SALVE REGINA UNIVERSITY

SALVAGING THE CAROLINE

AN EXAMINATION OF STATES USE OF FORCE IN SELF-DEFENSE AGAINST NON-STATE ACTORS

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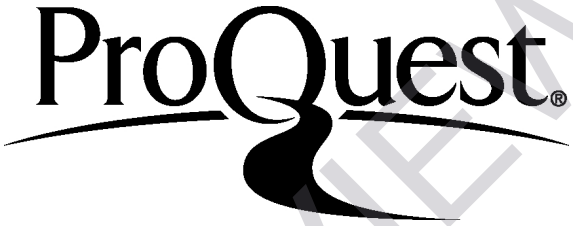

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GRADUATE STUDIES

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DEDICATION

To my parents, who made me the man I am,
and to Brianne, who makes me the man I want to be.

Special thanks to the MBTA
whose incessant delays and service interruptions
provided unexpected opportunities to
read, write, and edit my work.

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Purpose

Given the prevalence of instant and often overwhelming punditry via radio, TV, and the Internet this dissertation seeks to parse, to the extent possible, opinion and politics from fact with regard to the preemptive application of force in self-defense within the international system. Too often have commentators, learned and political, resorted in their analysis to "what should be" in direct contrast to "what has been" or "what is." This dissertation aims to lay bare the foundations of the modern regime governing recourse to force in self-defense via a careful examination of primary sources; a through legal-historical analysis of customary law, states practice, *Opinio Juris*, and *travaux préparatoires*; and the judicious use of illustrative case studies. "Those who cannot remember the past are condemned to repeat it."[1]

1 Santayana 1980

There is a sentence of Hesiod that has been much praised, that opinions which have prevailed amongst many nations, must have some foundation. – Hugo Grotius, On the Law of War and Peace

Chapter I: Introduction

International law has always been a bit different. By necessity it occupies the very space where common sense should dictate no law can function. Without recourse to clearly defined norms of conduct promulgated by those in a position to enforce them and backed by credible penalties for transgressors there would seem little incentive to comply.[2] Yet history is replete with examples of exactly this. The twin legacies of the age of reason and the industrial revolution, coupled with the modern reification of science and technology have lead many, if not most, practitioners to approach the study of law as a science or mathematic, a balance sheet of action and outcome.

> A *comprehensive and scientific knowledge* of international law is highly necessary, not only to lawyers practicing in our commercial ports, but to every [one] who is animated by liberal views, and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if [that person] should be found deficient in the great leading principles of this law; and I think I cannot be mistaken in considering the elementary learning of the law of nations, as not only an essential part of the education of an American lawyer, but as proper to be academically taught.[3]

Despite what many modern textbooks would have us believe however, the foundation of law is pragmatism. Though practitioners may wish to reduce the law in all its forms to a quantifiable mathematics of behavior, the fact remains – the law in general, and international law in particular, is a human construction and finds its basis not in science

2 Austin 2000
3 Kent 1873, emphasis added.

but in human interaction.

The assertions of Austin and hard-line realists aside, there can be no dispute that international law and the regimes that support it are once again on the rise. In the wake of the two World Wars a clear and distinct normative framework has blossomed encompassing a dizzying array of courts, tribunals, and international governmental organizations (IGOs). These IGOs are all geared in one way or another towards preserving the peace and ensuring 'justice.' Given the current prominence of international law it is easy to assume that this is a new and unprecedented era unique in human history. This hubristic interpretation would however reveal a deeply flawed understanding of history.

International law has, in one form or another, been with us for millennia. The remarkably cumbersome ritual of the Roman declaration of war with its dramatic hurling of a blood-dipped javelin into the territory of the offending enemy is at this point an oft-reproduced Hollywood trope. Biblical examples of international law abound,[4] with some of the earliest known iterations residing in the Old Testament, such as Deuteronomy 20:19-2 commanding:

> When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them: for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field is man's life) to employ them in the siege: Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued.[5]

Early examples of international law in practice are by no means confined to the Judeo-Christian tradition. The first Islamic Caliph Abu Bakr promulgated laws of war as

4 The law of war being among the subsets of international law.
5 The Holy Bible 2011

early as the seventh century A.D., including:

> Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.[6]

With regard to treaty law (itself among the earliest of the genera) examples of covenants between the Pharaoh Ramses II of Egypt and the Hittite King Hattusili III from approximately 1000 B.C. still exist. Focusing on matters such as the demarcation of borders and the establishment of a defensive alliance the context of this ancient treaty should be familiar to any modern reader. Predating even this by over 1000 years (about 2100 B.C.) is the treaty hewn into stone between the Mesopotamian city-states of *Lagash* and *Umma* marking their agreed upon boarder.[7]

International law, then, has been with us in one form or another since at least the dawn of recorded history. That is not however, to suggest that it has remained static over time. As with all human concepts, international law has run the gamut from the high-minded philosophy of Cicero to the pragmatic sate-craft of Kissinger, and virtually everywhere in between. While historians often caution against the grouping of epochs into thematic categories for fear of obscuring meaning for convenience,[8] it is possible to trace the origins of our modern conception of international law to, at the very least, an approximate time-frame.

The genesis of our modern understanding of international law (as well as its

6 Siyar 1966
7 Nussbaum 1954
8 For a decent explanation of the pitfall see report on Cliff Davies' research on the 'Tudor' era in Briton available at: http://www.bbc.co.uk/news/education-18240901.

practice) is nominally traced by many historians back to the 1648 Treaties of Westphalia. However convenient this demarcation may be from a historiographical point of view, to say it is an oversimplification would itself be an understatement. Still, Westphalia serves as a useful point of departure and does warrant scrutiny. The Peace of Westphalia[9] is the term lent to the collection of treaties that endeavored to end the Thirty Years War between Catholic and Protestant factions within Europe. It represented the attempt at a pragmatic solution to what had proved to be a very complex (and bloody) problem, namely, who determines the 'official' religion of a state (the nominal cause of fighting for the titular thirty years). The Peace as far as is relevant to this examination consisted of three major components. First, all signatories acknowledged the undisputed right of the ruler to decide the religion of their own state. This was accomplished by formally embracing the Peace of Augsburg of 1555, though it restricted the choices to Catholicism,[10] Lutheranism, or Calvinism.[11]

Second, those Christians choosing to embrace faiths other than that of their ruler were permitted to practice openly at regulated places and times, and freely in private. Third, and perhaps most important in the current context, all parties embraced the concept of state sovereignty over both territory and people.[12] The translation from parchment to paving stone was, however, less than seamless. The French and Spanish, for

9 The Peace was actually made up of 3 separate treaties, the Peace of Münster between the Dutch and Spain, the Treaty of Münster between France and the Holy Roman Empire (HRE), and the Treaty of Osnabrück between the HRE and Sweden.

10 Calvinism was not included in the Peace of Augsburg, but rather added later during the negotiations at Westphalia.

11 Barro 2005

12 See full text of the Treaty of Münster for examples of reciprocal grants of sovereignty between signatories. Available at: http://avalon.law.yale.edu/17th_century/westphal.asp.

example, remained at war for another eleven years until 1659.[13] This full embrace, at least on paper, of the concept of absolute state sovereignty is marked by many as the nascent germ of modern international law and our current state system.[14]

This foundation is not without its detractors. For many the idea that Westphalia represents the starting point of modern international law is an egregious reduction of a very complex evolution. Even among those who 'agree' that international law is a uniquely European development there is little consensus as to where or when this development arose. Prospective founders typically include the Greeks,[15] Romans,[16] Medieval Christendom,[17] 'modernity'[18] and, as previously mentioned, Westphalia. The references to ancient text and traditions noted above stand as strong counterbalance to this Eurocentric thesis, as does Montesquieu when he notes "all countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners; for they send and receive ambassadors, and understand the rights of war and peace."[19] Here Montesquieu joins the legions of Cicero in asserting that international law is part of the natural law common to all mankind.

It is safe then to say that the specific genesis of international law is widely disputed. There are clear and documented examples of ancient cultures practicing what is demonstrably international law. This would appear to give the lie to those claiming a

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13 Peace was formalized between them via the Treaty of The Pyrenees in November of that year.
14 For a general refutation of Westphalia thesis see Osiander 2001, 264-265 and Beaulac 2000, 148-177
15 Leech 1877, 2
16 Olga 2003, 193
17 Olga 2003; Verzijl, Jan Hendrik Willem 1968, 444
18 Grewe 2000, 8
19 Montesquieu 1900

modern or European origin. Then again, as is so often the case when it comes to the law, this really depends on how the terms are defined. Many arguing for a European birth insist that while discrete instances of a nascent international law are discernible throughout history, our modern conception of international law with its proscriptive, normative systems and mechanisms first came together from within the territorial confines of Europe.[20] Though this may be a bit of a bait and switch from a historiographical standpoint, as this analysis will deal mostly with the modern application and understanding of international law it constitutes a useful level of analysis.

Research Question

The research question of this study is: Does there exist in modern international law a recognized right to use force in self-defense absent an armed attack by an aggressor? If so, was the so called *Caroline* Doctrine the definitive standard for lawful execution? Does it remain so? Simple though the syntax may be, any answer to this question must first deal with significant issues of definition. The idea of self-defense in international relations has a long and tumultuous history stretching back centuries and subject to continual evolution. Treated on by such luminaries as Cicero, Aquinas, and Grotius, but equally subject to interpretation and execution by legions of nameless bureaucratic functionaries, the 'rules' of self-defense in the international system are notoriously difficult to pin down, especially when one considers the potential distortion incentivized by political expediency.

20 Though even here there is much debate as to when in Europe this occurred, ranging from Westphalia to after WWII right up to the modern era.

As self-defense is a component of international law, consideration must first be given to what, exactly, constitutes international law. The Cornell University Law School's Legal Information Institute defines International Law thusly:

> Traditionally, international law consisted of rules and principles governing the relations and dealings of nations with each other, though recently, the scope of international law has been redefined to include relations between states and individuals, and relations between international organizations. Public international law, concerns itself only with questions of rights between several nations or nations and the citizens or subjects of other nations. In contrast, Private international law deals with controversies between private persons, natural or juridical, arising out of situations having significant relationship to more than one nation...International Law includes the basic, classic concepts of law in national legal systems -- status, property, obligation, and tort (or delict). It also includes substantive law, procedure, process and remedies. International Law is rooted in acceptance by the nation states which constitute the system.[21]

Unlike domestic law then, the basis for judicial authority in international law rests not primarily within juridical bodies (such as supreme courts, or legislatures), but rather with the direct consent of the states themselves. The international system (as currently constituted) is inherently anarchical, with no clear authority apart from the individual sovereignty of its collective members.

Given this innate anarchy and the lack of a clear deliberative body, the sources of international law are perhaps even more important than a working definition of the term. States and most scholars (including the very same Cornell Institute cited above) agree that the two primary sources of international law are, in no particular order, customary and conventional law. Conventional law is derived from international agreements and usually takes the form of contracts between consenting states, otherwise known as treaties. Such treaties can be bilateral, as are the Camp David Accords between the

21 Cornell 19 August 2010

governments of Israel and Egypt, or multilateral including several states and/or multinational organizations, such as the Charter of the United Nations.

Treaties such as those mentioned above create positive international law binding between the parties involved. In some instances these treaties may also give rise to (or otherwise illustrate preexisting) customary law. When treaties are demonstrative of generally accepted norms of international behavior and are accepted as such in fact they can lead to the creation of binding customary international law. Customary law itself is a vaguely defined concept, but is no less accepted by states for it. Concurrent with a shift in the international community towards a more positive approach to international law (stemming from the aftermath of WWII), the Vienna Convention on the Law of Treaties (23 May 1969) attempted to codify some of the more amorphous aspects of customary international law.

In particular the Convention codified methods of treaty interpretation and laid down some foundational guidelines to interpreting customary international law. Specifically, the Vienna Convention expresses in Article 31 that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[22] It did not, however, stop at this common sense instruction. Instead it went on in Article 32 to list:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.[23]

22 Sinclair, I.M. 1984
23 Ibid.

Thus even the codified rules of treaty interpretation rest on a foundation of custom and historical context. Similarly, the Statute of the International Court of Justice in Article 38 specifies:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[24]

Given the above definition of international law (and its sources) it then follows that an answer to the research question can only be found via a careful examination of treaties, custom, and o*pinio juris* dealing with the matter of self-defense. In particular, the use of force in self-defense in anticipation of an armed attack must be examined.

The preemptive use of force in self-defense is hardly a settled matter. Much ink and vitriol have been spilled on the topic, filling the pages of books, articles, and lectures. Though the concept itself may at times appear somewhat straightforward, the dueling fogs of war and history make for a rather dramatic blurring of otherwise bright lines. While admitting that any organizational delineation carries with it the liability of arbitrary distinction, it is possible (and useful) to divide the literature of the field into three broad categories, each with their own subset: Historical/ Foundational, Strict Constructionist, and Loose Constructionist. While a historical analysis of any topic is always relevant in

24 International Court of Justice

terms of providing context and establishing a framework of understanding, the very nature of the loose vs. strict constructionist debate instills even greater import on the historical record. The discourse between these two analytic camps will be parsed in greater detail subsequently, however a rudimentary understanding of the lines of argumentation is vital to comprehending which sources carry the most weight, and why.

Most Strict and Loose constructionists agree that Article II (4) of the United Nations Charter establishes a rigid prohibition on the use (or threat) of force when it states, "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."[25] They further agree that the Charter permits only one exception to this prohibition, self-defense.[26] It is in the nature of that exception that the two ideological camps differ. Strict constructionists argue that the only recourse to force in self-defense permitted under the U.N. Charter is the exception outlined in Article 51 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[27] Based on the text of this article they assert that recourse to force in self-defense is only permissible in those situations where the defending state is responding to an "armed attack." No armed attack, no justifiable self-defense.

Loose constructionists counter via a close read of the very same text. While

25 United Nations 1945

26 Excepting actions taken by the UN itself acting under Chapter VII authority.

27 Ibid. emphasis added

generally agreeing that the plain text of Article 51 does indeed restrict the use of force in self-defense to only those defenders responding to an armed attack, they do not agree that this is the only instance whereby the use of force in self-defense is permissible. In point of fact they rest their argument on the very same line as the strict constructionists: "Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." (Emphasis added)

Rather than focusing preponderantly on the import of the phrase "if an armed attack occurs" however, loose constructionists demand equal consideration be given to the phrase "inherent right." In order for the right of self-defense to be inherent, as the text plainly states, there must be a source of law pertaining to this right that predates the charter. The source of this inherent right, argue the loose constructionists, is customary international law, itself made up of states practices and *opinio juris.* As both strains of logic claim to be firmly grounded in the historical behavior of states, sovereigns, and the writings of contemporary legal theorists and practitioners, recourse to history is among the best tools for analysis.

The Caroline Incident

On the 29th of December a small party of dedicated solders slipped quietly over the border. Risking the potential exposure of a nearly full moon, they stole their way

across a frigid river to board an enemy vessel.[28] A brief firefight ensued leaving one adversary dead. They then proceeded to loose the ship from its mooring, set it ablaze, and send it headlong over a waterfall. Though this account may seem little more than a melodramatic Hollywood cliché conjuring images of heroic action in far flung theaters of combat, the truth is simultaneously less, and more, remarkable. The year was 1837 and the exotic locale was the shores of the Niagara River between New York State and Ontario, Canada.

This clandestine incursion by the British into sovereign U.S. territory occurred against the backdrop of the doomed Upper Canada Rebellion centered in and around Ontario. Routed rebel forces lead by William Lyon Mackenzie and self-proclaimed 'General' Rensselaer Van Rensselaer took refuge on Navy Island in the Niagara River and declared the 'Republic of Canada.'[29] Short on funds, forces, and supplies Mackenzie and Rensselaer redoubled their ongoing efforts to secure support from like-minded Americans, even going so far as to hold recruiting drives in and around Buffalo, New York.[30]

In response, the Federal Government of the United States dispatched a marshal for the northern district of New York to Buffalo charged with suppressing violations of neutrality with regard to the insurrection in Canada. Upon arrival the U. S. marshal reported that he found:

> 200 or 300 men, mostly from the American side of the Niagara River,

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28 NASA Phases of the Moon 1801 to 1900 available at: http://eclipse.gsfc.nasa.gov/phase/phases1801.html

29 The Farmers' Cabinet 1837

30 Hudson River Chronicle 1838

> encamped on Navy Island, in Upper Canada, armed and under the command of "General " Van Rensselaer, of Albany, and that the encampment had received accessions till it numbered about 1,000 men, well armed. This expedition had been organized at Buffalo after McKenzie's arrival, and warrants had been issued for the arrest of the men, but could not be served.[31]

The steamer *Caroline* was employed by the rebels camped on Navy Island and, according to the testimony of the Master, set sail from Buffalo on the 29th of December for the port of Schlosser, NY. While *en route* the *Caroline* landed at Black Rock, NY and ran up U.S. Colors when a volley of musket fire was directed at her from the Canadian side of the river. She subsequently disembarked a number of passengers at Navy Island and proceeded to her destination at Schlosser, arriving at about 3:00 PM. Later that afternoon two additional trips to Navy Island were made after which she put in to Schlosser. As she was battened down for the evening 23 people (all U.S. citizens) requested and received permission to remain on board for the night. At approximately midnight on the night/morning of the 29th/30th a party of armed men boarded the vessel and thus began the events described above.[32]

Chapter II: Literature Review

Historical/ Foundational

Greco-Roman Foundation

While a thorough historical analysis of the foundations of self-defense in the ancient world would take us far beyond the scope of this inquiry, so much of the modern conception has as its foundation Greek and Roman understandings that a brief treatment

31 Miller 1928
32 Ibid.

of the subject is necessary. Both the Greeks and Romans provided numerous causes for legitimate war. Absent these formulaic triggers, recourse to war was not only illegal, but also taboo as the foundation of law and religion were often deeply interwoven.[33] The Roman *ius fetiale* gave a formal legality to matters of war. Commencement of hostilities was considered "just" only when it was carried out in conformity with this set of religious laws. Adherence to the rules was assured and overseen by the *fetiales*, a college of priests who had special responsibility for maintaining peaceful relations among the Latins.[34] For Cicero, the primary justification for recourse to war was, in fact, so that "we may live in peace unharmed."[35]

For both Cicero and the Greeks, resort to arms was permitted on what would today be considered egregious, perhaps even criminal, grounds. For example, the state was permitted to exercise despotic power over those it deemed warranted enslavement, such as the *helots* of Sparta. War was also permitted (and in some cases encouraged) to attain such lofty goals as 'supremacy' and 'glory.'[36] The history of this attitude towards warfare is laid bare in the pages of Thucydides as he Chronicles the Peloponnesian War and its causes. The rise of Athens and her allies (the Delian League) was seen by Sparta and the Peloponnesian League as a direct threat. When the Athenian ally Corcyra initiated an expansionist attack on Corinth the Corinthians turned to Sparta for support and the die was cast.

> Spartans, you still delay and fail to see that peace stays longest with those who are not more careful to use their power justly than to show their determination not to submit to injustice... Here, at least, let your

33 Phillipson 1911, 167
34 Kinga 2011, 33
35 Cicero 1913, Book I Chap. 11, Section 35, page 37
36 Aristotle 1934, Book VII, Chap 13; Cicero 1913, Book I, Chap 11

> procrastination end. For the present, assist your allies and Potidaea in particular, as you promised, by a speedy invasion of Attica [the Athenian countryside], and do not sacrifice friends and kindred to their bitterest enemies, and drive the rest of us in despair to some other alliance.[37]

What followed was a war of truly historic proportions, fitting the classical mold of both expansionist (on the part of Corcyra) and anticipatory (from the Spartan viewpoint) actions.

Saint Augustine of Hippo (354 - 430)

Saint Augustine of Hippo was a preeminent Christian philosopher, bishop, and early Church Doctor. Born in 354 in Roman Africa in the town of *Thagaste* (modern day Algeria), Augustine was a Roman citizen and is credited with establishing the Christian Just War doctrine.[38] His works served as a major inspiration for countless authors in the field, perhaps most notably St. Thomas Aquinas, Francisco de Vitoria, and Hugo Grotius. His treatment of just war (or just causes for war) married Roman philosophy (Cicero in particular) with that of the early church.[39]

His magnum opus, The City of God, provides a heavenly counter to the earthy 'City of Man' and was written against the backdrop of the sack of Rome by the Visigoths in 410. In part a Christian apology for the current circumstances, Augustine sought to counter the idea that abandonment of pagan worship was the cause of Rome's fall.

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37 Thucydides 1991, The Peloponnesian War, Book I, Chap 71

38 The concept of a "just war" was by no means new, having been extensively dealt with in the Indian theological epic the Mahabharata somewhere between the 8th and 9th century BCE.

39 Mattox 2009, 74

Instead, he asserted that dependence of the City of Man[40] on the earthly pleasures of this temporary world was responsible for Rome's recent troubles. More importantly however, he argued that even if Rome (and through it the City of Man) were threatened and destroyed, the City of God would ultimately triumph. In other words, earthly peril is immaterial when considered against Divine favor and the quest for the eternal truth of God, as illuminated through the Christian faith.

Most relevant to this inquiry however is the fact that The City of God in particular, and Augustine's works in general, marked one of the first instances of the Christian church turning away from the pacifism apparently espoused by Christ. In spite of the biblical prohibition on violence laid out in Matthew 5:39, "But I say to you, offer no resistance to one who is evil. When someone strikes you on (your) right cheek, turn the other one to him as well."[41] Augustine proffered the idea that this example was an allegory designed to foster an inward disposition towards a personal philosophy of peace. More specifically, he asserted the claim that adhering to strict pacifism in circumstances where so doing would lead to a greater wrong would in and of itself be a graver sin than failing to turn the other cheek.

As Christianity moved from the fringes of Roman society to the official state religion, this more nuanced approach to institutionalized violence in the name of justice became increasingly relevant. For Augustine the defense of self or others was not only a natural law right, but also potentially a duty, especially if exercised from within the confines of a legitimate authority. "The commandment forbidding killing was not broken by those who have waged wars on the authority of God, or those who have imposed the

40 By which he meant politics, among other things.
41 Holy Bible 2011