and other UN gun control efforts, there is much emphasis on polymer firearms (guns made with plastic components), modular firearms (guns with easily interchangeable parts and

accessories; the semi-automatic AR-15 type rifle is one example), and 3-D printing of firearms. Report of the Secretary-General, [The illicit trade in small arms and light weapons in all its aspects](#), UN doc. A/71/438-A/CONF.192/BMS/2016/1, Oct. 4, 2016, at 13-14 [hereinafter *Illicit Trade*]. The technical facts of such arms are described in online Chapter 15. Although plastic guns and 3-D printing are a very small part of the problem of illicit trafficking today, is there an advantage in getting ahead of the curve on these subjects? Does focusing on them detract from other issues that are more important at present but are politically inconvenient? Would China's proposal that 3-D printers must be licensed like firearms be helpful? Further reading: Mark A. Tallman, *Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution* (2020).

Another idea has been to place radio frequency identification (RFID) chips in all firearms, "to track and document which individual has used a specific weapon, when and for how long." *Illicit Trade, supra*, at 15. What are the advantages and disadvantages of this idea?

7. *Ammunition*. Whether to include ammunition in global gun control was an issue at the 2006 and 2012 UN Programme of Action conferences mentioned above. At the ongoing conferences for the PoA and the ATT, international gun control advocates continue to work hard to try to add explicit mentions of ammunition.

Their first success was the 2018 Third Review Conference to the UN Programme of Action, in New York in June 2018. Allison Pytlak, [Editorial: Inside the theatre of the absurd—the final day of RevCon3](#), 10 *Small Arms Monitor* (no. 6, July 3, 2018). The adopted language was simply "[t]o acknowledge that States that apply provisions of the Programme of Action to small arms and light weapons ammunition can exchange and, as appropriate, apply relevant experiences, lessons learned and best practices acquired within the framework of other relevant instruments to which a State is a Party, as well as relevant international standards, in strengthening their implementation of the Programme of Action." [Report of the Third United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects](#), A/CONF.192/2012/RC/4, II. ¶18. Although the statement seems banal, supporters hoped that the inclusion of the word "ammunition" in the document would be starting point for enforceable ammunition controls. It was the first time that the UN had crossed the red line, drawn by U.S. delegation leader John Bolton in 2001, that the PoA must not involve itself with ammunition. Ted Bromund, [To Promote Gun Control, the UN Changes the Rules](#), *Daily Signal*, June 10, 2018.

Separate from the ATT, but as part of the broader UN process, the UN Office for Disarmament Affairs has created [International Ammunition Technical Guidelines](#). These specify how states should manage their ammunition stockpiles.

Would you recommend including ammunition in the definition of small arms? What are the benefits, harms, and practical challenges that affect your recommendation?

8. *Foreign aid.* Most smuggling of arms into conflict zones is carried out with the complicity of one of more neighboring states. Notwithstanding the high aspirations of the PoA and other UN gun control programs regarding registration and tracing, many governments around the world lack the competence to maintain a functional firearms registry or to trace guns. Thus, the international gun control programs have resulted in proposals for increased international assistance. For example, pursuant to the PoA, the Non-Aligned Movement (a group of 120 underdeveloped nations) has demanded that the U.S. intensify its gun control laws, and that underdeveloped nations be provided with “advanced radar systems,” ostensibly to combat arms smuggling. Coordinator of the Non-Aligned Movement Working Group on Disarmament, [working paper](#) (March 4, 2014).

Could mandatory technology transfers strengthen autocracies in underdeveloped countries? To what extent can a nation implement an agreement like the PoA without also improving its governance more broadly? What is the value of an international agreement that is signed in the knowledge that many of its signatories are unable to fulfill the terms?

9. *Microdisarmament.* Although the PoA and associated projects envision a massive reduction of gun ownership globally, the PoA has also been implemented by disarmament efforts concentrated on a single nation, or a region within a single nation. *See, e.g.,* South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), [Guide to Regional Micro-Disarmament Standards/Guidelines \(RMDS/G\) and SALW control measures](#) (July 20, 2006).

The PoA urges nations:

To develop and implement, where possible, effective disarmament, demobilization and reintegration programmes, including the effective collection, control, storage and destruction of small arms and light weapons, particularly in post-conflict situations, unless another form of disposition or use has been duly authorized and such weapons have been marked and the alternate form of disposition or use has been recorded, and to include, where applicable, specific provisions for these programmes in peace agreements.

PoA II.21. Some microdisarmament programs involve efforts to reintegrate former guerrillas or gangsters into peaceful civilian life. Microdisarmament sometimes focuses on crime-ridden neighborhoods. Microdisarmament can also involve broad efforts to collect guns from the entire civilian population. For examination of UN disarmament programs in Cambodia, Bougainville, Albania, Panama, Guatemala, and Mali, see David B. Kopel, Paul Gallant & Joanne D. Eisen, *Micro-Disarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969 (2005).

Can you imagine circumstances in which the UN should not implement microdisarmament in a nation where the government desires it? When the UN should carry out microdisarmament in a nation whose government does not want it?

10. According to the PoA, nations are supposed to submit voluntary biennial reports. However, many nations have failed to file reports every two years.

Many reports that are submitted do barely more than check certain boxes on the reporting form; they provide little or no information in the data fields. Reporting is especially weak in regions where illicit traffic is especially bad, namely the Mid-East and Africa. *See* UN Office for Disarmament Affairs, [Programme of Action on small arms and its International Tracing Instrument](#) (follow links under “National Reports”); Ted Bromund, *Declines in National Reporting Reveal Failure of U.N.’s Programme of Action on Small Arms*, Heritage Found. (May 28, 2015).

11. Does the PoA empower any nation to do something it could not legally do through its own national laws? If not, what can the PoA achieve?
12. **CQ:** As you work through this chapter, consider the relationship between the PoA and other international instruments on small arms and light weapons. What is the legal relationship? To what extent are these instruments intermingled, asserted to be part of, or reliant upon, each other? What are the advantages and disadvantages of treating these instruments separately or as a comingled whole?
13. Further reading: Sarah Parker & Marcus Wilson, *A Diplomat’s Guide to the UN Small Arms Process*, Small Arms Survey, June 2016 (urging importation of PoA norms into the Arms Trade Treaty and other international gun control programs); Ted Bromund, *U.S. Participation in the U.N.’s “Programme of Action” on Small Arms and Light Weapons Is Not in the National Interest*, Heritage Found. (June 13, 2014) (criticizing “The Cross-Contaminating Structure of the PoA,” especially for domestic gun control).

#### 4. Firearms Protocol and International Tracing Instrument

In 2000, the General Assembly adopted the [United Nations Convention against Transnational Organized Crime](#). GA res. 55/25. This was supplemented by the [Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition](#), GA res. 55/255 (entered into force June 3, 2005) (“Firearms Protocol”). Under the Protocol, states that enter the protocol must criminalize illicit firearm manufacturing and trafficking, and also tampering with firearms markings. States must maintain records of firearms marking and transactions. States should also exchange information to mitigate illicit trade and manufacture.

Pursuant to the Protocol and the PoA, negotiations were held to set international standards for the marking of firearms. The negotiations led to the General Assembly’s adoption of the [International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons](#), A/60/88 (Dec. 8, 2005). The agreement, commonly known as the International Tracing Instrument (ITI), is not legally binding. It defines small arms this way:

For the purposes of this instrument, “small arms and light weapons” will mean any man-portable lethal weapon that expels or launches, is designed to expel or

launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899:

(a) "Small arms" are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns

*International Tracing Instrument*, ¶4. The Instrument's core rules for marking are contained in paragraph 8(a). The general requirement is for a "unique marking providing the name of the manufacturer, the country of manufacture and the serial number."

The ITI contains what might be called an enormous loophole, known as "the Chinese exception." Instead of marking with country/manufacturer/serial number, a marking can be merely "simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture." ITA, ¶8(a). Thus, China was allowed to continue to use only a simple national geometric mark on guns, with no manufacturer identification or serial number.

Various firearms manufacturers in China have enjoyed a thriving business supplying guns to African warlords, dictators, terrorists, and other bad actors. The International Tracing Instrument allows the continuation of this practice by providing plausible deniability. Chinese-made guns found in the possession of a warlord cannot be traced to any particular manufacturer. Even for guns traced to China, the absence of a serial number prevents any dating of the gun. This makes it much harder to prove whether a gun was sold to an African government decades earlier, and had leaked into unauthorized hands, or whether it was recently manufactured for an arms broker, who, with the complicity of the Chinese government, specializes in trafficking to customers who are warlords.

### NOTES & QUESTIONS

1. The ITI and the Firearms Protocol did not lead to any changes to U.S. laws on firearms, which have long required that guns have serial numbers (with the exception of home-made guns that are kept by the person who made them).
2. It is difficult to combat firearms smuggling without reliable tracing. It is impossible to have reliable tracing without reliable marking. Why have the PoA and the ITI not placed more emphasis on reliable marking, both as a political commitment and in practice?

## 5. UN Human Rights Council

In 2006, the UN Human Rights Council endorsed some principles for gun control, as detailed in a report for the Council. The report was prepared by

University of Minnesota Law Professor Barbara Frey, who was the Council’s Special Rapporteur (official expert) on small arms control. The Council has no legal authority, but its pronouncements may be considered by some to contribute to international norms.

**The Frey Report**

**UN Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (prepared by Barbara Frey)**

4. The human rights policy framework for this entire study is based upon the principle that States must strive to maximize human rights protection for the greatest number of people, both in their own societies and in the international community. In other words, to meet their obligations under international human rights law, States must enact and enforce laws and policies that provide the most human rights protection for the most people. In regard to small arms violations, this principle—the maximization of human rights protection—means that States have negative responsibilities to prevent violations by State officials and affirmative responsibilities to increase public safety and reduce small arms violence by private actors.

5. Accordingly, States are required to take effective measures to reduce the demand for small arms by ensuring public safety through adequate law enforcement. State officials, including law enforcement officials, serve at the benefit of their communities and are under a duty to protect all persons by promoting the rule of law and preventing illegal acts. . . .

6. To maximize human rights protection, States are also required to take effective measures to minimize private sector violence by enforcing criminal sanctions against persons who use small arms to violate the law and, further, by preventing small arms from getting into the hands of those who are likely to misuse them. Finally, with regard to extraterritorial human rights considerations, States have a duty to prevent the transfer of small arms and light weapons across borders when those weapons are likely to be used to violate human rights or international humanitarian law. . . .

**I. INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS TO PREVENT SMALL ARMS ABUSES BY NON-STATE ACTORS. . .**

9. Under human rights law, States must maximize protection of the right to life. This commitment entails both negative and positive obligations; States officials must refrain from violations committed with small arms and States must take steps to minimize armed violence between private actors. In the next sections, the present report will set forth the legal authority that is the foundation for the positive responsibilities of States—due diligence—to protect the human rights from private sector armed violence. The report then proposes the specific effective measures required under due diligence to maximize human rights protections in the context of that violence.

**A. THE DUE DILIGENCE STANDARD IN RELATION TO ABUSES BY PRIVATE ACTORS**

10. Under article 2, paragraph 1, of the International Covenant on Civil and Political Rights, States must respect and ensure human rights to all individuals. Ensuring human rights requires positive State action against reasonably foreseeable abuses by private actors. . . .

**B. EFFECTIVE MEASURES TO MEET THE DUE DILIGENCE OBLIGATION. . .**

16. Minimum effective measures that States should adopt to prevent small arms violence, then, must go beyond mere criminalization of acts of armed violence. Under the principle of due diligence, it is reasonable for international human rights bodies to require States to enforce a minimum licensing requirement designed to keep small arms and light weapons out of the hands of persons who are likely to misuse them. Recognition of this principle is affirmed in the responses to the questionnaire of the Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons which indicate widespread State practice to license private ownership of small arms and ammunition. The criteria for licensing may vary from State to State, but most licensing procedures consider the following: (a) minimum age of applicant; (b) past criminal record including any history of interfamilial violence; (c) proof of a legitimate purpose for obtaining a weapon; and (d) mental fitness. Other proposed criteria include knowledge of laws related to small arms, proof of training on the proper use of a firearm and proof of proper storage. Licences should be renewed regularly to prevent transfer to unauthorized persons. These licensing criteria are not insurmountable barriers to legitimate civilian possession. There is broad international consensus around the principle that the laws and procedures governing the possession of small arms by civilians should remain the fundamental prerogative of individual States. While regulation of civilian possession of firearms remains a contested issue in public debate—due in large part to the efforts of firearms manufacturers and the United States of America-based pro-gun organizations—there is in fact almost universal consensus on the need for reasonable minimum standards for national legislation to license civilian possession in order to promote public safety and protect human rights. This consensus is a factor to be considered by human rights mechanisms in weighing the affirmative responsibilities of States to prevent core human rights violations in cases involving private sector gun violence.

17. Other effective measures should also be considered by human rights bodies charged with overseeing State action to protect the right to life. These measures are similar to United Nations guidelines adopted to give meaningful protection to other core human rights obligations. They include:

- (a) The prohibition of civilian possession of weapons designed for military use (automatic and semi-automatic assault rifles, machine guns and light weapons);
- (b) Organization and promotion of amnesties to encourage the retiring of weapons from active use;
- (c) Requirement of marking and tracing information by manufacturers. . .



**II. THE PRINCIPLE OF SELF-DEFENCE WITH REGARD TO HUMAN RIGHTS VIOLATIONS COMMITTED WITH SMALL ARMS AND LIGHT WEAPONS**

19. This report discusses and recognizes the principle of self-defence in human rights law and assesses its proper place in the establishment of human rights principles governing small arms and light weapons. Those opposing the State regulation of civilian possession of firearms claim that the principle of self-defence provides legal support for a “right” to possess small arms thus negating or substantially minimizing the duty of States to regulate possession. The present report concludes that the principle of self-defence has an important place in international human rights law, but that it does not provide an independent, legal supervening right to small arms possession, nor does it ameliorate the duty of States to use due diligence in regulating civilian possession.

**A. SELF-DEFENCE AS AN EXEMPTION TO CRIMINAL RESPONSIBILITY, NOT A HUMAN RIGHT**

20. Self-defence is a widely recognized, yet legally proscribed, exception to the universal duty to respect the right to life of others. Self-defence is a basis for exemption from criminal responsibility that can be raised by any State agent or non-State actor. Self-defence is sometimes designated as a “right”. There is inadequate legal support for such an interpretation. Self-defence is more properly characterized as a means of protecting the right to life and, as such, a basis for avoiding responsibility for violating the rights of another.

21. No international human right of self-defence is expressly set forth in the primary sources of international law: treaties, customary law, or general principles. While the right to life is recognized in virtually every major international human rights treaty, the principle of self-defence is expressly recognized in only one, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), article 2. Self-defence, however, is not recognized as a right in the European Convention on Human Rights. According to one commentator, “The function of this provision is simply to remove from the scope of application of article 2(1) killings necessary to defend against unlawful violence. It does not provide a right that must be secured by the State”.

22. Self-defence is broadly recognized in customary international law as a defence to criminal responsibility as shown by State practice. There is not evidence however that States have enacted self-defence as a freestanding right under their domestic laws, nor is there evidence of *opinio juris* that would compel States to recognize an independent, supervening right to self-defence that they must enforce in the context of their domestic jurisdictions as a supervening right.

23. Similarly, international criminal law sets forth self-defence as a basis for avoiding criminal responsibility, not as an independent right. The International Criminal Tribunal for the Former Yugoslavia noted the universal elements of the principle of self-defence. The International Criminal Tribunal for the Former Yugoslavia noted “that the ‘principle of self-defence’ enshrined

in article 31, paragraph 1, of the Rome Statute of the International Criminal Court ‘reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law’.<sup>7</sup> As the chapeau of article 31 makes clear, self-defence is identified as one of the “grounds for excluding criminal responsibility”. The legal defence defined in article 31, paragraph (d) is for: conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Thus, international criminal law designates self-defence as a rule to be followed to determine criminal liability, and not as an independent right which States are required to enforce.

24. There is support in the jurisprudence of international human rights bodies for requiring States to recognize and evaluate a plea of self-defence as part of the due process rights of criminal defendants. Some members of the Human Rights Committee have even argued that article 6, paragraph 2, of the International Covenant on Civil and Political Rights requires national courts to consider the personal circumstances of a defendant when sentencing a person to death, including possible claims of self-defence, based on the States Parties’ duty to protect the right to life. Under common law jurisdictions, courts must take into account factual and personal circumstances in sentencing to the death penalty in homicide cases. Similarly, in civil law jurisdictions: “Various aggravating or extenuating circumstances such as self-defence, necessity, distress and mental capacity of the accused need to be considered in reaching criminal conviction/sentence in each case of homicide.”

25. Again, the Committee’s interpretation supports the requirement that States recognize self-defence in a criminal law context. Under this interpretation of international human rights law, the State could be required to exonerate a defendant for using firearms under extreme circumstances where it may be necessary and proportional to an imminent threat to life. Even so, none of these authorities enumerate an affirmative international legal obligation upon the State that would require the State to allow a defendant access to a gun.

**B. NECESSITY AND PROPORTIONALITY REQUIREMENTS FOR CLAIM OF SELF-DEFENCE**

26. International bodies and States universally define self-defence in terms of necessity and proportionality. Whether a particular claim to self-defence is successful is a fact-sensitive determination. When small arms and light weapons are used for self-defence, for instance, unless the action was necessary to save a life or lives and the use of force with small arms is proportionate to the threat of force, self-defence will not alleviate responsibility for violating another’s right to life.

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7. [*Prosecutor v. Kordić & Čerkez* [ICTY Trial Chamber], Case no. IT-95-14/2, *Judgment of Feb. 26, 2001*, ¶ 451. —Eds.]

27. The use of small arms and light weapons by either State or non-State actors automatically raises the threshold for severity of the threat which must be shown in order to justify the use of small arms or light weapons in defence, as required by the principle of proportionality. Because of the lethal nature of these weapons and the *jus cogens* human rights obligations imposed upon all States and individuals to respect the right to life, small arms and light weapons may be used defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged.

28. The requirements for a justifiable use of force in self-defence by State officials are set forth in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In exceptional circumstances that necessitate the use of force to protect life, State officials may use firearms and claim self-defence or defence of others as a justification for their decision to use force. However, if possible to avoid the threat without resorting to force, the obligation to protect life includes the duty of law enforcement to utilize alternative non-violent and non-lethal methods of restraint and conflict resolution.

29. The severe consequences of firearm use therefore necessitate more detailed and stricter guidelines than other means of force. Even when firearm use does not result in death, the injuries caused by firearm shots can be paralyzing, painful, and may immobilize a person for a much longer period of time than would other methods of temporary immobilization. The training handbook for police on human rights practices and standards produced by the Office of the High Commissioner for Human Rights says that “firearms are to be used only in extreme circumstance”. Any use of a firearm by a law enforcement official outside of the above-mentioned situational context will likely be incompatible with human rights norms. . . .

#### D. SELF-DEFENCE BY STATES AGAINST THE FORCE OF OTHER STATES

38. Finally, it is important to address briefly the claim that Article 51 of the Charter of the United Nations provides a legal right to self-defence to individuals. The ability of States to use force against another State in self-defence, through individual State action or collective action with other States, is recognized in Article 51 of the Charter. This article is applicable to the States Members of the United Nations who act in defence of armed attacks against their State sovereignty. Article 51 provides an exception to the general prohibition on threat or use of force in international law, as expressed in article 2, paragraph 4, of the Charter. International customary law also binds States who act in self-defence against other States to conform to the three elements of necessity, proportionality and immediacy of the threat.

39. The right of self-defence in international law is not directed toward the preservation of lives of individuals in the targeted country; it is concerned with the preservation of the State. Article 51 was not intended to apply to situations of self-defence for individual persons. Article 51 has never been discussed in either the Security Council or General Assembly as applicable, in any way, to individual persons. Antonio Cassese notes that the principle of self-defence claimed by individuals is often wrongly confused with self-defence under public international law, such as in Article 51. “The latter relates to conduct by States

or State-like entities, whereas the former concerns actions by individuals against other individuals . . . confusion [between the two] is often made.” . . .

**UN Human Rights Council Prevention of Human Rights Violations Committed with Small Arms and Light Weapons**  
**United Nations, A/HRC/Sub.1/58/L.24, Human Rights Council**  
**Sub-Commission on the Promotion and Protection of Human Rights**  
**Fifty-eighth session, Agenda item 6(d), 2006**

Prevention of human rights violations committed with small arms and light weapons. . . .

Reaffirming the importance of the right to life as a fundamental principle of international human rights law, as confirmed in article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights and in the jurisprudence of the Human Rights Committee. . . .

1. Urges States to adopt laws and policies regarding the manufacture, possession, transfer and use of small arms that comply with principles of international human rights and international humanitarian law;

2. Also urges States to provide training on the use of firearms by armed forces and law enforcement personnel consistent with basic principles of international human rights and humanitarian law with special attention to the promotion and protection of human rights as a primary duty of all State officials;

3. Further urges States to take effective measures to minimize violence carried out by armed private actors, including using due diligence to prevent small arms from getting into the hands of those who are likely to misuse them;. . .

5. Welcomes the final report of the Special Rapporteur, Barbara Frey, on the prevention of human rights violations committed with small arms and light weapons (A/HRC/Sub.1/58/27), containing the draft principles on the prevention of human rights violations committed with small arms (A/HRC/Sub.1/58/27/Add.1);

6. Endorses the draft principles on the prevention of human rights violations committed with small arms and encourages their application and implementation by States, intergovernmental organizations and other relevant actors.

**NOTES & QUESTIONS**

1. According to the Frey Report, a state’s failure to restrict self-defense is itself a human rights violation. The report states that a government has violated the human right to life to the extent that a state allows the defensive use of a firearm “unless the action was necessary to save a life or lives.” Thus, firearms “may be used defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged.” In other words, not only is a government not *obligated* to allow the use of deadly force to defend against rape, arson, carjacking, or armed

robbery; any government that does generally allow citizens to use lethal self-defense against these crimes *has itself violated human rights*—namely, the criminal’s right to life.

Do you agree with the UN Human Rights Council and Professor Frey that it is a human rights violation for governments to allow the use of deadly force in self-defense in such circumstances? Practically, speaking, how would you administer a legal system based on the HRC’s standards? For example, what criteria should be used to discern whether a rapist is simply intent on rape and not murder?

2. Relatedly, everywhere in the United States, law enforcement officials may use deadly force to prevent the commission of certain crimes (such as rape or sexual assault on a child) even when the law enforcement officer has no reason to believe that the victim might be killed or seriously injured. Do you agree with the Human Rights Council that such uses of force violate human rights?
3. The Human Rights Council’s “draft principles” include detailed rules for gun control, among them that no one may possess a firearm without a permit, and the permit should enumerate “specific purposes” for which the gun could be used. Today, no U.S. jurisdiction is compliant with this standard. Most states do not require a permit to possess a handgun, and hardly any require a permit for a long gun. Anyone who may lawfully own a gun may keep it at home for self-defense, may take it to a target range, hunt with it (for which a hunting license is usually required), or use the gun for any other lawful purpose. In many states, a separate permit is necessary to carry the gun in public places for self-defense, especially if the gun is concealed.
4. The Frey Report argues that nations have a right to self-defense but that individuals do not. A different view was expressed by the nineteenth-century French philosopher Frederic Bastiat, in his classic, *The Law*. He wrote that when “law” is used to protect criminals and to render victims defenseless, then true law has been destroyed:

The law has been used to destroy its own objective: It has been applied to annihilating the justice that it was supposed to maintain; to limiting and destroying rights which its real purpose was to respect. The law has placed the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others. It has converted plunder into a right, defense into a crime, in order to punish lawful defense.

Whose view is better, Frey’s or Bastiat’s? Why?

5. The Bill of Rights to the United States Constitution protects individual rights by limiting government power. Does the Frey report envision a different approach? Is the difference significant? Could the Frey approach be implemented in a manner that is consistent with the U.S. constitutional structure, which generally does not guarantee “positive rights” (things that the government must provide)?

It is a well-established rule that police and governments have no responsibility for protecting anyone in particular from crime. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) (government inaction in rescuing child who was known to be severely abused, and was later murdered); *Riss v. New York*, 240 N.E.2d 860 (N.Y. 1968) (stalker who attacked and disfigured his victim; dissent notes that Miss Riss was prevented from carrying a firearm in public by New York law). Would the Frey approach demand a different outcome in cases like *DeShaney* and *Riss*?

6. For subsequent statements from the Human Rights Council/Committee that nations have a human rights obligation to enact very strict gun control, see [Human rights and the regulation of civilian acquisition, possession and use of firearms](#), UN Doc. A/HRC/RES/29/10 (July 2, 2015); Human Rights Committee, General comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 ¶ 9 (Dec. 16, 2014); Human Rights Committee [Concluding observations on the fourth periodic report of the United States of America](#), UN Doc. CCPR/C/USA/CO/4 ¶ 10 (Apr. 23, 2014).

## 6. Arms Trade Treaty

While the 2001 Programme of Action is addressed to the *illicit* trade in SALW, the Arms Trade Treaty (ATT) aims to create a system of regulations for lawful trade. The ATT is particularly concerned with regulations to prevent the transfer to arms to human rights violators.

The UN General Assembly adopted the [Arms Trade Treaty](#) on April 2, 2013. Advocates of the ATT credited President Barack Obama as being decisive in adoption, since the George W. Bush administration had opposed such a treaty. For the history of the creation of the ATT, see Ted R. Bromund, *The U.N. Arms Trade Treaty: A Process, Not an Event*, 25 J. Firearms & Pub. Pol’y 30 (2014).

Among ratifying nations, the ATT entered into force on December 24, 2014, having met its standard of having been ratified by at least 50 nations. As of 2020, 106 nations have ratified the ATT. The ATT text and extensive information about the ATT process are available at the website of the [Secretariat of the Arms Trade Treaty](#).

Although the ATT was created by a UN process, the ATT is now under the auspices of a secretariat that is independent of the UN. The Secretariat is located in Geneva, which has long been home to various arms control entities. Most relevant for the ATT’s work, Geneva is home to the [Small Arms Survey](#), the leading international gun-control think tank, hosted by Geneva’s Graduate Institute of International and Development Studies.

U.S. Secretary of State John Kerry signed the ATT in September 2013. President Barack H. Obama, in his last month in office, transmitted the ATT to the U.S. Senate for advice and consent on December 9, 2016 (Senate Treaty Doc. 114-14). The ATT was referred to the Senate Committee on Foreign Relations. The Committee did not take up the ATT.

On April 20, 2019, President Donald J. Trump sent a [message to the Senate](#) requesting that the Treaty be returned. This was followed up by a July 18, 2019,

letter from the President to the UN Secretary-General announcing that the U.S. did not intend to become a party to the Arms Trade Treaty and had no legal obligations stemming from the Treaty. Depositary Notification from the UN Secretary-General, UN Doc. C.N.314.2019. Treaties-XXVI.8 (July 19, 2019). There is precedent for Presidents unsigned treaties, but never before for a treaty that has been transmitted to the Senate. *See President Trump “Unsigned” Arms Trade Treaty After Requesting Its Return from the Senate*, 113 Am. J. Int’l L. 813 (2019). Accordingly, the ATT remains in the Senate until the Senate returns the Treaty to the President. Legislation has been introduced to return the Treaty, but the Senate has not acted on the resolution, as of 2020. *See S. Res. 204* (Rand Paul, R-Ky.).

Under the ATT, governments must create a “national control list” of arms and ammunition imports and exports. Governments are “encouraged” to keep information about the “make and model” of the imports, and the “end users.” The national control list is to be delivered to the UN. The “national control list” is similar to a longstanding provision of U.S. law, known as the “United States Munitions List.” Pursuant to the law, exports of various military items, including some but not all firearms, require prior authorization from the US State Department’s Directorate of Defense Trade Controls (DDTC), which keeps records of authorized exports. Arms Export Control Act, 22 U.S.C. §§ 2778, 2794(7); 22 C.F.R. part 121.

The ATT preamble declares the ATT to be “mindful of” the legitimate use of firearms for “recreational, cultural, historical, and sporting activities, where. . .permitted or protected by law.” Defensive gun ownership is not acknowledged in the text.

A major objective of the ATT is to stop the export of arms to persons or governments who would use them to violate human rights. There was no dispute that previous UN arms embargoes had an unbroken record of failure. Previous embargo efforts had two major problems. First, only the Security Council has the legal authority to impose an embargo. But each of the five permanent members of the Security Council has veto power. So, the permanent members can and do block efforts to impose arms embargoes on allies. For example, China would veto any embargo on Zimbabwe, and the United States would do the same for Israel. Accordingly, ATT advocates favored creating a new entity that would have the power to impose embargoes and would do so according to objective standards.

Skeptics argued that new embargoes imposed by a new entity would still have the same problems as the embargoes that the UN did manage to enact: many countries that nominally agree to an embargo violate the embargo. For example, Iran and China have shown that they will continue to supply arms to terrorists or to governments that violate human rights, regardless of what promises are made at the Security Council or in a treaty. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 Penn St. L. Rev. 891 (2010) (describing, *inter alia*, the South African government’s violation of South African law in order to facilitate Chinese arms shipments to the Mugabe dictatorship in Zimbabwe).

Thus, skeptics argued, a new international treaty would in practice only limit arms supplying by the relatively small number of democracies that

generally comply with international law. To ATT advocates, partial compliance was better than none at all, since clamping down on arms exports from Western industrial nations was a priority for the advocates.

The ATT forbids state parties to authorize three types of arms transfers. First, if the transfer would violate a UN Security Council arms embargo. ATT art. 6.1. Second, if the transfer would violate “relevant international obligations under international agreements to which it is a Party.” *Id.* 6.2. This second category could encompass arms-specific treaties (e.g., country A signs a treaty with country B, by which each country agrees to stop supplying arms to rebels in the other country). Or the prohibition could be read very broadly. For example, adopting the view of the UN Human Rights Commission (Section A.5, *supra*), it could be argued that any arms sale intended for US law enforcement or citizens violates the International Covenant on Civil and Political Rights; the Covenant protects the right to life, and any government that allows police or citizens to use lethal force against nonlethal felons (e.g., rapists) is violating the right to life.

Third, the ATT forbids arms sales if the authorizing government “has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.” ATT art. 6.3.

While all of Europe has ratified the Arms Trade Treaty, several major exporters have announced they will not join the ATT: India, Pakistan, Iran, the People’s Republic of China, and Russia. *See* ATT Secretariat, [Status of ATT Participation](#). As for ratifying nations, the arms trade seems to have continued unabated. For example, the leading African advocate for the ATT was Kenya. Nevertheless, Kenya is used as a transit route for the delivery of weapons to South Sudan, whose government perpetrates many violations of human rights. ATT Monitor, [Arms Transfers to South Sudan](#) (Aug. 25, 2015).

In 2019, the United Kingdom’s Court of Appeal overruled the High Court and held that the British government must reconsider its arms sales to Saudi Arabia because the British government, when authorizing the sales, had not considered Saudi Arabia’s previous uses of small arms and light weapons to violate human rights. *The Queen (on the application of Campaign Against the Arms Trade) v. Secretary of State for International Trade*, [2019] EWCA 1020. The sales to the Saudis were for Saudi use in the war in Yemen, where Houthi rebels are using arms supplied by Iran.

Pursuant to the ATT, Conferences of State Parties have met to work on implementation. Details of the conferences are available at the [UN Office of Disarmament Affairs](#), and from the [ATT Secretariat](#). US delegations participate in the conferences, albeit as non-voting signatories, since the US has not ratified the ATT.

The first Conference of States Parties (CSP) to the Arms Trade Treaty (ATT) was held in Cancun, Mexico, in August 2015. The CSP adopted a modified version of the UN’s assessment scale for how much each nation should contribute to funding the UN’s ATT operations. In general, many countries pay close to nothing, while a few countries (e.g., Japan, the United Kingdom) pay most of the expenses.



An ATT Secretariat was established with a mission of “collating best practices on the implementation and operation of the Treaty,” and “identifying lessons learnt and need for adjustments in implementation.”

The second Conference of States Parties (CSP) took place in Geneva in August 2016. The CSP adopted the Voluntary Trust Fund (VTF) to assist requesting States Parties with international funding to implement the ATT. As of 2018, the VTF, which is primarily funded by the European Union, had supported over two dozen projects in various countries. Saferworld, [Arms Trade Treaty report card for 2018: must try harder](#) (Oct. 31, 2018). The majority of funding requests are for workshops and conferences. ATT Secretariat, [Voluntary Trust Fund \(VTF\)](#) (follow links for short descriptions of various projects).

Most nations that have ratified the ATT are not complying with the ATT’s reporting requirements on arms exports. The CSP called on States Parties to meet their reporting duties. The third Conference of States Parties to the Arms Trade Treaty was held in Geneva in September 2017. The Conference discussed the links and synergies between the ATT and the UN’s 2030 Agenda for Sustainable Development—in particular Goal 16, the promotion of peaceful and inclusive societies.

Like the second conference, the third conference expressed deep concern about widespread noncompliance with the ATT’s transparency and reporting obligations and also the widespread nonpayment by states of their ATT financial obligations. A fourth conference was held in Tokyo in August 2018.

All ATT parties must submit an initial report, which includes information about their arms exports. There are 99 States Parties to the ATT, and only 47 have submitted an initial report and a current annual report. Reports are supposed to include arms imports; yet of the exports reported in the 2016 annual reports, fewer than 10 percent were matched even partially by a corresponding import report (1,923 transfers; 172 mirrored in part; of those 31 mirrored exactly). See ATT Monitor, [The 2018 Report](#) (Aug. 19, 2018); Ted Bromund, [The Failure of Conventional Arms Reporting Under the Arms Trade Treaty](#), Heritage Found. (Aug. 24, 2017).

As for payments, an ATT Secretariat report in February 2019 indicated that 67 nations were partially or fully deficient in their dues over the previous four years, whereas 25 nations had paid their obligations. Of \$3.8 million dollars in assessed dues, over a million dollars had not been paid. About half the revenue came from seven nations with cumulatively over \$100,000 in contributions over the period: Japan (\$279,000), the United States (\$263,000), Germany, the United Kingdom, France, Italy, and China (a non-signatory, but still paying dues and participating in conferences). ATT Secretariat, [Status of Contributions to ATT Budgets as at 08 February 2019](#).

In practice, the ATT functions as somewhat-relevant law only in Europe, supplemented by rhetorical support elsewhere, particularly from small island nations. Ted Bromund, [Beware: the United Nations Is Taking Aim at Ammo](#), Heritage Found. (Feb. 1, 2018). In terms of reducing arms sales to human rights violators, effects have thus far been minimal or nil.

Under the ATT’s terms, the ATT will open for amendments in late 2020.

*NOTES & QUESTIONS*

1. What measures would you recommend be taken to fix the ATT's problems of nonreporting and nonpayment of dues?
2. *Israel.* Among the NGOs that supported the ATT, a top objective was an arms embargo against Israel. Control Arms, [Arms Without Borders](#) 12, 25 (2006) (criticizing US arms sales to Israel). In your view, is Israel an especially notorious violator of human rights, that should be prohibited from acquiring arms?
3. *Additional United Nations programs.* There are 20 UN bodies involved in small arms control. They are coordinated by the UN's [Coordinating Action on Small Arms](#) (CASA). They include the Office for Disarmament Affairs (ODA), United Nations Institute for Disarmament Research (UNIDIR) (a think tank), United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), Office on Drugs and Crime (ODC), Office of the United Nations High Commissioner for Human Rights (OHCHR), Counter-Terrorism Committee Executive Directorate (CTED), Department of Economic and Social Affairs (DESA), Department of Political Affairs (DPA), Department of Public Information (DPI), Department of Peacekeeping Operations (DPKO), International Civil Aviation Organization (ICAO), Office for the Coordination of Humanitarian Affairs (OCHA), Office of the Special Adviser on Africa (OSAA), Office of the Special Adviser on the Prevention of Genocide (OSAPG), Office of the Special Representative of the Secretary-General for Children and Armed Conflict (OSRSG/CAAC), Office of the Special Representative of the Secretary-General on Violence Against Children (OSRSG/VAC), United Nations Human Settlements Programme (UN-HABITAT), United Nations High Commissioner for Refugees (UNHCR), United Nations Mine Action Service (UNMAS), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), United Nations Environmental Programme (UNEP), and the World Health Organization (WHO).
4. The Arms Trade Treaty is about the "arms trade." According to the text, "the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as 'transfer'." ATT, art. 2.2. Relying on the potential breadth of the word "transfer," Mexico argues that the ATT should cover domestic trade, not just foreign trade. Is a US hunter who takes a rifle to Canada for a hunting trip and later brings it home engaging in international trade by virtue of his transit? How about a gun dealer who sells a firearm that is later, without the dealer's knowledge, smuggled to Mexico? Is there any meaningful distinction between domestic and international trade?
5. Is it wrong to export arms to governments that violate human rights (e.g., South Korea in the 1950s, Iraq today) if the arms will be used to resist or deter even worse violators of human rights (e.g., North Korea, ISIS)? What

would be the human rights situation in Yemen if Iranian-backed forces defeated the Saudi-backed government and took over?

6. *Imperial relations.* The international gun control movement is heavily funded by European governments and Japan. According to one author, internationally-led

small arms control serves to reproduce imperial relations in a number of ways. It is characterized by four key analytical themes—the blurring of the distinction between state, non-state and civilian actors; the increasingly fuzzy line between conflict and crime; the pacific nature of development; and the desirability of a Weberian monopoly on violence—that are derived from an idealized reading of the European historical experience and applied to the contemporary South. This conceptual Eurocentrism is furthered by the exclusion of wider questions of the world military order and militarism through a geographical and technological selectivity and the absence of a single analytical frame, as well as North–South hierarchies in the institutional formation of policymaking. Overall, small arms control serves to reproduce the South as a site of benevolent Northern intervention. . .

Anna Stavrianakis, *Small arms control and the reproduction of imperial relations*, 32 *Contemp. Security Pol’y* 193 (2011). Is the above critique fair? Hypothesizing that the critique is accurate, does it necessarily mean that promoting the European agenda on the global South is a bad idea?

7. Further resources: [Conflict Armament Research](#) (CAR) attempts to track the movement of illegal weapons in conflict zones. The leading advocate of international gun control is [Control Arms](#), which has assimilated all other voices, sometimes willingly. For the ATT, Control Arms has created an [ATT Monitor](#).

In the international gun policy control space, “pro-gun” NGOs are minor compared to “anti-gun” organizations. Among supporters of arms and self-defense rights, the most notable is Heritage Foundation scholar Ted R. Bromund, who writes frequently on the various international gun control programs, including details of conferences. His materials are available via his [biography page](#) at the Heritage Foundation, or by selecting an appropriate keyword on his [personal website](#).

The [Foreign Gun Control](#) page on Professor Kopel’s website includes links to numerous articles on international gun control and studies of particular nations.

## 7. International Small Arms Control Standards

The Programme of Action and the Arms Trade Treaty generated considerable media attention and political concern in the United States. Yet perhaps the most important UN gun control instrument is a document that is obscure to everyone except specialists: the [International Small Arms Control Standards](#) (ISACS). These are UN-created model standards for domestic gun control.

Although formally voluntary, the UN describes them as the proper methods to implement the ATT and PoA.

The UN's numerous agencies involved in gun control adhere to ISACS. Indeed, ISACS are the glue that gun controllers are using to hold the ATT and the PoA together. While the PoA and ATT have a great deal of intentionally ambiguous language that can be interpreted in favor of domestic gun control, the PoA and ATT disappointed advocates who wanted clear and specific standards for domestic control. ISACS fill the gap, with a model for strict national gun control. ISACS have been adopted in most of Europe, as the foundation for the EU's European Firearms Directive (*infra* Section E.5). It will likely shape gun control around the world for years to come.

ISACS establish a floor, not a ceiling for gun control. So, for example, Luxembourg's prohibition on all citizen firearms ownership is compliant with ISACS. One ISACS standard covers "National regulation of civilian access to small arms and light weapons." ISACS 03.30 (June 11, 2015). According to the standard: Citizens may not own firearms without a national license. Illegal aliens must be prohibited from possessing small arms. No one under 18 may be issued a license, although younger people may be allowed to use arms under supervision. Firearms not in use must be locked in a safe that can withstand a 15-minute attack using common household tools, and ammunition must be stored separately. Licenses should be conditioned on passing a safety knowledge test or an equivalent demonstration of knowledge.

In addition to the above, which apply to all firearms, ISACS provide a graduated system of controls for four broad categories of arms. The lowest regulation, Category 4, is for shotguns with a capacity of three or fewer rounds, and for manual action rimfire rifles. Licenses for Category 4 may be issued after recommendations from local community leaders or other responsible persons who know the applicant, plus consultation with local law enforcement.

Next, in Category 3, are semiautomatic rimfire rifles, manual action (bolt, lever, pump) centerfire rifles, and shotguns. Besides being stored in a safe, Category 3 arms should have enhanced security—for example, not only stored in a safe, but also be cable-locked with a cable that withstands a 15-minute attack with common household tools. (This is a very difficult standard, since a large bolt-cutter can slice almost any cable lock in a few seconds). Ammunition purchases for Category 3 arms should be prohibited except for persons who have a license for the relevant arms. There should be numerical limits on how many such arms a person may possess. License applicants should be required to take a safety class, and not merely to provide proof of safety knowledge (as is allowed for Category 4). The minimum age for a license should be 21.

Category 2 is for all handguns of .45 caliber or less, semiautomatic centerfire rifles, and short-barreled rifles. All such firearms should be registered. Collecting ballistic information for all such firearms is preferred. (Some argue that collecting ballistic images of lawful firearms creates an overwhelming problem of false partial matches in the law enforcement ballistic databases of crime guns. *See* Sterling Burnett & David B. Kopel, [Ballistic Imaging: Not Ready for Prime Time](#), National Center for Policy Analysis (2003).)

Finally, Category 1 is arms that must be prohibited. These are automatics, "high capacity magazines" (not defined), short-barreled shotguns, and handguns over .45 caliber.

*NOTES & QUESTIONS*

1. Would the ISACS gun control system be a good model for your state? For federal law? Would any elements violate the Second Amendment?
2. Are any provisions of ISACS too weak?

***B. Regional Conventions***

With enthusiastic support from the United Nations, many parts of the world have created regional gun control conventions. Separately, there are also regional conventions on human rights. This section begins with the African Charter on Human and People’s Rights. Then we examine the Nairobi Protocol, an East African gun control treaty.

The European Convention on Human Rights has been an especially influential human rights document. After examining the Convention, we then survey pan-European gun controls that have been created by the European Union.

The Western Hemisphere is covered by the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials. The Convention is commonly known by its Spanish acronym, CIFTA.

**1. African Charter on Human and Peoples’ Rights**

1. All peoples . . . have the unquestionable and inalienable right to self-determination. . . .
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

[African Charter on Human and Peoples’ Rights](#) (entered into force 1986), art. 20, f.

*NOTES & QUESTIONS*

1. If all peoples have the right of self-determination, then are authoritarian African governments, such as those in Cameroon, Chad, and Rwanda, necessarily illegitimate?

2. Does the African Charter require some sort of international permission to revolt when it says that oppressed peoples have a right to resort only to “means recognized by the international community”? Is the Universal Declaration of Human Rights’ (*supra* Section A.1) recognition of the right of resistance sufficient? What about the recognition of legitimate violent resistance in the UN Resolution on the Definition of Aggression (Section A.2)? If these are not sufficient, is some specific authorization required? If so, from whom? The UN Security Council? The African Union?
3. If you were an African head of government, and were conscientious about your responsibilities under paragraph 3, how would you go about assisting other peoples in liberation from foreign domination? Would you address what some consider to be the problem of neocolonial domination of some African states by Western powers or by China?
4. Scholar and human rights attorney Fatsah Ouguerouz connects article 20 to the long-standing African tradition of armed resistance to oppression. He argues that the article 20 right applies to all forms of extreme oppression, not just oppression by colonial or racist regimes. In his view, any government that rules by force rather than consent is necessarily violating the right of self-determination. He suggests that oppressed peoples resort to armed revolt only when a national government has been condemned for oppression by the African Union and persists in its misconduct. Preferably, governments would abide by the spirit of article 20 by respecting self-determination, including for minority groups. Fatsah Ouguerouz, *The African Charter on Human and People’s Rights* 227-69 (2003).
5. A similar provision is contained in the Arab Charter of Human Rights: “All peoples have the right to resist foreign occupation.” Arab Charter of Human Rights, art. 2(4). More broadly, Islamic law recognizes a fundamental right of self-defense against persecution and oppression. Abdul Ghafur Hamid & Khin Maung Sein, *Islamic International Law and the Right of Self-Defense of States*, 2 J. East Asia & Int’l L. 67, 90-92 (2009). Should the above be construed to recognize the right of the people of Syria, Lebanon, and Israel (where Arabs are about 20 percent of the citizenry) to resist Iran’s military operations against their nations?

## 2. Nairobi Protocol

The [Nairobi Protocol](#) is a gun control agreement among East African governments. Pursuant to the 2001 UN Programme of Action (*supra* Section A.3), the UN facilitated the Nairobi Protocol, as well as similar regional agreements [in Southern Africa](#) (Southern African Development Community, SADC) and [in West Africa](#) (Economic Community of West African States, ECOWAS). The terms of the three African protocols are generally similar.

## **The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa**

### **PREAMBLE**

We, the Ministers of Foreign Affairs and other plenipotentiaries of Republic of Burundi, Democratic Republic of Congo, Republic of Djibouti, Federal Democratic Republic of Ethiopia, State of Eritrea, Republic of Kenya, Republic of Rwanda, Republic of Seychelles, Republic of the Sudan, United Republic of Tanzania, Republic of Uganda (Hereafter referred to as the States Parties); . . .

### **ARTICLE 3**

#### **Legislative Measures**

(a) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its national law the following conduct, when committed intentionally:

- (i) Illicit trafficking in small arms and light weapons.
- (ii) Illicit manufacturing of small arms and light weapons.
- (iii) Illicit possession and misuse of small arms and light weapons.
- (iv) Falsifying or illicitly obliterating, removing or altering the markings on small arms and light weapons as required by this Protocol.

(b) States Parties that have not yet done so shall adopt the necessary legislative or other measures to sanction criminally, civilly or administratively under their national law the violation of arms embargoes mandated by the Security Council of the United Nations and/or regional organisations.

(c) States Parties undertake to incorporate in their national laws:

- (i) the prohibition of unrestricted civilian possession of small arms;
- (ii) the total prohibition of the civilian possession and use of all light weapons and automatic and semi-automatic rifles and machine guns;
- (iii) the regulation and centralised registration of all civilian-owned small arms in their territories (without prejudice to Article 3 c (ii));
- (iv) measures ensuring that proper controls be exercised over the manufacturing of small arms and light weapons;
- (v) provisions promoting legal uniformity and minimum standards regarding the manufacture, control, possession, import, export, re-export, transit, transport and transfer of small arms and light weapons;
- (vi) provisions ensuring the standardised marking and identification of small arms and light weapons;

- (vii) provisions that adequately provide for the seizure, confiscation, and forfeiture to the State of all small arms and light weapons manufactured or conveyed in transit without or in contravention of licenses, permits, or written authority;
- (viii) provisions for effective control of small arms and light weapons including the storage and usage thereof, competency testing of prospective small arms owners and restriction on owners' rights to relinquish control, use, and possession of small arms;
- (ix) the monitoring and auditing of licenses held in a person's possession, and the restriction on the number of small arms that may be owned;
- (x) provisions prohibiting the pawning and pledging of small arms and light weapons;
- (xi) provisions prohibiting the misrepresentation or withholding of any information given with a view to obtain any license or permit;
- (xii) provisions regulating brokering in the individual State Parties; and
- (xiii) provisions promoting legal uniformity in the sphere of sentencing. . . .

**ARTICLE 5**

**Control of Civilian Possession of Small Arms and Light Weapons**

- (a) States Parties undertake to consider a co-ordinated review of national procedures and criteria for issuing and withdrawing of small arms and light weapons licenses, and establishing and maintaining national databases of licensed small arms and light weapons, small arms and light weapons owners, and commercial small arms and light weapons traders within their territories.
- (b) State Parties undertake to:
  - (i) introduce harmonised, heavy minimum sentences for small arms and light weapons crimes and the carrying of unlicensed small arms and light weapons;
  - (ii) register and ensure strict accountability and effective control of all small arms and light weapons owned by private security companies;
  - (iii) prohibit the civilian possession of semi-automatic and automatic rifles and machine guns and all light weapons. . . .

**ARTICLE 17**

**Corruption**

States Parties shall institute appropriate and effective measures for cooperation between law enforcement agencies to curb corruption associated with the illicit manufacturing of, trafficking in, illicit possession and use of small arms and light weapons. . . .



*NOTES & QUESTIONS*

1. Signatories to the Nairobi Protocol agree to comply with UN arms embargoes. As UN members, the signatory states were already supposed to comply with embargoes. Countries that are known to have violated the UN arms embargo on the eastern Democratic Republic of the Congo are Albania, Burundi, China, the Democratic Republic of the Congo, Rwanda, South Africa, Sudan, Uganda, and Zimbabwe, five of which are signers of the Nairobi Protocol. David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 Penn St. L. Rev. 891 (2010). Two of the other violators, Zimbabwe and South Africa, promised in a different regional treaty to obey UN arms embargoes. [Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community \(SADC\) Region](#), art. 5 § 2. Can anything be done to make arms embargoes effective when governments that promise to obey them do not?
  
2. The Nairobi Protocol mandates registration of all firearms. Is it a good idea that each of the governments that joined the Protocol knows where all guns within its borders are at all times? Which, if any, of the Nairobi Protocol governments have the administrative capacity to maintain an accurate registry?
  
3. The Protocol also mandates a ban on semi-automatic rifles. What effects would such a ban have, if successfully implemented? Are there issues in East Africa that make a ban on semi-automatic rifles more or less desirable than would be the case elsewhere?
  
4. Under the Nairobi Protocol, all automatic rifles must be banned. In the United States, there are only about 100,000 automatics in citizen hands, out of a total U.S. gun supply of over 360 million guns. *See* Ch. 1.B. In Africa, though, automatics are a much larger fraction of the available gun supply. The typical gun that an African villager might purchase on the black market would be an AK-47 (or its descendants, such as the AK-74 or the AKM, or the dozens of variants manufactured in many other nations). The AK-47 can fire automatically or semi-automatically; a selector switch controls the mode of fire. The gun is very simple, with many fewer parts than its US counterparts, the M-16 and M-4 rifles. The parts of the AK-47 do not fit together as tightly as do the parts of the M-16, or most other Western guns. As a result, the AK-47 is not as accurate, especially at longer distances; but the AK-47 is renowned for its durability and imperviousness to harsh conditions, such as sandstorms. *See generally* Marco Vorobiev, *AK-47: Survival and Evolution of the World's Most Prolific Gun* (2018); Edward Clinton Ezell, *The AK47 Story: Evolution of the Kalashnikov Weapons* (1986). Semi-automatic-only variants of the AK are commonly owned in the U.S. But true, fully-automatic, AK-type rifles are by far the most common firearms in the Third World, with tens of millions in circulation.

Do these facts affect your assessment of the Nairobi Protocol's prohibition against any civilian possession of automatic rifles? In what way?

5. According to the Protocol, there must be “heavy minimum sentences” for “the carrying of unlicensed small arms.” Is this a good policy?
6. David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 Quinnipiac L. Rev. 385 (2008), examines human rights abuses in gun confiscation programs in Kenya and Uganda, and in South Africa’s quasi-confiscatory licensing law. (Kenya is discussed further in Section E.2, *infra*; Kenya and South Africa are both the subjects of case studies in online Chapter 14.C.) Given that before the Nairobi Protocol there were human rights abuses in gun control enforcement (e.g., burning villages down to collect guns), would the Protocol affect the prevalence of abuse?
7. The US constitutional right to keep and bear arms, like much of the rest of the Constitution, is partly based on fear or distrust of government power, especially when that power is concentrated and unchecked. Prior to his presidency, Ronald Reagan summarized the concern, based on past and present experience:

Lord Acton said power corrupts. Surely then, if this is true, the more power we give the government the more corrupt it will become. And if we give it the power to confiscate our arms we also give up the ultimate means to combat that corrupt power. In doing so we can only assure that we will eventually be totally subject to it. When dictators come to power, the first thing they do is take away the people’s weapons. It makes it so much easier for the secret police to operate, it makes it so much easier to force the will of the ruler upon the ruled.

Now I believe our nation’s leaders are good and well-meaning people. I do not believe that they have any desire to impose a dictatorship upon us. But this does not mean that such will always be the case. A nation rent internally, as ours has been in recent years, is always ripe for a “man on a white horse.” A deterrent to that man, or to any man seeking unlawful power, is the knowledge that those who oppose him are not helpless.

The gun has been called the great equalizer, meaning that a small person with a gun is equal to a large person, but it is a great equalizer in another way, too. It insures that the people are the equal of their government whenever that government forgets that it is servant and not master of the governed. When the British forgot that they got a revolution. And, as a result, we Americans got a Constitution; a Constitution that, as those who wrote it were determined, would keep men free. If we give up part of that Constitution we give up part of our freedom and increase the chance that we will lose it all.

I am not ready to take that risk. I believe that the right of the citizen to keep and bear arms must not be infringed if liberty in America is to survive.

Ronald Reagan, *Ronald Reagan on Gun Control*, Guns & Ammo, Sept. 1975. Do Reagan’s views, and the ideology underlying the Second Amendment, have any relevance to Africa? Would Africa be better off or worse off with widespread gun ownership by ordinary citizens? Does it depend on the country? Do you think there are certain traditions or values that make the right to arms more workable in the United States than it would be in other countries? Does it make a difference whether particular African governments

are more or less trustworthy than the U.S. government? Are Africans more capable, less capable, or equally as capable as Americans of responsible fire-arm ownership? Is a robust right to arms workable in African countries that, after long periods of colonial rule, have mostly been run by dictatorships?

Given Africa's history, is an individual right to arms, for the purpose of resisting tyranny, more or less important than in the United States or Europe? How does a nation's or region's political stability influence your answer? What are the pros and cons of such a right in Africa versus in the United States?

8. Is discussion of an individual right to arms even relevant to the concerns addressed by the Nairobi Protocol? Many of the guns at issue seem to be related to conflicts between governments, political factions, or warlords. Would an individual right to arms make things better or worse in this context? Is the better approach a *de jure* ban on all private guns (with recognition that some guns would be available on the black market to persons willing to break the law)? Who would enforce such a ban?
9. *Law enforcement corruption.* The Nairobi Protocol depends on law enforcement officers to enforce its provisions. However, law enforcement officials in Africa have long been recognized as corrupt, exploiting citizens and failing to uphold their respective laws. A 2014 survey of 28 sub-Saharan nations from Transparency International revealed that 22% of respondents admitted paying a bribe in the past year. See Transparency International, *Corruption in Africa: 75 million people pay bribes* (Nov. 30, 2015). For a close look at police corruption, see Pauline M. Wambua, *Police corruption in Africa undermines trust, but support for law enforcement remains strong*, Afrobarometer Dispatch (Nov. 2, 2015). With regard to firearms, there have been well-documented cases of African law enforcement personnel "losing" their weapons. For example, according to a parliamentary committee, South African police lost over 20,000 firearms between 2004 and 2011. See BBC News, *South African police lost 20,000 guns* (Mar. 9, 2011).

Nairobi Protocol Article 17 requires states to institute effective measures to prevent corruption that allows for illicit trade in small arms. Can regional firearms treaties be successfully implemented if the parties to the treaty are unequal in their ability or willingness to properly implement it? Why or why not? In the case of Africa, how does the corruption of local law enforcement affect the implementation of the Nairobi Protocol?

10. Further reading: Small Arms Survey, [Publications on Africa and Middle East](#).

### 3. European Convention on Human Rights (ECHR)

In 1953, the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force. It is commonly known as [European Convention](#)

on Human Rights (ECHR). Enforcement is led by the Council of Europe and by the European Court of Human Rights, which is based in Strasbourg, France.

Art. 2(1). Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Art. 2(2). Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Art. 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

...

Art 5(1): Everyone has the right to liberty and security of person.

European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222.

### NOTES & QUESTIONS

1. According to the ECHR, under what circumstances is use of lethal force in self-defense permissible?
2. If a government prohibited self-defense against deadly attack, would it be violating the right to life in Article 1 of the ECHR?
3. In a report adopted by the UN Subcommission on Human Rights, UN Special Rapporteur Barbara Frey wrote that under the ECHR, "[s]elf-defence is more properly characterized as a means of protecting the right to life and, as such, a basis for avoiding responsibility for violating the rights of another." *Supra* Section A.3. Based on the text of the ECHR, has a person who kills in self-defense (or while lawfully quelling a riot or insurrection) violated the rights of another person?
4. Several national constitutions, mainly former British colonies, include language similar to article 2, regarding defense against unlawful violence. These are covered in online Chapter 14.A.2.
5. Examining self-defense law, one scholar observes that it does not require exact proportionality. Diego M. Luzón Peña, *Aspectos Esenciales de la Legítima Defensa* 561 (Julio César Faria ed., Buenos Aires 2d ed. 2006) (1978). This is the same point made by one of the founders of international law, Samuel von Pufendorf (*infra* Section C.4). For example, an

attack with a knife may be repelled with a gun. However, extreme disproportion in response to a minimal aggression is forbidden. *Id.* For example, if a rude person on a subway intentionally pushes people out of the way, the victims may not use deadly force against the aggressor. Professor Luzón Peña argues that the European Convention on Human Rights implicitly contains a proportionality rule of government violence: the government may not use deadly force to protect state property (*bienes patrimoniales*—public property, such as parks, monuments, or government buildings). *Id.* at 562. Based on the text of the ECHR, is the inference plausible? Necessary?

6. Several other international human rights conventions guarantee a right to life, a right to personal security, or a right to property.

[American Convention on Human Rights](#) (1969):

- art. 5(1): “Every person has the right to have his physical, mental, and moral integrity respected.”
- art. 7(1): “Every person has the right to personal liberty and security.”
- art. 21(1): “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”

[Universal Declaration on Human Rights](#) (1948):

- art. 3: “Everyone has the right to life, liberty and security of person.”
- art. 17(1): “Everyone has the right to own property alone as well as in association with others.”
- art. 17(2): “No one shall be arbitrarily deprived of his property.”

[International Covenant on Civil and Political Rights](#) (1976):

- art. 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- art. 9(1): “Everyone has the right to liberty and security of person.”

Would any of these conventions be violated if a government outlawed forcible self-defense against murderers, rapists, torturers, robbers, or other violent criminals?

#### 4. European Firearms Directives

European political integration began in 1951 when six nations created the European Coal and Steel Community (ECSC). In 1957, the European Economic Community (EEC, usually known as the “Common Market”) was established. The name changed to European Community (EC) in 1993, the year the European Union was created. In 2009, the EC was dissolved into the EU.

The 1985 [Schengen Agreement](#) aimed to gradually introduce a system allowing persons to travel between European nations with little or no checks at the borders. So today, you can drive from Madrid to Paris without having to undergo a border check when you enter France. In 1999, the Schengen system was incorporated into the European Union. Today, the [Schengen Area](#) comprises 22 EU nations, except for the U.K. and Ireland, which exercised their legal right to opt out. Three non EU nations—Iceland, Norway, and Switzerland—chose to join the Schengen Area. In 2016, some nations reintroduced border controls because of the migrant crisis, and in 2020 all did because of the SARS-Cov-2 pandemic.

The Schengen participants were concerned that the abolition of border checks for intra-European travel would allow citizens of nations with restrictive firearms laws to obtain arms when visiting nations with less restrictive laws. Accordingly, the Council of European Communities adopted [Directive 91/477/EEC](#) in 1991. This was supplemented by the EU’s [Directive 2008/51/EC](#) in 2008. In European law, a directive is not self-executing. Instead, it orders European nations to adopt laws that meet certain minimum standards, while allowing nations to choose to be more stringent.

To travel internationally within the Schengen Area while possessing a firearm, an individual must obtain a European Firearms Pass. The pass must list the specific firearms that will be possessed while traveling. To obtain the pass, an individual must provide proof of the reasons for traveling with firearms—for example, an invitation to participate in a shooting competition.

Significantly, the Pass does *not* provide an exemption from complying with the laws of any country. So, if a person owns a legal rifle in country A, and wants to travel to country C, where the same rifle is also legal, the person may not travel via country B, which bans that type of rifle.

The Schengen directives further required nations to adopt gun licensing laws. Firearms were divided into four categories: Category A: These must be prohibited by national law. Category B: Licensees must have “good cause” and permission before acquisition. Category C: licensing and good cause, but not registration. Category D: licensing only.

In 2017, the European Council and European Parliament substantially revised the Directive. The new directive was officially published on May 17, 2017. [EU 2017/853](#). EU member states were given 15 months to enact national legislation compliant with the Directive. The directive also applies to the non-EU states of Switzerland, Norway, Iceland, and Liechtenstein, because they are part of the Schengen Area. *Id.* at pmb1. (35)-(37). The Directive includes certain exemptions for Switzerland, due to its militia system. (Switzerland is discussed in online Chapter 14.C.2.)

Arms classifications under the Directive are:

*Category A.* Must be prohibited:

- Automatics.
- Semi-automatics that were converted to semi-automatic-only but had once been automatic.
- Handgun magazines over 20 rounds.
- Long gun magazines over 10 rounds.
- Long guns that can function when shorter than 60cm (23 5/8 inches). This covers many long guns with folding or telescoping stocks.

The Directive allows countries to authorize possession of converted semi-automatics and of magazines to sport shooters whose medical and psychological condition is evaluated, and who are active members of a shooting club and are participating in a sport that uses the firearm. Lawful owners before June 13, 2017, may also be exempted.

*Category B.* Licensees must have “good cause” and be at least 18. Persons under 18 may use the arms when under supervision. Government permission is required in advance for each acquisition. Category B is for:

- All handguns except single-shot rimfire handguns longer than 11 1/8 inches (28cm).
- Semiautomatic long guns with an ammunition capacity greater than 3 or with a detachable magazine.
- Repeating shotguns whose barrels are shorter than 23 5/8 inches (60cm).

*Category C.* Licensees must have good cause and be at least 18. Specific prior authorization is not required for acquisition. Registration is required. Before 2017, a lower category, D, had existed for a few types of arms, such as single-shot shotguns. Category D was eliminated in 2017. Category C now covers everything that is not in A or B. This includes:

- Single-shot rimfire handguns longer than 11 1/8 inches.
- Single-shot rifles and shotguns.
- Repeating long guns with a capacity of no more than 3 rounds and barrel at least 23 5/8 inches (60cm).

### *NOTES & QUESTIONS*

1. The Schengen Area, with no border checks on internal travel, has some resemblances to the free travel within the United States, where a right to interstate travel has been recognized as implicit in the Constitution. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (“This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”); *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (“We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”). Like the Schengen nations, the United States has had to grapple with the challenges of differing gun laws among various sovereign (or somewhat sovereign) jurisdictions. The federal Gun Control Act of 1968, for example, attempts to prevent the criminal flow of guns from less restrictive states to more restrictive states. *See* Ch. 8.C. If you were a citizen of a Schengen nation, would you give up your right to no-check

international travel in the Schengen zone, in return for less restrictive gun laws in your home country? Would you be willing to make a similar trade in the United States, hypothesizing that states would be allowed to search vehicles crossing a state border?

2. Which provisions, if any, of the European Firearms Directive would, if enacted in the U.S., be contrary to the Second Amendment or the state constitutional arms rights? If the European Union asked you for advice, would you suggest revision of any provisions of the directive?
3. Further reading: [Fighting Illicit Firearms Trafficking Routes and Actors at European Level Final Report of Project FIRE](#) (Savona Ernesto U. & Mancuso Marina eds., 2017) (Transcrime Research Center at the Università Cattolica del Sacro Cuore, in Italy); [Firearms United Network](#) (news and critiques of EU gun controls).

#### a. Case Study: Czechoslovakia and the Czech Republic

In August 2017, the government of the Czech Republic, supported by the government of Poland, brought a lawsuit in the Court of Justice of the European Union asserting breach of four legal principles: 1. *Conferral of power*. The Directive was beyond the powers conferred on the European Union. 2. *Proportionality*. The EU “deliberately did not obtain sufficient information,” and therefore “adopted manifestly disproportionate measures consisting in the prohibition of certain kinds of semi-automatic weapons which are not however used in the European Union for committing terrorist acts.” 3. *Legal certainty*. “The newly delimited categories of prohibited weapons . . . are altogether unclear.” 4. *Non-discrimination*. The Swiss exemption. *Czech Republic v. European Parliament and Council of the European Union*, no. C-482/17 R. Initially, the court denied the Czech Republic’s request to enter an interim order (similar to a preliminary injunction). In the court’s view, the Republic had not provided sufficient proof of “serious and irreparable damage.” [ECLI:EU:C:2018:119](#) (Feb. 28, 2018) (unpublished). On the merits, the Court later ruled in favor of the EU on all claims. *Czech Republic v Parliament and Council*, no. C-482/17 (Dec. 3, 2019).

The same year that the Czech Republic sued the European Union, the Czech Parliament considered adding a right to arms [constitutional amendment](#):

Citizens of the Czech Republic have the right to acquire, hold and carry weapons and ammunition for the fulfillment of the tasks mentioned in paragraph 2. This right may be restricted by law and other conditions of its exercise may be laid down by law if it is necessary to protect the rights and freedoms of others, public order and safety, life and health or the prevention of crime.

The reference to “paragraph 2” was to art. 3, ¶2 of the [Czech Constitution](#): Appendix B: Constitutional Act of 22 April 1998 No. 110/1998 Sb., on the Security of the Czech Republic. According to paragraph 2: “State bodies, bodies of self-governing territorial units, and natural and legal persons are obliged to participate in safeguarding the Czech Republic’s security. The extent of this



obligation, as well as further details, shall be provided for by statute.” The government’s explanatory memorandum for the right to arms proposal stated that armed citizens can help to provide defense against terrorist attacks, especially against soft targets, such as malls or other places where large numbers of people gather and there is little professional security. Further, the right of self-defense would be a nullity without the right to possess and carry arms. Ministry of Interior, [Proposal of amendment of constitutional act no. 110/1998 Col., on Security of the Czech Republic](#) (2016) (link is to an official government document set for the proposal; the linked documents, including the official text and the memorandum, are in Czech).

The proposed amendment passed the lower house overwhelmingly but fell short of the necessary 3/5 majority in the Senate. [Právo nosit zbraň pro zajištění bezpečnosti Česka Senát neschválil](#), iDNES.cz, Dec. 6, 2017; [Lidé budou mít právo držet zbraň kvůli obraně státu, schválili poslanci](#), iDNES.cz, June 28, 2017. Although not adopting the amendment, the Senate urged the government not to enact some provisions of the European Firearms Directive. [Senát odmítl některé části směrnice EU o regulaci zbraní. Zádá výjimky](#), iDNES.cz, Dec. 6, 2017.

After the success of the Civic Democratic Party, which favored the amendment, in the 2018 elections, another arms rights proposal was introduced in the Senate in September 2019. Supported by 102,000 petition signers, the proposal would amend the Charter of Fundamental Rights and Freedom to expressly guarantee the right to use a weapon to defend one’s own life or someone else’s. Proponents argue that European nations that have banned the carrying of all defensive arms have become unsafe. See [Czech Republic may enact bill protecting right to self-defense with a weapon](#), Expats.cz, Sept. 17, 2019.

The Czech Republic’s interest in the right to arms perhaps stems from the nation’s history of totalitarian rule—by Nazis from 1938 to 1945, and then by Communists from 1948 to 1989. Today, the Czech Republic and the Slovak Republic are separate nations, but from 1919 to 1993, they were the single nation of Czechoslovakia. The Republic of Czechoslovakia was created from territory of the former Austro-Hungarian Empire in 1918, following World War I. During the period between World War I and World War II, almost all of central and eastern Europe devolved into dictatorship. The notable exceptions were Czechoslovakia and Switzerland.

The Czechoslovak Republic retained the gun licensing system from Austro-Hungary. A person with a clean record could obtain a three-year permit to own firearms. Administered by local governments, the permits were renewable. The license records functioned as a gun owner registration system. Austrian Firearms Act, *Zbrojnipatent* of 1852, No. 223r.z.<sup>8</sup>

In Germany, the National Socialist German Workers Party (“Nazi”), led by Adolf Hitler, won a plurality in the 1933 elections.<sup>9</sup> Hitler was appointed

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8. Summarized in Novak Karel, *Vzoroo ve vecch honebniho prava, zbrojniho patentu a rybolovu* Kempas 151-52 (Praha, 1934) (describing sections 17-40 of the Czechoslovakian Firearms Act.); Legislative Reference Service, Library of Congress study, July 5, 1968, in *Federal Firearms Legislation*, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 482 (1968).

9. *Nazi* was a shorthand for the party’s formal name, *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP).

Chancellor and moved rapidly to consolidate a totalitarian dictatorship. The former democratic government, known as the Weimar Republic, had instituted gun licensing and registration in 1928. In Hitler's hands, the registration lists were perfect for confiscating guns from all political opponents. The licensing system kept guns out of the hands of persons not considered politically reliable. As is the nature of a totalitarian regime, the Nazis worked to bring all aspects of civil society under state control. This included mandating that all gun and hunting clubs have a political officer appointed by the government. Many clubs disbanded rather than comply. *See* Stephen Halbrook, *Gun Control in the Third Reich: Disarming the Jews and "Enemies of the State"* (2013).

Hitler's aggressive foreign policy was met by appeasement on the part of the British and the French. In violation of the Versailles Treaty, he sent his army to occupy the Rhineland (an industrial region, bordering France, that was supposed to be demilitarized), ignored the Versailles limits on the size of the German army, and absorbed Austria in the 1938 *Anschluss*. His next target was Czechoslovakia. The republic had one of the best arms industries in the world and a very capable army. It also had defensible borders, in the mountainous regions next to Austria and Germany, and an extensive system of fortifications.

In the late summer of 1938, Hitler provoked an international crisis by demanding that Czechoslovakia surrender its border regions, which had a large German-speaking population. The Nazis called this region the *Sudetenland*. Czechoslovakia was ready to fight, and France was obliged to assist, by virtue of its 1925 mutual defense treaty with Czechoslovakia. But France would not fight unless Great Britain joined, and the British refused. In the infamous Munich Agreement, the West forced Czechoslovakia to give Hitler everything he demanded. British Prime Minister Neville Chamberlin proclaimed "Peace in our time," and the British public overwhelmingly approved. But the appeasers were self-deluded.

After taking the mountains and forts, Hitler invaded Czechoslovakia in March 1939. The government fled and told the people not to resist. As the Germans and Czechs both knew, the French would not honor the Franco-Czech mutual defense treaty. When the Germans arrived:

Immediately a proclamation, bordered in red and bearing the German eagle and swastika which is now familiar to every Czech town and village, was posted. . . Under this proclamation no one was allowed in the streets after 8 p.m. . . ; all popular gatherings were forbidden; and weapons, munitions, and wireless sets were ordered to be surrendered immediately. Disobedience of these orders, the proclamation ended, would be severely punished under military law.

The Times (London), Mar. 16, 1939, at 16b. The second day of occupation brought house-to-house arms searches conducted by Nazi soldiers. *Berhaftungen in Prag*, *Neue Zürcher Zeitung* (Switz.), Mar. 17, 1939. During Nazi occupation, "The Gestapo raided homes to check for shortwave radios; these were outlawed so people couldn't listen to the BBC broadcasts from London." Charles Novacek, *Border Crossings: Coming of Age in the Czech Resistance* 61 (2012).

In Hitler's view, "The most foolish mistake we could possibly make would be to allow the subject races to possess arms. History shows that all conquerors who have allowed their subject races to carry arms have prepared their own

downfall by so doing.” Hitler’s Secret Conversations 403 (Norman Cameron & R.H. Stevens trans. 1961). Registration lists (the gun licenses) were used for confiscation. Stephen Halbrook, interview with Milan Kubele, Uherský Brod, Czech Republic, March 16, 1994.

Suspecting that not all guns had been found, the Nazis, in August 1939, issued an order demanding the surrender of all arms within two weeks. N.Y. Times, Aug. 11, 1939, at 6. A September 1941 decree by Protector and Deputy Gestapo Chief Reinhard Heydrich announced the application of martial law against anyone who possessed arms or ammunition; anyone who learned of such possession and did not immediately report it was also guilty.<sup>10</sup> Legislative Reference Service, Library of Congress study of July 5, 1968, in *Federal Firearms Legislation*, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 487 (1968).

Under Nazi control, Czechoslovakia was split in two. The Czech area was titled the “Protectorate of Bohemia and Moravia.” To the east, Slovakia became a separate nation; it is discussed *infra*.

During the war, “the Czech resistance was handicapped by an almost total absence of arms and ammunition.” Radomír Luža, *The Czech Resistance Movement*, in *A History of the Czechoslovak Republic 1918-1948*, at 350 (Victor S. Mamatey & Radomír Luža eds., 1973). Moreover, the non-*Sudetenland* Czech region was mainly flat, had little forestland, and was urbanized—difficult terrain for offensive guerilla activity. *Id.* at 350. The biggest success of the Czech resistance was a 1942 operation, in conjunction with British commandos, to assassinate the German military ruler Reinhard Heydrich, an exceptionally evil man. But the Germans inflicted heavy reprisals on the Czech people and rooted out the Czech resistance. *Id.*

The resistance managed to reconstitute the next year—thanks in part to Soviet prisoners of war who escaped from German camps, were sheltered by the Czech people, and who led small guerilla bands. *Id.* at 356. But neither the Soviets nor the West would send arms to the Czech resistance, which was “[i]solated in the heart of the Reich, without caches of weapons.” *Id.* at 358.

Arms finally were supplied in April 1945, as the Nazi regime neared collapse. Guerilla actions began in large numbers, and in early May, the Czech people rose up and seized control of their capital, Prague. With no support from the nearby Soviet and American armies, the Czechs fought the Germans for Prague, sustained heavy casualties, and eventually convinced the Germans to surrender on May 8. The next day, Stalin’s Soviet army moved into Prague. *Id.* at 354-59.

The resistance took a very different course in Slovakia, to the east. Slovakia has long been less developed educationally and economically. When the Germans invaded in March 1939, they put the Czech areas under direct military rule, but Slovakia was treated as a friendly semi-autonomous nation. The new ruler, Father Tiso, was a Slovak priest who was sympathetic to fascism and the Germans, but who did exercise some autonomy.

When Hitler invaded Poland in September 1939, Slovakia was ordered to join in. A well-planned revolt broke out in Slovakia, Bohemia, and Moravia.

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10. “Gestapo” was a short form for *Geheime Staatspolizei* (Secret State Police).

Thousands of Slovak soldiers mutinied, but they were eventually suppressed. *Neue Zürcher Zeitung* (Switz.), Sept. 21, 1939; Anna Josko, *The Slovak Resistance Movement*, in *A History of the Czechoslovak Republic*, *supra*, at 367-68.

Afterwards, for security, the remaining Slovak resistance operated in isolated cells. Josko, at 363. They carried out a number of successful sabotage operations in 1940-42. *Id.* at 368-69.

By 1943, partisan groups were active in the mountains of northern and central Slovakia. The partisans were comprised of political dissidents who had fled, Jews who did the same, army deserters, and escaped Soviet prisoners of war. *Id.* at 374-75.

But some of the partisans acted too quickly. As the Nazis were losing on the eastern front, Rumania's King Michael orchestrated a coup on August 23, 1944, removed the pro-Nazi regime, and replaced it with a pro-Soviet one. The Germans feared that Slovakia might also switch sides. When Slovak partisans killed 28 German officers who were returning from their military liaison service in Rumania, the Germans announced that direct military rule would be imposed on Slovakia. *Id.* at 376. Consequently, the Slovak underground had to commence its long-planned general uprising immediately, rather than wait for a more propitious time. The majority of the army joined the rebels. The Slovak National Uprising soon controlled about half the territory of Slovakia. But after hard fighting in September and October 1944, the Germans managed to defeat the uprising. Surviving resisters melted back into the mountains to resume partisan warfare. *Id.* at 374-84.

At the infamous 1944 Yalta Conference, President Franklin Roosevelt agreed to let Josef Stalin have all of eastern Europe and some of central Europe as a Soviet sphere of influence. Stalin promised to allow democracy within his new dominions. Initially, democratic coalition governments of national unity were set up in newly-liberated Czechoslovakia, Poland, and Hungary. The coalition governments included communist parties as well as democratic ones. Czechoslovakia was reunited; the new government did not dare object to Stalin annexing a portion of eastern Slovakia.

Over the next few years, Stalin worked to replace the free governments with puppet communist dictatorships. As Prime Minister Winston Churchill noted in a famous speech in March 1946, "an iron curtain has descended across the Continent. . . . The Communist parties, which were very small in all these Eastern States of Europe, have been raised to pre-eminence and power far beyond their numbers and are seeking everywhere to obtain totalitarian control. Police governments are prevailing in nearly every case, and so far, except in Czechoslovakia, there is no true democracy." Winston Churchill, *The Sineus of Peace*, Westminster College, Fulton, Missouri, Mar. 5, 1946.

Democracy in Czechoslovakia survived until the spring of 1948, when it was exterminated by what the Czechoslovak communists described as "the revolution from above." Paul E. Zinner, *Communist Strategy and Tactics in Czechoslovakia, 1918-48*, at 135 (1963).

When the coalition government was forming after the German surrender in May 1945, the Communists demanded, *inter alia*, the cabinet post of Ministry of the Interior, which was in charge of the police. Non-communists were purged from the police, and the police force converted into an armed instrument of the Communist Party. Adams Schmidt, *Anatomy of a Satellite* 136-37

(1952); Hubert Ripka, *Czechoslovakia Enslaved, The Story of a Communist Coup D'Etat* 152 (1950).

When World War II ended, the Czechoslovak government reclaimed the *Sudetenland* territories that had been seized by Hitler in 1938. To protect industrial installations from attacks by German-speakers who had supported the Nazis, armed “factory guards” were created, comprised of factory workers. But the German danger soon vanished, as the German population was forced to leave Czechoslovakia and settle in Germany proper. Nevertheless, the now-vanished danger of pro-Nazi Germans was used as a pretext for the factory guards to constitute an armed reserve, a “Worker’s Militia.” The Militia’s true purpose was to be ready to assist a communist coup, while receiving arms from secret caches. Zinner, *supra*, at 166-67; Schmidt, *supra*, at 113, 139; Ripka, *supra*, at 152, 167 (describing some communist caches discovered by the government), 259.

Within the police, the communists’ main force was the Security Police (S.N.B.). This was supplemented by police “mobile detachments”—paramilitary forces. Ripka, *supra*, at 152.

The police made all sorts of accusations that leaders of the democratic parties were foreign agents and were plotting a coup. Adams, *supra*, at 116. Actually, the communists were the ones planning a coup, and they were willingly subservient minions of the Soviet tyrant, Stalin.

The crisis began to come to a head in February 1948. Illegal communist caches of arms for the Workers’ Militia had been discovered. The communist-run Security Police announced the eight police divisional commanders in Prague would be fired and replaced by communists. Since divisional commanders were in charge of arms supply to police officers, the implication of the purge of the commanders was that arms would be distributed only to pro-communist police. Ripka, *supra*, at 196.

Against strong communist opposition, the National Assembly annulled the police commander appointments and passed a resolution to create a special committee to investigate the police. Zinner, *supra*, at 199; Ripka, *supra*, at 196-97. A newspaper essay, “We Will Not Permit a Police Regime” documented what communists had been doing to the police and exposed the abuses of the Ministry of Interior. *Id.* at 223 (*Svodobné Slovo* newspaper).

As a minister of the democratic government remembered, “The Communists knew that had touched the sore spot, and that our campaign against the police regime imposed by them could have profound repercussions on the elections, if these took place under normal circumstances. Hence their decision to prevent free elections by any means. Obviously they could succeed in this only by stifling by violence the democratic forces of the nation. . .” *Id.* at 224.<sup>11</sup>

The communists mobilized their Workers’ Militia and other paramilitaries. Quickly, Prague was occupied by armed communist forces, who began arresting political opponents. It was reminiscent of the first days of occupation by the

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11. Ripka had been Minister for Foreign Trade under the democratic government, and also a member of the Constituent National Assembly of Czechoslovakia. During World War II, he was Secretary of State for the Czechoslovak government in exile.

Nazi secret police. *Id.* at 248-49.<sup>12</sup> The same tactics were used in Bratislava, the Slovak capital. *Id.* at 259.

In Czechia, the paper mills had been nationalized, and their pro-communist managers cut off paper supplies to opposition newspapers. Schmidt, *supra*, at 117; Ripka, *supra*, at 149, 264. In Slovakia, the pro-communist printers union refused to print the opposition press. Schmidt, *supra*, at 117.

Students poured into the streets of Prague and demonstrated for two days in support of democracy. But they were soon “brutally repressed by the police.” Ripka, *supra*, at 268.

President Edvard Beneš could have called out the army, which had not yet been taken over by the communists. But no one was sure what the army would do. Ripka, *supra*, at 280. In any case, if the Czechoslovak army had defended the republic, Stalin’s Red Army stood ready to intervene on behalf of the communists. As in March 1939, President Beneš capitulated, and handed his country over to foreign totalitarians. The American ambassador had informed the Czechoslovak government that the U.S. would not intervene against a communist takeover. Schmidt, *supra*, at 135.

Not knowing that Beneš had already acted, a group of nearly ten thousand students marched to the presidential residence to try to persuade him to stand firm. The Workers’ Militia and the communist secret police (the SNB, *Sbor národní bezpečnosti*) arrived, but as they approached, the students began to sing the National Hymn. The police respectfully stopped and stood at attention. Once the song was over, the communist police commander gave the order to attack. Several students were shot, hundreds were wounded by clubs, and over a hundred were arrested. Ripka, *supra*, at 294-95; Zinner, *supra*, at 210.

Following the coup, the Workers’ Militia were kept in Prague as a visible manifestation of the new dictatorship’s power. Zinner, *supra*, at 210. They used machine guns to break up a parade in St. Wenceslas Square (the heart of Prague) that had been organized by one of the democratic parties. Ripka, *supra*, at 284.

The Social Democrat Party was Marxist in ideology, but the vast majority of its members were opposed to the coup. With the cooperation of traitors in the party, the Social Democrats were quickly eliminated. *Id.* at 275.

The *Svodobné Slovo* newspaper, which had published the expose of the communist police, was occupied by police from the Ministry of the Interior. *Id.* at 285.

Hubert Ripka recalled, “My heart bled at the sight of these poor people who saw themselves reduced to slavery for the second time in ten years, without having a chance to defend themselves without being able to cry out in despair.” *Id.* at 297.

Soon, Czechoslovaks were forced to attend mass rallies in support of the new dictatorship. It was like during the Nazi occupation, as one student recalled: “The same promises, the same enthusiasm, which rang false, the same discipline of a crowd kept in awe of the machine guns.” *Id.* at 320. Once again, listening to foreign radio was outlawed. *Id.* at 321. Concentration camps were

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12. The Nazi secret police were known as “S.S.”—short for *Schutzstaffel* (“Protection Squadron”).

established, judicial independence was eliminated, and arbitrary arrest and torture became the norm. *Id.* at 325-26. The Czechoslovak economy was converted to serve the Soviet Union. The same system under the Nazis had been called *Raubwirtschaft* (economy of brigandage). *Id.* at 328. The English word is *kleptocracy* (rule by thieves).

According to the *New York Times* reporter who covered Czechoslovakia during and before the coup, “It seems obvious from the preceding points that the anti-Communists should have organized a paramilitary force. Paramilitary forces are illegal almost by definition and are not a pretty thing, but the non-Communist political parties would have been justified in organizing such a force considering what the communists were doing.” Schmidt, *supra*, at 139.

Although the government had capitulated, popular resistance to the new totalitarian rulers began quickly. In May 1949, a truckload of armed resisters unsuccessfully tried to break into the Litomerice prison and liberate the political prisoners. Schmidt, *supra*, at 436. The prison liberation was intended to be the signal for a national uprising, for which extensive preparations had been made. However, government spies had infiltrated the resisters and reported the plans. *Id.* at 436-37. Small partisan groups operated in the hills for at least the next two years, but all were eventually destroyed by the Workers’ Militia, the police, or the army. *Id.* at 437.

Starting in 1949, a push began to bring the Czechoslovak Catholic church under communist government control. When the bishops defied the government, the government began arresting priests who supported the bishops. The arrests provoked riots in parts of Slovakia. “Peasants armed with clubs, scythes and pitchforks defied the police who arrived in these villages to arrest the priests.” Although the peasants had some initial success in driving off the police, the peasants were eventually suppressed by the Workers’ Militia. *Id.* at 438.

In 1968, reformers who had worked within the communist system began to allow more freedom of the press, speech, and travel, and to decentralize political authority. The “Prague Spring” reforms, led by Alexander Dubček, called their program “Socialism with a human face.” In August 1968, the Soviet Union led a massive Warsaw Pact invasion of Czechoslovakia, which reimposed a police state. The invasion was an application of the “Brezhnev Doctrine”—the principle of the U.S.S.R.’s then-dictator Leonid Brezhnev that no nation that has become communist may ever adopt a different form of government.

While the invasion was in progress, Brezhnev worried that “various underground radio transmitters and arms caches have been discovered. Today for instance submachine guns and other arms were found in a cellar of the Ministry of Agriculture.” The Prague Spring and the Warsaw Pact Invasion of Czechoslovakia in 1968, at 462 (Gunter Bischof ed. 2010) (App’x 8, notes of Brezhnev conversation of Aug. 23, 1968). But the Czechoslovak army did not resist, heeding the Soviet warnings that if “even a single shot” were fired, the Soviets would “crush the resistance mercilessly.” Mark Kramer, *The Prague Spring and the Soviet Invasion in Perspective*, in *The Prague Spring*, *supra*, at 48.

In late 1988, the unpopular communist regimes of eastern Europe again faced mass demonstrations and widespread opposition. This time, the Soviet Union, now led by President Mikhail Gorbachev, chose not to intervene militarily. For one thing, the Soviet army was bogged down in an unwinnable war elsewhere, having invaded Afghanistan in 1979. The Soviet satellite regimes

crumbled, promptly replaced by democracies—which have been maintained with varying degrees of success. On January 1, 1993, the Czech and Slovak regions amicably separated, becoming two nations: the Czech Republic and the Slovak Republic.

### 5. Inter-American Convention (CIFTA)

Founded in 1948, the Organization of American States (OAS) includes all independent nations of the Western Hemisphere. Cuba’s participation was suspended from 1962 to 2009; although reinstated in 2009, Cuba has chosen not to participate. In 1997, President Clinton signed a gun control treaty that had been negotiated in the OAS, and he transmitted the treaty to the Senate. The Senate has neither ratified it nor held hearings on it.

The treaty is commonly known as “CIFTA,” for its Spanish acronym, *Convención Interamericana contra la Fabricación y el Tráfico Ilícitos de Armas de Fuego, Municiones, Explosivos y Otros Materiales Relacionados*. The document is called a “convention” rather than “treaty,” because “convention” is a term of art for a multilateral treaty created by a multinational organization. We cover CIFTA in more detail than the other regional treaties, since CIFTA would become the law of the United States if ratified by the Senate.

## Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

THE STATES PARTIES, . . .

MINDFUL of the pertinent resolutions of the United Nations General Assembly on measures to eradicate the illicit transfer of conventional weapons and on the need for all states to guarantee their security, and of the efforts carried out in the framework of the Inter-American Drug Abuse Control Commission (CICAD); . . .

RECOGNIZING that states have developed different cultural and historical uses for firearms, and that the purpose of enhancing international cooperation to eradicate illicit transnational trafficking in firearms is not intended to discourage or diminish lawful leisure or recreational activities such as travel or tourism for sport shooting, hunting, and other forms of lawful ownership and use recognized by the States Parties;

RECALLING that States Parties have their respective domestic laws and regulations in the areas of firearms, ammunition, explosives, and other related materials, and recognizing that this Convention does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession, or trade of a wholly domestic character, and recognizing that States Parties will



apply their respective laws and regulations in a manner consistent with this Convention;

REAFFIRMING the principles of sovereignty, nonintervention, and the juridical equality of states,

HAVE DECIDED TO ADOPT THIS INTER-AMERICAN CONVENTION AGAINST THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS, AMMUNITION, EXPLOSIVES, AND OTHER RELATED MATERIALS:

## ARTICLE I

### DEFINITIONS

For the purposes of this Convention, the following definitions shall apply:

1. "Illicit manufacturing": the manufacture or assembly of firearms, ammunition, explosives, and other related materials:

- a. from components or parts illicitly trafficked; or
- b. without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or
- c. without marking the firearms that require marking at the time of manufacturing.

2. "Illicit trafficking": the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.

3. "Firearms":

- a. any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or
- b. any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.

4. "Ammunition": the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles that are used in any firearm.

5. "Explosives": any substance or article that is made, manufactured, or used to produce an explosion, detonation, or propulsive or pyrotechnic effect, except:

- a. substances and articles that are not in and of themselves explosive; or
- b. substances and articles listed in the Annex to this Convention.

6. "Other related materials": any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm. . . .

### ARTICLE III

#### SOVEREIGNTY

1. States Parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of nonintervention in the domestic affairs of other states.

2. A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State Party by its domestic law.

### ARTICLE IV

#### LEGISLATIVE MEASURES

1. States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. Subject to the respective constitutional principles and basic concepts of the legal systems of the States Parties, the criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses.

### ARTICLE V

#### JURISDICTION

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense in question is committed in its territory.

2. Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory.

3. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal.

4. This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law. . . .

## ARTICLE VII

### CONFISCATION OR FORFEITURE

1. States Parties undertake to confiscate or forfeit firearms, ammunition, explosives, and other related materials that have been illicitly manufactured or trafficked.

2. States Parties shall adopt the necessary measures to ensure that all firearms, ammunition, explosives, and other related materials seized, confiscated, or forfeited as the result of illicit manufacturing or trafficking do not fall into the hands of private individuals or businesses through auction, sale, or other disposal. . . .

## ARTICLE IX

### EXPORT, IMPORT, AND TRANSIT LICENSES OR AUTHORIZATIONS

1. States Parties shall establish or maintain an effective system of export, import, and international transit licenses or authorizations for transfers of firearms, ammunition, explosives, and other related materials.

2. States Parties shall not permit the transit of firearms, ammunition, explosives, and other related materials until the receiving State Party issues the corresponding license or authorization.

3. States Parties, before releasing shipments of firearms, ammunition, explosives, and other related materials for export, shall ensure that the importing and in-transit countries have issued the necessary licenses or authorizations.

4. The importing State Party shall inform the exporting State Party, upon request, of the receipt of dispatched shipments of firearms, ammunition, explosives, and other related materials. . . .

## ARTICLE XI

### RECORDKEEPING

States Parties shall assure the maintenance for a reasonable time of the information necessary to trace and identify illicitly manufactured and illicitly trafficked firearms to enable them to comply with their obligations under Articles XIII and XVII. . . .

**ARTICLE XIII**

**EXCHANGE OF INFORMATION**

1. States Parties shall exchange among themselves, in conformity with their respective domestic laws and applicable treaties, relevant information on matters such as:

- a. authorized producers, dealers, importers, exporters, and, whenever possible, carriers of firearms, ammunition, explosives, and other related materials;
- b. the means of concealment used in the illicit manufacturing of or trafficking in firearms, ammunition, explosives, and other related materials, and ways of detecting them;
- c. routes customarily used by criminal organizations engaged in illicit trafficking in firearms, ammunition, explosives, and other related materials;
- d. legislative experiences, practices, and measures to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials; and
- e. techniques, practices, and legislation to combat money laundering related to illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. States Parties shall provide to and share with each other, as appropriate, relevant scientific and technological information useful to law enforcement, so as to enhance one another's ability to prevent, detect, and investigate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials and prosecute those involved therein.

3. States Parties shall cooperate in the tracing of firearms, ammunition, explosives, and other related materials which may have been illicitly manufactured or trafficked. Such cooperation shall include accurate and prompt responses to trace requests.

**ARTICLE XIV**

**COOPERATION**

1. States Parties shall cooperate at the bilateral, regional, and international levels to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. States Parties shall identify a national body or a single point of contact to act as liaison among States Parties, as well as between them and the Consultative Committee established in Article XX, for purposes of cooperation and information exchange. . . .

**ARTICLE XVII**

**MUTUAL LEGAL ASSISTANCE**

1. States Parties shall afford one another the widest measure of mutual legal assistance, in conformity with their domestic law and applicable treaties, by promptly and accurately processing and responding to requests from authorities which, in accordance with their domestic law, have the power to investigate or prosecute the illicit activities described in this Convention, in order to obtain evidence and take other necessary action to facilitate procedures and steps involved in such investigations or prosecutions.

2. For purposes of mutual legal assistance under this article, each Party may designate a central authority or may rely upon such central authorities as are provided for in any relevant treaties or other agreements. The central authorities shall be responsible for making and receiving requests for mutual legal assistance under this article, and shall communicate directly with each other for the purposes of this article. . . .

**ARTICLE XIX**

**EXTRADITION**

1. This article shall apply to the offenses referred to in Article IV of this Convention.

2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty in force between or among the States Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.

4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.

6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, the Requested State Party shall submit the case to its competent authorities for the purpose of prosecution under the criteria, laws, and procedures applied by the Requested State to those offenses when they are committed in

its own territory. The Requested and Requesting States Parties may, in accordance with their domestic laws, agree otherwise in relation to any prosecution referred to in this paragraph. . . .

**ARTICLE XXII**

**SIGNATURE**

This Convention is open for signature by member states of the Organization of American States.

**ARTICLE XXIII**

**RATIFICATION**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

**ARTICLE XXIV**

**RESERVATIONS**

States Parties may, at the time of adoption, signature, or ratification, make reservations to this Convention, provided that said reservations are not incompatible with the object and purposes of the Convention and that they concern one or more specific provisions thereof.

**ARTICLE XXV**

**ENTRY INTO FORCE**

This Convention shall enter into force on the 30th day following the date of deposit of the second instrument of ratification. For each state ratifying the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the 30th day following deposit by such state of its instrument of ratification.

**ARTICLE XXVI**

**DENUNCIATION**

1. This Convention shall remain in force indefinitely, but any State Party may denounce it. The instrument of denunciation shall be

deposited with the General Secretariat of the Organization of American States. After six months from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State, but shall remain in force for the other States Parties.

2. The denunciation shall not affect any requests for information or assistance made during the time the Convention is in force for the denouncing State.

#### ANNEX

The term “explosives” does not include: compressed gases; flammable liquids; explosive actuated devices, such as air bags and fire extinguishers; propellant actuated devices, such as nail gun cartridges; consumer fireworks suitable for use by the public and designed primarily to produce visible or audible effects by combustion, that contain pyrotechnic compositions and that do not project or disperse dangerous fragments such as metal, glass, or brittle plastic; toy plastic or paper caps for toy pistols; toy propellant devices consisting of small paper or composition tubes or containers containing a small charge or slow burning propellant powder designed so that they will neither burst nor produce external flame except through the nozzle on functioning; and smoke candles, smokepots, smoke grenades, smoke signals, signal flares, hand signal devices, and Very signal cartridges designed to produce visible effects for signal purposes containing smoke compositions and no bursting charges.

#### NOTES & QUESTIONS

1. The CIFTA preamble says that the convention is “not intended to discourage or diminish lawful leisure or recreational activities such as travel or tourism for sport shooting, hunting, and other forms of lawful ownership.” Why is there no mention of self-defense? Of resistance to tyranny? The constitutions of Mexico, Haiti, and Guatemala have a right to arms, with the former two specifically mentioning self-defense. The constitutions of 12 OAS nations expressly recognize self-defense. The constitutions of Argentina, Guatemala, Honduras, and Peru affirm citizens’ right and duty to resist unconstitutional usurpations of government power. (National constitutions are in online Chapter 14.A.) Why is recognition of these rights missing from CIFTA?
2. *Firearms destruction.* CIFTA requires that any firearms confiscated from criminals (such as stolen guns) be destroyed, rather than returned to the owner or sold to a licensed firearms dealer. In the United States, it is common for police departments and sheriffs’ offices to sell confiscated firearms to federally licensed firearms dealers (federal firearms licensees, or FFLs). The FFLs then resell the guns to lawful purchasers. Should this practice be outlawed? Does your answer turn on an instinct about whether even small reductions in guns per capita would be socially beneficial? Review the material in Chapter 1 tracking the gun-crime rate and the

number of private guns in the United States. Does that material support your intuitions?

3. *Ammunition handloading.* In the United States, millions of people manufacture their own ammunition. As noted in Chapter 3, Americans have long made their own ammunition, but today it is much easier because ammunition components, such as primers and gunpowder, are readily available at retail. Home workshop presses for “handloading” or “reloading” start with an empty, used ammunition shell, and then assemble a new primer, gunpowder, and bullet to create a fresh round of ammunition.

Competitive target shooters are often handloaders. They fire so much ammunition during practice (often tens of thousands of rounds per year) that they cannot afford to use only store-bought ammunition. More importantly, their custom crafted ammunition, geared precisely to their particular guns, will be more accurate than factory ammunition. Some hunters create custom ammunition tailored to their particular firearm and type of game. Many firearms safety trainers handload especially low-powered ammunition for use in teaching beginners. Another category of handloaders is hobbyists who simply enjoy making things themselves and saving money. The competitive shooter might manufacture more than a thousand rounds of ammunition in a month. The big game hunter might make only 50 or 100 per year.

Handloading is lawful in every US state, and no state requires a specific permit for handloading. CIFTA declares (in art. I, § 1, and art. IV, § 1) that “manufacture or assembly” of ammunition may only take place if the government has issued a license. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) currently issues licenses to companies (or individuals) who manufacture ammunition that will be transferred to another person. Requiring licenses for handloading for personal use would require a major addition of new ATF personnel to process millions of manufacturing license applications. Would changing U.S. laws to comply with CIFTA be good policy?

4. *Manufacturing.* CIFTA not only requires that manufacture of firearms or ammunition be forbidden except under government license. Article I further mandates licensing for the manufacture of “other related materials.” These are defined as “any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.” The definition straightforwardly includes all firearms spare parts. It also includes accessories that are attached to firearms, such as scopes, ammunition magazines, sights, recoil pads, bipods, and slings.

Current U.S. law requires a license to manufacture firearms commercially, and “firearm” is defined as the receiver (*see* online Ch. 15.A; 27 CFR § 478.11 (receiver definition)). No federal license is needed for making other parts of the firearm, such as barrels or stocks, or other firearms accessories, such as scopes, slings, or the like.

The Convention literally requires federal licensing of the manufacturers and sellers of barrels, stocks, screws, springs, and everything else that may be used to make firearms. Likewise, the manufacture of all accessories—for



example, scopes, sights, lasers, slings, bipods, and so on—would have to be licensed.

In the United States, the manufacture of an ordinary firearm or ammunition for personal use does not require a license, because the manufacturer licensing requirements apply only to persons who “engage in the business” by engaging in repeated transactions for profit. 18 U.S.C. § 923(a). *But see* 28 U.S.C. §§ 5821-5822 (requiring federal permission and a tax payment for the manufacture of certain firearms, such as machine guns and short-barreled rifles or shotguns, covered by the National Firearms Act). The Convention would require licensing for everyone.

Many, perhaps most, firearm owners tinker with their guns. They may replace a worn-out spring or install a better barrel. Or they may add accessories such as a scope, a laser aiming device, a recoil pad, or a sling. All of these activities would require a government license under CIFTA. The Article I definition of “Illicit manufacturing” is “the manufacture *or assembly* of firearms, ammunition, explosives, *and other related materials*” (emphasis added).

Even if putting an attachment on a firearm were not considered in itself to be “assembly,” the addition of most components necessarily requires some assembly. For example, scope bases and rings consist of several pieces that must be assembled. Replacing one grip with another requires, at the least, the use of screws. And in some guns, like the AR-15, replacement of the grip, if done incorrectly, will cause the gun to malfunction. The grip on an AR holds in place a spring and plunger that control the safety selector switch. If the spring and plunger fall out when you remove the grip (they often do), installing a new grip would seemingly constitute assembly.

Because the definition of “manufacturing” is so broad, most gun owners would eventually be required to obtain a manufacturing license. CIFTA itself does not specifically require gun registration (although the CIFTA model legislation, discussed below, does require comprehensive registration). Under current US federal laws, once a person has a manufacturing license, registration comes with it. Existing federal regulations for the manufacturers of firearms and ammunition require that manufacturers keep detailed records of what they manufacture, and these records must be available for government inspection.

Would it be a good idea if handloaders were required to keep records of every round they made, and gun owners had to keep a record of everything they “assembled” (e.g., putting a scope on a rifle)? These records would then presumably be open to warrantless ATF inspection. *See United States v. Biswell*, 406 U.S. 311 (1972) (Ch. 8.C.2.b) (discussing warrantless inspections of federal firearms licensees).

5. *Requirement to change US law?* CIFTA mandates that “States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials. . . . [T]he criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and

counseling the commission of said offenses.” Yet the Preamble of CIFTA says: “[T]his Convention does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession, or trade of a wholly domestic character.” Mexico, however, has long taken the position that the domestic market is impossible to separate from the international market.

Does the Preamble negate the comprehensive licensing system that CIFTA demands? The exemptions are for “ownership, possession, or trade.” There is no exemption for “manufacturing.” As detailed above, “manufacturing” is defined broadly enough to include the home manufacture of ammunition, as well as repair of one’s firearm, or assembling an accessory for attachment to one’s firearm.

The nations that have ratified CIFTA so far have not fully implemented the literal requirements regarding firearms and related material manufacturing. It is hardly unusual for nations to make a show of ratifying a treaty but then do little to carry out the treaty’s requirements.

6. *CIFTA as a basis for executive branch regulations.* If the CIFTA Convention received the advice and consent of the Senate, it would become the law of the land, on equal footing with congressional enactments and second only to the Constitution. Would the ATF then be empowered to write regulations implementing the Convention—without waiting for Congress to pass a new statute? Would any of the regulations necessary to implement CIFTA raise Second Amendment questions under *District of Columbia v. Heller*, 544 U.S. 570 (2008) (Ch. 10.A)?

A “self-executing” treaty is an independent source of authority for domestic regulations. Under traditional views of international law, CIFTA is not self-executing, because it anticipates that ratifying governments will have to enact future laws in order to comply.

On the other hand, CIFTA does not explicitly disclaim self-executing status. Harold Koh, former Legal Adviser to the US Department of State, has challenged the doctrine of “so-called self-executing treaties” and argues that the Supreme Court decisions creating the doctrine are incorrect. In other words, Koh argues that all treaties should be presumed to be self-executing. See Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1111 & n.114 (2002); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 666 (1998); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2658 n.297 (legislatures “should ratify treaties with a presumption that they are self-executing”), 2360-61, 2383-84 (1991).

Would it be better if treaties ratified by the Senate automatically had the same force as federal statutes and automatically authorized relevant administrative agencies to promulgate regulations?

7. Would Senate ratification of CIFTA trump the 2005 Protection of Lawful Commerce in Arms Act (Ch. 8.D), which outlaws most lawsuits against firearm manufacturers and stores that comply with all gun controls and that sell properly functioning firearms?

Suppose that the Senate, when ratifying CIFTA, added specific reservations that CIFTA is not self-executing, that CIFTA authorizes no additional regulations, and that CIFTA does not authorize any new lawsuits. Could the US executive branch properly ignore the reservations? Regarding a Senate reservation to another treaty, Koh wrote, “Many scholars question persuasively whether the United States declaration has either domestic or international legal effect.” Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1828-29 n.24 (1998).

8. *Freedom of speech.* The anti-counseling provision in CIFTA article IV(2) is very broad. In some of the signatory foreign dictatorships, such as Venezuela or Cuba, it is illegal for a citizen of the country to say that fellow citizens should arm themselves for defense against government violence. Presumably CIFTA’s effect on speech within the tyrannized nation would be minimal, since the tyrants already repress speech without need to cite CIFTA. However, CIFTA’s anti-counseling rules apply in any ratifying nation. So, for example, if the U.S. ratified, speech within the United States that urged the armed overthrow of the Venezuelan dictatorship would be illegal, whether that speech were made by a Venezuelan exile or by an American. Pursuant to CIFTA, the U.S. government would be required to extradite the speaker for prosecution in Venezuela. See Theodore Bromund, Ray Walser & David B. Kopel, *The OAS Firearms Convention is Incompatible with American Liberties* (May 19, 2010).
9. *Freedom of association.* Some persons have urged that the National Rifle Association be prosecuted as a terrorist organization. Under CIFTA article IV, could the NRA be prosecuted if it urged people not to comply with CIFTA—for example, urging people to carry on with their traditional home gunsmithing without obtaining the license that CIFTA requires? Under the First Amendment, the traditional rule is that speech advocating the commission of a crime can only be prosecuted when there is danger of imminent lawless action—for example, urging an angry mob to attack a nearby individual. When circumstances allow for reflection rather than imminent action (e.g., when the communication is delivered via a book), prosecution is not permitted. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).
10. *CIFTA model legislation.* The OAS had drafted model legislation for the implementation of CIFTA, including: Model Legislation on the Marking and Tracing of Firearms (Apr. 19, 2007); Draft Model Legislation and Commentaries on Legislative Measures to Establish Criminal Offenses (May 9, 2008); Broker Regulations (Nov. 17-20, 2003). All are available at <http://www.oas.org>.

The CIFTA models criminalize any “unauthorized” acquisition of firearms or ammunition. Respecting the seizure of any “illicit” firearms or ammunition, the model legislation states that courts “shall issue, at any time, without prior notification or hearing, a freezing or seizure order.” The recommended prison term for any unauthorized firearm or ammunition is from one to ten years.

“Arms Brokers” are defined as anyone who “for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition.” This is broad enough to include a hunting guide who arranges that the local gun store have suitable ammunition on hand for his clients.

Arms brokers must have a license from the national government. A broker must file annual reports with the government specifying exactly what arms and ammunition he brokered, and to whom. A broker’s records are subject to government inspection without need for a warrant.

Pursuant to the CIFTA model, governments must register all guns and their owners: “The name and location of the owner and legal user of a firearm and each subsequent owner and legal user thereof, when possible.” In addition, people who do not own a gun, but who use it (e.g., borrowing a friend’s gun to go hunting), must also register: “The name and location of the owner and legal user of a firearm and each subsequent owner and legal user thereof, when possible.”

Which elements of the CIFTA model laws would be appropriate for adoption in the United States?

11. *Asian cooperation.* Unlike the Western Hemisphere, Europe, or Africa, the continent of Asia has no regional gun control conventions. However, the Association of Southeast Asian Nations (ASEAN) does promote regional cooperation against illicit trade. Various forms of cooperation, and their limited efficacy to date, are examined in A.K. Fidelia Syahmin, *The International Cooperation to Eradicate Illicit Firearms Trafficking in Southeast Asian Region*, 2 Sriwijaya L. Rev. 183 (July 2018).

### C. Classical International Law

International law in some form can be found in ancient times, such as in the Roman Law concept of *jus gentium* (laws that are found among all peoples), or in the first true international legal code, the Rhodian Law, which was promulgated by the rulers of the island of Rhodes, in the eastern Mediterranean Sea. The Rhodian Law was the earliest maritime code, and was put into its final form between 600 and 800 A.D. The Rhodian Law extended far beyond the boundaries of the island of Rhodes and was the widely accepted international law for the thriving maritime trade of the eastern Mediterranean.<sup>13</sup>

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13. Notably, the Rhodian Law recognized personal self-defense: “Sailors are fighting and *A* strikes *B* with a stone or log; *B* returns the blow; he did it from necessity. Even if *A* dies, if it is proved that he gave the first blow whether with a stone or log or axe, *B*, who struck and killed him, is to go harmless; for *A* suffered what he wished to inflict.” Walter Ashburner, *The Rhodian Sea Law* 84 (Walter Ashburner ed., 2001).

But international law in the sense that we understand it today was created during the Age of Discovery and the Enlightenment, in what is now called the Classical Period in international law. At that time, influential scholars wrote treatises about the obligations of civilized nations, and these treatises were often accepted by national governments as authoritative statements of binding law. The treatises covered a variety of issues, such as rules for the treatment of ambassadors, and for maritime trade and navigation. The preeminent concern, however, was the law of war. These treatises prohibited making war against civilians, killing prisoners, and attacking without provocation for the purpose of conquest. The laws of war were derived by deduction from the principles of personal self-defense. For example, a person has the right to use force to defend herself against a violent attacker, but if she subdues the attacker and ties him up so that he is no longer a threat, then she may not kill the attacker. Similarly, once an enemy soldier is taken prisoner, he must not be killed.

The treatises were works of moral and political philosophy. Because they attempted to elucidate the laws that must necessarily apply to all nations, they started with natural law, which by definition is found everywhere. (See the Index entry on “Natural rights” for discussion of natural law in the printed textbook.) Starting from first principles, including the natural rights of self-defense, the treatises examined topics such as when forcible resistance to tyranny was legitimate, or whether invading another country to liberate its people from a tyrant could be lawful.

All of the authors discussed below were very influential in their own time, and for centuries afterward. In Protestant Europe and its American colonies, the ideas of two leading Catholic authors, Vitoria and Suárez, were mainly known through restatement by Protestant writers, such as Grotius, Pufendorf, and Vattel. In the American Founding Era, Vattel was generally treated as the authoritative standard of international law. For example, after the French Revolution executed King Louis XVI, President Washington’s administration had to decide whether the 1778 Franco-American treaty of friendship was still binding even after the change in France’s government. Based on Vattel, the Washington administration concluded that the treaty was no longer binding, and so the administration proclaimed American neutrality in France’s new war with Great Britain. Noah Feldman, *The Three Lives of James Madison* 373 (2017).

You may find that the attitudes expressed toward arms and to individual self-defense in these Classical international law materials differ markedly from the attitude implicit in some of materials excerpted in the other Parts of this Chapter.

The narrative below, describing the authors and their treatises, is based on David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. Pub. L.* 43 (2008). Additional citations can be found therein. For some authors, we provide links to English translations of the works; these translations are not necessarily the same as the English translations used in the Kopel, Gallant, and Eisen article, so there may be small differences in wording.

## 1. Francisco de Vitoria

During the sixteenth century, the higher education system of Spain was the greatest in the world, and the greatest of the Spanish universities was the University of Salamanca. At Salamanca, as at other universities, the most prestigious professorship was head Professor of Theology—a position that included the full scope of ethics and philosophy.

When the Primary Chair in Theology at the University of Salamanca became open in 1526, Francisco de Vitoria (1486-1546) was selected to fill it. He was chosen, in accordance with the custom of the time, by a vote of the students. One of Vitoria's biographers observed, "It is no slight tribute to democracy that a small democratic, intellectual group should have chosen from among the intellectuals the one person best able to defend democracy for the entire world." James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* 73 (1934).

Like Thomas Aquinas (Ch. 16.C.3.c), Vitoria came from the Dominican Order of monks, which governed itself through democratic, representative procedures established in the Order's written constitution. Between the destruction of the Roman Republic by Julius Caesar in the first century B.C. (Ch. 16.B.2.b) and the founding of the Dominicans in the thirteenth century A.D., the Western world had very little experience with functional, enduring systems of democratic government. The Dominican Order served as one of the incubators of democracy for the modern world.<sup>14</sup>

University lectures were open to the public, and Vitoria attracted huge audiences of students and laymen. He quickly became known as the best teacher in Spain. He was the founder of the School of Salamanca: a group of Spanish scholars who applied new insights to the Scholastic system of philosophy. (Scholasticism, a dialectical methodology for academic inquiry, had been developed centuries before by Thomas Aquinas and other scholars. *See* Ch. 16.C.3.)

Vitoria had been educated in Paris and was part of a continent-wide community of Dominican intellectuals. Accordingly, Vitoria was an internationalist. One biographer summarized: "Vitoria was a liberal. He could not help being a liberal. He was an internationalist by inheritance. And because he was both, his international law is a liberal law of nations." Scott, *supra*, at 280.

Francisco de Vitoria's classroom became "the cradle of international law." "Vitoria proclaimed the existence of an international law no longer limited to Christendom but applying to all States, without reference to geography, creed, or race." *Id.*

The Spanish conquest of the New World impelled the sixteenth century's scholarly inquiry into international law. Many Spaniards were concerned with whether the conquests were moral and legal. The debate led to Francisco de Vitoria's 1532 treatise, *De Indis* (On the Indians). The first two sections of the treatise rejected every argument that Christianity, or the desire to propagate the Christian faith, or even the express authority of the Pope, could justify the

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14. The Catholic Benedictine Order, governed by the Rule of St. Benedict (sixth or seventh century A.D.), also had democratic elements, such as the election of the abbot by all the monks. Vitoria's name is sometimes spelled "Vittoria" or "Victoria."

conquest of the Indians. Vitoria wrote that heretics, blasphemers, idolaters, and pagans—including those who were presented with Christianity and obstinately rejected it—retained all of their natural rights to their property and their sovereignty.

In section three, Vitoria examined other possible justifications for the conquest. He argued in favor of an unlimited right of free trade. If a Frenchman wanted to travel in Spain, or to pursue peaceful commerce there, the Spanish government had no right to stop him. Similarly, the Spanish had the right to engage in commerce in the New World. A Frenchman had the right to fish or to prospect for gold in Spain (but not on someone's private property), and the Spanish had similar rights in the New World. If the Indians attempted to prevent the Spanish from engaging in free trade, then the Spanish should peacefully attempt to reason with them. Only if the Indians used force would the Spanish be allowed to use force, "it being lawful to repel force with force."<sup>15</sup>

Vitoria also argued for a duty of humanitarian intervention, because "innocent folk there" were victimized by the Aztecs' "sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes." (Indeed, the Spanish conquest of Mexico was only possible because so many other Mexican tribes were tired of being used as the main protein source for the Aztecs, and so they allied with the Spanish in war against the Aztecs.) The principle of humanitarian intervention against human sacrifice and other atrocities was not limited to Spaniards and Aztecs; it was universally applicable.

Although Spanish title in the New World could be legitimately defended, according to Vitoria, Spain's subsequent abuses of the Indians could not. As Vitoria put it, "I fear measures were adopted in excess of what is allowed by human and divine law." He wrote on another occasion that the pillage of the Indians had been "despicable," and the Indians had the right to use defensive violence against the Spaniards who were robbing them.

Vitoria produced a follow-up treatise, commonly known as *On the Law of War*, examining the lawfulness of Spanish warfare in the New World, as measured by international legal standards of war. The treatise explained various reasons why personal and national self-defense are lawful. One reason is that a contrary rule would put the world in "utter misery, if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate upon them."

His "first proposition" was:

Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force. Hence, any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.

From the first proposition about personal self-defense, Vitoria derived his second proposition: "Every state has authority to declare war and to make war"

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15. For the Roman law principle that Vitoria quoted, see Chapters 16.B.2.e, 16.C.3.a, 16.C.3.c, 16.D.2.a; Edward Coke, *Institutes of the Laws of England* (Ch. 2.E Note 3); S.C. Const. pmbl. (1776) (Ch. 3.H.1).

in self-defense. State self-defense is broader than personal self-defense, because personal self-defense is limited to immediate response to an attack, whereas a state may act to redress wrongs from the recent past.

The personal right to self-defense was used to derive humanitarian restrictions on war. Vitoria examined whether, in warfare between nations, it is lawful to deliberately kill innocent noncombatants. He explained such killings could not be just, “because it is certain that innocent folk may defend themselves against any who try to kill them.” Because self-defense by innocents is just, the killing of innocents is unjust. “Hence it follows that even in war with Turks it is not allowable to kill children. This is clear because they are innocent. Aye, and the same holds with regard to the women of unbelievers.”

Vitoria thus held that international law protected everyone, not just Christians, because the basic moral principles that underpinned international law applied globally. He was likewise at the forefront in insisting that the same moral rules that applied to ordinary individuals also applied to the great and the powerful, including governments. Vitoria was the world’s most renowned scholar urging humanitarian limits on war. The moral principle he used to derive those humanitarian limits was the personal right of self-defense.

In other writings, Vitoria directly connected the right of self-defense to a right of defense against tyranny—either in a personal or in a political context. Thus, a child has a right of self-defense against his own father if the father tried to kill him. Analogously, a subject may defend himself against a murderous king; and people may even defend themselves against an evil pope. Likewise, innocent Indians or Muslims may defend themselves against unjust attacks by Christians.

### *NOTES & QUESTIONS*

1. Vitoria, like other classical authors, carefully examined the similarities and distinctions between “private war” (use of force by an individual) and “public war” (use of force by a government). In this Section C, observe the many situations where the rules for private war and public war are the same, and the exceptions where there is more latitude in one or the other.
2. In the years before the ratification of the Second Amendment in 1791, there are many documents that use “bear arms,” or “bearing arms,” or similar phrases in conjunction with “war” or similar words. In context, some of these documents are plainly about military combat, while others are more general. In interpreting the Second Amendment, some persons argue that any phrase such as “bear arms in war” must indicate that the Second Amendment’s “bear arms” refers only to militia service, since militias fight wars. However, the militia-only argument overlooks the long-standing usage in Western thought, including by the scholars excerpted in Section C, of using “war” to include personal self-defense.
3. If Vitoria is correct that personal self-defense is the basis for the legitimacy of defensive state warfare, does a state that forbids personal self-defense



forfeit its legitimacy to engage in warfare? A state that forbids the practical tools for self-defense?

4. Vitoria strongly believed in commerce as a human right and said that a Frenchman had a right to travel to Spain to engage in trade. Similarly, a Spaniard had a right to travel to the Aztec Empire in Mexico to engage in trade there. Do you agree that commerce is a human right? If it is, can the would-be traveler use force as a last resort against attempts to exclude him?

## 2. Francisco Suárez

Francisco Suárez (1548-1617) was appointed to a chair in philosophy at the University of Segovia at the age of 23. During his career, he taught at Salamanca, in Rome, and at the University of Coimbra (in Portugal). Suárez wrote 14 books on theological, metaphysical, and political subjects, and was widely recognized as a preeminent scholar of his age, and a founder of international law.

Self-defense is “the greatest of rights,” wrote Suárez. It was a right that no government could abolish, because self-defense is part of natural law. The irrevocable right of self-defense has many important implications for civil liberty. A subject’s right to resist a manifestly unjust law, such as a bill of attainder,<sup>16</sup> is based on the right of self-defense.

Similarly, as a last resort, an individual subject may kill a tyrant, because of the subject’s inherent right of self-defense, by “the authority of God, Who has granted to every man, through the natural law, the right to defend himself and his state from the violence inflicted by such a tyrant.”

Unlike some moderns, Suárez did not assume that “the state” was identical to “the government.”<sup>17</sup> Rather, the state itself could exercise its right of “self-defence” to depose violently a tyrannical king, because of “natural law, which renders it licit to repel force with force.” The principle that “the state” had the right to use force to remove a tyrannical government was consistent with Suárez’s principle that a prince had just power only if the power was bestowed by the people.

Like the other founders of international law, Suárez paid particular attention to the laws of war. The legitimacy of state warfare is, according to Suárez,

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16. A legislative act declaring a person guilty of treason or another crime without a trial. Prohibited by U.S. Const. art. I, § 9 cl. 3 (federal) & § 10 cl. 1 (state).

17. The author of the first American dictionary of the English language agreed. “State” meant “[a] political body, or body politic; the whole body of people united under one government, whatever may be the form of government. . . . More usually the word signifies a political body governed by representatives. . . . In this sense, state has some times more immediate reference to government, sometimes to the people or community.” 2 Noah Webster, *An American Dictionary of the English Language* 80 (1828); See also *District of Columbia v. Heller*, 554 U.S. 570, 597 (“the phrase ‘security of a free State’ and close variations seem to have been terms of art in eighteenth-century political discourse, meaning a ‘free country’ or free polity”) (citing Eugene Volokh, *Necessary to the Security of a Free State*, 83 Notre Dame L. Rev. 1, 5 (2007)).

derivative of the personal right of self-defense, and the derivation shows why limits could be set on warfare. Armed self-defense against a person who is trying violently to take one’s land is “not really aggression, but defence of one’s legal possession.” The same principle applies to national defense—along with the corollary (from Roman law (Ch. 16.B.2) that the personal or national actions be “waged with a moderation of defence which is blameless” (that is, not grossly disproportionate to the attack)).

For the individual and for the state, defense against an aggressor is not only a right, but a duty—such as for a parent, who is obliged to defend her child:

Secondly, I hold that defensive war not only is permitted, but sometimes is even commanded. This first part of this proposition . . . holds true not only for public officials, but also for private individuals, since all laws allow the repelling of force with force. The reason supporting it is that the right of self-defence is natural and necessary. Whence the second part of our proposition is easily proved. For self-defence may sometimes be prescribed [i.e., mandated], at least in accordance with the order of charity. . . . The same is true of the defence of the state, especially if such defence is an official duty. . . .

Francisco Suárez, *De Triplici Virtute Theologica, Fide, Spe, et Charitate* (1621) (On the Three Theological Virtues, Faith, Hope, and Charity), in 2 Selections from Three Works of Francisco Suárez, S.J. 802-03 (Gwladys L. Williams ed., 1944) (Disputation 13, § 1.4).

While Suárez (like Vitoria) was a member of a Catholic religious order, he was extremely influential on Protestant writers. The eminent British historian Lord Acton wrote that “the greater part of the political ideas” of John Milton and John Locke “may be found in the ponderous Latin of Jesuits who were subjects of the Spanish Crown. . . .” such as Suárez. John Dalberg Acton, *The History of Freedom and Other Essays* 82 (1907). Suárez was also a major influence on Grotius, who is discussed next.

### NOTES & QUESTIONS

1. Suárez’s last book, *De Defensio Fidei Catholicae Adversus Anglicanae Sectae Errores* (Defense of the Catholic Faith against the Errors of the Anglican Sect), was published in 1613. It directly challenged the English King James I’s assertion of divine right. (Ch. 2.H.1) *De Defensio* was publicly burned in London in 1614. Suárez’s advocacy of the right of revolution was so powerful that the Catholic Parlement in Paris burned the book the same year. Do governments have the legitimate power to suppress books arguing for a right of revolution? Does it depend on the government and other circumstances?
2. Modern Spanish law on self-defense is detailed in M. Luzón Peña, *Aspectos Esenciales de la Legítima Defensa* (Julis César Faria ed., Buenos Aires 2d ed. 2006) (1978). Self-defense is a justification, not a mere excuse, and is immune from any criminal or civil liability. In some situations, the defense of third persons may be a legal duty. *Id.* at 526-27; Código Penal (Criminal Code), art. 20, § 4 (anyone acting in defense of their own rights or of a

third person; illegitimate aggression is presumed from illegal entrance into a dwelling; the means used for defense must be rational; defender must not have sufficiently provoked the attacker), 118 (no civil liability).

### 3. Hugo Grotius

The Dutch scholar Hugo Grotius (1583-1645) was a child prodigy who enrolled at the University of Leiden when he was 11 years old. Hailed as “the miracle of Holland,” he wrote more than 50 books, and “may well have been the best-read man of his generation in Europe.” David B. Bederman, *Reception of the Classical Tradition in International Law: Grotius’ De Jure Belli Ac Pacis*, 10 *Emory Int’l L. Rev.* 1, 4-6 (1996).

As the 2005 edition of his 1625 masterpiece *The Rights of War and Peace* puts it, the book has “commonly been seen as the classic work in modern public international law, laying the foundation for a universal code of law.” Or as international legal scholar George B. Davis wrote in 1900, the book was “the first authoritative treatise upon the law of nations, as that term is now understood.” George B. Davis, *The Elements of International Law* 15 (2d ed. 1900). “It was at once perceived to be a work of standard and permanent value, of the first authority upon the subject of which it treats,” said Davis. A 1795 author explained, “in about sixty years from the time of publication, it was universally established in *Christendom* as the true fountain-head of the *European* Law of Nations.” Robert Ward, *An Enquiry into the Foundation of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius* 621 (1795). In short, “it would be hard to imagine any work more central to the intellectual world of the Enlightenment,” writes Richard Tuck, in his Introduction to the 2005 edition of Grotius. Richard Tuck, *Introduction* to 1 Hugo Grotius, *The Rights of War and Peace* at xi (Richard Tuck ed., Liberty Fund 2005) (reprint of 1737 English translation by John Morrice of the 1724 annotated French translation by Jean Barbeyrac) (1625).<sup>18</sup>

During the sixteenth century, there were 26 editions of the original Latin text, as well as translations into French, English, and Dutch. The next century saw 20 Latin editions, and multiple editions in French, English, Dutch, German, Russian, and Italian.

The purpose of *The Rights of War and Peace* was to civilize warfare, especially to protect noncombatants from attack. To do so, Grotius started with the right of personal defense. As Grotius observed, even human babies, like animals, have an instinct to defend themselves. Moreover, self-defense was essential to social harmony, for if people were prevented from using force against others who were attempting to take property by force, then “human Society and Commerce would necessarily be dissolved.”

After listing numerous examples from Roman law and the Bible, in which personal self-defense and just war were approved, Grotius declared that “[b]y

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18. The Liberty Fund’s [Online Library of Liberty](#) offers many free, modern editions of classic works of liberty, including Grotius.

the Law of Nature then, which may also be called the Law of Nations,” some forms of national warfare were lawful, as was personal warfare in self-defense. The rationale for both was succinctly expressed in the Roman maxim: “It is allowed to Repel Force by Force.” Examples of personal and national use of force were woven together seamlessly, for the same moral principles applied to both.

Grotius classified “Private War” (justifiable individual self-defense) and “Public War” (justifiable government-led collective self-defense) as two types of the same thing. Regarding personal self-defense:

We have before observed, that if a Man is assaulted in such a Manner, that his Life shall appear in inevitable Danger, he may not only make *War* upon, but very justly *destroy* the *Aggressor*; and from this Instance which every one must allow us, it appears that such a *private War* may be *just* and *lawful*. It is to be observed, that this *Right of Self-Defence*, arises directly and immediately from the Care of our own Preservation, which *Nature* recommends to every one. . . .

Relying on the Scholastic philosopher Thomas Aquinas (Ch. 16.C.3.c), Grotius explained that defensive violence is based on the intention of self-preservation, not the purpose of killing another.

Self-defense is appropriate not just to preserve life, but also to prevent the loss of a limb or member, rape, and robbery: “I may shoot that Man who is making off with my Effects, if there’s no other Method of my recovering them.” To this discussion, Jean Barbeyrac—Grotius’s most influential translator and annotator—added the footnote: “In Reality, the Care of defending one’s Life is a Thing to which we are obliged, not a bare Permission.” (The Barbeyrac edition was the standard in American colonies. See Chapter 2.K.4 for John Adams’s lengthy verbatim reliance on Barbeyrac in a newspaper essay arguing for the American right of revolution. See *infra* Section C.4, discussing Samuel von Pufendorf, for more on Barbeyrac’s influence.)

“What we have hitherto said, concerning the Right of defending our *Persons* and *Estates*, principally regards private Wars; but we may likewise apply it to public Wars, with some Difference,” Grotius explained. Grotius then noted various differences; for example, personal wars (that is, individual violence) are only for the purpose of self-defense, whereas public wars (those undertaken by a nation) could have the additional purposes “of revenging and punishing Injuries.”

The Italian writer Alberico Gentili (1552-1608) had argued that a nation could attack another nation if the former feared the growing power of the latter. Diego Panizza, *Political Theory and Jurisprudence in Gentili’s De Iure Belli: The Great Debate Between ‘Theological’ and ‘Humanist’ Perspectives from Vitoria to Grotius* 20 (NYU Institute for International Law and Justice, Working Paper No. 2005/15, 2005). Grotius called Gentili’s doctrine “abhorrent to every principle of equity.” Grotius’s counter-argument was the national self-defense restrictions that come directly from the rules of personal self-defense.

Grotius also wrote that victorious warriors must not abuse the bodies of the dead. As Barbeyrac elaborated, there is no legitimate purpose in mutilating the dead, because “this is of no Use either for our Defence, the Support of our Rights, or in Word for any lawful End of War.”

While Grotius approved only in rare circumstances of a people carrying out a revolution against an oppressive government, he did argue that other

nations have a right and a moral obligation to invade and liberate nations from domestic tyranny. Barbeyrac's footnotes in these sections, and elsewhere in the book, argued for a much broader right of revolution.

Several years before writing *The Rights of War and Peace*, Grotius penned *The Free Sea* (*Mare Librum*), which was a foundational book of maritime law, and hence of international law. In *The Free Sea*, he argued that natural law is immutable, and cannot be overturned by governments. Suárez had made the same point explicitly, and the principle is implicit in most of the other Classical founders of international law.

### NOTES & QUESTIONS

1. Do you agree with Grotius that a people would never enter into a social compact if the price were to surrender their right of resisting an unjust and violent government? If given the choice at the start of a new political system, would you give up that right? Under what conditions? Does it depend on how bad you perceive the alternative "state of nature" to be? What if during an agreed "trial period," the new social compact produced order and prosperity? What about the generations that come after you: should they also have a trial period?
2. Grotius allowed a nation to wage public war for "revenging and punishing Injuries," but individuals were forbidden to engage in private war for the same purposes. What are the best rationales for the distinction? How can a nation have rights greater than the collective rights of all the individuals who comprise the nation? If private war for revenge and punishment were lawful, what challenges would be presented to today's legal systems?

## 4. Samuel von Pufendorf

The Swedish scholar Samuel von Pufendorf (1632-94) was the first person appointed as a professor of the law of nations at the University of Heidelberg. The position was created explicitly to allow Pufendorf to teach Grotius's text. Pufendorf also served as a counselor to the King of Sweden and the King of Prussia. In 1672, he published the eight-volume magnum opus, *Of the Law of Nature and Nations*. It was instantly recognized as a work of tremendous importance and was published in many editions all over Europe. "[T]he two works [of Grotius and Pufendorf] together quickly became the equivalent of an encyclopedia of moral and political thought for Enlightenment Europe." Richard Tuck, *Introduction* to the 2005 edition of Grotius, *supra*.

Pufendorf advanced the theories of Grotius, while also incorporating ideas of later philosophers such as John Locke and Thomas Hobbes. Pufendorf was not the first to argue that international law applied beyond the relations of Christian nations with each other, but his overriding concern for the common human community made the theme especially important in his book. Pufendorf

(born in the middle of Europe’s devastating Thirty Years War, 1618-48) was, like Grotius, greatly interested in restraining warfare, but Pufendorf painted on a broader canvas. As he pondered how the global community might live together more peaceably, he also considered how individuals could live together successfully in society. Repeatedly he argued that the right, duty, and practice of self-defense—at the personal level and at the national level—are essential for the preservation of society, both locally and globally.

Pufendorf’s treatise grew even more influential after the 1706-07 publication of a French translation by the French lawyer Jean Barbeyrac (1674-1744), which was supplemented by Barbeyrac’s own copious notes and commentary. Barbeyrac, who was a professor of law at Groningen University, in the Netherlands, and a member of the Royal Academy of Sciences in Berlin, also produced an annotated French version of Grotius in 1724. Grotius and Pufendorf had already been translated into many languages in dozens of editions. Now, the Barbeyrac editions themselves were also translated all over Europe and soon became the most popular editions. Grotius and Pufendorf, as translated and annotated by Barbeyrac, remained the preeminent authorities on international law for centuries afterward.

Pufendorf followed Thomas Hobbes’s theory that states are imbued with the same qualities as are individual persons and are governed by the same precepts of natural law. “Law of nature” was the term used when referring to individuals, and this same law, when applied to states, was called the “law of nations.”

In contrast to the pessimistic spirit of Hobbes, Pufendorf thought that humans had a natural inclination toward peaceful cooperation: “Tis true, Man was created for the maintaining of Peace with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, do primarily tend towards the Constitution and Preservation of this universal safety and Quiet.”

Self-defense is an essential foundation of society, for if people did not defend themselves, then it would be impossible for people to live together in a society. Not to use forceful defense when necessary would make “honest Men” into “a ready Prey to Villains.” “So that, upon the whole to banish *Self-defence* though pursued by *Force*, would be so far from promoting the Peace, that it would rather contribute to the Ruin and Destruction of Mankind.”

Pufendorf denied “that the *Law of Nature*, which was instituted for a Man’s Security in the World, should favor so absurd a Peace as must necessarily cause his present Destruction, and would in fine produce any Thing sooner than *Sociable* life.” Likewise:

But what Possibility is there of my living at Peace with him who hurts and injures me, since Nature has implanted in every Man’s Breast so tender a concern for himself, and for what he possesses, that he cannot but apply all Means to resist and repel him, who either respect attempts to wrong him.

Pufendorf explained that there is much broader latitude for self-defense in a state of nature<sup>19</sup> than in civil society; preemptive self-defense is disfavored in society, but not in a state of nature.

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19. A “state of nature” is *not* the same as “natural law.” The “state of nature” is the philosophical term for the conditions that exist before people choose to enter into society together. “Natural law” is usually used by the Classical international law writers to mean a set

However, Pufendorf continued, even civil society does not forbid imminent preemption in circumstances in which the victim has no opportunity to warn the authorities first: “For Example, if a Man is making towards me with a naked Sword and with full Signification of his intentions toward me, and I at the same time have a Gun in my Hand, I may fairly discharge it at him whilst he is at a distance. . . .” Similarly, a man armed with a long gun may shoot an attacker who was carrying a pistol, even though the attacker is not yet within range to use his pistol.

Making the same point as Justice Oliver Wendell Holmes, who in 1921 would write that “detached reflection is not required and cannot be demanded in the presence of an uplifted knife,” *Brown v. United States*, 256 U.S. 335, 343 (1921) (Ch. 6.I), Pufendorf wrote that “it is scarce possible that a Man under so terrible Apprehension should be so exact in considering and discovering all Ways of Escape, as he who being set out of the danger can sedately deliberate on the Case.” Thus, while a person should safely retreat rather than use deadly force, Pufendorf recognized that safe retreat is often impossible. Nor is there any requirement that a defender use arms that are not more powerful than the arms of the aggressor:

As if the Aggressors were so generous, as constantly to give notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have the Leisure to furnish themselves in like manner for the Combat. Or if these Rencounters<sup>20</sup> we were to act on our Defence by the strict Rules of the common Sword Plays and Tryals of Skill, where the Champions and their Weapons are nicely match'd and measur'd for our better Diversion.

Self-defense, using lethal force if necessary, is permissible against a non-deadly aggressor who would maim the victim, or who would inflict other less-than-lethal injuries.

For what an age of Torments should I undergo, if another Man were allow'd perpetually to lay upon me only with moderate Blows, whose Malice I could not otherwise stop or repel, than by compassing his Death. Or if a Neighbour were continually to infest me with Incursions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For since the chief Aim of every human *Socialness* is the Safety of every Person, we ought not to fancy in it such Laws, as would make every good and honest Man of necessity miserable, as often as any wicked Varlet<sup>21</sup> should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men on so destructive a Bottom as the Necessity of enduring Wrongs.

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of principles that are found in all human societies. (See Gratian’s treatise in Chapter 16.C.3.a for some examples.) Natural law includes certain natural rights, such as the right to the fruits of one’s labor. In the Classical view, the reason why people choose to leave a state of nature, enter into society, and create a government, is that society and government are the organizations by which people can collectively protect their natural rights. This view is expressed in paragraph 2 of the U.S. Declaration of Independence (Ch. 3.F.5).

20. [An unexpected and hostile meeting.—Eds.]

21. [A rascal.—Eds.]

Lethal force in self-defense is also permissible to prevent rape or assault. And likewise to prevent robbery: “[I]t is clearly evidence that the Security and Peace of Society and of Mankind could hardly subsist, if a Liberty were not granted to repel by the most violent Courses, those who come to pillage our Goods. . . .”

What if one person attacks another’s *honor*—such as by boxing his ears, a degrading, but not physically dangerous, affront? Pufendorf acknowledged that in a state of nature there is a limitless right to redress any attack, but he insisted that in a civil society, the proper recourse in case of an insult or an attack on honor is to be found in resort to the courts, not in deadly force. It should be remembered that Pufendorf was writing at a time when the educated gentlemen of Europe often killed each other in duels because one man had insulted another’s honor. Pufendorf’s strict rule denying that deadly force could be used in defense of honor was one aspect of his broader view that self-defense was properly made for the repose, safety, and sociability of society.

Pufendorf also rejected the view that self-defense could be forbidden because it is a form of punishing criminals, and the prerogative of punishment belongs exclusively to the state. Pufendorf agreed that genuine punishment—for retribution, after a crime had been completed—was, in a civil society, exclusively a state function. “But Defence is a thing of more ancient date than any Civil Command. . . .” Accordingly, no state could legitimately forbid self-defense.

The chapter “Of the Right of War” began, with a detailed restatement of the natural right of personal self-defense. Then, following the methodology of the other Classical international law scholars, Pufendorf extrapolated from the fundamental principles of self-defense the broader rules of national warfare, including the requirement of Just Cause, prohibitions on attacks on non-combatants, prohibitions on the execution of prisoners, prohibition on wanton destruction of property, limitations on what spoils might be taken in war, and similar humanitarian restrictions.

Pufendorf had argued that a victim has a right to defend himself against an aggressor even if the aggressor might not have a fully formed malicious intent (such as if the aggressor were insane). Barbeyrac agreed and applied the example specifically to a prince, who through self-indulgence in his own violent fits of anger, or through excessive drink, formed a transient but passionate determination to take a subject’s life. Barbeyrac held that “we have as much Right to defend ourselves against him, as if he acted in cold Blood.” He suggested that the behavior of future rulers would be improved if subjects did not meekly submit to a ruler’s murderous fits of temper.

More generally, Pufendorf described the right of resisting a tyrant as another application of the right of self-defense. If the ruler makes himself into a manifest danger to the people, then “a People may defend themselves against the unjust Violence of the Prince.”

Pufendorf acknowledged the argument that, in a state, it might be illegal for anyone to call “that the Subjects have to take up Arms against the chief Magistrate; since no Mortal can pretend to have a Jurisdiction” over a sovereign. Pufendorf denied that self-defense—including collective self-defense against barbarous domestic tyranny—is dependent on either jurisdiction or a lawful call: “As if Defence were the Effect of Jurisdiction! Or, as if he who sets himself to keep off an unjust Violence, which threatens his Life, has any more need of



a particular Call, than he who is about to fence against Hunger and Thirst with Meat and Drink!”

Pufendorf repeated with approval Grotius’s analysis that a people would never enter into a social compact if the price were to surrender their right of resisting an unjust and violent government. It would be better to suffer the “Fighting and Contention” of a state of nature than to face “certain Death” because they had given up the right to “oppose by Arms the unjust Violence of their Superiors.”

Barbeyrac added that if a government attempts to hinder people from the peaceful exercise of religion according to personal conscience, then “the People have as natural and unquestionable a Right to defend the Religion by Force of Arms . . . as to defend their Lives, their Estates, and Liberties. . . .”

Likewise, at the conclusion of Pufendorf’s chapter on self-defense, Barbeyrac included a long note on a subject that he chided Pufendorf for omitting: John Locke’s theory of the right to resistance against a government that usurps powers that had never been granted by the people—a theory with which Barbeyrac plainly agreed. Barbeyrac quoted at length, and with great approval, John Locke’s explication that a tyrant is in a state of war with the people. (*See* Ch. 2.K.2.) He echoed the point made centuries earlier by Cicero, St. Augustine, and Philo of Alexandria that robbery is robbery, regardless of whether the perpetrator is a small gang leader with a few followers, or a tyrant with a standing army. (*See* Chs. 16.B.2.c; 16.C.1.e Note 3; 16.C.2.e.)

The American revolutionaries considered Barbeyrac, Pufendorf, and Grotius part of a fabric of humanitarian philosophy that justified violent resistance to Great Britain as legitimate self-defense against the British government’s efforts to destroy the orderly peace of free and civil society.

### NOTES & QUESTIONS

1. Pufendorf warned that prohibiting self-defense would cause honest men to fall prey to villains. Does a robust legal doctrine of self-defense give rise to the same risk, in different ways? For example, how are we to be certain who was the villain and who was the lawful self-defender if only one person survives?

Does the risk of false claims of self-defense suggest that the law should be skeptical of, or entirely reject, the concept of legal self-defense? It is not uncommon in our legal system for courts and juries to make decisions based on imperfect information—such as unrebutted, self-interested testimony of lone witnesses. Is it possible to ferret out truth about self-defense claims, even without eyewitnesses, using circumstantial evidence?

Consider the costs and benefits of a duty-to-retreat rule versus a no-retreat rule. Does the answer depend on whether you focus on the individual victim or society at large? Would you give victims the benefit of the doubt or hold them to a more exacting standard? For more, see Chapter 6.I.

2. Consider Barbeyrac’s conclusion that the behavior of future rulers would be improved if subjects did not meekly submit to a despotic ruler’s murderous

fits of temper. Is this a deterrence argument? Deterrence of future violators is one of the traditional functions of punishment.

3. Pufendorf and Barbeyrac favor broad rights of legitimate violence in response to state tyranny. For example, citizens facing a tyrant’s oppression may resist before oppression becomes complete; they need not wait for their chains to be affixed. Is there a stronger justification for violence against a state that has trampled a fundamental right, such as the free exercise of religion, or against a lone criminal who is perpetrating deadly violence? Why?
4. Do you agree that there is a distinction between self-defense and punishment? The Classical view would consider violence against an imminent threat to be a necessary preventative measure, and not to be punishment. Do you agree? Isn’t a criminal who is shot in self-defense just as dead as a criminal who is executed after a trial and appeals with due process? How much does it matter that the convicted criminal is executed after a deliberate public process, with no claim that the execution is necessary to save a particular innocent life?
5. In Barbeyrac’s view, government suppression of free exercise of religion was a preeminent example of when the people were justified in using force to resist the government. In the West from the Middle Ages onward, there was much debate over whether Christians ever had a legitimate right to use force against the governments that ruled. For many people, suppression of one’s own religion (e.g., Protestants being suppressed by a Catholic monarch, or Catholics being suppressed by a Protestant) proved that resistance was justified in some situations. Over time, more and more people understood the right of resistance to apply to any form of tyranny, and to imply a right to free exercise of religion for everyone. *See* online Ch. 16.C-D.; David B. Kopel, *The Morality of Self-Defense and Military Action: The Judeo-Christian Perspective* (2018).

## 5. Emmerich de Vattel

Along with *Of the Law of Nature and Nations* by Pufendorf, *The Law of Nations* by the Swiss scholar Emmerich de Vattel was considered one of the two great books founded on the work of Grotius. Vattel (1714-67) was notably influential on the American Founders, among others.

The full title of Vattel’s book stated the connection between natural and international law: *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (1758).<sup>22</sup>

Vattel agreed with other scholars that the right of personal self-defense is the foundation of the national right to engage in defensive war. Self-defense is both a right and a duty: “Self-preservation is not only a natural right, but

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22. In the original, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*.

an obligation imposed by nature, and no man can entirely and absolutely renounce it.”

The right of self-defense applies whenever the government does not protect an individual, and it includes a right to defend oneself against rape or robbery, not merely against attempted homicide:

[O]n all these occasions where the public authority cannot lend us its assistance, we resume our original and natural right of self-defence. Thus a traveler may, without hesitation, kill the robber who attacks him on the highway; because it would, at that moment, be in vain for him to implore the protection of the laws and of the magistrate. Thus a chaste virgin would be praised for taking away the life of a brutal ravisher who attempted to force her to his desires.

Also: “A subject may repel the violence of a fellow-citizen when the magistrate’s assistance is not at hand; and with much greater reason may he defend himself against the unexpected attacks of foreigners.” In order to prevent dueling, Vattel urged enforcement of the custom that only military men and nobles should be allowed to wear swords in public.

Vattel wrote that the right of revolution against tyranny is also an extension of the right of self-defense; like an ordinary criminal, a tyrant “is no better than a public enemy against whom the nation may and ought to defend itself.” A prince who kills innocent persons “is no longer to be considered in any other light than that of an unjust and outrageous enemy, against whom his people are allowed to defend themselves.” (Compare this to the various sources in Chapters 2, 3, and 16, arguing that there is no essential difference between a lone criminal and a criminal government.)

Vattel agreed with the consensus of Grotius, Pufendorf, and the Spanish humanitarians, that there is a right and duty of humanitarian intervention. Vattel formulated the duty in terms of self-defense: When a prince’s tyranny gives “his subjects a legal right to resist him . . . in their own defence,” then every other nation should legitimately come to the aid of the people, “for, when a people, from good reasons take up arms against an oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties.” And, “[a]s to those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race, they are savage beasts, whom every brave man may justly exterminate from the face of the earth.” United States Senator Henry Clay, in his famous 1818 oration “[The Emancipation of South America](#),” cited Vattel as authority for U.S. support for the South American wars of national liberation against Spanish colonialism.<sup>23</sup>

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23.

I maintain that an oppressed people are authorized, whenever they can, to rise and break their fetters. This was the great principle of the English Revolution. It was the great principle of our own. Vattel, if authority were wanting, expressly supports this right. We must pass sentence of condemnation upon the founders of our liberty, say that you were rebels, traitors, and that we are at this moment legislating without competent powers, before we can condemn the cause of Spanish America. . . . Spanish America for centuries has been doomed to the practical effects of an odious tyranny. If we were justified, she is more than justified.

Henry Clay, *The Emancipation of South America*, in 4 *The World’s Famous Orations* 82-83 (1906).

The personal right of self-defense also showed why a protectorate may renounce its allegiance to a sovereign that fails to provide protection. When Austria defaulted in its obligation to protect Lucerne, Austria lost its sovereignty over Lucerne, and so Lucerne allied with the Swiss cantons. Austria complained to the Holy Roman Emperor, but the people of Lucerne retorted “that they had used the natural right common to all men, by which everyone is permitted to endeavor to procure his own safety when he is abandoned by those who are obliged to grant him assistance.”

Vattel pointed out that the town of Zug had been attacked and the duke of Austria had refused to defend it. (He was busy hunting with hawks and would not be interrupted.) Zurich, too, had been attacked, and the Holy Roman Emperor Charles IV had done nothing to protect it. Vattel concluded that both Zug and Zurich were justified in asserting their natural right to self-protection and in joining the Swiss confederation. Similar reasoning justified the decision of other Swiss cantons to separate themselves from the Austrians, who never defended them.

### NOTES & QUESTIONS

1. Note Vattel’s claim of equivalence between self-defense and resistance to tyranny. Are the circumstances that would justify violent resistance to tyranny more or less complicated than the circumstance that would justify self-defense? Consider, for example, Vattel’s reference to the prince who kills innocents. What if an American official caused innocents to be killed while prosecuting the war on terror? What if some of those innocents were American citizens? Does it matter if the innocents were killed as primary targets, rather than being killed as part of an operation against a known terrorist (e.g., a bomb dropped on a terrorist leader’s home, killing the terrorist as well as members of his family)? Consider Thomas Aquinas’s theory of the principle of double effect—that self-defense is justified because it arises from the intention of preserving one’s own life, not the intention of killing the attacker. *See* Ch.16.C.3.c.
2. What do you think of Vattel’s assertion that self-defense is not just a privilege or prerogative, but rather a *duty* that it is immoral to renounce? To whom is this duty owed? If a person decides to eschew violence and sacrifice her life instead of fighting back, isn’t that solely her affair? Or does the community have a claim on her decision? What would be the substance of the community’s claim? Is this obligation necessarily owed to other people? Is it a duty owed to God? Under traditional Jewish law, self-defense and defense of others is a positive obligation. Christian views have been diverse, with many but not all Christians viewing self-defense as a duty, and more considering defense of others to be a duty. *See* Ch. 16.C; David B. Kopel, *The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition* (2017). For the influence of the duty-based view on the American Revolution, see Chapter 3.C.

## 6. Jean-Jacques Burlamaqui

Jean-Jacques Burlamaqui (1694-1748) was Professor of Natural Law at the Academy of Geneva. His treatise *The Principles of Natural and Politic Law* was translated into six languages (besides the original French) in 60 editions.

His vision of constitutionalism had a major influence on the American Founders. For example, Burlamaqui's understanding of checks and balances was much more sophisticated and practical than that of Montesquieu,<sup>24</sup> in part because Burlamaqui's theory contained the seed of judicial review. He was frequently quoted or paraphrased, sometimes with attribution and sometimes not, in political sermons during the pre-revolutionary era.

He was the first philosopher to articulate the quest for happiness as a natural human right, a principle which Thomas Jefferson later restated in the Declaration of Independence. Burlamaqui connected the right of pursuing happiness to the right to arms: all men have a "right of endeavoring to provide for their safety and happiness, and of employing force and arms against those who declare themselves their enemies." With variations in phrasing, the same principle is stated in most American state constitutions. *See* Ch. 3.H.11 (discussing Mass. Const. of 1780, pt. 1, art. I: "All men . . . have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 *Tex. Rev. L. & Pol.* 399 (2007).

The principle that legitimates self-defense also provides the appropriate boundaries: "necessity can authorise us to have recourse to force against an unjust aggressor, so this same necessity should be the rule and measure of the harm we do him. . . ."

National self-defense is simply an extension, with appropriate modifications, of the right and duty of personal self-defense. Defensive war, both personal and national, is essential to the preservation of peaceful society; "otherwise the human species would become the victims of robbery and licentiousness: for the right of making war is, properly speaking, the most powerful means of maintaining peace."

The right to collective self-defense against tyranny (a criminal government) is an application of the individual right of self-defense against a lone criminal: "when the people are reduced to the last extremity, there is no difference between tyranny and robbery. The one gives no more right than the other, and we may lawfully oppose force to violence." Thus, people have a right "to rise in arms" against "extreme abuse of sovereignty," such as tyranny.

Burlamaqui agreed with the Englishman Algernon Sidney (Ch. 2.K.3) that subjects are "not obliged to wait till the prince has entirely riveted their chains, and till he has put it out of their power to resist him." Rather, they may initiate an armed revolt "when they find that all his [the prince's] actions manifestly

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24. Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of Laws* (1748).

tend to oppress them, and that he is marching boldly on to the ruin of the state.”

Burlamaqui acknowledged that if the people have the power to revolt, they might misuse it, but the risk would be much less than the risk of allowing tyranny to flourish: “In fine, though the subjects might abuse the liberty which we grant them, yet less inconveniency would arise from this, than from allowing all to the sovereign, so as to let a whole nation perish, rather than grant it the power of checking the iniquity of its governors.”

Similarly, the fact that “every one has a natural right to take care of his preservation by all possible means” suggests that if “the state can no longer defend and protect the subjects, they . . . resume their original right of taking care of themselves, independently of the state, in the manner they think most proper.” Thus, whenever a state fails to protect one of its subjects from criminal attack, the subject has a right of self-defense.

In an international law application, the same principle proves that a sovereign has no authority to “oblige one of his towns or provinces to submit to another government.” Rather, the sovereign may, at most, withdraw his protection from the town or province, in which case the people of the town or province have a complete right of self-defense, and of independence if they can prevail in their self-defense.

Burlamaqui, like Vattel, supported a broad rule of humanitarian intervention to liberate the tyrannized people of another nation—provided that “the tyranny is risen to such a height, that the subjects themselves may lawfully take up arms, to shake off the yoke of the tyrant.” This principle is an extension of personal assistance in self-defense, for “Every man, as such, has a right to claim the assistance of other men when he is really in necessity.”

Burlamaqui acknowledged that the principle of humanitarian intervention is often misused. Nevertheless, the misuse of a good principle does not mean that the principle should be eliminated, any more than the misuse of weapons means that weapons should be prohibited: “the bad use of a thing, does not hinder it from being just. Pirates navigate the seas, and robbers wear swords, as well as other people.”

### NOTES & QUESTIONS

1. Under the Classical view, if a government purported to enact a law abolishing the right of self-defense (or constricting the right so that it becomes a practical nullity), that law would be considered void ab initio. Is the reasoning persuasive today?
2. The Classical view considered personal self-defense to be a fundamental human right, essential to the foundation of international law and order. Is that view still valid? If so, why do you think contemporary international law sources (such as many of those in this Chapter) reflect much less concern for individual self-defense than do the Classical sources?
3. In a case from the post-World War II war crimes trials of the Japanese military dictatorship, the court stated, “Any law, international or municipal,

which prohibits recourse to force, is necessarily limited by the right of self-defense.” *In re Hirota & Others*, 15 Ann. Dig. & Rep. of Pub. Int’l L. Cas. 356, 364 (Int’l Mil. Trib. for the Far East 1948) (no. 118, Tokyo trial). Discussing the *Hirota* case, Professor Yoram Dinstein wrote, “This postulate [from *Hirota*] may have always been true in regard to domestic law, and it is currently accurate also in respect of international law. . . . [T]he right of self-defence will never be abolished in the relations between flesh-and-blood human beings. . . .” Yoram Dinstein, *War, Aggression, and Self-Defense* 181 (2d ed. 1994). Is Dinstein right? Would a statute purporting to abolish any right of self-defense be only a “pretend law”? See Ch. 3.F.5 Note 3.

4. The works of Classical international law discussed here are not binding authority, so their appeal will be purely persuasive. Do you find them so? Are some ideas more persuasive than others?
5. The Classical authors state repeatedly that the defensive claims of nations are grounded analytically on the right to individual self-defense. Do you think that individual self-defense is more fundamental than the national defense claim of states? Why? Which writers and documents featured in this chapter agree with you? What about individual defense against tyranny? How does deciding when defense against the state is legitimate differ from deciding whether defense against another individual is legitimate?
6. Consider Grotius’s statement that self-defense is essential to social harmony, that without it, “human Society and Commerce would necessarily be dissolved.” Pufendorf and Burlamaqui also agreed that human beings are by nature social, and that a right of self-defense is essential for society to exist. In the modern American gun debate, guns and self-defense are often extolled or derided as examples of the American ideal of rugged individualism. Grotius and Pufendorf provide a different perspective on self-defense, advancing it as a practical foundation of humans being able to live together in society. Do you find this convincing?
7. If the Classical view on the fundamental status of self-defense is correct, then does a right to firearm ownership follow as an incident of that right? See David B. Kopel, *The Universal Right of Self-Defense, and the Auxiliary Right to Defensive Arms*, in *The Second Amendment and Gun Control: Freedom, Fear, and the American Constitution* (Kevin Yuill & Joe Street eds., 2017). Does private gun ownership promote social harmony? Can you imagine a harmonious society where the state had an absolute monopoly on legitimate violence and all types of private self-defense were outlawed? Would you prefer that society to the modern United States? Are there any examples of such societies that you would consider good alternatives to the armed society of the United States today?
8. Vattel, Burlamaqui, and others argue that the self-defense rights of nations can be derived from principles of personal self-defense. Vattel also writes that personal self-defense is justified only against imminent threats where the state is powerless to intervene. Does this rule of imminence place greater

restrictions on individual self-defense than on national defense? If defense of nations is derivative of personal self-defense, can one justify intricately planned military offensives where there is no imminent threat, and negotiation or nonviolent sanctions are still available? Are all such offensives philosophically or morally repugnant? Are they automatically more suspect than private self-defense against imminent threats?

9. Burlamaqui acknowledged that if the people have the power to revolt, they might misuse it. However, he argued that this risk would be much less than the risk of allowing tyranny to flourish. Is he right? Does the answer depend on how much one values order?

Would you be willing to live with some degree of tyranny or oppression if the alternative were large-scale violence or civil war? Is it inevitable that different people have different estimates of the tipping point where violent resistance becomes necessary? Burlamaqui says that people need not wait until their chains are fully locked onto them. Should violent resistance to tyranny be the last option? Or will waiting too long make resistance impossible? How should a polity determine when that point has come? Consider the materials in Chapter 3, such as Patrick Henry's speech "The War Inevitable," and the Declaration of Independence, both of which argue that resistance is justified once the government makes it clear that tyranny is the objective and the peaceful petitions for liberty would be futile.

10. The Classical Founders of international law considered personal self-defense to be the most fundamental of all human rights. Some modern international agreements, such as the UN Programme of Action (*supra* Section A.3), the Nairobi Protocol (*supra* Section B.2), the Arms Trade Treaty (*supra* Section A.6), and CIFTA (*supra* Section B.5) do not acknowledge any personal right of self-defense. Why are some aspects of modern international agreements so different from the founding principles of international law?
11. Further reading: Shannon Brincat, *The Philosophy of Internationally Assisted Tyrannicide*, 34 Australian J. Leg. Philo. 151 (2009) (comparing and contrasting the pro-tyrannicide theories of Grotius, Vattel, and Alberico Gentili with modern international law); Shannon Brincat, "Death to Tyrants": *The Political Philosophy of Tyrannicide, Part I*, 4 J. Int'l Political Theory 212 (2008) (examining tyrannicide under medieval, natural law, liberal, and social contract theories).

#### D. Resistance to Genocide

Does international law recognize the right of people to resist genocide? If there is such a right? Does that right overcome otherwise valid laws that prevent the acquisition or use of arms?



Classical international law, discussed *supra* Section C, supports a general right to resist all forms of tyranny, but does not specifically address genocide. In this Section D, we consider genocide in light of the [Convention on the Prevention and Punishment of the Crime of Genocide](#), the [Universal Declaration of Human Rights](#), and other modern human rights documents. The two essays in this section discuss the implications of these documents. The first essay argues that modern international law recognizes a right to resist any genocide. The second essay counters that resistance is lawful if the genocide is racial, but not if the genocide victims are selected on a nonracial basis.

**Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948**  
 102 Stat. 3045, 78 U.N.T.S. 277

Art. 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

**David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?***  
 81 Notre Dame L. Rev. 1275 (2006) (slightly modified for this text)

...A. THE GENOCIDE CONVENTION...

...Neither the text of the Genocide Convention nor the drafting history provide guidance about the scope of the legal obligation to prevent genocide. However, international law is clear that the duty to prevent is real and is entirely distinct from the duty to punish. *See, e.g., Application of the Convention of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 443-44 (Sept. 13) (separate opinion of Judge Lauterpacht); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 2001 I.C.J. 572 (Sept. 10).<sup>25</sup>

The Genocide Convention prohibits more than the direct killing of humans. Other actions—if undertaken with genocidal intent—can constitute genocide. For example, rape would not normally be genocide, but if a political or military commander promoted the widespread rape of a civilian population—with the intent of preventing normal reproduction by that population—then the pattern of rape could constitute genocide. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment 2, ¶ 731 (Sept. 2, 1998).

Similarly, many governments do not provide their citizens with minimal food rations or medical care. Such omissions are not genocide. On the other hand, if a government eliminated food rations to a particular group but not to other groups, and the change in rations policy was undertaken with the intent

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25. [This excerpt is slightly modified from the published text. —Eds.]

of exterminating the particular group by starvation, then the government’s termination of food aid could constitute genocide. *United States of America v. von Weizaecker* (The Ministries Case), 14 T.W.C. 314, 557-58 (1948).

Similarly, under normal conditions, governments have extensive authority over arms possession within their borders. But to the extent that a government enacted or applied arms control laws for the purpose of facilitating genocide, then the government’s actions would constitute genocide.

Notably, the Genocide Convention abrogates the Head of State immunity which applies in most other international law. Genocide Convention, art. IV. . . . Given that the Genocide Convention explicitly abrogates one of the most well established principles of general international law, it would hardly be surprising that the Convention also abrogates, by implication, some forms of ordinary internal state authority, such as the power to set standards for food rations, medical rations, or arms possession.

**B. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND OTHER HUMAN RIGHTS INSTRUMENTS**

Another international law source of the right to resist genocide is the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948. The Universal Declaration never explicitly mentions “genocide,” but a right to resist genocide is an inescapable implication of the rights which the Declaration does affirm.

First, the Declaration affirms the right to life. Of course the right to life is recognized not just by the Universal Declaration, but also by several other international human rights instruments.

Second, the Declaration affirms the right to personal security. The right of self-defense is implicit in the right of personal security, and is explicitly recognized by, inter alia, the European Convention on Human Rights and by the International Criminal Court. [Rome Statute of the International Criminal Court](#) art. 31, July 17, 1998, 2187 United Nations T.S. 90.

The preamble of the Universal Declaration of Human Rights recognizes a right of rebellion as a last resort: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. . . .” The drafters’ intent was explicitly to recognize the preexisting human right of resisting tyranny and oppression. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* 307-12 (1999).

Finally, Article 8 of the Universal Declaration states that “[e]veryone has the right to an effective remedy.” The Universal Declaration therefore comports with the long-established common law rule that there can be no right without a remedy. *Cf. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts would be alert to adjust their remedies so as to grant the necessary relief.” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

Thus, the Declaration recognizes that when a government destroys human rights and all other remedies have failed, the people are “compelled to have

recourse, as a last resort, to rebellion against tyranny and oppression.” Because “[e]veryone has the right to an effective remedy,” the people necessarily have the right to possess and use arms to resist tyranny, if arms use is the only remaining “effective remedy.”

In international law, a “Declaration” does not directly have a binding legal effect, although it may be used as evidence of customary international law. . . .

C. *JUS COGENS*

Under international law, some laws are accorded the status of *jus cogens*, which means that in case of conflict, they override other laws. [Vienna Convention on the Law of Treaties](#) art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331. Many commentators agree that the duty to prevent genocide must be considered *jus cogens*.<sup>221</sup> Indeed, it would be difficult to articulate a more fundamental principle than the prevention of genocide. . . .

Accordingly, the legal duty to prevent genocide would be superior to whatever limits the UN Charter sets on military action that is not authorized by the Security Council. Similarly, the legal duty to prevent genocide would be superior to treaties or conventions restricting the transfer or possession of arms.

D. APPLICATION OF THE GENOCIDE CONVENTION AGAINST ARMS CONTROL: THE CASE OF BOSNIA

The first legal analysis of the prevention duty came from the dissenting judges in a 1951 advisory opinion by the International Court of Justice, in which the Court made a nonbinding ruling on whether the “reservations” that some states attached to their ratification of the Genocide Convention were legally effective.<sup>227</sup> The dissenting judges’ words have often been quoted by human rights activists: “[T]he enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.”

The first contested case involving the scope of the duty to prevent genocide was *Bosnia v. Yugoslavia*, in which an opinion by Judge Lauterpacht squarely faced the duty to prevent issue. [Application of the Convention of the Crime of Genocide](#) (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 407-48 (Sept. 13) (separate opinion of Judge Lauterpacht).

The Kingdom of Serbs, Croats, and Slovenes (later renamed the Kingdom of Yugoslavia) had been proclaimed in 1918, after the collapse of the

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221. See Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. 6 (1987) (explaining that an international agreement that encourages, practices, or condones genocide is void under *jus cogens* principles).

227. [Reservations of the Convention on the Punishment and Prevention of Genocide](#), Advisory Opinion, 1951 I.C.J. 15, 47 (May 28) (Guerrero, McNair, Read, & Hsu Mo, JJ., dissenting).

Austro-Hungarian Empire at the end of the World War I. Until the country broke up in 1991, it was the largest nation on the Balkan peninsula.

Yugoslavia was turned into a Communist dictatorship in 1945 by Josip Broz Tito. When Tito died in 1980, his successors feared civil war, so a system was instituted according to which the collective leadership of government and party offices would be rotated annually. But the new government foundered, and in 1989, Serbian president Slobodan Milošević began re-imposing Serb and Communist hegemony. Slovenia and Croatia declared independence in June 1991.

Slovenia repelled the Yugoslav army in ten days, but fighting in Croatia continued until December, with the Yugoslav government retaining control of about a third of Croatia. Halfway through the Croat-Yugoslav war, the UN Security Council adopted [Resolution 713](#), calling for “a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia” (meaning rump Yugoslavia, plus Croatia and Slovenia).

It was universally understood that the Serbs were in control of most of the Yugoslavian army’s weaponry, and that the embargo therefore left them in a position of military superiority. Conversely, even though the embargo was regularly breached, it left non-Serbs vulnerable. The United Nations had, in effect, deprived the incipient countries of the right to self-defense, a right guaranteed under Article 51 of the [UN Charter](#).

Macedonia seceded peacefully from Yugoslavia in early 1992, but Bosnia-Herzegovina’s secession quickly led to a three-way civil war between Bosnian Muslims (Bosniacs), Serbs (who are Orthodox Christians), and Croats (who are Roman Catholic). It was generally recognized that the Bosnian Serbs received substantial military support from what remained of old Yugoslavia (consisting of Serbia and Montenegro, and under the control of Slobodan Milošević).

Security Council Resolution 713 now operated to make it illegal for the new Bosnian government to acquire arms to defend itself from Yugoslav aggression.

Bosnia sued Yugoslavia in the United Nations’ International Court of Justice. In April 1993, the International Court of Justice ruled, with only one dissenter, that Yugoslavia was perpetrating genocide, and ordered it to stop. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.))*, 1993 I.C.J. 325 (Sept. 13) (Requesting the Indication of Provisional Measures Order of Apr. 8).

A few months later, Bosnia brought forward additional legal claims. Among the new claims was a request to have the UN embargo declared illegal, as a violation of the Genocide Convention. The majority of the International Court of Justice voted only to reaffirm portions of the April 1993 order; they stated that the court had no jurisdiction over the Security Council’s embargo. The majority’s ruling was not implausible, since the Security Council was not a party to the case.

Several judges who had voted in favor of the majority opinion also wrote separate opinions. One of the judges, Judge Elihu Lauterpacht, wrote a separate opinion which was the first international court opinion to address the legal scope of the Genocide Convention’s affirmative duty “to prevent” genocide.

Judge Lauterpacht cited the findings of a Special Rapporteur about the effect of the arms embargo and pointed to the “direct link. . .between the continuation of the arms embargo and the exposure of the Muslim population

of Bosnia to genocidal activity at the hands of the Serbs.” *Id.* at 438 (separate opinion of Judge Lauterpacht).

Normally, Security Council resolutions are unreviewable by the International Court of Justice. However, Judge Lauterpacht ruled that the prevention of genocide is *jus cogens*. *Id.* at 439-44. He concluded that the Security Council arms embargo became void once it made UN member-states “accessories to genocide.” *Id.* at 501.

Formal repeal of the Security Council embargo was impossible, because Russia threatened to use its veto to prevent any action harmful to its client-state Serbia. However, Judge Lauterpacht’s opinion stated that the UN embargo was already void as a matter of law, the moment it came into conflict with the Genocide Convention. Accordingly, Bosnia acted in accordance with international law when Bosnia subverted the United Nations arms embargo, by importing arms from Arab countries. The United States’s Clinton Administration, which winked at the Bosnian arms smuggling, was compliant with international law, even though the administration was subverting a Security Council resolution that purported to set a binding international rule.

## VI. INTERNATIONAL LAW IMPLICATIONS

Decisions of the International Court of Justice are binding only on the parties to the case. So even if Judge Lauterpacht had written the majority opinion, rather than a concurring opinion, the opinion would not, ipso facto, create a binding international standard of law. Nevertheless, Judge Lauterpacht’s opinion brings together several principles that seem difficult to deny:

- The Genocide Convention imposes an affirmative duty to prevent genocide (or at least, not to prevent others from preventing genocide).
- The Genocide Convention is *jus cogens*. (If the Genocide Convention is not so important as to be *jus cogens*, then hardly anything else could be.)
- Numerous international standards affirm a right of self-defense, including a right to self-defense against criminal governments perpetrating genocide.
- In some cases, a state’s compliance with an otherwise-valid gun control law may bring the state into violation of the Genocide Convention, if the gun control law facilitates genocide.
- Therefore, in case of conflict between the gun control law and the Genocide Convention, every state and the United Nations, including their courts, is obligated to obey the Genocide Convention.

To see that the final principle is an inescapable standard of international law, one only need state the converse, which is self-evidently immoral and abhorrent: “An international or national court must always enforce arms prohibition laws, even if enforcement makes the court complicit in genocide.”

The majority of the United Nations International Court of Justice was, understandably, reluctant to confront the United Nations Security Council by declaring a Security Council resolution to be unlawful. In this Article, though,

we are not primarily concerned with whether the International Court of Justice will develop the institutional strength to confront illegal actions of the Security Council. Rather, our focus is on the standard of conduct for all persons, including domestic and international judges, who are concerned with obeying international human rights law, especially the Genocide Convention.

Let us now examine some particular applications of the international human right of genocide victim self-defense.

#### A. SUDANESE GUN CONTROLS

Sudan's national gun control laws are invalid, insofar as they are enforced to prevent the genocide victims of Darfur from obtaining firearms for lawful defense against genocide. The antigenocide rule does not affect the validity of Sudanese gun laws as applied in areas of the country, such as northeast Sudan, where no genocide is taking place.<sup>26</sup>

The practical juridical effect of our finding about the enforcement of Sudanese gun laws in Darfur is limited. After all, Sudanese enforcement of national gun control laws in Darfur tends to proceed mainly by killing people, not by putting them on trial.

Moreover, even if a Sudanese court did try a gun law prosecution, it would not be realistic to expect the Sudanese court to rule, in effect, "Sudan's gun laws, while prima facie valid, cannot presently be enforced against the people of Darfur who are trying to defend themselves against the genocide sponsored by the Sudanese government." A regime that perpetrates genocide is unlikely to tolerate an independent judiciary that would interfere with the genocide.

Acknowledgement that enforcement of the Sudanese gun laws against the people of Darfur is a violation of the Genocide Convention could, perhaps, be of significance to non-Sudanese government officials. For example, if a Sudanese national smuggled arms to the Darfur victims, and then took refuge in another country, that country's executive or judicial officers might refuse to extradite the smuggler to Sudan. Notwithstanding an extradition treaty with Sudan, application of the extradition treaty, in the particular case of the anti-genocide arms smuggler, would make the host country complicit in genocide.

#### B. THE SUDANESE ARMS EMBARGO

[T]he UN Security Council has imposed an arms embargo which prohibits the transfer of arms to the government of Sudan, the Janjaweed Arab militias, and the resistance movement in Darfur (the SLA and the JEM). *S.C. Res. 1591*, UN Doc. S/RES/1591 (Mar. 29, 2005).

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26. [As the published article details, the Islamist dictatorship of Sudan was perpetrating genocide against the Darfuri people of western Sudan. The means of genocide including depriving the Darfuri of arms, while supplying arms to the *Janjaweed* ("evil horsemen")—Arab horsemen who slaughtered the Darfuri. —Eds.]

The application of the embargo to the Darfur resistance is a violation of the Genocide Convention, for the same reasons that Judge Lauterpacht stated that application of the Security Council arms embargo to Bosnia was a violation of the Genocide Convention: a facially neutral gun control that leaves genocide victims helpless against genocide perpetrators is a violation of the Genocide Convention; enforcement of such an embargo makes the enforcer complicit in genocide.

Accordingly, no state has a legal obligation to interfere with the delivery of arms to the people of Darfur. To hinder their acquisition of arms would be to assist the genocide being perpetrated in Darfur.

**C. PROTOCOL AGAINST THE ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS**

In July 2005, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms became law, for the more than forty nations that have ratified the Protocol. (Section A.4, *supra*.) Briefly stated, the Protocol and its related International Tracing Instrument require that parties to the Protocol enact laws requiring that all firearms manufactured in the host country have a serial number and a manufacturer identification.<sup>27</sup> Further, ratifying countries must keep registration records of firearms sales and owners, for the purpose of combating international arms smuggling.

For the same reason that Sudanese gun laws and the Security Council embargo cannot be enforced against the victims in Darfur, neither can the Protocol. Thus, if a defendant were charged in a national or international court with violating the Protocol, he should be allowed to raise an affirmative defense showing that he was supplying arms to genocide victims.

The affirmative defense would be consistent with the spirit of the Preamble to the Protocol, which recognizes “the inherent right to individual or collective self-defence” and “the principle of equal rights and self-determination of peoples.” In any case, the Protocol must yield to the Genocide Convention whenever the Protocol conflicts with the Convention. It is the prohibition of genocide, not the imposition of paperwork rules on arms transfer, that is the *jus cogens*, the expression of fundamental human rights.

**D. PROPOSED CONVENTION PROHIBITING TRANSFER OF FIREARMS TO “NONSTATE ACTORS”**

In 2001, the United Nations held a conference on “small arms” which some activists hoped would produce an international treaty restricting the possession and transfer of firearms. . . . Among the most sought objectives of the treaty advocates is an international prohibition on the transfer of firearms to “nonstate

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27. [In December 2005, the Protocol was adopted by the UN General Assembly, and is commonly known as the International Tracing Instrument. *See supra* Section A.4.—Eds.]

actors”—that is, to rebels, or to any non-government person. (Discussed *supra* Section A.3.) Should such an international treaty be created, it should include an explicit exemption to authorize supplying arms to genocide victims. Such an exception must exist, implicitly, because of the *jus cogens* status of the Genocide Convention. However, it would be clearer for the treaty to include an explicit exception. Indeed, any nation’s delegation that refused to vote in favor of an exception for genocide victims would necessarily raise doubts about its own commitment to human rights.

#### E. THE NAIROBI PROTOCOL

[The Nairobi Protocol, a gun control agreement among East African governments, is detailed *supra* Section B.2.]

Of the signatories, only Eritrea (which won independence in 1991 in a revolutionary war against Ethiopia) has been democratic for at least half its existence as an independent nation.<sup>28</sup> The majority of signatories of the Nairobi Protocol have witnessed genocide in their nations within the last several decades, including the current genocides being perpetrated in the Democratic Republic of the Congo (i.e. Pygmies), Ethiopia, and Sudan. . . .

Regional antifierearms agreements, even if generally valid, cannot lawfully be enforced, if their enforcement would conflict with the Genocide Convention.

### Antonio Cassese, *The Various Aspects of Self-Defence Under International Law*

Background paper (Small Arms Survey 2003), excerpted in *Small Arms Survey 2004*, at 181 (2005)<sup>29</sup>

The right of self-defence under international law governs relations between states as opposed to groups and individuals. Pursuant to Article 51 of the [Charter of the United Nations](#) and [Statute of the International Court of Justice](#) (UN, 1945) and corresponding customary international law, states have a right to defend themselves against an “armed attack” if the UN Security Council fails to take effective action to stop it. Rebels, insurgents, and other organized armed groups do not have a right to use force against governmental authorities, except in three cases. Liberation movements can use force in order to resist the forcible denial of self-determination by (1) a colonial state, (2) an occupying power, or (3) a state refusing a racial group equal access to government. These situations, however, are not considered ones of “self-defence” under international law. Individuals who are not organized in groups have even less scope for

28. [As of 2020, Eritrea is near-totalitarian. —Eds.]

29. Cassese wrote a background paper that was published in 2003 by the Small Arms Survey, a research organization based in Geneva, Switzerland, whose “objective is to reduce the illicit proliferation of small arms and light weapons and their impacts.” Every year, the Small Arms Survey publishes a book about gun-control issues; the book is always titled “Small Arms Survey,” along with a particular year. The book *Small Arms Survey 2004* was published in 2005.



the use of force under international law. Individuals have no legal right to use force to repel armed violence by oppressive states. This includes governments that commit acts of genocide or other serious human rights violations. Nor does international law grant individuals a right to defend themselves against other individuals. This right is provided for by states in their national legal systems as each state determines the conditions under which individuals can use force for these purposes. It is not surprising that states have refused to legitimize the resort to armed violence by individuals given the threat this would pose to their own authority. International law is made by states and tends to reflect their interests and concerns. The Universal Declaration of Human Rights nevertheless provides a moral endorsement of the violent reaction of individuals to political oppression or other forcible denial of fundamental human rights: “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

### NOTES & QUESTIONS

1. Cassese’s three exceptions in which the use of force for resistance is legally allowed derive from the UN General Assembly’s 1974 [Resolution on the Definition of Aggression](#) (*supra* Section A.2). According to Article 7 of the Resolution:

Nothing in this definition. . . could in any way prejudice the right of self-determination, freedom and independence. . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and seek and receive support.

Putting aside the fact that General Assembly resolutions are not international law, is Cassese’s narrow reading of this Resolution correct? Does the Resolution recognize a right to use force only against colonial or racist regimes? Or against any regime that denies “the right of self-determination, freedom and independence”? What is the effect of the word “particularly” here?

2. Under Cassese’s theory would any of the following have a legal right of forcible resistance?
  - German Jews facing Hitler’s genocide, taking into account that the Nazi government was not an “occupying power” and that the Jews were of the same racial group (Caucasian) as their persecutors, although they were of different ethnicity and religion? *Cf.* George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 Fordham L. Rev. 2113, 2160 n.420 (2008) (“One cannot legitimately argue that Jews being taken away by the Gestapo had no right to fight back then and there, especially given their ultimate destination.”). Would Jews have a self-defense right only if one accepted the Nazi theory that Jews *are* a separate race?

- Cambodians under the Pol Pot regime? The Khmer Rouge communist regime of 1975 murdered over 1.5 million people, more than 20 percent of population. The regime was extremely racist, and while it killed over a million Khmer people, it killed ethnic minorities (Chinese, Vietnamese, Lao, Thai, Muslim Chams, and others) at an even higher rate. *See* Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, at 456-65 (3d ed. 2008).
  - Victims of rape that is systematically encouraged by government, such as by allowing rape charges to be brought only if there are four male witnesses?
  - Victims of the 1994 Rwandan genocide, who were of the same race but a different tribe than the genocidaires? Sudanese Darfuris, who are very dark skinned, live in Africa, and are often called “Africans,” and whose genocidaires have very dark skin, live in Africa, and are Arabs? Does the answer depend on whether the killers consider the Darfuris to be of a different race from themselves? Does the answer depend on the motivation of the genocidaires (whether they think they are killing people of a different race)? Or does the answer depend on whatever the scientists of the day say about whether genocidaires and their victims are of different races?
3. What are the differences between Cassese’s view of international law and Classical international law?
  4. For more on genocide and gun control, see David B. Kopel, [Book Review](#), 15 N.Y.L. Sch. J. Int’l & Comp. L. 355 (1995) (reviewing Aaron Zelman et al., *Lethal Laws* (1994) (role of gun confiscation in various twentieth century genocides)). Also see the material in Chapter 14.D.2. and D.3.
  5. Consider Cassese’s statement that international law does not grant individuals a right to defend themselves against other individuals. Instead, self-defense may be allowed by national legal systems as each government determines the lawfulness of use of force. What principles justify the divergent treatment of individuals versus groups or governments? Do you think most Americans would agree with the proposition that individual self-defense is not a fundamental human right?
  6. Is armed resistance to genocide a right recognized by international law? Should it be? Could legal recognition of such a right create dangerous or unintended consequences? Should members of a group facing genocide make decisions about forcible resistance based on international law? Should governments or individuals in other countries assist such resistance only if the assistance complies with international law?
  7. Further reading: *The United Nations and Genocide* (Deborah Mayer sen ed. 2018) (describing history of UN’s torpor regarding genocide, and efforts at reform).

## *E. Bringing International Law Home, or a Global Second Amendment?*

### 1. The Case for Global Control

At the time that Harold Hongju Koh wrote the essay below, he was an eminent professor of international law at Yale. From 2009 to 2012, he served as Legal Advisor to the U.S. State Department. Thereafter, he returned to Yale.

**Harold Hongju Koh, *A World Drowning in Guns***  
**71 Fordham L. Rev. 2333 (2003)**

Let me start by describing the problem. Today there are an estimated 639 million documented small arms in the world. That is more than half-a-billion small arms: more than one for every twelve men, women, and children on the face of the earth. Significantly, all sources concede that this number undercounts the actual number by tens of millions. It does not include, for example, the millions of undocumented, privately held guns in such major countries as China, India, Pakistan, or France. . . .

While no universally accepted legal terminology exists, considerable agreement has begun to emerge that the term “small arms” includes, at a minimum, handguns, revolvers, pistols, automatic rifles, carbines, shotguns, and machine guns. “Light weapons,” which are usually heavier, larger, and designed to be hand-carried by teams of people, embrace grenade launchers, light mortars, shoulder-fired missiles, rocket launchers, artillery guns, antiaircraft weapons, anti-tank guns, and related ammunition. . . .

But in 1993—only ten years ago—academic articles started to appear about the small arms trade, and academic conferences began to spotlight the topic. The academics pushed to get the UN interested, particularly the UN Institute for Disarmament Research. Research NGOs in several supplying countries also took up this issue—including the Arms Division of Human Rights Watch, the Bonn International Center for Conversion, British American Security Information Council (“BASIC”), International Alert, and the Institute for Security Studies in South Africa. As often happens, once research NGOs get involved, activist NGOs begin to get involved as well. The international gun control lobby soon linked up with the domestic gun control lobbies in leading countries.

And then, as with the Landmines treaty,<sup>30</sup> transnational norm entrepreneurs entered the picture and started to create action networks. One of the leaders of this movement was my interlocutor, Oscar Arias, who gathered eighteen Nobel Prize Winners to create an International Code of Conduct with regard to arms transfers. Finally, the transnational activists developed their own

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30. [\[Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction \(1997\) \(entered into force in 1997\).—Eds.\]](#)

network, the International Action Network on Small Arms (“IANSA”), which has become the biggest international network that has existed on any issue since the global landmines campaign. It is a group of over 300 NGOs, which currently include faith-based groups, educational groups, human rights groups, social development groups, public health and medical groups, democracy groups, justice groups, conflict-resolution groups, and anti-gun lobbies. . . .

But the regulation of small arms presents a far more difficult problem. For we are a long way from persuading governments to accept a flat ban on the trade of legal arms. Given that small arms will continue to be lawfully traded, what kind of enforceable norms can be developed in the relevant law-declaring forum? To be viable, a global regime should incorporate at least three elements.

First, a marking and tracing regime must be implemented. . . . The UN Resolution establishing the UN Register of Conventional Arms could be modified so that the United States, and the ninety other nations that annually submit relevant information to the Register, could be required to submit information about their small arms production. In addition, a number of countries have proposed complementary regional registers that would explicitly enumerate small arms in areas such as Africa, where small arms remain the primary weapons of war. In due course, a marking and tracing norm could be embedded in a treaty:<sup>31</sup> Article VI of the OAS Convention, for example, calls for marking at the time of manufacture, importation, and confiscation of firearms, grenades and other covered weapons, and Articles XI and XIII further require various forms of record-keeping and information exchange.<sup>32</sup>

Second, transparency and monitoring of these processes by international NGOs are critical. . . .

Third and most important, the horizontal process should produce a “transfer ban” that would prevent legal arms from being transferred either to illicit users or to recognized human rights violators. Although this would not be easy to do, under our own US domestic arms law, there are already restrictions on making transfers or licenses to certain gross violators of human rights who have been so certified by, for example, the Bureau of Political-Military Affairs at the State Department, congressional staffs, and my own former bureau at the State Department, the Bureau of Democracy, Human Rights and Labor. . . .

[T]he OAS Convention provides the best model. The Inter-American Convention, *inter alia*, requires each state: to establish a national firearms control system and a register of manufacturers, traders, importers, and exporters of these commodities; to establish a national body to interact with other regional states and a regional organization advisory committee; to standardize national laws and procedures with member states of regional organizations; and to control effectively borders and ports. Other key provisions include requiring an effective licensing or authorization system for the import, export, and in-transit movement of firearms, an obligation to mark firearms indelibly at the time of manufacture and import to help track the sources of illicit guns, and

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31. [A marking regime was implemented by the 2005 International Tracing Instrument, detailed *supra* Section A.4.—Eds.]

32. [“The OAS Convention” refers to the CIFTA convention, which the United States has signed but not ratified, excerpted *supra* Section B.5.—Eds.]

requiring states to criminalize the illicit manufacturing of and illicit trafficking in firearms. . . .

More fundamentally, however, to fully effectuate the goals of the small arms regime, the United States must focus on supply-side solutions and destination controls. Supply-side controls mean destroying existing stockpiles of small weapons. Through bilateral and multilateral diplomacy, our government should start a process of promoting exchanges and destruction of existing small weapons caches. . . .

These weapons destruction measures, however, must be combined with supply-side control measures within the United States. . . . To address this concern, in 1996, President Clinton signed arms brokering legislation that amended the [Arms Export Control Act](#) to give the State Department greater authority to monitor and regulate the activities of arms brokers. Key provisions included the requirements that all brokers must register with the Department of State, must receive State Department authorization for their brokering activities, and must submit annual reports describing such activities. The United States is currently working to promote adoption of similar laws by other nations by incorporating such a provision into the international crime protocol being negotiated in Vienna.

Perhaps the strongest mode of internalization of supply-side controls would be through an enhanced search for technological solutions. One particularly intriguing idea is the idea of promoting production of smart or “perishable ammunition,” e.g., AK-47 bullets that would degrade and become unusable over time. Ironically, by focusing exclusively on controlling the delivery mechanism—the guns themselves—the small arms activists may have overlooked a surer longer-term solution to the international firearms problem.

### NOTES & QUESTIONS

1. Professor Koh admitted that “we are a long way from persuading governments to accept a flat ban on the trade of legal arms.” He urged that the next steps be the creation of international arms registries; giving nongovernmental organizations power to monitor governmental compliance with international restrictions on arms transfers; and “stronger domestic regulation.” Would these measures be helpful steps toward a later ban on the legal trade in arms?
2. What would be the advantages and disadvantages of “a flat ban on the trade of legal arms”? If you supported such a ban, what steps could you take towards persuading governments to adopt a flat ban? How would you counter the arguments of skeptics?
3. *American exceptionalism.* Writing in the *Stanford Law Review* about “the most problematic face of American exceptionalism,” the type that Koh ranked highest in “order of ascending opprobrium,” he complained that the United States did not “obey global norms.” Among his examples was the American stance of “claiming a Second Amendment exclusion from a proposed

global ban on the illicit transfer of small arms and light weapons.” Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1486 (2003). Koh was referring to the American position at the 2001 UN Conference that produced the Programme of Action on Small Arms. As detailed *supra* Section A.3, the administration drew a red line against express requirements for domestic gun control, and against proposed language that would ban arms transfers to “nonstate actors”—that is, to individuals, including rebel groups. Was the US wrong to invoke the Second Amendment as a justification for its stance at the UN?

4. *Constitutional Charming Betsy Canon*. In the 1804 U.S. Supreme Court case *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804), Chief Justice Marshall wrote that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” The *Charming Betsy* ship was originally owned by an American but was later sold in St. Thomas to a Dane who sent it on a commercial voyage to the French island of Guadeloupe. The issue before the Court was whether the ship was forfeitable under a congressional statute that forbade American trade with France. The Marshall Court construed the statute narrowly, so as not to run counter to international law, which allows trade by neutrals (such as Denmark).

In statutory construction, the *Charming Betsy* canon has been applied by American courts ever since. Professor Koh [has argued](#) for a “Constitutional Charming Betsy Canon.” In other words, the U.S. Constitution should, when possible, be interpreted to comply with international law. See Vicki Jackson, *Constitutional Engagement in a Transnational Era* (2009) (arguing for use of international law in interpreting some constitutional provisions, but not the Second Amendment, which has the “specificity or distinctiveness . . . that makes transnational sources irrelevant”); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628 (2007) (describing use of international treaties to create the equivalent of a constitutional *Charming Betsy* canon in the courts of other nations); Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 Ohio St. L.J. 1339 (2006) (arguing against domestic application of *Charming Betsy*).

To elevate *Charming Betsy* to a canon of constitutional construction would mean that whenever there is ambiguity, the Constitution should be construed to match international law. Of course, almost every constitutional case that reaches the Supreme Court involves the resolution of some kind of ambiguity: What kind of punishment is “cruel and unusual”? What searches and seizures are “unreasonable”? Does the protection of “the freedom of speech” include political advertisements by the National Rifle Association or the Brady Campaign, if the ads are paid by general membership dues?<sup>33</sup> What kind of “Arms” are encompassed in the Second Amendment, and what kinds of controls amount to the right’s being “infringed”?

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33. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), ruled that corporations (including the National Rifle Association and Brady) can use funds in their corporate

Should all ambiguities in the U.S. Constitution be resolved so that the Constitution is consistent with international law? Does the answer depend on what “international law” is?

## 2. Norms Entrepreneurs for Gun Control and Gun Rights

As explained at the beginning of this Chapter, one form of international law is *positive law*, which is created by written documents similar to a statute or a contract. Examples include treaties, conventions, bilateral agreements, and so on. Long before wide-ranging international treaties became common, international law was derived from *customary law*. Customary law arises from the common behavior of nations who believe that their actions are compelled by international law. For example, in the eighteenth century, civilized nations did not execute enemy soldiers who had been captured, nor did they arrest or imprison ambassadors from foreign nations, even if the ambassador were almost certainly guilty of crime. These customary practices were considered by the nations themselves to be legally mandatory, even though there were no applicable treaties about the laws of warfare or the immunities of diplomats. Thus, the term “customary law.”

In an ordinary sense, customary law is defined by what nations actually do based on their beliefs about prevailing legal requirements. In this sense, customary international law is not particularly controversial. As detailed in Part A, “norms” are somewhat similar to customary law, but weaker. Sometimes, they are treated as international law.

In the article above, Professor Koh approvingly notes how “transnational norm entrepreneurs” and “transnational activists” have worked successfully in recent decades to expand dramatically what is meant by “international law.” He lauds their efforts on the gun control front. As he explains, “Twenty-first-century international lawmaking has become a swirling interactive process whereby norms get ‘uploaded’ from one country into the international system and then ‘downloaded’ elsewhere into another country’s laws or even a private actor’s internal rules.” Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 *Geo. L.J.* 725, 747 (2013). The norms creators sometimes have assistance from the United Nations. *See, e.g.,* Nadia Fischer, *Outcome of the United Nations Process: The Legal Character of the United Nations Programme of Action, in Arms Control and Disarmament Law* 165-66 (2002) (United Nations publication) (UN gun control documents are “norms” of international law).

The concern that foreign gun control norms may be “downloaded” into the US legal system is precisely why some Second Amendment supporters oppose the international gun control project. *See, e.g.,* Ted Bromund, *Why the U.S. Must Unsign the Arms Trade Treaty in 2018*, Heritage Found. (Feb. 22, 2018). For example, the UN Human Rights Council position that gun control is an international human right, *supra* Section A.5, might be used in judicial interpretation of U.S.

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treasuries to make independent expenditures in federal elections; that is, they can expend their own money to speak on behalf of a preferred candidate.

firearms statutes and the Second Amendment. The same could be done with the 2001 UN Programme of Action (which the U.S. joined) or the Arms Trade Treaty (which the US, when it was an unratified signer, might have had an obligation not to undermine). *See supra* Part A. The same is true for CIFTA, the western hemisphere gun control treaty that is signed but not ratified. *Supra* Section B.5.

A program of action for norms entrepreneurs who wish to undo the Second Amendment is detailed in Leila Nadya Sadat & Madaline M. George, *The U.S. Gun Violence Crisis: Human Rights Perspectives and Remedies*, 60 Wash. U. J.L. & Pol’y 1 (2019). The authors’ plan is to:

1. Seek declarations from international bodies on the U.S. human rights obligations to prevent gun crime. *Id.* at 36-50.
2. Use these declarations to encourage U.S. interpretation of the Second Amendment to defer to international norms, as some Supreme Court Justices have already done for Eighth Amendment interpretation. *Id.* at 82-86.

The primary focus of the paper is the first step, gathering available international legal interpretations to demonstrate the failures of the U.S. to fulfill its duty to protect as a signatory state under various international treaties. By using only one page out of the entire paper to briefly touch on the Second Amendment jurisprudence, the authors are practicing what they preach in the second step, namely to move their discourse away from the “gun rights rubric.”

The authors identify four international bodies for step one of the program:

1. The *UN Human Rights Council (HRC)* has the power to “investigate alleged human rights abuses anywhere in the world and accepts complaints . . . from NGO’s and private individuals.” *Id.* at 60. In the Universal Periodic Review (UPR) process, states are supposed to declare their actions to improve domestic human rights conditions and their fulfillment of “international legal obligations.” *Id.* at 61. During the UPR, other countries can make recommendations, which have no force of law. Because of the Council’s domination by dictatorships, and long-standing bias against the United States and Israel, the U.S. withdrew from the Council in June 2018 and currently has no duties to appear in any of the HRC meetings or to submit national reports.
2. The *UN Human Rights Committee* is distinct from the UN Human Rights Council. The latter is composed of representatives of states. The Human Rights Committee, in contrast, consists of 18 experts. The sole purpose of the Committee is to monitor compliance with the International Covenant on Civil and Political Rights (ICCPR) by nations that have ratified the Covenant. The Committee has the power to hold a hearing investigating the United States if another ICCPR signatory country files a complaint on alleged violations of the Covenant. A private party within the U.S. has no standing to file a complaint via the Committee. A national government may bring a complaint against another nation only when the issue cannot be “satisfactorily resolved, and all domestic remedies are exhausted.” *Id.* at 66. A signatory country is required to



report its domestic human rights conditions to the Committee every four years for review. After reviewing the report submitted by a signatory country, the Committee will issue its Concluding Observations, which a further response from the state is expected to be made within a year. The Committee has no legal authority to compel a nation to take any specific legislative or legal actions.

3. The *Inter-American Commission on Human Rights* (IACHR) will accept cases from individual petitioners to bring a member state of the Organization of American States (OAS) before the Commission for a judgement. Petitioners “must have exhausted all legal remedies” and be unable to reach a “friendly settlement” with the member state on alleged violations of the OAS Charter and the American Declaration on Rights and Duties of Man. *Id.* at 102. Once the IACHR decides to take the case, it will ask the petitioner and the member state to submit briefs. The IACHR will also accept amicus briefs and may hold a public hearing. A decision of the IACHR will be issued to the member state, providing instructions “on how to comply with its obligations in the given matter.” *Id.* The US does not recognize IACHR decisions as legally binding.

A famous IACHR case on the U.S. came after the US Supreme Court’s ruling in *Castle Rock v. Gonzales*, 545 U.S. 748 (2005). The Supreme Court ruled that a local government had no legal duty to protect three children who were the beneficiaries of a court-issued protective order against their father. The IACHR held that “the failure of the United States to adequately organize its state structure to protect them [Rebecca, Katherine, and Leslie Gonzales] from domestic violence not only was discriminatory, but also constituted a violation of their right to life under Article I and their right to special protection as girl-children under Article VII of the American Declaration.” *Jessica Lenahan (Gonzales), et al.*, Report No. 80/11, Case 12.626, (2011), Inter-Am. Comm’n H.R., § VIII, ¶ 164. After finding the US failed to comply with IACHR recommendations, all IACHR could do is “reiterate its recommendations.” *Id.* ¶ 215.

4. The *World Health Organization* (WHO) has the “authority to make recommendations to Members with respect to any matter within the competence of the Organization.” Sadat & George, *supra*, at 103. The WHO can also issue guidance on health-related issues, such as “responsible reporting on suicide.” *Id.* Sadat and George see a “useful comparison” between the tobacco industry and the firearm industry. *Id.* at 104. With the U.S. implementation of “strict regulations on the [tobacco] industry,” the outcome of the tobacco control is “a significant decline in the percentage of the population who smokes.” *Id.* Since the WHO is an influential international organization and its last publication on gun violence is issued in 2001, the authors wish to see an issue of the WHO *Bulletin* being published in the future on “global gun violence concerns.” *Id.*

Although norms entrepreneurs for gun control—such as Professors Koh, Sadat, and George, as well as activist organizations—have grown in influence

over the last several decades, norms entrepreneurship does not work only in one direction. In October 2005, the people of Brazil voted on a referendum to outlaw private gun ownership. Although the referendum was strongly supported by Brazil’s President Luiz Inácio Lula da Silva, the prohibition proposal was crushed by a 64 to 36 percent vote. The vote had been strongly supported by the international gun prohibition coalition described in Professor Koh’s article, and Brazilian prohibition activists received support from the United Nations. A win for prohibition in Brazil was supposed to set the stage for similar votes in other nations, and for the creation of a major international gun control treaty at the UN Programme of Action review conference in the Summer of 2006.

The Brazilian election had the opposite effect. NGO advocacy for prohibition was led by the group Viva Rio. Its leader, Rubem Fernandes, explained at a UN meeting what he had learned from the experience: “First lesson is, don’t trust direct democracy.” He also noted that the argument “I have a right to own a gun” became “a very profound matter” in the debate on the referendum. Rubem Fernandes, *Lessons from the Brazilian Referendum, Remarks to the World Council of Churches* (Jan. 17, 2006), *quoted in* Wayne Lapierre, *The Global War on Your Guns* 187 (2006);<sup>34</sup> *see also* Roxana Cavalcanti, *Edge of a barrel: Gun violence and the politics of gun control in Brazil*, *Brit. Soc. of Criminol. Newsletter*, No. 72, Summer, 11-14 (2013) (arguing that the referendum was defeated partly because of the Mensalão scandal, involving bribery of Brazilian legislators by the ruling Workers Party, which had helped lead the referendum campaign, and partly because the Brazilian public accepted NRA-derived rhetoric about distrust of government and the need for self-defense).

Perhaps the landslide rejection of the Brazilian gun ban referendum started the nation down a slippery slope. In 2018, presidential candidate Jair Bolsonaro was elected while promising to reform Brazil’s onerous gun control laws, so that ordinary citizens can own and carry firearms for protection from Brazil’s rampant violent crime. In January and May 2019, he used existing authority to issue executive decrees that temporarily revised the effects of a 2003 statute ([Law no. 10.826](#)) that had prohibited lawful gun acquisition by most Brazilians. *See* Tara John, [Brazil’s Bolsonaro signs executive order easing gun rules](#), CNN, May 8, 2019; [Presidência da República, Presidente assina decreto que altera regras para uso de armas](#), May 7, 2019; [Presidência da República, Governo altera decreto de regras sobre o uso de armas](#), May 22, 2019 (summarizing Decreto 9.785); [Presidência da República, Decreto regulamenta posse de armas de fogo no Brasil](#), Jan. 15, 2019. Even before Bolsonaro’s 2018 election victory on a right to arms platform, an article in *Foreign Policy* magazine pondered whether Brazil’s referendum had broader implications:

If you asked people in Bosnia, Botswana, or, for that matter, Brazil, what the Second Amendment of the US Constitution stands for, most of them would

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34. Fernandes was speaking at PrepCon 2006, a UN-sponsored preparatory conference for the major UN gun control conference that would take place in June-July 2006. Side Events, PrepCom 2006 (Preparatory Committee for the Conference to Review Progress in the Implementation of the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects), United Nations, Jan. 9-20, 2006.

probably have no idea. But the unexpected defeat of Brazil’s proposed gun prohibition suggests that, when properly packaged, the “right to keep and bear arms” message strikes a chord with people of very different backgrounds, experiences, and cultures, even when that culture has historically been anti-gun.

In fact, the Second Amendment may be a more readily exportable commodity than gun control advocates are willing to accept, especially in countries with fresh memories of dictatorship. When it is coupled with a public’s fear of crime—a pressing concern in most of the developing world—the message is tailored for mass consumption.

David Morton, *Gunning for the World*, Foreign Policy, Jan./Feb. 2006.

Online Chapter 14.C, on Comparative Law, describes the situation in Kenya, where many pastoral tribes have been resisting government gun confiscation efforts for decades. An article in Kenya’s leading newspaper urges the government to abandon the confiscation campaigns, and instead to follow the Second Amendment model:

How can the Government ask us to surrender our guns when we know very well that there is no security for us? If we give out our firearms, say today, who will protect us when the neighbouring tribes strike? How about our stolen livestock? Who is going to return them to us?” Mr. Lengilikwai talks with bitterness.

In the past, critics of liberalising access to firearms have argued that they would put ordinary people’s lives in peril because even squabbles in the streets or the bedroom would be resolved by bullets. Incidentally, such incidents are few and far between in the Kerio Valley despite the easy accessibility of AK-47s as well as the relatively low levels of education and social sophistication. . . . If Kenya is to achieve long-lasting stability, it ought to borrow a leaf from the US, whose constitution gives the people the right to bear arms and form militias for their own defence should the armed forces fail them, as happened in Kenya after the December elections.

Paul Letiwa, *Why Herders Won’t Surrender Their Firearms Just Yet*, Daily Nation, Apr. 30, 2008; see also Ng’ang’a Mbugua, *Law Should Be Changed to Free Guns*, Daily Nation (Apr. 25, 2008) (noting success of armed defense program of the people of the Kerio Valley).

### NOTES & QUESTIONS

1. Suppose that the idea of a fundamental human right to keep and bear arms became popular globally. What consequences might ensue?
2. Recall the materials earlier in this chapter asserting that personal self-defense and collective resistance to tyranny are fundamental, natural, inherent human rights. Similar provisions are found in various national constitutions. See Ch. 14.A. Should these rights be considered universal norms?
3. Self-defense from criminals or criminal governments does not always involve using firearms or other arms. But there are sometimes situations in which no lesser force will suffice. Should the right to keep and bear arms

be considered a necessary corollary to individual and collective rights of self-defense?

4. In the world of international arms entrepreneurship, the numbers and funding for prohibition advocates far exceeds those of arms rights advocates. As this chapter indicates, the former type of advocates has not yet achieved all it wanted, but it has helped create many international documents that advance its goals. If you were an advisor for each side, what suggestions would you give about future strategy and tactics?
5. *Hessbruegge’s analysis of self-defense and international law.* An impressively thorough and thoughtful analysis of human rights and self-defense is Jan Arno Hessbruegge’s book *Human Rights and Personal Self-Defense in International Law* (2017). Analyzing many of the materials presented in this Chapter, and in online Chapters 14 (comparative law) and 16 (antecedents of the Second Amendment), Hessbruegge finds that the right to self-defense is a natural and universal right. *Id.* at 17-89. However, he does not consider self-defense to be recognized as a human right in international law:

The right of self-defense is a genuinely pre-society right that evolved in the *absence* of the state. It survived the formation of the state because no state will ever have *enough* power to perfectly protect individuals. Conversely, human rights evolved to in response to the overbearing *presence* of the state and serve primarily to ensure that states do not accumulate *too much power*. Unlike human rights, self-defense does not additionally incorporate a vision to transform the state. It can accommodate any type of state, including authoritarian states that fail to respect human rights. For these reasons, the right to personal self-defense can best be described as an individual right *sui generis* under international law.

Even if it does not constitute a human right in its own right, the right to personal self-defense still links closely to international human rights law. Human rights shape the right to self-defense because they prohibit denying or unduly curtailing the right to personal self-defense. In this sense, the right to personal self-defense is derivative of human rights, even if it is not a human right itself.

*Id.* at 89.

Arguably, Hessbruegge’s view that a right which precedes the existence of society cannot be an international law human right is too strict. After all, marriage, bearing children, and raising children are natural rights that long precede society. Today, such rights are certainly part of international human rights. *E.g.*, [Universal Declaration of Human Rights](#) art. 16 (1948) (“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

Because Hessbruegge does believe that human rights law forbids suppression of self-defense, he arrives at conclusions that would be the same as if

self-defense were denominated as a right in itself. For example, he writes that the governments like Papua New Guinea or Iran, which refuse to entertain self-defense claims by female victims or rape or other abuse by men, are violating natural law. Hessbruegge, *supra*, at 239-42.

Similarly, a legal system (such as Iceland's) that requires a defendant to prove self-defense, rather than requiring the government to disprove it beyond a reasonable doubt, violates the presumption of innocence. *Id.* at 276-78.<sup>35</sup> The allowance for self-defense required by international human rights law also means that there is a right to use deadly force against at least some forms of manifestly unlawful government violence, including extrajudicial killings and torture. *Id.* at 299-312.

However, Hessbruegge disagrees with the argument, presented in section D, *supra*, that the Genocide Convention and the inherent right of self-defense authorize the supplying of arms to a population that is the victim of an ongoing genocide. "Allowing the Bosnian side to arm itself might have limited the level of atrocities. However, such cases are the exception, not the rule. As a matter of general principle, preventing genocide and mass atrocities will typically require . . . sustained efforts to counter the proliferation of small arms." *Id.* at 288.

This is an empirical judgement. It is at least called into question by the fact that every genocidal regime in the last century and the present one has assiduously worked to disarm the intended victims beforehand. To the extent that such regimes have been unable to fully disarm victims, many lives have been saved, including in the Turkish genocide of the Armenians in World War I, and the German genocide of Jews in World War II. The issue is discussed further in Chapter 14.D.2.

Hessbruegge also examines the question of whether the right of self-defense implies a right to possess defensive firearms. His first argument against such a right is that having a gun is counterproductive for personal safety. The basis for the argument is a citation of several social science studies. *Id.* at 280-85. The full body of empirical evidence is not nearly so unanimous as Hessbruegge's discussion implies. Some of the empirical evidence from both sides is discussed in Chapter 1.

Even if, *arguendo*, gun ownership enhances individual safety, there should be no right to gun ownership because of the greater interest in the safety of society as a whole, Hessbruegge argues. As he points out, most people believe that it is alright to disarm convicted violent felons, even though ex-felons are at unusually high risk of being victimized by criminals. (The higher victimization rates for ex-felons are a consequence of ex-felons tending to live in poorer areas with high crime rates, tending to associate with criminals, and perhaps having lower impulse control and poor prudential judgement.) Hessbruegge extrapolates a broader principle from felon disarmament: although gun ownership

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35. Under an Ohio statute that was enacted in 1978, the defendant had the burden of proof on self-defense. The statute was amended in 2019 to put the burden of disproving self-defense on the government. [Ohio Rev. Code § 2901.05](#); Ohio House Bill 228 (2019). The former Ohio statute was held by the U.S. Supreme Court not to violate the Due Process Clause of the Fourteenth Amendment, in a 5-4 decision. *Martin v. Ohio*, 480 U.S. 228 (1987).

might make gun owners safer, greater gun ownership makes society more dangerous in the long run. *Id.* at 282-83.

This, too, is an empirical judgement, and some empirical evidence is to the contrary. As the data in Chapter 1 indicate, rising gun density in the United States over the last three decades has coincided with a tremendous drop in gun crime. Online Chapter 14.B presents cross-national studies of gun ownership, and some of the studies find no link between higher rates of gun ownership and violent crime. Public safety may be enhanced by laws that disarm people whose individual behavior demonstrates an unusual risk that they will misuse guns in the future; however, individuals who have been peaceable all their lives may pose little or no risk of misusing arms and may (according to some of the data presented in Chapter 1) actually contribute to greater social safety if they are armed.

Hessbruegge’s final argument is that a right of some persons to own guns would harm the self-defense rights of people who do not want to own guns: “People who choose not to have a gun or are unable to have one will see their capacity to effectively implement their right to self-defense diminished, because any aggressors they face are more likely to be armed. . . . Those who proclaim a right of firearms as a means of self-defense fail to see how such a right diminishes the right to personal self-defense of those who also insist on their right not to own a gun.” *Id.* at 289.

The argument is plausible if one makes certain assumptions. First, that a significant quantity of firearms owned by law-abiding people will come into the hands of criminal aggressors, since guns owned by law-abiding people can be stolen by criminals and then sold to other criminals. The second assumption is that a government that severely constricts or eliminates lawful gun ownership by citizens is also effective enough to thwart criminal gun acquisition from other sources, such as thefts from government armories, illicit sales of government arms by corrupt government officials, or international smuggling. As described in online Chapter 14.C, the assumption of government efficacy is plausible for certain nations, such as Japan, and less plausible for other some other nations. *See also* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 Wake Forest L. Rev. 837 (2008) (Ch. 14.B) (discussing obstacles to successfully implementing government restrictions on firearm availability).

While Hessbruegge’s discussion focuses on firearms, the logic of his argument applies equally to any type of personal arm, including pepper spray, stun guns, knives, swords, bows, and clubs. If the law-abiding are allowed to own any arms at all, some of those arms may leak into the hands of violent aggressors, thus making self-defense all the more difficult for the law-abiding.

The other side of the argument, however, is that self-defense without arms is not necessarily very easy for a large portion of the population. If neither law-abiding citizens nor criminals have arms, then the advantage goes to physically strong young men—all the more so if they work in groups to attack isolated victims. That is precisely why many people who worry about being victimized by criminals choose to own some kind of arm. The reason that guns are called “equalizers” is because they are by far the most effective tool allowing a small person to defend him- or herself at a distance from a group of larger people.

See Dave Kopel, Paul Gallant & Joanne Eisen, *A World Without Guns*, Nat'l Rev. Online, Dec. 5, 2001.

But the problem with the equalizing effect of guns is that they also allow a smaller, lone individual to attack a larger victim, or group of victims, especially if the victims happen to be unarmed. Arms in the wrong hands harm public safety, while arms in the right hands enhance it. Although the principle is easy to state, implementation is more challenging.

Regardless of whether the reader agrees with Hessbruegge's conclusions, his book is a major contribution to the literature and an outstanding resource for future scholarly examination of personal self-defense in international law.

