Defending Humanity: When Force is Justified and Why
George Fletcher and Jens Ohlin
Print publication date: 2013
Published to Oxford Scholarship Online: April 2015
DOI: 10.1093/acprof:osobl/9780199757213.001.0001

Murder Among Nations
George P. Fletcher
Jens David Ohlin
DOI:10.1093/acprof:osobl/9780199757213.003.0001

Abstract and Keywords
This chapter discusses some of the uncertainties that arise in declaring war under the UN Charter. Under the Charter, military operations are justified in the eyes of international law in only two situations: the authorization of the UN Security Council in order to restore collective peace and security and the military action without the permission of the Security Council due to self-defense from an “armed attack”. It also looks at historical accounts of several nations that used military force and how they used, or maybe abused, the term of self-defense as justification of their actions. It cites four examples: the War on Terror, Invasion of Iraq, Israel's invasion of Lebanon in 2006, and the ongoing War in Darfur.

Keywords: war declaration, UN Charter, military operation, international law, UN Security Council, self-defense, armed attack, War on Terror, Invasion of Iraq, Lebanon invasion

This book takes as its starting point the unquestioned truth that military action is justified under international law only in two situations. First, the United Nations Security Council can authorize the use of military force to restore collective peace...
and security. Second, military action is legal even in the absence of Security Council authorization, but the United Nations Charter explicitly limits this use of military force to self-defense, and only in cases in which an “armed attack” has occurred. Because Security Council authorizations for military force are rare, the universally accepted formula for justifying aggression is the combination of two magic words: self and defense. If your sense of self is big enough, however, you might invoke the principle of self-defense any time your interests are threatened. It is not surprising, then, that dictators and tyrants have also invoked this magic formula. Osama bin Laden and his followers consider the presence of American bases in Saudi Arabia a form of aggression, an intrusion of Western elements in Dar el Islam; thus they bomb symbols of Western power in New York and Washington to defend “the Home of Islam.”

The rhetoric of self-defense was one of the most frequently abused concepts of the twentieth century. As Oscar Schachter wrote in 1989, “When they [states] have used force, they have nearly always claimed self-defense as their legal justification.”¹ This is true in internal politics as well. Stalin claimed he was defending the Soviet Union by engaging in a campaign of homicidal elimination against the Kulaks, bourgeois farmers who supposedly stood in the way of collectivized agriculture. Hitler used an image of Jews as insects attacking the integrity of the German Volk in some of his most graphic anti-Semitic propaganda.²

In the United States, too, politicians have fallen back on self-defense as the metaphor of first resort. They believed that the first major threat after World War II was the Communists. Many people feared that the United States would go the way of Eastern Europe—that we, too, would suffer knocks on the door in the middle of the night. The House Un-American Activities Committee was supposedly the vanguard of defensive operations: committee members would find out who the disloyal (or potentially disloyal) were, and then it was up to the rest of American society to shun them in order to keep our institutions free of Communist contamination. Senator Joseph McCarthy sought to expose one Communist after another, often on the basis of rumor and association. His campaign collapsed when he accused the U.S. Army itself of being a
danger to our internal security. The lawyer Joseph Welch stood him down with a single question: “At long last, sir, have you left no sense of decency?”

Welch engaged in verbal self-defense—an often overlooked variety—and used a deft phrase to put McCarthy in his place. The country held firm against those who wanted to use the fear of Communism to undermine the legal rights of ordinary citizens. When Congress wanted to make it a crime to be a mere member of the Communist Party, the courts said no, membership alone is not a form of aggression and does not warrant the use of criminal sanctions in self-defense.3 Criminals must pose an active threat, something more serious than signing up and getting a membership card.

The next threat to American security was the wave of criminal behavior that hit the streets in the 1970s and 1980s, a threat that made residents of the racially mixed areas we dubbed “inner cities” quiver in their shoes as they walked to the market. In New York City, a Columbia University law professor was murdered in broad daylight in 1972, six blocks from the law school, in a neighborhood where being white was seen as a provocation.4 In 1984, as the violence approached its peak, a black teenager traveling with three rowdy friends approached Bernhard Goetz on the New York subway and asked him for five dollars. Goetz responded by pulling out a concealed .38 Smith & Wesson revolver and shooting all four “threatening” youths, one in the back and another allegedly while sitting down. No one died, but the last teenager hit, Darrell Cabey, was paralyzed for life. Goetz’s trial proceeded amid widespread fear of the perceived enemy on (p.5) the streets and corresponding sympathy for the new “hero” of New York: the subway vigilante who stood up against the “terrorists” of the time.5

In those days we heard the recurrent conservative cry that we were too soft on the real criminals (not Goetz, but the four black kids who got shot) and therefore we must restrict civil liberties to ensure our safety on the streets. Restricting civil liberties was repeatedly advocated in the name of self-defense. This was called “balancing liberty against security.” As David Cole insightfully pointed out, we balanced “their” liberty against “our” security.6 This is the essence of defensive action: we harm others for our own sake.
Self-defense is always directed against an outside aggressor, and those who are alien, foreign, or different are far more likely to be seen as the “other.” Over the past half-century our image of danger has continually shifted: Communists were the original postwar other; then came the street criminals, particularly the black criminals typified by the four “punks” in the Goetz case. Since 9/11, the other has been terrorists, in particular Islamic terrorists. Claims of self-defense are always easier to level against the foreign, the different, or the despised.

1. Rescuing Self-Defense
Self-defense is therefore the ubiquitous, all-purpose justificatory argument. Virtually every wrongdoer appeals to self-defense, no matter how aggressive he or she might be. But if everything is defensible, then nothing is defensible. All-purpose concepts lose their traction and slide into trivia and tautology. This has happened lately to claims of self-defense in international politics. The modern world is rife with terrorism, military aggression, and preemptive war, but no matter who does the killing, the state always appeals to the rhetoric of self-defense. Al Qaeda claims to be defending itself against American imperialism; the United States defends itself against Islamic terrorists. The Palestinians defend themselves against Israeli aggression; Israel defends itself against Palestinian terrorism. The rhetoric of self-defense is so appealing that no one is willing to surrender it. Ever more reason, then, that the confusing strands of self-defense need to be untangled. We still need the distinction between aggression and self-defense too much to surrender it to those who would abuse it. We must defend the notion of self-defense itself.

The need to rescue the concept is most acute at the level of international law, where we encounter so many allegations—but few authoritative judgments—of right and wrong. The few examples we do have, such as the Nicaragua case before the International Court of Justice, and multiple cases involving Israel (against Egypt in 1967, against Iraq in 1981, and, recently, involving the building of a security wall on the West Bank) are mined for all they are worth. But these few examples are not enough to serve as the foundations of a nuanced body of law. As it stands today, international law is
still too thin to provide a reliable framework for understanding even such basic concepts as aggression and defense.

The solution is to draw on the leading domestic legal systems, which have a very rich jurisprudence of statutes and decisions on the permissibility of self-defense. As self-defense was the central issue in the Goetz case, it is also the anchor that orients the law of war. As four black youths surrounded and threatened Bernhard Goetz on the subway, at least four Arab states aimed their hostile power against Israel in June 1967. If Goetz could use necessary force to prevent being mugged, then our tentative judgment should be that Israel could also use necessary force to prevent being overrun.

But recent events have revealed a troubled understanding of self-defense in international law, not just among diplomats but among legal scholars and commentators as well. The first event was the Bush administration’s self-declared War on Terror. After the attacks on 9/11, the Bush administration launched a comprehensive program at home and abroad—all in the name of self-defense. The first targets were the Taliban and Al Qaeda forces in Afghanistan. But the Bush administration soon appealed to the right of self-defense for a series of more aggressive moves: military detentions at Guantánamo Bay, increased domestic police powers under the Patriot Act, the right to declare American citizens unlawful combatants and detain them without charge, military commissions with few procedural protections for unlawful combatants, extraordinary renditions of terror suspects to friendly countries for their interrogation and torture, and the official sanctioning of torture at secret CIA detention facilities in Europe. Although all of these actions raised numerous legal problems under international and U.S. constitutional law, all of them were explicitly justified by our right to self-defense against terrorism.

The second event was the invasion of Iraq. Not content with military strikes in Afghanistan, the Bush administration launched the invasion of Iraq after arguing to the American public, the United Nations, and the world that Saddam Hussein had weapons of mass destruction that constituted an unacceptable threat against U.S. security. Preemptive war against Iraq was therefore justified on the grounds of our self-defense. At the same time, several U.S. intellectuals justified the invasion on the grounds that (p.7) the United States
should come to the aid of oppressed minority groups in Iraq that had long since suffered under Hussein’s oppressive regime. This was an appeal to “the defense of others,” or the idea that all individuals have the right to come to the aid of those who have been unjustly attacked. Of course, the weapons of mass destruction were never found, prompting questions about manipulated intelligence and the degree to which a preemptive war of self-defense can be justified on the basis of false information.

The third event was the Israeli military incursion into Lebanon in the summer of 2006 to stop Hezbollah guerrillas from launching rockets across the border. After the unilateral withdrawal of Israeli forces from southern Lebanon in 2000, Hezbollah guerrillas took up positions there and began firing rockets across the border into Israeli territory. These Hezbollah attacks intensified in the summer of 2006, with frequent rocket launches and civilian casualties. In most cases the rockets were crudely targeted or not targeted at all, and Hezbollah guerrillas simply lobbed the rockets indiscriminately at an Israeli town with no particular target—civilian or military—in mind. Because the Lebanese government was either unwilling or unable to stop the attacks, Israel appealed to its right of self-defense and launched a ground offensive into southern Lebanon to neutralize the guerrillas. This campaign was both militarily and politically disastrous for the Israelis: they had difficulty neutralizing the far-outnumbered guerrillas and convincing the world that their actions were legally justified.

At the same time, a genocidal civil war rages in the Darfur region of Sudan. Government forces are engaged in a bloody war against rebels and have armed sympathetic militia known as Janjaweed to conduct military operations on their behalf, many of which have resulted in civilian casualties, massacres, rape, and forced displacement. The UN Security Council referred the situation to the International Criminal Court, whose prosecutor is considering charges of war crimes, crimes against humanity, and genocide. The government of Sudan has attempted to justify these widespread attacks against civilians as unfortunate collateral damage from their anti-insurgent campaign against the rebels. In other words, the government
is appealing to its right of self-defense as a legal defense for war crimes.

These four ugly situations have brought the right of self-defense into the very forefront of our political and legal discourse, although in each case there is profound misunderstanding about the structure of this right, its scope and limits, and its application in the moral and legal arenas. Although the right of self-defense has served as a bedrock legal principle (p.8) in international law since the adoption of the UN Charter in 1945, it remains somewhat underanalyzed, especially when compared to the principle of self-defense in domestic criminal law, where a well-considered doctrine and rigorous theory have flourished. The disparity might stem from the fact that disputes about self-defense in international law are rarely decided in a legal forum, whereas disputes about self-defense in criminal law must always result in a decision one way or the other that must be justified by a judge in writing, either in jury instructions or in a written opinion, thereby enriching the materials of the law. Although some disputes are brought before the International Court of Justice and legal scholars have produced commentaries on the use of military force under international law, there are basically few forums for actual legal adjudication, especially when one considers that claims of self-defense are made in almost every international military dispute. The result is a comparative advantage for the domestic law of self-defense over the international one.

Of course there are many hotly contested issues in the domestic law of self-defense, too, and the same issues, or most of them, appear in these international law cases. By studying the debates in domestic law, we will uncover sources of knowledge and understanding that, by and large, have been ignored in the literature of international law—as though there were a hidden manuscript containing the secrets of life but no one had bothered to read it.
2. The Collapse of International Law with Criminal Law

Part of the confusion stems from a basic misunderstanding about the relative roles of international law and international criminal law in contemporary discussions of the use of force. This is especially the case during discussions about proportionality, a principle that we focus on in more detail in chapters 4 and 8. For example, during the Israeli campaign against Hezbollah, legal commentators often worried that the military response was not proportional, although few were clear about whether they meant that Israel’s actions were disproportionate because its military objectives went too far, or whether Israel’s methods were disproportionate because they caused too many civilian casualties. Although both questions are about proportionality, the former is about international law and the latter is about international criminal law, and the principle of proportionality works somewhat differently in each area. The word is the same, and to a certain degree the concept is the same, but the questions are different.

To understand this distinction, we must be clear about the contours of international law and criminal law. This is elementary, of course, although it is shocking how many international and criminal lawyers confuse these basic ideas. International law governs relations between nation-states who voluntarily consent to be bound by treaties through which they gain international rights and responsibilities with regard to other nation-states. The UN Charter, the Security Council, and customary international law may also impose duties on nation-states that are not voluntary, but they are still state responsibilities toward other states. For example, states are restricted in their use of military force, as explained earlier, whether they have signed a treaty to that effect or not. If they use military force without Security Council authorization, it must be in selfdefense, and, presumably, the response must be proportional. They may use as much force as is necessary to protect their political independence and territorial integrity. They cannot legitimately continue a war of selfdefense as a quest for vengeance.

Some treaties, such as the Geneva Conventions, impose restrictions on how nation-states can treat individuals, either their own nationals or nationals from other countries who, for example, they capture on the battlefield. Although in this case the beneficiaries of these treaties are individuals, the basic
international obligation is owed by one nation-state to another. It is a promise, as it were, that each nation makes to the international community of nation-states to respect certain human rights. Violations of these human rights treaties yield state responsibility. One state may call another state to account for its horrendous treatment of individuals during war or peacetime. Violations of international law can be enforced by the Security Council, by economic sanctions, by actions before the International Court of Justice, or by public disapprobation before the court of world opinion.

International criminal law, on the other hand, imposes criminal liability on individuals for a very specific set of crimes that have been identified by international criminal statutes, such as the Rome Statute. These statutes typically define acceptable behavior during war, whether international or internal, and they outlaw genocide, war crimes, crimes against humanity, and torture. Individual soldiers and militias can be found guilty of these offenses, as well as their military and civilian supervisors who may have ordered them to commit these crimes or negligently supervised them and allowed the crimes to happen under their watch. Either way, it is individuals who will be prosecuted before an ad hoc tribunal such as the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, or the now permanent International Criminal Court in The Hague, and sentenced to prison. Simply violating an international human rights treaty is insufficient here. Prosecutors must prove that the defendants engaged in particular conduct that meets the definition of an offense that is recognized in international criminal law as one that bears individual criminal liability.

To take one example of how difficult these matters can be, consider that the Nazis were charged at Nuremberg with conspiracy to wage a war of aggression. While it was undoubtedly true that as a political matter the Nazis had engaged in aggressive war by invading Poland, marching across Europe, and invading Russia, the legal case was more complicated. The prosecution, led by a team of U.S. and international lawyers from Allied countries, appealed to the Kellogg-Briand Pact, an international treaty signed in the aftermath of World War I in which the signatories, including Germany, pledged to renounce aggressive war. This treaty was introduced to show that aggressive war was a violation of
international law. But this posed a problem. The prosecution needed to show that aggressive war was not only a violation of international law, implying state responsibility for Germany as a whole, but that it was also a crime bearing individual criminal liability for those who conspired to wage aggressive war. This point was finessed quite delicately by the prosecution; the judges of the International Military Tribunal held that the Nazis could not claim ignorance that aggressive war was wrong.

Similar confusion about international law and international criminal law reigned during the Israeli war with Hezbollah. It is imperative that we separate two distinct questions. The first is how far Israel can go on behalf of its right of self-defense: Does self-defense allow Israel to bomb Hezbollah targets, to bomb government targets in Beirut, to invade southern Lebanon, to invade the whole country and topple the government? What is the proportional response? These are all questions governed by standards of international law for the exercise of self-defense. The second question is how many civilian casualties are acceptable when an individual military commander authorizes an attack against a specific target. According to the Rome Statute, the attack could be a war crime if the civilian casualties are disproportionate to the importance of the military target. As we shall see in chapter 8, determining what is meant by “disproportionate” in these circumstances is a difficult affair. But the important point at this juncture is that proportionality here is judged at the level (p.11) of the individual target and the collateral damage that could result. A disproportionate attack—whatever that is—would violate international criminal law, and soldiers could go to prison for it. This really has little to do with whether Israel was justified in invading southern Lebanon. One has to do with justifying a decision to go to war, the other with how the war is conducted. As we shall see, this is a familiar distinction in discussions about just war theory, though lawyers do not always pay sufficient attention to it. It is possible to conduct a just war unjustly, just as it is possible to conduct an unjust war justly.

These difficulties stem from our hesitation over whether we want to hold nations or individuals responsible when war goes wrong. The first is a function of international law and the second a function of international criminal law; this tracks a basic distinction between collective and individual conduct.
When nations act as a collective group, certain standards apply, and we hold states responsible when they fail to live up to them. When soldiers act as individuals, criminal law applies, and we put them on trial when they break the law. There is much to learn by comparing self-defense in these two arenas. This dialectic runs throughout the entire book.

3. A Word about Methodology
We must be clear about the structure of our reasoning and the mode of analysis we employ. Collective and individual actions are different, but the concepts underlying each are the same. We just finished explaining the differences between criminal and international law. So what are the similarities between criminal and international law, between the actions of individuals and the actions of nation-states? Both are free agents, capable of deliberating and making choices and can be held responsible for their actions. Whether or not a nation is actually a single moral agent—as opposed to just a jumbled collection of individual human beings—is beside the point. This worry is irrelevant because international law treats nations as moral and rational agents, regardless of the degree to which they actually approximate this ideal. International law grants legal personality to nation-states and treats them as the kind of entities that have moral and legal interests, rights, and responsibilities. They can be held accountable for their actions just like human beings.

The legal personality of nation-states is what allows us to compare self-defense in international law with self-defense in domestic criminal law. It is therefore possible to import some of the basic intuitions of criminal law and apply them to the sphere of international relations. We can take well-traveled distinctions from the criminal law of self-defense and bring these tools to bear on the conundrums of self-defense that we find at the international level. However, we cannot simply import basic notions of domestic criminal law blindly. This would be foolish. We do not regard criminal law as providing an intellectual foundation for international law. Criminal law is not primary as a matter of logic, nor is it necessarily more developed in every case. It does not yield essential truths that should be accepted without question. Our methodology is not simply to apply criminal law notions to the field of international law. That would be naïve.
Rather, we must critically examine whether the principles of criminal law generate just outcomes in the sphere of international law. To the extent that these doctrinal devices from criminal law improve our understanding of international relations, we should consider accepting them as amendments to the basic principles of international law. For example, if we have solid criteria for what kind of attacks spark a right to self-defense in criminal law, we should take these criteria, apply them to nation-states, and see what the result might be. The result might be a deeper and more sophisticated doctrine of the international law of self-defense. If, on the other hand, we analyze a basic principle of criminal law and find that, when applied to the international arena, it yields absurd consequences, it would be unwise to import it into international law. Indeed, we might even revisit the principle’s application in criminal law if we see that it has strange consequences at the level of collective action. This would be a warrant for serious intellectual reconsideration for the criminal lawyer as well.

So the process works both ways. We can also take general principles of international law and see how they would fare in the world of criminal law. The best procedure is a rich interplay between the two spheres, charting the consequences of basic principles and making revisions to basic elements of both criminal and international law as warranted. Neither should be regarded as primary, free from skepticism, and immune from revision. John Rawls famously described this procedure as one of “reflective equilibrium”: a coherent balance between general principles and individual judgments that are evaluated in relation to each other.¹¹ For example, in his famous Theory of Justice, Rawls described the basic principles of justice by formulating a thought experiment. What principles of justice would we agree to in an original position if we had to (p.13) bargain behind a veil of ignorance that prevented us from knowing anything about our lives? We would have no information about our race, sex, ethnicity, talents and handicaps, or our economic class in the original position. Bargainers at the social contract table would be bare rational agents, deciding on pure reason alone on principles that, by definition, would be fair for everyone. We would agree on principles fair to everyone because each of us has no idea who we really are.¹² The thought experiment was therefore constructed to write out self-interest and replace it
with pure, disinterested, rational deliberation. One might think Rawls’s thought experiment involved deriving the basic principles of justice from the structure of this original position. But this would be a false interpretation. Rather, the process is one where we develop our intuitions about what would be a fair structure for the original position. For example, it is clearly fair that we stand behind a veil of ignorance. Otherwise, we would just choose principles of justice that benefit only ourselves, and this could never yield adequate principles of justice. With a basic procedure in place for the negotiations, we can see which principles of justice these negotiations would yield and therefore evaluate our intuitions at this end of the spectrum as well. If the principles of justice generated by this procedure are morally suspect (i.e., they strike us as wrong), we go back and revise the basic structure of the original position. And the process works in reverse, too.

Legal scholars are sometimes unused to this style of reflective equilibrium because the law is more hospitable to top-down thinking. We take a constitutional provision as fixed and foundational and determine whether a particular statute transgressed it; we consider a penal law as fixed and we determine whether someone’s conduct violated it. But as many legal scholars have recognized, one must be careful not to descend into formalistic thinking, of blindly applying principles to new situations without also reevaluating a principle’s application to the new context.

In our case, one reason to engage in this process of reflective equilibrium is a belief that both international and criminal law share, at least in part, a deep structure that unifies the two fields. This is not to say that there is some unified body of legal principles from which all of criminal and international law could be derived. Nothing is further from the truth. Rather, the hypothesis is simply that both fields regulate the actions of morally free agents in some way. Specifically, both fields regulate when a free agent may use force in self-defense. It is reasonable to expect that there is enough of a common deep structure here to make a process of reflective equilibrium worthwhile. And it is quite clear that international lawyers are all too ignorant of this deep structure and its application in criminal law, and criminal lawyers are
disengaged from how this deep structure plays out in the field of international relations. It need not be so.

It goes without saying that these types of comparisons are dangerous and fraught with difficulty. It is quite possible to gloss over the relevant differences and find similarities where there are none. We might, as it were, exaggerate the common structure between the two areas, leading to an impoverished understanding of the law and urging revisions to international law that are supported by nothing more than bare intuition and gut feelings. The danger is accentuated by the fact that this comparison between the international law of self-defense and the criminal law of self-defense has never been accomplished before, or at least has never been given anything other than a cursory treatment. But the difficulties inherent in a comparative analysis are no reason to preempt a legal analysis before it even starts. They are only a reason to pledge fidelity to both international and criminal law and to avoid parading either of them while seeking a deeper understanding of both.

4. Lawyers and Philosophers
Our methodology involves more than just a comparison between international and criminal law. Two other modes of inquiry are also synthesized by our work: law and philosophy. The U.S. wars of the past thirty-five years have triggered an intense reaction not only among lawyers but also among philosophers, political theorists, and legislators. Each of these branches of knowledge has a different way of thinking and a different take on war, its ethics, and its principles of legitimacy. Of particular concern to us is the influence that training and institutional loyalties have on the way lawyers and philosophers think and write about war. The remarkable fact is that these two camps ignore each other. Take the influential philosophical text by Michael Walzer and the leading legal text on war and self-defense by Yoram Dinstein. Both books are currently enjoying third editions published in the twenty-first century, yet neither takes notice of the other.\footnote{13}

The international criminal lawyers who write about the Rome Statute are equally indifferent to philosophical and jurisprudential analysis. The Rome Statute rather clearly reflects the principle of “double effect” devised by Aquinas to reconcile self-defense with respect for human life.\footnote{14} Originally, the principle maintained that killing an attacker was permissible \footnote{p.15} (despite the usual prohibitions against killing) because one’s use of force had the primary effect of self-protection: the killing of one’s attacker was simply a secondary or “double” effect that could not be avoided. Indeed, the killing was not even intended, in a sense, because one’s primary and direct intention was simply to save oneself. When applied in military contexts, the principle holds that it is legitimate to bomb military targets provided that the secondary effects to the civilian population are not disproportionately onerous. Thus, as the argument goes, there is a radical difference between targeting civilians and causing one hundred deaths (as a primary effect) and aiming at a military installation with the “collateral effect” of one hundred civilian deaths. The Rome Statute incorporates this principle by penalizing a number of offenses based on intentionally launching attacks on civilians, including one undertaken in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment that
would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁵

In other words, directly attacking civilians is illegitimate, as is aiming at a military target if such a strike anticipates excessive civilian harm relative to the expected military advantage. Yet it is important to distinguish this standard of “excessive” collateral harm from a straightforward utilitarian analysis based on the expected costs and benefits of the action. The military purpose permits a possible skewing of the balancing process in favor of the military. This analysis follows from the principle of double effect; many moral philosophers explicitly subscribe to this doctrine or a version of it,¹⁶ yet the literature of international law appears to be indifferent to the philosophical roots of the Rome Statute. This degree of specialization is unfortunate. It clearly renders the legal commentary less convincing and deprives the law of war of its proper cultural resonance.

In this divide between philosophy and law, neither side concedes that there may be anything to learn from the other.¹⁷ To make the positions more nuanced, a third approach, exemplified by Walzer's important book, stresses the evolution of moral arguments in their historical context. Though it was the specific issues of the Vietnam War that galvanized a generation of moral philosophers to take up the law of war,¹⁸ their mode of argument is timeless. They emphasize moral reasoning, abstracted from concrete historical examples. For example, Thomas Nagel argues for an “absolutist” position based on the Kantian view that we must respect others as persons rather than things. In his view, the utilitarian approach to war reduces the human beings on the other side to things.¹⁹ His test (p.16) for treating someone as a person is whether you could plausibly explain what you are doing to him or her and expect the person to understand.²⁰ You can expect soldiers to understand why you are shooting at them, but you cannot expect civilians to show a similar sympathy for their being the object of aerial bombardment.²¹

We find ourselves caught between these camps, loyal to all, fully committed to none. We also reject the need to make a choice between them. Any serious book about international law and justice must pay attention to history and philosophy as well as law. Philosophers who ignore the law do so at their peril. The lawyers who ignore moral and analytic philosophy—
not to mention great European thinkers like Karl Jaspers—
isoalte themselves from the traditions of Western humanistic
thought. Historical sensitivity requires attention not only to
specific cases, but also to the evolution of the relevant
distinctions in the law of war, among them the distinction
between *jus ad bellum* (just war) and *jus in bello* (justice in the
conduct of war).

In the hope of overcoming some of these professional
divisions, we will specifically explore the differences between
philosophers and lawyers when they write about the law of
war. The three most salient dimensions of comparison are the
role of authority, the relevance of institutions, and the problem
of individualism and the nation as an actor in international
affairs. Discussing these points of difference between
philosophers and lawyers provides an opportunity to introduce
many of the themes of this book.

A. The Role of Authority

Lawyers begin their arguments by relying on authoritative
texts: statutes, cases, and regulations. The relevance of
authority means that an *avocat* arguing under French law will
make different arguments from a lawyer invoking common law
sources. Some lawyers put a great deal of weight on
commentators; others regard commentators as secondary
sources.\(^\text{22}\)

International lawyers appeal to a shared set of authoritative
sources, among them the Hague and Geneva Conventions.
Philosophers, when they reason from first principles, can
reach some of the same results found in these conventions.
For example, Nagel offers an account of the ban on dumdum
bullets and other weapons that inflict more harm than is
necessary to achieve their military objectives.\(^\text{23}\) Similarly, the
philosopher Richard Brandt offers a rule-utilitarian account for
many of the same rules.\(^\text{24}\) Reasoning from first moral
principles, however, philosophers cannot \(\textbf{\(p.17\)}\) account for
many of the most entrenched rules in the law of war, such as
the bans against treachery and the use of poison. We need to
examine the history of these prohibitions and then offer an
account of why standard approaches to moral philosophy fail
to account for them.
For example, Article 23 of the Hague Convention of 1907 addresses poison and treachery side by side in subsections (a) and (b):

Art. 23: In addition to the prohibitions provided by special Conventions, it is especially forbidden

(a) To employ poison or poisoned weapons.
(b) To kill or wound treacherously individuals belonging to the hostile nation or army.

These stable and venerable provisions in the law of war are now incorporated word for word into the Rome Statute. But why are these activities prohibited, and do the two provisions have anything to do with each other?

Moral philosophy has little to offer us by way of explanation. Whether you agree with Nagel that soldiers must treat the enemy as persons, or you side with the utilitarians, the relevant moral arguments focus on the victims, their interests, and their rights. Either the focus is on the status of others as persons, or on their interests in the utilitarian calculus. Neither approach can accommodate an ethic of honor.

The only way to understand the ban against poison and treachery is to invoke the chivalric tradition of warfare. The honorable way to fight is to face the enemy and kill by shooting, dueling, stabbing—even strangling. Poison is dishonorable because it is secret and duplicitous. Treachery is prohibited for similar reasons. Approaching the enemy as a civilian and then opening fire or pretending to be wounded before attacking exploits the law of war for unfair advantage. In warfare it is permissible to stand and deliver—to look the enemy squarely in the eye and shoot; it is not permissible to pretend to be innocent and then use poison to contaminate his food, his land, or his wells.

The association between poison and treachery derives, to be sure, from the chivalric tradition of fighting as a knight and a gentleman. But perhaps the best philosophical account is found in Immanuel Kant’s treatment of jus in bello:
Means of defense that are not permitted include using its own subjects as spies; using them or even foreigners as assassins or (p.18) poisoners [emphasis added] (among whom so-called snipers, who lie in wait to ambush individuals, might well be classed); or using them merely for spreading false reports—in a word, using such underhanded means as would destroy the trust requisite to establishing a lasting peace in the future.26

This strong taboo against deception lies deeply entrenched in Kantian thinking. To the dismay of many modern readers, Kant also treats lying as an absolute evil—with no possibility of justification—but his transition from the morality of deception to a prohibition against spies and snipers is admittedly dubious. (Of course, spying is not prohibited today under the law of war. On the contrary, the Hague Convention of 1907 seeks to protect spies against immediate execution, and snipers are often considered heroes of modern warfare.)27 The important point is that Kant connects the issue of poisoning with the kind of dishonorable behavior that bars future relations of mutual respect.

Kant provided the primary source for jurist Francis Lieber’s code of 1863, which makes the direct association between poison and perfidy in Article 16:

Military necessity does not admit of ... poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

“Perfidy” and “treachery” are synonyms and are used interchangeably. If men fight dishonorably, they cannot return, with self-respect, to a culture of peace; therefore, as Lieber argues, perfidy is banned because it “makes the return to peace unnecessarily difficult.” If the state is at war and its soldiers engage in forbidden means of warfare—poison and perfidy—it humiliates and demeans the adversary and makes it more difficult for the two sides to return to peaceful postwar relations.

To sum up this line of thought, poison is treachery because it kills secretly; it works by laying a trap for the unwary. Even a seemingly innocent meal can be an occasion for treachery. It is widely believed that the Ukrainian leader Victor Yushchenko
suffered dioxin poisoning because he happened to have dinner with the wrong person. Yushchenko was in the midst of a tight and controversial election battle for the Ukrainian presidency in September 2004 when he became severely ill. Images of him (p.19) in the hospital with a severely disfigured face—one symptom of dioxin poisoning—were flashed across television broadcasts. Yushchenko lost the first round of voting by less than 1 percent, but allegations of electoral fraud and massive street protests led to a new election, which he narrowly won. The poisoning prompted charges of covert agency involvement, although the case was never solved by the authorities. Whoever poisoned him did it covertly, like a spy—not like a soldier.

Though poison and treachery have common roots in the history of warfare, the connection seems to have been downplayed by modern commentators and manuals of legal advice for the military. One exception appears to be Air Force pamphlet 110–31, *International Law: The Conduct of Armed Conflict and Air Operations*, which refers to chivalry as one of three pillars of the international law of armed conflict and defines chivalry as a prohibition against treacherous misconduct and the use of poison.\(^{28}\)

The emphasis in the contemporary military manuals seems to be on the danger of poisoning the food and water supply. According to the British military manuals, “Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated.”\(^{29}\) Lieber was as deeply committed to this view as he was to the association between poison and perfidy. As his code posits in Article 70, “The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.” Significantly, Lieber’s explicit ban on poison and perfidy in Article 16 was repeated word for word (without attribution) in the U.S. military manuals up to the end of World War II. In the 1956 army manual entitled *The Law of Land Warfare*, the language shifts to the following commentary on the prohibition against poison in Article 23(a) in the Hague Convention:
The foregoing rule [banning poison] does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses, or to destroy, through chemical or bacterial agents harmless to man, crops intended for consumption by the armed forces (if that fact can be determined).\(^{30}\)

Implicitly, the ban on poison prohibits measures that affect the water and food supply in a way that is harmful to human beings. This adds a different twist. The argument is not only that using poison against enemy troops is perfidious and dishonorable, but that using poisonous means creates great risks for the civilian population. Moral philosophers could easily \((p.20)\) accommodate this shift in emphasis, but they have trouble engaging with the black letter rules of the law of war, preferring instead to deal with the moral principles that are familiar from their own philosophical tradition.

Philosophers think about abstract moral principles without paying attention to the problems of applying the norms in practice. They rarely discuss how to enforce these norms, either because they assume that human beings will always follow them or because they regard questions of application as being needlessly empirical. Indeed, this attitude has a long tradition in philosophy. Kant could favor the death penalty without thinking for a minute about the institutional problems of applying it without error or undue cost or delay. He would be shocked to witness the practice of capital execution in the United States—a process that requires numerous appeals and forces the condemned to wait on death row for years, even decades, for a resolution.

The notion of institutions includes certain architectonic distinctions that structure the law of war. The most basic of these is the radical separation of jus ad bellum and jus in bello. The lawfulness of the war has no bearing on the proper conduct of warfare. As a soldier, regardless of whether you are part of the aggressing or the defending army, you may not violate the strict prohibitions of the Geneva Conventions or the Rome Statute. Though the Latin phrases are arguably of recent vintage, Kant made exactly the same distinction in German in 1797.\(^{31}\) But however well entrenched this distinction is in the law of war, philosophers still balk at it. A good example is Nagel, who argued in 1972 with the Vietnam War in mind, “If the participation of the United States in the
Indo-Chinese war is entirely wrong to begin with, then that engagement is incapable of providing a justification for any measures taken in its pursuit.” In other words, if the war is unjustified and unlawful, everything done in the course of that war is unjustified and unlawful. This is a shocking position. If it were true, and if one believed that the war in Iraq is wholly unjustified, then every act of killing the enemy in Iraq would constitute unjustified homicide.

This way of thinking—disregarding the distinction between jus ad bellum and jus in bello—accounts for the curious use of language in the work of Jeff McMahan. Following Nagel, McMahan refers to the soldiers who fight in an unjust war as “unjust combatants.” Thus every soldier doing his or her duty and refraining from committing prosecutable war crimes still warrants the label “unjust.” This reflects a bias against the military, which we explore in the next section. McMahan’s position draws on the work of the late great liberal philosopher John Rawls. In his classic 1971 work *A Theory of Justice*, Rawls initially took the position that the justice of the war should have a direct bearing on whether a soldier has a right to kill. But later in the same decade, Michael Walzer took a step back from this disconnect between the two dimensions of just war and argued in favor of a presumptive distinction between jus ad bellum and jus in bello, a once well-known distinction from just war theory that had long since fallen out of usage. The only exception, according to Walzer’s influential theory, should be cases of “extreme emergency.” He had in mind the necessity of defeating National Socialism in World War II. Rawls came around to this position in his later work, but some contemporary philosophers, such as McMahan, steadfastly hold on to the notion that all killing in an unjust war is prohibited.

Why should philosophers be reluctant to accept such a conventional truth about the law of war? As a matter of abstract moral principle, Rawls might have been right in 1971. But lawyers think differently because they are concerned about application of the principle over the long run, in a series of factually disputed cases. If the influence of jus ad bellum on jus in bello were an open question, no soldier would ever know for sure what the rules of warfare are. The scope of lawful behavior would depend on a determination of which nation
was the aggressor and which was the lawful defender. This uncertainty would be unfair to individual soldiers, who risk criminal liability if they make a false judgment about the lawfulness of the orders they execute.\(^{36}\)

With only a few exceptions, philosophers rarely deal with how moral norms will be applied and enforced in real life. Or, to the extent that they recognize the problem, they regard it as a matter to be resolved by another academic discipline, such as applied ethics, not philosophy proper. But lawyers cannot even begin to think about norms of conduct without contemplating their application in practice; if an organizational principle in the law of war—such as a flexible and moving boundary between jus ad bellum and jus in bello—does not lend itself to easy application, this is of immediate concern to lawyers. For lawyers, norms enjoy a suspended existence in the abstract, but they come to life in institutions, under the pressure of adapting the norm to real-life situations. Institutions still seek justice in every case, but those within the system understand that perfection is not always possible. Mistakes will be made. The criminal trial is a good example. It requires proof of guilt beyond a reasonable doubt, not proof beyond “every conceivable doubt.”\(^{37}\)

The reason for adopting a rigorous distinction between jus ad bellum and jus in bello is the need for a bright-line cleavage that is workable in (p.22) the field of battle. Soldiers do not have to think about who started the war. They know that, regardless of who started the conflict, certain means of warfare are clearly illegal. Regardless of who the aggressor is, no one may target innocent people, employ poison, use dumdum bullets, or declare that no quarter will be given to prisoners.\(^{38}\) These and a host of other provisions govern battles in the field. The world within the war—insulated by an indifference to who started the war and why—has its own law. It is a law for both sides, and those who refuse to follow this law are liable for war crimes under the Rome Statute.

The institutional perspective of lawyers leads to an entire apparatus of rules that are alien to philosophers. These are the common law rules of evidence, the presumption of innocence, and the privilege against giving testimony and the constitutional rules against using certain forms of evidence. One could say that lawyers are, by their nature, pragmatic
about norms. They want to know not only whether a norm is right, but whether it will work in practice.

Kant is one of the very few philosophers to appreciate this style of legal reasoning. In a dramatic and underappreciated passage, Kant explains the difference between abstract norms and how they work in practice. He gives four examples where the norms in the real world—what he calls, in translation, “Right in the civil condition”—differ from what he calls the abstract theory of Right. His first example is the promise to make a gift. In theory, the promise should not be binding, because there is no reason to assume that the promisor meant to surrender his freedom gratuitously. Yet in practice, courts can assume that the promisor meant to be bound “because otherwise its verdict on rights would be made infinitely more difficult or even impossible.”

For the sake of practical administration, then, courts can adopt a rule that is just the opposite of what should be true in principle.

Kant makes the same point about the hypothetical case of being caught in the rain and borrowing a coat from a stranger. If the coat is stolen from the borrower (who has not paid for the use of the coat), who should bear the loss? In a state of nature, Kant reasons, the borrower should bear the risk, but “before a court,” according to “Right in the civil condition,” the lender should know that the burden is on him to stipulate the conditions on which he expects to receive the coat back. Kant’s reasoning is a bit clearer in the third example, a sincere purchaser who buys from someone who deceitfully represents himself as the rightful owner of an object. In the abstract theory of property, no one can acquire title from someone who does not have it, but “in the civil condition,” a court would decide differently. If someone buys a horse in good faith on the open market, then he should acquire not only a personal right against the seller but also the property in the horse—even if the seller was not the actual owner.

In the final example, Kant defends the use of oaths to induce people to be honest in their testimony. He regards oaths as a form of “superstition,” but he endorses their use on the grounds that they are “expedient.”

These concessions to the necessity of practical justice illustrate an important point. Kant had a vivid understanding of the difference between law and morality. The administration of the law in the world requires compromises with abstract
principle. It would be better in theory to protect the freedom of promisors, lenders, owners, and witnesses against the burdens of conflict in the courts. But in practice, we hold people to their promises; they must take the risk of lending objects without securing their rights; we tolerate owners losing their rights in good-faith commercial transactions; we require witnesses to take oaths. In the same spirit, we should enforce a strict separation between jus ad bellum and jus in bello. In most cases, determining who is aggressing and who is defending is open to debate. As Kant reasoned, judges in court or soldiers in the field should be able to make judgments on the basis of what is certain. The rules in the law of war are difficult enough to apply, and the burden of false judgment carries serious consequences for soldiers who obey an unlawful order—or who disobey lawful orders. From either a moral or a legal point of view, there is no warrant for making these decisions more difficult by requiring soldiers in the field to assess the lawfulness of the war in which they are engaged.

B. The Liberal Bias

Philosophers in the English-speaking world are by and large liberals. Following the work of Rawls, Ronald Dworkin, Bruce Ackerman, and Joseph Raz, they think primarily about individuals as the units of moral action. Thus they have a hard time understanding the basic institutions of the law of war, which are essentially collective in nature. At least, this is the way we thought about the law of war in its formative stages. Lieber captured the spirit well by conceding that “the citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.” Since the adoption of the Geneva Conventions in 1949 we have recognized a more rigorous distinction between combatants and civilians, but at least we accept that all combatants are part of the enemy at war and all should be engaged in the arena of hostilities.

The implication of an arena of warfare is that all participants within it are permitted to kill and all are subject to being killed. It makes no difference whether they are on the front line or providing backup logistical support. It has no legal bearing whether they are aiming to kill another or whether they are asleep. They are all subject to the rules of jus in bello.
Philosophers disregard this foundational principle in the law of war to a remarkable extent. Nagel set the tone for the modern philosophical literature by wondering whether it is permissible to kill enemy soldiers when disabling them might be sufficient for self-defense.\footnote{47} His starting point is that the justification for the use of deadly force must be the harmful threat emanating from the enemy. McMahan continued this pattern by labeling as “materially innocent” all those who do not pose “an imminent threat of harm.”\footnote{48} David Rodin is the latest in this line of philosophers who collapse collective and individual self-defense.\footnote{49}

Indeed, one can see further evidence of the schism on this point between lawyers and philosophers by carefully examining their use of the terminology. For most philosophers, “collective” self-defense refers to the self-defense exercised by the nation as a collective, through its army, against its enemies. But international lawyers mean something completely different when they talk about collective self-defense. To them the term refers to a group of nations that fight to protect their common interests, much as the Allies did in World War II or as one finds in regional defense pacts such as NATO.\footnote{50} What philosophers call collective self-defense (i.e., the defense of the nation) is simply called “individual self-defense” by the international lawyers, a term that philosophers reserve for self-defense exercised by individual human beings. Philosophers are inclined to think of national self-defense as collective because they analyze the army with the same categories that they use to describe criminal gangs. The only way they can think about enemy soldiers is the way they might think about a band of robbers attacking civilians.\footnote{51}

Once they take this fundamentally wrong theoretical turn, philosophers have a hard time explaining why soldiers are not guilty of homicide when they kill other soldiers who are not actually engaged in attacking them. They must speculate about the implicit coercion of military service or other implausible theories to explain the well-accepted distinction between routine military operations and war crimes. Their moral contortions on this issue would come as a great surprise to lawyers, if the latter group ever bothered to read moral philosophy. For lawyers, the immunity of combatants for killing combatants is taken for granted. They understand intuitively
that war is a collective engagement and that when combatants don a uniform and become subject to a chain of command they are no longer protected persons under the Geneva Conventions.

If moral philosophers are confused about whether a combatant may kill other combatants with immunity, they are also in a quandary about civilians who kill soldiers. Because they do not grasp the immunity of combatants, they do not understand that only combatants enjoy immunity conferred by the law of war. Even as the 1977 Protocol I to the Geneva Conventions extends the principles of armed conflict to armed resistance “against colonial domination and alien occupation,” the principles of the Geneva Conventions still apply. These principles presuppose that those engaged in warfare are not protected persons; that is, they are not the sick, the wounded, prisoners of war, or civilians. Interestingly, there is no specific crime in the Rome Statute that covers incidents of civilians attacking soldiers. This absence is telling, since the Rome Statute includes specific provisions for all other categories, including one provision that holds commanders criminally liable for failing to supervise their soldiers. Also, the Rome Statute eliminates immunity for heads of state, who are typically civilians rather than military personnel. But for routine assaults committed by civilians against soldiers, the more appropriate response is prosecution under the applicable domestic law, not the Rome Statute.

The total disconnect between the philosophical and legal literature means that neither side has felt it necessary to justify its assumptions. So far as we can tell, the philosophers have not mounted a serious argument against the collective conception of military forces, and the lawyers never bothered to refute the moral quandaries about why soldiers enjoy immunity for actions committed in the ordinary course of fighting. The philosophical view derives from the principles of liberal individualism that are dominant in the academy today. The more intriguing question is what the lawyers could argue on behalf of their assumptions about jus in bello.

The law of war has developed by justifying exceptions to the general principle that nations engage in war with the entirety of other national entities. Lieber began this process and the Geneva Conventions completed it by refining the exception for “protected persons,” who are protected from the theater of
hostilities by virtue of their status as noncombatants. The moral philosophers now turn the question around and demand a justification, not for the exception, but for the basic rule that combatants enjoy immunity for killing combatants. Generating this justification is more difficult than meets the eye.

As argued elsewhere, we certainly believe that the Romantic sensibilities of the late eighteenth century and early nineteenth—the sweeping (p.26) ideas of Rousseau, Herder, Hegel, and Fichte that emphasized the collective “self” of a people that found expression in a particular state—could justify the traditional view that nations go to war with nations. However, no one is obligated to adopt Romantic rather than liberal (and individualistic) premises. Believing in the collective action and the collective guilt of the nation may be too much of a stretch for many serious thinkers nurtured by individualistic ways of thinking that grew out of the Enlightenment. Yet even more difficult is reconciling the Romantic vision with the conception of protected persons developed by the Geneva Conventions.

Romantics think of nations as actors in history. The nation has a culture, a history, usually a common language, often a unifying religion. The army is but a subset of the nation. Lieber could grasp the idea that nations go to war, and he therefore recognized that civilians must share in the “hardships of the war.” Yet he pleaded for a general principle of minimizing harm to “unarmed citizens.” We are not sure that the foundations of the law of war have advanced much beyond this point.

To account for present assumptions in the law of war, we need a two-stage argument. First, we must explain why the entire nation goes to war; second, we must justify the exceptions for protected persons under the Geneva Conventions. We tackle both of these conceptual problems in this book.

5. History in a Nutshell
Every legal system has a concept of self-defense; the contours of the idea have engaged the imaginations of lawyers and philosophers for thousands of years. The Bible acknowledges the principle of self-defense when it recognizes the right of the homeowner to kill the “thief breaking in.” If the homeowner kills to protect himself, he has no blood on his hands. He carries no “blood guilt,” as Kant called it, and therefore
there is no need for punishment or any other social response. The Talmud supplemented this core idea by adding a right to use defensive force against aggressors threatening human interests. The rabbis reasoned that it was permissible to kill a rodef, or aggressor, who was threatening to kill, rape a man, or commit adultery with a betrothed woman. It was not enough for the immediate use of force that the aggressor threaten to commit a nonviolent capital offense, such as desecrating the Sabbath or engaging in idolatrous practices. These nonviolent crimes constituted great evils, but they did not threaten irreparable harm to a human being, and they were (p.27) not time-sensitive, which meant the community could afford to wait for a trial. Thus there was no right of immediate resistance. These nonviolent crimes were still subject to the death penalty, but only at the hand of a court or divine judgment.

There are many problems in the Talmudic account of self-defense, as we shall see, but one that stood out in the early history of moral philosophy was the kind of intention required for self-defense. Thomas Aquinas was particularly concerned about whether self-defense actually authorized the killing of human beings, and to avoid arriving at the conclusion that it did, he invented a powerful moral doctrine called “double effect.” The purpose of killing in self-defense, he reasoned, was not to kill per se but to ward off the attack. The use of force had to be directed against the attack, not the attacker. The death was a side effect of the legitimate purpose rather than the goal itself.

Many moral philosophers, drawn to the theory of self-defense in the past few decades, speak freely about a right to kill in self-defense. The Oxford philosopher John Gardner argues that the moral reasons for avoiding killing are suspended in cases of self-defense. His reasoning is ingenious, but it fails to make the important Thomistic distinction between the right to kill and the right to ward off the attack. As we shall see, several characteristics of self-defense—most notably, the requirement that the force be necessary—will lend themselves to explanation only if we recognize this vital distinction.

In his sophisticated account of self-defense in both international and domestic law, Rodin argued that self-defense should be considered a “liberty,” used as a term of art in a framework designed by Wesley Hohfeld to account for
interpersonal rights and duties. To call self-defense a liberty in the Hohfeldian sense is to say that neither the original attacker nor anybody else has a right to prevent the defender from using force. Unfortunately, this tells us very little about the nature of the “right” to use force; we have an infinite number of liberties, ranging from going for a walk to speaking our mind about public issues to engaging in religious worship as we please. Hohfeld’s theory would offer us very little guidance if it merely led us to think that self-defense was just another of our many constitutional liberties enjoyed in modern democratic societies.

The Hohfeldian scheme is actually designed to describe interpersonal relationships in private law. One agent bears a right, and so another is endowed with a correlative duty. If A has a right against B, then B is under a duty to A. The Hohfeldian scheme can also account for legal relationships. If A has a power to exercise a contractual option against B, then B is under a liability relative to that power. The idea of a liberty is simply the negation of the right/duty relationship: no one has a right against B with respect to a certain action, and therefore B has a liberty to engage in that action.

Rodin presupposes, as do many moral philosophers, that the right of self-defense arises in an interpersonal relationship between two specific individuals: the aggressor and the victim or defender. The scope of self-defense depends on the way the two interact—on the parties’ relative innocence or fault or on the way one has coerced the other. If there is a right to self-defense, therefore, it should be understood as A’s interpersonal right against B. Because the right applies to B, it is appropriate in the idiom of this philosophical school to speak of a “right to kill” in self-defense. This idea is tempting and obviously seductive, but fundamentally flawed.

Rather, to vindicate Aquinas’s concern about the taking of human life, the proper characterization of self-defense is based not on a right to kill, but on a right to ward off the attack. If the aggressor must suffer as a result, it is a regrettable but unavoidable side effect. This is the way lawyers think about self-defense, both in the domestic sphere and in international law. To understand the lawyers’ point of view, we must review Kant’s theory of self-defense in his Legal Theory of 1797. Kant begins on the assumption that under the law, understood as an ideal set of principles, everyone is entitled to
a maximum sphere of external freedom. This ideal legal system is defined as the Right, or the Law as a set of principles of “ordered liberty.”

Aggressors violate this guaranteed sphere of individual freedom. Because the violation of the Right (Law) is also a violation of personal rights, in every case the aggressor threatens not only an individual right, but the legal order as a whole. The Right (Law) encompasses all personal rights—to life, to property, to privacy, to human dignity. This bundle of rights is often referred to as autonomy. Under a proper legal order, all aspects of personal autonomy, or external freedom, are protected against aggression.

When autonomy is violated, the victim requires a remedy. Suing in a court of law is an appropriate remedy in many cases, but not in all. The first available remedy is to use force to prevent the aggression, thereby preventing the violation of the Right; but this remedy should be available only when the wrongful threat is still pending and it can still be avoided. The key word here is “necessity.” The defendant is allowed to do all that is necessary to prevent the violation of his personal autonomy. If the violation has already transpired, however, then the only lawful response available is to bring a lawsuit to repair the wrong.

Whether the former should be available in all cases of aggression raises a different issue, with a different label, namely, “proportionality.” There might be some cases in which the victim/defender must hold back and not take remedial action by using force. When and if this restraint is required poses difficult questions, which we take up in due course in chapter 4.

This is Kant’s argument for a right of self-defense: a remedy designed to prevent violations of the external freedom that is protected under the principle of Law as guaranteed freedom and ordered liberty. The key to thinking about the right of self-defense, then, is not the relationship with the aggressor but the autonomy of the victim/defender. The defender is morally permitted to do what is necessary to restore his autonomy (or external freedom). To do so, however, he may not necessarily have to kill. He need only use enough force to repel the attack. The idea that self-defense unequivocally generates a “right to
—something you might even enjoy doing—is a perversion of a great legal tradition.

The Kantian method of focusing on individual autonomy replicates, in domestic law, our vision of the independence of nations. It is not farfetched to picture nation-states as islands, each with an absolute right to control what occurs within its territory. When a nation-state suffers aggression, it may repel that violation of its rights by force. Similarly, if we think of every individual as an island, then, by analogy to international law, domestic law entails a right to repel aggressors who trod upon the space of the individual.

The Kantian approach gives due regard to the aggressor’s right to life by instead focusing on the victim’s right to restore his autonomy. There is no right to kill—only a right to take the measures necessary to prevent violations of the defender’s autonomy. This Kantian approach to self-defense has generated a pattern of legal discourse on the Continent that is distinctly different from the prevailing approach in English-speaking countries. German codes and literature have always referred to the right of self-defense as Notwehr, or necessary defense, implying that more interests and rights are protected than just the “self.” In the Kantian conception of the Right, all aspects of personal autonomy are protected by this right of “necessary defense.” This notion of necessary defense will play a key role in our explorations in subsequent chapters as we seek a new interpretation of self-defense in international law.

Notes:

(2.) The Nazis claimed self-defense on all fronts and asserted that the claim was beyond adjudication. This position was rejected at Nuremberg, thus establishing that the question of self-defense is always subject to legal analysis. See Judgment of the International Military Tribunal at Nuremberg, 1946, 1 Trial of German Major War Criminals Before the International Military Tribunal 208 (1947).


(4.) See Emanuel Perlmutter, Professor Slain in Mugging Here, N.Y. Times, September 20, 1972,


(9.) This analogy is explored in greater depth in chapter 6.


(12.) Rawls famously referred to this as the veil of ignorance.


(14.) A full analysis of the doctrine is offered later in this chapter, infra note 49 and accompanying text.

(15.) Rome Statute Articles 8(2)(b)(i), (ii), (iii), and (iv).

(interpreting the proper attitude requiring that “some degree of care be taken not to harm civilians”).

(17.) There are some exceptions, notably in the work of Richard Wasserstrom. See his articles The Relevance of Nuremberg, 1 Phil. & Pub. Affairs 22 (1971) and The Laws of War, 56 Monist 1 (1972). See also R. B. Brandt, Utilitarianism and the Rules of War, 1 Phil & Pub. Affairs 145 (1972), reprinted in Cohen et al., War and Moral Responsibility, at 25 (discussing the rules of the Hague and Geneva Conventions as the choices a rational nation would make from behind a veil of ignorance).

(18.) For a very useful collection of articles, see Cohen et al., War and Moral Responsibility.

(19.) See Nagel, War and Massacre, at 14.

(20.) See T. M. Scanlon, What We Owe to Each Other (Cambridge, Mass.: Harvard University Press, 1998).

(21.) One obvious fallacy of Nagel’s approach is that it would permit civilians to target soldiers. Soldiers might understand why they are being shot at, regardless of who is taking aim. For a discussion of this problem, see Walzer, Just and Unjust Wars, at 325–26.


(23.) Nagel, War and Massacre, at 20–21.

(24.) Brandt, Utilitarianism and the Rules of War.

(25.) Rome Statute Art. 8(2)(b)(xvii) (poison) and 8(2)(b)(xi) (treacherous wounding or killing).

(26.) Kant, Legal Theory at 57.

(27.) Hague Convention (1907) Art. 29–31. Kant’s ban on snipers might also seem a bit extreme in light of evolving practices of warfare. For a cinematic treatment of the theme, see the German film Stalingrad (dir. Sebastian Dehnhardt, 2003). Nothing in the film suggests that the role of the sniper was dishonorable.


(30.) Department of the Army, FM 27–10 The Law of Land Warfare, Point 37, at 18 (1956) (quoted in full).


(33.) Nagel goes even further and muses about whether there is ever a justification for killing in warfare, when disabling the enemy might be a sufficient means of self-defense. Nagel, *War and Massacre*, at 21 n.11.

(34.) Jeff McMahan, *Innocence, Self-Defense, and Killing in War*, 2 J. Pol. Phil. 193, 196 (1994). Because McMahan does not believe that every “unjust combatant” is personally culpable, a more appropriate term would have been “wrongful combatant.”


(36.) Rome Statute Art. 33.


(38.) Declaring that no quarter will be given means that surrendering soldiers will be shot rather than taken prisoner.

(39.) Kant, *Legal Theory* § 37, at 114. The term in German is *Rechtens*, which has no clear English translation. Translator Mary Gregor calls the opposite of “public Right” “Right in civil condition.” *Id*.

(40.) *Id*.

(41.) *Id*. § 38, at 115.
(42.) The law refers to a buyer in this situation as a “bona fide purchaser for value.”

(43.) Kant, *Legal Theory* § 39, at 118.

(44.) *Id.* § 40, at 119.

(45.) Actually, this is not entirely true in modern legal spheres. The common law will not enforce gift promises, and the civil law systems require these promises to be in writing and to be notarized. For analysis of the problem, see Fletcher and Sheppard, *American Law in a Global Perspective*, at 396–98.


(47.) Nagel, *War and Massacre*, at 141 n.11.


(50.) This is how the terms individual and collective self-defense are used in Article 51 of the United Nations Charter.

(51.) Walzer takes a more nuanced approach when he analyzes the justification for shooting a soldier who is relaxing and smoking a cigarette. *See Walzer, Just and Unjust Wars*, at 141–43.

(52.) Protocol I of 1977 to the Geneva Conventions, Article 1(4) referring to common Article 2 of the Geneva Conventions, which says simply that the law of war applies whether the war is declared or not. The United States has not ratified this Protocol.


(54.) Article 7 of the Rome Statute on Crimes against Humanity addresses attacks against the civilian population. Article 8 on war crimes is not clear about who is protected and who is not. Some grave breaches of the Geneva Convention
are defined so that they might include crimes committed by civilians or groups of civilians against military personnel. A good example is Rome Statute Art. 8 (2)(a)(vi) (willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial).

(55.) Rome Statute Art. 28.

(56.) Id. Art. 27(1).


(58.) Lieber Code Art. 21.

(59.) Id. Art. 22 (“The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”).

(60.) Exodus 22:1.

(61.) Exodus 22:2.

(62.) Kant, Legal Theory, at 333 [Gregor at 142].

(63.) Babylonian Talmud, Tractate Sanhedrin 73a.

(64.) Thomas Aquinas, Summa Theologiae II-II, Q. 64, art. 7.

(65.) John Gardner, Fletcher on Offenses and Defenses, 39 Tulsa L. Rev. 817 (2004).

(66.) Rodin, War and Self-Defense, at 33; Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913); Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917).

(67.) This way of thinking is implicit in many codes. See, e.g., MPC 2.04 (“necessary for the purpose of protecting himself against the use of unlawful force”); StGB § 34 (“in order to avert an imminent unlawful attack”).

(69.) StGB § 34.

Access brought to you by: