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International Law

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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.

A *treaty* is a common type of bilateral agreement between nations. When an international agreement involves many parties, the agreement is typically called a *convention*. The general rules of treaties and conventions are codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

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*. One definition of 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. However, certain norms, called *peremptory norms*, are said to be always and everywhere binding, and unchangeable. As Section B discusses, the Classical Founders of international law described Natural Law in similar terms. Since the late twentieth century, international policy entrepreneurs (discussed in Section D) have been busy trying to argue that their favorite policy on this or that subject is a peremptory norm 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.

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 ([I.C.J. Statute](#)) 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*.

This chapter is separated into four main sections. Section A addresses modern international law conventions, with a focus on the United Nations and the Organization of American States. Section B covers Classical international law, based on the treatises of scholars such as Grotius, Pufendorf, and Vattel, who helped found the global system of international law in the sixteenth through eighteenth centuries. Section C discusses the right of resistance under international law, especially resistance to genocide. Section D offers the perspective of Harold Koh, former Legal Adviser to the U.S. State Department, on how and why international gun control should be implemented.

A. *Modern Treaties and the United Nations*

1. **Modern Human Rights Conventions and Other Documents**

a. *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, is not a binding legal treaty or convention, but rather a statement of principles. However, some nations have explicitly adopted it into their own constitutional law. In addition, some consider the Universal Declaration a source of customary international law norms. The 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. . . .

b. Resolution on the Definition of Aggression

The U.N. General Assembly (GA) has no ability to create international law. While no GA resolution is, in and of itself, 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, G.A. Res. 3314 (XXIX), Annex, art. 7 (Dec. 14, 1974).

c. 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.

d. European Convention on Human Rights (ECHR)

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.

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.

European Convention on Human Rights art. 2, Nov. 4, 1950, 213 U.N.T.S. 222.

NOTES & QUESTIONS

1. According to the Resolution on the Definition of Aggression, is the right to resist limited to persons fighting colonial, racist, or alien regimes?
2. According to the ECHR, under what circumstances is use of lethal force in self-defense permissible?
3. If a government prohibited self-defense against deadly attack, would it be violating the right to life in Article 1 of the ECHR?
4. In a report adopted by the U.N. Subcommission on Human Rights, U.N. 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.” 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?
5. Several 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.”

[European Convention on Human Rights \(1953\):](#)

- 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.”

[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?

6. If a convention guarantees the right to food, or the right to an education, can the government properly outlaw the private cultivation of food, or private tutoring? What if the government supplies everyone with plenty of food and excellent education? What if the government aspires to supply sufficient food and education, but is unable to do so? Can these situations be analogized to the right to life, property, and security, and the prohibition of self-defense?
7. Do you think the “tyranny” mentioned in the Universal Declaration of Human Rights would encompass the tyranny that Americans claimed to be resisting in the Revolutionary War against England? (You may wish to review Chapter 3.C – 3.D.) Did late eighteenth-century English policies toward the American colonies violate human rights? Which ones? Do you think “tyranny” envisioned by the Declaration of Human Rights is the same concept as the tyranny that was denounced in the U.S. Declaration of Independence?
8. Does the African Charter on Human and Peoples’ Rights 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”?

2. Modern International Gun Control Treaties and Documents

The [Programme of Action](#) (PoA) excerpted below was adopted in 2001 at a U.N. conference. It is not legally binding. Since then, there have been meetings every two or three years to assess progress on the PoA. The efforts of some nations and many gun-control organizations to strengthen the PoA at a 2006 conference were defeated because of opposition from the United States and several other nations. The essential provisions of the PoA appear in the excerpt below.

Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects UN Document A/CONF.192/15

I. Preamble

1. We, the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, having met in New York from 9 to 20 July 2001,

2. Gravely concerned about the illicit manufacture, transfer and circulation of small arms and light weapons and their excessive accumulation and uncontrolled spread in many regions of the world, which have a wide range of humanitarian and socio-economic consequences and pose a serious threat to

peace, reconciliation, safety, security, stability and sustainable development at the individual, local, national, regional and international levels, . . .

5. Recognizing that the illicit trade in small arms and light weapons in all its aspects sustains conflicts, exacerbates violence, contributes to the displacement of civilians, undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict and fuels crime and terrorism,

6. [Gravely concerned about children, child soldiers, women, and the elderly,]

7. [Concerned about terrorism, organized crime, drug trafficking, and precious minerals trafficking; and agreeing on the need to combat both the supply and the demand for illicit small arms,]

8. Reaffirming our respect for and commitment to international law and the purposes and principles enshrined in the Charter of the United Nations, including the sovereign equality of States, territorial integrity, the peaceful resolution of international disputes, non-intervention and non-interference in the internal affairs of States,

9. Reaffirming the inherent right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations,¹

10. Reaffirming also the right of each State to manufacture, import and retain small arms and light weapons for its self-defence and security needs, as well as for its capacity to participate in peacekeeping operations in accordance with the Charter of the United Nations,

11. Reaffirming the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognizing the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples,

12. Recalling the obligations of States to fully comply with arms embargoes decided by the United Nations Security Council in accordance with the Charter of the United Nations, . . .

16. Recognizing also the important contribution of civil society, including non-governmental organizations and industry in, inter alia, assisting Governments to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects, . . .

1. [Article 51 of the U.N. Charter (adopted 1945) reads:

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.

—Eds.]

22. Resolve therefore to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects by:

(a) Strengthening or developing agreed norms and measures at the global, regional and national levels that would reinforce and further coordinate efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects;

(b) Developing and implementing agreed international measures to prevent, combat and eradicate illicit manufacturing of and trafficking in small arms and light weapons;

(c) Placing particular emphasis on the regions of the world where conflicts come to an end and where serious problems with the excessive and destabilizing accumulation of small arms and light weapons have to be dealt with urgently;

(d) Mobilizing the political will throughout the international community to prevent and combat illicit transfers and manufacturing of small arms and light weapons in all their aspects, to cooperate towards these ends and to raise awareness of the character and seriousness of the inter-related problems associated with the illicit manufacturing of and trafficking in these weapons;

(e) Promoting responsible action by States with a view to preventing the illicit export, import, transit and retransfer of small arms and light weapons.

II. Preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects

1. [We, the States participating in this Conference, agree:]

At the national level

2. To put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the export, import, transit or retransfer of such weapons, in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients.

3. To adopt and implement, in the States that have not already done so, the necessary legislative or other measures to establish as criminal offences under their domestic law the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their areas of jurisdiction, in order to ensure that those engaged in such activities can be prosecuted under appropriate national penal codes.

4. To establish, or designate as appropriate, national coordination agencies or bodies and institutional infrastructure responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects. This should include aspects of the illicit manufacture, control, trafficking, circulation, brokering and trade, as well as tracing, finance, collection and destruction of small arms and light weapons.

5. [To establish a national point of contact to act as liaison on the Programme of Action.]

6. To identify, where applicable, groups and individuals engaged in the illegal manufacture, trade, stockpiling, transfer, possession, as well as financing for acquisition, of illicit small arms and light weapons, and take action under appropriate national law against such groups and individuals.

7. To ensure that henceforth licensed manufacturers apply an appropriate and reliable marking on each small arm and light weapon as an integral part of the production process. This marking should be unique and should identify the country of manufacture and also provide information that enables the national authorities of that country to identify the manufacturer and serial number so that the authorities concerned can identify and trace each weapon.²

8. To adopt where they do not exist and enforce, all the necessary measures to prevent the manufacture, stockpiling, transfer and possession of any unmarked or inadequately marked small arms and light weapons.

9. 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.

10. To ensure responsibility for all small arms and light weapons held and issued by the State and effective measures for tracing such weapons.

11. [To have strict regulations for export and import authorizations.]

12. To put in place and implement adequate laws, regulations and administrative procedures to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures. . . .

14. To develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation or procedures should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control.

15. [To take action against any violations of U.N. arms embargoes.]

16. To ensure that all confiscated, seized or collected small arms and light weapons are destroyed, subject to any legal constraints associated with the preparation of criminal prosecutions, unless another form of disposition or use has been officially authorized and provided that such weapons have been duly marked and registered.

17. To ensure, subject to the respective constitutional and legal systems of States, that the armed forces, police or any other body authorized to hold small arms and light weapons establish adequate and detailed standards and procedures relating to the management and security of their stocks of these weapons. These standards and procedures should, inter alia, relate to: appropriate locations for stockpiles; physical security measures; control of access to

2. [Carried into action by the nonbinding 2005 International Tracing Instrument, described on page 208—Eds.]

stocks; inventory management and accounting control; staff training; security, accounting and control of small arms and light weapons held or transported by operational units or authorized personnel; and procedures and sanctions in the event of thefts or loss.

18. To regularly review, as appropriate, subject to the respective constitutional and legal systems of States, the stocks of small arms and light weapons held by armed forces, police and other authorized bodies and to ensure that such stocks declared by competent national authorities to be surplus to requirements are clearly identified, that programmes for the responsible disposal, preferably through destruction, of such stocks are established and implemented and that such stocks are adequately safeguarded until disposal.

19. To destroy surplus small arms and light weapons designated for destruction, taking into account, inter alia, the report of the Secretary-General of the United Nations on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092) of 15 November 2000.

20. [To implement public awareness programs, such as] the public destruction of surplus weapons and the voluntary surrender of small arms and light weapons, if possible, in cooperation with civil society and non-governmental organizations, with a view to eradicating the illicit trade in small arms and light weapons.

21. 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. . . .

23. To make public national laws, regulations and procedures that impact on the prevention, combating and eradicating of the illicit trade in small arms and light weapons in all its aspects and to submit, on a voluntary basis, to relevant regional and international organizations and in accordance with their national practices, information on, inter alia, (a) small arms and light weapons confiscated or destroyed within their jurisdiction; and (b) other relevant information such as illicit trade routes and techniques of acquisition that can contribute to the eradication of the illicit trade in small arms and light weapons in all its aspects.

At the regional level

24. [To establish a regional liaison.]

25. To encourage negotiations, where appropriate, with the aim of concluding relevant legally binding instruments aimed at preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, and where they do exist to ratify and fully implement them.

26. [To encourage moratoria on the transfer and manufacture of small arms and light weapons.]

27. [To establish trans-border customs cooperation and networks for information-sharing among law enforcement.]

28. [To encourage strengthening relevant laws, regulations, and administrative procedures.]

29. [To improve stockpile management, in particular physical security measures, for small arms and light weapons.]

30. To support, where appropriate, national disarmament, demobilization and reintegration programmes, particularly in post-conflict situations, with special reference to the measures agreed upon in paragraphs 28 to 31 of this section.

31. [To encourage transparency with a view to combating the illicit trade in small arms and light weapons in all its aspects.]

At the global level

32. [To cooperate with the U.N. arms embargoes.]

33. [To request that the U.N. Department for Disarmament Affairs collate and circulate data and information provided by States.]

34. To encourage, particularly in post-conflict situations, the disarmament and demobilization of ex-combatants and their subsequent reintegration into civilian life, including providing support for the effective disposition, as stipulated in paragraph 17 of this section, of collected small arms and light weapons. . . .

36. To strengthen the ability of States to cooperate in identifying and tracing in a timely and reliable manner illicit small arms and light weapons.

37. To encourage States and the World Customs Organization, as well as other relevant organizations, to enhance cooperation with the International Criminal Police Organization (Interpol) to identify those groups and individuals engaged in the illicit trade in small arms and light weapons in all its aspects in order to allow national authorities to proceed against them in accordance with their national laws.

38. To encourage States to consider ratifying or acceding to international legal instruments against terrorism and transnational organized crime.

39. To develop common understandings of the basic issues and the scope of the problems related to illicit brokering. . . .

40. To encourage . . . international . . . organizations and States to facilitate the appropriate cooperation of civil society, including non-governmental organizations, in activities related to the prevention, combat and eradication of the illicit trade in small arms. . . .

41. To promote dialogue and a culture of peace by encouraging, as appropriate, education and public awareness programmes. . . .

III. Implementation, international cooperation and assistance . . .

6. [States should help each other in building capacities legislation and regulations, law enforcement, tracing and marking, stockpile management and security, destruction of small arms and light weapons and the collection and exchange of information.]

7. [States should enhance cooperation among customs, police, intelligence and arms control officials.]

8. Regional and international programmes for specialist training on small arms stockpile management and security should be developed. Upon

request, States and appropriate international or regional organizations in a position to do so should support these programmes. The United Nations, within existing resources, and other appropriate international or regional organizations should consider developing capacity for training in this area.

9. [States should use and support Interpol’s International Weapons and Explosives Tracking System database or any other relevant database that may be developed for this purpose.]

10. [States should cooperate on improved technology for arms tracing and detection of illicit trade.]

11. [States will cooperate in arms tracing, and exchanging relevant information. . . .]

13. States are encouraged, subject to their national practices, to enhance, according to their respective constitutional and legal systems, mutual legal assistance and other forms of cooperation in order to assist investigations and prosecutions in relation to the illicit trade in small arms and light weapons in all its aspects.

14. [States should assist each other in destroying surplus arms, and unmarked or inadequately marked arms.]

15. [States should assist other States in combating the illicit trade in arms linked to drug trafficking, transnational organized crime and terrorism. . . .]

18. States, regional and subregional and international organizations, research centres, health and medical institutions, the United Nations system, international financial institutions and civil society are urged, as appropriate, to develop and support action-oriented research aimed at facilitating greater awareness and better understanding of the nature and scope of the problems associated with the illicit trade in small arms and light weapons in all its aspects.

IV. Follow-up to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects . . .

2. Finally, we, the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects:

(a) Encourage the United Nations and other appropriate international and regional organizations to undertake initiatives to promote the implementation of the Programme of Action;

(b) Also encourage all initiatives to mobilize resources and expertise to promote the implementation of the Programme of Action and to provide assistance to States in their implementation of the Programme of Action;

(c) Further encourage non-governmental organizations and civil society to engage, as appropriate, in all aspects of international, regional, subregional and national efforts to implement the present Programme of Action.

NOTES & QUESTIONS

1. It is no mistake that the PoA never defines “small arms.” The issue was deliberately left open. Some advocates argue that “small arms” should mean only military automatic 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., almost all shotguns). Still others say that the term should include any firearm. As the PoA has been actually 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 U.N. finally decided that the PoA should define “small arms” and chose you to prepare the definition, what would you write?

2. Would it make sense for the PoA to apply to “small arms” in the broadest sense to any arms that are as small as a firearm, or smaller? Should this include knives, swords, bows, blunt weapons, chemical sprays, martial arts weapons, and the like?
3. One result of the PoA was negotiations 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, 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, U.N. Doc. A/60/88 (Dec. 8, 2005).

Are you satisfied with the Instrument’s definition of small arms?

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.”

However, in the late-night negotiating session that created the final version of the Instrument, the Chinese delegation inserted an alternative provision, whose implications were apparently not understood by the other, tired delegates. Instead of 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.” *Id.*

The practical effect of this has been that China has often used geometric markings on guns. China may continue to do so, and may therefore *omit* the identity of the manufacturer. China may likewise omit a serial number, which could be used to identify the approximate date of manufacture of a gun.

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 has leaked into civilian hands, or whether it was recently manufactured for a rogue arms broker whose prime customers are warlords.

In light of this risk, what legitimate reasons might there be for the International Tracing Instrument’s geometric alternative?

4. “Small arms” definitely does not include ammunition for small arms. Whether to include ammunition in global gun control treaties has been a very contentious issue and was a point of contention at the 2006 and 2012 U.N. conferences discussed below. Would you recommend including ammunition in the definition of small arms? What are the benefits, harms, and practical challenges that affect your recommendation?
5. The PoA calls for comprehensive, permanent registration of all small arms:

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.

Other provisions of the PoA urge the sharing of registration with other nations, and with regional organizations. What are the advantages and disadvantages of internationalizing gun registration?

6. The PoA affirms “the inherent right to individual or collective self-defense in accordance with Article 51” of the United Nations Charter:

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

U.N. Charter art. 51. In the context of article 51 (which controls international use of force), the “inherent right” of self-defense is a right of nations.

As Section B of this chapter details, however, the Classical view of international law is that the inherent right of national self-defense is derivative of the personal right of self-defense. The PoA refers to the lawfulness, in some countries, of arms use for sporting purposes, but does not acknowledge the existence of any right of personal self-defense. Why do you think the PoA was careful to mention national self-defense, but not personal self-defense?

7. If you were a gun owner or gun rights supporter in the United States, would you object to the U.S. government's endorsing the PoA? Why? Do you interpret the PoA to require citizen disarmament in places like the United States where a large fraction of citizens own guns? Which provisions of the PoA could be used to oppose this reading? As you read it, would a significant portion of the U.S. gun inventory fall within any of the categories of guns targeted by the PoA?
8. The PoA seems to 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 such as gun crime. *See, e.g.,* Don B. Kates, *Genocide, Self Defense and the Right to Arms*, 29 Hamline L. Rev. 501 (2006). Does that affect your assessment of whether government should have a monopoly on arms? Is the distinction between state and individual violence compelling? *See* Chapter 11.K. Is the PoA even concerned with the type of private gun violence that prompts U.S. gun regulation?
9. 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 transfer to nonstate actors (that is, to any recipient who is not a government, or authorized by the government). The U.S. delegation, led by John Bolton, insisted on deletion of the "non-state actors" language. The United States argued that such a provision would have outlawed arms sales to the American Revolutionaries (who at the start of the war did not have diplomatic recognition), to anti-Nazi partisans during World War II, and to rebel groups that are attempting to overthrow a dictatorship. It has also been argued that a nonstate actors provision would outlaw U.S. arms sales to Taiwan, since the U.N. 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). For an overview of the issue, 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). What are the best arguments for and against outlawing arms transfers to nonstate actors?
10. Because the PoA is not legally binding, it did little to strengthen U.N. arms embargoes. Subsequent U.N. conferences in 2006 and 2012 (discussed in Question 12) were called in part for the purpose of strengthening the embargo system, but neither conference produced a consensus document.

Embargo advocates conceded that an arms embargo has never been successful in the history of the United Nations. Advocates point to 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, advocates favor creating a new U.N. agency or office that would have the power to impose embargoes, and would do so according to “objective” standards.

A second problem is that many countries that have nominally agreed to an embargo then violate the embargo. Opponents of the proposed new treaties argue that countries such as 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 in a treaty. Thus, critics argue, a new international treaty would in practice only limit arms supplying by the relatively small number of democracies who generally comply with international law.

Issues involving embargoes are explored in 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).

Is there any practical way to block arms flows to dictatorships that use arms to perpetrate gross violations of human rights? If not, what else might be done?

11. The 2001 PoA is not legally binding. However, many national governments have intensified domestic gun controls since 2001, claiming that the PoA requires it. Invoking the PoA, the United Nations has also carried out many programs to disarm civilians. For examination of U.N. disarmament programs in Cambodia, Bougainville, Albania, Panama, Guatemala, and Mali, see David B. Kopel, Paul Gallant, & Joanne D. Eisen, *Microdisarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969 (2005). “Microdisarmament” is the U.N.’s term for effectuating disarmament in a single nation. Some microdisarmament programs involve efforts to reintegrate former guerillas or gangsters into peaceful civilian life. Others involve broad efforts to collect guns from the entire civilian population. Can you imagine circumstances in which the U.N. should not implement microdisarmament in a nation where the government desires it?

12. After years of efforts, the United Nations General Assembly approved an Arms Trade Treaty (ATT) on April 3, 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. Secretary of State John

Kerry signed the ATT in September 2013. As of mid-2014, President Obama has not sent the ATT to the U.S. Senate for ratification.

The ATT will take effect on Dec. 24, 2014, after having been ratified by at least 50 nations. The ATT text and information about the ATT's are available at the website of the U.N. Office of Disarmament Affairs, <http://www.un.org/disarmament/ATT>.

The ATT does not recognize the legitimacy of defensive gun ownership. 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.”

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, which is required to make every nation’s gun registration lists available to every other country in the Treaty.

The ATT aims to prohibit the export of arms to persons or governments who would use them to violate human rights.

The Treaty also covers “components” for firearms or ammunition, but does not explicitly cover ammunition per se.

For supportive perspectives on the ATT, see the website of Control Arms, a consortium of NGOs dedicated to the creation of the Treaty, and to making its interpretation and enforcement as stringent as possible. <http://controlarms.org/en>.

For critical perspectives on the ATT, see Heritage Foundation forum “Assessing the Risks of the Arms Trade Treaty,” with presentations from Major General (Ret.) D. Allen Youngman (Defense Small Arms Advisory Council), David B. Kopel (Research Director, Independence Institute, Adjunct Professor, Denver University Sturm College of Law), Johanna Reeves (FireArms Import/Export Roundtable), Ted R. Bromund (Heritage Foundation). See also the many monographs by Heritage Foundation Scholar Ted R. Bromund.

The U.N.’s Human Rights Council has developed a separate proposal for the international regulation of small arms. The first excerpt that follows is from that proposal for preventing human rights violations committed with small arms. The second is from a report by a U.N. official expert (*special rapporteur*) on small arms control, which was formally adopted and endorsed by the HRC. The report states that very restrictive gun control (much more restrictive than currently existing anywhere in the United States) is a human right that all governments have a legal obligation to implement. Keep in mind your impressions of the PoA and your answers to the questions above as you assess the scope and underlying concerns and policy prescriptions in the excerpts below. Consider whether the issues highlighted by the PoA provide persuasive reasons for the U.N.’s continuing work on gun control and whether there are additional persuasive reasons for gun control that could have been included in the PoA.

U.N. 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.

In 2006, the U.N. Human Rights Council endorsed (*supra*) some draft principles for gun control, as detailed in a report for the Human Rights 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 Frey Report

U.N. 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’”. 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.

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.” . . .

NOTES & QUESTIONS

1. According to the Frey report, a state’s failure to restrict self-defence 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 U.N. 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, the only U.S. jurisdiction which is even partially compliant with the Human Rights Council’s “specific purposes” rules is New York State for handgun licensing; a New York handgun permit may specify that the permit is only for target shooting, or for hunting. The handgun permit may also be unrestricted, allowing the gun to be carried for lawful self-defense.

In every other US jurisdiction, if a person can legally possess a firearm, the person can use the firearm for all lawful purposes, including target shooting, collecting, hunting, and self-defense. (With the caveats that hunting, at least on public lands, typically requires a separate hunting license; and that carrying for self-defense outside of one’s home, business premises, or automobile typically requires a separate permit as well.)

4. When New York City issues permits to residents to possess rifles and shotguns, the permits are not limited to one particular purpose. The permittee may use the firearm for any lawful purpose, such as collecting, shooting flying clay disks (trap, skeet, and sporting clays), bird hunting, or home-defense. This is contrary to the Human Rights Council’s draft principles. Is New York City violating human rights in how it issues rifle or shotgun permits? As host city for the United Nations, does New York City have a special obligation to conform its municipal laws to U.N. guidance?

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 does not generally 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. What do you make of the Frey Report’s acknowledgement that nations have a right to self-defense to protect themselves, but that individuals do not? Is this consistent with the vision of the American founders underlying the Second Amendment? See Chapters 3, 4, 11.K.

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

[The Nairobi Protocol is a gun control agreement among East African governments. Consistent with the 2001 U.N. Programme of Action on small arms control, the U.N. 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).]

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 U.N. arms embargoes, which as U.N. members they are supposed to comply with anyway. Yet the countries that are known to have violated the U.N. 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). Can anything be done to make arms embargoes effective when governments who 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? 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?
3. Under the Nairobi Protocol, all automatic rifles must be banned. In the United States, there are only about 100,000 automatics in civilian hands, out of a total U.S. gun supply of approximately 300 million guns. 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 U.S. 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 durability and imperviousness to harsh conditions, such as sandstorms. *See generally* Gordon Rottman, *The AK-47: Kalashnikov-series Assault Rifles* (2011). In the United States, there are only a few hundred AK-47-type assault rifles, and most of those are in military museums. (Semi-automatic-only variants of the AK are more commonly owned, numbering at least into the tens of thousands.) But true, fully automatic, AK-type rifles are by far the most common firearm 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?

4. According to the Protocol, there must be “heavy minimum sentences” for “the carrying of unlicensed small arms.” Is this a good policy?
5. 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. Chapter 14 also discusses Kenya. Assuming 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?
6. The U.S. constitutional right to 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. Recall, for example, the tyranny-control justification for the Second Amendment discussed by Judge Kozinski’s dissent to the denial of rehearing en banc in *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (Chapter 11). Are these concerns relevant in the African context? 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 firearm 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, say, 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 the United States?

7. Is discussion of a 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 guns available

on the black market to persons willing to break the law)? Who would enforce such a ban?

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

[Founded in 1948, the Organization of American States (OAS) includes all of the independent nations of the Western Hemisphere. (Cuba’s participation was suspended from 1962 to 2009, and Cuba has chosen not to participate since 2009.) In 1997, President William Jefferson Clinton signed a gun control treaty that had been negotiated by OAS. Neither he nor President George W. Bush sent the treaty to the United States Senate for ratification. President Obama, however, did send the treaty to Congress in 2009, but Congress has not ratified 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.]

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. *Firearms destruction.* CIFTA requires that any firearms confiscated from criminals (such as stolen guns) be destroyed, rather than returned to the original 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 12 tracking the gun-crime rate and the number of private guns in the United States. Does that material support your intuitions?
2. *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 are readily available at retail. Home workshop presses for “handloading” or “reloading” speed the assembly of an empty, used ammunition shell, plus a new primer, gunpowder, and bullet to create a fresh round of ammunition.

Competitive target shooters are often handloaders. They fire so much ammunition in 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 also like to create custom ammunition tailored to their particular firearm and type of

game. Many firearms safety trainers handload especially mild 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 U.S. 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 (ATF) and Explosives 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?

3. *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* Chapter 1 and online Chapter 15). 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 unusual 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 occasionally 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 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 this gun 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 U.S. 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 would have 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 the *United States v. Biswell*, 406 U.S. 311 (1972), case in Chapter 8 for discussion of warrantless inspections of federal firearms licensees.)

4. *Requirement to change U.S. 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.”

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.

If ratified by the Senate, the CIFTA Convention would become the law of the land, on equal footing with congressional enactments and second only to constitutional limitations on governmental action. 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) (Chapter 9)?

If a treaty is “self-executing,” then it 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 U.S. 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 authorized relevant administrative agencies to promulgate automatically regulations?

5. Would Senate ratification of CIFTA trump the 2005 Protection of Lawful Commerce in Arms Act (*see* Chapter 8), which outlaws most lawsuits against gun manufacturers and stores for selling properly functioning firearms that are later misused?

Suppose that the Senate, when ratifying CIFTA, added specific reservations declaring that CIFTA is not self-executing, that CIFTA authorizes no additional regulations, and that CIFTA does not authorize any new lawsuits. Could the U.S. 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).

6. *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>.

Among the provisions in the CIFTA models is criminalization of 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?

For further reading, see Theodore Bromund, Ray Walser, & David B. Kopel, [The OAS Firearms Convention Is Incompatible with American Liberties](#) (Heritage Found. Backgrounder, May 19, 2010) (raising Second Amendment concerns, and pointing out that under CIFTA’s Article IV anti-counseling provision, “it would be illegal for a citizen of a signatory foreign tyranny to say that his fellow victims should seek to arm themselves,” and the CIFTA would require the United States to extradite such a person for prosecution by the foreign tyranny).

B. 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.³

3. 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 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. They 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 unprovoked attacks for the purpose of conquest. The laws of war were derived by deduction from the principles of personal self-defense. For example, a person would have the right to use force to defend herself against a violent attacker, but if she subdued the attacker and tied him up so that he was no longer a threat, then she could not kill the attacker. Similarly, once an enemy soldier was taken prisoner, he could 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 elsewhere in the textbook.) Starting from first principles like 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 enormously influential in their own time, and for centuries afterward. In Protestant Europe and its American colonies, the ideas of the two Catholic authors, Vitoria and Suárez, were mainly known through restatement by the Protestant writers, such as Grotius, Pufendorf, and Vattel. In the American Founding Era, Vattel was generally treated as the authoritative standard of international law.

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 Section A 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 that of 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 (Chapter 2), 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. (Chapter 2) 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.⁴

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* Chapter 2.)

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 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

4. 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.”

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.”⁵

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.” The principle of humanitarian intervention against human sacrifice and other atrocious crimes against humanity was not limited to Spaniards and Aztecs, but rather was universally applicable.

While 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 this:

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” 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 likewise used to declare 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 also applied globally. He was likewise at the forefront in insisting that the same

5. For the Roman law principle that Vitoria quoted, see Chapter 2.

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.

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 one of the preeminent scholars of his age, and one of the founders 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,⁶ 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.” Rather, the state itself could exercise its right of “self-defense” 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 were 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, 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) that the personal or national actions be “waged with a moderation of defence which is blameless” (that is, not grossly disproportionate to the attack).

6. A legislative act declaring a person guilty of treason or another crime without a trial.

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 his 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 de Vitoria) was a member of a Catholic religious order, he was extremely influential on Protestant writers. The great 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.

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.” As international legal scholar George B. Davis wrote in 1900, it 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. Or as a 1795 writer observed, “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* 374-75 (Lawbook Exch. 2005) (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).⁷

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 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” (which was justifiable individual self-defense) and “Public War” (which was 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 (Chapter 2), Grotius explained that defensive violence is based on the intention of self-preservation, not the purpose of killing another.

Self-defense is also 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 for John Adams’s lengthy verbatim reliance on Barbeyrac in a newspaper essay arguing for the American right of revolution. See the Pufendorf section, *infra*, for more on the influence of Barbeyrac.)

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

“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 publick 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. 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 his masterpiece, Grotius wrote *The Free Sea* (*Mare Librum*), which was a foundational book of maritime law, and hence of international law itself. In *The Free Sea*, he also 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.

4. Samuel Pufendorf

The Swedish scholar Samuel Pufendorf (1632-94) was the first person ever appointed as a Professor of the Law of Nations, at the University of Heidelberg. In fact the position was created explicitly for the purpose of allowing 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. He 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) 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 with each other: “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 nature⁸ than in civil society; preemptive self-defense is disfavored in society, but not in a state of nature.

8. 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 and to create a government. “Natural law” is usually used by the Classical international law writers to mean a set of principles that are found in all human societies.

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) (Chapter 6), 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 usually 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 Rencounters⁹ 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 Varlet¹⁰ 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.

(See Gratian’s treatise in Chapter 2 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, and 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 (Chapter 3).

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

10. [A rascal. — Eds.]

Lethal force in self-defense is also permissible to prevent rape or assault. It was also permitted 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, significantly, 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 noncombatants, 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 Chapter 2.) He echoed the point made 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 Chapter 2.)

The American revolutionaries considered Barbeyrac, Pufendorf, and Grotius to be part of a seamless 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.

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).¹¹

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

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

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 to the various sources in Chapters 2 through 4 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.¹²

12.

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 failed 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 every one 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 failed 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 protected them.

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,¹³ 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 that Thomas Jefferson later restated in the Declaration of Independence. When Burlamaqui’s treatise affirmed the right of pursuing happiness, he stated the right as intimately connected 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.”

The same 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:

13. Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, [The Spirit of Laws](#) (1748).

“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 (*see* Chapter 2) 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 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. Under the Classical view personal self-defense was a fundamental human right, essential to the foundation of international law and order. Is that view persuasive today? If so, why do you think contemporary international law sources (such as many of those *supra* Section A.2) reflect much less concern for individual self-defense than the Classical sources?
3. In a case from the post-World War II war crimes trials of the Japanese military dictatorship, *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), the court stated, "Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense." 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-defense 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"? (Chapter 3.D.5)
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? 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. 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, after a violent death, 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. G.

9. 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 long and deliberate public process, with no claim that the execution is necessary to save a particular innocent life?
10. 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. Is every form of deterrence a form of punishment?
11. 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 later you, should they also have a trial period?
12. 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?

13. 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?
14. 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 (Chapter 2).
15. 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 plausibly considered as a duty owed to God?
16. 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.

- 17. De Vitoria strongly believed in free trade 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 free trade is a human right? If it is, can the would-be traveler use force as a last resort against attempts to exclude him?
- 18. The Classical Founders of international law considered personal self-defense to be the most fundamental of all human rights. Some modern international law agreements, such as the 2001 U.N. Programme of Action, the Nairobi Protocol, and CIFTA (*supra* Section A.2) do not acknowledge any personal right of self-defense. Why are some aspects of modern international law so different from the founding principles of international law?

C. Resistance to Genocide

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

Classical international law, discussed *supra* Section B, supports a general right to resist all forms of tyranny, but does not specifically address genocide. In this Section C, we consider the genocide issue 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)

... A. THE GENOCIDE CONVENTION ...

... Neither the text of the Genocide Convention nor the drafting history provide[s] 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).

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 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 Ministeries 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 applications of 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 *travaux* (drafting history) of the Universal Declaration clearly show that the preamble was explicitly intended to recognize a preexisting human right to revolution against tyranny. 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*.²²¹ 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 U.N. Charter sets on military action which 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.

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).

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

Since the Genocide Convention came into force half a century ago, there has been very little exposition of the meaning of the Convention's affirmative duty on signatory states "to prevent" genocide. Perhaps not entirely by coincidence, very little has actually been done to stop on-going genocides in the last half century.

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" which some states attached to their ratification of the Genocide Convention were legally effective.²²⁷ 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, and so far only, 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).

Yugoslavia had been created by the [Treaty of Versailles](#) in 1919, and 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 U.N. Charter.

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).

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 Milosević).

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 ever 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 U.N. 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 U.N. 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.
- 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 arms control law may bring the state into violation of [the] Genocide Convention, if the arms control law facilitates genocide.
- Therefore, in case of conflict between the arms 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.

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 antigencide arms smuggler, would make the host country complicit in genocide.

B. THE SUDANESE ARMS EMBARGO

[T]he U.N. 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](#), U.N. Doc. S/RES/1591 (Mar. 29, 2005).

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 arms control which 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. Briefly stated, the Protocol requires that parties to the Protocol enact laws requiring that all firearms manufactured in the host country have a serial number and a manufacturer identification.¹⁴ (The United States enacted a similar law decades ago.) Further, ratifying countries must keep registration records of firearms sales and owners, for the purpose of combating international arms

14. [In December 2005, the Protocol was adopted by the U.N. General Assembly, and is commonly known as the International Tracing Instrument. *See supra* Section A.2. — Eds.]

smuggling. The Protocol exempts Communist China from its requirements, even though China is a major international source of illegal firearms (*see* p. 208).

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.” However, even with the Preamble, 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 convention on “small arms” which many people 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 actors” — that is, to anyone not approved by government. [Discussed *supra* Section A.] Should 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 A.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. 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 antifiorearms 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)¹⁵

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 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 are each based on U.N. General Assembly resolutions that have made general statements approving the use of force.
 - 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

15. Cassese wrote a background paper that was published in 2003 by the Small Arms Survey, a gun-control research organization based in Geneva, Switzerland. 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.