The Human Right of Self-Defense

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I. INTRODUCTION

"Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense."[4]

Is there a human right to defend oneself against a violent attacker? Is there an individual right to arms under international law? Conversely, are governments guilty of human rights violations if they do not enact strict gun control laws?

The United Nations and some non-governmental organizations have declared that there is no human right to self-defense or to the possession of defensive arms.[5] The UN and allied NGOs further declare that

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4. *In re* Hirota and Others, 15 ANN. DIG. & REP. OF PUB. INT'L L. CASES 356, 364 (Int'l Mil.. Trib. for the Far East, 1948) (no. 118, *Tokyo* trial) (also stating that under the Kellogg-Briand Pact, a state is the initial judge of the necessity of self-defense against an impending attack, but not the final judge); *see also* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 181 (2d ed. 1994) ("This postulate [from *Hirota*] may have always been true in regard to domestic law, and it is currently accurate also in respect of international law . . . . [T]he right of self-defence will never be abolished in the relations between flesh-and-blood human beings . . . . ").

5. *See infra* text accompanying notes 6, 15 and Parts II–III; *see also* Sami Faltas, Glenn McDonald. & Camilla Waszink, *Removing Small Arms from Society: A Review of Weapons Collection and Destruction Programmes*, Occasional Paper No. 2 (Geneva, Small Arms Survey), at 8, *available at* http://www.smallarmssurvey.org/files/sas/publications/o_papers_pdf/2001-op02-weapons_collection.pdf (last visited Nov. 4, 2007) (stating that "when successful, practical disarmament will tend to reinforce the state's monopoly of force [and] must therefore be accompanied by safeguards against the abuse of this monopoly.").

insufficiently restrictive firearms laws are themselves a human rights violation, so all governments must sharply restrict citiz en firearms possession.[6]

This Article investigates the legal status of self-defense by examining a broad variety of sources of international law. Based on those sources, the Article suggests that personal self-defense is a well-established human right under international law and is an important foundation of international law itself.

Since the 1990s, the United Nations has been focusing increasing attention on international firearms control. UN-backed programs have promoted and funded the surrender and confiscation of citizen firearms in nations around the world.[7] The United Nations subsidized the proponents of an October 2005 national gun confiscation referendum in Brazil.[8] A subcommission of the United Nations Human Rights Council (HRC) has declared that there is no human right to personal self-defense and that extremely strict gun control is a human right which all

6. *See* U.N. Human Rights Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, 58th Sess., *Adoption of the Report on the Fifty-eighth Session to the Human Rights Council*, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 (Aug. 24, 2006), *available at* http://hrp.cla.umn.edu/documents/ A.HRC.Sub.1.58.L.11.Add.1.pdf. [hereinafter U.N. Human Rights Council].

7. *See*, *e.g.*, David B. Kopel, Paul Gallant & Joanne D. Eisen, *Micro-disarmament: The Consequences for Public Safety and Human Rights***,** 73 UMKC L. REV. 969 (2005) (describing efforts to confiscate guns from citizens in Cambodia, Albania, Mali, and other nations).

8. *See* UNESCO, International Programme for the Development of Cooperation, *New Projects Approved 2005: Part III: Latin American and the Caribbean* (UNESCO headquarters: Paris, Mar. 7–9, 2005), at 13–18, *available at* http://portal.unesco.org/ci/en/files/18699/11134898021Latin_America_and_Caribbean_2005__new_projects_approved_.pdf/Latin+America+and+Caribbean+2005++new+projects+approved+.pdf (UNESCO grant to the Brazilian gun prohibition lobby Viva Rio, to promote women's participation in the gun confiscation referendum); *UN highlights Brazil gun crisis*, BBC NEWS, June 27, 2005, *available at* http://news.bbc.co.uk/2/hi/americas/4628813.stm ("The UN has urged lawmakers to approve plans for a referendum in October on whether to ban the sale of firearms . . . . The UN and disarmament groups are using shocking statistics to put pressure on Brazil's parliamentarians."); *Cf. Tip of the Hat*, SMALL ARMS & HUMAN SEC. BULL., Oct. 2004, at 7 (UNESCO awarded a prize to the Brazilian gun prohibition lobby Viva Rio for a campaign to urge Brazilians to voluntarily surrender their guns to the government), *available at* http://www.iansa.org/documents/2005/Bul4English.pdf.

The referendum was defeated. *See Brazilians Reject Gun Sales Ban*, BBC NEWS, Oct. 24, 2005. Rubem Fernandes, the head of Viva Rio, explained what he had learned from the experience: "First lesson is, don't trust direct democracy." Rebum Fernandes, *Lessons From the Brazilian Referendum, Remarks to the World Council of Churches*, (Jan. 17, 2006) *in* WAYNE LAPIERRE, THE GLOBAL WAR ON YOUR GUNS 187 (2006). He also noted that the argument "I have a right to own a gun" became "a very profound matter" in the debate on the referendum. *Id*. Fernandes was speaking at PrepCom 2006, a UN-sponsored meeting to prepare participants for the major UN gun control conference in June–July 2006. Side Events, Prepcom 2006 (Preparatory Committee for the Conference to Review Progress in the Implementation of the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects), United Nations, Jan. 9–20, 2006, *available at* http://www.un.org/events/smallarms2006/prepcom/side-events.html.

governments are required to enforce immediately. [9] The full Human Rights Council is expected to take up the issue and promulgate similar orders.[10] The declaration implements a report for the HRC prepared by Special Rapporteur Barbara Frey.[11]

According to the Frey standard adopted by the United Nations, even the most restrictive gun laws in the United States, such as those in Washington, D.C., or New York City, are violations of current human rights law, because they are insufficiently stringent. For example, a person in New York City who obtains a permit to possess a shotgun may use that shotgun for a variety of purposes (e.g., collecting, shooting clay pigeons, bird hunting, or home-defense), whereas the UN and Frey would require that a license enumerate "specific purposes" for which a gun could be used.[12] In addition, every jurisdiction in the United States is in violation of present human rights law (according to the UN) in that state laws allow law enforcement officials to use deadly force (e.g., a handgun) 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.[13]

The anti-self-defense and anti-firearms ownership mandates from the United Nations are unlikely to be directly adopted as law by Congress or by state legislatures in the United States. Nevertheless, there are a variety of ways, discussed *infra*, in which purported international law mandates can be imposed on American citizens without legislative consent.[14]

Part II of this Article sets forth the basic claims about human rights and firearms made by the United Nations and by international gun prohibition activists. Part III details the report on gun control, self-defense, and human rights prepared by the United Nations Special

9. *See* U.N. Human Rights Council, *supra* note 6.

10. *See infra* text accompanying notes 48–50.

11. For Frey's interim reports, *see* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, 55th Sess., *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. E/CN.4/Sub.2/2003/29 (June 25, 2003) (*prepared by* Barbara Frey), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8de4967bdc9b662dc1256d720052bbf1/$FILE/G0314738.pdf; *see also* Barbara Frey, *Progress Report on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, *delivered to the Sub-Comm'n on the Promotion and Prot. of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2004/37 (June 21, 2004), *available at* http://www1.umn.edu/humanrts/demo/smallarms2004-2.html.

12. *See infra* Part III.C.

13. *See* text at Part III.C., note 48 item 8. The U.N. subcommission's report does not specifically mention self-defense standards for non-government actors. However, item 14 of the subcommission's report (requiring governments to prevent serious human rights violations by private persons) would appear to also mandate a ban on defensive use of firearms by private persons in self-defense against non-lethal threats (e.g., rape), in light of the Frey Report's insistence that such use of force is a serious violation of human rights. *See id.* at item 14; Frey Report, *infra* note 48.

14. *See* text at Part III.C.

Rapporteur on firearms and human rights violations.

Part IV examines the claims of the UN Report in light of the work of the classical founders of international law, including Hugo Grotius. Part V examines those same claims in light of the history of major legal systems which have contributed significantly to the creation of international law, including Roman law, Spanish law, Islamic law, and Anglo-American law. Part VI looks at contemporary constitutions, statutes, and treaties.

Part VII addresses the claim that gun control is already an international human right because it is necessarily implicit in the right to life.

Part VIII investigates whether a right to self-defense would necessarily imply a right to arms. This Article concludes that it must imply such a right, although not necessarily a right to possess *firearms* under all circumstances.

II. THE INTERNATIONAL GUN PROHIBITION AGENDA AND HUMAN RIGHTS

Since the end of the Cold War, many disarmament activists have turned their focus from controlling government-owned arms of mass destruction to prohibiting civilian possession of firearms. Increasingly, firearms prohibition advocates have claimed that firearms prohibition is necessary to protect human rights.[15] The theory posited by the

15. *See*, *e.g.*:

Scholars:

Derek Miller & Wendy Cukier, Can. Dep't of Foreign Affairs and Int'l Trade, *Regulation of Civilian Possession of Small Arms and Light Weapons: Biting the Bullet, Policy Briefing* 16, at 5, *available at* http://www.smallarmssurvey.org/files/portal/issueareas/measures/Measur_pdf (follow "BtB civ possession.pdf" hyperlink) (last visited Dec. 5, 2007) ("[T]he proliferation of weapons, and in particular the issue of civilian possession, is regarded as the leading threat to Human Security. Maintaining a focus on the reduction of small arms death and injury in the context of international Human Rights is widely seen as critical."); WENDY CUKIER, ANTOINE CHAPDELAINE & CINDY COLLINS, GLOBALIZATION AND FIREARMS: A PUBLIC HEALTH PERSPECTIVE 11 (Fall 2000), *available at* http://dsp-psd.pwgsc.gc.ca/Collection/E2-372-2000E.pdf ("The problem of firearms is a concern for a wide range of constituencies . . . . While they focus on different aspects of the problem and solutions appropriate to different contexts, the overarching goal many share is the prevention of firearms injury and death in the context of international humanitarian and human rights."); Carmen Rosa de León-Escribano, Cent. Am. Network for the Constr. of Peace and Human Sec. [IEPADES], *Small Arms and Development in Post Conflict Societies* 10 (July 2006) (citing an International Action Network Against Small Arms (IANSA) document: "There are clear signs which show that small firearms—as instruments of violence—contribute to human and social destruction, endangering human rights and the rule of law and undermining political stability and economic development.").

Non-Governmental Organizations (NGOs):

Joint letter from Int'l Sec. Info. Serv. Eur. et al. to Eur. Parliament, Mar. 15, 2001, http://www.quaker.org/qcea/archive/smallarmsletter.htm ("[T]he international NGO community has

identified the proliferation and misuse of small arms as a serious humanitarian challenge with implications for development, human rights, peace and global justice."); *UN Arms Control Meet Opens with Call for Global Treaty*, AGENCE FRANCE PRESSE, June 26, 2006 (According to Amnesty International Secretary General Irene Khan, "Arms proliferation has facilitated some of the worst human rights tragedies of our times, including massacres, mass displacement, torture and mistreatment."); Thalif Deen, *Disarmament: Does the World Really Need 14 Billion Bullets a Year?*, INTERPRESS SERVICE, June 15, 2006 ("The bullet trade is out of control," says Oxfam, and "it is fueling conflict and human rights abuses worldwide."); Small Arms Working Group [SAWG], *Small Arms and Human Rights*, at 10, Jul. 26, 2006, http://fas.org/asmp/campaigns/smallarms/sawg/2006factsheets/Small_Arms_and_Human_Rights.pdf ("Small arms are used to commit a wide variety of human rights abuses . . . ."); DEBBIE HILLIER & BRIAN WOOD, OXFAM GB & AMNESTY INT'L, SHATTERED LIVES: THE CASE FOR TOUGH INTERNATIONAL ARMS CONTROL, at 24 (2003) ("[T]he easy availability of arms tends to increase the incidence of armed violence, prolong wars once they break out, and enable grave and widespread abuses of human rights."); Friends Comm. on Nat'l Legislation [FCNL], *What is the UN Programme of Action on Small Arms and Light Weapons?*, para. 2, Aug. 7, 2006, http://www.fcnl.org/issues/item.php? item_id=1836&issue_id=46 ("The connection between the growing proliferation of SALW and the usage of these weapons to commit heinous crimes, violate human rights and threaten human security . . . ."); Environmentalists Against War [EAW], *Curb Trafficking of Small Arms and Light Weapons*, para. 10, July 20, 2004, http://www.envirosagainstwar.org/know/read.php?itemid=1666 ("These weapons directly contribute to widespread human rights violations . . . ."); Human Rights Watch [HRW], *Small Arms and Human Rights: A Human Rights Watch Briefing Paper for the U.N. Biennial Meeting on Small Arms*, at 3, July 7, 2003, http://hrw.org/backgrounder/arms/ small-arms-070703.htm (last visited Sept. 8, 2006) ("Small arms facilitate countless human rights abuses and violations of international humanitarian law around the globe."); *Small Arms Survey 2004: Rights at Risk*, SMALL ARMS SURVEY 1 (2004) ("The widespread proliferation and misuse of small arms threatens the realization of basic human rights and security in various ways."); Int'l Action Network on Small Arms [IANSA], *2006: Bringing the Global Gun Crisis Under Control*, at 8, 2006, http://www.iansa.org/members/IANSA-media-briefing-low-res.pdf ("More human rights abuses are committed with small arms than with any other weapon."); Amnesty Int'l, *UN: Oral Statement on Small Arms and Light Weapons*, para. 2, Aug. 15, 2002, www.web.amnesty.org/library/Index/ENGIOR400222002?open&of=ENG-325 ("A wide variety of cases of serious human rights abuse examined by Amnesty International involve the deliberate or reckless misuse of small arms and light weapons"); *2006 Review Conference at risk of failure, Response from IANSA to the President's Non-paper of 3 July 2006*, REVCON NEWS, July 5, 2006, http://www.iansa.org/un/review2006/documents/RevConNewsWednesday5july.pdf ("Illicit trafficking and proliferation of small arms and light weapons fuels gross violations of international human rights law and serious breaches of international humanitarian law."); The Arias Found. for Peace and Human Progress [AFPHP], *The Arms Trade Treaty: No More Arms for Atrocities*, at 3 *available at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT300022003ENGLISH/$File/ACT3000203.pdf (follow ACT300022003ENGLISH hyperlink near document title "no more arms for atrocities") ("The proliferation and misuse of conventional arms—everything from tanks to grenade launchers to hand pistols—fuels poverty, conflict and human rights violations around our world."); Int'l Comm. of the Red Cross [ICRC], *Targeting the Weapons: Reducing the Human Cost of Unregulated Arms Availability*, at 5, June 2005 ("Inadequate controls on arms transfers, combined with the frequent use of weapons in violation of international humanitarian law and human rights, contribute to undermining respect for the law."); World Council of Churches [WCC], *WCC Executive Committee Statement on the Control of Small Arms and Light Weapons*, at 2, Sept. 16, 2005 ("Their presence [small arms and light weapons] fuels conflict, exacerbates abuses of human rights . . . ."); South Asian Movement Against Small Arms, Issue 1, Aug. 2005 ("[T]he proliferation of small arms and light weapons . . . also gives rise to abuse of human rights, strengthens the criminals and instills fear among the innocent.").

Media:

UN World Conference on Small Arms Collapses Without Agreement, AFRICA NEWS, July 7, 2006 ("The Control Arms Campaign has called on governments to establish such a treaty and to agree

disarmament community is that fewer firearms will lead to fewer human rights abuses.

The theory is enthusiastically promoted by the world's leading gun control lobby, the International Action Network Against Small Arms (IANSA), an umbrella network to which almost all national and regional gun control groups belong.[16] IANSA's director, speaking on behalf of the organization, has endorsed the prohibition of possession of a firearm for self-defense.[17] IANSA also works toward the confiscation of all non-governmentally-owned firearms, except for single-shot low-power rifles owned by hunters.[18] Amnesty International and Oxfam work very closely with IANSA, and the three of them have formed a fourth lobbying group

global guidelines for small arms sales to stop weapons fuelling human rights abuses and poverty around the world."); *Empty Rhetoric on Gun Control Means Little to Those in Conflict,* THE IRISH NEWS LTD., June 19, 2006 ("[I]rresponsible arms sales continue to fuel conflicts, undermine development and contribute to countless human rights abuses."); Brian Wood, *A Dirty Trade in Arms*, LE MONDE DIPLOMATIQUE, June 2006, http://mondediplo.com/2006/06/10dirtytrade ("The proliferation of arms, especially small arms, has had a lasting [negative] impact on human rights.").

U.N.:

S.C. Res. 1467, para. 1, U.N. Doc. S/RES/1467 (March 18, 2003), *available at* http://hrw.org/backgrounder/arms/ small-arms-annex-070703.pdf ("The Security Council expresses its profound concern at the impact of the proliferation of small arms and light weapons. . . . These contribute to serious violations of human rights and international humanitarian law, which the Council condemns."); Patricia Lewis, U.N. Inst. for Disarmament Research [UNIDR], *Disarmament Forum: Taking Action on Small Arms*, at 3, Feb. 2006 ("[S]mall arms play a huge role in crime, sexual violence, domestic violence, suicide and human rights abuses such as torture.").

Governments:

Press Release, Inter-Parliamentary Union, Parliamentarians in Nairobi Urge All Parties to Ensure that Food Relief Should Not be Used for Political Ends (May 12, 2006), http://www.ipu.org/press-e/nai9.htm ([T]hey urged parliaments to combat SALW proliferation and misuse as a key element in national strategies on conflict prevention, peace-building, sustainable development, protection of human rights . . . ."); *Malawi Forms NGO to Control Firearms*, AFRICA NEWS, Apr. 27, 2006 (Acting Inspector General of Malawi Police, Often Thyolani: "The availability and spread of these weapons [small arms] is one of the main factors undermining development and fuelling conflict, crime and human rights abuses.").

16. IANSA is headquartered in London.

17. When IANSA Director Rebecca Peters debated Wayne LaPierre, the Executive Vice President of the National Rifle Association at the Oxford Union, LaPierre argued that people should be able to have guns to resist criminals or genocidaires. Peters retorted: "It's not going to be up to each individual person to be like a hero in a movie defending against this threat to freedom." LaPierre touted a NRA advertising campaign which had asked: "[S]hould you shoot this rapist before he cuts your throat?" Peters replied: "Women need to be protected by police forces, by judiciaries, by criminal justice systems. People who have guns for self-defense are not safer than people who don't. . . . [H]aving a gun in that situation escalates the problem." Rebecca Peters & Wayne LaPierre, IANSA, The Great Gun Debate, Debate at King's College (Oct. 12, 2004), http://www.iansa.org/action/nra_debate.htm [hereinafter Peters & LaPierre Debate].

18. *See*, *e.g.*, Peters & LaPierre Debate, *supra* note 17; *Q&A Early Afternoon* (CNN International television broadcast, Oct. 23, 2002) *available at* http://cnnstudentnews.cnn.com/TRANSCRIPTS/0210/23/i_qaa.01.html (Peters states that civilians should not have "rifles that they can kill someone at 100 meters distance, for example. There needs to be a much greater degree of proportionality in the firepower that's available.").

known as "Control Arms."[19]

IANSA and the United Nations work together in support of their common agenda. IANSA is "the organization [sic] officially designated by the UN Department of Disarmament Affairs (DDA) to coordinate civil society involvement to the UN small arms process."[20] On June 26, 2006, the day the United Nations gun control conference opened, UN Secretary-General Kofi Annan welcomed IANSA head Rebecca Peters and re-iterated the UN's support for her efforts.[21] At the conference, IANSA staff served on the delegations of some nations.

The 2006 gun control conference was the follow-up to the UN's first major gun control conference, held in 2001.[22] The conferences were intended to produce a treaty or some other legally binding international instrument. One proposed provision was a ban on the transfer of firearms to "non-state actors", which meant anyone not approved by the national government; examples would include the Kurds in Iraq under the Saddam Hussein regime, rebel groups in Sudan, and the army and navy of Taiwan (which the UN considers to be a province of China).[23] Historically, the "non-state actor" ban would have outlawed aid to anti-Nazi guerillas during World War II, anti-communist rebels during the Cold War, and the American rebels during the War for Independence.[24] Another objective was complete registration of all firearms and all firearms owners in national and international databases.[25] Because of

19. *See*, *e.g.*, HILLIER & WOOD, *supra* note 15.

20. IANSA's 2004 Review—The Year in Small Arms, http://www.iansa.org/documents/2004/iansa_2004_wrap_up_revised.doc (last visited Sept. 27, 2007).

21. *Annan Receives Arms Petition by One-millionth Signer, Vows to Transmit Call Onward*, U.N. NEWS CENTRE, June 26, 2006, *available at* http://www.un.org/apps/news/story.asp?NewsID=18997 &Cr=small&Cr1=arms; *see also* Control Arms, http://www.controlarms.org/events/unreview.htm.

22. Preparatory conferences were held in 2003 and 2005. The post-2001 conferences were held under the title of "The Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects."

23. The U.N. News Centre refers to "Taiwan" as "Taiwan, Province of China." *See Saint Kitts and Nevis Says Taiwan, Province of China, Should Be UN Member*, UN NEWS CENTRE, Oct. 2, 2007, *available at* http://www.un.org/apps/news/story.asp?NewsID=24138&Cr=general&Cr1=debate. The U.N. Statistics Division calls Taiwan a "province" of China. *See* United Nations Statistics Division, "Series by Country: China," http://unstats.un.org/unsd/cdb/cdb_da_itypes_cr.asp?country_code=157. The United Nations Global Youth Leadership Summit expelled two Taiwanese citizens from a 2006 meeting because the United Nations does not recognize Taiwan "as a nation separate from China." Darren Sands & Iris Kuo, "Taiwanese observers asked to leave summit," United Nations Office of Sport for the Development of Peace, *available at* http://www.un.org/youthsummit/journal.asp?page=JournalTues3.

24. *See*, *e.g.*, 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); David B. Kopel, *The UN Small Arms Conference*, 23 SAIS REV. 319 (2003).

25. *See*, *e.g.*, David B. Kopel, *Gunning Against Guns*, NAT'L REV. ONLINE, Aug. 1, 2001, *available at* http://davekopel.com/NRO/2001/Gunning-Against-Guns.htm.

opposition from the United States and some other countries, neither of the conferences achieved their goal, and no treaty or other binding international legal instrument was produced.[26]

Shortly after the end of the 2006 conference, a subcommittee of the United Nations Human Rights Council declared that strict gun control is *already* mandated by international human rights law.[27] Oxfam and Amnesty International have also stated this position.[28]

III. THE FREY REPORT FOR THE HUMAN RIGHTS COMMISSION/COUNCIL

A. The Background of the Creation of the Frey Report

On August 14, 2002, the United Nations Human Rights Commission appointed University of Minnesota Law Professor Barbara Frey as Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons.[29] Frey was already known to the Human Rights Commission since she was an alternate expert member of the U.S. delegation to a HRC subcommission, having been nominated in 2000 to a four-year term by the Clinton administration, which strongly supported UN gun control efforts.

In international organizations, a Special Rapporteur is an expert who is chosen to advise the organization on a particular issue.[30] A Special

26. *See*, *e.g.*, *The UN Small Arms Conference*, *supra* note 24; Nick Wadhams, *U.N. Conference on Arms Ends in Failure*, ASSOCIATED PRESS, July 7, 2006 ("A two-week U.N. conference reviewing efforts to fight the illegal weapons trade ended in failure Friday, with nations too divided on too many contentious issues to agree on the best way to combat a scourge that fuels conflict worldwide."); Lynne Griffith-Fulton, *The Small Arms Review Conference Ends With No Agreement*, 27 THE PLOUGHSHARES MONITOR 3–4 n.3 (2006).
http://www.ploughshares.ca/libraries/monitor/mons06a.pdf (last visited Mar. 8, 2007).

27. *See* U.N. Human Rights Council, *supra* note 6.

28. Under international human rights law, every person has a duty to respect another's right to life. More importantly, states have a duty to take positive measures to prevent acts of violence and unlawful killings, including those committed by private persons. There is growing recognition that states' duties under international human rights law include exercising due diligence to ensure that basic rights—certainly the right to life and security of the person—are not abused by private actors. Where a foreseeable consequence of a failure to exercise adequate control over the civilian possession and use of arms is continued or increased violence, then states might be held liable for this failure under international human rights law. HILLIER & WOOD, *supra* note 15, at 81.

29. U.N. High Comm'r for Human Rights, Sub-Comm'n on Human Rights Res. 2002/25, *The Prevention of Human Rights Violations Caused by the Availability and Misuse of Small Arms and Light Weapons*, ¶ 5, E/CN.4/Sub.2/2003/29 (June 25, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/6d123295325517b2c12569910034dc4c/10a32527edc27cd4c1256c1d0038ee46?OpenDocument.

30. *See*, *e.g.*, Office of the U.N. High Comm'r for Human Rights, *Special Procedures of the Commission on Human Rights, Urgent Appeals and Letters of Allegations on Human Rights Violations*, *available at* http://www.ohchr.info/english/bodies/chr/special/communications%20english.pdf (describing functions of Special Rapporteurs for the Human Rights Commission).

Rapporteur has a duty of "impartiality," at least in theory.[31] The Human Rights Commission's description of the Special Rapporteur's mandate indicated the kind of reports the Commission wanted; the mandate precluded any investigation of whether firearms are ever used to protect human rights or whether the confiscation of firearms (or other restrictions on firearms) are ever enforced in ways which violate human rights. Rather, the Special Rapporteur's sole mission was to detail the link between firearms possession and human rights violations.[32]

As Special Rapporteur, Frey began producing interim papers and studies.[33] On March 16–18, 2005, in her capacity as Special Rapporteur, Frey participated in a multi-day political strategy meeting in Brazil assisting the proponents of an October 2005 referendum to ban the personal possession of firearms in Brazil. The meeting was part of a public relations program for the gun confiscation referendum which was funded by UNESCO.[34] (In the election, 64% of Brazilian voters rejected the gun prohibition referendum.)[35]

31. Office of the U.N. High Comm'r for Human Rights, *Special Procedures Assumed by the Human Rights Council*, *available at* http://www.ohchr.org/english/bodies/chr/special/index.htm.

32. U.N. High Comm'r for Human Rights, *supra* note 29, ¶ 5 (Frey was tasked with "preparing a comprehensive study on the prevention of human rights violations committed with small arms and light weapons . . . ."). "Small arms and light weapons" is a term which includes mortars, machine guns, portable anti-tank weapons, and a variety of other military weapons. SMALL ARMS SURVEY 2002: COUNTING THE HUMAN COST 10 (Peter Batchelor & Keith Krause eds., 2002) ("small arms" are "revolvers and self-loading pistols, rifles and carbines, assault rifles, sub-machine guns, and light machine guns." "Light weapons" are "heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable antitank and anti-aircraft guns, recoilless rifles, portable launchers of anti-tank and antiaircraft missile systems, and mortars of less than 100mm caliber"). Frey, however, wrote only about firearms and presumed that all firearms (including non-military type firearms) were "small arms and light weapons."

33. *See* ECOSOC, Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, 55th Sess., *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. E/CN.4/Sub.2/2003/29 (June 25, 2003) (*prepared by* Barbara Frey), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8de4967bdc9b662dc1256d720052bbf1/$FILE/G0314738.pdf; *Progress Report on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, *supra* note 11.

34. *Brazil . . . Strengthening of Communications Networks and International Partnerships* (International Programme for the Development of Communications, UNESCO), *available at* http://portal.unesco.org/ci/en/file_download.php/53d7121e58db595db8571998a273f592Latin+America+and+Caribbean+2005++new+projects+approved+.pdf. Viva Rio, the Brazilian gun prohibition lobby, receives funding from UNESCO and UNICEF. Viva Rio, "Fight for Peace Sports Centre" (Rio de Janeiro, Brazil, 2004), at 5 *available at* http://www.globalgiving.com/pfil/807/projdoc.doc.

35. *See Brazilians Reject Gun Sales Ban*, BBC NEWS, Oct. 24, 2005. Among the reasons for the defeat were Brazil's traditions of hunting and target shooting; concerns about the notoriously corrupt Brazilian police; the need for self-defense in Brazil's crime-ridden cities, many of which enjoy little protection from the police; and concerns about corruption in the regime of President Lula da Silva, who was the main proponent of the referendum.

B. The Human Rights Commission

In December 2005, the United Nations abolished the Human Rights Commission. The Commission had been widely criticized for inattention to human rights. The Human Rights Commission had encouraged terrorist bombings of Israeli civilians,[36] refused to pass resolutions criticizing human rights violations perpetrated by the genocidal regime in Zimbabwe,[37] and refused to condemn the Libyan and Sudanese slave trade.[38] Mary Robinson, the UN's High Commissioner for Human Rights, helped allow the Durban Conference Against Racism to become a forum for aggressive and vicious anti-Semitism, and to fail to mention the existence of—let alone condemn—the current slave trade in Africa.[39] In 2005, the Commission was chaired by a representative of the Libyan dictatorship of Moammer Qaddafi, [40] a regime which, ever since

36. A few days after thirty Israelis celebrating the Passover Seder were murdered by a terrorist bomber, the Human Rights Commission adopted a resolution endorsing "all available means including armed struggle" against Israelis. *See* Anne Bayefsky, *How the U.N.'s Human Rights Investigations Do Yasser Arafat's Dirty Work*, N.Y. SUN, Apr. 29, 2002. The resolution was understood as endorsing suicide bombing of civilians; hence, Britain and Germany, which often abstain on anti-Israel resolutions, voted against the resolution. The resolution passed by 40 to 5. *See* DORE GOLD, TOWER OF BABBLE: HOW THE UNITED NATIONS HAS FUELED GLOBAL CHAOS 41–42 (2005).

37. *See* Brett D. Schaefer, *No Funding for U.N.'s Farcical Rights Council*, BALT. SUN, Oct. 10, 2007, *available at* http://www.baltimoresun.com/news/opinion/oped/bal-op.un10oct10,0,1259104.story; Joseph Klein, *They Deserve Each Other*, FRONTPAGEMAGAZINE.COM, Apr. 10, 2006, http://www.frontpagemag.com/Articles/Read.aspx?GUID={F4D00D8E-263D-4AE6-98DB-101F4EDAF2B0} ("Iran hopes to emulate the example of its fellow repressive regimes like Sudan, Zimbabwe and Cuba who have avoided challenges to their human rights records in the past by taking over the machinery of the Human Rights Council's predecessor, the UN Commission for Human Rights.").

38. Nile Gardiner & Baker Spring, *Reform the United Nations*, Oct. 27, 2003, *available at* http://www.heritage.org/Research/InternationalOrganizations/BG-1700.cfm; Letter from Tommy Calvert, Jr., Chief of External Operations, Abolish: The Anti-Slavery Portal Jan. 27, 2003, http://ga0.org/freedom_action/alert-description.html?alert_id=2002698.

39. The World Conference Against Racism began to go off-track when the February 2001 pre-conference in Tehran turned into an anti-Israel fest, and Ms. Robinson applauded the conference's results. As the Durban conference neared, Robinson sided with the Arab dictatorships in equating Israel with Nazi Germany. Under Robinson's supervision, the Tehran pre-conference barred participation by Jewish, Baha'i, and Kurdish NGOs. Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER F. OF WORLD AFF. 31 (2002). Ms. Robinson is a strong advocate of the U.N.'s gun control campaign. *See Interview by Control Arms with Mary Robinson, Honorary President, Oxfam Int'l*, http://www.controlarms.org/famous_faces/ mary_robinson.htm (last visited Sept. 28, 2007); *Campaign Launched to Control Small Arms Trade*, THE DAILY STAR, Jan. 18, 2004, http://www.thedailystar.net/2004/01/18/d40118130381.htm.

40. Najat Al-Hajjaji, the Libyan ambassador to the United Nations. One of the best-known HRC's Special Rapporteurs is Jean Ziegler, Special Rapporteur on the Right to Food. Mr. Ziegler is also vice president of North-South XXI, the organization that bestows the "Moammar Khaddafi Human Rights Prize." Mr. Ziegler won the $250,000 prize himself in 2002, sharing the award that year with French holocaust denier Roger Garaudy. U.N. Watch, *Jean Ziegler's Campaign Against America: A Study of the Anti-American Bias of the U.N. Special Rapporteur on the Right to Food*,

Qaddafi's coup in 1969, has had one of the worst human rights records in the world.

Given the Human Rights Commission's complicity with genocidaires, terrorists, and slave-traders, and given that some Commission member governments are state sponsors of genocide, terrorism, and slave-trading,[41] those governments' interest in appointing a Special Rapporteur dedicated to gun prohibition was consistent with those governments' pragmatic interest in preventing resistance by the victims of genocide, slave-capturing, and state terrorism.[42]

The Human Rights Commission's reputation as an adversary of human rights harmed the UN's reputation, and finally led Secretary-General Kofi Annan to ally, at least publicly, with reform advocates.[43] In March 2006, the old UN Human Rights Commission was replaced by the new UN Human Rights Council. As with the old Commission, the new Council did not require that members have a democratic form of government, or meet any tangible standards regarding human rights.[44] Members of the Council in 2007 included dictatorships such as Cuba, Saudi Arabia, Tunisia, Russia, China and Pakistan.[45] The new Human

Oct. 2005, http://www.unwatch.org/site/c.bdKKISNqEmG/b.1289203/apps/s/content.asp?ct=1760293; *see also* U.N. Watch, *Switzerland's Nominee to the UN Human Rights Council and the Moammar Khaddafi Human Rights Prize*, June 20, 2006, http://www.unwatch.org/ziegler/ (follow "Exposed: Jean Ziegler & the Khaddafi Prize").

41. *See supra* text accompanying notes 36 –40; *see infra* text accompanying notes 43–47.

42. For one notable example of the type of resistance that successful gun confiscation would prevent, *see* Vahram Leon Shemmassian, The Armenian Villagers of Musa Dagh: A Historical-Ethnographic Study, 1840–1915 (1996) (unpublished Ph.D. dissertation, UCLA) (on file with authors) (detailing successful use of firearms by Armenian villagers in Musa Dagh, in modern-day Turkey, in 1915, to resist mass murder by the Ottoman Empire).

43. *E.g.*, Kofi Annan, Office of the Spokesman for the U.N. Secretary-General, Sec'y-Gen.'s Address to the Comm'n on Human Rights,, Apr. 7, 2005, *available at* http://www.un.org/apps/sg/sgstats.asp?nid=1388 ("We have reached a point at which the Commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole, and where piecemeal reform will not be enough."); Mark P. Lagon, Deputy Assistant Secretary for International Organization Affairs, United States State Department, The UN Commission on Human Rights: Protector or Accomplice?, Testimony before the House International Relations Committee, Subcommittee on Africa, Global Human Rights and International Operations, Apr. 19, 2005, *available at* http://www.state.gov/ p/io/rls/rm/44983.htm.

44. Human Rights Council, G.A. Res. 60/251, ¶ 8, U.N. Doc. A/60/L.48 (Apr. 3, 2006), (declaring that votes for membership in the Council "shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto" and that Council members shall "uphold the highest standards in the promotion and protection of human rights"). That the language is of no practical significance in keeping extreme abusers of human rights off the Council is demonstrated by election of Cuba, Saudi Arabia, and other extreme violators of human rights to the Council. Even a proposal to bar membership to governments which are under Security Council sanctions for human rights abuses were rejected. Eye on the U.N., *Summary of the Outcome of the Human Rights Commission Negotiations: Nothing to Show,* http://www.eyeontheun.org/un-reform.asp?p=77 (last visited Nov. 11, 2007).

45. Brett D. Schaefer, *The United Nations Human Rights Council: Repeating Past Mistakes,*

Rights Council appears to often follow the same path as the old Human Rights Commission.[46] For example, like the Commission, the Council identifies a litany of human rights abuses allegedly perpetrated by Israel, but never any abuses perpetrated by Israel's adversaries. In the Council's first year of operation, the only country which was named as actually being engaged in human rights violations was Israel.[47]

C. The Frey Report

Having been selected as Special Rapporteur by the old Human Rights Commission, Frey delivered her final report to the new Human Rights Council on July 27, 2006.[48] On August 24, 2006, the UN Human Rights Council's subcommission on the Promotion and Protection of Human Rights endorsed the Frey report, and announced that all national governments were required by international human rights law to implement various listed gun control provisions; the subcommission recommended that the full Human Rights Council also adopt the report and issue a similar mandate.[49] Of course the subcommission has little power to enforce its wishes directly, but the declaration gives national government officials, including courts, considerable support to promote restrictive gun laws which are, according to the UN, mandated by

Address Before the U.S. House of Representatives, Committee on International Relations, Sept. 6, 2006, http://www.heritage.org/Research/WorldwideFreedom/hl964.cfm. The Council has forty-seven members, of which only half (twenty-four) are rated "free" by Freedom House. Freedom House, *Freedom in the World 2006: Selected Data from Freedom House's Annual Global Survey of Political Rights and Civil Liberties*, Sept. 1, 2006, http://www.freedomhouse.org/uploads/pdf/charts2006.pdf.

46. Schaefer, *supra* note 45.

47. *Id.*; U.N. HUMAN RIGHTS COUNCIL, *Report to the General Assembly on the First Session of the Human Rights Council*, U.N. Doc. A/HRC/1/L.10/Add (July 5, 2006) (prepared by Musa Burayzat), *available at* http://www.ohchr.org/English/bodies/hrcouncil/ docs/L.10add.1.doc; U.N. HUMAN RIGHTS COUNCIL, *Report of the Human Rights Council on its Second Special Session*, U.N. Doc. A/HRC/S-2/2 (Aug. 11 2006), *available at* http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.S-2.2_en.pdf (condemning Israel for its tactics in the war in Lebanon, but not criticizing any of the numerous violations of international human rights law by Hezbollah, including the use of civilians as human shields, and the deliberate targeting of Israeli civilians for terrorist missile attacks); Brett D. Schaefer, *The United Nations Human Rights Council: A Disastrous First Year and Discouraging Signs for Reform*, Sept. 5, 2007, http://www.heritage.org/Research/InternationalOrganizations/tst072607a.cfm (stating that seventy percent of the HRC's resolutions in its first year were aimed at Israel; John Duggard, the Council's Special Rapporteur for human rights in the "occupied Palestinian territory" considers his mission to include reporting only on human rights abuses by Israelis, but not by Arabs).

48. *See* U.N. HUMAN RIGHTS COUNCIL, Sub-Comm'n on the Promotion and Prot. 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), *available at* http://www.geneva-forum.org/Reports/20060823.pdf. [hereinafter *Frey Report*].

49. U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights in Geneva, *supra* note 6.

international law. The full Human Rights Council is scheduled to take up the issue, and indications at the time of this writing suggest that the full Council will ratify most or all of Frey's report. The Chairman of the full Human Rights Council has already announced his enthusiastic support for the Frey Report, the subcommission's adoption of the report, and the prospect of using the Human Rights Council to advance a worldwide gun control mandate.[50]

The Frey Report, then, is not simply a scholarly paper that will be filed away in a United Nations library. It is an effort to establish a new norm of international human rights law, and this effort to establish the new norm is supported by the United Nations Human Rights Council, as one aspect of the UN's far-ranging support for restrictive and confiscatory firearms policies.

The United Nations General Assembly began drafting an international Arms Trade Treaty in late 2006. A stated purpose of the Arms Trade Treaty is to prohibit arms transfers which violate human rights.[51] As interpreted by the HRC and Frey, every firearms sale in the United States would be a human rights violation; this is because even the most restrictive jurisdictions in the United States—such as Washington, D.C., or New York City—do not meet the minimum Frey/HRC gun control standards.[52]

50. Luis Alfonso de Alba, Centre for Humanitarian Dialogue, *The Human Rights Council and Efforts to Reduce Small Arms and Light Weapons Related Violence*, *in Small Arms and Human Security Bulletin*, HD, 3–4, Nov. 2006–Feb. 2007, http://www.hdcentre.org/Small%20Arms%20and%20Human%20Security%20Bulletin (link to issue 8).

51. Arms Trade Treaty, How Would an ATT Work? http://www.armstradetreaty.org/att/howwould.php (last visited Nov. 4, 2007). The Arms Trade Treaty Steering Committee includes IANSA itself, and is dominated by IANSA members, such as the Brazilian gun prohibition lobby Viva Rio, Oxfam, and Amnesty International. Arms Trade Treaty Steering Committee, About Us, http://www.armstradetreaty.org/att/aboutus.php (last visited Nov. 4, 2007). The Steering Committee's "About Us" page lists only two "Useful websites": IANSA and Control Arms (a prohibitionist consortium of IANSA, Oxfam, and Amnesty International). Arms Trade Treaty Steering Committee, About Us.

52. For example, New York City and Washington, D.C., allow persons to acquire long guns (rifles or shotguns) to be used for any and all lawful purposes. (D.C. law allows armed self-defense in business premises, but not in the home; New York City allows self-defense in the home or in business premises.) The New York and D.C. laws violate the HRC Sub-Commission requirement that "Possession of small arms shall be authorized for specific purposes only; small arms shall be used strictly for the purpose for which they are authorized." U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights in Geneva, *supra* note 6.

The HRC Sub-Commission requires that gun possession be allowed only with a license that must be periodically renewed. U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights in Geneva, *supra* note 6. Although all American states require some form of background check for retail purchases of firearms (and some have a similar requirement for informal private transfers, such as gifts) only a few American states require a license for handgun possession; few states require a license for long gun possession. Hardly anywhere, except in New York State for handguns, does the licensing requirement inquire (as the HRC demands) into the applicant's "purpose" for wanting a

With the proposed Arms Trade Treaty being vigorously promoted by IANSA and its allied delegations at the United Nations, the Frey/HRC declarations about human rights and firearms will likely be incorporated into the new treaty.

While it is unlikely that a severely restrictive international gun control treaty could be ratified by two-thirds of the United States Senate, there are many mechanisms by which unratified treaties can work their way into U.S. law. For example, some eminent international disarmament experts have taken the position that the president of the United States may announce that a treaty has entered into force, and thereby become the law of the United States even if the U.S. Senate has never voted to ratify the treaty.[53] The United States Supreme Court has cited unratified treaties (and even an African treaty), and various contemporary foreign law sources, as guidance for interpreting United States constitutional provisions.[54] Likewise, other scholars, writing in a UN publication, argue that United Nations gun control documents (notwithstanding the fact that the documents, on their face, have no binding legal effect) represent "norms" of international law.[55] Attorney Joseph Bruce Alonso has detailed how the theories being developed by

gun.

The HRC Sub-Commission states that "Governments should take steps to encourage voluntary disarmament." U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights in Geneva, *supra* note 6. Some American cities occasionally encourage disarmament, by promoting "buy-back" programs in which people receive cash or some other benefit for surrendering their guns. But the much more common program is for American governments to encourage armament, by running hunter safety education and other programs encouraging people to learn how to use firearms safely.

While all American states require safety training in order to acquire a hunting license, and most states require safety training in order to obtain a permit to carry a concealed handgun for protection in public places, very few states require a safety test or formal training to possess a handgun, and almost none impose a test or training requirement for long guns. The HRC Sub-Commission states that safety training should be mandatory for possession of any gun. U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights in Geneva, *supra* note 6.

53. Baker Spring, *Weapons of Mass Destruction, Current Nuclear Proliferation Challenges,* Sept. 26, 2006, http://www.heritage.org/Research/NationalSecurity/hl968.cfm (discussing Weapons of Mass Destruction Comm'n, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms*, June 1, 2006, http://www.wmdcommission.org/files/Weapons_of_Terror.pdf).

54. *E.g.*, Roper v. Simmons, 543 U.S. 55 (2005) (rejecting a U.S. Senate reservation to the ratification of the International Covenant on Civil and Political Rights; citing the United Nations Convention on the Rights of the Child, which the United States has not ratified, and the African Charter on the Rights and Welfare of the Child); Grutter v. Bollinger, 539 U.S. 306 (2003) (Ginsburg, J., concurring) (citing the never-ratified Convention on the Elimination of All Forms of Discrimination against Women); Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (citing European court cases, and favorably citing an amicus brief filed by Mary Robinson, a gun prohibitionist who promoted anti-Semitic propaganda at the U.N. Durban Conference on Racism, *see* Lantos, *supra* note 39); Atkins v. Virginia, 536 U.S. 304 (2002) (citing the European Union's position on capital punishment).

55. Nadia Fischer, *Outcome of the United Nations Process: The Legal Character of the United Nations Programme of Action*, *in* ARMS CONTROL AND DISARMAMENT LAW at 165–66 (2002).

IANSA and its allies would allow American manufacturers, governments, or gun owners to be sued in foreign courts.[56]

D. No Right of Self-Defense

The most startling of the claims in the Frey/HRC report is that there is no human right of self-defense. She states:

> 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.[57]

Frey specifically cites, and rejects, an article arguing that there is a human right of self-defense against genocide.[58] Elsewhere, she has, in accord with the IANSA position, stated that "It is the State that must be responsible—and accountable—for ensuring public safety, rather than civilians themselves."[59]

Frey then argues that a state's failure to restrict self-defense is itself a human rights violation. According to Frey, a government violates 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."[60] Thus, firearms "may be used defensively only in the most extreme

56. Joseph Bruce Alonso, *The Second Amendment and Global Gun Control*, 15 J. ON FIREARMS & PUB. POL'Y. 1 (2003).

57. *Frey Report*, *supra* note 48, ¶ 21.

58. *Id.* at 16 n.14 (discussing David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275 (2006) ("The Universal Declaration of Human Rights affirms the existence of a universal, individual right of self-defense, and also a right to revolution against tyranny. . . . Taken in conjunction with Anglo-American human rights law, the human rights instruments can be read to reflect a customary or general international law recognizing a right of armed resistance by genocide victims.").

59. *Reducing Gun Violence, Improving Security: National Arms Control Efforts*, SMALL ARMS AND HUMAN SECURITY BULLETIN, April (Center for Humanitarian Dialogue, Geneva, Switz.), Apr. 2005.

60. *Frey Report*, *supra* note 48, ¶ 26 (citation markers omitted):

"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."

circumstances, expressly, where the right to life is already threatened or unjustifiably impinged."[61] Frey also states that law enforcement officials may only use firearms in similar circumstances.[62]

In other words, it is a human rights violation for a state to allow its citizens or its law enforcement officers to use firearms to protect victims of rape, robbery, or mayhem. As this paper will detail *infra*, in Parts IV, V, and VI, Frey's hyper-narrow conditions on permissible self-defense—and her denial of the existence of a human right to self-defense—are inconsistent with a long and well-established tradition of human rights law.

The issue of whether international law mandates highly restrictive gun control, as Frey and the HRC claim, is discussed in Part VII. Then, Part VIII addresses the related question of to what extent, if any, an international right of self-defense would imply a right to some type of arms, or to firearms.

IV. THE FOUNDERS OF INTERNATIONAL LAW

Regarding the vast body of non-treaty international law, Frey offers a throwaway line: "No international human right of self-defence is expressly set forth in the primary sources of international law: treaties, customary law, or general principles."[63] Such assertion is incorrect.

Frey's claim that non-treaty sources of international law do not recognize a right of self-defense is unsupportable when those sources are examined. In fact, *the* fundamental "general principle" of international law is the personal right of self-defense—as shall be detailed.

One source of international law is the opinion of leading scholars.[64] During the classical period of international law, the opinion of scholars was perhaps the most important source of international law, since there were few treaties of broad applicability.

61. *Frey Report*, *supra* note 48, ¶ 27 (citation markers omitted):

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.

62. *Id.* ¶¶ 28–29.

63. *Id.* ¶ 21.

64. *See*, *e.g.*, Statute of the I.C.J., art. 38, § 1(d) (The International Court of Justice shall apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

We begin this survey with the first international law treatise, from Italy in the fourteenth century.[65] We then follow the development of international law in the treatises of the great Spanish and Italian scholars through the early seventeenth century.

Dutchman Hugo Grotius published the greatest and most influential treatise of international law in 1625.[66] It remained of preeminent importance even in the early twentieth century.

Second only to Grotius's *magnum opus* was Samuel Pufendorf's 1674 eight-volume work.[67] Most of the international law treatises were written in Latin, the universal second language of educated persons in Europe and the Americas. Both Grotius and Pufendorf became even more influential thanks to the French translations, with copious annotations, by Jean Barbeyrac. The Barbeyrac editions became the standard editions of Grotius and Pufendorf, and the foundation for English translations.

The 1725 treatise of Switzerland's Emmerich de Vattel is generally considered to complete the trilogy of the three classic works of international law.[68] Another Swiss scholar, Jean-Jacques Burlamaqui was notably influential, especially among the American Founders.[69]

Among all the scholars, we see some consistent themes: personal self-defense is an essential human right. Self-defense is likewise an essential foundation of international law, as the rules and limits of personal self-defense were scaled up to international application, with appropriate modifications.

The scholars were highly concerned with shaping international law so as to impose rules on the conduct of war. The code of chivalry had once provided some limits on warfare (such as not targeting civilians), but as warfare passed from the hands of armored, aristocratic knights to large mercenary armies, warfare became more brutal, most notably in the Thirty Years War, which devastated German civilians.

The great international law scholars succeeded, as warfare in the eighteenth century was fought according to standards which were more respectful of the rights of non-combatants than were the wars of the

65. "*Multa ignoramus quae nobis non laterent, si veterum lectio nobis esset familiaris*." (We are ignorant of many things that would not be hidden from us if the readings of old authors were familiar to us.) Arthur Lyon Cross, *English History and the Study of English Law*, 2 MICH. L. REV. 649, 652 (1904) (quoting the Roman philosopher, Macrobius); The Case of Marshalsea, 10 COKE REP. 68, 73 (E. & R. Nutt & R. Gosling, 1738) (1614) (quote rendered as "Quod multa ignoramus quae nobis non laterent si veterum lectio fuit nobis familiaris.").

66. *See infra* Part IV.B.1.

67. *See infra* Part IV.B.2.

68. *See infra* Part IV.B.3.

69. *See infra* Part IV.C.2.

preceding century. The scholars changed the way that governments behaved—convincing the governments that they had a *legal* obligation to constrain the conduct of their militaries; the way the scholars succeeded was by building a system of international law in which the right of personal self-defense was the cornerstone.

A. Before Grotius

1. Giovanni da Legnano

Hailed as "a second Aristotle," the fourteenth century Milanese scholar Giovanni da Legnano authored "the earliest attempt to deal, as a whole, with the group of rights and duties which arise out of a state of War."[70] Legnano was no Aristotle, but he may justly be regarded as the scholar who began the systematic analysis of international law which has continued to the present.

Legnano classified wars into different categories, including "universal corporeal war" (nation against nation), "reprisal" (a government taking revenge against foreigners for harm done to one of its subjects), and "particular war" (self-defense).[71] Like the scholars in the succeeding centuries, Legnano saw no fundamental difference between individual violence and government violence. To be sure, there were important distinctions among the various categories of war, but all types of fighting were simply variants on the same theme.

As with most scholarship of the time, Legnano's principal sources were Roman law,[72] the Bible, other philosophers, and logic.

According to Legnano, "self-defense proceeds from natural law, and not from positive law, civil or canon."[73] While positive law did sanction self-defense, self-defense was not an artificial creation of positive law,

70. Thomas Erskine Holland, *Introduction* to GIOVANNI DA LEGNANO, DE BELLO, DE REPRESALIIS ET DE DUELLO ix (Thomas Erskine Holland ed. 1917) (1360) [hereinafter LEGNANO]. Legnano is a city in northern Italy, near Milan. For many of the authors discussed in this Part, the author's "name" is a combination of a given name (e.g. "Giovanni") and a geographical location indicating where the author is from (e.g., "da Legnano"). The geographical location is not really a "name" in the modern sense; nevertheless, we follow the convention of many authors in using the geographical appellation as if it were a "last name" in modern usage.

71. LEGNANO, *supra* note 70, at 217.

72. *See* discussion *infra* Part V.C.

73. LEGNANO, *supra* note 70, at 278. "Positive law" is law formally created by a government or governments. The works of the founding classical authors have been reprinted many times, in many different editions. We recognize that not all present or future readers will be using the same printed editions which we have used. Some readers may also wish to consult editions written in other languages. Thus, the page numbers which we use in our pinpoint cites may not be the page numbers in the editions which some readers may use.

but rather was an inherent instinct.[74]

Although the fourteenth century world was strictly hierarchical, Legnano allowed for self-defense against one's superior, or even against a judge, if it were clear that the defender was the victim of an unprovoked violent attack.[75] Even a slave could defend his own life against a master, because the law did not allow masters to kill their slaves.[76]

Self-defense is lawful, wrote Legnano, not only in defense of life, but also in defense of lawfully possessed property,[77] with deadly force if necessary.[78] The principle of self-defense allows a person to come to the aid of a relative or friend whose person or property is being attacked.[79] Aiding others is not compulsory, however, unless a person can do so safely.[80]

Notably, a victim is not required to use only the precise level of force that his assailant uses: "suppose a strong and vigorous man strikes me with his fist, and I am a poor fellow who cannot stand up to him with the fist. May I defend myself with a sword?" Legnano answered in the affirmative.[81]

2. Honoré de Bonet and Christine de Pisan

Honoré de Bonet's *The Tree of Battles* popularized Legnano's ideas in a simpler form.[82] Like many other international law writers, Bonet was very concerned with curbing the tendency of soldiers to victimize non-combatant peasants and other non-combatants.[83]

In the hierarchical world of the Middle Ages, Bonet showed the primacy of the right of self-defense by explaining that subordinates could rightfully defend themselves against their superiors: a serf against his lord, a monk against his abbot, a son against his father; to fail to defend oneself against a deadly attack would be tantamount to suicide, and

74. *Id.*
75. *Id.* at 289.
76. *Id.* at 291.
77. *Id.* at 297.
78. *Id.* at 299–300.
79. *Id.* at 294–95.
80. *Id.* at 295.
81. *Id.* at 303.
82. HONORÉ BONET, THE TREE OF BATTLES (G.W. Coopland trans., Harvard Univ. Press 1949) (late 14th century).
83. *Id.* at 188–89 (arguing that traditional practices should be enlarged regarding non-combatants having a right to safe conduct passage during war, regarding the protection of all animals used for tilling the soil, and that farm laborers should have the same immunity from military attack as does the farmer owner).

would lead to damnation.[84] Of course it was permissible to defend one's wife.[85] More generally, the defense of the innocent needed no license from the sovereign.[86] Helping a third person who is the victim of a potentially homicidal attack was allowed, but not required.[87]

The Founding Mother of international law, Christine de Pisan (1364-1430), spread the ideas of Legnano and Bonet further.[88] Pisan's father was an Italian scholar who was called to join the court of France's King Charles V; her father ensured that she received a broad and deep education, of the type that at the time was only provided to boys.[89] After her husband died when she was only twenty-five years old, she made herself the first woman to support herself by writing.[90] She wrote a variety of works of fiction and non-fiction, which extolled heroic women and women's rights to self-determination.[91]

In 1409 she penned *Le Livre des Faits d'Armes et de Chevalrie* (The Book of Feats of Arms and Chivalry).[92] Later in the century, William Caxton translated the book into English. Because Pisan and Bonet were writing in a vernacular language (French), their ideas were accessible to a larger audience than the Latin-reading élites who were the main audience for other scholars. The English translation of Pisan further magnified her influence.

Le Livre des Faits d'Armes et de Chevalrie was written for knights, and included advice about military strategy and tactics (mainly based on Roman sources), as well as standards for the legitimate conduct of warfare—particularly the imperative not to deliberately harm non-combatants. Pisan affirmed that a knight could defend himself, including with deadly force, for "a man in deffense is permytted to hurt another", since "Iuste deffense" was "preuyleged."[93] She rejected the idea that a victim could be prosecuted for using deadly force just because the

84. *Id.* at 170.

85. *Id.* at 166.

86. *Id.* at 137.

87. *Id.*

88. CHRISTINE DE PISAN, THE BOOK OF FAYETTES OF ARMES AND OF CHYVALRYE (A.T.P. Byles, ed., William Caxton trans., Oxford Univ. Press 1932) (1409).

89. A.T.P. Byles, *Introduction* to CHRISTINE DE PISAN, THE BOOK OF FAYTTES OF ARMES AND OF CHYVALRYE, at xi (A.T.P. Byles ed., 2002).

90. *Microsoft Encarta Online Encyclopedia*, s.v. "Christine de Pisan," http://encarta.msn.com/text_761553009__0/ Pisan_Christine_de.html (last visited Nov. 4, 2007).

91. *Id.* (discussing ÉPÎTRE AU DIEU D'AMOUR [LETTER TO THE GOD OF LOVE] (1399) (rejecting courtly love conventions which idealized and falsified women's nature); BOOK OF THE CITY OF LADIES (1405) (biographies of heroic women from antiquity and from Christian history; arguing that women are as intelligent as men, are not blameworthy for rape, and can be great warriors); DITIÉ EN L'HONNEUR DE JEANNE D'ARC [SONG IN HONOR OF JOAN OF ARC] (1429)).

92. Byles, *supra* note 89, at xii.

93. PISAN, *supra* note 88, at 211.

government claimed that the assailant's attack was not intended to be deadly.[94]

3. Francisco de Victoria

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 which 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 Victoria (1486–1546) was selected to occupy the most important position in the University.[95] He was chosen, in accordance with the custom of the time, by a vote of the students.[96] As one of Victoria'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."[97]

Victoria came from the Dominican Order—which governed itself through democratic, representative procedures, according to procedures in the Order's written constitution.[98] During the period between the destruction of the Roman Republic by Julius Caesar in the first century BC, and the founding of the Dominicans in the thirteenth century AD, 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.

94. *Id.* at 211–12.

95. Ernest Nys, *Introduction* to FRANCISCO DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES 69 (Ernest Nys ed., John Pawley Bates trans., William S. Hein & Co. 1995) (1532). An important predecessor of Victoria was Alfonso Tostado, a leading Spanish theologian and canonist of the fifteenth century. He addressed many topics, including just war. Tostado wrote that: "in a just war everything that a man can seize becomes the property of the captor, both by divine law and by the Law of Nations, and it is just to kill; but an unjust war does not differ from brigandage." *Id.* at 63. Except for the requirement that a war be just, Tostado set no limits on how the war be conducted, save that there must be no "violation of truth." *Id.* As a modern commentator explains, Tostado saw personal self-defense and national self-defense as essentially identical: "The author has before his eyes, we must point out, not only public war, but also private war, when it is conducted in accordance with the rules laid down by the law of the country." *Id.*

96. JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS 73 (Oxford University Press 1934).

97. *Id.*

98. *Id.* at 275–80 (citing ERNEST BARKER, THE DOMINICAN ORDER AND CONVOCATION: A STUDY OF GROWTH AND REPRESENTATION IN THE CHURCH DURING THE THIRTEENTH CENTURY (1913)).

University lectures were open to the public, and Victoria attracted huge audiences of students and laymen. He quickly became known as the best teacher in Spain.[99] He was the founder of the "celebrated school of Salamanca": a group of Spanish scholars, at the University of Salamanca and other Spanish universities, who applied new insights to the Scholastic system of philosophy.[100] (Scholasticism, a dialectical methodology for academic inquiry, had been developed centuries before by Thomas Aquinas and other scholars.)

Victoria had been educated in Paris, and, as an eminent Dominican scholar, he was part of a continent-wide community of Dominican intellectuals. Accordingly, Victoria was an internationalist. In addition, "Victoria 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."[101]

Francisco de Victoria's classroom became "the cradle of international law."[102] "Victoria proclaimed the existence of an international law no longer limited to Christendom but applying to all States, without reference to geography, creed, or race."[103]

Victoria was a key source for Grotius[104] as transmitted via the Spanish legal scholars Ferdinand Vasquez and Diego Covarruvias.[105]

The Spanish conquest of the New World impelled the sixteenth-century's scholarly inquiry into international law. Many Spaniards were intensely concerned with whether the conquests had been moral and legal. Indeed, it is to the credit of Spain that many of its leading intellectuals and scholars strongly denounced the abuse of Indians and urged that Spanish policy conform to international law. The actual

99. *Id.* at 95.

100. Nys, *supra* note 95. The earlier Scholastics, including Aquinas, argued for a right of personal defense, and for a right to community self-defense to overthrow a tyrant. *See* David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 519 (2006). Another leading Salamancan was the Jesuit Juan de Mariana (1536–1624). Today, Spain's leading liberal think tank is named for him, the Instituto Juan de Mariana. (www.juandemariana.org). In 1599, Mariana wrote *De Rege et Regis Institutione* (The King and the Education of the King) which elaborated the right of popular revolution against tyrants. J.H.M. Salmon, *Catholic Resistance Theory, Ultramontism, and the Royalist Response, 1580–1620*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700, at 75–77 (J.H. Burns ed., 1996) (citing 2 JUAN DE MARIANA, DE REGE ET REGIS INSTITUTIONE, at ch. 6 (1599)).

101. SCOTT, *supra* note 96, at 280.

102. *Id.* at 75.

103. *Id.* at 10*a*–11*a*. In Spanish, "Victoria" is the proper spelling for the man in general (e.g., "Victoria was very intelligent"), while "Vitoria" is the spelling for discussion of him as a theologian or jurist (e.g., "Vitoria developed more sophisticated answers to some of the questions raised by Thomas Aquinas."). *Id.* at 70. To avoid confusion, this Article uses "Victoria" (except when a direct quote or formal citation uses "Vitoria").

104. *See* discussion *infra* text accompanying notes Part IV.B.1.

105. Nys, *supra* note 95, at 98.

behavior of the Spanish government in the New World was hardly admirable on the whole, but Spain was far ahead of France, England, and other colonial powers, because Spain at least had a group of influential scholars who raised the right questions—and who sometimes affected the course of government policy.

The issue of treatment of the Indians had been raised at the Spanish court of Queen Isabella as early as 1494; a special commission of theologians and canonists had actually convinced the Queen of the legal and moral necessity of a humanitarian policy, but the Queen eventually yielded to the demands of colonists who insisted on unfettered power of exploitation.[106]

The debate continued in Spain during ensuing decades, leading to Francisco de Victoria's 1532 treatise *De Indis* (On the Indians).[107] The first two sections of the treatise demolished 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. Victoria wrote that heretics, blasphemers, idolaters, and pagans—including those who were presented with Christian evangelization and then obstinately rejected it—retained all of their natural rights to their property and their sovereignty.[108]

In section three, Victoria examined other possible justifications for the conquest. He argued in favor of an unlimited right of free trade. [109] If a Frenchman wanted to travel in Spain, or to pursue peaceful commerce there, the Spanish government had no right to stop him. Similarly, the Spanish had the right to engage in commerce in the New World. A Frenchman had the right to fish or to prospect for gold in Spain (but not on someone's private property), and the Spanish had similar rights in the New World. If the Indians attempted to prevent the Spanish from engaging in free trade, then the Spanish should peacefully attempt to reason with them. Only if the Indians used force would the Spanish be allowed to use force, "it being lawful to repel force with force."[110]

Victoria also argued in favor of 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."[111] The principle of humanitarian intervention

106. *Id.* at 84.

107. *Id.* at 69.

108. VICTORIA, *supra* note 95, at 115–49. The famous phrase was *causa iusti belli non est diversitas religionis*.

109. *Id.* at 151–54.

110. *Id.* For the Roman law principle which Victoria quoted, *see* discussion *infra* Part V.D.

111. VICTORIA, *supra* note 95, at 159.

against human sacrifice and other atrocious crimes against humanity was not limited to Spaniards and Aztecs, but was universally applicable.[112]

A related theory was that "title may be found in the cause of allies and friends."[113] He noted that the Spanish had allied with the Tlaxcalans in their just war against the Aztecs, and that in successful pursuit of this just war, the Spaniards were entitled to the ordinary fruits of conquest and victory.[114]

Historically, it was the combination of the two theories which had actually led to the Spanish victory over the Aztecs. In the thirteenth century, the Aztecs had begun conquering Mexico, and by the fifteenth century, they had brought most of central Mexico under their control. Rather than assimilating the conquered tribes into a unified empire, as the ancient Romans had done, the Aztecs used the other tribes as "human stockyards."[115] The conquered tribes were required to supply, collectively, between 20,000 and 200,000 victims for human sacrifice every year. Aztecs were not sacrificed.[116]

The Aztec priests, often wearing flayed human skins, skillfully cut out the hearts of living victims. Their favorite victims were children, whose tears were supposed to be a special source of pleasure to the Aztec gods. The dead bodies were then eaten by the Aztec upper class, which used cannibalism as their major source of protein.[117]

Hernando de Cortes landed in Mexico with 508 soldiers, 100 sailors, sixteen horses, and firearms.[118] Although the Aztecs had neither firearms nor horses, it would have been impossible for Cortes to conquer the Aztecs if not for the alliances Cortes formed with other Indian tribes, who contributed 200,000 fighters to his cause.[119]

While Spanish title in the New World could be legitimately defended, according to Victoria, Spain's subsequent abuses of the Indians could not. As Victoria put it: "I fear measures were adopted in

112. *Id*.

113. *Id.* at 160.

114. *Id.*

115. Roger McGrath, *Atrocities Azteca*, CHRONICLES, Oct. 2006, at 13.

116. *Id.*; *see also* ROSS HASSIG, ENCYCLOPEDIA OF RELIGION AND WAR 30 (Gabriel Palmer-Fernandez ed., 2004) (During the 1487 rededication of the Great Temple in Tenochtitlan, 80,400 victims were slaughtered in human sacrifice).

117. McGrath, *supra* note 115.

118. *Encyclopedia Britannica Online*, s.v. "Cortés, Hernán, Marqués Del Valle De Oaxaca," http://www.britannica.com/eb/article-9026431/Hernan-Cortes-marquis-del-Valle-de-Oaxaca (last visited Nov. 27, 2007).

119. *Id.* Spanish title to the Inca Empire would also, under Victoria's theory, be legitimate, since the Inca and his minions were also enthusiastic practitioners of human sacrifice. *See generally*, BURR CARTWRIGHT BRUNDAGE, EMPIRE OF THE INCA (1985).

excess of what is allowed by human and divine law."[120] Or as he wrote on another occasion: 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.[121]

Victoria produced a follow-up treatise, commonly known as *On the Law of War*, in which he examined the lawfulness of how the Spanish had conducted their wars in the New World, as measured by international legal standards of war.[122]

In the treatise, Victoria 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."[123]

His "first proposition" was: Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force.[124] 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.[125]

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

120. VICTORIA, *supra* note 95, at 158.

121. SCOTT, *supra* note 96, at 79–81.

122. Victoria's treatises are actually compilations of his lecture notes, although they are so thorough they read very much like a book.

123. 2 VICTORIA, *supra* note 95, at 167.

124. Here Victoria cited Justinian's Digest, the Roman law treatise discussed *infra* at text accompanying notes Part V.D.

125. 2 VICTORIA, *supra* note 95, at 167. Victoria was a prolific scholar, and wrote about self-defense in other treatises as well. *See* FRANCISCO DE VITORIA, ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE IIa–IIae, at 193–95 (John P. Doyle trans., 1997) (Distinguishing "will" from "intent" and pointing out that a person acting in self-defense might "will" the death of an assailant but not "intend" the death—just as a person who asked that his own gangrenous arm be amputated might "will" the amputation but not "intend" it.). Could a person exempt himself from a moral obligation to obey the law, if he sincerely believed that the rationale for the law was inapplicable to him? Victoria said "no." As an example, he pointed to the law against the nighttime carrying of weapons:

> For the fact that dangers often arise from the practice of carrying weapons by night, is sufficient reason for prohibiting the practice to all; otherwise the law would be entirely inefficacious, since every individual would suppose that it had not been laid down for him, but for others; and in like manner, with regard to other precepts, the reason should be viewed not from a particular but from a universal standpoint.

Francisco de Victoria, *Reflectio of the Reverend Father, Brother Franciscus de Victoria Concerning the Civil Power* (*De Potestate Civili*) (Gwladys L. Williams trans.), *in* SCOTT, *supra* note 96, at xc.

and to make war" in self-defense.[126] State self-defense is broader than personal self-defense, since personal self-defense is limited to immediate response to an attack, whereas a state may act to redress wrongs from the recent past.[127]

The personal right to self-defense was likewise used to create humanitarian restrictions on war. Victoria examined whether, in national warfare, it is lawful to deliberately kill innocent non-combatants. Victoria explained such killings could not be just, "because it is certain that innocent folk may defend themselves against any who try to kill them."[128] 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."[129]

To a reader in 2008, it sounds strange to hear an eminent Catholic theologian refer to "unbelievers." Nonetheless, Victoria's point was that international law protected everyone, not just Christians. He believed that basic moral principles applied globally. He was likewise at the forefront in insisting that the moral rules which applied to ordinary individuals also applied to the great and the powerful, including governments. Victoria was the world's most renowned scholar urging humanitarian limits on war; the principle he used to prove those humanitarian limits was the personal right of self-defense.

In other writings, Victoria directly connected the right of self-defense to a right of defense against tyranny—either in a personal or in a political context.[130] Thus, a child has a right of self-defense against his own father if the father tries to kill him; a subject may defend himself against a murderous king; and people may even defend themselves against an evil pope.[131] And, of course, innocent Indians or Muslims may defend themselves against unjust attacks by Christians.

In 1536, Pope Paul III held a conference in Rome where Victoria's ideas were presented. The next year, the Pope declared that anyone who enslaved an Indian would be excommunicated, and he forbade Catholics from taking the lives or property of Indians, including non-Christian Indians.[132]

126. 2 VICTORIA, *supra* note 95, at 168.

127. *Id.*

128. *Id.* at 178–79.

129. *Id.*

130. 2 VICTORIA, *supra* note 95, at 195–97; BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 296 (1997).

131. *Id*.

132. POPE PAUL III, SUBLIMUS DEI (1537) *reprinted in* LEWIS HANKE, ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE

In 1542, the Spanish King Charles I enacted The New Laws of the Indies for the protection of Indians.[133] Unfortunately, the laws met with substantial resistance from the Spanish colonists. In 1550, the king and his "Council of Fourteen" heard argument on the issue in "the Valladolid debate." Unfortunately, the Council appears not to have issued a decision, thereby leaving the Indians unprotected, in practice, until the promulgation of new laws in 1573, which may well have been influenced by the arguments raised previously by Victoria and other humanitarians.[134]

4. Pierino Belli

In the mid-sixteenth century, the Italian Pierino Belli (1502-1575) served as a high-ranking military advisor to the Holy Roman Emperor Charles V and King Philip II of Spain. In 1561, he was appointed as a counselor to the Duke of Savoy, and in that capacity provided guidance on many important legal issues.[135]

Belli wrote a treatise, published in 1563, in which he explicated the international law of war, based on natural law. Belli's explicit purpose was to moderate the conduct of war, particularly the wholesale pillaging and abuse of civilians which characterized the era.[136]

Belli advocated far-reaching restrictions on the methods of just warfare, including a significant time lapse between when war is declared and when the fighting begins, moderate treatment of prisoners, respectful treatment of all non-combatants, and generous treatment of the inhabitants of an occupied territory, so long as they did not wage war against the occupying army.[137]

Although Belli's book was highly praised upon publication, its reputation was somewhat obscured in subsequent centuries because Alberico Gentili (a major influence on Grotius)[138] did not give Belli the

SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS 21 (1994) (English translation).

133. *Id*. Charles I of Spain also ruled the Holy Roman Empire as Charles V. Another scholar active in carrying forward the arguments for the rights of the Indians was Domingo de Soto. In the mid-sixteenth century, after Victoria retired, Domingo de Soto was the leading scholar of the School of Salamanca. He agreed with Victoria about community defense and self-defense. ANABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT 139–40 (2003).

134. HANKE, *supra* note 132, at 113–22.

135. Arrigo Cavaglieri, *Introduction*, *to* PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS [A Treatise on Military Matters and Warfare] 11a (Herbert C. Nutting, trans., William S. Hein 1995) (1563).

136. *Id.* at 13a.

137. *Id.* at 15a–16a.

138. *See infra* text accompanying notes Part IV.A.6.

credit he deserved for influencing Gentili's own thinking.[139] The modern view is that Belli was a leader in separating theology from law, and that he was "the first to attempt . . . to raise the treatment of international law to the dignity of an independent scientific discipline."[140]

According to Belli, defensive war is lawful, for "Surely nature teaches us to oppose force with force, and arms with arms."[141] Belli's citations for the principle were to a Roman law rule about personal defense, and to a Canon law (Catholic Church law) rule about warfare.[142] "And inasmuch as it is permissible to fight on one's own behalf, much more may we do so to save the state, i.e. in defence of liberty and fatherland."[143] Personal and collective self-defense were conceptually identical.

Belli argued that soldiers should, in most cases, be subject to the ordinary law applicable to everyone else.[144] One of Belli's proofs of his standard was the Roman law's rule that "at night it is permissible to oppose a soldier who is breaking in, just as you would resist any other person, since no respect needs to be shown a soldier who has to be opposed with a weapon, as if he were a robber."[145]

5. Francisco Suárez

Thirteen-year-old Francisco Suárez (1548–1617) enrolled at the University of Salamanca in 1561, which by then was well established as the leading university in Europe.[146] At the age of 23, he was appointed to a chair in philosophy at the University of Segovia. During his career, he taught at Salamanca, in Rome, and at the University of Coimbra.[147]

139. Cavaglieri, *supra* note 135, at 18a–26a.

140. *Id.* at 26a (citing G. CHIALVO, IL PRECURSORE ITALIANO DEL DIRITTO INTERNAZIONALE 20–24 (1919)).

141. BELLI, *supra* note 135, at 61.

142. *Id*., (citing DIG. 1.1.3 (personal defense), and Decretum, 2.23.1.1. (warfare)).The cited sources are discussed *infra* Part V.D–G.

143. BELLI, *supra* note 135, at 62.

144. *Id.* at 214.

145. *Id.* (citing and paraphrasing Justinian's Code, 3.23.1; the Code is discussed *infra* at Part V.D.). Another international law author from the same period, the Spaniard Balthazar Ayala, focused almost exclusively on narrowly military issues such as rules for discipline of soldiers, and treatment of deserters. He stated that a tyrant who had usurped the throne could lawfully be overthrown; but unlike most of the other international law authors, he stated that a tyrant who had acquired the sovereignty lawfully could never be overthrown, no matter how cruel his rule. 2 BALTHAZAR AYALA, THREE BOOKS ON THE LAWS OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE 17 (John Pawley Bate trans., 1995) (1582).

146. James Scott Brown, *Introduction* to 2 FRANCISCO SUÁREZ, SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, at S.J. 5a (Gwladys L. Williams ed., William S. Hein 1995).

147. *Id.* at 7a–8a.

Suárez wrote fourteen 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. [148]

Self-defense is "the greatest of rights," wrote Suárez. [149] It was a right which no government could abolish, because self-defense is part of natural law.[150]

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, is based on the right of self-defense.[151]

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."[152]

Unlike some modern scholars, Suárez did not make the mistake of assuming that "the state" was identical to "the government." Rather, the state itself could exercise its right of "self-defence" to depose violently a tyrannical king, because of "natural law, which renders it licit to repel force with force."[153] 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

148. TIERNEY, *supra* note 130, at 301.

149. *Id.* at 314.

150. Jurisdiction could not be reasonably applied to "do away with the right of self-defence—springing from the law of nature—against a criminal charge, especially a charge that was so grave; for it would not be permissible that the Emperor should abolish those things which proceed from the natural law." 2 FRANCISCO SUÁREZ, *A Treatise on Laws and God the Lawgiver*, *in* 2 SUÁREZ, *supra* note 146, at 273 (quoting the *Constitutions* of Pope Clement, bk. 2, tit. 11, ch. 2).

151. *Id.* at 101.

152. FRANCISCO SUÁREZ, DEFENSIO FIDEI CATHOLICAE ADVERSUS ANGLICANAE SECTAE ERRORES [DEFENCE OF THE CATHOLIC FAITH AGAINST THE ERRORS OF THE ANGLICAN SECT] 714 (1613) [hereinafter A DEFENCE]. Suárez argued that General precepts of natural law all have implicit exceptions. For example, the natural law rule that a deposit should be returned to its owner did not apply when the owner meant to use it to harm the state. Likewise, "Thou shalt not kill" had an exception for self-defense. SUÁREZ, *supra* note 146, at 261; *see also id.* at 313–14.

153. A DEFENCE, *supra* note 152, at 718; *see also* FRANCISCO SUÁREZ, *A Work on the Three Theological Virtues of Faith, Hope, and Charity: Divided into Three Treatises to Correspond with the Number of the Virtues Themselves*, *in* 2 SUÁREZ, *supra* note 146, at 854–55 [hereinafter *A Work on the Three Theological Virtues*] (the state is superior to the ruler, and has a natural right of self-defense against a tyrant; the state also has the right to enforce the implicit term of its contract with a ruler—namely that the ruler act for the good of the public). *Cf.* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 80 (1828) ("state" is "A political body, or body politic; the whole body of people united under one government, whatever may be the form of government. . . . More usually the word signifies a political body governed by representatives. . . . In this sense, *state* has some times more immediate reference to government, sometimes to the people or community."). The "repel force with force" principle is from Roman law, discussed *infra* text accompanying notes Part V.D.

by the people.[154]

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.[155] 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."[156] 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).[157]

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).[158]

While Suárez was a Catholic, 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.[159] Suárez was also a major influence on Grotius.[160]

6. Alberico Gentili

Alberico Gentili (1552–1608) was "perhaps the most important of the fore-runners of Grotius."[161] Gentili was an Italian lawyer who fled to Germany, and then England, after his family became Protestants. He was appointed Professor of Civil Law at Oxford, teaching Roman law.[162]

154. Salmon, *supra* note 100, at 238 (citing 4 SUÁREZ, DE LEGIBUS AC DEO LEGISLATORE § 2, at 123 (1612)).

155. *A Work on the Three Theological Virtues*, *supra* note 153, at 804.

156. *Id.*

157. *Id.*

158. *Decretals*, Bk. V, tit. Xxxix, chap. Iii, *Id.* at 802–03. ("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, 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 . . . .").

159. JOHN DALBERG ACTON, THE HISTORY OF FREEDOM AND OTHER ESSAYS 82 (1993).

160. Brown, *supra* note 146, at 18a–19a.

161. Coleman Phillipson, *Introduction* to ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 10a (William S. Hein 1995) (1598).

162. *Id*. at 12a–13a.

As the preeminent scholar of international law in England, he was frequently consulted on the leading controversies of his time. At the request of the English government, Gentili rendered a legal opinion on the Mendoza affair—in which Spain's ambassador to England had been discovered to be participating in a plot to overthrow Queen Elizabeth. Gentili insisted on the principle of the inviolability of ambassadors; the English government acceded to his international law reasoning, and so the Spanish ambassador Mendoza was expelled rather than executed.[163]

Gentili was praised in the twentieth century as "the first great writer on *modern* international law, the first clearly to define its subject-matter, and to treat it in the way which is on the whole consonant to the conception and practice of our own time."[164] This was, in part, because "The theological basis of the subject, which was generally affirmed or assumed by his predecessors, was once for all undermined by Gentili, and a more acceptable foundation was substituted."[165] Unlike many of his predecessors and successors, Gentili did not found his system on natural law.[166]

Rather, Gentili's approach was founded on "the basic axiom of human solidarity," that "'*ubi societas ibi ius*' [Where there is society, there is law.] is as applicable to a group of peoples as it is to a group of individuals."[167] His greatest work was *De Jure Belli libri tres* (On the Law of War, Three Books).[168]

His views on self-defense were consistent with the mainstream of the other international law founders. He explained self-defense as an instinct of all living things, and a "natural" reason for taking up arms.[169] This "most accepted of all rights" of "private individuals" is a right which allows a victim to defend himself even if he could safely retreat; private self-defense has the same intellectual basis as the right of states to violent self-defense:

> For to kill in self-defence is just, even though the one who kills may flee without danger and to save himself. . . . These

163. *Id.* at 13a.

164. *Id.* at 18a (emphasis in original).

165. *Id.* at 18a. Gentili was at the forefront of an intellectual movement which was replacing theology with jurisprudence as the "masterscience" of moral philosophy and inquiry. *See* DIEGO PANIZZA, POLITICAL THEORY AND JURISPRUDENCE IN GENTILI'S *DE IURE BELLI*: THE GREAT DEBATE BETWEEN 'THEOLOGICAL' AND 'HUMANIST' PERSPECTIVES FROM VITORIA TO GROTIUS (NYU Institute for International Law and Justice, Working Paper No. 2005/15, 2005), *available at* http://www.iilj.org/events/documents/Panizza.pdf.

166. Phillipson, *supra* note 161, at 51a.

167. *Id.* at 23a.

168. *Id.* at 16a.

169. GENTILI, DE JURE, at 58–59 (bk. 1, ch. 13).

> views have been admitted in the case of private individuals, and I consider them still more valid with regard to states . . . And it is a necessary right; for what can be done against violence, says Cicero, without resort to violence? This is the most generally accepted of all rights. All laws and all codes allow the repelling of force by force. There is one rule which endures forever, to maintain one's safety by any and every means.[170]

Gentili pointed out that there is a unanimously-agreed duty of individuals to come to the defense of other innocents, even strangers. "That it is even lawful to kill another in defence of a stranger is a view approved by all the scholars."[171] From this duty he derived a state duty of humanitarian intervention to protect people who are being victimized by a tyrant, and to protect nations which are being victimized by aggressors.[172] "And if these things are true in the case of private individuals, how much truer they will be of sovereigns . . . ."[173]

As a lawyer, Gentili used well-known truths about personal defense in order to make broader points about international law. In one case, for example, an English merchant ship reasonably feared that it was about to be attacked by an armed Tuscan ship. The English ship then fired the first shot, in anticipatory self-defense. Gentili argued that international maritime law allowed for anticipatory self-defense, as an extension of the universally accepted rule that allowed for anticipatory personal defense.[174]

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170. *Id.* The Cicero quotation is from MARCUS TULLIUS CICERO, ON INVENTION (*De inventione*) (84 BC) (bk. 2, ch. 22) ("invention" in the title is meant in the sense of "the construction of arguments"). For more on Cicero, *see infra* text accompanying notes 257, 353–58, 384.

171. GENTILI, *supra* note 169, at 69 (bk. 1, ch. 15).

172. *Id.* at 68–78 (bk. 1, chs. 15–16).

173. *Id.* at 70 (bk. 1, ch. 15).

174. ALBERICO GENTILI, *Of an English Ship Which Fought with a Tuscan Ship and Was Captured*, *in* HISPANICAE ADVOCATIONIS LIBRI DUO [PLEAS OF A SPANISH ADVOCATE, TWO BOOKS] 122–24 (Frank Frost Abbott trans., William S. Hein 1995) (1661). This book was a posthumously published collection of Gentili's arguments on maritime law, compiled by his brother. In the English Ship case, Gentili was attempting to convince a court to reverse its decision that allowed the Tuscan to keep the captured English ship. The book does not specify which court was hearing the case, or whether Gentili's plea was successful. Regarding personal defense, Gentili stated:

> "The defense of the Englishmen was proper, because they feared offense, and simply because the other man is making ready to attack me, I may lawfully take the offensive and slay him. Of course I do not have to wait till I am attacked; it is my duty to being myself." This is said to be the more humane view, a view tested in according with facts in the courts, and "approved moreover by all the doctors." "One should anticipate offense, that which is potential as well as that which is actual."

B. The Grotius Trinity

1. Hugo Grotius

The Dutch scholar Hugo Grotius (1583–1645) was a child prodigy who enrolled at the University of Leiden when he was eleven years old. Hailed as "the miracle of Holland," he wrote over fifty books, and "may well have been the best-read man of his generation in Europe."[175]

His classic *The Rights of War and Peace* has "commonly been seen as the classic work in modern public international law, laying the foundation for a universal code of law."[176] It was "the first authoritative treatise upon the law of nations, as that term is now understood."[177] "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."[178] Thus, "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."[179] In short, "it would be hard to imagine any work more central to the intellectual world of the Enlightenment."[180]

Three centuries later, when World War One was being settled, Grotius was still considered "the founder of modern civilized interstate relations."[181]

During the sixteenth century, there were twenty-six editions of the original Latin text, as well as translations into French, English, and

Id., at 123. (The internal quotes are cited to "Ias. l. ut vim n. 9" and "Alb. d. 14." The first citation is Gentili's idiosyncratic cite form for the Digest, 1.1.3. Arthur Williams, *Index of Authors Cited by Gentili*, *in* HISPANICAE ADVOCATIONIS LIBRI DUO, at 275. The other citation may be commentary on the Digest by Albericus (a/k/a Alberico de Rosate), of Bergamo, Italy. The Digest is discussed *infra* Part V.D.).

175. 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).

176. 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, inside jacket (Liberty Fund 2005) (reprint of 1737 English translation by John Morrice of the 1724 annotated French translation by Jean Barbeyrac) (1625), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt &staticfile=show.php?title=1877&Itemid=99999999. When the Carnegie Institution began a republication and translation series of the "leading classics of International Law," the General Editor noted that "The masterpieces of Grotius will naturally be the central point in the series . . . ." James Brown Scott, *Preface* to GIOVANNI DA LEGNANO, DE BELLO, DE REPRESALIIS ET DE DUELLO a2 (Thomas Erskine Holland ed., 1995) (reprint of 1917 Carnegie edition) (1360). Hugo Grotius is the Latin form of the name; "Huig de Groot" is his Dutch name.

177. GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 15 (2005) (1900).

178. *Id.*

179. 2 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 (2005) (1795).

180. Richard Tuck, *Introduction* to 1 GROTIUS, *supra* note 176, at xi.

181. *Id.*

Dutch. The next century saw twenty Latin editions, and multiple editions in French, English, Dutch, German, Russian, and Italian.[182]

Writing in the middle of the Thirty Years War, Grotius was explicitly working to counter the tendency of the period towards unrestrained warfare, and warfare for spurious causes.[183] "I observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of," he stated in his introduction.[184] As one historian explained:

> The actual conduct of warfare in the Middle Ages and even in later times was often marked by atrocious and barbaric cruelty. The belligerents were wont to assume that they were not subject to any restraint, whether of law or morality or humanity. They had recourse to every kind of available act, instrument, or device that might lead to the annihilation of the enemy. Accordingly, they burned down towns, devastated lands, destroyed sacred places, objects, and buildings and things of art; they put prisoners to the sword or mutilated them, massacred the non-combatant population—old, young, and feeble alike, ecclesiastics as well as laymen—and dishonoured women. There is no need to enlarge this sinister catalogue: let it suffice to say that belligerents made use of everything that diabolical ingenuity could devise and unrestrained ferocity actuate, of every proceeding that would create a state of terror.[185]

The purpose of *The Rights of War and Peace* was to civilize warfare, especially to protect non-combatants from attack. To do so, Grotius started with the right of personal defense: "Grotius grounded his theory of laws, or rights, in 'the design [*intentio*] of the Creator' as manifested in the constitution of the natural world. Two principles were uppermost: self-defense and self-preservation."[186]

As Grotius observed, even human babies, like animals, have an instinct to defend themselves.[187] Moreover, self-defense was essential to social harmony, for if people were prevented from using force against

182. *Id.* at x.

183. GEORGE BOWYER, COMMENTARIES ON UNIVERSAL PUBLIC LAW 6; DAVIS, *supra* note 177, at 16–17.

184. 1 GROTIUS, *supra* note 176, ¶ 29, at 106.

185. Phillipson, *supra* note 161, at 40a.

186. 1 GROTIUS, *supra* note 176, at inside jacket.

187. *Id.* at 183–84 (bk. 1, ch. 2, § 1.3).

others who were attempting to take property by force, then "human Society and Commerce would necessarily be dissolved."[188]

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: "[I]t is allowed to Repel Force by Force."[189] Examples of personal and national use of force were woven together seamlessly, for the same moral principles applied to both.

Like Giovanni da Legnano, 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.[190] 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 . . . .[191]

Relying on the Scholastic philosopher Thomas Aquinas, Grotius explained that defensive violence is based on the intention of self-preservation, not the purpose of killing another.[192]

Self-defense is also appropriate not just to preserve life, but also to prevent the loss of a limb or member, rape,[193] and robbery: "I may shoot that Man who is making off with my Effects, if there's no other Method of my recovering them."[194] To this discussion, Jean Barbeyrac—Grotius's most influential translator and annotator[195]—added the

188. *Id.* at 184–85 (bk. 1, ch. 2, § 1.3) (quoting TULLY, ON DUTIES [DE OFFICIIS], bk. 3, ch. 5 (44 BC) ("Tully" is a pen name for Marcus Tullius Cicero.). For more on Cicero, *see infra* text accompanying notes 257, 353–58, 384.

189. *Id.* at 185–89 (bk. 1, ch. 2, §§ 2–4) (quoting LIVY (Titus Livius), AB URBE CONDITA [A HISTORY OF ROME] bk. 42, ch. 41).

190. *Id.* at 240 (bk. 1, ch. 3, § 1).

191. 2 GROTIUS, *supra* note 176, at 397.

192. *Id.* at 398. For Aquinas, *see infra* text at notes Part V.G.

193. *Id.* at 401–02.

194. *Id.* at 408.

195. *See infra* text accompanying notes 220–22.

footnote: "In Reality, the Care of defending one's Life is a Thing to which we are obliged, not a bare Permission."[196]

"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 explicated.[197] 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."[198]

Gentili had argued that a nation could attack another nation if the former feared the growing power of the latter.[199] Grotius called Gentili's doctrine "abhorrent to every principle of equity."[200] Grotius's counter-argument was the national self-defense restrictions which come directly from the rules of personal self-defense.[201] "In other words, Grotius extends to public war the basic criteria laid down with regards to individual self-defence, which, in emphasizing the classical requirement of 'immediacy' and 'certainty' . . . ."[202]

Grotius also wrote that victorious warriors must not abuse the bodies of the dead.[203] 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."[204]

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.[205]

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.[206] While setting forth general principles

196. 2 GROTIUS, *supra* note 176, at 403 n.3. Barbeyrac also cited his own discussion in note 5 of his annotated edition of Pufendorf, bk. 2, ch, 5, § 2, and also Pufendorf's analysis in § 14 of that chapter. SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (The Lawbook Exchange 2005) (reprint of 1726 London edition of the 1706–07 Barbeyrac French translation and annotation, with English translation by Mr. Carew) (1672).

197. 2 GROTIUS, *supra* note 176, at 416.

198. *Id*.

199. PANIZZA, *supra* note 165, at 20.

200. *Id.* at 25.

201. *Id.* at 26.

202. *Id*.

203. 3 GROTIUS, *supra* note 176, at 1312.

204. *Id.* at 1312 n.3.

205. 1 GROTIUS, *supra* note 176, at 356–72; 2 GROTIUS, *supra* note 176, at 1159–62. Barbeyrac's footnotes in these sections, and elsewhere in the book, argued for a much broader right of revolution. *E.g.*, 1 GROTIUS, *supra* note 176, at 343 n.4 (Barbeyrac note).

206. David Armitage, *Introduction* to HUGO GROTIUS, THE FREE SEA xii (David Armitage ed.,

of international law, *The Free Sea* was specifically written to address the 1603 controversy involving a Dutch captain who seized a Portuguese vessel in the Straits of Singapore.[207] As in *The Rights of War and Peace*, Grotius derived the principles of international law from the essential natural laws of self-defense and self-preservation.[208]

In *The Free Sea*, he also explained that natural law is immutable, and cannot be overturned by governments.[209] Suárez had made the same point explicitly,[210] and the principle is implicit in most of the other classical founders of international law. Accordingly, if a government purports to enact a law abolishing the right of self-defense (or constricting the right so that it becomes a practical nullity), that law should be considered void ab initio—at least according to the foundational principles of international human rights law.

Below, we will address whether a right to self-defense implies a right to arms which are necessary for self-defense.[211]

Grotius had begun *On the Rights of War and Peace* during the first decade of the Thirty Years War, which continued to ravage Europe, especially Germany, until the Peace of Westphalia in 1648. Among the terms of the Peace was Spanish recognition of Dutch independence, thus ending a series of wars which had raged, intermittently, in the Low Countries for eight decades.[212] These wars had been fought with an awful ferocity, and non-combatants suffered terribly.

Grotius's biographer Hamilton Vreeland wrote that the 1648:

> [P]eace embodied principles which Grotius had striven to expound, such as the independence and equality of sovereign states, and was founded upon the equitable and merciful doctrines which he had labored to impart . . . . The old order had changed, and the new which came in was largely the work of Hugo Grotius.[213]

Richard Hakluyt trans., 2004) (1609).

207. *Id.* at xii–xiii.

208. *Id.* at xiii. *See also*, HUGO GROTIUS, *Defense of Chapter V of the* Mare Liberum, *in* THE FREE SEA, *supra* note 206, at 77, 99 (first published approximately 1615 as a response to a critique by William Welwood) ("The freedom of blameless defense proceeds from the law of nature, yet that this is licit has been handed down in rescripts by the emperors.").

209. GROTIUS, *supra* note 206, at 6, 43. *See also id.* at 38 ("the Pope hath no authority to do these things which are contrary to the law of nature.").

210. *See supra* text accompanying note Part IV.A.5.

211. *See infra* text accompanying notes Part VIII.

212. Grotius had earlier noted how the Netherlands were preserving their new-found freedom from Spanish domination: "liberty scarce gotten but defended by taking arms." GROTIUS, THE FREE SEA, *supra* note 206, at 8.

213. HAMILTON VREELAND, HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF

According to the international law historian Henry Wheaton, in the second part of the seventeenth century:

> [T]he influence of the writings of the publicists, including Grotius and his successors, was perceptibly felt in the councils and conduct of nations. The diplomacy . . . state papers are filled with appeals, not merely to reasons of policy, but to the principles of right, of justice, and equity; to the authority of the oracles of public law; to those general rules and principles by which the rights of the weak are protected against the invasions of superior force by the union of all who are interested in the common danger.[214]

The international law intellectuals had changed the world of action. The intellectuals had demonstrated how to address serious questions of war and foreign policy by logically reasoning from basic principles of justice—starting with "the greatest of all rights,"[215] the right of self-defense. Now, the generals, admirals, and diplomats were doing the same. The result could be seen, *inter alia*, in the War of the Spanish Succession (1701–1714):

> [W]hen the contending armies crossed and recrossed parts of the soil on which the Thirty Years' War had been waged, Marlborough and Prince Eugene, and other commanders, exhibited in their conduct a sharp contrast with Wallenstein and Tilly, who had devastated those fields seventy years before. Destruction of property by fire and of peoples by massacre was practically abandoned; governments paid the costs of war, not the captured individuals; and prisoners were treated with justice and mercy. Grotius' influence was becoming felt, and warfare was growing less cruel.[216]

INTERNATIONAL LAW 242 (Fred B. Rothman 1999) (1917).

214. HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA 79–80 (William S. Hein 1982) (1845).

215. *See* Suarez discussion, *supra* Part IV.A.5, 2d para.

216. VREELAND, *supra* note 213. Gustavus Adolphus, the commander of the Swedish forces during the Thirty Years War, had always carried a copy of *On the Rights of War and Peace*. WHEATON, *supra* note 214, at 55. Perhaps the treatise moderated his conduct.

2. Samuel Pufendorf

The Swedish scholar Samuel Pufendorf was the first person ever appointed as a Professor of the Law of Nations—a position that was created at the University of Heidelberg for Pufendorf to teach Grotius's text.[217] Pufendorf also served as a counselor to the King of Sweden and the King of Prussia. In 1674 his eight volume magnum opus was published: *Of the Law of Nature and Nations*.[218] It was instantly recognized as a work of tremendous importance, and was published in many editions all over Europe. "[T]he two works [Grotius and Pufendorf] together quickly became the equivalent of an encyclopedia of moral and political thought for Enlightenment Europe."[219]

Pufendorf advanced the theories of Grotius, while also taking into account subsequent philosophers such as John Locke and Thomas Hobbes. Pufendorf was not the first to argue that international law applied beyond the relations of Christian nations with each other, but his over-riding concern for the common human community made the theme especially important in his book. Like Grotius, Pufendorf was greatly interested in restraining warfare, but Pufendorf painted on a broader canvas; as he looked for ways to make the global community live together more peaceably, he also looked at 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

217. Jean-Jacques Barbeyrac, *The Life of Hugo Grotius*, *in* 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 176, at 69.

218. PUFENDORF, *supra* note 196.

219. Tuck, *supra* note 180, at xi. John Locke recommended that, after mastering Latin, a young person should read Cicero's *Offices*, then Pufendorf's *Officio Hominis & Civis* (an abridged version of *Of the Law of Nature and Nations*), and then the multi-volume treatises of Grotius or Pufendorf, with the latter being "perhaps . . . the better of the two." Thereby, the young person would be "instructed in the natural rights of men, and the original and foundations of society, and the duties resulting from thence." JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION, § 186 (Cambridge Univ. Press 1922) (1692), *available at* http://www.fordham.edu/halsall/ mod/1692locke-education.html. [reprinted in the series *English philosophers of the seventeenth and eighteenth centuries* (c. 1910) Harvard classics, no. 38].

version of Grotius in 1724.[220] Grotius and Pufendorf had already been translated into many languages in dozens of editions, but the Barbeyrac editions themselves were soon also translated all over Europe and became the most popular editions.

Grotius and Pufendorf, as translated and annotated by Barbeyrac, remained the preeminent authorities on international law for centuries afterward. In 1854, the English legal scholar George Bowyer wrote that Barbeyrac's translations "make the two works together one *Corpus* of the Law of Nations which has not been equaled in extent, learning, richness of illustration, and acumen."[221] Barbeyrac was in complete accord with Pufendorf and Grotius about the fundamental human right of self-defense, and his annotated versions offered extensive additional support for that right.[222]

Pufendorf followed 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."[223]

In contrast to the pessimistic spirit of Hobbes, Pufendorf saw that humans had a natural inclination towards peaceful co-operation 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."[224] The advocates of the right of self-defense are sometimes caricatured as social isolationists who believe only in the law of the jungle, and who believe in nothing greater than atomistic individualism. Pufendorf was just the opposite. Like Grotius, he affirmed the right of self-defense because it is a sine qua non for civilization.

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

220. Tuck, *supra* note 180, at x.

221. BOWYER, *supra* note 183, at iv. For biographical information on Bowyer, see *New Advent Catholic Encyclopedia*, s.v. "Sir George Bowyer," http://www.newadvent.org/cathen/02724c.htm.

222. For example, Barbeyrac wrote a long introduction to Pufendorf in which he argued that Pufendorf's treatise was far superior to much of the moral philosophy from previous times. While Barbeyrac praised Jesus and Confucius, he carefully dissected the numerous inconsistencies and absurdities (as Barbeyrac saw them) of some early Christian writers (such as Tertullian) who had been pacifists. Jean Barbeyrac, "An Historical and Critical Account of the Science of Morality," *in* PUFENDORF, *supra* note 196, § 9 19–25.

223. *Id.* at 149–50 (bk. 2, ch. 3, § 23); THOMAS HOBBES, MAN AND CITIZEN (*DE HOMINE* AND *DE CIVE*), 275 (Berand Gert ed., Charles T. Wood, T.S.K. Scott-Craig & Bergnard Gert trans., Hackett 1991) (*De Cive* 1647); WHEATON, *supra* note 214, at 92–93.

224. PUFENDORF, *supra* note 196, at 183 (bk. 2, ch. 5, § 1).

make "honest Men" into "a ready Prey to Villains."[225] "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."[226]

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."[227]

Pufendorf explained that there is much broader latitude for self-defense in a state of nature than in civil society; preemptive self-defense is disfavored in the latter.[228] However, Pufendorf continued, 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 . . . ."[229] 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.[230]

Making the same point as Justice Oliver Wendell Holmes, who in 1921 would write "detached reflection is not required and cannot be demanded in the presence of an uplifted knife,"[231] 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."[232] Thus,

225. *Id.* at 184 (bk. 2, ch. 5, § 1).

226. *Id.*

227. *Id.* 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.

Id. at 214 (bk. 3, ch. 1, § 1).

228. *Id.* at 189–90 (bk. 2, ch. 5, §§ 6–7). As a general rule, anticipatory self-defense is always allowed in a state of nature; in a civil society, it is allowed only if the potential victim first informs the government authorities of the danger, and the authorities then refuse to take action to protect the victim. *Id.*

229. *Id.* at 191 (bk. 2, ch. 5, § 8).

230. *Id.*

231. Brown v. United States, 256 U.S. 335, 343 (1921). For more on *Brown*, see David B. Kopel, *The Self-Defense Cases: How the Supreme Court Confronted a Hanging Judge in the Nineteenth Century*, 27 AM. J. CRIM. L. 294 (2000).

232. PUFENDORF, *supra* note 196, at 191 (bk. 2, ch. 5, § 9).

while a person should safely retreat rather than use deadly force, Pufendorf recognized that safe retreat is usually impossible.[233] Nor is there any requirement that a defender use arms which are not more powerful than the arms of the aggressor.[234]

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.[235] Lethal force in self-defense is also permissible to prevent rape[236] or assault.[237] It is 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 . . . ."[238]

What if one person attacks another's honor—such as by boxing his ears? 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.[239] It should be remembered that Pufendorf was writing at a time when the educated gentlemen of

233. *Id.* at 193–94 (bk. 2, ch. 5, § 13).

234. *Id.* at 191 (bk. 2, ch. 5, § 9).

> As if the Aggressors were so generous, as constantly to give notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have the Leisure to furnish themselves in like manner for the Combat. Or if these Rencounters 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.

Id.

235. *Id.* at 192 (bk. 2, ch. 5, § 10).

> 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 fansy in it such Laws, as would make every good and honest Man of necessity miserable, as often as any wicked Varlet 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.

Id. at 186 (bk. 2, ch. 5, § 11).

236. *Id.* at 192 (bk. 2, ch. 5, § 11).

237. *Id.* at 193–94 (bk. 2, ch. 5, § 13).

238. *Id.* at 198 (bk. 2, ch. 5, § 16); *see also id.* at 186 (bk. 2, ch. 5, § 3).

239. *Id.* at 192–94 (bk. 2, ch. 5, § 12).

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 rejected the view that self-defense is a form of punishing criminals, and that the prerogative of punishment belongs exclusively to the state. [240] Pufendorf agreed that genuine punishment—for retribution, after a crime had been completed—was, in a civil society, exclusively a state function.[241] "But Defence is a thing of more ancient date than any Civil Command . . . ." and accordingly, no state could legitimately forbid self-defense.[242]

The chapter "Of the Right of War" began with a detailed restatement of the natural right of personal self-defense.[243] 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 Just Cause, prohibitions on attacks on non-combatants, prohibitions on the execution of prisoners, prohibition on wanton destruction of property, limitations on what spoils might be taken in war, and similar humanitarian restrictions.[244]

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).[245] 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." [246] 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.[247]

More generally, Pufendorf conceded 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

240. *Id.* at 190 (bk. 2, ch. 5, § 7).

241. *Id.*

242. *Id.* at 198 (bk. 2, ch. 5, § 16) (also noting that a state may regulate the boundaries of self-defense).

243. *Id.* at 832–33 (bk. 8, ch. 6, §§ 1–2).

244. *Id.* at 833–48 (bk. 8, ch. 6).

245. *Id.* at 187–88 (bk. 2, ch. 5, § 5).

246. *Id.* at 187–88 n.1 (bk. 2, ch. 5, § 5).

247. *Id.*

themselves against the unjust Violence of the Prince."[248] Pufendorf announced his agreement with Grotius that it is absurd to claim that because subjects cannot have courtroom jurisdiction over a sovereign, subjects are therefore forbidden to use force to overthrow a tyrant. "As if to defend one's Life against an injurious Assailant were to proceed against him in a judicial manner!" scoffed Pufendorf.[249]

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.[250] 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!"[251]

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."[252]

Barbeyrac stated 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 . . . ."[253]

Likewise, at the conclusion of Pufendorf's chapter on self-defense, Barbeyrac included a long note on a subject which he chided Pufendorf for omitting: John Locke's theory of the right to resistance against a government which usurps powers which had never been granted by the people—a theory with which Barbeyrac plainly agreed.[254]

Barbeyrac quoted at length, and with great approval, John Locke's explication that a tyrant is in a state of war with the people.[255] The point

248. *Id.* at 721–22 (bk.7, ch. 8, § 6).

249. *Id.* at 723 (bk. 7, ch. 8, § 7).

250. *Id.* (italics omitted).

251. *Id.*

252. *Id.*

253. *Id.* at 719 n.2 (bk. 7, ch. 8, § 5).

254. *Id.* at 201 n.2 (bk. 2, ch. 5, § 19).

255. *Id.* at 720–21 n.1 (bk. 7, ch. 8, § 5) (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 210 (1690)).

is in accord with Giovanni da Legnano's observation that warfare is warfare, regardless of the number of people involved.[256] It also echoes 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.[257]

Barbeyrac's humanitarian vision is squarely opposed to the apologists for state violence (eighteenth century, and twenty-first century) who assert that governments have an inherent right to use domestic violence and an exemption from the rules which constrain individual violence. The American revolutionaries considered Barbeyrac, Pufendorf, and Grotius to be part of the 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.[258]

256. *See* LEGNANO *supra* note 70, pt. IV.A.1, 2d para.

257. The preeminent Christian theologian St. Augustine of Hippo asked: "If justice be taken away, what are governments but great bands of robbers?" ST. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS (Henry Bettenson trans., Penguin Books 1984) (translation of 1459 edition) (early fifth century) (bk. 4, ch. 4). To illustrate the point, Augustine used a story attributed to Cicero:

> Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor."

Id. See also CICERO, ON THE COMMONWEALTH AND ON THE LAWS 67 (James E.G. Zetzel ed., Cambridge Univ. Press 1999) (54–51 BC) (bk. 3, para. 24a) (final sentence of the story; the story appears in a section of *Commonwealth* from which several pages of the original text have been lost). Philo of Alexandria, the leading Jewish legal scholar of the first century BC, agreed with the Romans that all forms of theft are merely variations on a single type of attack on society: an assault on the right of ownership of private property. Thus, a petty thief was no different in principle from a tyrant who stole the resources of his nation, or a nation which plundered another nation. *See* EDWIN R. GOODENOUGH, THE JURISPRUDENCE OF THE JEWISH COURTS OF EGYPT: LEGAL ADMINISTRATION BY THE JEWS UNDER THE EARLY ROMAN EMPIRE AS DESCRIBED BY PHILO JUDAEUS 230–31 (2002). *Cf.* Kathleen A. Parrow, *From Defense to Resistance*, 83 TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY 18 (pt. 6, 1993) (citing HIPPOLYTE PISSARD, LE CLAMER DE HARO DANS LE DROIT NORMAND 118–19 (1911) (the Norman cry of *haro*, used to call out citizens to pursue a thief, was usable against magistrates who flagrantly abused their power or exceeded their jurisdiction; Norman jurists regarded such government criminals as *larrons* [robbers]).

258. To take but one example, consider "Novanglus," a series of 1775 newspaper essays in which John Adams set forth the most sophisticated legal and philosophical arguments for the colonists' right of resistance. In essay number six, Adams justified the Boston Tea Party and similar violent acts of resistance. In the third paragraph of the essay, he reminded readers: "Grotius B. 1, c. 3, § 1, observes, 'that some sort of private war may be lawfully waged. It is not repugnant to the law of nature, for any one to repel injuries by force.'" Several paragraphs later, Adams cited Grotius for the point that it was not seditious to resist a ruler who was assuming powers which had never been granted to him:

> The same course is justly used against a legal magistrate who takes upon him to exercise a power which the law does not give; for in that respect he is a private man,—"*Quia,*" as Grotius says, "*eatenus non habet imperium,*" [Because he does not have the authority to that extent]— and may be restrained as well as any other; because he is not set up to do what he lists, but what the law appoints for the good of the people; and as he has no other power than what the law allows, so the same law limits and directs the exercise of that which he has.

Then, Adams quoted verbatim a massive footnote by Barbeyrac, in which Barbeyrac had woven together Grotius, Pufendorf, Jean LeClerc (a liberal Swiss Protestant philosopher and theologian), Locke, and Algernon Sidney (a seventeenth-century British advocate of resistance to tyranny), to show that revolution against tyranny was a way to restore civil society, to show that resistance was justified before the tyranny become omnipotent, and to reassure the public that resistance would not lead to mob rule:

> When we speak of a tyrant that may lawfully be dethroned by the people, we do not mean by the word *people,* the vile populace or rabble of the country, nor the cabal of a small number of factious persons, but the greater and more judicious part of the subjects, of all ranks. Besides, the tyranny must be so notorious, and evidently clear, as to leave nobody any room to doubt of it, &c. Now, a prince may easily avoid making himself so universally suspected and odious to his subjects; for, as Mr. Locke says in his Treatise of Civil Government, c. 18, § 209,—'It is as impossible for a governor, if he really means the good of the people, and the preservation of them and the laws together, not to make them see and feel it, as it is for the father of a family not to let his children see he loves and takes care of them.' And therefore the general insurrection of a whole nation does not deserve the name of a rebellion. We may see what Mr. Sidney says upon this subject in his Discourse concerning Government:—'Neither are subjects bound to stay till the prince has entirely finished the chains which he is preparing for them, and put it out of their power to oppose. It is sufficient that all the advances which he makes are manifestly tending to their oppression, that he is marching boldly on to the ruin of the State.' In such a case, says Mr. Locke, admirably well,—'How can a man any more hinder himself from believing, in his own mind, which way things are going, or from casting about to save himself, than he could from believing the captain of the ship he was in was carrying him and the rest of his company to Algiers, when he found him always steering that course, though cross winds, leaks in his ship, and want of men and provisions, did often force him to turn his course another way for some time, which he steadily returned to again, as soon as the winds, weather, and other circumstances would let him?' This chiefly takes place with respect to kings, whose power is limited by fundamental laws.
>
> "If it is objected that the people, being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and the uncertain humor of the people, is to expose it to certain ruin; the same author will answer you, that 'on the contrary, people are not so easily got out of their old forms as some are apt to suggest. England, for instance, notwithstanding the many revolutions that have been seen in that kingdom, has always kept to its old legislative of king, lords, and commons; and whatever provocations have made the crown to be taken from some of their princes' heads, they never carried the people so far as to place it in another line.' But it will be said, this hypothesis lays a ferment for frequent rebellion. 'No more,' says Mr. Locke, 'than any other hypothesis. For when the people are made miserable, and find themselves exposed to the ill usage of arbitrary power, cry up their governors

As for humanitarian intervention in other nations, Pufendorf recognized that it was often a pretext for aggression. He favored

> as you will for sons of Jupiter; let them be sacred and divine, descended or authorized from heaven; give them out for whom or what you please, the same will happen. The people generally ill treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. 2. Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny and murmur. 3. This power in the people of providing for their safety anew by a legislative, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the probablest means to hinder it; for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they be, *who by force break through, and by force justify the violation of them, are truly and properly rebels.* For when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity, among themselves; those who set up force again, in opposition to the laws, do *rebellare,* that is, do bring back again the state of war, and are properly, rebels,' as the author shows. In the last place, he demonstrates that there are also greater inconveniences in allowing all to those that govern, than in granting something to the people. But it will be said, that ill affected and factious men may spread among the people, and make them believe that the prince or legislative act contrary to their trust, when they only make use of their due prerogative. To this Mr. Locke answers, that the people, however, is to judge of all that; because nobody can better judge whether his trustee or deputy acts well, and according to the trust reposed in him, than he who deputed him. 'He might make the like query,' (says Mr. Le Clerc, from whom this extract is taken) 'and ask, whether the people being oppressed by an authority which they set up, but for their own good, it is just that those who are vested with this authority, and of which they are complaining, should themselves be judges of the complaints made against them. The greatest flatterers of kings dare not say, that the people are obliged to suffer absolutely all their humors, how irregular soever they be; and therefore must confess, that when no regard is had to their complaints, the very foundations of society are destroyed; the prince and people are in a state of war with each other, like two independent states, that are doing themselves justice, and acknowledge no person upon earth, who, in a sovereign manner, can determine the disputes between them.

After the massive quotation from Barbeyrac, Adams made a direct appeal to authority:

> If there is any thing in these quotations, which is applicable to the destruction of the tea, or any other branch of our subject, it is not my fault; I did not make it. Surely Grotius, Pufendorf, Barbeyrac, Locke, Sidney, and Le Clerc, are writers of sufficient weight to put in the scale against the mercenary scribblers in New York and Boston [that is, the newspaper essayists to whom Adams was responding] . . . ."

John Adams, *Novanglus*, essay 6, 204–06, *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS (C. Bradley Thompson ed., 2000), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt& staticfile=show.php%3Ftitle=592&Itemid=27 (quoting PUFENDORF, *supra* note 196, at 720 n.1 (bk. 7, ch 8, § 6)).

humanitarian intervention if, and only if, the subjects of the country themselves had the right to "take Arms to repress the insupportable Tyranny and Cruelties of their own Governors."[259]

3. 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.[260] Vattel (1714–1767) was notably influential on the American founders, among others.[261]

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*.[262]

Vattel agreed with other scholars that the right of personal self-defense is the foundation of the national right to engage in defensive war.[263] 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."[264]

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

259. PUFENDORF, *supra* note 196, at 844 (bk. 8, ch. 6, § 14).

260. WARD, *supra* note 179, at 377.

261. *Microsoft Encarta Online Encyclopedia*, s.v. "International Law," http://encarta.msn.com/encyclopedia_761571627/ Internationl_Law.html (last visited Dec. 3, 2007).

262. EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS [*Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*] (The Lawbook Exchange 2005) (Joseph Chitty trans., 1854) (1758), *available at* http://www.constitution.org/vattel/vattel.htm.

263. *Id.* at 211 (bk. 2, ch. 5, §§ 66–67).

264. *Id.* at 79 (bk. 1, ch. 4, § 54). Here Vattel disagreed with Juan de Mariana, who had suggested that an individual could choose not to protect himself, in the spirit of charity. *See* MARIANA, *supra* note 100, at IV.A.3, para. 4.

attempted to force her to his desires.[265]

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."[266]

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."[267] "As 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."[268]

265. VATTEL, *supra* note 262, at 142 (bk. 1, ch. 13, § 176). 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." *Id.* at 399 (bk. 3, ch. 15, § 223). 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. *Id.* at 141 (bk. 1, ch. 13, § 176).

266. *Id.* at 18; *see also id.* at 75 (bk. 1, ch. 4, § 54) (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."). Joseph Chitty (1828–1899), besides being an English translator of Vattel, was a prominent English judge and author of legal treatises. Chitty's annotation of Vattel quoted with approval Grotius's statement that if a sovereign violated the laws of the country, the people were absolved of their oath of allegiance. VATTEL, *supra* note 262, at 73, n.* (bk. 1, ch. 4, § 46), *quoting* HUGO GROTIUS, 2 ANNALS OF THE NETHERLANDS (1797) ("past generations" had "made effectual use of arms" to redress the abuses of sovereigns such as John II, who was King of Aragon and Navarre).

267. VATTEL, *supra* note 262, at 216 (bk. 2, ch, 4, § 56). United States Senator Henry Clay, in his famous oration "The Emancipation of South America," cited Vattel as authority for American support for the South American wars of national liberation against Spanish colonialism:

> 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).

268. VATTEL, *supra* note 262, at 156 (bk. 2, ch. 4, § 56). Vattel noted that "All antiquity has praised Hercules for delivering the world from an Antaeus, a Busiris, and a Diomede." *Id.* Diomedes

The personal right of self-defense also showed why a protectorate may renounce its allegiance to a sovereign which 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."[269]

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. [270] Similar reasoning justified the decision of other Swiss cantons to separate themselves from the Austrians, who never protected them.[271]

was a king who fed human beings to his four carnivorous horses. Antaeus was a giant in Libya who challenged travelers to a wrestling match, always defeated them, and then killed them. The story of Hercules and Busiris is this:

> After Libya he [Hercules] traversed Egypt. That country was then ruled by Busiris, a son of Poseidon by Lysianassa, daughter of Epaphus. This Busiris used to sacrifice strangers on an altar of Zeus in accordance with a certain oracle. For Egypt was visited with dearth for nine years, and Phrasius, a learned seer who had come from Cyprus, said that the dearth would cease if they slaughtered a stranger man in honour of Zeus every year. Busiris began by slaughtering the seer himself and continued to slaughter the strangers who landed. So Hercules also was seized and haled to the altars, but he burst his bonds and slew both Busiris and his son Amphidamus.

APOLLODORUS, § 2.5.11, at 223–27 (James G. Frazer trans., 1921), *available at* http://ancienthistory.about.com/library/bl/bl_herc_lab11.htm. The original source is *Bibliotheke*, an ancient collection of Greek myths. It was originally attributed to the second-century BC Greek writer Appolodorus, but scholars now recognize that the book was composed much later. "Pseudo-Appolodorus" is sometimes designated as the author. The characters from the Hercules myth are fictional, of course, as Vattel knew. But can it be disputed that there are monstrous rulers in the modern world, at least as wicked and bloodthirsty as Busiris, Antaeus, and Diomedes? Those ancient rulers killed innocents one at a time, but never perpetrated genocide.

269. VATTEL, *supra* note 262, at 153 (bk. 1, ch. 16, § 196).

270. *Id.* at 96–97 (bk. 1, ch. 17, § 202).

271. *Id.*

C. Some Post-Grotius Scholars

1. Johann Textor

Johann Wolfgang Textor, the great-great-grandfather of Johann Wolfgang Goethe, was a law professor, judge, and legal advisor to governments in Germany in the late seventeenth century.[272]

More than most of the other scholars discussed in this Part, Textor was a legal positivist. Textor was an especially outstanding scholar of Roman law. (As will be detailed *infra*, Roman law was the foundation of much of the law in Europe at the time.[273]) Textor was intimately familiar not only with the multi-volume treatises which had been produced during the reign of the Emperor Justinian but also with many commentaries (or "glosses") which had been written in the margins of various editions of the treatises, beginning with the Western rediscovery of Roman law in the eleventh century.

Textor's book *Synopsis of the Law of Nations* included a full chapter "On Self-defense against Violence."[274] He wrote that use of deadly force in self-defense is lawful against a deadly attack, rape, or mayhem.[275] For defense against lesser assaults, and for defense of property, self-defense is also permissible, but deadly force is not, unless the circumstances of the crime create the risk of death.[276] As Textor demonstrated, there were many Roman law and Canon law commentators on each side of the various questions and subquestions involving deadly force against lesser assaults and property crimes.[277]

2. Jean-Jacques Burlamaqui

Jean-Jacques Burlamaqui (1694–1748) was Professor of Natural Law at the Academy of Geneva.[278] His treatise *The Principles of Natural and Politic Law* was translated into six languages (besides the original French) in sixty editions.[279]

272. Ludwig von Bar, *Introduction* to JOHANN WOLFGANG TEXTOR, SYNOPSUS JURIS GENTIUM (Synopsis of the Law of Nations) (Ludwig von Bar ed., John Pawley Bate trans., William S. Hein 1995) (1680) [hereinafter TEXTOR].

273. *See infra* Parts V.D and V.G.

274. TEXTOR, *supra* note 272, at 34–46.

275. *Id.*

276. *Id.*

277. *Id.*

278. Petter Korkman, *Introduction* to JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW ix (Petter Korkman ed., Liberty Fund 2006) (1747) (*Principes du droit naturel* first published in 1747 and *Principes du droit politique* first published in 1751).

279. *Id.* at x.

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, 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.[280]

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.[281] When Burlamaqui 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."[282]

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 . . . ."[283]

National self-defense is simply an extension, with appropriate modifications, of the right and duty of personal self-defense.[284] 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."[285]

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

280. RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM (1937) [hereinafter BURLAMAQUI].

281. *Id.* at 16–17, 119–24.

282. BURLAMAQUI, *supra* note 280, at 446 (bk. 2, pt. 4, ch. 1, § 5).

283. *Id.* at 157 (bk. 1, pt. 2, ch. 4, § 16).

284. [W]ar is nevertheless permitted in certain circumstances, and sometimes necessary both for individuals and nations. This we have sufficiently shewn . . . by establishing the rights which nature has invested mankind for their own preservation. The principles of this kind, which we have established with respect to particulars, equally, and for stronger reasons, are applicable to nations. . . . The law of God no less enjoins a whole nation to take care of their preservation, than it does private men.

Id. at 447 (bk. 2, pt. 4, ch. 1, §§ 10–11).

285. *Id.* at 448 (bk. 2, pt. 4, ch. 1, § 11).

violence."[286] Thus, people have a right "to rise in arms" against "extreme abuse of sovereignty," such as tyranny.[287]

Burlamaqui agreed with the Englishman Algernon Sidney 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."[288] 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."[289]

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."[290]

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."[291] 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."[292] 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.[293]

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."[294] This principle is an extension of personal assistance in self-defense, for "[e]very man, as such, has a right to claim the assistance of

286. *Id.* at 373 (bk. 2, pt. 2, ch. 6, § 22).
287. *Id.* at 372 (bk. 2, pt. 2, ch. 6, §§ 16–17).
288. *Id.* at 373 (bk. 2, pt. 2, ch. 6, § 30).
289. *Id*.
290. *Id.* at 378 (bk. 2, pt. 2, ch. 6, § 38).
291. *Id.* at 443 (bk. 2, pt. 3, ch. 5, § 55).
292. *Id.* at 442.
293. *Id.* at 442–43 (bk. 2, pt. 3, ch. 5, § 42).
294. *Id.* at 465 (bk. 2, pt. 4, ch. 2, § 47).

other men when he is really in necessity."[295]

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."[296]

3. George Frederick von Martens

The late eighteenth century marked the end of the classical period of international law. One of the last of the founding treatises was written by the University of Göttingen professor George Frederick von Martens: *Summary of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe.*[297] He acknowledged that some uncivilized nations did not follow the norms of international law, but he argued that the nations of Europe did, and so he confined his treatise to what Europeans did.

The principles of Grotius, Pufendorf, and the other founding giants were so well established that Martens could simply state, as an obvious truth, "our right to wound and kill being founded on self-defense," it is impermissible in warfare to target non-combatants.[298]

295. *Id.* at 466 (bk. 2, pt. 4, ch. 2, § 49).

296. *Id.* § 50. He made a related point about firearms in order to illustrate his point that action can only be imputed to a person based on his knowledge of foreseeable consequences:

> A gunsmith sells arms to a man who has the appearance of a sensible, sedate person, and does not seem to have any bad design. And yet this man goes instantly to make an unjust attack on another person, and kills him. Here the gunsmith is not at all chargeable, having done nothing but what he had a right to do; and besides, he neither could nor ought to have foreseen what happened.

Id. at 208 (bk. 1, pt. 2, ch. 10, § 5). In contrast, if a careless person left a pair of loaded pistols on a table in a public place, he would be chargeable if a child found the pistols and accidentally injured himself. *Id*. Barbeyrac had made a similar argument in favor of liability for the pistol owner. PUFENDORF, *supra* note 196, at 46 n.2 (bk. 1, ch. 5, § 3).

297. *E.g.* MARTENS, SUMMARY OF THE LAW OF NATIONS FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 89, n.† (William Cobbett trans., Fred B. Rothman 1986) (reprint of 1795 English translation) (1788) ("The roman law ought to be considered as the subsidiary law in Germany, Switzerland, Holland, France, Italy, Spain, Portugal, Polon, and in some of the tribunals in Great Britain.").

298. MARTENS, *supra* note 297, at 282 (bk. 8, ch. 3, § 4).

4. George Bowyer

Englishman George Bowyer was the author of four legal treatises in the mid-nineteenth century. His work was so highly regarded that the University of Oxford awarded him its greatest honor, naming him a Doctor of Civil Law (a title usually reserved for heads of state and the Chancellor of the University).[299] In his 1854 *Commentaries on Universal Public Law*, he aimed to describe the shared elements of public law "of human society in general throughout the world, including the foundations of International Law."[300]

Bowyer cited and agreed with Grotius's theory of self-defense.

> For a chief object of society is that each person may enjoy peaceably all that belongs to him, with the assistance of the power of his whole body. Therefore the law of society cannot justly prevent a man from defending and enforcing his own rights, unless society will undertake that task for him.[301]

Thus,

> Every man has a right to defend himself or his property, or even to defend others, where there is not time or opportunity to call in aid the civil power. The reason is obvious; for if it were not so, men would find themselves in a worse condition in those cases, under civil government, than they would be in if they were living in a mere natural society without any civil government.[302]

Not all nineteenth century legal scholars followed Bowyer's practice of reminding readers of first principles. By the nineteenth century, a large edifice of international law had been built on the foundation of Grotius and the other classical authors. Just as people who work on the sixty-fifth story of a skyscraper may not spend much time thinking about the building's foundation, many of the international law scholars of the nineteenth (and twentieth century) tended to concentrate on elaborating the details and applications of particular subjects—such as maritime rights, or the extent of ambassadorial immunities—without discussion of first principles. The first principles, like the foundation of a skyscraper,

299. BOOTHMAN, *supra* note 221.
300. BOWYER, *supra* note 183, at 12.
301. *Id.* at 232.
302. *Id.* at 233.

were still there of course, for the whole edifice would collapse without them.

5. George B. Davis

As of the early twentieth century, the direct connection between the national right of self-defense and the individual right continued to be an obvious element of international law. George B. Davis was West Point's most renowned Professor of Law. In his 1901 treatise *The Elements of International Law*, George B. Davis explained that the "Right of Self-Preservation" is "called in being whenever the corporate existence of a state is menaced, and corresponds to the individual right of self-defence."[303]

D. Conclusion: Burning Down the House

Frey's attempt to deny the existence of a human right to self-defense has terrifying implications, which run far beyond her narrow effort to assist international gun prohibition. If Frey is right—that there is no human right to self-defense—then Grotius, Pufendorf, Vattel, Victoria, and all the rest of the humanitarian founders of international law are wrong.

And these humanitarians would not be wrong about an incidental matter (such as whether consuls have the same rights as ambassadors); they would be wrong in the very foundation of their humanitarian principles. The personal right of self-defense is the foundation of the humanitarian edifice built by the classic authors. The personal right to self-defense is why the Indians had a right to resist Spanish pillaging. It is why prisoners of war must be treated humanely, why armies must not target non-combatants, and why aggressive war is unjust.

If Frey is correct that self-defense is not a fundamental human right, then the structure of more than five centuries of humanitarian international law collapses. All the generals, admirals, and diplomats who restrained the conduct of their militaries because they believed in the international law taught by Grotius and the rest were fools, because Grotius and his fellows were concocting international law on the basis of a human right that does not really exist; they were as misguided as the chemists who believed in phlogiston.[304]

303. DAVIS, *supra* note 177, at 74.

304. Phlogiston was, in the theory of some seventeenth and eighteenth century chemists, an odorless, colorless, weightless substance which was released during combustion. The phlogiston theory was disproved by Antoine-Laurent Lavoisier, who showed that combustion requires oxygen;

Justice Felix Frankfurter decried the short-sighted advocates of repressive law enforcement who would "burn the house to roast the pig."[305] Frey's target is gun ownership, but in order to get at gun owners, she is promoting a radical theory which tends towards the destruction of humanitarian international law itself.

In modern international law, there is a continuing controversy over natural law versus positivism. As detailed *supra*, the positivist tradition and the natural law position *both* have historically recognized the right of personal self-defense.[306] Johannes Textor was an international law positivist *avant la lettre*, and also a firm defender of self-defense. Later scholars have argued about the degree to which Grotius, Pufendorf, et al., used natural or positive law.

Frey's position is premised on an extremist version of positivism: that humans have no rights other than the rights which governments grant them via international human rights treaties or other positive enactments. (Although, even if one accepts the view that rights are *only* created by positive law, Frey has failed to inform the Human Rights Council about many positive laws of the right of self-defense, as discussed in Part V and Part VI.) The positivist-only view is contrary to the essential nature of human rights—which is that all humans have certain fundamental rights, regardless of whether those rights have been codified in a national code or international treaty. If all the human rights treaties in the world were repealed tomorrow, could a person still assert that she has a right to freedom of religion, a right not to be raped, a right to criticize the government? We think that the answer is clearly "yes"—that these rights have always been inherent; the human rights treaties of the twentieth century recognized these rights, but did not *create* them.[307]

There are some modern scholars, such as Yoram Dinstein of Israel, who insist that natural law is anachronistic because it came from an "ecclesiastical" era.[308] Of the many authors we have surveyed, some of

once combustion was understood to be a form of oxidation, the evidence supporting the phlogiston theory disappeared.

305. Butler v. Michigan, 352 U.S. 380, 383 (1957) (rejecting the notion that literature for adults should be censored in order to protect children from seeing inappropriate materials).

306. *See supra* Part IV.A–C.

307. The United States Supreme Court has noted that the right to arms, like the right to peaceably assemble, is not created by positive law, but rather derives "'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists." United States v. Cruikshank, 92 U.S. 542, 551 (1875) (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824)). The "civilized man" quote comes from the Court's discussion of the right to assemble; the right to arms discussion follows immediately, and adopts the same reasoning as the right to assembly analysis. For a more detailed discussion of *Cruikshank*, *see* David B. Kopel, *The Supreme Court's Thirty-five Other Second Amendment Cases*, 18 ST. LOUIS U. PUB. L. REV. 99, 177 (1999).

308. DINSTEIN, *supra* note 4, at 179–80. Although Dinstein's credentials as an international law scholar are indisputable, his knowledge of the ecclesiastical theory and practice is weak. For

the important Spanish predecessors of Grotius were indeed ecclesiastics. Today, there are some people who, writing from a religious foundation, believe that natural law is a bulwark of human liberty.[309] But it is much too glib to dismiss natural rights theory as religiously based. In this Part, almost none of the arguments—including the arguments made by ordained members of religious orders—depend on any proof deriving directly from revealed religion. Rather, the arguments often used Bible stories—as they used stories from ancient Greece and Rome—to illustrate or reinforce their points

Moreover, one hardly needs to believe in natural law to recognize self-defense as a fundamental right. When we examine the sources of international law, we will not expect to find that all the great founders of

example, he claims that before the Roman Emperor Constantine made Christianity the state religion (in 312 AD), Christians were entirely pacifist. Dinstein further claims that the theoretical justification for Christians serving in the Roman armies was invented by Augustine, in his fifth-century book *The City of God*. *Id.* at 64. While Augustine elaborated "Just War" principles with great sophistication, he was far from the first Christian apologist to justify Christian service in the Roman army. *See*, *e.g.*, CLEMENT OF ALEXANDRIA, PAEDAGOGUS, (The Instructor), bk. 2, ch. 12; bk. 3, ch. 12, para. 7, (G.W. Butterworth trans., G.P. Putnam's Sons 1919) (Clement of Alexandria lived between 150–215 AD); *available at* www.ccel.org/fathers2/ANF-02/anf02-52.htm#P3288_976824 (Christian men should wear shoes only when they serve in the military, and Christian soldiers should not extort money from civilians); EUSEBIUS OF CAESAREA, THE PROOF OF THE GOSPEL (*Demonstratio Evangelica*) 48–50 (bk. 1, ch. 8) (W.J. Ferrar ed. & trans., 2001) (One way to be a Christian is to adopt a religious vocation, such as becoming a monk. The other way, "more humble, more human, permits men to join in pure nuptials and to produce children, to undertake government, to give orders to soldiers fighting for right.") (Eusebius of Caesarea lived approx. 260 to 339 AD); ST. ATHANASIUS, Letter to Amun, Letter 48, *available at* www.ccel.org/fathers2/NPNF2-04/Npnf2-04-102.htm#P9806_3501911 (written before 354 AD) ("[I]n war it is lawful and praiseworthy to destroy the enemy; accordingly not only are they who have distinguished themselves in the field held worthy of great honours, but monuments are put up proclaiming their achievements."); ST. AMBROSE, THE DUTIES OF THE CLERGY, bk. 1, ch. 28–29 (Christians should fight wars to give people freedom, as Moses did, and not for selfish purposes; Christian armies should fight fairly, and should not be excessively hard to vanquished enemies who did not fight with brutality.) (St. Ambrose lived from 339 to 397 AD, and this piece was written approximately 391 AD). The notion that the pre-Constantine Christians were all pacifists who would not serve in the army is contradicted by numerous other sources, starting with the New Testament. *See*, *e.g.*, *Acts* 13:6–12 (Sergius Paulus, the deputy military governor of Cyprus, becomes a Christian, without abandoning his post.); *Acts* 10; 11:1–18 (A centurion—that is, a Roman army unit commander—and an enlisted man become Christians.); Timothy S. Miller, *Introduction* to PEACE AND WAR IN BYZANTIUM 9 (Timothy S. Miller & John Nesbitt eds., 1995) (Sometime between 193 and 235 AD, a Christian church was built in the large Roman military camp at Dura Europos, in Syria. The existence of the camp shows that, at least in Syria, there were a large number of Christians in the army, and that the military leadership not only tolerated them, but tried to accommodate their religious needs.); ADOLF HARNACK, MILITIA CHRISTI: THE CHRISTIAN RELIGION AND THE MILITARY IN THE FIRST THREE CENTURIES 94–95 (David McInnes Gracie trans., 1981) (Before the Emperor Diocletian began the final, most severe persecution of Christians, the Roman military had come to an accommodation with its many Christian soldiers: the soldiers would attend the army's numerous pagan rites, but they would be allowed to make the sign of the cross, which would protect them from demons).

309. *See*, *e.g.*, Paolo G. Carozza, *The Universal Common Good and the Authority of International Law*, 9 LOGOS 28 (2006) (discussing natural law theory of international relations of Pope John Paul II).

international law were unanimous in their epistemology, or that all their sensibilities are congruent with our own. Wherever one thinks rights come from, it is quite significant that there is unanimity of opinion among the founders of international law: personal self-defense is a fundamental human right, essential to the foundation of international law and order. If one agrees with the opening paragraphs of the U.S. Declaration of Independence, that it is "self-evident" that all men inherently have inalienable human rights, then one agrees with the general principles of Grotius, Pufendorf, Vattel, and the rest.

On the other hand, if one takes Dinstein's position that "law" is *solely* a creation of governments and of bodies created by governments, then consider what the governments of the world have created in their constitutions, in their most fundamental statements of the structure of the legal order. The constitutions of at least sixteen nations explicitly affirm that human rights are inherent (or "natural" or created by God); they affirm human rights are recognized by governments, but not created by governments.[310] And so does the United Nations Universal Declaration of Human Rights,[311] the International Covenant on Civil and Political Rights,[312] and the main human rights treaty of the Western Hemisphere—the American Convention on Human Rights.[313] Thirty-five

310. *See* THE CONSTITUTION OF AFGHANISTAN art. 23 ("Life is a gift of God and a natural right of human beings."); CONSTITUTION OF THE PRINCIPALITY OF ANDORRA art. 4 ("The Constitution recognizes the intangibility of the human dignity and guarantees the person's inviolable and imprescriptible rights . . . ."); AZERBAIJAN CONSTITUTION art. 24 ("Everyone . . . possess inviolable and inalienable rights and liberties."); CONSTITUTION OF BELIZE pmbl., § a (recognizing "inalienable rights with which all members of the human family are endowed by their Creator . . . ."); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 41 ("Individual freedom is a natural right not subject to violation . . . ."); CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA art. 10 ("Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable."); CONSTITUTION OF THE REPUBLIC OF LIBERIA art. 11 ("All persons . . . have certain natural, inherent and inalienable rights . . . ."); CONSTITUTION OF THE REPUBLIC OF LITHUANIA art. 18 ("The rights and freedoms of individuals shall be inborn."); CONSTITUTION art. 11 ("The State guarantees the natural rights of the individual . . . ."); CONSTITUCION POLITICA art. 4 (Para.) ("The right to the life is inherent to the human person."); CONSTITUTION OF SAINT LUCIA Part II, sched. III, b ("[A]ll persons have been endowed equally by God with inalienable rights . . . ."); SAUDI ARABIA CONSTITUTION art. 26 ("The state protects human rights in accordance with the Islamic Shari'ah."); SPAIN CONSTITUTION art. 10 ("[I]nviolable rights which are inherent . . . ."); SYRIA CONSTITUTION art. 25 ("Freedom is a sacred right."); THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO pmbl. ("[T]he equal and inalienable rights with which all members of the human family are endowed by their Creator . . . ."); THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 12 ("Everyone possesses inherent fundamental rights . . . .").

311. Universal Declaration of Human Rights, G.A. Res. 217A, at pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (recognizing "the inherent dignity and of the equal and inalienable rights of all members of the human family").

312. International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U.N.T.S. 171 (same language as Universal Declaration).

313. Organization of American States, American Convention on Human Rights, pmbl., Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123 ("[T]he essential rights of man are not derived from

American state constitutions, too, affirm that human rights are inherent, natural, or otherwise *not* the mere creation of positive law; quite often, the affirmations of inherent rights include the enumeration of self-defense.[314]

one's being a national of a certain state, but are based upon attributes of the human personality . . . ."); *see also* Judicial Condition and Rights of Undocumented Migrants, advisory opinion OC-18/03 Ser. A, no. 18 (Sept. 17, 2003) ("All persons have attributes inherent to their human dignity that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure.").

314. ALA. CONST. § 1 (describing the equality and rights of men and their "inalienable rights . . . life, liberty and the pursuit of happiness."); ALASKA CONST. art. 1 ("[A]ll persons have a natural right to life, liberty . . . ."); ARK. CONST. art. 2, § 2 ("All men . . . have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty . . . ."); CAL. CONST. art. 1, § 1 ("All people . . . have inalienable rights. Among these are enjoying and defending life and liberty . . . ."); COLO. CONST. art. 2, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties . . . ."); DEL. CONST. pmbl. ("Through Divine goodness, all people have by nature the rights . . . of enjoying and defending life and liberty . . . ."); FLA. CONST. art 1, § 2 ("All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty . . . ."); HAW. CONST. art. 1, § 2 ("All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty . . . ."); IDAHO CONST. art. 1, § 1 ("All men . . . have certain inalienable rights, among which are enjoying and defending life and liberty . . . ."); ILL. CONST. art. 1m, § 1 ("All men . . . have certain inherent and inalienable rights among which are life . . . ."); IND. CONST. § 1 ("all people are . . . endowed . . . with certain inalienable rights; that among these are life, liberty . . . ."); IOWA CONST. art. 1, § 1 ("All men and women . . . have . . . inalienable rights . . . of enjoying and defending life . . . ."); KAN. CONST. § 1, Bill of Rights. ("All men are possessed of equal and inalienable natural rights, among which are life, liberty . . . ."); KY. CONST. § 1, Bill of Rights ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: The right of enjoying and defending their lives and liberties . . . ."); ME. CONST. art. 1, § 1 ("All people . . . have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life . . . ."); MASS. CONST. art. 1 ("All men . . . have certain natural, essential, and unalienable rights . . . enjoying and defending their lives . . . ."); MO. CONST. art. 1, § 2 ("all persons have a natural right to life . . . ."); MONT. CONST. art. 2, § 3 ("All persons . . . have certain inalienable rights . . . and the rights of . . . defending their lives . . . ."); NEB. CONST. art 1, ("All persons have certain inherent and inalienable rights; among these are life . . . and the right to keep and bear arms for security or defense of self, family, home, and others . . . ."); NEV. CONST. art. 1, § 1 ("all persons . . . are endowed by their Creator with certain inalienable rights; that among these are life . . . ."); N.H CONST., Bill of Rights, art 2. ("All men have certain inalienable rights among which are those of . . . defending life . . . ."); N.J. CONST. art. 1, § 1 ("All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life . . . ."); N.M. CONST. art. 2, § 4 ("All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of . . . defending life . . . ."); N.C. CONST. art. 1, § 1 ("all persons . . . are endowed by their Creator with certain inalienable rights; that among these are life . . . ."); N.D. CONST. art 1, § 1 ("All individuals . . . have certain inalienable rights . . . defending life . . . to keep and bear arms for the defense of their person, family, property, and the state . . . ."); OHIO CONST. art. 1, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life . . . ."); OKLA. CONST. art. 2, § 2 (" All persons have the inherent right to life . . . ."); PA. CONST., § 1 ("All men . . . have certain inherent and indefeasible rights . . . defending life . . . ."); S.D. CONST. art. 6, § 1 ("All men . . . have certain inherent rights. . .defending life . . . ."); UTAH CONST., art. 1, § 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties . . . ."); VT. CONST. art. 1 ("That all persons . . . have certain natural, inherent, and unalienable rights, amongst which [is] . . . defending life . . . ."); VA. CONST. art. 1, § 1 ("That all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life . . . .");

Thus, the principle of inherent human rights would be, in a sense, a widespread enactment of positive law. The positive law would be supported by the consensus of the great jurists of international law.

The status of self-defense in international law does not depend on precisely how an individual resolves the natural law versus positive law debate. Either the unanimous consensus of the founding scholars reflects natural law, or it reflects positive law as articulated unanimously by the experts themselves. [315] In any case, it is apparent that self-defense forms the intellectual foundation of international law.

The reader may wonder how Frey, acting as a Special Rapporteur, could fail to inform the Human Rights Council about the overwhelming consensus of the founding scholars of international law. Perhaps an international law professor might not know about Giovanni da Legnano, but it is inconceivable that an international law professor would not know about Grotius and Pufendorf. The answer may be found in Professor Frey's artfully-worded statement that "[n]o international human right of self-defence is expressly set forth in the primary sources of international law: treaties, customary law, or general principles."[316] The statute of the International Court of Justice describes "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[317] Thus, by referring only to "primary" sources, Frey evades the responsibility of a conscientious Special Rapporteur to inform the Human Rights Council about each of the four sources of international law. Yet Frey is not consistent, for she is actually quite liberal about using quotes and

W.VA. CONST. art. 3, § 1 ("All men . . . have certain inherent rights . . . the enjoyment of life . . . ."); WIS. CONST. art. 1, § 1 ("All people . . . have certain inherent rights; among these are life . . . ."); WYO. CONST. art. 1, § 2 ("In their inherent right to life . . . .").

315. More eloquently:

> There are two ways of investigating the law of nature: . . . either by arguing from the nature and circumstances of mankind, or by observing what has generally been approved by all nations. The former is the more certain of the two: but the latter will lead us, if not with the same certainly, yet with a high degree of probability to the knowledge of this law. For such a universal approbation must arise from some universal principle; and the principle can be nothing else than the common sense of mankind. Since, therefore, the general law of nature may be investigated in this manner, the same law as it is applied particularly to nations as moral agents, and hence called the law of nations, may be investigated in the same manner.

HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 39–40 (The Lawbook Exchange 2002) (1836) (quoting Grotius).

316. *Frey Report*, *supra* note 48, ¶ 21.

317. Stat. of the Int'l Ct. of Just., art. 38, § 1(d).

citations from scholars to buttress her other points.[318] So, in short, she informs the Human Rights Council about the opinions of scholars who support some tangential aspects of her theories, but fails to inform the Human Rights Council of the opinions of the most influential international law scholars of all time regarding the primary subject of her report.

In any case, Frey's claim about the "primary" sources of international law is also quite wrong, as will be detailed in the next two Parts. Frey engages in some other verbal obfuscation in order to avoid informing the Human Rights Council about what the sources of international law really say.

V. HISTORICAL LEGAL SYSTEMS

Major legal systems are a source of international law, especially when there is consensus among the systems. The statute of the International Court of Justice tells the court to apply "the general principles of law recognized by civilized nations."[319] Frey acknowledges that these "general principles" are a "primary" source of international law.[320] While Part VI will discuss contemporary law, this Part examines the historical practices of civilized nations and the influence of those practices on the evolution of international law. These historical sources are important because "modern international law—making all proper allowance for its greater comprehensiveness, more solid basis, and more determinate character—is by no means a new creation, but partly a reassertion and refinement of ancient doctrines, partly a restoration or continuation or adaptation of ancient customs and institutions."[321]

A. Greek Law

It is often said that Western Civilization was built on the foundations of Athens and Jerusalem, on the synergy of ancient Greece and ancient Israel which produced Christianity.[322] So let us begin with Athens.

The best source of ancient Athenian law on self-defense is the speech of Demosthenes, "Against Aristocrates." Aristocrates had convinced the Athenian Senate to enact a decree for the protection of the mercenary leader Charidemus. The laws provided for automatic punishment of

318. *See Frey Report*, *supra* note 48, ¶¶ 15, 19, 21.
319. Stat. of the Int'l Ct. of Just., art 38, § 1(c).
320. *Frey Report*, *supra* note 48, ¶ 21.
321. Phillipson, *supra* note 161, at 12a.
322. *See*, *e.g.*, LEO STRAUSS, STUDIES IN PLATONIC POLITICAL PHILOSOPHY 171 (1983).

anyone who killed Charidemus. The decree failed to win the approval of the Assembly, and did not go into effect.[323]

An opponent of Aristocrates brought a case in the law courts, where Demosthenes presented an argument that the decree had been repugnant to the legal principles of Athens. For example, the decree provided for automatic punishment, rather than the due process of a trial with fact-finding. Similarly, the decree had no exception for a killing in self-defense, even though Athenian law clearly provided for self-defense.[324]

Demosthenes cited the Athenian statute: "If any man while violently and illegally seizing another shall be slain straightway in self-defence, there shall be no penalty for his death."[325] Pufendorf quoted this passage with approval.[326] (Pufendorf also cited Plato's *Laws*, which repeatedly justify self-defense, although today we do not know if Plato's particular ideas were actually followed as law.)[327]

Demosthenes explained that "straightway" meant that the victim had slain the aggressor in immediate self-defense, rather than after "long premeditation."[328] The words "in self-defense" made it clear that the law was "giving indulgence to the actual sufferer, and to no other man."[329]

In Part VI, we will examine Frey's astonishing theory that there is no self-defense right because all self-defense is an excuse, rather than justification.[330] The Greeks did not agree. Demosthenes explained, "there is such a thing as justifiable homicide," for some kinds of homicide can "be accounted righteous."[331]

323. J.H. Vince, *Introduction* to "Against Aristocrates" in 3 DEMOSTHENES, ORATIONS 212–13 (1935) (originally delivered in 352 BC) [hereinafter DEMOSTHENES].

324. *Id.*

325. DEMOSTHENES, *supra* note 323, § 69, at 253.

326. PUFENDORF, *supra* note 196, bk. 2, ch. 5, § 16, n.(t), at 198. Pufendorf wrote his own footnotes, which used letters as footnote markers. The Barbeyrac footnotes are indicated by numerals.

327. PLATO, LAWS, bk. 9, at 216 (Benjamin Jowett trans.), *available at* http://www.gutenberg.org/dirs/ etext99/plaws11.txt ("If a brother kill a brother in self-defence during a civil broil, or a citizen a citizen, or a slave a slave, or a stranger a stranger, let them be free from blame, as he is who slays an enemy in battle. But if a slave kill a freeman, let him be as a parricide. A man is *justified* in taking the life of a burglar, of a footpad, of a violator of women or youth; and he may take the life of another with impunity in defence of father, mother, brother, wife, or other relations." (emphasis added)).

328. DEMOSTHENES, *supra* note 323, § 60, at 253.

329. *Id.*

330. *See infra* Part VI.F.4 notes and accompanying text.

331. DEMOSTHENES, *supra* note 323, § 74, at 265. Athenian law presumed that the citizen militia would possess their own arms, which they would use when called to military service. Arms-carrying was allowed in the countryside, but not in the city unless there was a particular need. XENOPHON, HELLENICA, bk. 1.

B. Jewish Law

Jewish law, as expressed in the Jewish Bible (what Christians call "the Old Testament"), became part of Christianity, and the Jewish texts on self-defense and defense of others were frequently cited by Christian writers. Jewish law is also important in its own right as an early form of transnational law. After Judea was conquered by Babylon in 587 BC, some of the Jewish community was forcibly transported to Babylon, while some remained behind in Judea (part of modern-day Israel). Later, a thriving Jewish community developed in Alexandria, Egypt. Following an unsuccessful war of national independence against the Roman Empire in 70 AD, many (although not all) of the Jews in Israel were dispersed throughout the Empire. In the subsequent centuries, Jews lived all over Europe and the Middle East, often in segregated, self-governing communities. These communities regulated their internal affairs according to Jewish law and used it in their dealings with Jewish communities in other nations.

Jewish law explicitly authorized personal and family self-defense against criminal attack. The book of Exodus absolved a homeowner who killed a burglar at night: "If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him."[332] The Modern Language Bible renders the verse: "When a burglar is caught breaking in, and is fatally beaten, there shall be no charge of manslaughter."[333]

Under the Mosaic Law, the nearest relative of a person who was murdered was obliged to kill the murderer, providing blood restitution for the death of the innocent. However, when a nocturnal burglar was killed in the act, there was no wrongdoing. Thus, his relatives had no right of restitution against the homeowner.[334] That no restitution was allowed suggests that, in modern terms, the killing of the home invader would be in the category of justification, rather than excuse (contrary to Frey's theory that self-defense is not a justification, but is instead an

332. *Exodus* 22:2. For more extensive analysis of Jewish law, *see, e.g.*, David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17 (2004). The next verse stated that "If the sun be risen upon him, there shall be blood shed for him." *Exodus* 22:3. Jewish legal scholars interpreted the "sun" language metaphorically: if the circumstances indicated that the burglar posed a violent threat to the victims in the home, the burglar could be slain regardless of the time of day; conversely, if it were clear that the burglar was only taking property, and would not attack the people in the home, even if they interfered with the burglary, the burglar could not be slain. Kopel, *supra*, at 32–34.

333. THE WORD: THE BIBLE FROM 26 TRANSLATIONS 225 (Curtis Vaughn ed., 1993) (quoting THE MODERN LANGUAGE BIBLE: THE NEW BERKELEY VERSION IN MODERN ENGLISH).

334. EDWARD J. WHITE, THE LAW IN SCRIPTURES 77 (2000). If the deceased were not a real burglar, but someone who was mistaken for a burglar, there was no criminal offense. SAMUEL MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS 33 n.55 (The Lawbook Exchange 2001) (1891).

excuse).[335]

The *Talmud*, a multi-layered and ever-expanding commentary on Jewish law, is itself a source of Jewish law. Regarding the passages in *Exodus*, the *Talmud* explains:

What is reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, "If I go there, he [the owner] will oppose me and prevent me; but if he does, I will kill him." Hence the Torah decreed "If he come to slay thee, forestall by slaying him."[336]

This last sentence is sometimes translated, "If someone comes to kill you, rise up and kill him first."[337]

The final sentence is not an option; it is a positive command. A Jew has a *duty* to use deadly force to defend herself against murderous attack.

The *Talmud* also imposes an affirmative duty for bystanders to kill if necessary to prevent a murder, the rape of a betrothed woman, or pederasty.[338] The commentators agree that a person is required to hire a rescuer if necessary to save the victim from the "pursuer" (the *rodef*).[339] Likewise, "if one sees a wild beast ravaging [a fellow] or bandits coming to attack him . . . he is obligated to save [the fellow]."[340]

The duty to use force to defend an innocent is based on two passages. The first is *Leviticus* 19:16, "you shall not stand up against the life of your neighbor."[341] Or in a modern translation, "nor shall you stand idly by when your neighbor's life is at stake."[342]

The second passage comes from *Deuteronomy* and explains that if a man and a betrothed (engaged) woman have illicit sex in the city, it would be initially presumed that she consented because she could have cried out for help. But if the sexual act occurred in the country, she would be presumed to have been the victim of a forcible rape, "For he found her in the field, and the betrothed damsel cried, and there was none

335. *See infra* Part VI.F.4.

336. HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD: SANHEDRIN, folio 72a. (I. Epstein ed., 1994).

337. BABYLONIAN TALMUD, TRACTATE SANHEDRIN, folio 72a.

338. 2 TALMUD BAVLI; THE GEMARA: THE CLASSIC VILNA EDITION WITH AN ANNOTATED, INTERPRETIVE ELUCIDATION, AS AN AID TO TALMUD STUDY, TRACTATE SANHEDRIN folio 73a[1] (Michael Wiener & Asher Dicker elucidators, Mesorah Pubs., 2d ed. 2002) [Hereinafter VILNA TALMUD, TRACTATE SANHEDRIN].

339. *Id.* at folio 73a[3].

340. *Id.* at folio 73a[1] (brackets in original).

341. *See also Prov.* 24:11–12 ("Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter. If you say, 'Behold, we did not know this,' does not he who weighs the heart perceive it?") (English Standard Version).

342. *Lev.* 19:16 (New American Bible).

to save her."[343] The passage implies that bystanders must heed a woman's cries and come to her rescue.[344]

C. Roman Law

The law of the Roman Republic and Empire was the dominant legal system in the Western world for many centuries. Indeed, in Europe, North Africa, and Asia west of Persia, the Roman legal system was the only enduring legal system, as the Roman Empire encompassed every civilized region.

Even after the Western Roman Empire fell in the fifth century AD, Roman law remained a foundation of European law, as we shall detail *infra*.[345] As a foundation of European law, Roman law became part of the laws of much of Latin America, Africa, and Asia, through the process of colonization. Roman law continued to be a major part of the European legal system during the Napoleonic era.[346]

Although post-colonial nations have developed their legal systems in diverse ways, it is still fair to say that Roman law comes closer than any other legal system to being the common heritage of all mankind. In 1901, an international law treatise stated that it was "easy for Grotius and his successors to deduce from the Roman law by far the greater part of the system of international law as it exists to-day. In its fundamental principles it has changed but little since Grotius's day."[347]

The foundation of Roman law was the Twelve Tables.[348] The Twelve Tables were, literally, twelve bronze tablets containing some of the basic legal rules, published in the final form in 449 BC. They were placed in the Forum, so that every citizen could easily read them. They were created after extensive public debate and discussion, by a committee of ten (*decemvirs*) which relied in part on Greek law, and which made revisions based on public comment by citizens.[349]

343. *Deut.* 22:23–27. The presumption was not conclusive and could be overcome by other evidence.

344. 2(a) THE MISHNEH, SEFER NEZEKIN 150–51 (Matis Roberts trans. & commentary, 1987) (ch. 8, § 7); *see also* VILNA TALMUD, TRACTATE SANHEDRIN, folio 73a. *Nezekin* or *Neziqin* is the portion of the law dealing with damages of all sorts. *Sefer* means "Book of."

345. *See infra* Parts V.D–H.

346. *E.g.* MARTENS, *supra* note 297, at 89 n.† (William Cobbett trans., 1986) (reprint of 1795 English translation) (1788) ("The [R]oman law ought to be considered as the subsidiary law in Germany, Switzerland, Holland, France, Italy, Spain, Portugal, Polon, and in some of the tribunals in Great Britain.").

347. DAVIS, *supra* note 177, at 19.

348. *Lex Duodecim Tabularum*, or *Duodecim Tabulae.*

349. TITUS LIVIUS, THE EARLY HISTORY OF ROME 192–248 (bk. 3, *8–59) (Aubrey de Sélincourt trans., Penguin Books 1971) (First published sometime during the reign of Augustus Caesar).

The very creation of the Twelve Tables was a monumental development in due process; the laws were published, readily accessible, and written to be readily understood by an ordinary citizen. Previously, the laws had been closely guarded by an élite which secretly manipulated and perverted the law to its own benefit. As one legal historian summarized:

> From an historical point of view, their importance cannot be overrated. The fixing of the brazen tablets, in a conspicuous position in the heart of the city, marks, at a critical period in the infancy of the commonwealth, the successful issue of one of the many struggles of the plebeian element for that equality of rights which was denied them by the patricians, and which it was vain to look for until a preliminary step had been obtained, viz., the withdrawal, from the hands of a dominant caste, of the exclusive knowledge of, and power of perverting to their own ends, those hitherto unwritten usages which had served the purposes of law.[350]

Unfortunately, the Twelve Tables themselves were later destroyed, so what we know of them comes from secondary sources. The self-defense rules are in Table VIII:

12. If a theft be committed at night, and the thief be killed, let his death be deemed lawful.

13. If in the daytime (only if he defend himself with weapons).[351]

The Twelve Tables thus contained a counterpart of the Hebrew law from *Exodus*, based on the principle that the slaying of a night-time burglar was lawful, because the burglar was presumed to be a deadly threat.[352] A daytime burglar could also be slain, if the facts indicated that he were a deadly threat.

350. T. Lambert Mears, *Introduction* to THE INSTITUTES OF GAIUS AND JUSTINIAN: THE TWELVE TABLES, AND THE CXVIIITH AND CXXVIITH NOVELS, lvi (T. Lambert Mears trans., The Lawbook Exchange 2004) (1882).

351. *Id.* at Table 8, items 12–13 (parenthetical addition by translator); *see also* ALLAN CHESTER JOHNSON et al., ANCIENT ROMAN STATUTES 11 (2003) (alternate translation, to the same effect). Another scholar puts this law in Table 8, law 3: "If one is slain while committing theft by night, he is rightly slain." INTERNET ANCIENT HISTORY SOURCEBOOK, http://www.fordham.edu/HALSALL/ancient/12tables.html (last visited Nov. 19, 2007). Still another scholar puts the law in Table 2, law 4. "Where anyone commits a theft by night, and having been caught in the act is killed, he is legally killed." S. P. SCOTT, THE CIVIL LAW INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO (1932), *available at* http://www.constitution.org/sps/sps01_1.htm.

352. *See supra* Part V.B.

For a thousand years, the Twelve Tables were venerated as the embodiment of Roman law. For example, they were held in the highest esteem by the great Roman lawyer and orator of the first century BC, Cicero.[353] Cicero himself, in a text that was studied for many centuries afterwards by almost everyone who learned Latin (that is, almost every well-educated person), affirmed the right of self-defense:

> What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.
>
> The law very wisely, and in a manner silently, gives a man a right to defend himself . . . the man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.[354]

The principle of self-defense led directly to the commendation of tyrannicide.[355] Self-defense against lone criminals and against tyrants

353. "Though all the world exclaim against me, I will say what I think: that single little book of the Twelve Tables, if anyone look to the fountains and sources of laws, seems to me, assuredly, to surpass the libraries of all the philosophers, both in weight of authority, and in plenitude of utility." CICERO, DE ORATORE (On the Orator), bk. 1, § 44, ¶ 195 (John Selby Watson trans., George Bell & Sons 1884) (55 BC).

354. Marcus Tullius Cicero, *Speech in Defence of Titus Annius Milo*, *in* 3 ORATIONS OF MARCUS TULLIUS CICERO 134, 158–59 (Charles Duke Yonger trans., Colonial Pr., ed., rev. 1899) (52 BC), *available at* http://www.uah.edu/student_life/organizations/SAL/texts/latin/classical/cicero/promilone.html. Cicero never delivered the speech as written, because Milo's enemy Pompey surrounded the courtroom with troops. However, the speech was preserved and studied by many generations of Latin students and scholars.

355. CICERO, DE OFFICIIS [ON DUTIES], bk. 3, ch. 4, ¶ 19, at 287 (Walter Miller trans., Harvard University Press 1975) (44 BC) ("[I]f anyone kills a tyrant . . . of all glorious deeds, they [the Roman People] hold such an one to be the most noble."); *see also id.* at bk. 3, ch. 6, ¶ 32, at 298 ("[T]those fierce and savage monsters in human form [tyrants] should be cut off from what may be called the common body of humanity.").

were both applications of the natural "instinct of self-preservation."[356]

Cicero's political theory thus drew a parallel between personal self-defense against criminals, and national self-defense against public enemies. From this principle he extrapolated some basic principles of Just War, such as only fighting for a just cause, and sparing enemies who surrendered (unless they had fought the war with unusual cruelty). Cicero traced the decline of Roman fortunes in the first century BC to the abandonment of the Roman Republic's adherence to just war standards.[357] His views were based, in part, in his desire to strengthen "the common bonds of union and fellowship subsisting between all the members of the human race."[358]

Under Roman law, citizens had a right to carry personal arms. This right was sometimes denied to conquered people. For example, at the time of Jesus, Roman law forbade the Jews and other subject people to carry swords, under penalty of death.[359] (Apparently, the apostles of Jesus violated this law by carrying a pair of swords.)[360] In AD 212, Roman citizenship was extended to all free subjects of the Empire,[361] and

356. *Id.* at bk. 1, ch. 4, ¶ 11, at 13.

357. CICERO, DE LEGIBUS [ON THE LAWS], bk. 1, chs. 11–12 (n.p., n.d.); CICERO, DE OFFICIIS, *supra* note 355, at bk. 1, chs. 11–12, 23; bk. 2., ch. 8; bk. 3, ch. 20; *see also* WHEATON, *supra* note 214, at 20–24.

358. CICERO, DE OFFICIIS, *supra* note 355, at bk. 1, ch. 42, ¶ 149.

359. GOODENOUGH, *supra* note 257, at 151 (citing 1 L. MITTEIS & U. WILCKEN, GRUNDZÜGE UND CHRESTOMATHIE DER PAPYRUSKUNDE [FUNDAMENTALS AND COLLECTIONS OF PAPYRUS KNOWLEDGE], pt. 2, No. 19 (1912)). The weapons prohibition was enacted sometime between 35 BC and AD 5.

360. At the Last Supper, Jesus gave his final instructions to the apostles, and revoked the previous order about not carrying useful items. He asked, "When I sent you out with no moneybag or knapsack or sandals, did you lack anything?" "Nothing," the apostles replied. Jesus continued:

> But now, let the one who has a moneybag take it, and likewise a knapsack. And let the one who has no sword sell his cloak and buy one. For I tell you that this scripture must be fulfilled in me: And he was numbered with the transgressors. For what is written about me has its fulfillment.

The apostles responded, "Look, Lord, here are two swords." Jesus said to them, "It is enough." *Luke* 22:35–38 (English Standard Version). The Apostle Matthew was a tax collector (*Matthew* 10:3). Accordingly, he might have been allowed legally to carry a sword. It is possible that Matthew walked around carrying *two* swords, although it was unusual for one person to carry two swords. The swords might have been carried concealed in a bag or knapsack, although *Luke* 22 suggests that the Apostles did not carry bags or knapsacks before the last supper. The typical Roman sword of the Republic was the *gladius Hispaniensis*, whose blade was approximately thirty inches long. In the first century AD, the *gladius* was replaced by the Pompeii-type sword, whose blade was only sixteen inches. James Hurst, *The Roman Sword In The Republican Period And After*, http://www.unc.edu/courses/rometech/public/content/special/James_Hurst/THE_ROMAN_SWORD_IN_THE_REP.htm (last visited Nov. 19, 2007). The latter type of sword would have been relatively easy to carry concealed, especially under loose flowing garments.

361. Emperor Caracalla, *Constitutio Antoniniana De Civitate*, *in* PAUL ROBINSON COLEMAN-NORTON, FRANK CARD BOURNE, ALLAN CHESTER JOHNSON, & CLYDE PHARR, ANCIENT ROMAN

consequently they all enjoyed the right to arms.

The right to arms was abolished in 361, at least for persons who did not have advance approval from the government.[362] However, the Empires' inability to protect their subjects led to a restoration of the right in 440 in both the Western and the Eastern Empires. The restoration was re-confirmed several years later by the Western Emperor Majorian Augustus.[363]

D. Justinian's Corpus Juris

The Western Roman Empire vanished in 476, when the last emperor, Romulus Augustulus, was deposed. The Eastern Roman Empire, also known as the Byzantine Empire, was much stronger. The Eastern Empire lasted until 1453, when Constantinople fell to a Turkish Moslem army. The Byzantines never called themselves "Byzantines." Instead, they considered themselves "Romans"—a continuation of the state which had, according to tradition, been founded in 753 BC.

Around AD 534, the Byzantine Emperor Justinian ordered the creation of a compilation of all Roman law, which became known as the *Corpus Juris*.[364]

STATUTES: A TRANSLATION WITH INTRODUCTION, COMMENTARY, GLOSSARY, AND INDEX 212, 225–26 (2003).

362. CLYDE PHARR, THE THEODOSIAN CODE § XV.15.1, at 439 (2001) (Emperors Valentian (Valentinianus I) and Valens Augustuses to Bulphorus, Governor of Campia, Decree of Oct. 5, 364, "No person whatever, without Our knowledge and advice, shall be granted the right to employ any weapons whatsoever.").

363. Emperors Valentinianus III (West) and Theodosius II (East) "to the Roman People:"

> [B]ecause it is not sufficiently certain, under summertime opportunities for navigation, to what shore the ships of the enemy can come, We admonish each and all by this edict that, with confidence in the Roman strength and the courage with which they ought to defend their own, with their own men against the enemy, . . .they shall use those arms which they can, but they shall preserve the public discipline and the moderation of free birth unimpaired.

CLYDE PHARR, *Restoration of the Right to Use Weapons* (*De Reddito Jure Armorum*), *in The Novels of the Sainted Valentinian Augugustus*, *in* THE THEODOSIAN CODE AND NOVELS, tit. 9, 524 (June 24, 440). "Novels" was a legal term of art for new laws. The "enemy" mentioned in the law was the Visigoths, whose military victories in North Africa had exposed the entire Western Roman Empire to amphibious invasion.

The Emperor Majorian reigned in the West from 457 to 461. He was "the only man to hold that office in the 5th century who had some claim to greatness." ENCYLOPAEDIA BRITANNICA (2002 DVD edition). There are records of twelve laws enacted during his reign. One of those is titled *Restoration of the Right to Use Weapons* (*De Reddito Jure Armorum*). No text of the law survives. It is not known if the Restoration was co-issued with Leo I, the Eastern Roman Emperor. Of the ten Majorian decrees with surviving texts, the first two were not co-issued with Leo, and the latter eight all were.

364. The modern legal encyclopedia *Corpus Juris Secundum* was apparently named,

The Roman law was considered, in many respects, to embody universal principles of law. Gaius, a second-century Roman legal scholar who was a major source of authority for the *Corpus Juris*, explained that:

> All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to itself. It is called 'state law' [jus civile], the law peculiar to that state. But the law which natural reason makes for all mankind is applied the same way everywhere. It is called 'the law of all peoples' [jus gentium] because it is common to every nation.[365]

The term *jus gentium* ("the law of all peoples") implied that the same law applies to individuals and to states, in that states are made up of peoples. Francisco de Victoria was among international law pioneers who used the principle of the necessarily universal application of the *jus gentium* in order to restrain the conduct of governments.[366]

somewhat optimistically, with the intention that the encyclopedia become a modern equivalent of Justinian's *Corpus Juris*.

365. THE INSTITUTES OF GAIUS AND JUSTINIAN, *supra* note 350, at G. INST. 1.1. We have changed the translator's use of two letters, so that "ius ciuile" reads as "jus civile" and "ius gentium" as "jus gentium;" in a translation of Latin, either choice of modern English letters is correct, and we chose to use letters which are easiest for a modern English reader—since English readers say "justice" instead of "iustice" and "civil" instead of "ciuil."

The legal scholar most-quoted in the *Corpus Juris*, Ulpian, explained—in the very first passage of the Digest—that *jus gentium* was the law "which all human peoples observe," while *jus naturale* also included animals. DIG. 1.1.1 (Ulpian, Institutes). Domitius Ulpianus was a lawyer from Tyre (in modern Lebanon), active during the Severan dynasty (AD 193–235). TONY HONORÉ, ULPIAN: PIONEER OF HUMAN RIGHTS 1 (2d ed. 2002). "Europe's view of the law has been formed more by Ulpian than by any other lawyer. This is true as regards substance, style, method of reasoning, and background philosophy . . . [I]t was Ulpian who expounded Roman law as a universal system capable, as it turned out, of being adapted to the needs of the radically different societies that emerged from the breakdown of the empire." *Id.* at 229. His legal philosophy was "cosmopolitan and egalitarian," believing that the law and its interpretation and application "should take account of the natural freedom, equality, and dignity of all." *Id.* at 85. He emphasized that all human beings have dignity, and that dignity is the core of the human personality. "To be beaten up or defamed infringes a person's dignity." Thus, he argued that a legal remedy should protect even slaves who were unjustly beaten or tortured. His principles "freedom, equality, and dignity" are the basis "of the contemporary civil rights movement. . . . Because they form the framework and underpinning of Ulpian's writing, he is properly to be regarded as the first human rights lawyer." *Id.* at 85–86.

In this Article, most of our citations to the *Corpus Juris* are to the Digest, which was the most important part of the *Corpus Juris*. The Digest (*Digesta*) consisted of fifty books that compiled excerpts from cases decided by Roman judges, and opinions written by legal scholars. Some of the material in the Digest was so old that it came from the time before Julius Caesar destroyed the Roman Republic and turned it into a dictatorship. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 127–28 (1983).

366. SCOTT, *supra* note 96, at 140.

The *Corpus Juris*, by preserving for posterity the work of Rome's legal scholars, thereby transmitted to the world the greatest surviving elements of Rome's historic culture of liberty.[367]

The Emperor Justinian's *Corpus Juris* formally replaced the Twelve Tables as the embodiment of Roman law, and the self-defense principles of the Twelve Tables were incorporated into the *Corpus Juris*:

The Law of the *Twelve Tables* permits one to kill a thief caught in the night, provided one gives evidence of the fact by shouting aloud, but someone may only kill a person caught in such circumstances at any other time if he defends himself with a weapon, though only if he provides evidence by shouting.[368]

The universal *jus gentium* included

> the right to repel violent injuries. You see, it emerges from this law that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.[369]

Significantly, for Frey's theory that self-defense is an excuse rather than a justification,[370] the *Corpus Juris* says that self-defense is "done rightfully"—a phrase which cannot apply to an excuse. For example, if a person committed a crime because of duress or insanity, we might excuse

367. After the Roman Republic was replaced by the Empire:

> The civil law was the only walk of public life in which the genius of old Rome still survived. The heart of the Roman patriot there still recognized his country. In performing the duty of interpreting the laws to their clients and fellow citizens, the patricians invented a sort of judicial legislation, which was improved from age to age by the long line of jurisconsults, following each other, in regular and unbroken succession, from the foundation of the republic to the fall of the empire. The consequence was that civil law, which seems never to have grown up to be a science in any of the Grecian republics, became one very early at Rome, and was thence diffused over the civilized world. The mighty fame and fortune of the Roman people in this respect cannot be contemplated without emotion. Its martial glory has long since departed, but the "Eternal City" still continues to rule the greatest part of the civilized and Christian world, through the powerful influence of her civil laws.

WHEATON, *supra* note 214, at 30–31 (citing ADAM SMITH, THE WEALTH OF NATIONS, bk. 1, ch. 1, pt. 3).

368. DIG. 9.1.4 (Gaius, Provincial Edict 7).

369. DIG. 1.1.3 (Florentinus, Institutes 1).

370. *See infra* Part VI.F.4.

the person from criminal punishment, but we would not say that a person had acted "rightfully."

Far more detailed than the Twelve Tables, the *Corpus Juris* contained numerous provisions affirming the right of self-defense. The general principle was that the use of deadly force was permissible when no lesser force would suffice.

If someone kills anyone else who is trying to go for him with a sword, he will not be deemed to have killed unlawfully; and if for fear of death someone kills a thief, there is no doubt he should not be liable under the *lex Aquila.* But if, although he could have arrested him, he preferred to kill him, the better opinion is that he should be deemed to have acted unlawfully.[371]

A person lawfully in possession has the right to use a moderate degree of force to repel any violence exerted for the purpose of depriving him of possession, if he holds it under a title which is not defective.[372]

But anyone who uses force to retain his possession is not, Labeo says, possessing it by [illegitimate] force.[373]

Someone who recovers by force in the same conflict a possession of which he has been forcibly deprived is to be understood as reverting to his original condition rather than possessing it by force. So if I eject you and you immediately eject me, and I then eject you, the interdict "where by force" will lie effectively in your favor.[374]

[I]t is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon . . . .[375]

371. DIG. 9.2.5 (Ulpian, Edict 18).

372. Code Just. 8.4.1 (Honorius & Theodosius , 422). The Code (*Codex Justinianus*) was part of the *Corpus Juris*, and collected the laws and decisions made by Roman Emperors before Justinian. For detailed analysis of Code provisions on self-defense and arms, *see* Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the* Codex Justinianus, 16 J. FIREARMS & PUB. POL'Y 163 (2004). This section of the Code was cited by the French Huguenots in the sixteenth century as justification for armed resistance to France's central government, which was attempting to wipe them out. Parrow, *supra* note 257, at 45–46, citing Peirre Fabre, *Traitte Du Quel on peut apprendre en quel cas il est permis à l'homme Chrestien de porter les armes et par lequel est respondu à Peirre Charpentier, tendant à la fine d'empescher la paix, & nous laisser la guerre* (trans. from Latin to French 1576), in French Political Pamphlets collection in Newberry Library (Lindsay and Neu, no. 877) (arguing that the undisputed right of self-defense in "the case of a Christian assaulted by brigands in the forest" could be applied to national self-defense against an invader or a domestic tyrant).

373. DIG. 43.16.1.28 (Ulpian, Edict 69) (bracketed text added by translator).

374. DIG. 43.16.17 (Julian, Digest 48). In other words, the original rightful owner who forcefully reclaimed his own property would not lose a lawsuit which was based on the claim that the owner's possession of the land was based merely on force. *But see* J. INST. 4.2 (Peter Birks & Grand McLeod trans., 1987) (A person who uses force to recover property which he thinks belongs to him is not punished, even if the person is mistaken. However, the forcible recovery is not authorized by law. Roman law aims "to induce men to renounce every type of violent seizure"). The *Institutes*, also part of the *Corpus Juris*, was an introductory textbook summarizing the law.

375. DIG. 4.2.7 (Ulpian, Edict 11).

If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man[‘s life] without risk to his own.[376]

[I]f I kill your slave who is lying in ambush to rob me, I shall go free; for natural reason permits a person to defend himself against danger.[377]

Someone who kills a robber is not liable, at least if he could not otherwise escape danger.[378]

A person who acted in lawful self-defense was immune from civil damages for any harm caused.[379] As we will discuss *infra*, immunity from civil damages is one of the key distinctions between justification and excuse.[380]

The famous formulations of the self-defense rule were “arms may be repelled by arms” and “it is permissible to repel force by force.”[381] The latter formulation is embodied in the self-defense provision of the modern Italian criminal code (*è lecito respingere la violenza con la violenza*), which recognizes self-defense as a justification, not a mere excuse.[382]

The *Corpus Juris* authorized the possession of arms for lawful defense, while forbidding the accumulation of arms for seditious purposes. For example, “[p]ersons who bear weapons for the purpose of protecting their own safety are not regarded as carrying them for the purpose of homicide.”[383]

376. DIG. 48.8.9 (Ulpian, Edict 37) (bracketed text added by translator).

377. DIG. 9.2.4 (Gaius, Provincial Edict 7).

378. J. INST. 4.3.

379. DIG. 9.2.45 (Paul, Sabinus 10).

380. *See infra* Part VI.F.4.

381. DIG. 43.16.1.27 (Ulpian, Edict 69) (“Cassius writes that it is permissible to repel force by force, and this right is conferred by nature. From this it appears, he says, that arms may be repelled by arms.”). For another formulation of the rule, showing its use in the Portuguese legal system, *see* Henerik Kocher, *Dicionário De Expressões E Frases Latinas*, *available at* http://www.hkocher.info/minha_pagina/dicionario/v04.htm (item 720).

382. CODICE PENALE [C.P] art. 52 (It.); *see also Id.* art. 53 (legitimate use of arms as a justification).

383. DIG. 48.6.11 (Paul, Views 5); *see also* THE INSTITUTES OF GAIUS AND JUSTINIAN, *supra* note 350, at J. INST. 4.18 (“Next, the Cornelian Act on Assassins. This puts to the sword murderers and those who carry arms with murderous intent.”). Also:

> A man is liable under the *lex Julia* on *vis publica* on the grounds that he collects arms or weapons at his home or on his farm or at his country house beyond those customary for hunting or a journey by land or sea.
>
> But those arms are excepted which someone has by way of trade or which come to him by inheritance.
>
> Under the same heading come those who have entered into a conspiracy to raise a mob or a sedition or who keep either slaves or freemen under arms. 1. A man is also liable under the same statute if, being of full age, he appears in public with a missile weapon.

In the world of the Eastern Roman Empire—what we today call the Byzantine Empire—the *Corpus Juris* reigned for many centuries as the greatest and most complete expression of the law. But in the world of the fallen Western Roman Empire, a Dark Age descended, and most of the intellectual inheritance of Greece and Rome was lost. Cicero was one of the very few classical authors whose works remained available to the small fraction of the western population that was literate.[384]

In "the Little Renaissance" that began in the twelfth century, one of the most important events was the western rediscovery of Aristotle and of the *Corpus Juris*. The University of Bologna was the first western academic institution to study the *Corpus*; almost as soon as the *Corpus Juris* was rediscovered, and for centuries afterward, the greatest scholarly activity of law professors was studying the *Corpus Juris* and writing commentaries on it; the commentaries were usually written *Talmud*-style, in the form of marginal annotations.[385] The *Corpus Juris* led to the University of Bologna creating the first law school that the western world had known since the fall of Rome.

The *Corpus Juris* served as a source—and often as a primary source—for local laws, and was regarded as the authoritative source of international law. Indeed, the *jus gentium* became synonymous with what we today call international law.[386] During the Middle Ages and thereafter, the portions of the *Corpus Juris* dealing with the proper authority of the king were analyzed to show that the king was granted his authority by the people, and that a king who broke his agreement with the people—by exercising ungranted powers, or by using his powers tyrannically—was a traitor, and could be resisted with force, as could any traitor.[387]

DIG. 48.6.1–3 (Marcian, Institutes 14 & Scaevola).

384. Even after the rediscovery of most of the works of classical Greece and Rome, Cicero's popularity remained undiminished. His book *De Officiis* [On Duties] was the first classical book produced on a printing press (in 1465). CICERO, *supra* note 355, at xv.

385. *See*, *e.g.*, BERMAN *supra* note 365; CLIFFORD STEVENS WALTON, THE CIVIL LAW IN SPAIN AND SPANISH AMERICA 75 (2003) (In medieval times, "the history of Rome, and above all, the study of its laws and practices" was the favorite subject "of the wise men of Europe and its schools.").

386. WHEATON, *supra* note 214, at 32–33.

387. Parrow, *supra* note 257, at 54.

E. Later Byzantine and Rhodian Law

The Roman Byzantine Empire survived for nearly a millennium after the publication of the *Corpus Juris*. New laws created by the Byzantines continued to guarantee the right of self-defense.[388]

The rulers of the island of Rhodes, in the eastern Mediterranean Sea, promulgated the first true international legal code. The Rhodian Law, the earliest maritime code,[389] was put into its final form between AD 600 and 800.[390] 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. Rhodes, having once been ruled by the unified Roman Empire, and then by the Byzantines, incorporated many principles of Byzantine law into the Rhodian Law.

Notably, the Rhodian Law also addressed 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.[391]

F. Islamic Law

During the period when the Rhodian Law was being established as the first true international legal code, a new transnational legal system was being created: Islamic law. While Shari'a law is the only law in several countries, it is also broadly influential in many more, where its values play an important role in the legal codes, and it is cited in constitutions as a source of law.[392]

388. WALTER ASHBURNER, THE RHODIAN SEA LAW lxxxvi (The Lawbook Exchange 2001).

389. DAVIS, *supra* note 177, at 9. Earlier versions had been incorporated into the Roman legal code by the time of the Emperors Tiberius and Hadrian. *Id.*

390. ASHBURNER, *supra* note 388, at lxxv.

391. ASHBURNER, *supra* note 388, at 84.

392. *See*, *e.g.*, CONSTITUTION OF THE STATE OF BAHRAIN art. 2 ("Islam shall be the religion of the State; Islamic Sharia a main source of legislation."); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 2 ("Islamic jurisprudence is the principal source of legislation."); QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN [Constitution] 1358 [1980], pmbl. ("judicial system on the basis of Islamic justice, manned by just judges, well acquainted with the exact rules of the Islamic code."); CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN ch. 6 (creating a judicial system of civil courts Shari'a courts, and religious courts for communities of non-Muslims, based on their particular religion); KUWAIT CONSTITUTION art. 2 ("Islamic Sharia shall be a main source of legislation."); CONSTITUTION ch. 7, part I, § E, ¶¶ 260–64, part II, § B, ¶¶ 275–79 (Nigeria) (creating Shari'a courts of appeal in one federal territory and in several states); PERMANENT CONSTITUTION OF THE STATE OF QATAR art. 1 ("Shari'a law shall be a main source of its legislations."); SAUDI ARABIA CONSTITUTION art. 8 ("in accordance with the Islamic Shari'ah."); SYRIA CONSTITUTION art 3 ("Islamic jurisprudence is a main source of legislation."); YEMEN CONSTITUTION art. 3 ("Islamic

While there are several distinct schools of Islamic law, all Islamic law agrees that self-defense, including defense of property, is lawful. According to a modern scholar's summary of Islamic criminal law:

There is a natural right to self-defense. One may defend oneself from a criminal act that poses an imminent threat to person or property, but only necessary force may be used. An intruder who might be repelled with a stick may not be shot and killed; neither may one pursue an intruder who has retreated and is no longer a threat. Violation of the limits of self-defense is aggression and renders one criminally liable.[393]

The nineteenth century Islamic jurist 'Ulaysh wrote that all jurists have always agreed that Muslims have the right to defend their life and their property. From this undisputed right, 'Ulaysh argued that the self-defense right includes resistance to a government which is destroying Muslim lives or property. The people who resist such a government are not rebels; rather, it is the wrongdoing government that is in rebellion.[394]

The right of resistance is affirmed in Universal Islamic Declaration on Human Rights.[395] This document was proclaimed at UNESCO (United Nations Educational, Scientific and Cultural Organization), adding a United Nations imprimatur to the right of resistance "by all available means" against the suppression of the "inalienable right to freedom."

jurisprudence is the main source of legislation.").

393. MATTHEW LIPPMAN, SEAN MCCONVILLE & MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 56 (1988).

394. KHALED ABOU EL FADL, REBELLION & VIOLENCE IN ISLAMIC LAW 334–35 (2001). 'Ulaysh was making a point which was also made in England in the seventeenth century, and in America in the twentieth:

> In the English Bill of Rights dated Feb. 13, 1688 . . . [a]nother complaint was that of "causing several good subjects, being protestants, to be disarmed and employed contrary to law." If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 105–06 (1916) (Schroeder was a founder of the Free Speech League, the first group in American history to defend the rights of all speakers on all subjects, based on the principles of the First Amendment). *See also* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM, 12–13, 69, 78 (2006) (explaining that Khawārij legal thought emphasized democracy, social contract theory, and the right of revolution against a tyrant, while other Islamic schools of thought argued for obedience even to tyrants).

395. Universal Islamic Declaration on Human Rights, 21 Dhul Qaidah 1401, art. 2 (Sept. 19 1981), *available at* http://www.alhewar.com/ISLAMDECL.html (emphasis added).

G. Canon Law

Just as Islamic law became established as a law applied across national boundaries, so did the Canon law established by the Roman Catholic Church. Canon law was closely intertwined with Roman law. "The church lives by Roman law" (*ecclesia vivit lege Romana*) was the saying, for the law of the Roman Catholic Church entwined itself with Roman law in order to incorporate ancient Rome's principles of justice, and in order to share in the esteem in which ancient Rome was universally held.[396]

In the medieval Christian world, Canon law became the foundation for international law.

For centuries the great offices of state, especially those having to do with foreign relations, were held by bishops learned in canon law, and, as canon law was based upon Roman law and especially adapted to the government of the Church whose jurisdiction was not bounded by state lines, it naturally suggested many of the rules that have found a place in international law.[397]

"Unquestionably the most powerful influence that was exerted upon the science of international law during its formative period was that of the Roman Church." [398] Canon law was "found to be applicable to the decision of a great variety of controversies, ranging in importance from the disputes of private individuals to the adjustment of difficulties of serious international concern."[399]

As with Islamic law and Jewish law, we will not, in this Article, attempt to provide a comprehensive survey of Catholic Canon law. We will simply point to the foundational text of Canon law, the *Decretum*, written around 1140 by Gratian, a Professor of Theology at the University of Bologna.[400] The *Decretum* began: "The human race is ruled by two things, namely natural law and usages."[401] Gratian explained

396. JAMES A. BRUNDAGE, MEDIEVAL CANON LAW 111 (1995); WHEATON, *supra* note 214, at 33.

397. *New Advent Catholic Encyclopedia*, s.v. "International Law," http://www.newadvent.org/cathen/09073a.htm (last visited Jan. 21, 2008).

398. DAVIS, *supra* note 177, at 13.

399. *Id.* at 12.

400. *New Advent Catholic Encyclopedia*, s.v. "Corpus Juris Canonici," http://www.newadvent.org/cathen/04391a.htm; *New Advent Catholic Encyclopedia*, s.v. "Johannes Gratian," http://www.newadvent.org/cathen/06730a.htm. The University of Bologna was where, in the late eleventh century, the Western re-discovery of the *Corpus Juris* had created such an intellectual sensation.

401. GRATIAN: TEXT UND IMAGES DER EDITION FRIEDBERGS Pt. 1, D.1 p.1. (1879) ("uiolentiae per uim repulsion"), *available at* http://mdz.bib-bvb.de/digbib/gratian/text/@Generic__BookView;cs=default;ts=default.

natural law:

Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.

For example: the union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things which are taken from the heavens, earth, or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force. This, and everything similar, is never regarded as unjust but is held to be natural and equitable.[402]

Later in the *Decretum*, Gratian explained that war is lawful, but is allowed only for necessity. Even then, wars must not be fought with cruelty.[403]

An especially influential commentary on the *Decretum* was written by Joannes Teutonicus sometime in 1211–15, in a work which drew heavily on Roman law. He distinguished vengeance (injuring someone when there was no longer any danger) from legitimate defense of person and property against an immediate attack.[404]

Also foundational in Canon law were the *Decretals* of Pope Gregory IX, published in 1234, which continued the consolidating work of the *Decretum*, incorporated the commentary by Teutonicus, and affirmed the legitimacy of self-defense.[405] The Canon lawyer Raymond of Pennaforte (or Peñafort) (ca. 1180–1275)—who wrote Pope Gregory IX's *Decretals*—followed the *Corpus Juris* self-defense rule: "it is always lawful to meet force with force."[406]

The *Decretum* (including later commentaries) was the definitive consolidation, harmonization, and analysis of all church laws since the time of the apostles. The *Decretum* was taught in law schools, and until 1917 served as the first volume of the *Corpus Juris Canonici,* the law of the Roman Catholic Church.

The principles articulated by the *Decretum* and the *Decretals* were developed in sophisticated detail by the Scholastics, including the

402. GRATIAN, *supra* note 401, at Pt. 1 D.1 p.2c.7. For the original Latin text, see http://mdz.bib-bvb.de/digbib/gratian/text/@Generic__BookView;cs=default;ts=default ("uiolentiae per uim repulsion").

403. GRATIAN, *supra* note 401, at Pt. 2, D. 23; *see also* Nys, *supra* note 95, at 58.

404. Parrow, *supra* note 257, at 30 (citing FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 131–32 (Walter Ullman ed., Cambridge University Press 1975)).

405. The Latin Library at Ad Fontes Academy, Decretals of Gregory IX (1234), V.12.18, http://www.thelatinlibrary.com/gregdecretals5.html (citing Dat. Viterbii Kal. Iul. Pont. nostr. Ao. XII. 1209).

406. RAYMOND OF PENNAFORTE, SUMMA, vol. 2, ch. 5, § 18, *quoted in* M. H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 67 (Routledge & Kegan Press 1965). Raymond was so influential that, centuries later, his works were a primary text in universities.

"universal doctor," Thomas Aquinas, in the twelfth and thirteenth centuries. Aquinas and the other scholastics affirmed the right of self-defense against lone criminals and against tyrants, and used the principles of legitimate personal defense to build a theory of just war and limits on the conduct of warfare.[407] As discussed *supra*, the Spaniards of the School of Salamanca in the sixteenth and seventeenth century, including Victoria and Suárez, were known as the "Second Scholastics," and their humanitarian scholarship achieved the apogee of Scholasticism.[408]

The Reformation removed Canon law as an authority in a large fraction of Europe. Roman law, however, remained prestigious and influential in Protestant nations and in Catholic ones.[409]

H. Spanish Law

Self-defense has always been well-established in Spanish law. As part of the Roman Republic, and, later, the Roman Empire, Spain was part of the Roman law system with its right of self-defense.

The Visigothic kingdom succeeded the Roman Empire as ruler of Spain, and incorporated self-defense into its own legal code, following the Roman Twelve Tables.[410] Self-defense was considered to be a "justifiable" form of homicide.[411]

407. THOMAS AQUINAS, SUMMA THEOLOGICA, 2d Pt. of the 2d. Pt., questions 42, 64 (Fathers of the English Dominican Province trans., Benziger Bros. ed., 1947) (1265–1274), *discussed in* Kopel, *The Catholic Second Amendment*, *supra* note 100.

408. *See supra* Parts IV.A.3, IV.A.5.

409. For example, the Protestant authors discussed in Part IV, such as Gentili, Grotius, Pufendorf, Vattel, Burlamaqui, and Textor, all frequently cited Roman law.

410. THE VISIGOTHIC CODE: (FORUM JUDICUM) 230 (bk. 6, tit. 5, law 19) (S. P. Scott ed., Riverdale Press 1910), *available at* http://libro.uca.edu/vcode/visigoths.htm (if "the parricide was committed in self-defense[,] the party accused shall be in no danger of his life, and shall be discharged, without loss of property or subjection to torture; such discrimination being used as is proper in all cases of homicide."); *see also id*. at 222 (bk. 6, tit. 5, law 12), *id*. at 243 (bk. 7, tit. 2, law 15) ("If a thief should be killed in the daytime, while defending himself with a sword, no responsibility shall attach to anyone on account of his death."); *id*. at 243 (bk. 7, tit. 2, law 16) ("If a thief should be surprised at night, and should be killed while he is attempting to remove stolen property, his death shall under no circumstances be punished."); *id.* at 270 (bk. 8, tit. 1, law 13) (" Where anyone takes the property of another by force, and is wounded, or killed in the act," there shall be "no legal responsibility for the same.").

411. Homicide was justifiable, as has been seen, when committed in self-defense against an attacking party; in certain cases of trespass *vi et armis*. . . . Justification could also be pleaded where a criminal was killed while committing highway robbery, larceny, or burglary; the latter (*furtum nocturnum*) being a much more comprehensive term than ours, and including all kinds of nocturnal depredations. The employment of that popular American fiction, the "unwritten law," by means of which so many homicides have been acquitted, and which appeals so strongly to the primitive sense of retributive justice which still dominates humanity, was thus openly endorsed by the Visigothic Code.

The greatest Western scholar during that time was the Spanish theologian Isidore of Seville (ca. AD 560–636). In Isidore, "Spain found the writer to express those principles which became the philosophy of her government" for many centuries to come.[412] Gratian's explanation of natural law and self-defense was directly quoted from Isidore's encyclopedia, the *Book of Sentences and Etymologies*.[413] Isidore is considered the last of the Western Fathers of the Church, and has been canonized (officially labeled as a Saint) by the Roman Catholic Church.[414]

Following the Moorish conquest of Spain, Shari'a law was imposed on much of Spain, and of course Shari'a includes the right of self-defense.[415] Pursuant to Shari'a, the Christian and Jewish communities continued to govern their internal affairs according to their own laws, including the relevant self-defense provisions.

In the thirteenth century, King Alfonso X of Castile, the Learned, compiled an extensive legal code known as *Las Siete Partidas* (The Seven Divisions), which was strongly influenced by Roman law.[416] *Las Siete Partidas* is considered one of the proto-sources of international law. As Spain's empire grew, *Las Siete Partidas* grew into a major global source of law—in Spanish colonies in South America, Central America, Texas, California, Louisiana, and the Philippines.

One of the best features of *Las Siete Partidas* was its prohibition on double jeopardy, a principle that was not entirely original, but which was expressed by *Las Siete Partidas* in terms which left little room for evasion.[417]

Las Siete Partidas protected the right of defensive homicide:

[F]or it is but natural and proper that every man should have the power to protect himself from death when anyone seeks to kill him; and he should not wait for the other to strike him first, because it might happen that the attacked party would be killed by the first blow which he received, and afterwards could not defend himself.[418]

S.P. Scott, *Note for Book VI, Title V in* THE VISIGOTHIC CODE, *supra* note 410, at 224 n.1.

412. MARIE R. MADDEN, POLITICAL THEORY AND LAW IN MEDIEVAL SPAIN 19 (The Lawbook Exchange 2005).

413. GRATIAN, *supra* note 401, at 142.

414. TIERNEY, *supra* note 130, at 142.

415. *See supra* Part V.F; WALTON, *supra* note 385, at 60–61 (2003) (Islamic law in Spain was based on the Koran, without local innovation).

416. *Id.* at 75.

417. The only exception was when the defendant had originally "caused the accusation to be fraudulently brought," and, in furtherance of the fraud, had concealed evidence. LAS SIETE PARTIDAS, 5 UNDERWORLDS: THE DEAD, THE CRIMINAL, AND THE MARGINALIZED 1309 (Div. 7, tit. 1, law 12) (Robert I. Burns ed., Samuel Parsons Scott trans., Univ. of Penn. Press 2001).

418. *Id* at 1342 (Div. 7, tit. 8, law 2).

Defensive homicide was also allowed against rape, arson (including arson of agricultural property), any attempt to take property by force, or "any one who is well known to be a thief, or any robber who publicly frequents the highways."[419]

Throughout the Middle Ages, Spanish law, legal commentators, and popular culture authorized resistance to a king who became a tyrant.[420]

One modern exemplar of the traditional Spanish law principles is the Argentine Penal Code, which broadly protects self-defense while specifically authorizing unlimited use of force against home invaders.[421]

I. Anglo-American Law

The English legal system at its height was the rule of law in a third of the world, and its international influence is today at least as extensive as any other contemporary legal system.

The earliest laws of the Anglo-Saxons protected the right of self-defense.[422] The right of self-defense is affirmed by Bracton,[423] Matthew

419. *Id*. at 1342–43 (Div. 7, tit. 8, law 3).

420. MADDEN, *supra* note 412, at 115–18, 167–69 (citing, inter alia, the Valencia constitution of June 1340).

421. CÓD. PEN. § 34:

> The following are not criminally liable:
> . . .
> 6. Anyone acting in defense of his person or rights under the following circumstances:
> (a) unlawful aggression,
> (b) reasonable necessity of the means employed to prevent or avert aggression,
> (c) absence of sufficient provocation on the part of the defender
> Any person who at nighttime repels another who climbs or breaks fences, walls or entrances to his dwelling or an inhabited part thereof, or of the curtilage, regardless of the extent of harm caused to the aggressor, shall be deemed to be in compliance with these circumstances. The same provision is applicable to any person who acts against a resisting stranger found in the home.

THE ARGENTINE PENAL CODE 2004, at 11–12 (2004) (English translation).

422. Laws of King Ine,, law 16 in ANCIENT LAWS AND INSTITUTES OF ENGLAND 49 (Benjamin Thorpe ed., The Lawbook Exchange 2003) (1840) (whoever slays a thief must swear an oath that the thief was slain while offending). Ine was the King of Wessex from 688 to 726, and is most-remembered for his legal code. Other similar laws: Laws of King Withraed (reigned 690–725), laws 25–26, in ANCIENT LAWS 19 (no need to pay blood money for the slaying of thief caught in the act; reward of seven shillings for slaying a thief); Laws of King Alfred (King of Wessex, reigned 871–901), laws 21, 25, in ANCIENT LAWS 21, 23 (no punishment for self-defense killing; no punishment for slaying a night-time burglar).

423. BRACTON, DE LEGIBUS ET COVSUETUDINIBUS ANGLIÆ, bk. III, 155, 36, *cited in* SCOTT, *supra* note 351; Also FLETA, COMMENTARIUS JURIS ANGLICANÆ, bk. I, XXIII, 14.

Hale,[424] Edward Coke,[425] and by statute.[426] The law in Scotland was similar.[427] And so were the laws of Wales, which included laws prohibiting the disarming of a man.[428] These laws supported the duty of citizens in England (and in France, under Norman law) to arrest criminals at the scene of the crime, and to pursue fleeing criminals, upon the "hue and cry" (or *haro* in French).[429] It was also a crime to disarm a man.[430]

From at least 1330 onward, English law recognized an absolute justification for the killing of home invaders. Against a home invader,

424. MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN (Historia Placitorum Corone) 487–88 (The Lawbook Exchange 2003) (1736).

425. 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, ch. 8.

426. Stat. 24, Hen. VIII, ch. 5 (1532–33) (stating that defensive killings of robbers, murderers, and nocturnal burglars are not crimes).

427. SCOTT, *supra* note 351, n.1 *available at* http://www.constitution.org/sps/sps01_1.htm (citing JOHN BURNETT, A TREATISE ON VARIOUS BRANCHES OF THE CRIMINAL LAW OF SCOTLAND 57 (1811)).

> It is lawful to kill a Thief, who in the night offers to break our Houses, or steal our Goods, even though he defend not himself, because we know not but he designs against our Life; and Murder may be easily committed upon us in the night, but it is not lawful to kill a Thief who steals in the day time, except he resist us when we offer to take him, and present him to Justice.

Id.; *see also* GEORGE MACKENZIE, THE LAWS AND CUSTOMS OF SCOTLAND IN MATTERS CRIMINAL, 110–16 (The Lawbook Exchange 2005) (1678); DAVID HUME, 1 COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 217–29 (3d ed. 1729) ("The right to kill" includes defense of self and others against felony attacks, including rape, forcible robbery or invasion of property, night-time home burglary, daytime burglary when lesser force will not suffice, and arson).

428. THE ANCIENT LAWS OF CAMBRIA (William Probert trans., The Lawbook Exchange 2005) (1823). "The paraphernalia denotes clothes, arms, and the implements of the privileged arts; for without these a man is deprived of his just station in society; and it is not right for the law to unman a citizen, or to prevent him from practising the arts." *Id.* at 23. "There are three native rights belonging to every free born Cambrian, whether male or female. . .Second, the privilege of carrying defensive arms and armorial bearings, which are not allowed to any one except a free born Cambrian of unquestionable nobility." *Id.* at 33. "There are three persons who ought to be kept from arms: a captive, a child under fourteen years of age, and an idiot . . . ." *Id.* at 51. "There are three reasons for deposing arms, so that they may not be held naked in the hand: [at a religious meeting, in courts or other government meetings, and] the guest in his lodging." *Id.* at 52. "But none are allowed to have arms except the free born Cambrian, or the bondman upon the third of his lineal descendants, so that they may guard against treachery and concealed murder." Triad 222, at 79.

429. Parrow, *supra* note 257, at 17 (citing, inter alia, HIPPOLYTE PISSARD, LE CLAMER DE HARO DANS LE DROIT NORMAND 95–101 (1911); Laws of King Aethelstan (reigned 924–939), Judicia Civitatis Londoniae, §§ 4–5, in ANCIENT LAWS 98–99; Laws of King Cnut (a/k/a Canute the Great; Danish King who ruled England 1017–1035), law 29 in ANCIENT LAWS 168 (financial penalty for anyone who finds a thief but does not raise the hue and cry, or who fails to assist the hue and cry). The hue and cry was still in use in 1735. 1 HALE *supra* note 424, at 494 (ch. 41, § 6); 2 HALE *supra* note 424 at 98–104 (ch. 12) (detailing the procedures for the hue and cry). In addition, citizens had the authority to arrest felons in many circumstances, and the killing of a felon during arrest was, if unavoidable, considered "justifiable." *Id.* at 72–82 (ch. 10).

430. Laws of King Cnut (1017–1035), law 61 in ANCIENT LAWS 175 ("If any one unlawfully disarms a man, let him compensate with his 'heals-fang' [a financial penalty].").

English law had no requirement for proportionality, or for use of lesser force when possible. A home invasion was considered such a grave threat to society that the slaying of the invader was regarded as a very positive social good.[431]

Again, Frey's assertion that self-defense is always an excuse, rather than justification,[432] is simply incorrect.

Following the Glorious Revolution of 1688, the English Bill of Rights of 1689 specifically guaranteed the right of subjects to possess arms for personal defense.[433]

William Blackstone's *Commentaries* is the most influential legal treatise ever written in English, with enormous authority in every nation which has adopted the common law. In detailing the common law's protection of human rights, Blackstone first set forth the three primary rights: personal security, personal liberty, and private property.[434] Blackstone then turned to the auxiliary rights—such as the right to petition the government for redress of grievances—which protect the primary rights:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law . . . and it is indeed a public allowance under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[435]

So according to Blackstone, humans have "the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." Blackstone also upheld self-defense against ordinary criminals.[436]

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431. David Caplan & Susan Wimmershoff-Caplan, *Postmodernism and the Model Penal Code*, 73 UMKC L. REV. 1080 (2005) (also noting that Glanville's earlier restrictive statements about self-defense were clearly not followed after 1330 for cases involving the home).

432. *See infra* text at Part VI.F.4.

433. "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." English Bill of Rights, 1 W. & M., sess. 2, ch. 2 (1689). Catholics, who constituted about two percent of the population, were excluded from the formal right, because they were considered potentially subversive, but in practice they were allowed to own and carry personal defensive arms. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 118–26 (1994).

434. WILLIAM BLACKSTONE, 1 COMMENTARIES *142.

435. *Id*. at *143.

436. *Id*. at 4 COMMENTARIES *1–3, *176, *183–85.

The historical English common law is incorporated as part of the legal system almost everywhere among England's former colonies.[437] In Fiji, the rights based on the English common law are specifically protected by the Constitution.[438] Just as many English kings infringed, or sometimes completely ignored, the rights guaranteed in the Magna Carta,[439] many of the rights guaranteed by the common law and by the English Bill of Rights have been ill-treated by modern governments in the common law system.[440] The same could be said regarding how many nations have treated modern human rights treaties.[441]

Regarding human rights treaties, the common approach of human rights advocates is not to despairingly pronounce that the treaties are irrelevant because they are often honored only in the breach; rather, human rights activists strive for the meaningful implementation of the treaties. Similarly, for the human rights which are protected by the common law and by the English Bill of Rights (and those rights protected by Shari'a, or other modern legal systems), human rights advocates, when seeking to discover the state of international human rights, would recognize and respect the rights which are stated in principle, even while acknowledging that the rights are too often violated in practice.

Currently, the most influential nation within the Anglo-American legal system, and internationally, is the United States. The United States Constitution includes the Second Amendment, which does not explicitly

437. For the post-Blackstone common law, which was fully in accord with Blackstone, *see*, *e.g.*, FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 201 (New American ed., from 3d English ed. 1894); ROLLIN M. PERKINS, CRIMINAL LAW (2d ed., Foundation Press 1969) (summarizing the views of Bishop, Stephens, and other authorities); Caplan & Wimmershoff-Caplan, *supra* note 431 (summarizing English and American views up to and including the twentieth century).

438. CONSTITUTION OF THE REPUBLIC OF THE FIJI ISLANDS § 43 ("The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law . . . .").

439. The Magna Carta guarantees a right of armed resistance to a tyrannical king, with resistance to be led by the barons. *See* Magna Carta art. 61 (1215); DAVID I. CAPLAN & SUE WIMMERSHOFF-CAPLAN, 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF POLITICS, CULTURE, AND THE LAW 371–72 (Gregg Lee Carter ed., ABC-CLIO 2002).

440. For example, the English Bill of Rights forbids fines without trial. Yet the Blair government has created a procedure by which a policeman can decide to impose an on-the-spot fine on an alleged offender. *See Q&A: On-the Spot Fines*, BBC NEWS, Aug. 12, 2002; *Spot Fine Britain*, BBC NEWS, Nov. 21, 2006 ("This week we look at a developing area of the law which empowers police, or your local council, to declare you guilty without going before a judge."); s*ee generally* Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399, 438–47 (1999) (describing erosion of freedom of speech and of the press, tremendous shrinkage of the right to jury trial, and destruction of the right to grand jury indictment).

441. *See*, *e.g.*, Oona A. Hathway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935, 1940 (2002) ("[N]oncompliance with treaty obligations appears to be common.").

mention personal self-defense; but until the early twentieth century, the Amendment was (except by one judge in Arkansas) unanimously construed to include the right of individuals to possess arms for personal defense.[442] The Amendment became more controversial in the twentieth century, but the overwhelming number of Supreme Court cases which have mentioned the Second Amendment, including all of the cases in recent decades, treat the Second Amendment as an individual right, although usually doing so in *dicta*.[443]

Thirty-seven American state constitutions include the explicit right of personal self-defense; sometimes the self-defense is stated in conjunction with an arms right and sometimes stated independently.[444]

442. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998). Explaining the Second Amendment, St. George Tucker, the leading constitutional scholar of the Early Republic, began: "This may be considered as the true palladium of liberty. . . . The right of self-defence is the first law of nature . . . ." ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES OF THE COMMONWEALTH OF VIRGINIA, app. at 300 (Lawbook Exch. 1996) (1803).

443. *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (holding the Washington, D.C., handgun ban and ban on any use of a firearm for self-defense to be violations of the Second Amendment and summarizing the current status of the circuit split); David B. Kopel, *The Supreme Court's Thirty-five Other Second Amendment Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999) (reviewing Supreme Court cases).

444. *See* ALA. CONST. § 26 ("That every citizen has a right to bear arms in defense of himself and the state."); ARIZ. CONST. art. 2, § 26. ("The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired . . . ."); ARK. CONST. art. 2, § ("All men . . . have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty . . . ."*), id*. art. 2, § 5 ("The citizens of this state shall have the right to keep and bear arms, for their common defense."); CAL. CONST. art. 1, § 1 ("All people . . . have inalienable rights. Among these are enjoying and defending life and liberty . . . ."); COLO. CONST. art. 2, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties . . . ."), *id*. art. 2, § 13 ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question . . . ."); CONN. CONST. § 15 ("Every citizen has a right to bear arms in defense of himself and the state."); DEL. CONST. pmbl. ("Through Divine goodness, all people have by nature the rights . . . of enjoying and defending life and liberty . . . ."); FLA. CONST. art 1, § 2 ("All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty . . . ."), *id.* art 1, § 8a ("The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed . . . ."); IDAHO CONST. art. 1, § 1 ("All men . . . have certain inalienable rights, among which are enjoying and defending life and liberty . . . ."); IND. CONST. 32. ("The people shall have a right to bear arms, for the defense of themselves and the State."); IOWA CONST. art. 1, § 1 ("All men and women . . . have . . . inalienable rights . . . of enjoying and defending life . . . ."); KAN. CONST. Bill of Rights, § 4 ("The people have the right to bear arms for their defense and security . . . ."); KY. CONST. § 1 Bill of Rights ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: The right of enjoying and defending their lives and liberties. . . . The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons."); ME. CONST. art. 1, § 1 ("All people . . . have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life . . . ."); MASS. CONST. art. 1 ("All men . . . have certain natural, essential, and unalienable rights . . . enjoying and defending their lives . . . ."); MICH. CONST. art. 1, § 6 ("Every person has a right to keep and bear arms for the

J. A Universal Human Right

Modern international law is the product of millennia of legal development, and has grown from the soil of many great legal systems. It would be easy to identify many important differences among the legal

defense of himself and the state."); MISS. CONST. art. 3, § 12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question . . . ."); MO. CONST. art. 1, § 23 ("That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned . . . ."); MONT. CONST. art. 2, § 3 ("All persons . . . have certain inalienable rights . . . and the rights of . . . defending their lives . . . ."), *id.* art. 2, § 12 ("The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question . . . ."); NEB. CONST. art 1, ("All persons have certain inherent and inalienable rights; among these are life . . . and the right to keep and bear arms for security or defense of self, family, home, and others . . . ."); NEV. CONST. art 1, § 1 ("All men have certain inalienable rights among which are those of . . . defending life . . . ."), *id.* art. 1, § 11 ("Every citizen has the right to keep and bear arms for security and defense . . . ."); N.H. CONST. Bill of Rights, art 2. ("All men have certain natural, essential, and inherent rights. . . . All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."); N.J. CONST. art. 1, § 1 ("All persons . . . have certain natural and unalienable rights, among which are those of . . . defending life . . . ."); N.M. CONST. art. 2 § 4 ("All persons . . . have certain natural, inherent and inalienable rights, among which are the rights of . . . defending life . . . ."); N.C. CONST. art. 1, § 1 "all persons are . . . with certain inalienable rights; that among these are life . . . ."); N.D. CONST. art 1, § 1 ("All individuals . . . have certain inalienable rights . . . defending life . . . to keep and bear arms for the defense of their person, family, property, and the state . . . ."); OHIO CONST. art. 1, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life . . . ."); *id.* art. 1, § 4 ("The people have the right to bear arms for their defense and security . . . ."); OKLA. CONST. art. 2, § 26 ("The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited . . . ."); PA. CONST. § 1 ("All men . . . have certain inherent and indefeasible rights . . . defending life . . . ."); *id.* art. 1, § 21 ("The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."); S.D. CONST. art. 6, § 1 ("All men . . . have certain inherent rights . . . defending life . . . ."); *id.* art. 6, § 24 ("The right of the citizens to bear arms in defense of themselves and the state shall not be denied."); TEX. CONST. art. 1, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State . . . ."); UTAH CONST. art. 1, § 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties . . . ."); *id.* art. 1, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed . . . ."); VT. CONST. art. 1 ("That all persons . . . have certain natural, inherent, and unalienable rights, amongst which are . . . defending life . . . ."); *id.* art. 16 ("That the people have a right to bear arms for the defence of themselves and the State . . . ."); WASH. CONST. art. 1, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . . ."); W. VA. CONST. art. 3, § 22 ("A person has the right to keep and bear arms for the defense of self, family, home and state . . . ."); WIS. CONST. art. 1, § 25 ("The people have the right to keep and bear arms for security, defense . . . ."); WYO. CONST., art. 1, § 24 ("The right of citizens to bear arms in defense of themselves and the state shall not be denied.").

Some states which do not have a self-defense clause but do have a right to arms clause have specifically interpreted the arms right to include self-defense. *See* OR. CONST. art. I, § 27; State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984) (state constitutional right to arms includes arms which are useful for personal defense); R.I. CONST. art. I, § 22; Mosby v. Devine, 851 A.2d 1031 (R.I. 2004); TENN. CONST. art I, § 26; Andrews v. State, 3 Heisk. (50 Tenn.) 165 (1871) (right protects personal possession and use of arms "which will properly train and render him efficient in defense of his own liberties . . . .").

systems of Jewish, Christian, and Islamic law, or among the laws of Greece, Rome, Byzantium, Spain, and the Anglo-American nations. Notably, the self-defense principles of every one of these great legal systems are remarkably similar; their distinctions consist, at most, of details, while there is universal agreement on the core issues. As the twentieth-century American legal scholar Herbert Wechsler observed, laws regarding self-defense reflect the "universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims."[445]

If *any* principle of international human rights law can be discerned from the universal agreement of major legal systems, it is the right of self-defense.

Frey's narrow interpretation claims that there is no right to self-defense because it is not specifically enumerated in enough contemporary treaties to satisfy her. Yet the survey of the jurists and the world's legal systems shows that the right of self-defense has always been an essential part of international law, and has always been a principle of all major legal systems.

Frey, while briefly acknowledging that self-defense has been widely recognized, argues that self-defense is not "expressly" declared to be a "right."[446] Frey is doubly wrong. First of all, the Statute of the International Court of Justice instructs its international law judges to be guided by "general principles." There is no requirement in the Rome statute for Frey's "Mother may I?" tenet that a general principle must be "expressly" stated as a "right." Moreover, many of the major legal systems *have* expressly described self-defense as a "right."[447]

VI. CONTEMPORARY LEGAL SYSTEMS

In Part VI, we first examine contemporary international treaties. Next, we examine current state practice, as demonstrated by statutes and constitutions. Finally, we address Frey's inaccurate claim that self-defense is always regarded as an excuse rather than a justification.

445. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 736 (1937).

446. *Frey Report*, *supra* note 48, ¶¶ 20–21.

447. *See supra* Part V.C–I (describing Roman law, Islamic law, Canon law, Anglo-American law as having expressly described self-defense as a right).

A. Modern Human Rights Treaties

Frey states that self-defense is only mentioned in a single international human rights treaty. First of all, most international human rights treaties deal with very particular subjects (e.g., torture,[448] discrimination,[449] and cultural rights[450]) in which it would be unexpected to enumerate a general human right of self-defense. There are really only a few "general" international law human rights treaties, and of these, most do incorporate self-defense in one form or another. Only the American Convention on Human Rights says nothing directly about self-defense.[451]

As the commentators discussed above made very clear, the right of collective self-defense against tyranny is simply the right of personal defense writ large. The right of collective self-defense against tyranny (such as colonial oppression) is part of the African Charter on Human and People's Rights.[452] It is likewise implicitly part of the International Covenant on Civil and Political Rights.[453] The European Convention on Human Rights states:

448. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

449. *E.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 1995; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. *Cf.* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158, U.N. Doc. A/45/49s (Dec. 18, 1990).

450. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), 993 U.N.T.S. 3 (explaining rights to participate in cultural life, economic rights such as right to work and right to form trade unions, and social rights such as right to old-age pensions).

451. American Convention on Human Rights, *supra* note 313.

452. African Charter on Human and Peoples' Rights, art. 20, *available at* http://www.oup.com/uk/orc/bin/9780199259113/resources/cases/ch02/1981_african_chpr.pdf. The Article states:

> 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.

Id.

453. International Covenant on Civil and Political Rights, *supra* note 312, art. 1(1) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status."). The same language appears in the International Covenant on Economic, Social, and Cultural Rights, *supra* note 450, art. 1(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.
>
> 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.[454]

Frey asserts that deadly force may be used in self-defense only as a last resort against a deadly threat.[455] However, the European Convention takes a contrary view, contemplating the use of deadly force for defense against "unlawful violence"—such as attempted rape, mayhem, or robbery.[456]

In the European Convention, self-defense is not stated as a "right," notes Frey. This is a fair point. If we had no international resources other than the European Convention, Frey would be correct in stating that international law does not "expressly" include a "right" of self-defense.

For the moment, let us leave aside the many sources of international law which do include an express right, and which Frey has failed to acknowledge. Even then, a right of self-defense is a necessary implication of all modern international human rights treaties.

The European Convention does not explicitly state that there is a right to breathable air, to food, to sleep, or to clean drinking water. By Frey's artificially narrow reading then, there would be no violation of the Convention if a European government forbade breathing, eating, drinking, or sleeping—or even if the government took affirmative steps to make it impossible for citizens to breathe, eat, drink, or sleep.

Yet, obviously, a person cannot survive if he cannot breathe, eat, drink, or sleep. Accordingly, a government depriving people of the ability to breath, eat, drink, or sleep would be in violation of the right to life, which is explicitly guaranteed in the European Convention, and in the other broad modern treaties.

454. European Convention on Human Rights, 213 U.N.T.S. 222, art. 2 [hereinafter European Convention].

455. *Frey Report*, *supra* note 48, at 9, ¶ 21.

456. European Convention, *supra* note 454, art. 2.

Similarly, if a government forbade a person to defend her own life from a deadly attack, the government would violate the right to life. Forbidding self-defense against rape or robbery would also violate other rights which are included in the human rights treaties.[457]

Of course, if a government set up a program that provided everyone with sufficient food, then a government might, theoretically, forbid the private cultivation of food, and the prohibition would not necessarily violate the right to life. Similarly, a government that provided full-time, effective protection to every citizen might, theoretically, be able to abolish self-defense without violating the right to life. On the other hand, if the government forbade the private cultivation of food, and if the government supplied only enough food for some people to survive, and other people died of starvation, then the government would be culpable of violating the right to life.

The analogy to self-defense is straightforward. If a government forbids self-defense, and simultaneously provides sufficient police protection to protect only some of the people some of the time, and some undefended people are killed by criminals, then the government is guilty of violating the right to life.

Accordingly, even if one accepts Frey's claim that self-defense is not a right in itself, self-defense is a necessary corollary to the right to life (and the right to property, and the right not to be maimed or raped), and government may abolish self-defense if, and only if, government provides citizens with complete security. To state the obvious, no government in the world is currently capable of providing the necessary replacement for the right of self-defense.[458] No government has sufficient police forces to protect everyone all the time; the existence of violent criminal attacks, some of them deadly, even in wealthy nations which are relatively safe by global standards, proves that abrogation of the unenumerated right to self-defense would be a direct breach of the enumerated right to life.

457. *See* American Convention on Human Rights, *supra* note 312, art. 5(1) ("Every person has the right to have his physical, mental, and moral integrity respected."); *id.* art. 7(1) ("Every person has the right to personal liberty and security."); *id*. 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, *supra* note 454, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); *id.* art. 5(1) ("Everyone has the right to liberty and security of person."); Universal Declaration of Human Rights, *supra* note 311, art. 3 ("Everyone has the right to life, liberty and security of person."); *id.* art. 17(1) ("Everyone has the right to own property alone as well as in association with others."); *id.* art. 17(2) ("No one shall be arbitrarily deprived of his property."); International Covenant on Civil and Political Rights, *supra* note 312, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *id.* art. 9(1) ("Everyone has the right to liberty and security of person.").

458. In a few very tranquil nations, such as Japan and Taiwan, the government comes fairly close, mainly because there is so little (non-organized) violent crime in the first place.

B. The Universal Declaration of Human Rights

Another important contemporary international law source in which the right to self-defense is recognized is the Universal Declaration of Human Rights (hereinafter Universal Declaration), adopted by the United Nations in 1948.[459] The Universal Declaration is not a binding legal treaty, but rather a statement of principles.[460]

The Universal Declaration's Preamble clearly recognizes the right of people to defend themselves against tyranny, with force if necessary: "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 . . . ."[461] The principle of a right of resistance is reinforced by Article 8 of the Universal Declaration: "Everyone has the right to an effective remedy."[462]

The principle of the Preamble is congruent with Vattel's statement that armed resistance to an absolute ruler "ought to be attempted only in cases of extremity, when the public miseries are raised to such a height that the people may say with Tacitus, *miseram pacem vel beno mutatri*, that it is better to expose themselves to a civil war than to endure them."[463]

The Preamble likewise parallels Blackstone's statement that the primary purpose of the right to arms was "the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[464]

459. The Universal Declaration was most of all the work of Eleanor Roosevelt, America's first Ambassador to the United Nations. Mrs. Roosevelt, incidentally, began carrying a handgun for protection in 1933, and continued to do so for the rest of her life, including when she traveled alone to dangerous parts of the American South, in order to speak out for civil rights. *See* Dave Kopel, Paul Gallant & Joanne Eisen, *Her Own Bodyguard*, NAT'L REV. ONLINE, Jan. 24, 2002, *available at* http://www.nationalreview.com/kopel/kopel012402.shtml.

To ensure continued U.N. attention to Human Rights, the United Nations Human Commission on Human Rights was created. Eleanor Roosevelt served as the first Chair of the Commission, from 1946 to 1950. She used her chairmanship to lead the creation of the Universal Declaration of Human Rights. In 1948, the United Nations General Assembly created the "Convention on the Prevention and Punishment of the Crime of Genocide," which, after being ratified by a sufficient number of nations, became international law in 1951.

460. Ambassador Roosevelt explained that the entire Declaration is "not a treaty" and "does not purport to be a statement of law or legal obligations." 19 Dept. of State Bull. 751 (1948); *see also* Sosa v. Alvarez Machain, 542 U.S. 692, 734 (2004).

461. Universal Declaration of Human Rights, *supra* note 311, pmbl.

462. *Id.* art. 8.

463. VATTEL, *supra* note 262, at 19 (bk. 1, ch. 4, § 51). Vattel noted that when there were checks on the prince's power, such as a senate or parliament, it was much easier to redress grievances without causing "violent shocks." *Id.* The Tacitus quotation, which Vattel slightly misphrased, is *miserman pacem vel bello mutari* (exchanging agreeably an unhappy peace for war). TACITUS, ANNALS (bk. 3, § 44).

464. *See* 1 BLACKSTONE, *supra* note 434, at *143.

Tellingly, Frey does not address the international law implications of the Universal Declaration's recognition of a pre-existing right of people to use force as a last resort against tyranny.[465]

C. The Resolution on the Definition of Aggression

The Universal Declaration's principle about the legitimacy of self-defense against tyranny is reinforced by the UN General Assembly's Resolution on the Definition of Aggression:

> 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.[466]

The General Assembly resolution is especially concerned with "peoples under colonial and racist regimes or other forms of alien domination."[467] Yet significantly, the resolution is not limited to situations of racism, colonialism, or foreign domination. To the contrary, the language of the resolution applies to *all* places in which a government violates the right of "self-determination" or "freedom" or "independence." Almost any dictatorship that prohibits fair elections violates the people's right to "self-determination." Likewise, almost every dictatorship violates the right of "freedom."

D. The United Nations Charter

Article 51 of United Nations Charter affirms "the inherent right" of self-defense.[468] Frey accurately states that Article 51 is directly concerned with the defense of states, and not of individuals.[469] We agree.

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465. Instead, she cites Kopel, Gallant, & Eisen, *supra* note 58, and in a parenthetical summarizes the article's point about the Universal Declaration, but she never addresses the argument. *Frey Report*, *supra* note 48, at 9 n.14.

466. Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, art. 7 (Dec. 14, 1974), reprinted in IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 704 (5th ed., Oxford Univ. Press 2003). General Assembly resolutions do not create binding international law.

467. *Id.*

468. U.N. Charter art 51. *See also* General Treaty for the Renunciation of War, Aug. 27, 1928, 94 L.N.R.S. 57; H. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105, 109–13 (1928) (describing formal notes exchanged between the signatories, reserving the right to self-defense).

469. *Frey Report*, *supra* note 48, at 13, ¶ 39 ("Article 51 was not intended to apply to situations of self-defence for individual persons.")

However, what Frey elides is that the right of *national* self-defense is the child of the right of *personal* self-defense—as we detailed *supra*.[470] Notably, the UN Charter does not purport to *grant* states a right of self-defense. The charter simply recognizes an "inherent" right. In the French text of the UN charter, it is a "droit naturel", which means natural right or natural law. As Yoram Dinstein observes, "The choice of words has overtones of *jus naturale*, which appears to be the fount of the right to self-defense."[471] (*Jus naturale* is Latin for "natural law"; as discussed above, *jus naturale* included a strong right of personal defense.)[472]

Given the UN Charter's choice of language which explicitly invoked natural right, it was not surprising that the International Court of Justice wrote: "The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defense . . . ."[473]

Elucidating Article 51, Dinstein writes:

> The legal notion of self-defence has its roots in inter-personal relations, and is sanctified in domestic legal systems since time immemorial. From the dawn of international law, writers sought to apply this concept to inter-State relations, particularly in connection with the just war doctrine.[474]

If one explicitly recognizes the existence of the child, then one can scarcely deny the implication that a parent exists. "I admit that there was a person named Martin Luther King, Jr., but I deny the existence of Martin Luther King, Sr." The previous sentence is illogical—and so is Frey's claim that the explicit recognition of the natural, inherent right of national self-defense in Article 51 can be reconciled with the denial of the natural, inherent right of personal self-defense.

470. *See supra* Parts III.C–V.

471. DINSTEIN, *supra* note 4, at 179. Dinstein goes on to reject the overtone, because he rejects the whole concept of natural law, for reasons detailed *supra* note 308.

472. *See supra* Part IV.

473. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

474. DINSTEIN, *supra* note 4, at 176; *see also* M. A. Weightman, *Self-Defense in International Law*, 37 VIR. L. REV. 1095, 1099–1102 (1951).

E. Contemporary Constitutions and Statutes

1. Personal self-defense

The International Court of Justice is instructed to use as a source of law "the general principles" from the laws of "civilized nations."[475] Without arguing about what nations currently count as "uncivilized," we note that personal self-defense is part of the law of *every* legal system in the world today.[476] In addition, many nations have constitutionalized self-defense, in a variety of forms.

Before surveying the constitutions, we must acknowledge that around the world, many constitutional rights are honored only in the breach. For example, the constitution of Zimbabwe guarantees the right of free assembly[477] but all forms of dissent are ruthlessly suppressed. In 2007, opposition leader Morgan Tsvangirai was badly beaten by the government.[478] In Kenya, the constitution is clear: "No person shall be deprived of his life intentionally save in execution of the sentence of a court . . . ."[479] However, in 2007 shoot-to-kill orders were issued to police who executed the orders with a series of extrajudicial killings.[480] Even so, the expression of a standard in a national constitution is a signal of the importance of that standard in the national and international community, such that even governments which do not obey the standard feel compelled to assert that they do.[481]

475. Stat. of the I.C.J. *supra* note 64.

476. *See* Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999 (2005) ("the right to self-defense is recognized in all jurisdictions").

477. THE CONSTITUTION OF ZIMBABWE ch. III, art. 21(1) ("[N]o person shall be hindered in his freedom of assembly and association . . . and in particular to form or belong to political parties . . . .").

478. *See Tsvangirai Held in Intensive Care*, BBC News, Mar. 14, 2007 (concerning breach of Zimbabwe's guarantees "Zimbabwean opposition leader Morgan Tsvangirai is being treated in an intensive care unit as doctors examine wounds he received in police custody . . . . He and dozens of other activists were arrested at a rally on Sunday.")

479. CONSTITUTION OF KENYA ch. 5, art. 71(1).

480. *See* Cyrus Ombati, *Govt Burns 8,000 Guns As Minister Orders Police to Kill Thugs*, THE EAST AFRICAN STANDARD (Nairobi), Mar. 16, 2007. (Internal Security minister John Michuki stated: "An illegal weapon in the hands of a criminal has no other purpose except to kill an innocent person. It is, therefore, justifiable for the law enforcers to take equal measure against such a person.").

481. "Hypocrisy is a form of homage that vice pays to virtue." FRANÇOIS DE LA ROCHEFOUCAULD, COLLECTED MAXIMS AND OTHER REFLECTIONS 63 (E.H. Blackmore, A.M. Blackmore & Francine Giguère, trans., Oxford Univ. Pr. 2007) (incorporating the 1678 5th edition of Rochefoucauld's *Réflexions ou Sentences et Maximes morales*). "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule."

There are fifteen nations which use nearly-identical language to constitutionalize self-defense: Antigua & Barbuda,[482] the Bahamas,[483] Barbados,[484] Belize,[485] Cyprus,[486] Grenada,[487] Guyana,[488] Jamaica,[489] Malta,[490] Nigeria,[491] Samoa,[492] St. Kitts & Nevis,[493] Saint Lucia,[494] Saint Vincent and the Grenadines,[495] and Zimbabwe.[496] Another country, Slovakia,[497] uses a variation of the formula.

Military and Paramilitary Activities, *supra* note 473, at 98.

482. THE CONSTITUTION OF ANTIGUA & BARBUDA art. 4.
483. THE BAHAMAS CONSTITUTION art. 16.
484. CONSTITUTION OF BARBADOS art. 12.
485. CONSTITUTION OF BELIZE art. 4.
486. CONSTITUTION OF THE REPUBLIC OF CYPRUS art. 7.
487. THE GRENADA CONSTITUTION ORDER 1973 art 2.
488. THE CONSTITUTION OF GUYANA art. 138.
489. THE JAMAICA ORDER IN COUNCIL [Constitution] art. 14.
490. CONSTITUTION OF MALTA § 33.
491. CONSTITUTION OF NIGERIA art. 33.
492. THE CONSTITUTION OF THE INDEPENDENT STATE OF SAMOA art. 5.
493. THE CONSTITUTION OF ST. KITTS & NEVIS art. 4.
494. CONSTITUTION OF ST. LUCIA art. 2.
495. THE ST. VINCENT CONSTITUTION ORDER 1979 art. 2.
496. THE CONSTITUTION OF ZIMBABWE art. 12:

> (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
> (2) A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case
> (a) for the defence of any person from violence or for the defence of property;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or
> (d) in order to prevent the commission by that person of a criminal offence; or if he dies as the result of a lawful act of war.
> (3) It shall be sufficient justification for the purposes of subsection (2) in any case to which that subsection applies if it is shown that the force used did not exceed that which might lawfully have been used in the circumstances of that case under the law in force immediately before the appointed day.

497. CONSTITUTION OF THE SLOVAK REPUBLIC art. 15:

> (1) Everyone has the right to life. Human life is worthy of protection even before birth.
> (2) No one shall be deprived of life.
> (3) The death penalty shall be inadmissible.
> (4) No infringement of rights according to this Article shall occur if a person has been deprived of life in connection with an action not defined as unlawful under the law.

One more nation, the United Kingdom, has, in a more limited sense, put similar language into its supreme law. The U.K. has no written constitution, but the U.K.'s Human Rights Act 1998 incorporates the European Convention on Human Rights, and makes it pre-eminent over any conflicting national statute.[498] The Human Rights Act thereby incorporates the European Convention's language on self-defense; the incorporation complements the English Bill of Rights provision that subjects have the right to possess arms "suitable for their defence."[499]

The language in the seventeen constitutions (eighteen, if we count the U.K.) is similar to the language of the European Convention on Human Rights on self-defense.[500] Although Frey asserts that use of lethal force for self-defense is permissible only against a deadly peril, the European Convention—and fourteen of the sixteen national constitutions—specifically legitimize deadly force used in defense against "violence" or in "defense of property." These constitutions declare that when a person dies as a result of such self-defense, his right to life was not violated.

In the next section, we will address Frey's theory that the European Convention language requires that self-defense be considered an excuse rather than a justification. Her theory would necessarily apply to the nearly-identical language in all the national constitutions. The Zimbabwe constitution explicitly contradicts her theory. That constitution contains a "right to life" article very similar to that of the European Convention. The Zimbabwe constitution also specifically states (in a clause making the constitutional self-defense provision retroactively applicable) that self-defense is a "justification."

Regarding the European Convention, Frey made the plausible argument that the language (in which self-defense is enumerated as one of the exceptions to the right to life) could be construed as not granting a right of self-defense.[501] On the other hand, the European Convention and national constitutions are also consistent with the interpretation that the constitution-writers carefully enumerated the exceptions on the right to life so as not to interfere with the pre-existing right of self-defense.

It would not be surprising that some constitution-writers would decide that nothing more regarding self-defense was needed, because (until very recently), the right itself has hardly been questioned. In contrast, many governments have pervasively violated the right to freedom of expression, and so the need to make an especially firm

498. Human Rights Act 1998, 42 U.S.C. ch. 22 (1998).

499. *See supra* text accompanying note 433.

500. *See supra* text accompanying note 454.

501. *See supra* Part VI.A.

statement about the right of free expression in a constitution is understandable.

While many tyrannical governments have adopted censorship rules which restricted the entire population, there are few, if any, historical examples of governments prohibiting self-defense for the entire population. There are many examples of particular groups in a society being restricted in self-defense (e.g., Blacks in Jim Crow America being deprived of defensive arms;[502] Jews in medieval Europe being deprived of arms;[503] disarmed commoners in feudal Japan being forbidden to defend themselves when attacked by an aristocrat;[504] Jews and Christians in Muslim countries being forbidden to possess arms and to defend themselves from attacks by Muslims.[505]). But all of these deprivations of the right of self-defense were based on some form of class, racial, or religious discrimination. There were never broadly applicable bans on self-defense *per se*. Even in feudal Japan, a commoner who was attacked by another commoner could defend himself, as could a Muslim who was attacked by another Muslim in nineteenth-century Algeria. The right to

502. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309 (1990); Robert J. Cottrol and Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity-the Redeemed South's Legacy to a National Jurisprudence?* 70 CHI.-KENT L. REV. 1307 (1995).

503. DAVID NIRENBERG, COMMUNITIES OF VIOLENCE: PERSECUTION OF MINORITIES IN THE MIDDLE AGES 146, 221 (1996). *Cf.* VISIGOTHIC CODE, *supra* note 410, bk. 12, tit. 2, law 15 ("XV. All Christians are Forbidden to Defend or Protect a Jew, by Either Force or Favor. . . . No one shall attempt, under any pretext, to defend such persons in the continuance of their depravity, even should they be under his patronage. No one, for any reason, or in any manner, shall attempt by word or deed, to aid or protect such persons, either openly or secretly, in their opposition to the Holy Faith and the Christian religion.").

504. GORDON WARNER & DONN F. DRAEGER, JAPANESE SWORDSMANSHIP: TECHNIQUE AND PRACTICE 68–69 (1982); DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 30 (1992) (describing how the peasantry was disarmed by the central government. The inferior status of the peasantry having been affirmed by civil disarmament, the Samurai enjoyed *kiri-sute gomen*, permission to kill and depart. Any disrespectful member of the lower class could be executed by a Samurai's sword).

505. *See* A.S. TRITTON, THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS: A CRITICAL STUDY OF THE COVENANT OF 'UMAR 5–9 (F. Cass) (1970) (describing the standard formulation from the Covenant of 'Umar, which traditionally was said to have been a seventh-century treaty between the Caliph Umar I and Syrian Christians. Although the true historical origins of the Covenant are unclear, the Covenant was universally accepted by Muslim legal scholars as setting forth the basic standards for Christian rule over conquered monotheists. The Covenant requires that the conquered people agree "not to ride on saddles; not to keep arms nor put them in our houses nor to wear swords . . . he who strikes a Muslim has forfeited his rights."); *see also* BAT YE'OR, MIRIAM COCHAN & DAVID LITTMAN, *Islam and Dhimmitude: Where Civilizations Collide*, 56 MIDDLE EAST J. 733 (2002); BAT YE'OR, THE DECLINE OF EASTERN CHRISTIANITY UNDER ISLAM: FROM JIHAD TO DHIMMITUDE (1996); BAT YE'OR, THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM (1985); David B. Kopel, *Dhimmitude and Disarmament*, 18 GEO. MASON U. CIV. RTS. L.J. (forthcoming 2008). In practice, conquered Jews and Christians were often left unprotected by Muslim governments, and were forbidden to resist violence perpetrated by Muslim criminals or bullies.

self-defense, like the right to sleep, or the right to breast-feed infants, was itself never in doubt; accordingly, self-defense, like sleeping and breast-feeding, was not necessarily a right that needed protection by being constitutionally enumerated as a right. Even so, more than a dozen national constitutions, with lawyerly caution, did explicitly ensure that the right to life was not misconstrued so as to forbid self-defense.

Two national constitutions include an explicit right to armed self-defense which is coupled with an explicit arms right. These are Haiti ("[e]very citizen has the right to armed self defense, within the bounds of his domicile . . . ."),[506] and Mexico (arms for legitimate defense in the home).[507] The United States and Guatemala[508] constitutions have a right to arms, although the right is not expressly tied to personal self-defense. (As noted *supra*, many American state constitutions do have an express right of self-defense, which is sometimes, but not always, tied to an arms right.)[509] Two other countries constitutionally enumerate a right of self-defense without specific reference to arms: Honduras ("the right of defense is inviolable")[510] and Peru.[511]

506. CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI art. 268-1 ("Every citizen has the right to armed self defense, within the bounds of his domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police.").

507. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution], as amended, art. 10 Dario Oficiale de la Federación [D.O], 5 de Febero de 1917 (Mex.) ("Los habitantes de los Estados Unidos Mexicanos tienen derecho a poseer armas en su domicilio, para su seguridad y legítima defensa, con excepción de las prohibidas por la Ley Federal y de las reservadas para el uso exclusivo del Ejército, Armada, Fuerza Aérea y Guardia Nacional. La ley federal determinará los casos, condiciones, requisitos y lugares en que se podrá autorizar a los habitantes la portación de armas.") (The inhabitants of the United States of Mexico have the right to possess arms in their domiciles, for security and legitimate defense, with the exception of the prohibitions by federal law and the reservations for exclusive use of the military, army, air force, and national guard. Federal law will determination the cases, conditions, requirements, and place under which the inhabitants will be authorized to carry arms.)

508. GUATEMALA CONSTITUTION art. 38 ("Tenencia y portación de armas. Se reconoce el derecho de tenencia de armas de uso personal, no prohibidas por la ley, en el lugar de habitación. No habrá obligación de entregarlas, salvo en los casos que fuera ordenado por el juez competente. Se reconoce el derecho de portación de armas, regulado por la ley.") (Possession and carrying of arms. The right of possession of arms for personal use is recognized, not prohibited by the law, in the home. There will be obligation no to surrender them, save in cases that are ordered by a competent judge. The right of carrying of arms is recognized, and regulated by the law.).

509. *See supra* note 314 and accompanying text.

510. CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS DE 1982, art. 82.

511. CONSTITUCION POLITICA DEL PERU art. 2 ("Toda persona tiene derecho: . . . § 23. A la legítima defensa.") (Every person has the right: . . . § 23 [t]o legitimate defense.). The Peruvian constitution also contemplates the possession, carrying, and use of non-military firearms by the public, in accordance with the law. *Id.* art. 175 ("Sólo las Fuerzas Armadas y la Policía Nacional pueden poseer y usar armas de guerra. Todas las que existen, así como las que se fabriquen o se introduzcan en el país pasan a ser propiedad del Estado sin proceso ni indemnización. . . . La ley reglamenta la fabricación, el comercio, la posesión y el uso, por los particulares, de armas distintas de las de guerra.") (Only the Armed Forces and the National Police can possess and use military arms. All those that exist, as well as those that are made or they are introduced in the country,

To these countries which directly mention personal self-defense in their constitutions we might also add the nations which constitutionally base their law, in whole or in part, on Islamic law; as discussed *supra*, Shari'a considers self-defense to be a right (albeit not when practiced by non-Muslims against Muslims).[512] Accordingly, the constitutionalization of Shari'a serves, indirectly, to constitutionalize self-defense.

2. Self-defense against tyranny

As Grotius, Pufendorf, and many other legal and moral philosophers have elaborated, self-defense against tyranny is just a larger application of self-defense against a lone criminal. Many nations have constitutionalized the right of self-defense against tyrants. In five countries, the constitutionalization is framed as a constitutional intention to assist the liberation of other nations from tyranny: Algeria,[513] Angola,[514] Cuba,[515] Portugal,[516] and Suriname.[517]

In thirteen nations, the constitution affirms a right and duty of citizens to resist or revolt against domestic or foreign tyranny: Andorra,[518] Argentina,[519] Congo,[520] Greece,[521] Guatemala,[522] Honduras,[523] Hungary,[524] Lithuania,[525] Mauritania,[526] Peru,[527] Portugal,[528]

become property of the State with neither process nor indemnification. . . . The law regulates the manufacture, the commerce, the possession and the use, by the individuals, of arms different from the military ones.").

512. *See supra* text accompanying notes 393–95.

513. CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA art. 27 and 33.

514. CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA art. 16.

515. CONSTITUTION POLITICA DE LA REPUBLICA DE CUBA DE 1976 art. 12.

516. CONSTITUCION DE LA REPUBLICA PORTUGUESA art. 7(3) ("Portugal recognizes the right of peoples to revolt against all forms of oppression, ...").

517. CONSTITUTION OF SURINAME art. 7.

518. THE CONSTITUTION OF THE PRINCIPALITY OF ANDORRA art. 5 (incorporating the Universal Declaration of Human Rights). The Universal Declaration affirms the right of violent resistance to tyranny (*see supra* text accompanying notes 311), so the incorporation of the Universal Declaration into a national constitution thereby incorporates the rightfulness of resisting tyranny.

519. CONSTITUTION OF THE ARGENTINE NATION § 36 ("This Constitution shall rule even when its observance is interrupted by acts of force against the institutional order and the democratic system. These acts shall be irreparably null . . . Those who, ... were to assume the powers foreseen for the authorities of this Constitution . . . . shall be punished . . . . and shall be civil and criminally liable for their acts. . . . All citizens shall have the right to oppose resistance to those committing the acts of force stated in this section . . . .").

520. CONGO CONSTITUTION art. 17.

521. 1975 SYNTAGMA [SYN] [Constitution] art. 120(4) (Greece) ("Observance of the Constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution.").

522. GUATEMALA CONSTITUTION art. 45.

523. CONSTITUCIÓN POLITICA DE LA REPUBLICA DE HONDURAS DE 1982 art. 3 ("Nadie debe obediencia a un gobierno usurpador ni a quienes asuman funciones o empleos públicos por la fuerza de las armas o usando medios o procedimientos que quebranten o desconozcan lo que esta

Romania,[529] and Slovakia.[530]

3. Security against home invasion

Finally, a very common item in constitutions that include a Bill of Rights is the right to security against home invasion. Sometimes—as in the United States' Fourth Amendment—the right is stated in terms that apply only to home invasions by the government.[531] Very frequently, however, the right is stated in terms that are not limited to government actors. [532] For example, Afghanistan's constitution insists, "no one,

Constitución y las leyes establecen. Los actos verificados por tales autoridades son nulos. el pueblo tiene derecho a recurrir a la insurrección en defensa del orden constitucional.") (Nobody owes obedience to an usurping government nor to those who assume functions or public powers by the force of arms or by uses or procedures that violate or are unknown this Constitution and the established laws. The acts proclaimed by such authorities are null. The people have the right to resort to insurrection in defense of the constitutional order.").

524. A MAGYAR KOZTARSASAG ALKOTMANYA [Constitution] art. 2(3) (Hung.) ("No activity of any person may be directed at the forcible acquisition or exercise of public power, nor at the exclusive possession of such power. Everyone has the right and obligation to resist such activities in such ways as permitted by law.").

525. CONSTITUTION OF THE REPUBLIC OF LITHUANIA art. 3.

526. MAURITANIA CONSTITUTION pmbl. (incorporating the Universal Declaration of Human Rights and the African Charter of Human and Peoples Rights, and thereforce incorporating by implication the right of resistance contained in those documents. *See supra* text accompanying notes 452 and 461.)

527. CONSTITUCIÓN POLITICA DEL PERU art. 46 (similar to Honduras Constitution, *supra* note 523).

528. CONSTITUCION DE LA REPUBLICA PORTUGUESA art. 21 ("Everyone has the right to resist any order that infringes his rights, freedoms, or safeguards and to repel by force any form of aggression when recourse to public authority is impossible . . . ."). *See also id*., at art. 16(2) (Portuguese constitution shall be construed "in accordance with the Universal Declaration of human rights"; as discussed *supra* note 461, the Universal Declaration recognizes the right of violent self-defense against tyranny.

529. CONSTITUTION OF ROMANIA art. 20 (incorporating right of resistance articulated in the Universal Declaration of Human Rights). *See supra* text accompanying notes 461.

530. CONSTITUTION OF THE SLOVAK REPUBLIC art. 32 ("The citizens shall have the right to resist anyone who would abolish the democratic order of human rights and freedoms set in this Constitution,").

531. U.S. CONST. amend. IV.

532. THE CONSTITUTION OF AFGHANISTAN art. 38.1–2 ("Other than the situations and methods indicated in the law, no one, including the state, are allowed to enter or inspect a private residence without prior permission of the resident or holding a court order."); CONSTITUTION OF THE PRINCIPALITY OF ANDORRA art. 14 ("No one shall enter a dwelling or any other premises against the will of the owner or without a warrant, except in case of flagrant delicto."); CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA art. 44 ("The State shall guarantee the inviolability of the home . . . ."); THE CONSTITUTION OF ANTIGUA AND BARBUDA ch. 2(3)(c) ("protection for his family life, his personal privacy, the privacy of his home and other property . . . ."); THE (FIRST) CONSTITUTION OF THE REPUBLIC OF ARMENIA art. 21 ("It is prohibited to enter a person's dwelling against his or her own will except under cases prescribed by law."); THE CONSTITUTION OF THE AZERBAIJAN REPUBLIC art. 33.1–2 ("With the exception of cases specified by Law or Court no one shall be authorized to enter the Apartment against the will of the Resident."); THE BAHAMAS CONSTITUTION ch. 3.15(c) ("protection for the privacy of his home and other property . . . .");

CONSTITUTION OF THE REPUBLIC OF BELARUS art. 29 ("No person shall have the right, save in due course of law to enter the premises or other legal property of a citizen against one's will."); BELGIUM CONSTITUTION art. 15 ("The domicile is inviolable; no visit to the individual's residence can take place except in the cases provided for by law and in the form prescribed by law."); CONSTITUTION OF BELIZE art. II.9.1 ("Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises."); CONSTITUTION DE LA REPUBLIQUE DU BENIN art. 20 ("Le domicile est inviolable. Il ne peut y être effectué de visites domiciliaires ou de perquisitions que dans les formes et conditions prévues par la loi.") (The domicile is inviolable. There may be no inspections or searches except according to the forms and conditions envisaged by the law.); CONSTITUCION POLITICA DE LA REPUBLICA DE BOLIVIA art. 21 ("Toda casa es un asilo inviolable; de noche no se podrá entrar en ella sin consentimiento del que la habita y de día sólo se franqueará la entrada a requisición escrita y motivada de autoridad competente, salvo el caso de delito 'in fraganti'.") (Every house is an inviolable asylum; at night, no one may enter without the consent of the inhabitants, and by day only by written authorization of a competant authority or in case of flagrante delicto."); CONSTITUICÃO FEDERAL art. 5 (Braz.) ("La casa es asilo inviolable del individuo, no pudiendo penetrar nadie en ella sin el consentimiento del morador, salvo en caso de flagrante delito o desastre, o para prestar socorro, o, durante el dia, por determinacion judicial") (The home is the inviolable asylum of the individual; it is forbidden to enter except with the consent of those who live there, in case of a crime detetected in the act, a disaster, or to give aid, according to a judicial determination."); THE CONSTITUTION OF BULGARIA art. 33.2 ("(2) Entering a residence or staying in it without the consent of its occupant or without the permission of the judicial authority may be allowed only for the purpose of preventing an imminent crime or a crime in progress, for the capture of a criminal, or in extreme necessity."); CONSTITUTION DU BURKINA FASO art. 6 ("La demeure, le domicile, la vie privée et familiale, le secret de la correspondance de toute personne sont inviolables.") ("[T]he residence, the domicle, the private and family life, the secrecy of the correspondence of every person are inviolable."); CONSTITUTION DE BURUNDI art. 23 ("Nul ne peut faire l'objet d'immixtion arbitraire dans sa vie privée, sa famille, son domicile ou sa correspondance . . . . Il ne peut être ordonné de perquisitions ou de visites domiciliaires que dans les formes et les conditions prévues par la loi.") (No one can be the subject of arbitrary interference his private life, his family, his residence or hiss correspondence. . . . There may not be orders for searches or home inspections except by the forms and the conditions envisaged by the law.); THE CONSTITUTION OF THE KINGDOM OF CAMBODIA art. 40 ("The rights to privacy of residence . . . shall be guaranteed."); XIAN FA art. 39 (1982) (P.R.C.) ("Unlawful search of, or intrusion into, a citizen's home is prohibited."); CONGO CONSTITUTION art. 29 ("Le domicile est inviolable. Il ne peut y être effectué de visite ou de perquisition que dans les formes et les conditions prévues par la loi.") (The home is inviolable. There may not be inspections or searches except according to the forms and conditions envisaged by the law.); CONSTITUTION POLITICA DE LA REPUBLICA DE CUBA DE 1976 art. 56 ("Nobody can enter the home of another against his will, except in those cases foreseen by law."); CONSTITUTION POLITICA DE LA REPUBLICA DOMINICANA DE 2002 art. 8.3 ("La inviolabilidad de domicilio. Ninguna visita domiciliaria puede verificarse sino en los casos previstos por la ley y con las formalidades que ella prescribe.") (Inviolability of the home. No domiciliary inspection can be legitimate but in the cases anticipated by the law and with the formalities that it prescribes.); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 44 ("Homes shall have their sanctity and they may not be entered or inspected except by a causal judicial warrant prescribed by the law."); CONSTITUCION POLITICA DE LA REPUBLICA DE EL SALVADOR DE 1983 art. 20 ("La morada es inviolable y sólo podrá ingresarse a ella por consentimiento de la persona que la habita, por mandato judicial, por flagrante delito o peligro inminente de su perpetración, o por grave riesgo de las personas.") (The dwelling is inviolable and it will only be able to be entered by consent of the person who inhabits it, by judicial mandate, in case of a flagrant crime or imminent danger of its perpetration, or of serious risk to the people.); ERITREA CONSTITUTION art. 18(2) ("No person shall be subjected to unlawful search, including his home or other property"); CONSTITUTION OF THE REPUBLIC OF ESTONIA art. 33 ("No one's dwelling . . . shall be forcibly entered or searched, except in the cases and pursuant to procedure provided by law."); CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA art. 26.1 ("Everyone has . . . the right not to be subjected to searches of his home, person or property."); GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 13.1 (F.R.G.) ("The home is

inviolable."); THE GRENADA CONSTITUTION ORDER 1973 ch. 1.7 ("Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."); CONSTITUCION POLITICA art. 23 (Guat.); THE CONSTITUTION OF GUYANA art. 40.1(c) ("protection for the privacy of his home and other property and from deprivation of property without compensation."); CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS DE 1982, art. 99 ("El domicilio es inviolable. Ningún ingreso o registro podrá verificarse sin consentimiento de la persona que lo habita o resolución de autoridad competente.") (The domicile is inviolable. No entrance or registry will be able to be authorized without consent of the person who inhabits it or resolution of competent authority.); XIANGGANG JI BEN FA [Constitution] art. 29 (H.K.) ("Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."); CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 22 ("The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law."); IRISH CONSTITUTION art. 40.5 ("The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."); CONST. art. 14 (Italy) ("No one's domicile may be inspected, searched, or seized save in cases and in the manner laid down by law"); THE JAMAICA ORDER IN COUNCIL 1962 [Constitution] art. 19.1 ("Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."); THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN art. 10 ("Dwelling houses shall be inviolable and shall not be entered except in the circumstances and in the manner prescribed by law."); KUWAIT CONSTITUTION art. 38 ("Places of residence shall be inviolable. They may not be entered without the permission of their occupants except in the circumstances and manner specified by law."); CONSTITUTION OF THE REPUBLIC OF LATVIA art. 96 ("Everyone has the right to inviolability of a private life, place of residence and correspondence."); THE LEBANESE CONSTITUTION art. 14 ("The citizen's place of residence is inviolable. No one may enter it except in the circumstances and manners prescribed by law."); CONSTITUTION OF THE REPUBLIC OF LIBERIA art. 16 ("No person shall be subjected to interference with his privacy of person, family, home or correspondence except by order of a court of competent jurisdiction."); LIBYA CONSTITUTION art. 12 ("The home is inviolable and shall not be entered or searched except under the circumstances and conditions defined by the law."); CONSTITUTION OF LUXEMBOURG art. 15 ("No domiciliary visit may be made except in cases and according to the procedure laid down by the law."); CONSTITUTION OF THE REPUBLIC OF MACEDONIA art. 26.1 ("The inviolability of the home is guaranteed."); CONSTITUTION OF THE REPUBLIC OF MADAGASCAR art. 13.1 ("Everyone shall be assured of protection of his person, his residence, and his correspondence."); MONGOLIA CONSTITUTION art. 16.13 ("Privacy of citizens, their families, correspondence, and homes are protected by law."); CONSTITUTION OF THE KINGDOM OF NEPAL art. 22 ("Except as provided by law, the privacy of the person, house, property, document, correspondence or information of anyone is inviolable."); CONSTITUCION POLITICA DE LA REPUBLICA DE NICARAGUA art. 26 ("Toda persona tiene derecho: 1. A su vida privada y la de su familia. 2. A la inviolabilidad de su domicilio, su correspondencia y sus comunicaciones de todo tipo.") (Every person has the right: 1. To his private life and that of his family. 2. To the inviolabilidity of his domicile, his correspondence and his communications of all types.); CONSTITUTION art. 37 (Nig.) ("The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."); THE WHITE BOOK I. THE BASIC LAW OF THE SULTANATE OF OMAN [Constitution] art. 27 ("Dwellings are inviolable and it is not permitted to enter them without the permission . . . except in the circumstances specified by the Law"); CONSTITUCION POLITICA DE LA REPUBLICA DE PANAMA art. 26 ("El domicilio o residencia son inviolables.") (The domicile or residence are inviolable.); CONSTITUCION POLITICA art. 33 (Para.) ("La intimidad personal y familiar, así como el respeto a la vida privada, son inviolables.") (Personal and familiar privacy, as well as respect to private, are inviolable.); *id*. art. 34 ("Todo recinto privado es inviolable.") (Every private enclsure is inviolable.); CONSTITUCION POLITICA DEL PERU art. 2.9 ("A la inviolabilidad del domicilio.") (To the inviolability of the domicide.); CONSTITUCION DE LA REPUBLICA PORTUGUESA art. 34 ("The individual's home and the privacy of his correspondence and other means of private communication are inviolable . . . ."); QATAR CONSTITUTION art. 37 ("The sanctity of human privacy shall be inviolable, and therefore interference into privacy of a person, family affairs, home of residence . . . may not be allowed save as limited by the provisions of the law stipulated therein."); CONSTITUTION OF ROMANIA art. 27.1 ("No one shall enter or remain in the domicile or residence of

including the state, is allowed to enter or inspect a private residence without prior permission of the resident or holding a court order."[533] The Slovak constitution combines two principles often stated in other constitutions: "A person's home is inviolable. It must not be entered without the resident's consent."[534] Zimbabwe's constitution tends to be careful about making exceptions to general rules, so the Zimbabwe text is "Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises."[535]

Thus, it would be accurate to say to a burglar in Afghanistan, Slovakia, or Zimbabwe, and in many other countries: "You are violating

a person without his consent."); KONSTITUTSIIA ROSSISKOI FEDERATSII [Konst. RF] [Constitution] art. 25 (Russ.) ("No one shall have the right to penetrate the home against the will of those residing in it unless in cases provided for by the federal law or upon the decision of the court."); THE CONSTITUTION OF THE REPUBLIC OF RWANDA art. 22 ("A person's home is inviolable."); THE CONSTITUTION OF SAINT CHRISTOPHER AND NEVIS art. 9.1 (St. Kitts & Nevis) ("Except with his own consent, a person shall not be subject to the search of his person or his property or the entry by others on his premises."); CONSTITUTION OF SAINT LUCIA art. 7.1 (same as St. Kitts); THE SAINT VINCENT CONSTITUTION ORDER 1979 art. 7.1 (same as St. Kitts); CONSTITUTION OF THE SLOVAK REPUBLIC art. 21.1 ("Entrance without consent of the person residing therein is not permitted."); SAUDI ARABIA CONSTITUTION art. 37 ("The home is sacrosanct and shall not be entered without the permission of the owner or be searched except in cases specified by statutes."); CONSTITUTION OF THE REPUBLIC OF KOREA art. 16 ("All citizens are free from intrusion into their place of residence."); SPAIN CONSTITUTION art. 18.2 ("The home is inviolable."); CONSTITUTION OF SURINAME art. 17.1 ("Everyone has a right to respect of his privacy, his family life, his home"); BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [BV] [Constitution] art. 13.1 (Switz.) ("Every person has the right to receive respect for their private and family life, home, and secrecy of the mails and telecommunications."); SYRIA CONSTITUTION art. 31 ("Homes are inviolable."); CONSTITUTION OF THE KINGDOM OF THAILAND § 35 ("The entry into a dwelling place without consent of its possessor or the search thereof shall not be made except by virtue of the law."); THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO art. 4(c) ("the right of the individual to respect for his private and family life."); TUNISIA CONSTITUTION art. 9 ("The inviolability of the home and the secrecy of correspondence are guaranteed, save in exceptional cases established by the law."); THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 21.1 ("The domicile of an individual shall not be violated."); CONSTITUCION POLITICA DE LA REPUBLICA art. 11 (Uru.) ("El hogar es un sagrado inviolable. De noche nadie podrá entrar en él sin consentimiento de su jefe, y de día, sólo de orden expresa de Juez competente, por escrito y en los casos determinados por la ley.") (The home is an inviolable asylum. At night nobody may enter without consent of the head of the house, and by day, only by express order of a competent judge, in writing and according to cases determined by the law.); CONSTITUCION DE LA REPUBLICA BOLIVARIANA DE VENEZUELA art. 47 ("El hogar doméstico y todo recinto privado de persona son inviolables.") (The domestic home and all private personal enclosures are inviolable.); CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM art. 73.1–2 ("No one is allowed to enter the another person's home without the latter's consent, unless otherwise [authorized] by the law."); CONSTITUTION OF THE REPUBLIC OF ZAMBIA art. 17.1 ("Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."); THE CONSTITUTION OF ZIMBABWE art. 17.1 ("Except with his own consent . . . no person shall be subjected to the search of his person or his property or the entry by others on his premises.").

533. THE CONSTITUTION OF AFGHANISTAN art. 38.1–2.

534. CONSTITUTION OF THE SLOVAK REPUBLIC art. 21.1.

535. CONSTITUTION OF ZIMBABWE art. 17.1.

my constitutional rights." While preventing government intrusions is a prime objective of the home security provisions, the language articulates a broader and more fundamental principle of the right to be secure against any home invader.

It is plausible to infer that the explicit right against home invasion includes the implicit, derivative right to take steps to prevent or halt a home invasion—such as the right to put locks on one's door or windows.

In the common law, there is a strong connection between the right of home security and the right to defend the home. As discussed *supra*, the English common law specially protected, as a justification, the use of deadly force against home invaders.[536] The saying that "a man's home is his castle"—a well-established element of popular understanding of practical rights—comes from a famous English case, and affirms the right of even the poorest peasant to bar his home to anyone, including, but not limited, to the king.[537] It is not a coincidence that American laws that protect self-defense rights often style themselves as "Castle Doctrine" laws.

David Caplan has shown how the common law connection between self-defense and home defense influenced the American constitution, so that the Second, Third, and Fourth amendments are placed next to each other partly because they comprise a cluster of home security protections.[538] The Third Amendment ensures that a family cannot be forced to allow an armed ruffian into the home.[539] The Fourth Amendment guards the home against irregular intrusions, or intrusions not supported by probable cause. The Second Amendment ensures that citizens will have the practical means to stop (and deter) home invasions.

On a global level, we need not resolve the issue of firearms in the home in order to conclude that the worldwide principle of the sanctity of the home against violent intrusions reinforces, and is an especially privileged place for the exercise of, the right of self-defense.

536. *See supra* text accompanying notes 431, 433–35.

537. Semayne's Case, 5 Coke Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603) (That the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose.); T. 14 Hen. VII (1499) reported in 21 Henry VII 39 pl. 50 (K.B. 1506) (But a man's house is his castle and his defense, and where he has an absolute right to stay.) (Original text in Law French; translations by Kopel).

538. Caplan & Caplan, *supra* note 431 at 1075; David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2 J. ON FIREARMS & PUB. POL'Y. 165 (1989).

539. At the time of the Third Amendment, the enlisted soldiers in standing armies such as those of Great Britain and France tended to be drawn from the dregs of society. Forced enlistment in the army was often the soldier's only alternative to avoid a prison sentence or execution for a serious crime.

F. Frey's Theory that Self-defense Violates the Aggressor's Rights

The statute of the International Court of Justice states that the opinions of leading legal scholars are a source of international law. Frey does not even address the opinions of the leading scholars, because she claims that they are not "primary" sources. Yet she inconsistently cites other scholars when it suits her purpose.[540] The Rome statute tells judges to look to the general principles of law of civilized nations; when we look at the laws of the nations of the world—from the ancient democracy of Athens, to the young democracies of Eastern Europe, to the Spanish- and Roman-influenced laws of the New World, to the Islamic law of the Old World—we find that self-defense is a universal right. Indeed, it would be difficult to find any legal rule that is more universal than self-defense.

Frey acknowledges the universality in passing,[541] but attempts to make it disappear with a rhetorical sleight of hand:

> 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.[542]

Frey's paragraph contains a host of errors. She claims "there is inadequate legal support" to call self-defense a "right."[543] As we have detailed *supra*, self-defense is explicitly described as a "right" by the *Corpus Juris*, Suarez, Grotius, Pufendorf, Barbeyrac, Vattel, Burlamaqui, Martens, and Bowyer, and by numerous legal systems, past and present, all over the world.

Frey proposes an alternative theory. In support of her theory, she cites two treaties. It does not seem that Frey is consistent in her standards about how much legal authority is needed to be "adequate."

As is turns out, the first treaty actually says directly the opposite of

540. For Frey's interpretation of "primary sources," see text accompanying notes 316–18.

541. *Frey Report*, *supra* note 48, at 9, ¶ 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.").

542. *Frey Report*, *supra* note 48, ¶ 20.

543. *Id.*

what Frey claims. For the second treaty, Frey erroneously quotes the section on duress, rather than the section on self-defense.

1. The European Convention on Human Rights

Frey asserts that "[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."[544]

This argument fails as soon as one reads the source on which Frey bases her theory: the European Convention on Human Rights. According to Frey, when the victim of attempted murder kills the perpetrator in lawful self-defense, the victim must seek "a basis for avoiding responsibility for violating the rights of another." In other words, the victim "violat[ed] the rights of another," namely the criminal who was trying to murder the victim.

But the European Convention makes it clear that there was *no* "violation" of the criminal's rights; because the criminal was attempting to commit a murder, the would-be murderer had *no* "right to life" against the intended victim: "Deprivation of life *shall not be regarded as inflicted in contravention of this article* when it results from the use of force . . . ." such as self-defense.[545] Similarly, the national constitutions which contain analogues to the European Convention's right to life and self-defense articles also explicitly state that the criminal who is killed by a victim acting in lawful self-defense *was not deprived of the right to life*: "A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of [lawful self-defense] of person or property."[546]

Simply put, Frey's main source for her theory that self-defense is not a right states directly the opposite of what she says.

Further, although Frey repeatedly claims that deadly force is lawful only when used to prevent a homicide, the European Convention authorizes deadly force when necessary against "unlawful violence."[547]

2. The Statute of the International Criminal Court

Frey also cites a trial court from a former Yugoslavian tribunal in which a defendant raised a self-defense claim. The trial court stated that self-defense "form[s] part of the general principles of criminal law which

544. *Id.*

545. European Convention, *supra* note 454, art. 2 (emphasis added).

546. *See supra* text accompanying note 500.

547. *See* European Convention, *supra* note 454, art. 2.

the International Tribunal must take into account in deciding the cases before it."[548] The court then said that self-defense was protected by the Rome Statute of the International Criminal Court.[549]

Frey writes:

> 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.[550]

This is a difficult argument to take seriously. The statutory language quoted by Frey is not about self-defense; it is about duress, as the statutory text plainly states. The self-defense part of the statute, unquoted by Frey, appears in the preceding subsection.[551]

The Statute of the International Criminal Court ("I.C.C. Statute") makes self-defense an exemption from criminal responsibility. From this fact, Frey deduces that self-defense is not "an independent right which States are required to enforce."[552]

To state the obvious, the I.C.C. Statute does not name *any*

548. Kordić & Ćerkez, Case No. IT-95-14/2-T, § 449 (Feb. 26, 2001).

549. *Id.* § 450.

550. *Frey Report*, *supra* note 48, ¶ 23 (endnote markers omitted). "Chapeau" here means the first sentence of Article 31, which applies to all the various subsections of Article 31.

551. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, A/CONF.183/9* art. 31(c) (self-defense) & (d) (duress) (July 17, 1998), *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf [hereinafter I.C.C. Statute].

552. *Frey Report*, *supra* note 48, ¶ 23.

"independent right which States are required to enforce." The I.C.C. Statute does not purport to be a bill of rights. It is a statute that sets up a criminal court for certain heinous offenses and provides rules of procedure for the operation of that court. The only rights mentioned in the I.C.C. Statute are various procedural rights of suspects and defendants in the court itself.[553]

The mere fact that the Rome Statute (and national criminal codes) specifies self-defense as an exception to the rule against killing (and against injuring or hitting) is no contradiction of the numerous international law sources, which characterize self-defense as a right. After all, every legally justified form of violence (e.g., a state employee carrying out a capital sentence) is necessarily an exception to the general rule against killing or assault.

Consider, for example, Barbeyrac, who believed self-defense to be an absolutely fundamental human right. Barbeyrac also wrote:

> Then we must injure no Man, because every one is our Fellow citizen of the great City of the World. Do the Hands endeavor to hurt the Feet, or Eyes the Hands? As therefore the Members of the Body keep a fair Correspondence with one another for the Preservation of the whole: So Men ought to deal friendly one with another, because they are born for Society, which can't be preserved, unless all the Parts, of which it is compounded, love one another, and endeavor mutually their own Preservation.[554]

Barbeyrac was articulating a general rule against any person harming any other person. Barbeyrac also vigorously articulated the right of self-defense. By Frey's tendentious reasoning, Barbeyrac did not really

553. I.C.C. Statute, *supra* note 551, at 3–4 (creating the structure of the court, specifying its rules and procedures, and asserting jurisdiction over genocide, crimes against humanity, war crimes, and "[t]he crime of aggression"—the last item pending UN definition of the crime). To be precise, there are a few stray references in the statute to other rights: depriving people of their rights to a fair trial is denominated as a war crime under certain circumstances; the anti-slavery clause refers to the property right of the slave-owner; and there are various references to rights of governments.

554. PUFENDORF, *supra* note 196, at 213 n.2 (Barbeyrac note). Pufendorf's own text made the same point. A footnote by Pufendorf then quoted the Roman philosopher and statesman Seneca:

> It is a sin to injure one's Country; and therefore to injure a Fellow Subject, inasmuch as he is a Member of our Country. The Parts ought to be held sacred, if the whole deserve our Veneration. And likewise the Person of every Man ought to be inviolable, because every Man is our Fellow Citizen in the great and universal Society.

Id. at 214 n.a (quoting LUCIUS ANNAEUS SENECA, DE IRE (Of Anger) bk. 2, ch. 31 (41 AD)).

believe that self-defense was a right, because Barbeyrac considered self-defense an exception to the general rule against harming people.

Anywhere there is a government that respects the right of self-defense, the criminal code regarding illegal use of violence will contain an exemption for people who act in self-defense. Simply because self-defense functions as an exemption in many criminal codes, Frey asserts that there is no right to self-defense. That the right is protected, *inter alia*, by the structure of a criminal code is hardly proof that the right itself does not exist.

The exemption does not *in itself* prove the existence of the right; the right is proven by affirmative statements of right in constitutions and codes, treaties, and treatises. It is quite unpersuasive for Frey to dismiss all these sources as "inadequate." More than three thousand years of legal protection for a human right are much more "adequate" than a pair of plainly erroneous citations to a treaty and a statute.

3. National self-defense in the United Nations Charter

Another way to see the flaw in Frey's argument is to look at the United Nations Charter. The Charter imposes a general prohibition on the interstate use of force.[555] Then the Charter makes an exception, in Article 51, for "the inherent right of self-defense." In the UN Charter, the right of self-defense operates solely as an exemption from the broad rule against force; the Charter does not, in Frey's formulation, create a "free-standing" right of national self-defense. Frey argues that personal self-defense constitutes, at most, one of the "circumstances" which must be taken into account in a criminal prosecution.[556] Likewise, some persons argue that in Article 51, self-defense "connotes only a *de facto* condition, rather than a veritable right."[557]

However, explains Yoram Dinstein, "since it is conceded that the State exercising self-defence is 'exonerated' from the duty to restrain from the use of force against the other side (the aggressor), we fail to see a difference between that and a *de jure* right."[558]

Similarly, Frey's whole argument is a "purely nominal" exercise. It amounts, at best, to a distinction without a difference. Her argument

555. U.N. CHARTER art. 2, ¶¶ 3–4 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

556. *Frey Report*, *supra* note 48, ¶ 24.

557. DINSTEIN, *supra* note 4, at 178.

558. *Id.*

about individual self-defense depends on her careless misreading of a treaty (which in truth directly contradicts her) and her misquotation of a statute (which, if properly quoted, provides no support for her argument).

4. Justification, not excuse

The Frey theory is that self-defense, rather than being a right, is merely "a basis for avoiding responsibility for violating the rights of another."[559] If Frey were correct, then self-defense would have to be an excuse; self-defense could not be a justification. Yet the great weight of international legal authority treats self-defense as a justification, and not as an excuse.

Under the Frey theory, self-defense should be treated the same as insanity or duress. For example, if A (who is insane) and B (who is acting under legally sufficient duress) burn down C's house, we would certainly say that C's property rights have been violated by A and B. Even so, the criminal justice system might not punish A and B, because their conduct was *excused*. Similarly—according to Frey—a court should take into account the existence of self-defense, as a court should take into account all "factual, personal, or extenuating circumstances," such as "distress or mental capacity" in deciding whether to punish a defendant.[560]

Now consider a different situation: a policeman sees a young man running down the sidewalk, carrying a woman's purse. Several dozen yards away, an elderly woman is shouting "Stop, thief!" The policeman stops the purse-snatcher. He takes the purse from the purse-snatcher, and returns it to its owner, the elderly woman. Would we say that the purse-snatcher's property rights were violated? Of course not. The purse-snatcher *had no property rights* to the purse. The policeman's actions did not violate anyone's rights; rather, the policeman's actions protected the woman's property rights. Therefore, the policeman's actions were *justified.*

According to the Frey theory, self-defense must be an excuse and not a justification, because self-defense is a violation of the rights of another person. Self-defense is "a basis for avoiding responsibility for violating the rights of another."[561]

But Frey has *no* support for her claim that self-defense means "violating the rights of another." As discussed *supra*, the primary source of authority for her claim, the European Convention on Human Rights,

559. *Frey Report*, *supra* note 48, at 9.

560. *Frey Report*, *supra* note 48, at 10.

561. *Id.* ¶ 20.

clearly says that self-defense by the victim does *not* result in the violation of the rights of the aggressor.[562]

There are three standard distinctions between a justification and an excuse, and every one of them shows self-defense to be a justification:

Accomplice liability. If you assist an insane person in the commission of a crime, you will be guilty as an accomplice. If you assist in self-defense, you will not be guilty of anything.

Permissible self-defense of the "victim." If an insane person starts hitting you, you have the legal right to use violence in self-defense. If the victim of an attempted rape in progress starts hitting her attacker, the attacker has no legal right to hit back.[563]

Civil liability. A person who engages in lawful self-defense will owe no civil damages to the attacker. A person who—acting under the influence of duress or a mistake—injures another might be excused from criminal punishment, but could still be civilly liable to the victim.[564]

The Oxford University Press treatise *International Criminal Law* is written by Antonio Cassese, one of the world's leading experts on the subject.[565] The Frey Report recommends the book as "an authoritative discussion" of self-defense in international criminal law.[566] But—quite strangely for a Special Rapporteur—Frey does not inform her audience about the book's straightforward and very mainstream explanation of self-defense.

In the chapter on justifications and excuses, Cassese states that self-defense is a "justification." He distinguishes self-defense from "excuses," such as duress, insanity, or mistake. Cassese cites six cases in which international law courts "discussed this justification." Among the six is the Yugoslavia Tribunal case, which Frey cited as support for her theory.[567] Cassese here is supplying hornbook law, for, as detailed *supra*,

562. *See supra* text accompanying notes 544–47.

563. As Pufendorf pointed out, a person who violently attacks another renounces his own right of self-defense. PUFENDORF, *supra* note 196, at 220 ("He *tacitly* disclaims this Right, who in a violent manner sets upon another without just Cause. For since other has a Right of repelling the Violence by any Means he can, the Assailant is to accuse himself only for any harm he suffers in the Repulse of his own unlawful Force.") (emphasis in original). *Cf.* United States v. Von Weizsaecker et al. ("the Ministries case"), 14 N.M.T. 314, 329 (U.S. Mil. Trib. 1949) (in a national context, "there can be no self-defense against self-defense"); DINSTEIN, *supra* note 4, at 178.

564. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 220–24 (Oxford Univ. Press 2003). The three distinctions are Cassese's; the illustrations are ours.

565. *Id.*

566. *Frey Report*, *supra* note 48, at 16 n.13.

567. CASSESE *supra* note 564, at 223–24 (citing Kordić & Ćerkez, Case No. IT-95-14/2-T, § 449 (Feb. 26, 2001); Alfred Felix Alwyn Krupp et al., 9 TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NÜRNBURG, OCTOBER 1946—APRIL 1949, 1327 (1950); Trial of Willi Bernhard Karl Tessmann et al., 5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 66, 73 n.1 (1948); Trial

the world's legal systems have long treated self-defense as a justification.[568]

That self-defense is a justification does not, by itself, prove that self-defense is a right under international law. By analogy, capital punishment is also a justification. Yet if a nation abolishes capital punishment, no one's international law human rights are violated.

What we can glean from the well-recognized status of self-defense as a justification is additional evidence that Frey's anti-rights theory is wrong. The fact that self-defense is a justification is one more reason why she was incorrect to announce that "[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."[569]

G. Cassese's Choice: Can You Only Resist Genocide When the Perpetrators Are of Another Race?

An endnote in the Frey Report cautions:

> [T]he legal concepts discussed herein assume a non-conflict setting. Situations of mass human rights abuse and armed conflict involve international humanitarian law and security law principles that require an extended if not completely separate set of legal and policy considerations. For the Special Rapporteur's findings and recommendations regarding role of small arms and light weapons in violations of human rights and international humanitarian law in armed conflict, see her progress report (E/CN.4/Sub.2/2004/37).[570]

Yet Frey's cited report on situations of armed conflict and mass human rights abuses follows the same IANSA/UN agenda as did the Brazilian gun confiscation referendum which she worked to support: promote gun confiscation, and ignore every claim that—even in the most

of Yamamoto Chusaburo, 3 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 76 (1948) (self-defense includes protection of property); Frank C. Schultz, 18 C.M.A. 133 (1969); Trial of Erich Weiss and Wilhelm Mundo, 13 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 149 (1949).

568. *See supra* Part V. We are not claiming that self-defense has never been regarded as an excuse in any legal system; for example, medieval and Renaissance English and Scottish law did sometimes (although not always) treat self-defense as an excuse. *See supra* Part V.I. Frey has certainly not produced evidence that making self-defense an excuse is the normal practice of past or present criminal justice systems; rather, she confines her argument to contemporary international criminal law, in which self-defense is clearly a justification.

569. *Frey Report*, *supra* note 48, ¶ 20.

570. *Id.* at 16 n.13.

extreme situations of mass human rights violations or genocide—anyone except a government employee should be allowed to possess a firearm for protection.[571]

The very next endnote contains a citation to our own article, "Is Resisting Genocide a Human Right?" from the *Notre Dame Law Review*.[572] The article argued that national or international gun control laws should be considered inapplicable (under the authority of the Genocide Convention) in situations in which a group which is the victim of a continuing genocide wants to acquire arms for self-defense.[573] Frey characterizes our legal argument, which we explicitly and repeatedly confined to situations of genocide, as "negating or substantially minimizing the duty of States to regulate possession" of firearms.[574] It is hard to see how any state could have a legal "duty" to prevent the flow of defensive arms to genocide victims. But Frey does not explicitly state that genocide victims have no right of self-defense.

That declaration is made instead by Cassese. Like the Founders of international law, Cassese does not attempt to draw an artificial distinction between the right of defending oneself against a solitary criminal and the right of defending oneself against a criminal tyrant whose minions are carrying out genocide. The Founders argued that everyone has a human right to resist both. Cassese argues that there is no human right to resist either one; instead, he argues, positive law (in a national code, or an international instrument) can and sometimes does authorize resistance, but the scope of the currently-authorized resistance against tyrants and genocidaires is quite limited:

> 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

571. For Frey's role in the Brazil referendum, *see supra* text accompanying notes 33–35.
572. *Frey Report*, *supra* note 48, at 16 n.14.
573. *See* Kopel, Gallant, & Eisen, *supra*, note 58.
574. *Frey Report*, *supra* note 48, ¶ 19.

> 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." [575]

Cassese is an important contemporary scholar of international law, but his article does not negate all the other scholars, nor can it negate the many positive enactments which affirm a fundamental right of self-defense.

Cassese is commendably forthright in expressing the implications of his theory, and the applications are quite straightforward: the German Jews had no right of self-defense against Hitler's genocide (since the Nazi government was not an "occupying power" and since the Jews were of the same racial group—Caucasian—as their persecutors, although they were of different ethnicity and religion). Similarly the Cambodians had no right to resist the genocide of the native Pol Pot regime (which was not based on race).

If a government encourages rape (such as by allowing rape charges to be brought only if there are four male witnesses), the woman has no inherent right of self-defense against a rapist.

575. Antonio Cassese, *The Various Aspects of Self-Defence*, Background paper (Small Arms Survey 2003), excerpted in SMALL ARMS SURVEY 2004, 10 (2005).

If a government (such as the government of Rwanda) incites and directs the genocide of an ethnic group, the victims have no right to resist as long as the victims are of the same race as the genocidaires.

By Cassese's theory, the Darfuri victims of genocide, rape, ethnic cleansing, and other atrocities have a right to resist *only if* they are of a different race than their persecutors. The Darfuri victims have very dark skins, live in Africa, and are often called "Africans." The genocidaires have very dark skin, live in Africa, and are Arabs. It is preposterous that the Darfuris' collective right to resist genocide—or an individual Darfuri female refugee's right to use a cooking knife to fight off a rapist—would depend on whether the Darfuris are the same or a different race than their persecutors.

Cassese argues that international law only justifies resistance in situations of racism, colonialism, or foreign occupation, but he is adopting an overly narrow reading of the UN General Assembly's Resolution on the Definition of Aggression. That resolution did endorse violent resistance to racist, colonial, or foreign regimes; but the plain language of the resolution also endorsed resistance to *any* regime which violates the people's rights to self-determination, freedom, or independence.[576]

The notion that the rights of individuals or groups to resist genocide depend on the race of the victims and the race of the perpetrators is a theory unworthy of international law. An international "law" which blandly denies victims the right to attempt to save their own lives hardly deserves to be called a "law" at all. Such a "law" amounts to nothing more than a pretext for the strong to rape and murder the weak. It is repugnant. It is contrary to civilization itself, and to the entire course of development of international law.[577]

Half a millennium ago, systematic international law arose from the efforts of Victoria to stop the depredations against Indians and Muslims,

576. *See supra* text accompanying notes 466–67.

577. The French have sometimes referred to the enactments of the pro-Nazi Vichy government in terms such as "pretend laws" or "decrees said to be law." *See* PIERRE LEMIEUX, CONFESSIONS D'UN COURER DES BOIS HORS-LA-LOI 42 (2001); *Les Acquisitions Immobilieres de la Ville de Paris Entre 1940 et 1944 Sont-Elles le Produit de Spoliations?* Rapport établi par le Conseil du Patrimoine Privé de la Ville de Paris avec le concours de son Groupe d'experts (Nov. 16, 1998), *available at* http://www.v1.paris.fr/FR/La_Mairie/executif/communiques/ancienne_mandature/mandature_1995_2001/patrimoine.ASP (describing certain Vichy laws as "les Actes dits 'lois'", or as "prétendus lois, décrets et arrêtés, règlements ou décisions"). The appellations of "pretend law" or "said-to-be laws" rightly recognize that purported acts of a government, even though the acts may follow the standard form of law, may be so manifestly unjust (as the Vichy laws were) so as not to be real laws. The pretend laws do not merit the presumption of obedience which is accorded to real laws. Surely any international "law" (or academic interpretation thereof) which purported to forbid self-defense against genocide, homicide, rape, or tyranny is pretend law, not a real one.

and the efforts of Grotius to stop the pillaging of civilians during the religious wars in Europe. Victoria, Grotius, Suárez, and the many other humanitarian Founders knew that personal self-defense was "the greatest of all rights."[578] Indian, Spaniard, or Turk; Catholic, Protestant, Jew or Muslim—we all share a common humanity. When we recognize that each and every one of us has an inherent right of self-defense, then we can begin to reason towards an international system in which people and nations (that is, large groups of people) who do not understand each other can find common rules for treating each other fairly.

That was how the Founders reasoned. Cassese bluntly expresses the alternative: to deny the individual, inherent, and universal right of self-defense is to eliminate the right to resist genocide, ethnic cleansing, rape, and every other atrocity.

VII. IS THERE AN INTERNATIONAL HUMAN RIGHT TO GUN CONTROL?

A very large body of international law sources affirms that self-defense is a human right. But Frey has invented standards so rigorous that she almost never has to admit to the existence of those sources.

The Statute of the International Court of Justice tells us that the opinions of scholars are sources of international law, but Frey ignores them, as they are not "primary"[579]—even though she often cites other scholars for other points.

The Statute of the International Court of Justice tells us that the "general principles of law derived . . . from national laws of legal systems of the world" are sources of international law,[580] and we have seen that self-defense is a part of every major legal system that gave rise to international law,[581] and of every contemporary legal system.[582] But this too does not count for Frey, because she claims statements that self-defense is a right are not "expressly set forth."[583] Yet there are in fact a multitude of "express" statements; moreover, the Statute asks for "general principles," not "express" statements.[584]

All the rest of the evidence Frey waves away with the bizarre—and plainly incorrect—theory that self-defense is a violation of the criminal's rights.[585]

578. *See* TIERNEY, *supra* note 130, at 314.
579. *See supra* Part IV.D.
580. *See* I.C.C. Statute, *supra* note 551, at 15.
581. *See supra* Part V.
582. *See supra* Part VI.
583. *See Frey Report*, *supra* note 48, ¶ 21.
584. *See* I.C.C. Statute, *supra* note 551, at 15.
585. *See supra* Part III.D.

Frey is not so rigorous, however, when she declares that current international law mandates highly restrictive gun control, and that the international mandate is so powerful that it over-rides every contrary law, including national constitutions. In support of her declaration, the Special Rapporteur offers no direct support from any source of international law—not even a "subsidiary" citation to a single commentator.

Instead, she offers a theory based on a series of deductions she draws from some general rules of international law. The Special Rapporteur does not appear to be applying intellectually consistent standards in her report. Her operative rule could be stated as "no evidence is good enough." That is, when the issue is the right of self-defense, it is impossible for even an immense body of legal authority to be sufficient. When the question is the "right" of gun control, her conclusion can be proven without need for legal authority.

A. Due Diligence

The basis for Frey's right to gun control is the principle that a state must exercise "due diligence" in preventing human rights violations.[586] For example, if police officers are not trained in how to use firearms safely, and if an untrained officer fires wildly into a crowded street in order to catch a fleeing thief, and the officer misses the thief but hits a dozen innocent bystanders, then the state might be culpable of a human rights violation, for having failed to exercise "due diligence" in training.

Similarly, a state can be responsible when it allows groups that exercise *de facto* state power (even though the groups are nominally not state actors) to attack people. One good example (although not cited by Frey) would be the contemporary government of Sudan, which supports Arab tribal proxies in the extermination of the Africans of Darfur.[587] Likewise, the government of Mississippi (like several other American states) had a long-standing practice of tolerating, and tacitly encouraging, Ku Klux Klan terrorist violence against blacks and other supporters of civil rights.[588]

586. *Frey Report*, *supra* note 48, ¶¶ 8–18, 33–37; *see also* Barbara A. Frey, *Small Arms and Light Weapons: The Tools Used to Violate Human Rights*, DISARMAMENT FORUM 37 (no. 3, 2004) [hereinafter DISARMAMENT FORUM]. "Due diligence" can be subject to widely varying interpretations. Perhaps the first international law use of the term was in the 1871 Washington Treaty, settling various disputes between the United States and the United Kingdom. Washington Treaty for the Amicable Settlement of All Causes of Difference between the Two Countries, 1871, U.S.–U.K., 143 Consol. Treaty Series 145, 149. While the treaty as a whole was successful, the "due diligence" language proved difficult to interpret and enforce. DINSTEIN, *supra* note 4, at 29.

587. *See*, *e.g.*, Kopel, Gallant, & Eisen, *supra*, note 58, at 1277.

588. *See*, *e.g.*, Cottrol & Diamond, *The Second Amendment*, *supra* note 502, at 351–55. *Cf.*

She also cites one due diligence case in which a government did nothing to protect a person in peril, refusing to investigate death threats against an individual in Colombia, and two others where the government refused to act against discrimination.[589]

Frey's summary of due diligence rules, and cases and commentary thereon, provides no precedent for any government being required to enact items from a list of regulatory laws drawn up by a commentator or by an international organization. Nevertheless, Frey and the HRC subcommission proclaim that every government in the world must implement their gun control agenda, or else be declared guilty of failing to practice due diligence.[590]

Even if we hypothesize that each of Frey's gun controls would be a good idea, there is no support in international law for the proposition that "due diligence" about the general risk of crime can be used as an international law hammer to force governments to adopt particular types of regulatory laws.

As noted *supra*, Frey's standards for the minimum "due diligence" required under her purported right to gun control are so severe that even the laws of New York City and Washington, D.C., would be considered

WILLIAM B. ZIFF, THE RAPE OF PALESTINE 121–29 (1938) (describing the disarmament of Jews in Hebron, Palestine, in 1929, by British officials, after which British officials incited a program against the Jews by Arabs and failed to respond to the ensuing violence for eight days). It might be noted in passing that the depredations of the Sudanese Arabs and the American Klan were made possible in part because the governments had previously disarmed the intended victims. *See*, *e.g.*, sources cited *supra* notes 504–05.

589. *Frey Report*, *supra* note 48, ¶¶ 13–14.

590. *Frey Report*, *supra* note 48, at 7–8, 12–13. The closest she gets to precedential support for her mandate about citizen gun control is a quote from a 1975 law review article that under the European Convention's right to life provisions, a crime victim should have "a general duty to avoid the use of force where non-violent means of self-protection are reasonably open to the person attacked." *Frey Report*, *supra* note 48, at 19 n.36 (citing A.J. Ashworth, *Self-defence and the Right to Life*, 34 CAMBRIDGE L.J. 289 (1975)). At most, the law review article might raise questions about laws in many American states that some persons (e.g., a person in her own home) who are attacked by violent felons have no duty to retreat. Some American states also state that a person who is attacked by a violent felon (again, such laws most often apply to the home) and who, under the circumstances had the right to use force in self-defense, cannot be prosecuted for using deadly force. Even these laws are not necessarily in conflict with Ashworth's law review article. The legislative decision that a victim should not be forced to retreat reflects the social judgment that it is *not* reasonable to force a victim to retreat from a place where she has a right to be (especially her own home). Likewise, the laws against prosecutions for a particular level of force reflect the social consensus (as reflected in legislation) that it is unreasonable for prosecutors to second-guess a decision that a victim must make in split seconds. As the United States Supreme Court put it: "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

In any case, the law review article's analysis of the proper rules for self-defense have nothing to do with Frey's claim that due diligence requires governments to enact laws about the acquisition of firearms.

to be human rights violations, since they are not sufficiently restrictive.[591]

Frey has elsewhere suggested that, under international law, the minimum investigational standards for issuing a firearms possession license should be "akin in scope to those required for the effective investigation of an individual's death."[592] By this standard, even the gun laws of Japan and the United Kingdom, the most restrictive in the industrialized world, would be insufficient. Both nations have very intrusive licensing systems, including (in the United Kingdom) a home inspection, but even so, the police resources devoted to issuing a single gun license do not come remotely close to the resources ordinarily used to investigate a homicide.

It is hard to see why a sensible government would devote the same resources to issuing a single gun license as to investigating a single homicide. Homicide investigation is well known to be a very resource-intensive investigation. Because homicide is the worst of all crimes, it is easy to understand why a single homicide investigation is given much greater resources than the investigation of a single robbery, a single burglary, and so on.

In the United States, there were 17,732 homicides in 2003,[593] and there are tens of millions of lawful gun owners.[594] If the police began devoting homicide-investigation-level resources to gun licenses, which Frey and the HRC subcommission would require for every gun owner, with periodic renewals,[595] the police would be able to do little else. In the United Kingdom, there were approximately 1,100 homicides in 2002–2003.[596] Authorities in the UK reported approximately 760,000 firearms and shotgun certificates "on issue."[597] The criminal justice results would

591. *See supra* text accompanying notes 586–90.

592. DISARMAMENT FORUM, *supra* note 586, at 43.

593. *See Deaths: Preliminary Data for 2004*, National Vital Statistics Reports, Centers for Disease Control, and Prevention, Vol. 54, Number 19, June 28, 2006, Table 2. *But see* FBI UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES – 2003, Table 2.4 (14,408 murder victims), http://www.fbi.gov./ucr/03cius.htm (last visited Mar. 15, 2007).

594. *See* L. Hepburn, M. Miller, D. Azrael & D. Hemenway**,** *The US Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREV. 15 (2007) (57 million adult gun-owners in the U.S.).

595. *Frey Report*, *supra* note 48, ¶ 16; *U.N. Human Rights Council*, *supra* note 6, at 10.

596. *See* CRIME IN ENGLAND AND WALES 2002/2003: SUPPLEMENTARY VOLUME 1: HOMICIDE AND GUN CRIME 1 (David Povey ed., 2004), http://www.homeoffice.gov.uk/rds/pdfs2/hosb0104.pdf (last visited Mar. 10, 2007) ("There were 1,045 deaths initially recorded as homicides in England and Wales based on cases recorded by the police in 2002/03. This includes 172 victims of Dr Harold Shipman (see note 1 on page 3) all of which relate to offences committed in previous years."); *see also* STATISTICS RELEASE HOMICIDE IN SCOTLAND, 2003 – STATISTICS Published, 4 November 2004, http://www.scotland.gov.uk/Publications/2004/11/20292/47178 (last visited Mar. 15, 2007) ("In 2003, there were 108 cases currently recorded as homicide by the police.").

597. *See* Olivia Christophersen & Jason Lal, *Firearm Certificates in England and Wales, 2002/2003*, Home Office Online Report 03/04, http://www.homeoffice.gov.uk/rds/pdfs2/

be catastrophic if each gun license application were ramped up to homicide investigation levels.

Practically speaking, there could be two results: the police could try conscientiously to process the license applications within a few weeks or months (the time for a typical homicide investigation); if so, police resources available for patrol and for investigation of crimes would be reduced to nothing. Alternatively, the police could simply decide that the investigations take too much time, and so license applications would languish for years; law-abiding gun owners would be turned into felons as their license renewal applications sat in an immense stack in a police office. That is what has happened in South Africa, thanks to a highly-restrictive gun owner licensing law enacted several years ago.[598]

If the Frey/HRC theory that "due diligence" mandates highly restrictive gun control were to be accepted, then the same reasoning would require an almost limitless series of international law mandates for repressive legislation on many subjects. For example, in all industrial countries, including the United States, more people die from automobile accidents than from gunfire.[599] *A fortiori*, governments would have to act

rdsolr0304.pdf (last visited Mar. 10, 2007). In England and Wales, the renewal cycle for rifles and shotguns is 5 years. *See Renewal of a Rifle Certificate*, Metropolitan Police, Firearms Enquiries, http://www.met.police.uk/firearms-enquiries/f_renew.htm, (last visited Mar. 19, 2007); *Renewal of a Rifle Certificate*, Metropolitan Police, Firearms Enquiries, http://www.met.police.uk/firearms-enquiries/s_renew.htm (last visited Mar. 19, 2007); *see also Frequently Asked Questions*, Sussex Police Online, http://www.sussex.police.uk/online_forms/firearms_faq.asp (last visited Mar. 19, 2007). In Scotland, the renewal cycle is also five years for rifle and for shotgun certificates. *See* STATISTICAL BULLETIN CRIMINAL JUSTICE SERIES CRJ/2004/4 FIREARM CERTIFICATES STATISTICS, SCOTLAND, 2003 (May 2004), http://www.scotland.gov.uk/ Publications/2004/05/19425/38096#2 (last visited Mar. 10, 2007).

598. *See*, *e.g.*, David B. Kopel, Paul Gallant & Joanne Eisen, *Human Rights and Gun Confiscation* 26 QUINNIPIAC L. REV. (forthcoming 2008), *available at* http://www.davekopel.com/2A/Foreign/Human-Rights-and-Gun-Confiscation.pdf; Lizel Steenkamp, *No Legal Guns Sold Since July*, NEWS24.COM (Johannesburg), Sept. 27, 2004, http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1595913,00.html (noting a drop in monthly gun sales from 15,000 to zero and a backlog of appeals from individuals whose license applications were refused); *see also* Michele O'Connor, *New Gun Law Chaos*, NEWS24.COM (Cape Town), Aug. 23, 2005, http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1758060,00.html (no new gun licenses, and only sixteen renewals, have been issued in Western Cape since the new law took effect; at the current rate, processing the current license applications will take thousands of years); Wyndham Hartley, *Firearms Control Act Well Wide of its Target,* BUSINESS DAY (South Africa), Sept. 20, 2005, http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A93763 ("Implementation of the Firearms Control Act is threatening to spiral out of control with government's Central Firearms Registry processing only a fraction of the hundreds of thousands of reapplications for gun licences it was scheduled to process this year."); Sheena Adams, *Firearms Registry Slammed for 'Ineptitude'*, INDEPENDENT ONLINE (South Africa), Sept. 15, 2005, http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20050915060958770C464804 ("Of the 20,397 applications for competency certificates received since January, 3,937 had been finalised.").

599. In 2003, there were 37,341 fatalities of vehicle occupant and motorcycle riders; there were also 5,543 non-motorist fatalities. Thus, the total of automobile-related fatalities in 2003 was

with "due diligence" to protect the right to life by enacting extremely strict anti-automobile laws. Like firearms, automobiles are already pervasively regulated,[600] but "due diligence" for the right to life would seem to require much, much more.

Not that there is any need for international organizations to actually create anti-automobile treaties, or for such treaties to be ratified by national governments. The requirement for severe anti-automobile legislation is already, by Frey's theory, a mandatory requirement of international human rights law. Any government that has ratified a treaty respecting the right to life has, by necessary implication, accepted a requirement to enact drastic automobile control legislation in order to fulfill Frey's mandate that governments "must maximize protection of the right to life."[601] The maximization rule, invented by Frey,[602] offers nearly limitless opportunities for coercive utopians to use international law to force governments to enact extremely restrictive laws on almost everything.

We suggest that there are many good pro and con arguments about what kind of automobile controls are best—and that nations have not foreclosed their choices about automobile regulation simply by ratifying treaties guaranteeing the right to life.

The same point can be made about firearms control. Whatever the arguments for or against particular gun laws, Frey's theory that the right to life necessarily creates an international law mandate for her favorite forms of gun control has no precedential support.

B. Frey's Erroneous Claims of Empirical Support

As a Special Rapporteur, Frey was obligated to inform the Human Rights Council of the leading research on her topic. Unfortunately, while insisting that her proposed gun controls should become international

42,884. *See Fatality Analysis Reporting System (FARS) Web-Based Encyclopedia*, NHTSA, http://www-fars.nhtsa.dot.gov/ (last visited Mar. 16, 2007); *see also Deaths: Final Data for 2003*, 54 Nat'l Vital Statistics Reps. (no. 13, Apr. 19, 2006, Centers for Disease Control and Prevention), at 80, table 19 (listing total firearm-related deaths for 2003 as 30,136, including justifiable homicides).

600. *See* David B. Kopel, *Treating Guns Like Consumer Products*, 148 U. PA. L. REV 1701 (2000) (detailing how U.S. laws for possession for carrying guns in public places, or for possessing/using guns on private property are much more restrictive than the laws for driving automobiles in public places or possession/driving on private property; also detailing how firearms are much more highly regulated than alcohol or prescription drugs).

601. *Frey Report*, *supra* note 48, ¶ 9.

602. Frey's only citation for her alleged duty of maximization is a book which never claims that there is a duty of maximization: "As a norm of *jus cogens*, no government may deny the existence of the right to life and a higher duty and standard of protection of the right is imposed upon governments." *Frey Report*, *supra* note 48, at 15 n.3 (quoting B.G. RAMCHARAN, THE RIGHT TO LIFE IN INTERNATIONAL LAW 15 (1985)).

mandates, Frey did not inform the HRC of significant research, which casts serious doubt on her claim that her proposals would be effective.

For example, in 2003, the Centers for Disease Control and Prevention ("CDC"), released a meta-study of the efficacy of gun control. The report included a review of fifty-one published studies on a variety of restrictive gun laws, including bans on specific firearms and ammunition, measures prohibiting felons from purchasing guns, mandatory waiting periods, firearm registration, and background checks.[603] The Associated Press summarized the report: "A sweeping federal review of the nation's gun control laws—including mandatory waiting periods and bans on certain weapons—found no proof such measures reduce firearm violence."[604]

The National Academy of Sciences ("NAS") reached a similar conclusion in 2004: no link could be established between restrictive firearm laws and lower violent crime rates, firearm-related violence, or even firearm accidents. The 328-page report contained a review of 253 journal articles, 99 books, and 43 government publications, as well as independent research by the NAS.[605]

There is no requirement that other scholars, such as Frey, agree with the CDC or NAS assessments of the research evidence. But it is surprising that a Special Rapporteur would not even inform the HRC about the existence of the two most extensive meta-studies ever conducted on gun control efficacy.

Agnostic on gun control, the CDC and NAS also declared that the current evidence did not yield a clear answer on the benefits, if any, of defensive gun ownership.

The Frey Report attempted to argue that gun possession for self-defense is ineffective and dangerous. Unfortunately, Frey's argument—while omitting the meta-studies—relies on assertions that are not even supported by her own cited sources.

Frey claims that "research indicates that firearms are rarely used to stop crimes or kill criminals."[606] Her lone support for this assertion is that the FBI's Uniform Crime Reports recorded "only 203 justifiable

603. *See* TASK FORCE ON COMMUNITY PREVENTIVE SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.

604. Kristen Wyatt, *CDC Finds No Proof Gun Laws Curb Violence,* ASSOCIATED PRESS, Oct. 2, 2003, *available at* http://jacobisrael.us/gunscdc.htm.

605. *See* Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., COMMITTEE ON L. & JUST., NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (Nat'l Acad. Press 2004).

606. *See Frey Report*, *supra* note 48, ¶ 36.

homicides by private citizens using firearms" in 2003.[607] From this datum, she infers that guns are rarely useful for self-defense. By Frey's reasoning, we could count the number of criminals killed by police departments in different jurisdictions and conclude that whoever kills the most criminals is the best at protecting the public—what an inhumane method of measuring anti-crime efficacy.

Frey is apparently unaware of research data indicating that the FBI figures, which are based only on initial police reports, are a gross undercount, because they do not include determinations later made by prosecutors, grand juries, petit juries, or appellate courts that an individual acted in self-defense.[608]

In any case, Frey provided data only about how often firearms are used to "kill criminals" while providing no data about how often firearms are used "to stop crimes." Although her footnote cites the CDC for data about non-justifiable firearms deaths, she does not discuss the report from the CDC showing that in the United States, firearms are used over half a million times in a typical year against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired.[609]

Frey also asserts that guns "are often turned on the very person who may have the best arguments for self-defence—the woman herself."[610] Yet her citation for this assertion, a study led by Kimberly Grassel,[611] provides no support for Frey's statement. The Grassel study did not collect such data.[612] Nor were all the women in the Grassel study

607. *See id*.

608. GARY KLECK, BLANK: GUNS AND VIOLENCE IN AMERICA 111–16 (1991).

609. *See* Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997) (reporting results of study conducted by the CDC). *See generally* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995) (survey data showing 2.5 million defensive gun uses annually in the United States, most without firing a shot). Pro-control criminologist Marvin Wolfgang reluctantly praised the methodology used by Kleck and Gertz, stating: "I am as strong a gun-control advocate as can be found among the criminologists in this country . . . [Kleck and Gertz] have provided an almost clear-cut case of methodologically sound research in support of something I have theoretically opposed for years, namely, the use of a gun in defense against a criminal perpetrator . . . the methodological soundness of the current Kleck and Gertz study is clear. I cannot further debate it." Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188, 188 (1995).

610. *See Frey Report*, *supra* note 48, ¶ 36.

611. K.M. Grassel, G. J. Wintemute, M.A. Wright & M.P. Romero, *Association Between Handgun Purchase and Mortality from Firearm Injury*, 9 INJ. PREV. 48 (2003).

612. *See Id*. Data from the National Crime Victimization Survey show that a victim's weapon is taken by the attacker in, at most, one percent of cases in which the victim resists with a weapon. *See* Gary Kleck, TARGETING GUNS 168–69 (1997). The data from the National Crime Victimization Survey and other sources show that "[t]here is no sound empirical evidence that resistance does provoke fatal attacks." *See* Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 903 (2004).

murdered with firearms. Indeed, the authors admitted that they do not even know whether the subjects owned a gun at the time of their deaths.[613]

Frey cites another study, by Bailey et al., for the proposition that "having one or more guns in the home makes a woman 7.2 times more

613. Grassel et al., *supra* note 611, at 48, 51 ("We do not know if the gun deaths of the purchasers in our study population involved the handguns they bought between 1996 and 1998, nor do we know if any purchasers resold their guns before death and were no longer exposed."). Frey parenthetically describes the Grassel article as "reporting that women who were murdered were more likely, not less likely, to have purchased a handgun in the three years prior to their deaths." *Frey Report*, *supra* note 48, ¶ 36.

It is not surprising that women who accurately perceive that they are at high risk of criminal victimization would be more likely to take protective measures; women who are more at risk of fatal illness are also more likely to take protective measures, such as going to a doctor. That sick people go to doctors does not mean that doctors make people worse off; that women at risk of victimization take protective measures does not mean that the protective measures are harmful.

Suppose a study showed that female murder victims were more likely to have bought high-quality locks for their homes. Would the study prove that locks are not useful for protection? Would the study prove that locks "are often turned on the very person who may have the best arguments for self-defence—the woman herself"?

It is not surprising that women at risk would be more likely to take protective measures. To ascertain whether the protective measures were effective, one would have to compare the murder victims with a sample of women who were equally at risk, but who survived. Comparing an at-risk population with the general population does not tell us about the efficacy of any given protective measure.

Mere association (murder victims were more likely to have bought locks or guns; people who die of cancer are more likely to have gone to a hospital in the three years before their death) does not prove causation. Increased levels of ice cream sales are associated with hot days, but the association does not prove that ice cream makes the weather hotter. In evaluating the relationship between a particular action and a particular outcome, it is a mistake to assume that the action necessarily causes the outcome. *See* Jane L. Garb, UNDERSTANDING MEDICAL RESEARCH: A PRACTITIONER'S GUIDE 27–28 (1996):

> To test hypotheses about the relationship between a risk factor and an outcome, one must always compare two or more groups . . . . When we find a difference between the groups, we must consider the possible explanations for this difference:
>
> A spurious association: The difference in the groups is due to non-comparability—that is, a difference in the composition of the groups. This association is the subject of bias and confounding.
>
> A chance association: The difference in the groups is due to chance. This association is the basis of statistical analysis.
>
> A causal association: The difference in the groups is due to a true causal association between the risk factor and the outcome.

In order to prove our hypothesis and conclude that the last explanation is correct—that is, that the risk factor led to or caused the outcome—we must first rule out the other two explanations.

For example, ice cream, cold drinks, and sleeveless shirts are associated with the heat of summertime. But although these three items are associated, they are not causal to each other, nor to the heat of summer, and one would have to be ignorant about association and causality to so state. The Grassel study does show an association, but does not show causation. *See* Gary Kleck, *Can Owning a Gun Really Triple the Owner's Chances of Being Murdered?: The Anatomy of an Implausible Causal Mechanism*, 5 HOMICIDE STUD. 64 (2001).

likely to be murdered by an intimate partner."[614] This would be a frightening statistic if odds ratios were equivalent to risk factors. However, Frey wrongly described the article's adjusted odds ratio of 7.2 for "keeping 1 or more guns" as a risk factor for violent death.[615]

C. Jus Cogens

The Vienna Convention on the Law of Treaties states that under the principle of *jus cogens*, a treaty is void if it contradicts "a norm accepted

614. *See Frey Report*, *supra* note 48, ¶ 36 (citing James E. Bailey et. al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCH. INTERNAL MED. 777, 780 (1997)).

615. Odds ratios are not equivalent to risk factors, and it is odds ratios which are used in the analysis of the Bailey article. When studying a population group that is at high risk for a disease (e.g., coal miners for black lung disease), it is scientifically inappropriate to replace risk factors with odds ratios.

Dr. Jeanine Baker explains that "[a]lthough homicide is quite rare in the general population, caution is required when interpreting odds ratios on subsets of the population with high risks for the variable being examined. In these situations, the odds ratio overestimates the risk." E-mail from Jeanine Baker, Post-Doctoral Fellow, University of Adelaide (Australia), to Paul Gallant & Joanne D. Eisen (Mar. 17, 2007) (on file with authors). Baker continued:

More importantly, in studies such as that described by Bailey et al. (1997), an overestimated odds ratio combined with the biases and confounding factors introduced by comparing high risk sub-groups with the general population will result in the authors postulating causal association, thus masking the real causes . . . . It is sad that the Frey report has failed to recognise the methodological constraints of odds ratios and distressing that the real issues facing women and highlighted in the Bailey et al. study are mental illness and living alone[, which] have been ignored. These are key areas that still lack real input from the international aid agencies and are neglected by the community and government funding.

See also Louise-Anne McNutt, John P. Holcomb, Jr., & Bonnie E. Carlson, *Logistic Regression Analysis: When the Odds Ratio Does Not Work: An Example Using Intimate Partner Violence Data*, 15 J. INTERPERSONAL VIOLENCE 1050 (2000). The authors note:

Many areas of research involve the investigation of events that occur frequently. Intimate partner violence (IPV) is one such event. Estimates of the prevalence in clinic populations range between 10% and 25%, and sometimes as high as 50% . . . . Often researchers are interested in estimating the strength of association between a risk factor . . . and an adverse outcome . . . . The prevalence ratio is a measure of association between the exposure status [e.g. exposure to a firearm] and the outcome status [e.g., violent death] . . . . Another measure of association is the odds ratio . . . . [I]f the measure of association needs to be adjusted for other factors . . . the odds ratio is much easier to calculate [than the prevalence ratio]. And more important, the confidence intervals for the odds ratios are simpler to calculate compared with the prevalence ratios' confidence intervals. Using the knowledge that the odds ratio approximates the value of the prevalence ratio when the outcome is rare (less than 10%), the odds ratio gained popularity in scientific research . . . . Many articles in the violence and health literature incorrectly interpret odds ratios . . . as relative risks or prevalence ratios. When the incidence or prevalence of the health outcome is more than 10%, this will typically result in an overestimation of the effects of violence on women's health.

See also Ulka B. Campbell, Nicolle M. Gatto & Sharon Schwartz, *Distributional Interaction: Interpretational Problems When Using Incidence Odds Ratios to Assess Interaction*, 2 EPIDEMIOLOGIC PERSPECTIVES & INNOVATIONS (2005), http://www.epi-perspectives.com /content/2/1/1 (last visited Mar. 16, 2007) ("The incidence odds ratio is a very convenient measure of effect with many appealing statistical properties including estimability in a case-control study. However, when assessing interaction, as when assessing main effects, interpreting the incidence odds ratio as if it were a risk ratio can be misleading.").

and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[616]

Charles de Visscher, one of the most influential international judges and scholars in the twentieth century, observed that "the proponent of a rule of *jus cogens* . . . will have a considerable burden of proof."[617] In *Principles of Public International Law*, Ian Brownlie writes that "more authority exists for the category of *jus cogens* than exists for its particular content. . . . However, certain portions of *jus cogens* are the subject of general agreement, including the rules [relating] to the use of force by states, self-determination, and genocide. Yet even here many problems of application remain . . . ."[618]

Frey contends that her gun control program is not only part of the "right to life" protected by various treaties, but also a *jus cogens*—meaning that it overrides every other contrary law, including constitutional rights.[619] In 1992, the United States ratified the International Convention on Civil and Political Rights, which declares that "[e]very human being has the inherent right to life."[620] According to Frey, the United States thereby signed up for her 2006 gun control program. And since the gun control program is a *jus cogens*, it necessarily supersedes the Second Amendment, the forty-four state constitutional right-to-arms provisions,[621] and all thirty-seven of the state constitutions which declare that self-defense is a human right,[622] not to mention the multitude of state and federal statutes which authorize self-defense in circumstances far broader than Frey's standard that lethal self-defense cannot be used when it is necessary to prevent a rape or any other major violent felony short of homicide.[623] Also crushed under Frey's *jus cogens* are all the constitutional self-defense guarantees in other nations which authorize self-defense—against lone criminals and against criminal tyrants—in circumstances disfavored by Frey.[624] This

616. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

617. CHARLES DE VISSCHER, THÉORIES ET RÉALITIES EN DROIT INTERNATIONAL 295–96 (4th ed. 1970), quoted in IAN BROWNLIE, *supra* note 466, at 516.

618. *Id.* at 516–17.

619. *Frey Report*, *supra* note 48, ¶ 27.

620. International Covenant on Civil and Political Rights, *supra* note 312, art. 6, pt 1; Office Of The United Nations High Commissioner for Human Rights, *Status Of Ratifications Of The Principal International Human Rights Treaties* 11 (2004), *available at* http://www.unhchr.ch/pdf/report.pdf.

621. *See supra* Part VI.E.

622. *See supra* text accompanying note 444.

623. *Frey Report*, *supra* note 48.

624. *Id.*

result seems hard to reconcile with the 2006 report of the UN's International Law Commission that self-defense is one of the "most frequently citied examples" of *jus cogens*.[625]

Frey's effort to invent a *jus cogens* against self-defense is contrary to the very principle of *jus cogens*—of a universally-binding moral duty applicable in every nation; for *jus cogens* itself is a direct application of natural law,[626] and the first principle of natural law is the right of self-defense.[627]

All the flaws of Frey's attempt to claim that the right to life mandates her severe gun control and anti-self-defense program are magnified by her claim that the program is a *jus cogens.* One of the reasons that international law is viewed with intense suspicion in some circles is the tendency of some activists to twist international law so that it evades people's right to self-government and self-determination, imposing an elitist, far left social policy agenda on a population against its will. Frey's *jus cogens* claim, and the Human Rights Council's acquiescence, represents the worst of this tendency.[628]

625. INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, UN Doc. A/CN.4/L.682, at 189, (Apr. 13, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement.

626. *See* Bruno Simma, *The Contribution of Alfred Vedross to the Theory of International Law*, 6 EURO. J. INT'L L. 34, 51–54 (1995), *available at* http://www.ejil.org/journal/Vol6/No1/art3.pdf (without the journal pageination) (explaining that through the 19th century, the natural law basis of international law made it obvious that some rules were universal and non-derogable; during the 20th century, the legal positivist view that international law is purely the artificial creation of states, with no necessary normative content, gained ascendancy. The formalization of the principle of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties returned to the natural law principles, albeit without explicitly acknowledging the reliance on natural law.); *See also* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling The Law Of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 419 (1989) ("*jus cogens* is clearly an attribute of natural law.")

627. *See supra* Part IV.

628. As we discuss in the next Part, we have argued for a *jus cogens* right of the victims of an on-going genocide to acquire defensive arms. *See* Kopel, Gallant, & Eisen, *supra* note 59. We should point out that our *jus cogens* claim is much, much smaller than the one that Frey makes; the article makes the *jus cogens* claim, on the basis of the Genocide Convention, solely in the context of a continuing genocide in which the international community has failed to take effective steps to stop the genocide. Moreover, we cite international case law which directly states a *jus cogens* right of genocide victims to acquire defensive arms. *Id.* at 1277–78 (citing Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia), 1993 I.C.J. 325 (Sept. 13, 1993) (Lauterpacht, J., concurring)) (Request for the Indication of Provisional Measures Order of Apr. 8). Our genocide article does not assert that the narrow application of *jus cogens* to cases of active genocide (or, perhaps, imminent genocide) means that all nations are required to adopt types of firearms laws which we would favor as a matter of policy, or that a wide range of national firearms laws which we disfavor on policy grounds are necessarily invalid.

VIII. DOES THE RIGHT TO SELF-DEFENSE IMPLY A RIGHT TO ARMS?

If there is a right to self-defense, is there a right to arms? In answering this, we must be careful to distinguish two questions: "Is there a right to possess *some* kind of defensive arms?" and "Is there a right to possess *firearms* for defense?" The answer to the second question is much more complicated than the answer to the first.

A. Right to Arms

A common-sense principle is embodied in the legal maxims "[w]hen the law grants anything to any one, all incidents are tacitly granted"[629] and "[w]hen the law gives a man anything, it gives him that also without which the thing itself cannot exist." So if people have a right to the free exercise of religion, then they must necessarily have the right to possess, buy, and sell the scriptures of their religion, and related religious writings. If people have a right to freedom of the press, then the people must have a right to possess, buy, and sell newspapers and magazines. And since the right to publish newspapers is an incident of the right to freedom of the press, the publication of newspapers must not be hindered by, for example, a heavy tax imposed solely on newspaper ink.[630] Likewise the freedom of the press and of religion both imply that people have a right to learn how to read.[631]

To recognize a right while forbidding the means to exercise it would make the right a nullity. As Thomas Hobbes wrote: "because it is in vain for a man to have a right to the End, if the right to the necessary means be denied him, it follows, that since every Man hath a right to preserve himself, he must also be allowed a right *to use all the means, and do all the actions, without which he cannot preserve himself*."[632]

629. Cent. Bureau of Investigation v. Shri Ravi Shankar Srivastava, IAS and Anr., [Supreme Court] 36 of 2002, (2006) (India), http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=27925.

630. Minneapolis Star & Tribune v. Comm'r of Revenue, 460 U.S. 575 (1988); *See also* Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

631. This does not necessarily mean a positive right for the government to teach them how to read, but at least a negative right that the government not forbid them from learning how to read, not forbid educators from teaching people to read, and not forbid the sale, possession, and use of tools which help people learn how to read (such as audio tapes, Montessori materials, and so on).

632. HOBBES, DE CIVE, *supra* note 223, at 116 (emphasis in original). Hobbes of course agreed with the other philosophers about the primacy of self-defense; the preceding sentence stated: "That the first Foundation of natural Right, is the Liberty which each man hath, to preserve, as far as he is able, his own Life and Limbs, and to apply all his Endeavors towards the guarding his Body from Death, and from Pains." PUFENDORF, *supra* note 196, at 106 (quoting HOBBES, DE CIVE); *see also* HOBBES, *supra* note 223, at 115 (slightly different translation).

If there is a right of self-defense, there must necessarily be a right to possess some defensive arms—for otherwise the right would be a practical nullity. How can a 110 pound woman defend herself against a pair of 250 pound rapists if she cannot use arms? How can a frail 85-year-old man protect himself against three young men who are intent on robbing and killing him? It is true that *some* people can successfully defend themselves, in some circumstances, through martial arts, or similar techniques of unarmed combat. But, typically, it takes very extensive practice for a person to obtain proficiency.

Suppose that a government said, "Yes, we admit that our citizens have a right to freedom of the press. However, we have completely outlawed all non-government publications in the native language of our nation. Even so, we are not violating the right to freedom of the press, since we allow independent publications to be published in Ancient Greek." Although Ancient Greek is a beautiful and useful language, to prohibit vernacular newspapers, while allowing only newspapers in Ancient Greek, would obviously be contrary to the freedom of the press. Only a small, elite portion of the public would ever be able to master the Ancient Greek language sufficiently to take advantage of the freedom of the press. Likewise, to ban the possession of all defensive arms, while allowing only unarmed self-defense, would be to confine the right of self-defense to a small elite possessing the physical capability, the time, and the money to pay for a long and arduous course of training.

So it seems clear that, because there is a universal human right to self-defense, there must be a universal human right to *some* arms.

Because there is a right to possess *some* (not necessarily "any" or "all") arms, there must necessarily be a right to learn how to use those arms. If there is a right to freedom of religion, then the government cannot forbid people to be instructed in the tenets of their faith. If there is a right to freedom of the press, then the government cannot forbid teaching people how to read and write. The ability to receive instruction that makes it possible for a person to exercise a right is, necessarily, an incident of that right. Accordingly, a government may not forbid instruction in self-defense—either in self-defense with legal arms, or in unarmed self-defense, or in self-defense with improvised weapons (e.g., throwing a paperweight at an attacker's head, or using a key ring in one's fist to strike an attacker).

Functionally speaking, firearms, and especially handguns, are ideal defensive arms. As the International Committee of the Red Cross observes, firearms are among the types of weapons that "are easy to

handle effectively with a minimum of training."[633] What do the data say about efficacy of the use of firearms for self-defense, and defense of others?[634]

In answering the question, we need data about the *order* in which events took place in a crime. For example, in cases where the victim was injured, we need to know if the injury occurred *before* the victim used the gun (which might suggest that use of the gun stopped the crime in progress), or if the victim was injured *after* he used the gun (which might suggest that the display of the gun prompted the criminal to injure the victim). Before 1992, there was no useful data on the subject.[635] In 1992, the National Crime Victimization Surveys began to record the sequence of criminal events and victim response.

After analyzing the new data, Tark and Kleck discovered that "[a] variety of mostly forceful tactics, including resistance with a gun, appeared to have the strongest effects in reducing the risk of injury . . . ."[636] They concluded that "the best available evidence indicates that victim resistance to crimes is generally wise."[637] Further, "armed and other forceful resistance does not appear to increase the victim's risk of injury."[638]

B. Right to Firearms?

Does the human right to possess defensive arms encompass the right to possess firearms? We can begin the inquiry by, again, examining the practices of the major legal systems. The constitutions of the United States,[639] of almost every American state,[640] of Mexico,[641] of Haiti,[642] and

633. International Committee of the Red Cross, *Arms Availability and the Situation of Civilians in Armed Conflict*, June 1999, at 21, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0734/$File/ ICRC_002_0734_ARMS%20AVAILABILITY.PDF!Open.

634. The CDC and NAS studies described *supra* did not attempt to analyze data regarding the efficacy of armed victim resistance. *See supra* notes 603–05 and accompanying text.

635. Philip J. Cook, *The Relationship between Victim Resistance and Injury in Noncommercial Robbery*, 15 J. LEGAL STUD. 405, 414–16 (1986):

> Since we cannot distinguish between the influence of the robber's actions on the victim's response and the influence of the victim's actions on the robber's response, we are left simply not knowing how to interpret the statistical patterns of association between resistance and injury . . . the temporal sequence of events may not tell us enough about the causal process to support definitive conclusions.

636. Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 861 (2004).

637. *Id.* at 904.

638. *Id.* at 902.

639. U.S. CONST. amend. II. *See supra* text accompanying notes 442–43.

of Guatemala,[643] all contain a right to possess arms, particularly firearms, for personal defense. The English Bill of Rights and the common law also contain an explicit right to possess firearms for lawful personal defense.[644] As noted *supra*, the English system is part of the foundation of the law for approximately one-third of the planet. Of course, it should also be acknowledged that, particularly in the last decade, many Commonwealth nations have not respected the right to arms provision of the 1689 Bill of Rights and have also disrespected many of the other rights in that Bill of Rights.[645]

As detailed *supra*, Roman law (which was foundational for the law in most of continental Europe and its colonies) recognized a right to arms. The original Roman law was created long before firearms were invented. However, the Roman law continued in force in Europe until the nineteenth century, by which time firearms had been in common use for centuries.

This Article does not contend for a universal right to firearms under all circumstances. In the *Notre Dame Law Review*, the authors of this Article have argued that current international law, including the Genocide Convention, guarantees a right of self-defense by groups that are the victims of an on-going genocide; it further argued that the right includes the right to defensive firearms.[646] The main case in point is the current genocide in Darfur. The *Notre Dame Law Review* article suggests that Darfur refugees have a right to use firearms to protect themselves against genocide, rape, ethnic cleansing, and other atrocities being perpetrated at the direction of the government of Sudan. When Darfuris are prosecuted in Sudanese courts for possessing arms in violation of Sudan's extremely stringent (but selectively enforced) gun control laws, the Darfur refugees have a valid claim that their international law right to use arms for protection against active genocide trumps the Sudanese gun control laws. (The *Notre Dame* article acknowledges that Sudanese courts are hardly likely to respect international human rights law.) The *Notre Dame* legal argument was limited solely to the narrow context of actual genocide, while noting that the argument could be extended to cases of threatened genocide.

640. *See supra* text accompanying note 444.
641. CONSTITUCIÓN POLÍTICA DE LOS UNIDOS MEXICANOS art. 10 (Mex.).
642. 1987 CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI art. 268-1 (Haiti).
643. GUATEMALA CONSTITUTION art. 38.
644. *See supra* text accompanying notes 433–36.
645. *See supra* text accompanying notes 437–41.
646. Kopel, Gallant & Eisen, *supra* note 58.

In a non-genocide context, it would be wrong to use international law to attempt to impose the gun laws of the American state of Wyoming on Japan (or vice versa). The narrowest statement of international human rights law is that all people have a human right to self-defense, and therefore a human right to possess and learn how to use *some* arms, and that this right encompasses a right to firearms under *some* circumstances.[647]

It is important to distinguish nations where there is a direct, explicit right to arms (the United States, Mexico, Haiti, and Guatemala, and, in a weaker sense, the common law nations)[648] from other nations. In the former, the possession of arms is itself a right. The express right is not dependent on the citizen showing that he has a "need," let alone a "necessity," to exercise the right.

In many other countries, arms possession is not a right in itself. Arms possession would be only a derivative right of the primary right of self-defense, which is a universal right.[649] In the latter nations, the right to arms would exist *only to the extent reasonably necessary* to effectuate the primary right of self-defense. Similarly, a right to firearms would exist only to the extent that the possession of other arms could not reasonably effectuate the self-defense right.

We offer two suggestions in which a right to arms, derivative of the right of self-defense, would appear to be at its strongest. First of all: in the home. As discussed *supra*, the right to arms and the right to security of the home are closely related in the common law tradition.[650] The sanctity of the home against violent and unexpected invasion is a widely expressed fundamental human right all over the world.[651] More broadly, a violent home invasion is an especially atrocious crime because it destroys the peace and security of the home, which are the right of every person and family. That is one reason why breaking into a home is usually punished more severely than breaking into an unoccupied warehouse. Accordingly, the primary right to self-defense, and the derivative right to arms, are at their apex in the home.

Conversely, prudential concerns about the risks of arms possession—such as the mistaken shooting of a stranger—are significantly lower in one's own home than in a public place. For precisely this reason, the

647. *See supra* Part V.J. There are always implicit exceptions to almost every broadly stated rule. For example, a person in a prison or in an institution for the insane would not have a right to arms. Moreover, as detailed in Part VII, violent criminal aggressors forfeit their legal right to self-defense.

648. *See supra* text accompanying notes 506–11.

649. *See supra* Part V.J.

650. *See supra* Part VI.E.3.

651. *Id.*

Wisconsin Supreme Court, interpreting the state's newly enacted right to arms, rejected a right to carry arms in an automobile, while affirming a right to carry arms in one's home or privately-owned business.[652]

The second situation in which the right to arms for self-defense would be at its apex would be when a particular arm (including, in some situations, a firearm) is *necessary* for self-defense. At the least, the human right to defensive arms would become a human right to defensive *firearms* in situations when, like genocide victims, the potential victim faces grave danger, and, practically speaking, there is no adequate substitute for a defensive firearm. There are wide varieties of interpretations that can be placed on "necessary;" at the least, "necessary" means more than "under no circumstances."

So, for example, in Canada, the law states that a person may be issued a permit to possess a handgun for defensive purposes (as opposed to collecting or target shooting) only to protect life where other protection is inadequate.[653] Yet currently in Canada—a nation of more than thirty million people, some of whom live in very dangerous areas of Toronto or Vancouver, or who live in very isolated areas many hours or days from the nearest police—*no one* has been issued a permit to possess a handgun for defense of life.[654] A government policy of ignoring an express statutory command, and refusing to issue defensive handgun permits in even the most compelling, demonstrated cases of necessity

652. State v. Hamdan, 665 N.W.2d 785, 804–07 (Wis. 2003) (quoting Moore v. East Cleveland, 431 U.S. 494, 500 (1977) (Powell, J., plurality opinion)):

> None of these rationales is particularly compelling when applied to a person owning and operating a small store. Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain. There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon. Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible. A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store. The stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for security . . . . [Thus,] a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances, because application of the CCW statute "has but a tenuous relation to alleviation" of the State's acknowledged interests.

653. Authorizations to Carry Restricted Firearms and Certain Handguns Regulations SOR/98-207 (Can) (regulation implementing section 20 of the Firearms Act), http://laws.justice.gc.ca/en/showdoc/cr/SOR-98-207/bo-ga:l_1-gb:s_2//en#anchorbo-ga:l_1-gb:s_2.

654. Letter from Yves Marineau, Departmental Privacy and Access to Information Coordinator, R.C.M.P., to Dennis Young, assistant to M.P. Garry Breitkruz (Feb. 15, 2007), *available at* http://www.garrybreitkreuz.com/ publications/2007_new/126.pdf.

would appear to be inconsistent with the right of self-defense.

Defensive arms possession in cases of necessity—as a derivative of the right of self-defense—might be effectuated by a fact-specific analysis of the dangers to the family or individual, and the practical adequacy of other defensive measures.[655]

The derivative right of arms possession might also imply that "alternative defensive measures" not be construed to include the sacrifice of express rights in the relevant jurisdiction. For example, the argument that "you wouldn't need a gun for protection from terrorists if you would just order your newspaper staff to stop writing editorials in favor of religious liberty" is not valid. It sacrifices one right to eviscerate the need to use another right—self-defense.[656]

IX. CONCLUSION

As Grotius wrote in his introduction:

> I have used in proof of this law, the testimony of philosophers, historians, poets, and lastly even of orators. Not that they are indiscriminately to be relied on as impartial authority, since they often bend to the prejudices of their sect, the nature of their argument, or the interest of their cause, but where many minds of different ages and countries concur in affirming the same general sentiment, this general concurrence must be referred to some general cause; which in the questions we have undertaken to examine, can be no other than a right induction from the principles of natural justice, or some common consent. The former indicates the law of nature, the latter the law of nations . . . .[657]

The human right of self-defense is affirmed by the concurrence of many minds of different ages. Grotius knew this, and as this Article has elaborated, the concurrence has continued in the nearly four centuries

655. This does not mean that the licensing authority would have to devote resources equivalent to a criminal homicide investigation. *See id.*

656. In the United States, the principle that the government cannot withhold a license in order to coerce people into surrendering a right is known as the doctrine of unconstitutional conditions. *E.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Speiser v. Randall, 357 U.S. 513, 526 (1958); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

657. 1 GROTIUS, *supra* note 176, Prolog. § 41, *quoted in* WHEATON, *supra* note 315, at 29 n.13. While this Article has usually quoted from the 2005 edition of Grotius, we chose to use the alternative translation quoted in Wheaton because its English flows more naturally than does the 2005 text's version of the same quote.

since Grotius. This Article has cited fewer orators and poets than did Grotius,[658] and we have enjoyed the benefit of many sources which did not exist at the time of Grotius, including the written constitutions all over the world, the Universal Declaration of Human Rights, and the vast structure of international law that was built on the foundation of Grotius. We have only rarely touched on the many heated arguments between the great scholars, or the tremendous differences in practices between leading systems of law, or how the modern world's constitutions and treaties are based on strikingly diverse views of civilization and justice. We have not addressed all the differences among our many sources because, regarding self-defense, "many minds of different ages and countries concur in affirming the same general sentiment."

To examine the evidence is to discover what the Special Rapporteur so artfully concealed—the overwhelming consensus among the sources of international law, from ancient times to the present, among diverse legal systems, religions, and nations: self-defense is a fundamental human right.

This Article does not claim that the evidence produced thus far proves the existence of a universal international human right to possess and carry firearms in all circumstances. It does suggest that the evidence of an international human right to self-defense is clear. The existence of a right of personal defense undoubtedly must imply *some* right to defensive training, and to the possession of *some* type of defensive arms. However, this Article has only attempted to suggest some possible lines of exploration for subsequent scholarly analysis of the derivative rights to defensive arms and defensive training. It does seem apparent that it would be a violation of human rights law for a government to forbid self-defense, to forbid defensive training, or to forbid the possession of reasonably necessary defensive arms. No government has the legitimate authority to forbid a person from exercising her human right to defend herself against a violent attack or to forbid her from taking the steps and acquiring the tools necessary to exercise that right.

658. Indeed, the only orator we cited was Cicero (who was also a lawyer), and we have not cited any poets. So we will conclude the footnotes with an especially apt poet: "the sword Was given for this, that none need live a slave." Lucan, *Pharsalia*, bk. 4, ll. 644–45 (Edward Ridley trans., 1896) (composed between 59–65 AD) (epic poem of the Roman civil war), *available at* http://omacl.org/Pharsalia/book4.html.