

# The Second Amendment and Global Gun Control

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*This article explores the interplay between the international law involved in global gun prohibition efforts and the domestic law of the United States. Joseph Bruce Alonso is an attorney in Marietta, Georgia. This Article is based on a paper which received first prize in the NRA Civil Rights Legal Defense Fund student lawyer essay contest in 2002.*

## INTRODUCTION

The right to bear arms carries a unique significance in American law and culture and now faces conflict with international gun control. Left unchecked, international gun control will compromise a fundamental human right. This Article explains the United Nations' recent efforts at international gun control and how those efforts conflict with the American right to bear arms.

The first part of this Article describes international law and United States domestic law, and analyzes the interaction between the two legal schemes.

The second part details the July 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects. The second part also examines the United Nations Convention Against Transnational Organized Crime, and the Convention's Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. Finally, the second part discusses the International Criminal Court.

The third part explains how conflicts between international law and a sovereign state's law are resolved, and focuses on how global gun control conflicts with the United State's legal and cultural right to bear arms.

The fourth part predicts how proposed international gun controls will infringe upon the American right to bear arms.

The Second Amendment's Right to Bear Arms is intended to foster self-defense in all its forms as a human right. The right to bear arms, or lack thereof, alters the political balance between individuals, private groups, governmental organizations, local sovereigns (such as the states in the United States and the

Lander in Germany) and federal sovereigns (such as the Federal Government in the United States). Gun ownership, as well as the lack of gun ownership, has far reaching consequences. The effects of international gun control are global and will have an enormous impact on the rights and political power of individuals, as well as on sovereign states, global regions, supranational authorities and perhaps a quasi-world government. Conflicts between international law human rights of the United States should be anticipated and avoided.

## I. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND UNITED STATES MUNICIPAL LAW

Defining the relationship between international law and the domestic law of sovereign nations, often referred to as “municipal law,” presents novel legal questions. Municipal law and international law stem from different forms of authority. The differences in form and source can make the systems incompatible.

Municipal law is explicit, in that the law is passed by a sovereign and applied to citizens within an enclosed system. Enclosed systems establish the method of creation, form, and legal weight of all law promulgated within the system. Questions of legislation drafting, dispute resolution, legislative interpretation and enforcement of legislation are answered according to the system.

Conversely, international law is not passed by a sovereign but rather stems from an agreement between sovereign states. Until recently, international law resembled contract law between nation states absent any common superior or independent body for adjudication and appeal in cases of disagreement.<sup>1</sup>

Some commentators define traditional international law as governing “relations between independent States. The rules of law binding upon sovereign States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .”<sup>2</sup> However with the rise of New International Law,<sup>3</sup> “international law’s modern emphasis on human rights has increasingly concerned itself with the regulation of a state’s relationship with its own citizens, an area of regulation traditionally understood as exclusively within the sovereignty of individual nation-states.”<sup>4</sup>

Analysis of international law by traditional standards is

difficult and is open to debate. International law does not have an equivalent enclosed system. Essential aspects of predictability and even legitimacy change over time. The continuous change in structure has created serious faults in international law. The legal weights, method of passage and dispute resolution are not established in a uniform way. Such simple aspects as to whom the particular law applies, and the shape of jurisdiction change without warning.

Agreements between sovereign States take a variety of forms. Breach of international agreements and irreconcilable disagreements were traditionally dealt with in the same manner as other disagreements between sovereign states. For decades, sovereign states adhered to treaties out of convenience and moral obligation. When a sovereign state no longer wanted to abide by the treaty, it simply stopped and faced the discontent of the other member sovereign states. With the creation of the League of Nations, and then the United Nations<sup>5</sup>, international law changed dramatically. The United Nations evolved into a kind of supranational authority. Now, with more international organizations, agencies, courts and even “peace keeping” troops, treaties are increasingly “enforced.”

#### A. The United States Constitution

The United States Constitution is the “supreme law of the land.”<sup>6</sup> All laws in the United States are born out of the Constitutional system. The United States Constitution sets out three branches of government: the legislative, executive and judicial. The Legislative Branch passes legislation<sup>7</sup>; the Judicial Branch settles disputes and interprets legislation; the Executive Branch enforces legislation and holdings of the Judicial Branch. Issues of execution and adjudication are usually settled prior to enacting of legislation.

Forms of United States municipal law include constitutional law, federal and state legislation, executive orders, administrative rules and regulations, and case law. Each of these laws holds a predetermined status. Legislation can be repealed and amended. Court cases may be overturned. Supreme Court cases may be overruled by subsequent Supreme Court cases. Even the United States Constitution can be amended by a process specified within the document.<sup>8</sup> A predictable hierarchy dependent on precedent solves most legal problems such as creation of laws, enforcement of laws, jurisdictional issues and conflicts of laws.

An appeal process resolves disputes. In the United States, the Supreme Court has the final say on the meaning of the Constitution.

The United States Constitution provides for treaties in Article II, Section 2, stating that the President “shall have power, by and with the advice and consent of the Senate to make treaties, provided two thirds of the Senators present concur.” The United States Constitution further gives federal courts jurisdiction over cases “arising under” treaties in Article III Section 2.<sup>9</sup>

## B. International Law

International law has two primary sources: treaties and customary international law. Arguably, neither of these sources adheres to the American principles of self-determination, representative government, or separation of powers.<sup>10</sup>

The high rate of change in the administration of international law makes analysis difficult. For example, in the United States, the Constitution was drafted, debated and adopted as a constitution. Few, if any international instruments are given such attention by those over whom the instruments are binding. Additionally, instruments may take on a role in international law that was not intended when the instrument was drafted. For example, the President of the French Republic, Jacques Chirac stated in September of 2000 “The Charter of the United Nations has established itself as our ‘World Constitution.’ And the Universal Declaration of Human Rights adopted by the General Assembly in Paris in 1948 is the most important of our laws.”<sup>11</sup> This analogy to a constitutional system may be attractive, and even desirable, but is inaccurate.

### 1. Treaties

“Treaty” is the term used for the variety of explicit agreements between sovereign states. The Vienna Convention defines “treaty” as “an international agreement concluded between states in written form and governed by international law.”<sup>12</sup>

Due to the duality of municipal law and international law, a treaty is not considered in effect simply upon signing. Sovereign states and international bodies respect that a signing state representative must submit the final treaty to the domestic

authority for approval, typically a legislative branch. In the United States, acceptance of a treaty is ratification by the Senate. By signing, a sovereign state does indicate an intention to ratify or at least consider and abide by a treaty. The Vienna Convention stipulates, "A State is obliged to refrain from acts that would defeat the object and purpose of a treaty when . . . it has signed the treaty . . ." <sup>13</sup> If after signing, a sovereign state determines it will not ratify the treaty, the sovereign state is obligated to revoke its signature and make its intentions known.

In 1969, the Vienna Convention on the Law of Treaties was drafted to set out general rules of international law for the drafting and implementation of treaties.<sup>14</sup> The Vienna Convention creates a scheme similar to contract law.

## 2. Customary International Law

Customary international law is one of the terms used to describe implied legal tenets that bind parties. Customary international law is often founded on the expectation that states will continue to follow a pattern of behavior. The Statute of the International Court of Justice, Article 38, cites "international custom, as evidence of a general practice accepted as law."<sup>15</sup> The most striking characteristic of customary international law is that it can be nonconsensual.<sup>16</sup> A state may observe a practice with no intention of obligating itself to follow that practice in the future. The key to customary international law is determining when a pattern of activity becomes legally binding. Not surprisingly, questions of "legally binding" customary law typically arises in the context of disputes.

A more controversial creation of international law is a customary international law that is binding because of its international acceptance, regardless of the actions of the sovereign state in question. In other words, customary international law may legally bind a sovereign state that has never made an affirmative act of acquiescence. If a practice becomes widespread in the international sphere, international organizations and international courts can declare that the practice is binding on all states.

There is great controversy over what provides evidence of customary international law. Evidence may include the behavior of sovereign states involved, written instruments that demonstrate the sovereign states'

intent, and legal writings such as court decisions and articles written by legal scholars. Increasingly, the recommendations of international organizations are used as evidence of customary international law even when the international organization has not been delegated *any* legislative or rulemaking power.

In the United Nations Charter, the General Assembly of the United Nations is authorized to “initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification.”<sup>17</sup>

This scheme is problematic to those who believe in the separation of powers and in representative government.<sup>18</sup> The United Nations, an international organization, creates and accredits the bodies responsible for these studies. For example, regarding the “Small Arms” conference and subsequent Programme of Action, the General Assembly requested the Secretary-General to conduct a study. The Secretary-General appointed “governmental experts” to assist him in conducting this study.<sup>19</sup> Those “non-governmental” organizations that wish to take part must be accredited by the United Nations.<sup>20</sup> The same governmental or non-governmental groups play a role in drafting the instrument of the convention. The results of these studies are increasingly being used as evidence of customary international law.

### C. Conflicts between Treaties and The United States Constitution

#### 1. Conflicts between Treaties and Municipal Law

Two theoretical approaches have been used to analyze conflicts between international law and municipal law: the “dualist approach” and the “monist approach.” The dualist approach views both international law and municipal law as occupying two separate spheres. Under this approach, international law does not affect the domestic legal order. The monist approach “views the international legal order and all national legal orders as component parts of a single ‘universal legal order’ in which international law has a certain supremacy.”<sup>21</sup> The United States follows a dualist approach. The dualist approach is becoming problematic as treaties and

domestic laws are increasingly addressing the same subject matter. A further complication is the growing use of international courts to settle these matters.

In the case where a treaty conflicts with municipal law, an international court will hold the international law as overriding, while a municipal court may hold the municipal law as overriding. For example, if a treaty conflicts with the United States Constitution, the United States Supreme Court will hold that the treaty is not binding because it violates the United States Constitution. If the same conflict came before an international court, the international would hold that the treaty was binding. These competing legal systems are on a road to conflict.

## 2. International Courts and United States Municipal Law

International courts such as the International Criminal Court and the International Court of Justice will look to international law in applying legal rules. The Vienna Convention recognizes the general international law principal of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be preformed by them in good faith.”<sup>22</sup> The Vienna Convention further states, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>23</sup> Most importantly, the Vienna Convention addresses potential conflicts between an effective treaty and a municipal constitution stating that “a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”<sup>24</sup> When the party affected is a citizen or even a corporation, rather than the state in which the citizen lives, the same would hold true. Thus, an American citizen who is protected by the Second Amendment could not assert this right as a protection in an international court.

## 3. United States Constitution and Treaties

The United States Constitution clearly anticipates the United States federal government entering into treaties, but does not appear to have anticipated the extent to which treaties would have domestic ramifications. The U.S. Constitution, Article VI, Section 2, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;<sup>25</sup>

At first glance, one might conclude treaties are equal in weight to the United States Constitution because both are the “supreme law of the land.” Both the United States Constitutional structure and the United States case law illustrate that this view is untenable.

#### a. Constitutional Structure

The United States constitutional structure holds the Constitution superior to treaties. The procedural adoption methods of legislation, treaties, and of amending the Constitution demonstrate that treaties are equivalent to legislation. Thus, as legislation that violates the Constitution is invalid, treaties that violate the Constitution are invalid as well.

United States legislation requires passage by a majority of the House of Representatives and of the Senate and signature by the President.<sup>26</sup> Treaties tend to be drafted and passed in the reverse order, however. The Executive Branch conducts international relations. When the President deems appropriate, he may sign onto a treaty with another sovereign state. For the treaty to be effective, the President must submit it to the Senate, which may then ratify the treaty by a two-thirds vote.<sup>27</sup>

A variety of conclusions may be drawn from the difference in procedural adoption of legislation and treaties. Approval by the President is necessary for both treaties and legislation. Where passage by the two bodies of the Legislature is necessary for the adoption of legislation, only the Senate’s approval is needed for adoption of a treaty. Removal of the House from the procedure of ratifying treaties removes the part of the Legislative Branch intended to represent United States citizens according to population.

The most significant structural difference is the branch that drafts the document. Legislation is drafted by legislators whereas treaties are drafted (or at a minimum a final version approved) by the President. This is a strong indication that the drafters believed that the subject of treaties would primarily be relations

between states and would not directly affect the rights and obligations of citizens.

The method of amending the Constitution is expressly provided in the Constitution. Article V reads:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislature of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;

Adopting such a stringent method of amending the Constitution would not make sense if the President and the Senate could change the Constitution by simply adopting a treaty.

#### b. United States Case Law

The Supreme Court of the United States held that the United States Constitution is superior to treaties. Any treaty that violates the Constitution is void and unenforceable. In *Reid v. Covert*,<sup>28</sup> the Court stated: “This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”<sup>29</sup> The Court further held:

Article VI, Supremacy Clause of the Constitution declares: “This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.” There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates, which accompanied the drafting and ratification of the Constitution that even suggests such a result. These debates as well as the history that surrounds the

adoption of the treaty provision [make] it clear that the reason treaties were not limited to those made in “pursuance” of the constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>30</sup>

In *Geofroy v. Riggs*,<sup>31</sup> the United States Supreme Court held:

The treaty power, as expressed in the constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent

Notably, treaties do not inherently override legislation.

In *Whitney v. Robertson* the Supreme Court held:

By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other...<sup>32</sup>

A variety of conclusions may be drawn from the Constitutional structure and the case law. First is that the protections contained in the Bill of Rights cannot be infringed by treaties. Just as the United States federal Government and state governments cannot violate people's rights through legislation, the United States government may not do so through treaties. The United States President may revoke or breach a treaty and the Congress may pass legislation that voids a treaty.

It is the United States government's job to ensure that no foreign political body usurps the authority of the United States government. Although Congress may delegate power to bodies such as administrative agencies, such delegations are subject to the Constitution, as interpreted by the United States Supreme Court. The United States government may not grant power to a foreign polity to violate the rights of United States citizens.

The United States Constitution mandates that U.S. courts will hear cases arising in the United States.<sup>33</sup> The United States Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>34</sup> More importantly, the United States Constitution says:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a party; - to Controversies between two or more States; - between Citizens of different States;- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>35</sup>

In other words, the United States judiciary shall hear all cases arising in the United States, whether under color of state law, federal law, constitutional law, or treaties. The American judiciary also hears all cases involving United States citizens and foreign "States, Citizens or Subjects." In *Ex Parte Miligan*, the United States Supreme Court held that United States citizens are entitled to a trial by a domestic civil court.<sup>36</sup> The Supreme Court held,

“One of the plainest constitutional provisions was . . . infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.”<sup>37</sup> Assertion of jurisdiction over a United States citizen for a case arising in the United States by an international court is arguably a usurpation of the United States’ political power and sovereignty.

If a case arose before the United States Supreme Court in which an American citizen was alleged to have violated a treaty, the citizen could argue that the treaty violated the United States Constitution and that the treaty was thus unenforceable. The United States Supreme Court would make the decision, and because the Court is the final arbiter of the Constitution, no appeal would be available to any party.

Those treaties that directly alter a United States citizen’s rights and obligations and subject her to potential suits abroad should be carefully scrutinized by the President and Senate and should require enabling legislation to go into effect. The United States government must amend the Constitution if it wishes to adopt a treaty that would violate the United States Constitution.

When United States citizens are subject to suit under international agreements either in a domestic or international court, treaties are equivalent to legislation and the process for adoption should reflect that of legislation.

## II. GLOBAL GUN CONTROL

Global gun control has been at the forefront of international thinking and has recently found outlets for the creation of substantive international law. These laws apply to the international sphere and also require states to implement stricter gun control laws domestically. The Secretary-General of the United Nations submitted a report to the Millennium Assembly of the United Nations<sup>38</sup> clearly stating his view on the role of international law and gun control. *The Report of the Group of Governmental Experts, entitled “Small Arms”* summarized the Secretary-General’s comments<sup>39</sup>:

[T]he task of effective proliferation control in the field of small arms and light weapons is made far harder than it needs to be because of irresponsible behavior on the part of some States and lack of capacity by others, together with a lack of transparency that is characteristic

of much of the arms trade. He concludes that these weapons need to be brought under the control of States, and that States should exercise such control in a responsible manner, including exercising appropriate restraint in relation to accumulations and transfers of small arms and light weapons.<sup>40</sup>

#### A. Scope of “Small Arms and Light Weapons” and “Illicit Trafficking”

Several arms control treaties that relate to nuclear weapons and national defense have been passed and signed by the United States. These treaties relate to weapons owned by governments and do not significantly affect the rights and obligations of citizens within sovereign states which are party to the treaty, nor do these treaties subject United States citizens to suits in international courts.

More recently, movements have been made to address international problems of smaller weapons. Often these problems include internal instability and fighting as well as criminal activity. The language used to describe the arms in these discussions is often military-related. The language also tends to include “explosives” and “ammunitions.” Without reading the definitions of such terms as “small arms,” “military arms,” and “light weapons,” one may conclude that the proposed agreements would apply to machine guns, anti-aircraft missiles and other weapons that in the United States are typically reserved for government ownership. In reality, however, the definitions of “small arms” are so expansive that one wonders what exactly is excluded from these definitions and why phrases such as “military” are so often used. Often the phrase “weapons” and “arms” applies to all guns, including pistols, revolvers, shotguns and rifles used for hunting.

Likewise, terms such as “illicit arms” and “illicit trade” are used. Upon first impression “illicit” appears to describe gun smuggling or trafficking to criminals. When one analyzes the documents, one finds that use of such words, as “illicit” and “illegal” are at best amorphous. What qualifies as “illicit” or “illegal” varies greatly and is open to change and re-definition by those employing the term. At worst, “illicit” is simply a description intended to paint all arms transactions in a negative light.

For example, *The Report of the Group of Government Experts*

established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small Arms” defines “Small Arms and Light Weapons” and “Illicit Trade.” The definition of “Small Arms” reads “The category of small arms includes revolvers and self-loading pistols, rifles and carbines . . .”<sup>41</sup> “Illicit Trafficking” is “understood to cover those international transfers in small arms and light weapons, their parts and components and ammunition, which are unauthorized or contrary to the laws of any of the States involved, and/or contrary to international law.”<sup>42</sup>

Under this set of definitions, “Small Arms” and “Light Weapons” include all guns. “Illicit Trafficking” includes all those transactions that are international in scope and that violate law, whether it be the municipal law of a state involved or a treaty or customary international law, whatever they may turn out to be. The phrase “contrary to international law” is particularly expansive considering much of the law is in the drafting phase and the ease with which it can be changed.

Furthermore, the desire to end all private gun ownership worldwide is a final goal of many international law actors. This desire is often hidden or lightly shrouded, but is sometimes flaunted. On July 16, 2001, at a meeting of non-governmental organizations (“NGOs”) at the United Nations Conference on the Illicit Trade in Small Arms, Amparo Mantilla De Ardila of the Fundacio’n Gamma Idear from Colombia said: “We must overlook the differences between the licit and illicit trade in small arms and light weapons. Weapons are almost always associated with injuries and death. Whoever possesses such arms not only uses them for self-defense, but also for assaults.”<sup>43</sup>

## B. Conference On Illicit Trade In Small Arms

One goal of global gun prohibition movement came to fruition in the summer of 2001 in the form of a conference in New York City. On December 15, 1999, the General Assembly of the United Nations, through resolution 54/54 V requested that the Secretary-General of the United Nations conduct a study to determine “the feasibility of restricting the manufacture and trade of such weapons to manufacturers and dealers authorized by States, which will cover the brokering activities, particularly illicit activities, relating to small arms and light weapons, including transportation agents and financial transactions;” and to submit the same at a conference to be held

in 2001.<sup>44</sup> On July 9-20, 2001 this report, *The Report of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled "Small arms"*<sup>45</sup> ("The Report") was submitted to the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects ("The Conference"). A preparatory committee for The Conference drafted a document entitled "Draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects" ("The Draft").<sup>46</sup> The Draft set out a plan of action, whereby those sovereign states adopting the Programme of Action would through municipal and international law institute greater control over guns.

Between July 9, 2001 and July 13, 2001, The Conference held a general exchange of views and statements of attending sovereign states, international organizations and United Nations organizations.<sup>47</sup> On July 16, 2001, The Conference heard statements from NGOs.<sup>48</sup> After limited negotiation (focusing primarily on concerns of the United States), the Conference edited and finalized the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects ("The Programme"). On July 20, 2001, The Conference adopted "the orally amended draft Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects contained in document A/CONF.192/L.5/Rev.1."<sup>49</sup> The municipal and international laws prescribed by The Programme should be heavily scrutinized because they potentially violate the Second Amendment of the United States Constitution.

### 1. The Presence of the United States at The Conference

On July 9, 2001, John R. Bolton, Undersecretary of State for Arms Control and International Security Affairs, spoke at the Plenary Session. Bolton expressed concern over the domestic legal ramifications of The Draft. Citing the U.S. Attorney General, Bolton explained, "the Second Amendment protects an individual right to keep and bear arms." He then listed those aspects of The Draft that the United States could not support. Among others, these aspects included "measures that would constrain legal trade and legal manufacturing of small arms and light weapons" and "measures that prohibit civilian possession of small arms."<sup>50</sup>

Bolton presented the official position of the United States Government, and explained why the United States government was constitutionally precluded from giving support to The Programme in its draft form.

After alteration to address US concerns, the final version of The Programme was adopted. The President of the Conference submitted a short letter scolding the United States and requested that the letter be included in The Report to be sent to the General Assembly. He explained in his letter, "While congratulating all participants for their diligence in reaching this new consensus, I must as President, also express my disappointment over the Conference's inability to agree, due to the concerns of one State, on language recognizing the need to establish and maintain controls over private ownership of these deadly weapons and the need for preventing sales of such arms to non-State groups."<sup>51</sup>

Thus, although the approved Programme is in closer adherence with the Second Amendment than The Draft had been, the goal of The Convention, the United Nations, the sovereign state participants and the drafters of The Programme is express and clear. As the convention continues to meet, its final goal of outlawing private gun ownership contradicts the right of United States citizens to keep and bear arms.

## 2. Agenda

Since its conception, a focus of The Convention has been stricter gun controls that limit private gun ownership. This goal presents difficulties for the United States, where the right to bear arms is protected by the United States Constitution and widely respected as a natural human right. The Report of the Group of Government Experts listed as "options/solutions" 1) "strengthening of national controls on the legal manufacture, acquisition and transfer of small arms and light weapons..." and 2) "prohibition of unrestricted trade and private ownership of small arms and light weapons specifically designed for military purposes, such as automatic guns."<sup>52</sup>

Goals to restrict private gun ownership create serious conflicts in the United States. Many sovereign states are in agreement to limit or eliminate private gun ownership and now face the task of implementation. In the United States, not only does no such consensus exist, but many United States citizens feel that the United States government has already, without the

addition of gun control treaties, overstepped its bounds regarding the control of private gun ownership.

### 3. Documents

The Programme of Action is currently the primary international gun control law. The Programme is a treaty intended to assist member states in creating and implementing municipal and international law. The stated goal of these new laws is the eradication of the illicit trade in small arms. The treaty is open for signature by interested states.

The Programme of Action is divided into four parts. The first part, *The Preamble*, sets out in general terms the intent of The Convention. Among a variety of calls for intensified control of gun possession by sovereign states, manufacture and trade, the Preamble recognizes the importance of self defense: “the inherent right to individual or collective self-defense in accordance with Article 51 of the Charter of the United Nations.”<sup>53</sup> (For further discussion of Article 51, see Section III.) Thus, the scope, weight and definition of this “right” is not that of the United States Second Amendment but rather a right defined in the international law context. The following paragraph reaffirms the sovereign state’s “right to manufacture, import and retain small arms . . .”<sup>54</sup> Noticeably absent is any acknowledgement that private individuals have a right to own arms.

The second part, *Preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects*, is divided into national, regional and global measures. The second paragraph of the second part calls for sovereign states “to put in place, where they do not exist, adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction and over the . . . transit or retransfer of such weapons . . .”<sup>55</sup>

Some of the more striking laws required by the national level section include:

- A. To establish . . . national coordination agencies . . . responsible for policy guidance, research and monitoring of efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects.<sup>56</sup>

B. To establish or designate . . . a national point of contact to act as liaison between States on matters relating to the implementation of the Programme of Action.<sup>57</sup>

C. To ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction.<sup>58</sup>

D. To put into place and implement adequate laws . . . to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures.<sup>59</sup>

Measures required at the regional level include, “information sharing among law enforcement, border and customs control agencies . . .”<sup>60</sup>

One measure called for at the global level is, “To strengthen the ability of States to cooperate in identifying and tracing in a timely manner illicit small arms and light weapons.”<sup>61</sup>

The fourth part, *The Follow-up*, calls for a follow-up conference and a convening of sovereign States on a biennial basis to “consider the national, regional and global implementation of the Programme of Action.”<sup>62</sup> The fourth part also calls for “examining the feasibility of developing an international instrument to enable States to identify and trace in a timely manner illicit small arms and light weapons.”<sup>63</sup>

These governmental controls on guns and the trade of guns are in many ways similar to proposals in the United States Congress which have been vigorously opposed and are unpopular. Americans who oppose additional domestic gun restrictions would be even more opposed to gun restrictions sanctioned by an even larger and less democratic entity.

#### 4. Future

There is no indication that The Conference and its members are moving in a direction closer to that of the United States. Based on the intensity of disapproval aimed at the United States, one expects the politics will push in the direction of both municipal legislation and international law to end private gun ownership.

C. Convention against Transnational Organized Crime

The Convention on The Illicit Trade in Small Arms is paralleled by a second effort at global gun control. The second effort is an elaboration of The Convention against Transnational Organized Crime.<sup>64</sup> Ad Hoc Committees are drafting the gun control protocol attached to the original treaty. A ninth session convened in Vienna, June 5-16, 2000.

The Programme references the Protocol twice. The first page of The Report to The Convention on Illicit Small Arms states:

At the Global level two important processes are underway. First, the United Nations General Assembly process, supported by expert studies, has reached the stage of preparing for the United Nations Conference on the Illicit Trade in Small arms and Light Weapons in All Its Aspects, scheduled to be held in New York from 9 to 20 July 2001. In Vienna, under the aegis of the Commission on Crime Prevention and Criminal Justice, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime is working on a draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.<sup>65</sup>

Paragraph 20 of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects reads:

*Recognizing* that the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, establishes standards and procedures that complement and reinforce efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects,<sup>66</sup>

These two efforts are inseparable and are aimed at accomplishing the same two goals: global gun control and the eradication of private gun ownership. Strikingly, the Programme approvingly references the “standards” and “procedures” in the

Protocol, which is still being negotiated.

### 1. The Convention

The web page of the United Nations Convention against Transnational Organized Crime states “[The Convention on Transnational Organized Crime] is the first legally binding UN instrument in the field of crime.”<sup>67</sup> It requires that sovereign states which are party to The Convention must pass domestic laws establishing four criminal offenses. These crimes are defined in a typically amorphous fashion that leaves the elements of the crimes open to interpretation and evolution. The four crimes are: 1) participation in an organized criminal group, 2) money laundering, 3) corruption, and 4) obstruction of justice. The opening web page of The Convention on Organized Crime reads, “It is hoped that upon ratification The Convention will emerge as the main tool of the international community for fighting transnational crime.”<sup>68</sup>

Primary goals of the Organized Crime Convention, as stated on the web page under *After Palermo: an overview of what the Convention and Protocols Hope to Accomplish* are:

1. Boosting the exchange of information among nations on patterns and trends in transnational organized crime;
2. Cooperation with relevant international and non-governmental organizations;
3. Checking periodically on how well countries are implementing the treaty;<sup>69</sup>

In the body of The Convention is the statement that one of the first protocols will be gun control.

### 2. The Protocol

The third optional protocol of The Convention on Transnational Organized Crime is under negotiation and deals with the illicit manufacturing of and trafficking in firearms. According to the web site, *this Protocol against the Manufacturing of and Trafficking in Illicit Firearms, Ammunition and Related Materials* intends to require states to act in the following ways:

1. Pass new laws aimed at eradicating the illegal manufacturing of firearms, tracking down existing illicit

- weapons and prosecuting offenders;
- 2. Cooperate to prevent, combat and eradicate the illegal manufacturing and trafficking of firearms;
- 3. Tighten controls on the export and import of firearms;
- 4. Exchange information about illicit firearms.<sup>70</sup>

In hopes of furthering The Protocol, sovereign state parties are required to pass new laws. These include:

- 1. Criminalize the manufacturing and trafficking of illegal firearms;
- 2. Confiscate firearms that have been illegally manufactured or trafficked;
- 3. Hold information for ten years that is needed to trace and identify illicitly manufactured and trafficked firearms, including the manufacturer's markings, country and date of issuance, date of export, import or transfer of firearms;
- 4. Register and approve brokers for the manufacture, export, import or transfer of firearms;
- 5. Mark each firearm, when manufactured, with a serial number as well as the manufacturer's name and location; and
- 6. Mark confiscated firearms kept for official use.

The Protocol also comments upon the transfer of illicit firearms. In hopes of preventing illicit trade, sovereign state parties are required to "adopt new controls including . . . Refusing to allow the transit, re-export, retransfer or transshipment of firearms to any destination without written approval from the exporting country and licenses from receiving . . ."

The goals and required measures of The Protocol are related to those contained in the Conference on the Illicit Trade in Small Arms and Light Weapons and are equally problematic under United States law. The Programme, in its final form, focuses primarily on data collection and regulation. Alternately, The Protocol introduces the aggressive notion that violations of the data collection and regulation may be criminal and that sovereign states will be obligated to prosecute violations.

### III. CONFLICTS BETWEEN INTERNATIONAL LAW AND UNITED STATES DOMESTIC LAW

The gun control measures created in The Conference on Illicit Trade in Small Arms and in The Convention against Organized Crime would at a minimum raise serious United States constitutional concerns. Both the Individual Rights and Collective Rights theories of the Second Amendment would place obstacles in the path of international gun control. The Individual Rights theory would create an individual civil right for United States citizens that could not be infringed upon by either domestic laws or international laws.

The Collective Rights theory, although a weaker protection against domestic laws, would still serve as a protection against infringement by authority outside of the United States. Many of those in the Collective Rights camp view the executive and legislative branches as protectors of the Second Amendment. Such a domestic legal and governmental order does not anticipate a mass disarmament by an international body. The ways in which the rights of private United States gun owners could be infringed are endless.

Clearly, a final goal of eliminating private gun ownership would violate the Second Amendment. Criminal enforcement of data collection and the sharing of this information with other sovereign states, private organizations, supra-national organizations and international organizations and uniform marking and licensing of all transfers present constitutional problems.

The popularity of global gun control measures among many governments around the world is increasingly evident. The push for such gun control remains strong. These global gun control measures will go into effect in sovereign states that adopt the treaties. The United States has not adopted these treaties and is unable to do so because the treaties call for domestic laws or international laws that conflict with the United States Constitution.

The possibility of conflict does not stop there. There are a variety of ways that these gun control laws could affect the rights and obligations of parties within the United States. The first way is the possibility that the President of the United States signs one or both of these treaties. Signature by a United States President

would indicate to the international community that the United States intends to abide by the gun control laws, with or without ratification by the Senate.

A second way these gun control laws could affect United States parties is in the event that gun control becomes a customary international law. Even if the United States did not sign on to either treaty, if the United States began to abide by the treaties, the United States may, in effect, be consenting to the treaties becoming customary international law. In the eyes of an international court, the United States, by following the treaties, is consenting to be bound by the treaties in the future.

To avoid accidental consent, the United States should expressly state that as a nation, the United States does not consent to the gun control treaties and that any activity consistent with the treaties is not intended to recognize the treaties' legal status. If the United States does not make such an express statement to the international community, the United States might, arguably, be expected to maintain any and all gun control measures that the treaties require.

A third way the gun control measures could affect United States parties is through nonconsensual customary law. Nonconsensual customary international law may arise as a result of international practice. This international practice may be evidenced by events not approved by the United States but eventually held binding on the United States. For example, both the Conference on the Illicit Trade in Small Arms, the Conference on Transnational Organized Crime and ensuing Treaties have placed international gun control in the consciousness of the international community. In many ways, the international community is in agreement on gun control, with the exception being the United States. The respect and adherence by numerous countries to strict gun control adds weight to the notion that a common understanding of how sovereign states must deal with private gun ownership can be established with or without every country's consent.

Assuming that the United States gives express consent to global gun control or that gun control becomes customary international law, the global gun control will conflict with United States constitutional law. The question then becomes, which law will triumph?

The answer is simply: it depends. If a domestic United States Court hears the case, the treaty may be held invalid as violating the United States Constitution.

If however, an international court, such as the International Criminal Court or the International Court of Justice considers the question, the international law will take precedence. The party found in violation of the international law will be held accountable, perhaps criminally. The very notion of an American citizen standing trial in an international court remains controversial. Critiques of the International Courts have focused on jurisdiction and constitutional conflicts. In particular, American commentators focus on the lack of protection of the Bill of Rights in international courts.<sup>71</sup>

The United Nations Charter and the Universal Declaration of Human Rights contain significant elements of personal liberty owing to the Enlightenment tradition. The United Nations Charter, Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>72</sup>

Although Article 51 recognizes “the inherent right of individual or collective self-defense,” there are important limits. First, this “right” would only apply to sovereign states. Second, the Article requires a report to the Security Council. Third, the Article reaffirms the Security Council’s “authority” to “take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

Benoit Muracciole, from the Coalition Francais, asserted what might be a typical rebuttal to the assertion of Article 51 protects gun ownership, when he addressed a group of non-governmental organizations at the United Nations conference on the Illicit Trade in Small Arms.<sup>73</sup> In an emotional appeal he stated:

For a week now, some governments have cited Article

51 of the Charter on the sovereign rights of States to self-defense as the definitive reason for not taking concrete steps aimed at controlling the illicit trade in small arms and light weapons. But what will happen when there is no one left to defend and no State borders to protect because all our citizens have been killed by rapidly proliferating small arms?<sup>74</sup> We should all remember that before Article 51, the Charter elaborates certain other important principles, namely those that call for development and protection of human rights. Specifically, Article 26 calls for the establishment of an arms control regime.<sup>75</sup>

Article 26 states:

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.<sup>76</sup>

The Universal Declaration of Human Rights also contains a submerged version of a right to rebellion in the third recital of the Preamble: "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."<sup>77</sup> During the drafting convention and after extensive discussion and refinement, the right to rebel was relegated to the preamble and, like Article 51 of the United Nations Charter, most likely does not carry any explicit legal weight.<sup>78</sup>

#### IV. CONSEQUENCES OF THIS CONFLICT

How might a conflict between U.S. and international law over guns arise in the future? To answer this question, let us begin by examining to whom a treaty might apply.

### A. Jurisdiction

The contents of a Symposium entitled *The Rule of Law in the Global Village: Issues of Sovereignty and Universality*<sup>79</sup> held in Palermo to celebrate the signing of the U.N. Convention Against Organized Transnational Crime are telling. University of Florida Professor Winston Nagan introduced the theme and delivered a speech focusing on Sovereignty. In his speech he targeted traditional notions of sovereignty as dangerous, and he suggested that because organized crime is a danger to sovereignty, that same sovereignty should be sacrificed to international organizations.<sup>80</sup>

Nagan said: “Organized crime is thus a clear and present threat to the sovereignty of the state when based on the authority of the people.” Nagan’s solution was “cooperative sovereignty” for which he did not provide a useful definition. He concluded: “there is a changing idea of the relationship of the international Rule of Law to the idea of state sovereignty. The expression of cooperative sovereignty in this kind of treaty is a vital and important constitutional principle of the new millennium.”

Nagan confronted the United States’ opposition to the Rome statute which creates the International Criminal Court. He concludes the United States is “motivated by political factors as well as security concerns, it is also highly influenced by the recrudescence of the idea of ‘sovereignty’ and the concern that international obligations are corrosive of this idea.” When expansion of a court’s jurisdiction will conflict with fundamental freedoms of American citizens, such as the right to bear arms, the United States should be concerned.

Mark Gibney, of the University of North Carolina, offered an essay which stated the goal clearly:

It is within this context of changing notions of state sovereignty, but also changing ideas about our relationship and our responsibilities to others, that the principle of universal jurisdiction must be viewed. Universal jurisdiction allows any nation to prosecute offenders of certain crimes even when the prosecuting state lacks a traditional nexus with either the crime, the alleged offender, or the victim.<sup>81</sup>

However shocking it may be to the American citizenry, Gibney accurately concluded, “one would be hard pressed to find a recent international criminal convention that does not provide for universal jurisdiction. Moreover, many of these conventions now mandate jurisdiction, rather than using the permissive ‘may’. In sum, we live in a world where the notion of universal jurisdiction is not only commonly accepted, but seemingly honored and promoted.” Gibney closed with a call for a “real system” of universal jurisdiction and an international civil court where individuals may bring suit against the sovereign state where they live.

The International Criminal Court is perhaps the best example of the ambitious jurisdictional reach of international courts. The Rome Statute of the International Criminal Court sets out the Preconditions to the exercise of Jurisdiction for that court in Article 12:

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

#### B. Involvement of a United States Citizen Absent an International Element

How might these hurdles be met involving United States citizens? Who may be a party to a suit arising out of these international gun control laws?

First: who might file a suit? One can imagine a member sovereign state to the treaties filing suit. Additional possibilities include foreign nationals, foreign corporations or international organizations. As an example, The Rome Statute of the International Criminal Court, Article 4, reads, “The Court shall have international legal personality. It shall have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”<sup>82</sup> One may presume that

adjudicating international criminal law is one of the court's fundamental functions and that allowing a non-state party to file a complaint with international prosecutors necessary for that function.

Who might a suit be brought against? The most likely answer is a sovereign state; however, a suit might be brought against an individual, a corporation or another non-state entity. It is unlikely that the United States would be a party due to the United States' unique position as the most powerful nation in the world. Yet United States citizens, corporations and non-state entities should not feel as protected. In an increasingly global world, even those actors located within the United States may have ties to member states or conduct that connects them to activities occurring in member states.

Assuming current international gun controls do not become customary international law, the gun controls are only applicable to persons who meet the international court's jurisdiction as reached through the member states. The current international corporate structures demonstrate the complexities of just who is subject to international treaties.

One can imagine a member state freezing the assets of a corporation or individual located in the United States until that individual or corporation abides by the international gun controls. Violations could include such simple acts as not making guns in accordance with international norms, not keeping internationally approved transactional histories of guns or even refusing to report data about gun ownership to an international organization, to a private organization or even to a foreign sovereign state.

This last element, the control of data, is the most sensitive and currently the most prominent. Once data are collected and handed over, data cannot be taken back nor is there any practical way to prevent the entity in possession of the data from sharing it with whomever the entity pleases absent an enforcement mechanism.

Endnotes

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1. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71, 79 (2000). For an analysis of the delegation of Federal Power to international organizations, including a synopsis of the change from traditional international law to “new” international law see Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1556-62 (1999).
2. S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 18 (Sept. 7).
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4. Ku at 79.
5. The U.N. Charter was signed in San Francisco on June 26, 1945.
6. US Const. art. VI, §2.
7. US Const. art. I, 1.
8. US Const. art. V.
9. U.S. Const., art. III §2, cl. 1, art. VI, § 2]
10. See Ku, at 77.
11. Jacques Chirac, “Universal Values,” The United Nations Millennium Summit 6-8, September 2000, at 6.
12. Vienna Convention, art. 2(1)(a).
13. Vienna Convention, art. 18.
14. Vienna Convention, U.N. Doc A/CONF.39/27 (1969) (signed at Vienna May 23, 1969; effective January 27, 1980; not effective for the United States.)
15. Mark W. Janis, *An Introduction to International Law* 42 (3d ed. 1999), citing Statute of the International Court of Justice, art. 38(1)(b), as annexed to the Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 3 Bevans 1153.
16. Janis, at 42-44.
17. *Id.* at 50-51 (citing U.N. Charter art. 13(1), 59 Stat. 1031 T.S. No. 993, 3 Bevans 1153, signed at San Francisco June 26, 1945; effective October 24, 1945).
18. An example of disproportionate representation by NGOs can be found in the summaries of statements made by NGOs. A UN “press release” on its second page quotes Mary Leigh Blek, head of the Million Mom March: “the United States’ position expressed during the ministerial segment represented ‘a minority view of a minority government’” and Ms. Blek “sought to set the record straight.” *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at page 1(a), (16 July, 2001). The UN press release quoted her again: “the head of the United States delegation to this Conference does not represent the thinking of the American public.” *Id.* at 10. Available at <[www.un.org/News/Press/docs/2001/DC2792.doc.htm](http://www.un.org/News/Press/docs/2001/DC2792.doc.htm)> Notably, the Million Mom March has since gone out of business as an independent organization, and has been absorbed by another gun prohibition organization.
19. United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001). See also Letter of Transmittal dated 9 February 2001 from the Chairperson of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small arms”, addressed to the Secretary-General, citing para. 14 of resolution 54/54 V.
20. A list of the NGOs that requested accreditation is available at <<http://www.un.org/Depts/dda/CAB/smallarms/ngolist.htm>>
21. Janis, at 86, citing H. Kelsen, *Principles of International Law* 553-588 (2d ed. Tucher 1966).
22. Vienna Convention, art. 26.
23. Vienna Convention, art 27.
24. Janis, at 27, citing the Permanent Court of International Justice in its 1932 opinion on the Treatment of Polish Nationals and Other Personas of Polish Origin or Speech in the Danzig Territories. 1932 P.C.I.J. Reports, ser. A/B, no.44, at 24.
25. U.S. Const. art. VI, § 1, cl. 2.
26. U.S. Const. art. I, § 7.
27. US Const. art. II, § 2.
28. Reid v. Colvert, 354 U.S. 1 (1957).

29. *Id.* at 17, 77 (1957). *See, e.g.*, *United States v. Minnesota*, 270 U.S. 181, 207-08 (1926); *Holden v. Joy*, 84 U.S. 211, 242-43 (1872); *The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1870); *Doe v. Braden*, 57 U.S. 635, 657 (1850); *cf. Marbury v. Madison*, 5 U.S. 137, 176-80 (1803).
30. Reid, *supra* note 28, at 16-17 (discussing the Virginia Convention of the adoption of the Constitution, 3 Elliot's Debates (1836 ed.) 500-19).
31. *Geofrey v. Riggs*, 133 U.S. 258, 267 (1890).
32. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). *See also* *Edye v. Robertson*, 112 U.S. 580, 598 (1884).
33. It should be noted that some international courts claim jurisdiction over United States citizens. This is seemingly in violation of the United States Constitution. Although relevant, discussion of the constitutionality of international courts is beyond the scope of this article. For scholarship addressing such a proposition, Kristafer Ailsieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999).
34. U.S. Const. art. III, § 1.
35. U.S. Const. art. III, § 2, cl. 1.
36. *Ex parte Milligan*, 71 U.S. 2 (1866).
37. *Id.* at 122.
38. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001) (established pursuant to General Assembly resolution 54/54 V of 15 December 1999, citing A/54/2000).
39. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 at para. 17 (2001).
40. *Id.*, citing A/54/2000, paras. 241 and 245.
41. *Report of the Group of Government Experts*, Annex I, Clarification of key terms, A/CONF.192/2.
42. *Id.*
43. *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at 2 (statement made on behalf of Fundacio'n GAMMA IDEAR from Columbia at the UN Conference on the Illicit Trade in Small Arms 8th meeting (AM), available at <<http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>>
44. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001)(note by the Secretary-General, A/CONF. 192/2).
45. *Id.*
46. U.N. Doc. A/CONF.192/PC/L.4/Rev.1
47. For a complete list of states by date and meeting, *see* U.N. Doc. A/CONF.192/15 at paras. 7-14.
48. *Id.* at para. 15.
49. *Id.* at para. 24.
50. John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, statement at the Plenary Session of the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 9 July, 2001 (available at <<http://www.un.org/Depts/dda/CAB/smallarms/statements/use.html>>)
51. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15 (statement by the president of the Conference following its adoption).
52. *Report of the Group of Governmental Experts*, *supra* note 45, at par. 31.
53. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15, Sec. I, para. 9.
54. *Id.* at § I, para. 10.
55. *Id.* at § II, para. 2.
56. *Id.* at § II, para 4.
57. *Id.* at Sec. II, para 5.
58. *Id.* at § II, para 9.
59. *Id.* at § II, para 12.
60. *Id.* at § II, para 27.
61. *Id.* at § II, para 36.
62. *Id.* at § IV, para 1(a-b).
63. *Id.* at § IV, para 1(c).

64. U.N. Doc. A/55/383 (available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents/38](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/38)).
65. *Report of the Group of Governmental Experts*, *supra* note 45, at para. 6.
66. Programme of Action, *supra* note 53 at Sec. I par. 20.
67. Available at <http://www.undcp.org/palermo/theconvention.html>
68. Available at <http://undcp.org/palermo/theconvention.html>
69. Available at <http://undcp.org/palermo/sum1.html>
70. *Id.*
71. See Kristafer Ailshieger, *Why the United States Should be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999); see also Lee A. Casey and David B. Rivkin Jr., *The International Criminal Court vs. The American People*, The Heritage Foundation, Backgrounder, No. 1249, (Feb. 5, 1999), available at <http://www.heritage.org/library/backgrounder/bg1249.html>
72. U.N. Charter, art. 51.
73. United Nations Conference on the Illicit Trade in Small Arms, U.N. Doc. DC/2792 at 11, 16 July 2001 (available at <http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>)
74. There is no indication of that Muracciole was being facetious or ironic in making such an implausible prediction.
75. United Nations Conference on the Illicit Trade in Small Arms, *supra* note 74.
76. U.N. Charter, art. 26.
77. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Preamble, 3rd recital (1999).
78. For an extensive discussion of the evolution of the right to rebel, see Morsink, *supra* note 77, at 302-20 (200).
79. Held 12 December 2000.
80. Winston Nagan, *The Rule of Law: Lofty Idea and Harsh Reality*, 12 December 2000, available at <http://www.odccp.org/palermo/convmain.html>
81. Mark Gibney, *The Rule of Law and Universal Jurisdiction*, available at <http://www.odccp.org/palermo/convmain.html>
82. Rome Statute of the International Criminal Court, 1998, art. 4.

## Endnotes

- <sup>FN41</sup> Member Georgia bar 2002, J.D. Tulane Law School, 2002. B.A. Emory University, 1999. A.A. Oxford College of Emory University, 1997. The author would like to thank Professor Raymond T. Diamond for his help and support in editing this Article. The author would also like to thank Janice Alonso and Daniel Morgan for help in editing. Thanks also to my family, Bruce, Jan and Andrew, and to my Grandmother, Nell Barber, for their support.
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- <sup>82</sup> Ku at 79.
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- <sup>82</sup> US Const. art. I, 1.
- <sup>82</sup> US Const. art. V.
- <sup>82</sup> U.S. Const., art. III §2, cl. 1, art. VI, § 2]
- <sup>82</sup> See Ku, at 77.
- <sup>82</sup> Jacques Chirac, “Universal Values,” The United Nations Millennium Summit 6-8, September 2000, at 6.
- <sup>82</sup> Vienna Convention, art. 2(1)(a).
- <sup>82</sup> Vienna Convention, art. 18.
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- <sup>82</sup> Janis, at 42-44.
- <sup>82</sup> *Id.* at 50-51 (citing U.N. Charter art. 13(1), 59 Stat. 1031 T.S. No. 993, 3 Bevans 1153, signed at San Francisco June 26, 1945; effective October 24, 1945).
- <sup>82</sup> An example of disproportionate representation by NGOs can be found in the summaries of statements made by NGOs. A UN “press release” on its second page quotes Mary Leigh Blek, head of the Million Mom March: “the United States’ position expressed during the ministerial segment represented ‘a minority view of a minority government’” and Ms. Blek “sought to set the record straight.” *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at page 1(a), (16 July, 2001). The UN press release quoted her again: “the head of the United States delegation to this Conference does not represent the thinking of the American public.” *Id.* at 10. Available at <[www.un.org/News/Press/docs/2001/DC2792.doc.htm](http://www.un.org/News/Press/docs/2001/DC2792.doc.htm)> Notably, the Million Mom March has since gone out of business as an independent organization, and has been absorbed by another gun prohibition organization.
- <sup>82</sup> United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001). See also Letter of Transmittal dated 9 February 2001 from the Chairperson of the Group of Governmental Experts established pursuant to General Assembly resolution 54/54 V of 15 December 1999, entitled “Small arms”, addressed to the Secretary-General, citing para. 14 of resolution 54/54 V.
- <sup>82</sup> A list of the NGOs that requested accreditation is available at <<http://www.un.org/Depts/dda/CAB/smallarms/ngolist.htm>>
- <sup>82</sup> Janis, at 86, citing H. Kelsen, *Principles of International Law* 553-588 (2d ed. Tucher 1966).
- <sup>82</sup> Vienna Convention, art. 26.
- <sup>82</sup> Vienna Convention, art 27.
- <sup>82</sup> Janis, at 27, citing the Permanent Court of International Justice in its 1932 opinion on the Treatment of Polish Nationals and Other Personnas of Polish Origin or Speech in the Danzig Territories. 1932 P.C.I.J. Reports, ser. A/B, no.44, at 24.
- <sup>82</sup> U.S. Const. art. VI, § 1, cl. 2.
- <sup>82</sup> U.S. Const. art. I, § 7.
- <sup>82</sup> US Const. art. II, § 2.
- <sup>82</sup> Reid v. Colvert, 354 U.S. 1 (1957).
- <sup>82</sup> *Id.* at 17, 77 (1957). See, e.g., United States v. Minnesota, 270 U.S. 181, 207-08 (1926); Holden v. Joy, 84 U.S. 211, 242-43 (1872); The Cherokee Tobacco, 78 U.S. 616, 620-21 (1870); Doe v. Braden, 57 U.S. 635, 657 (1850); cf. Marbury v. Madison, 5 U.S. 137, 176-80 (1803).
- <sup>82</sup> Reid, *supra* note 28, at 16-17 (discussing the Virginia Convention of the adoption of the Constitution, 3 Elliot’s Debates (1836 ed.) 500-19).
- <sup>82</sup> Geoffrey v. Riggs, 133 U.S. 258, 267 (1890).
- <sup>82</sup> Whitney v. Robertson, 124 U.S. 190, 194 (1888). See also Edye v. Robertson, 112 U.S. 580, 598 (1884).
- <sup>82</sup> It should be noted that some international courts claim jurisdiction over United States citizens. This is seemingly in violation of the United States Constitution. Although relevant, discussion of the constitutionality of international courts is beyond the scope of this article. For scholarship addressing such a proposition, Kristafer Ailsieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999).
- <sup>82</sup> U.S. Const. art. III, § 1.
- <sup>82</sup> U.S. Const. art. III, § 2, cl. 1.
- <sup>82</sup> Ex parte Milligan, 71 U.S. 2 (1866).
- <sup>82</sup> *Id.* at 122.
- <sup>82</sup> *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001) (established pursuant to General Assembly resolution 54/54 V of 15 December 1999, citing A/54/2000).
- <sup>82</sup> *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 at para. 17 (2001).
- <sup>82</sup> *Id.*, citing A/54/2000, paras. 241 and 245.
- <sup>82</sup> *Report of the Group of Government Experts*, Annex I, Clarification of key terms, A/CONF.192/2.
- <sup>82</sup> *Id.*
- <sup>82</sup> *Civil Society Groups Highlight Impact of Firearms Injuries, Gun Ownership Rights in Small Arms Conference Debate*, U.N. Doc. DC/2792 at 2 (statement made on behalf of Fundacio’n GAMMA IDEAR from Columbia at the UN Conference on the Illicit Trade in Small Arms 8th meeting (AM), available at <<http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>>

<sup>82</sup>. *Report of the Group of Governmental Experts*, U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, U.N. Doc. A/CONF.192/2 (2001)(note by the Secretary-General, A/CONF. 192/2).

<sup>82</sup>. *Id.*

<sup>82</sup>. U.N. Doc. A/CONF.192/PC/L4/Rev.1

<sup>82</sup>. For a complete list of states by date and meeting, see U.N. Doc. A/CONF.192/15 at paras. 7-14.

<sup>82</sup>. *Id.* at para. 15.

<sup>82</sup>. *Id.* at para. 24.

<sup>82</sup>. John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, statement at the Plenary Session of the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 9 July, 2001 (available at <<http://www.un.org/Depts/dda/CAB/smallarms/statements/use.html>>)

<sup>82</sup>. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15 (statement by the president of the Conference following its adoption).

<sup>82</sup>. *Report of the Group of Governmental Experts*, *supra* note 45, at par. 31.

<sup>82</sup>. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/15, Sec. I, para. 9.

<sup>82</sup>. *Id.* at § I, para. 10.

<sup>82</sup>. *Id.* at § II, para. 2.

<sup>82</sup>. *Id.* at § II, para 4.

<sup>82</sup>. *Id.* at Sec. II, para 5.

<sup>82</sup>. *Id.* at § II, para 9.

<sup>82</sup>. *Id.* at § II, para 12.

<sup>82</sup>. *Id.* at § II, para 27.

<sup>82</sup>. *Id.* at § II, para 36.

<sup>82</sup>. *Id.* at § IV, para 1(a-b).

<sup>82</sup>. *Id.* at § IV, para 1(c).

<sup>82</sup>. U.N. Doc. A/55/383 (available at <[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents/38](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/38)>).

<sup>82</sup>. *Report of the Group of Governmental Experts*, *supra* note 45, at para. 6.

<sup>82</sup>. Programme of Action, *supra* note 53 at Sec. I par. 20.

<sup>82</sup>. Available at <<http://www.undcp.org/palermo/theconvention.html>>

<sup>82</sup>. Available at <<http://undcp.org/palermo/theconvention.html>>

<sup>82</sup>. Available at <<http://undcp.org/palermo/sum1.html>>

<sup>82</sup>. *Id.*

<sup>82</sup>. See Kristafer Ailsieger, *Why the United States Should be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999); see also Lee A. Casey and David B. Rivkin Jr., *The International Criminal Court vs. The American People*, The Heritage Foundation, Backgrounder, No. 1249, (Feb. 5, 1999), available at <<http://www.heritage.org/library/backgrounder/bg1249.html>>

<sup>82</sup>. U.N. Charter, art. 51.

<sup>82</sup>. United Nations Conference on the Illicit Trade in Small Arms, U.N. Doc. DC/2792 at 11, 16 July 2001 (available at <<http://www.un.org/News/Press/docs/2001/DC2792.doc.htm>>)

<sup>82</sup>. There is no indication of that Muracciole was being facetious or ironic in making such an implausible prediction.

<sup>82</sup>. United Nations Conference on the Illicit Trade in Small Arms, *supra* note 74.

<sup>82</sup>. U.N. Charter, art. 26.

<sup>82</sup>. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Preamble, 3rd recital (1999).

<sup>82</sup>. For an extensive discussion of the evolution of the right to rebel, see Morsink, *supra* note 77, at 302-20 (200).

<sup>82</sup>. Held 12 December 2000.

<sup>82</sup>. Winston Nagan, *The Rule of Law: Lofly Idea and Harsh Reality*, 12 December 2000, available at <<http://www.odccp.org/palermo/convmain.html>>

<sup>82</sup>. Mark Gibney, *The Rule of Law and Universal Jurisdiction*, available at <<http://www.odccp.org/palermo/convmain.html>>

<sup>82</sup>. Rome Statute of the International Criminal Court, 1998, art. 4.