Humanitarian Intervention

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Abstract and Keywords

This chapter demonstrates how the doctrine of legitimate defense might justify humanitarian intervention in another country facing aggression, whether due to war or other concerns. It explores the possibility of all nations utilizing this defense, not just states who are members of the UN and unrecognized states. As an example, the chapter discusses the Rwandan Genocide. It discusses reasons why nations and states should be able to perform humanitarian intervention and analyzes the Genocide Convention signed by the UN that establishes genocide as a crime.

Keywords: legitimate defense, humanitarian intervention, Rwandan Genocide, Genocide Convention

An armed attack is justified under international law only if authorized by the United Nations Security Council under its Chapter VII powers or by inherent self-defense. But who gets this right? Is it nations, states, or “peoples” in the broadest sense of the word? In this chapter we explore the possibility that the inherent right belongs to nations, not just states admitted to the United Nations. Although there is a tendency
in international law to do away with the concept of the nation entirely and to deal exclusively with states, we believe our view ultimately accords with the collective right of self-determination recognized by the UN Charter. If successful, this argument will have serious implications for our doctrine of legitimate defense: all nations, whether recognized as states or not, might have the right to engage in collective self-defense. Furthermore, the doctrine of legitimate defense would imply that other nations can come to their aid if the same conditions are met. All of these issues must now be critiqued and explored.
1. Intervening for the Sake of Humanity
On April 6, 1994, a missile struck an airplane flying above Kigali and carrying the Rwandan president Juvenal Habyarimana, killing him as well as the president of Burundi. The assassination immediately reignited a bloody civil war that included one of the worst genocides of the twentieth century. Hutu extremists seized the opportunity to launch a genocidal campaign against Tutsi and moderate Hutus. But their weapons of choice were not gas chambers, as the Nazis had used, or futuristic nuclear weapons. Their weapons of choice were machetes.

Roving bands of Hutu militiamen went door-to-door looking for Tutsi and hacking them to death one at a time. Newspaper articles encouraged Hutu civilians to aid in this effort and kill Tutsis that lived in their villages. Radio programs broadcast the location of fleeing Tutsi and called on Hutu citizens to do their duty and kill them. The result was that about eight hundred thousand Tutsi and moderate Hutus were exterminated in a bloodbath. And the killers were not limited to a handful of army commanders and their soldiers. This was a decentralized genocide, carried out by tens of thousands of Hutu militia—and civilians—who picked up a gun, knife, or machete and killed their neighbors just because they were Tutsi.

The killing was not performed in secret. It was done openly and in public, and the world knew about it. Indeed, the world was given advance notice about it. The United Nations already had peacekeepers on the ground who tried to keep the simmering ethnic conflict under control. The troops were under the command of Canadian General Roméo Dallaire, who received intelligence reports from the field that Hutu extremists were stockpiling small weapons and planning something. Dallaire dispatched an urgent report to UN headquarters in New York about the stockpiling and requested more troops to stop the coming attack. His report was ignored, although it is unclear whether Secretary General Kofi Annan saw the report and ignored it or whether the report got lost in the UN bureaucracy. When the killing started, there was nothing Dallaire could do without more troops.

Dallaire never got more troops because the U.S. government was against a larger international military force in the region and had privately expressed its skepticism to other world
leaders. Any attempt to launch a larger international force would have risked a U.S. veto on the Security Council. President Clinton had recently gotten stung by Operation Restore Hope, the U.S. military intervention in Somalia that resulted in the deaths of eighteen U.S. servicemen in 1993. The Somali government had collapsed and the country was being run by rival warlords and their militias. Relief supplies and food were being stolen by gangs and little of it was getting to Somali civilians, many of whom were getting shot and killed. Relief workers were being blocked. U.S. and UN (p. 131) troops were already in Somalia to restore order and pave the way for relief supplies, though little progress was being made.3 Clinton then mobilized U.S. Army Rangers and Delta Force commandoes with orders to arrest the warlord Mohamed Farrah Aideed. But when a Blackhawk helicopter was shot down by Somali militia, the soldiers got bogged down in a vicious street fight. A Blackhawk pilot was taken prisoner, eighteen soldiers were killed, and newspapers around the world carried photographs of Somali militia dragging the bloody corpses of U.S. soldiers through the streets of Mogadishu. Though it was the Somali militia that killed the soldiers, it was these photographs that effectively killed Operation Restore Hope.

After Clinton got the pilot back and withdrew the troops from Somalia, he was wary of “restoring hope” anywhere else in the world. The genocide in Rwanda was clearly horrific, but Clinton was not interested in sending U.S. troops to stop it. In fact, administration officials were unwilling to even refer to events in Rwanda as “genocide” because they felt this might imply a duty to intervene. There was a feeling at the time that the word “genocide” was legally significant. The Genocide Convention, signed by the United States in the aftermath of World War II, imposed a duty on all signatories to “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” The relevant phrase here was the requirement that states must “undertake to prevent” genocide. Some scholars had suggested that not only would the Genocide Convention legitimate foreign intervention, but it might also require intervention as a matter of international law.4 For a while, this argument was the darling of human rights activists, because it turned the tables on the question of humanitarian intervention. Not only was intervention
permitted, but a state’s failure to intervene might violate its international responsibilities. Because Clinton was not ready for intervention, he stayed away from any public statements that might suggest that the administration had concluded that the Hutu rampage was a genocide.

The prevailing wisdom about the Genocide Convention has since changed. Although it was a nice idea, no one really takes seriously anymore the idea that the Convention obligates signatories to launch military forces to prevent genocide. There may be a moral duty to launch military campaigns if a state has the capability to do so, but a moral duty is entirely different from a legal duty under international law. Although the Genocide Convention says that states must prevent genocide, this must be read in tandem with the general assumption of international law that military force is always exercised voluntarily. Even the Security Council (p.132) when it authorizes military action does not require an individual state to participate.

Ironically, the Bush administration has been much more willing to use the word “genocide.” Because the term is not considered to be a trigger for responsibilities under international law, the term is much less significant. The Bush administration has been much less reticent about calling the civil war in Darfur a genocide. There is substantial debate in the academic literature over whether the killing in Darfur is a genocide or “just” a crime against humanity and war crimes. But the important point is that the Bush administration did not believe that calling Darfur a genocide required intervention.

The Bush administration has shown absolutely no interest in intervening in Darfur, much as Clinton showed no interest in intervening in Rwanda. The Darfur situation is considered by all involved to be a humanitarian crisis, but U.S. forces are otherwise occupied by the war against Al Qaeda and the Taliban in Afghanistan, the war in Iraq, and the ever broadening war on terror. The idea of sending troops across the globe for humanitarian reasons to countries where the United States has no strategic interests sounds almost quaint. But the real reason is that U.S. politicians have not forgotten the photos from Somalia, and the U.S. public needs a really good reason to accept their soldiers coming home in body bags. The image of the World Trade Center collapsing on 9/11
provided exactly this kind of reason. Not surprisingly, the image of a starving family, or a burning village in Darfur, does not.

The great exception to this story is Kosovo. The United States refused to intervene in Rwanda and the Sudan, but we bombed Serbia to force its troops from Kosovo. Milosevic had already fought two wars against Serbia’s neighbors in pursuit of an ethnically homogeneous Greater Serbia. Militias rounded up men of fighting age and drove them to fields, where they were executed. Others were held in camps that were a shocking echo of the Holocaust. The fighting ended only when the Dayton Peace Accords were negotiated by Madeleine Albright and Richard Holbrooke and NATO bombed Milosevic and the Serbs to make clear that we would back up our negotiations with military force if necessary.

But just a few years later, Milosevic was back at his campaign of genocide and ethnic cleansing. He claimed that Kosovo historically “belonged” to the Serb “people,” and they would rid their province of all Albanians. A military campaign was launched, but much of the terror was carried out by militia in civilian clothes, who went door-to-door raping women and killing Albanian men. A flood of refugees fled the villages in search (p.133) of safety. This left them even more exposed to Serbian forces. Clinton was motivated to stop the genocide but had learned his lesson from Somalia. If intervention was going to be successful, it would have to follow three simple rules. First, the United States kept troops off the ground as much as possible and relied on air power instead; the use of ground forces was what got us in trouble in Somalia. So we bombed the Serbs instead of launching a ground invasion. Although this limited our options and resulted in collateral damage, at least we were not putting U.S. personnel at risk. Second, we went in with overwhelming firepower. The Somalia mission was carried out by a warship and one unit of Army Rangers and Delta Force commandoes. We would not make the same mistake twice. The war in Kosovo involved an overwhelming number of F-15s and F-16s launching sorties every few minutes and dropping an unprecedented number of bombs. Milosevic knew that we meant business. Third, the United States went in with an international force backed by NATO instead of an international force backed by the United Nations. Indeed, the Security Council never voted to authorize the Kosovo bombing. The member states of NATO, a mutual
defense pact, did. The general in charge of the campaign, Wesley Clark, was the supreme allied commander of NATO Forces. The Russian government was more sympathetic to the Serbs than was the United States, and they indicated that they would probably veto any Security Council attempt to authorize military force to stop the genocide.

This last point raised an uncomfortable question of international law. Because in international law the use of force is allowed only in cases of self-defense against an armed attack or Security Council authorization, the bombing of Serbian forces may have been illegal. Yet the intervention seemed like the right thing to do. There are only two approaches to resolving this tension: either construct a legal argument for humanitarian intervention or concede that the bombing was illegal but that morality required it. If we go the second route, we might argue that the law does not always dictate how we should act. This is a question of policy, which is separate from law. Usually the right thing to do is to follow the law, but not always, especially in cases where law and morality conflict. Sometimes the morally right thing to do requires transgressing the current law because the law needs to be changed. This is clearly true in domestic law, and there is no reason to think it would be any different in international law. The appropriate analogy is the concept of civil disobedience. Before the Civil War, slavery was legal in the United States, but it was clearly wrong. Opposing slavery was the right thing to do, even though it was sanctioned by the law. Perhaps humanitarian intervention should be regarded in the same light as an example of civil disobedience. Although international law says that intervention to stop genocide is illegal, it’s a case where civil disobedience of the law is morally justified.

We think that this view concedes too much. Admitting that humanitarian intervention to stop genocide is illegal under international law involves sacrificing the rhetorical high ground. Although moral arguments may be successful in the court of world opinion, one cannot walk into the Security Council conceding that a course of action violates international law and expect to prevail. The same is true in a domestic court; a judge will not be impressed if you admit that the law is not on your side but that you want him or her to rule your way regardless. It is true that you can sometimes get away with this with a jury by getting them to go with their gut
Another strategy for defending humanitarian intervention is to look beyond the UN Charter to broader principles of international law, such as international humanitarian law, that might justify the use of force. But the danger of these arguments is that they weaken the international prohibition on the use of force, which is the centerpiece of the international legal order. Because the source of this prohibition is the UN Charter, any theory of humanitarian intervention must be focused on the Charter. The argument should fall within the four corners of Article 51 and its standards for the use of force. Otherwise, one risks weakening the legal status of the Charter’s prohibition on the use of force, which would have unfortunate consequences. The Charter would become less effective as a legal document that governs the use of military force in international law. And this weakening of the Charter would not be limited to cases of humanitarian intervention, where we might applaud the fact that the Charter is sidestepped in favor of more moralistic concerns. Once the Charter and the international system is weakened or delegitimized, it is weakened in all situations, including cases of less justifiable use of force, such as brute aggression. Once people start arguing that Article 51 is not the sole standard for justifying the use of force, the door is opened for all kinds of arguments about the use of force.

There are many ways to justify humanitarian intervention within the context of moral theory. One might make a simple utilitarian argument and claim that intervention is justified when it will save more lives than it will cost. If we can start a war that will cost only a few thousand lives but we will save millions of civilians from genocide, then the cost is certainly worth it. Although we have to violate another state’s territorial integrity, this is a small price to pay for the great gains in utility maximization. The structure of this utilitarian argument would be the same for preemptive war. But regardless of the success of these consequentialist theories, they do not make much of a legal argument. Indeed, they are
almost question-begging because they assume that maximizing utility is more important than respecting state sovereignty simply because nothing is more important for a utilitarian than maximizing utility. But this is precisely what we need to demonstrate if a theory of humanitarian intervention is going to be successful: that territorial integrity can be violated in certain extreme situations.

Some theorists offer a more explicitly legal argument for humanitarian intervention by appealing to the recent expansion in international humanitarian law. This field is supported by an explosion in recent scholarship on universal human rights. The structure of this human rights argument suggests that when a state government either purposively commits human rights violations or allows others to commit them and does nothing about it, then state sovereignty is forfeited. A similar move is made in domestic criminal law by theorists who argue that criminals voluntarily forfeit certain rights when they decide to act unlawfully. This explains why society has the right to inflict punishments and deprive felons of their liberty, conduct that otherwise would be impermissible. This human rights argument might even note that most states have signed international treaties obligating them to protect human rights, and even if they have not signed such a treaty, most of the human rights discussed in the Universal Declaration of Human Rights are considered to be nonderogable rights that function as jus cogens (peremptory norms). Individual nation-states cannot decide for themselves if they will respect these rights or not. They are universal rights. Although this avenue of inquiry appears promising, there is nothing in these human rights treaties that implies that states have abrogated their sovereignty if they fail to protect them. The basic principles of Westphalia still apply. And as for the human rights that are codified in the Universal Declaration, there was never any suggestion when it was adopted that it would be used as a justification for intervention.

Offering a convincing account of humanitarian intervention that appeals both to our moral sensibilities and to the existing legal framework (p.136) is more than just a question of rhetorical strategy. It is a question of conceptual clarity as well. The goal of any theory of humanitarian intervention should be to adequately explain why and how such intervention is justified and in what circumstances, given that
the use of force is so restricted by international law. There is no value in trying to commit an end run around the UN Charter and its Article 51 prohibition on the use of force. A successful theory will not only win the hearts and minds of the international community, but it will also convince international judges and members of the Security Council. It is for this reason that we must look to our theory of legitimate defense for a convincing rationale for humanitarian intervention. Our theory of legitimate defense works within the framework provided by Article 51 and links intervention with the general right of self-defense outlined in the Charter and recognized throughout the history of international law. The basic outline of the theory recognizes that the inherent right of self-defense belongs not just to member states of the UN but to national groups as well. When these national groups are attacked, they have the right under international law to defend themselves; moreover, other nations have the right to come to their defense consistent with legitimate defense. A systematic exploration of our account follows.
2. The Rights of Nations
There has been a long-standing tendency within international law to focus almost entirely on states to the exclusion of nations. This is not surprising, given that states are defined in very precise ways. They are geographically defined, constituted by governments (whether legitimate or not), and recognized by the world community as states with legal personality. In the context of international law, legal personality means that a state has the authority to engage in legal relations with other states. It can negotiate and sign treaties, it can borrow and lend money, it can appear before international bodies, and it can be held responsible for its actions. The state is a legal “person” in international law.

Nowhere is this more evident than in the International Court of Justice opinion regarding Israel’s decision to build a defensive wall around the occupied territories. After Israel started construction of the wall, the General Assembly asked the ICJ for an advisory opinion on the wall’s legality. After concluding that the wall was inconsistent with international humanitarian law, the ICJ also rejected Israel’s claim that the wall could be defended by virtue of Article 51 and Israel’s inherent right of self-defense against terrorism. In language at once sweeping and swift, the ICJ rejected this argument, concluding that Article 51 had no relevance in cases where the armed attack comes from something other than another legal state, effectively limiting its application to attacks by a foreign state. If the attack cannot be attributed to a foreign state, according to the ICJ, Article 51 is irrelevant. Never mind for the moment that Article 51 simply refers to situations where “an armed attack occurs against a Member of the United Nations” and says nothing about where the attack must originate from. Under the interpretation proposed by the ICJ, Article 51 does not apply to cases of rogue terrorist activity unsupported by a foreign state. Of course, it may be the case that the wall was illegal for other reasons, although we leave this issue to the side. The ICJ’s categorical rejection of Israel’s self-defense argument is the most extreme example of international law’s myopic fixation on states to the exclusion of other entities.

On the other hand, the nation is a confusing concept with inexact boundaries. We have a good idea of what people mean when they talk about nations, but just start to define one and you run into problems. What are the boundaries between
nations? This is not clear. Nations have something to do with “peoples” and with “culture,” this much is for sure, but how many nations do we have in our world? It is difficult to count.

But it is not difficult to count states. We can just look at the map or at the number of seats at the United Nations General Assembly. Of course, there are liminal cases when a state is recognized by some and not other members of the world community, or when a province considers itself an independent state but another country does not (such as Taiwan). Of course, not all states belong to the United Nations. Aside from these marginal cases, states are much more positivistic than nations. Nations are abstract, metaphysical entities that are difficult to ascertain. But states are easy to define because they have nothing to do with the way the world should be organized—they deal only with how the world is actually constituted, for better or worse. Whether or not Quebec should be its own state is irrelevant to figuring out how many states currently exist north of the United States. The answer is clear: one. No wonder, then, that international law prefers to deal with a clearly defined entity such as a state. States are members of the United Nations, can appear before the ICJ, have ambassadors, and have citizens that emigrate from one state to another. And states are responsible for their actions within the international community. These are all attributes of states.

Although international law has historically focused on states, it does not do so exclusively. International humanitarian law is playing an increasingly important role within the international legal order, as states are required to treat both individuals and groups consistently with human rights treaties, protocols, and declarations (both universal and regional) that they have signed. In many cases, these humanitarian standards protect national groups, including ethnic, linguistic, and religious minorities. It is becoming commonplace to talk of the cultural and political rights of minority groups, and these rights have legal status. Although these groups do not necessarily have legal personality within the system of Westphalian international law, their interests are nonetheless protected by international humanitarian and human rights law. In both peace and war, there are limits to how these minority groups can be treated, and failure to abide by these standards can result in extreme international consequences, including complaints before human rights commissions and cases before
the ICJ. Similarly, the law of genocide is now a major part of both international law and international criminal law. It is an international crime to wipe out an ethnic group, and these prohibitions protect nations and national groups—not states. One might infer from these protections that nations have the basic right to exist under international law and that violating this right by killing individuals who belong to a particular ethnic group is the most serious breach of international law possible.

But nations and peoples have more than just a basic right to exist under international law. They explicitly have the right of self-determination as recognized by Article 1 of the UN Charter, which states that the purposes of the United Nations include promoting “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” This right belongs to all nations and peoples. The International Covenant on Civil and Political Rights is even more explicit. It states, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This right also includes the right of all peoples to “freely dispose of their natural wealth and resources,” and a people cannot be “deprived of its own means of subsistence.” The right of self-determination also has a long history in customary international law. Finally, state parties of the ICCPR are obligated to promote “the realization of the right of self-determination.” In addition, Article 55 of the UN Charter specifically refers to self-determination, and Chapters 11 and 12 on decolonization certainly imply the concept as well. Indeed, these principles of self-determination were critical to the basic deal that led to the creation of the post-World War II UN system. Because the UN system placed such a premium—some would call it a fetish—on world stability, the world’s minor powers worried that the system would simply entrench colonial and regional dominance by the world’s major powers. Because territorial integrity was to be protected at all costs and any deviation from this principle was viewed as illegal aggression, the status quo would be maintained and protected by the international legal order, even if that meant that fundamentally unjust arrangements persisted. It is for this reason that the principle of self-determination was explicitly recognized in the Charter. It was especially important for nations who had recently gained
independence from their colonial masters, and was meant to codify the right of peoples to rebel against colonial domination and fight for self-rule.

This right of self-determination could not have been attributed to states. That is a logical impossibility. To understand this point, we must first understand what this right means. In a sense, the right of self-determination is about autonomy—
them to determine one’s own political, economic, and cultural affairs. Usually, the most appropriate avenue for this autonomy is a state, through which one can establish secure boundaries, run schools and other cultural institutions, and legislate and enforce laws in the public sphere.

If only states had the right to become states, the right would devolve into a tautology. But peoples and nations that are not yet states have the right to determine their future and organize themselves as a state to make it happen. This formulation of the right has some meaningful content. International lawyers are somewhat insensitive to these distinctions, if only because matters of self-determination are rarely decided by international courts or tribunals. One does not go to court to determine if a nation should be recognized as a sovereign state by the international community. The international community decides these matters on the basis of more practical considerations: if a nation has de facto control over its territory, it is considered a state; if not, then not.

The right of self-determination is therefore the right of a people—however one chooses to define it—to be free from domination and have the necessary authority to control their own affairs. Usually, although not always, this means being in control of their own state, which allows them to govern themselves and organize a government around their core principles, assuming of course that they respect universal human rights in the process. In the case of a smaller ethnic group living within a democratic state, self-determination may mean that the political structure is such that they have enough regional autonomy to organize their social and political lives. At the very least they must have access to the political system so that they are adequately represented in the state’s government and can use this electoral influence to press their claims. This is a right that attaches to peoples. It is in this sense that one might say that states do not have a right to self-determination. Peoples or nations have the right,
and it frequently involves the creation of their own state. A state is usually, though not always, the fulfillment of that right. Or, more precisely, the state is the vehicle through which the right of self-determination is usually exercised.

Nationalism is the pursuit of self-determination by a nation.\textsuperscript{18} Nations advocate for their political self-determination by arguing for—or fighting for—their own state. These are nationalistic endeavors, and they are frequently supported by nationalist ideology and nationalist rhetoric. In the most general sense, then, nationalism is the idea that there should be a one-to-one correspondence between nations and states, that a nation must be in control of its own state in order to exercise its own autonomy.\textsuperscript{19} Sometimes nationalistic movements are completed in the political sphere. When they are not, they often transform into terrorism, guerrilla war, rebellion, or revolution, waged against the prevailing governmental powers from whom independence is sought.

The question of secession is a difficult one. When is a national group justified in waging a war of independence against a government that refuses to recognize its political authority, or refuses to allow a democratic referendum to decide the question of separation? It is clear that national groups have a right to meaningful participation in the political process, but it is not clear how far this right extends. On the other hand, it is equally clear that national groups do not always have the right to secede; this would create a world of chaos.\textsuperscript{20} There is an important distinction here between the morality of secession and the legality of secession. Allen Buchanan, among others, has written extensively about the moral right of secession.\textsuperscript{21} He argues that a moral right to secede exists for minority groups, but only when certain conditions are fulfilled. Buchanan situates his argument within the sphere of political theory, and his work has spawned much attention among political scientists. Strangely, though, the right to secede is underdeveloped in international law, which has little to say about the legality of secession, except that it is in principle justified by the principle of self-determination. All that matters is whether other countries recognize a new nation after it attempts to secede. For example, during the Civil War, the North refused to recognize the South’s attempt to leave the
Union. But when are these separations justified, and when are they illegitimate? And who gets to decide?

(p.141) Locke argued that the social contract between citizen and government is based on a fiduciary duty. The government is required to lead so that the citizens can have their basic rights (such as life and property) protected and to guarantee those natural rights that could not be secured in a state of nature. But when a government betrays that fiduciary relationship, the contract is breached and the citizens have the right to cast off their chains and launch a rebellion. This decision can be made only by the citizens; who judges whether this rebellion is justified or not? If any citizen can claim a breach and rebel against the government, it would seem that no government could enforce the loyalty of its subjects. So there has to be some kind of limit on the power of rebellion. Locke had a very instructive answer to this question. He argued that when a government fails to protect the basic rights—life and property—of its citizens, they are justified in waging war against their own leaders. This decision can be submitted to two judges. The first is the world community, to whom we must justify our actions. A national group that rebels against its government must submit its actions before the court of world opinion for adjudication. There is a certain logic to this idea. If a national group wins a war and declares its independence, the world community must decide whether to recognize the group as a state with legal personality, or whether they will consider it a rogue province that has no independent legal authority. So there is a very practical reason why these disputes must be submitted to the court of world opinion. Only the community of world states has the power to admit new members to the community of states that can negotiate and sign treaties and engage in all of the international interactions that come with statehood.

The U.S. Declaration of Independence is a perfect example of this phenomenon. The document explicitly outlines a list of grievances against the king, from taxation to the lack of jury trials, to justify the rebellion and urge the world to recognize the new United States. The list of grievances in the Declaration was not meant as a petition to Britain for redress. The United States had already declared its intention to separate, and the time for redress had passed. The Declaration
was meant to justify our reasons for rebellion to the world community.

According to Locke, the second judge of a rebellion is God. Citizens who engage in a treasonous rebellion will receive their just deserts from their maker during the final judgment.

Debates about nationalism often focus on the difficulties of defining the nation. Clearly, the following elements are important: race, religion, ethnicity, language, a common culture, and geography. But these factors often intersect with each other, making the boundaries between nations (p.142) unclear. Do the Basque belong to the same nation as the rest of Spain? If not, why not? Is it because they have a different language or a different history? What role does Roman Catholicism play in the analysis? Although these problems of definition are perplexing and have spawned an entire academic literature devoted to the subject, we should not let this obscure the basic fact that we have a commonsense understanding of what it means to be a nation, even though it is difficult to define.

It is quite possible that the idea of a nation is a cluster concept, composed of more primitive ideas such as race, ethnicity, language, and culture. Although this may be true, it does not necessarily mean that the idea of nationhood is incoherent or must be rejected. Just because the internal structure of “nationhood” is confusing and may not be atomic is no reason to entirely jettison the idea.23 We ought to be pragmatic about our choice of concepts. And the concept of the nation accords with our commonsense understanding that national groups have a right to self-determination and to be free from colonial rule.

It is difficult to identify nations based on hard criteria or necessary and sufficient conditions. For example, we think of the Swiss as a nation, even though they do not share a common language and were historically a loose confederation more than anything else. Also, the Jews were clearly a people before the creation of Israel, with a common language, religion, and history, even though they lacked geographic continuity and were dispersed worldwide. This, of course, does not mean that either the Swiss or the Jews are not a nation. Rather, this proves the reverse: we cannot always pick out
nations or peoples based on necessary and sufficient conditions.\textsuperscript{24}

It may be more accurate to say that nationhood is a family resemblance concept. Wittgenstein argued in the *Philosophical Investigations* that the concept of a game is a family resemblance concept.\textsuperscript{25} We all know about games: the word encompasses everything from checkers and soccer to crossword puzzles and solitaire. But it turns out that constructing a definition of games is actually quite difficult. Most definitions fall victim to being either under- or overinclusive. But none of this suggests that we do not understand what people are talking about when they refer to games. Rather, it suggests that we define games based on core examples that we know are games (checkers and chess) and then start including other examples that have features or qualities similar to those of checkers and chess. We group individuals together into families based on these similarities. These groupings happen not by iron-clad criteria that we can enunciate in a general and abstract way, but by inductive reasoning and analogy. Nationhood fits into this category of family resemblance concepts. We (p.143) have a definite idea that Russia and France are nations, and we work our way out from there. Other groups share features similar to those of Russia and France—common languages, a common sense of identity—and so we call them nations, too. And so on and so forth. It is therefore imperative that we take seriously this concept of nationhood, even if international law would rather replace it entirely with the concept of statehood.

Another place where nationhood matters is our collective moral psychology. Individuals believe their identity is constituted, at least in part, by their participation in a collective national group. In cases where this national group coincides with a nation-state, the psychological identification may target the state or the government. But this is not always the case. Individuals often feel strongly connected to each other through their common participation in a national group, even when the national group has no control over a nation-state or cuts across state boundaries in some uncomfortable way. Basque individuals think of themselves as Basque, and this perception forms a significant part of their sense of self, their values, and their identity. They value their participation
in the Basque way of life, and if they are blocked from this way of life, they feel wronged.

The moral psychology of nationhood also manifests itself in feelings of pride and resentment. As individuals embedded in a national culture, we feel pride in the accomplishments of our nation. This is not just a function of soccer matches and the Olympics; it is also a function of pride in artistic achievements, a noble history, or literary greatness. We also resent national groups that have engaged in less noble conquests. Consider a Jewish survivor of the Holocaust or a Tutsi survivor of the Rwandan genocide. They may not only resent individuals who are, say, Germans or Hutus, but they may also resent Germans or Hutus as a group—as a nation. Now one must be careful here when thinking about these moral reactive attitudes. A member of an oppressed national group may decide, as a matter of reason and logic, that he is wrong to think such thoughts about a nation as a whole, and that only the individuals who committed these wrongs (Nazi officers, etc.) should be held responsible for their actions. But these rational feelings come into play only after our moral reactive attitudes have emerged. The point is that we cannot help but feel pride in our nation’s accomplishments and resentment at another nation’s harmful conduct, even if we are good Enlightenment liberals who believe that only individuals matter. Our moral reactive attitudes are open to only so much revision.

This territory of collective pride and collective guilt is extremely perplexing. One might be tempted to argue that it is a fiction, a mere (p.144) illusion that should be discouraged and replaced with a cosmopolitan commitment to democratic institutions, not Romantic notions of the nation. But one must take seriously the moral psychology of nationhood, especially where collective shame is concerned. The crimes of one’s nation can result in a kind of collective shame that extends downward to individuals who never participated in the crime, or were not even alive when it occurred. It is in this way that young Germans can feel ashamed of the Holocaust, because it was a crime committed not just by a few Germans, but by Germany itself. Similarly, some Americans feel ashamed by slavery or by the systematic elimination of the Native Americans, even though these crimes were committed long ago. Crimes committed by nations linger in the collective
psychology of those who belong to the nation. We explore the source of these feelings in chapter 8.

These national ties may be illusionary in some respects, but they are significant nonetheless. Nations often exaggerate their homogeneity by rewriting their history, emphasizing unifying elements and deemphasizing centrifugal forces. The notion of a common and unidirectional culture is, to be sure, a fiction. In reality, cultures are fragmented and discordant, full of opposing forces and voices that cannot all be assimilated.

Many of our ideas about the nation come from an analogy to the individual, or the person. We think of nations on the world stage as individuals writ large, interacting with other such individuals, to which we can attribute mental states, intentions, beliefs, and desires, in much the same way that we attribute beliefs and desires to individual persons. Underlying all of this is an assumption that nations are rationally unified in the same way that individual persons are rationally unified. This analogy goes back at least as far as Plato’s *Republic*, if not further. However, this is problematic as an analogy, and it may not even be totally true about individual persons. Individuals are less rationally unified than we would like to believe; we are each full of discordant voices that make up our fragmented self. This is part of the illusion of the classic Enlightenment view of the rational self. It is therefore probably true that we exaggerate the rational and psychological unity of both nations and individuals.

Nevertheless, these “imagined communities” play a significant role in our lives. Whether based on hardened fact or illusion, individuals situate themselves in national cultures that form a major part of their sense of self and their psychological reality. It is therefore crucial to recognize the importance that nations play, not only in our individual lives, but in our interactions with the world. It is often nations that go to war with each other, engage in ethnic cleansing, and defend themselves against genocide. Although international law may be primarily concerned with the actions of nation-states, it is nations that are the more primary unit by which states are eventually composed. And any theory of international self-defense must be sensitive to this fact.

3. Defending the Nation
We must now return to our core dialogue about the right of self-defense. Having discussed the distinction between nations and states, we must ask: To whom do we attribute an international right of self-defense? Does it belong to states or to nations? The general consensus among international lawyers is that the right belongs to states. First, Article 51 refers to member states of the United Nations. Second, post-Westphalia international law has always concerned itself with the right of states, to the exclusion of other entities. The issue is considered so obvious among international legal scholars that it is never addressed. So our task here is to raise a few critical points showing that the obvious is actually not so obvious. There is reason to believe that a deeper understanding of international law will recognize a right of self-defense belonging to nations.

First, Article 51 of the Charter describes the right of self-defense as inherent, or in French, *le droit naturel*. This means of course that the right is not created by the UN Charter, which simply recognizes it. It existed before the Charter came into force, and it was not created by treaty obligations. It is inherent. If this is indeed the case, then we must think seriously about this underlying inherent right and where it comes from. Although the English language of the Charter gives us little guidance about the nature of this right, the French language is instructive. The right is a function of natural law, in the highest sense of the expression, not man-made law.

To whom does natural law grant the right of self-defense? Again, an analogy to the right of individual self-defense will guide our analysis. The right of individual self-defense exists in natural law because it is the right that all individuals enjoy in a state of nature before a social contract creates a functioning government. Similarly, one might think of nations as having existed in a state of nature with each other, forming a social contract that created the Westphalian international legal order. But nations retain the inherent right to self-defense, just as individuals do.

This analogy between nations and individuals forms a crucial part of our understanding of the international legal order: John Rawls argued *(p.146)* in *The Law of Peoples* that peoples bargain together in a second-tier social contract to create the basic institutions of international relations, including the
institution of statehood and the scope of sovereignty. Peoples—or what one might call nations—form the basic unit for the second-tier social contract because nations, just like individuals, are moral agents, capable of forming agreements and being responsible for their actions. According to Rawls, this hypothetical agreement among nations, in the most abstract sense of the expression, justifies the existence of the modern system of nation-states.

Rawls develops an interesting definition of “peoples.” He argues that they have three features: a just constitutional government, a unity based on “common sympathies,” and a moral nature. “Common sympathies” is a phrase borrowed from John Stuart Mill, meant to evoke the variety of attachments—language, religion, ethnicity—that bind a culture together. For the moment, it does not matter what these elements are. For each people the common sympathies might be different. Also, it does not matter if these common sympathies stem from illusion or myth. All that matters is that the common sympathies “make them cooperate with each other more willingly than with other people, desire to live under the same government, and decide that it should be government by themselves, or a portion of themselves, exclusively.”

Once we link this notion of nations bargaining together to agree on the basic principles of the international order with our previous point that the right of self-defense is naturel, then it becomes clear that the right to self-defense extends not just to the modern system of the UN Charter, but indeed extends to the very foundations of the international social contract. In an international state of nature, all nations have the right to defend themselves, and this is the source of the right recognized by Article 51 of the UN Charter.

This last step provides the general outline to our argument. Because nations have a natural right to self-defense in the face of an armed attack, it follows that others have a right to come to their defense as well. This should not be a shocking conclusion. Our previous account of legitimate defense involved a unified approach to self-defense and defense of others under a single umbrella, with a common set of conditions for the exercise of both. It is a natural conclusion of this account that any individual has the right to come to the aid of a victim who would be justified in using self-defense
with his own hand. Similarly, the world community can come to the aid of any nation who has a legitimate claim to self-defense against an armed attack.

(p.147) This forms the basic structure of our defense of humanitarian intervention. When a nation is not in control of its own affairs but is part of a larger state and it suffers an attack against its own interests, either from its own government or from outside forces, it has an inherent right of self-defense. And the world community has the right to intervene on its behalf through the exercise of legitimate defense. Moreover, this exercise of legitimate defense falls within the parameters of Article 51 of the Charter. This is important, because most attempts to justify humanitarian intervention sidestep the Charter by appealing to exterior legal norms. For example, the report of the International Commission on Intervention and State Sovereignty appealed to a principle called “the responsibility to protect” that, when violated, might justify foreign intervention. Although the principle is somewhat grounded in international humanitarian law, the report’s analysis of its relationship to the UN Charter’s Article 2 prohibition on the use of force is decidedly weak. The report simply notes that if the Security Council fails to act, the General Assembly has secondary authority to secure peace and security. However, this authority under Article 11 of the Charter is limited to nonbinding recommendations. This, or any other legal norm, is hardly sufficient to overcome the explicit directive in the Charter—the highest expression of binding law in the international system—that Security Council authorization and the inherent right to self-defense are the only two circumstances that justify military action.

In contrast, our defense of humanitarian intervention works within the four corners of Article 51 and explains how intervention can be justified in an international legal order obsessed with state sovereignty. By appealing to Article 51’s language of droit naturel and légitime défense, we can understand that all states have the right to exercise military force in defense of a nation whose existence is threatened by an armed attack, even if this intervention requires the violation of another’s state sovereignty or territorial integrity. Indeed, it is always the case that using defensive force to
protect a victim will involve a physical transgression against the aggressor. This is precisely the point of legitimate defense.

4. Problems
Our defense of humanitarian intervention, grounded in our theory of legitimate defense, is not without its problems. We must now address its shortcomings and demonstrate that, despite them, legitimate defense offers the most compelling account of foreign intervention under Article 51.

The first obvious point is that our account of humanitarian intervention, like all other accounts, flies in the face of the plain language of Article 51, which limits the right of self-defense to member states of the United Nations. We have gone to great lengths to demonstrate that the right belongs also to nations, not just member states of the UN. However, one might reasonably respond that the language of Article 51 is clear: the signatories of the UN Charter granted the right to member states only, and had they wanted to codify a broader right they would have certainly done so with more explicit language. But they did not, and the language of Article 51 is clear that the right belongs only to member states.

This objection shows an insufficient attention to the structure of Article 51. The article specifically states, “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.” Article 51 is therefore simply a limitation on the Charter prohibition against the use of military force. It says little about the full scope of international selfdefense. It simply reaffirms that member states need not wait for Security Council authorization before they defend themselves against an armed attack. What rights are held by non-member states—whether natural rights or a positive right under international law—is unclear. It is therefore an exaggeration to interpret Articles 2(4) and 51 as forming a blanket restriction on the use of military force. It would be more accurate to see Article 51 as a limited entitlement granted to member states, while leaving the rest unstated. When combined with the explicitly recognized right of self-determination, the language of Article 51 is in fact very compatible with our account of legitimate defense.
The second possible objection to our view is that it relies too heavily on antiquated notions of race and ethnicity in defining nations. The use of racial and other ethnic criteria to define nations offends our Enlightenment sensibilities. We have moved beyond Romantic notions of blood ties and tribal nations and replaced them with cosmopolitan political communities. Neither race nor religion is destiny, and we can all choose the political ties that bind us together. To suggest otherwise is to take race and ethnicity—immutable characteristics both—and bind the choices of free rational agents.

This objection has a kernel of truth, but it exaggerates the racial quality of our notion of nationhood. First, nations are defined based on common connections such as language and religion and a common cultural heritage. There is no reason that these connections need be racially defined. While it is certainly true that members of a nation with a common (p. 149) cultural heritage and a common religion may also share a common race, it is not necessarily so. Second, the objection exaggerates the degree to which these national ties can be simply disregarded and replaced with Enlightenment political commitments. But this totally ignores the fact that many individuals consider their participation in a common national culture (whether built around language, religion, or history) to be essential to their personal flourishing. The meaningfulness of this participation in a common national culture cannot be swept away by fiat.

This leads to another objection about any account of humanitarian intervention that is built around nations. National groups are rarely unified across all categories: language, religion, race, and history. One can always divide up a national group into ever smaller ethnic groups by appealing to other categories. The Italians speak Italian and are Roman Catholic, but regional differences remain, each with a separate historical heritage. Does each qualify as an independent nation? The French are united by their language, but if we insist on unification by religion as well, does this mean that we should divide up the French along religious lines? Do we need to divide up the British between Protestants and Catholics? This would seem to suggest an infinite regress with increasingly small ethnic groups with pure homogeneity and
the same skin color, religion, and language. If we follow this path we end up with many ethnic collectives smaller than the nations we were originally hoping to define.

These problems of definition strike some as insoluble and a reason to abandon a Romantic account of nationhood in favor of a constitutional one. In countries such as Germany, Canada, and the United States, the unifying elements of the national culture are a commitment to basic principles of constitutional identity. In the United States, one might say that a belief in the U.S. Constitution, and in particular the protections of the First Amendment, form the organizing principles around which our constitutional nation is defined. It doesn’t matter where you were born and which God you worship—what matters to be American is that you pledge allegiance to the Constitution and the legal protections of the Bill of Rights, including freedom of speech, religion, assembly, thought, and conscience. These are the core principles that we all share as Americans. One might tell a similar story about the Canadians, who share a commitment to the social welfare state, including nationalized health care, and a tolerance of minority cultures. Germans are loyal to their constitution and the post–World War II political system that they created as a rejection of their Nazi-era racialism. In all three of these examples, skin color, language, and race take a back seat to political freedoms as the organizing ideas of the nation.

Nothing in our account of nationhood requires that all nations be defined without regard to bedrock constitutional principles. In the number of nations that have successfully created a cosmopolitan nation—particularly those with a strong commitment to immigration and religious and linguistic freedom—it is correct to note that there is no ethnic unity to these nations. It may some day be the case that all nations will be organized around these key liberal commitments. But it is an exaggeration to suggest that all nations follow the American model here. Most nations are still unified by a common cultural heritage with an ethnic component, and even the great constitutional democracies of Europe—France, Germany, Italy, and others—are built around a common ethnic heritage that plays a strong role in their national identity in addition to their constitutional and political commitments.
There is a third objection. Occasionally the racial and ethnic
criteria of a national group are not defined by its own
members, but imposed by outside forces. For example, the
distinction between the Hutu and the Tutsi in Rwanda was
largely insignificant until Belgian colonial rule in the
nineteenth century. Although there were Hutus and Tutsis
before then, the distinction was not culturally relevant, and
the two groups were integrated. But when the Belgians
showed up with their nineteenth-century pseudo-science, they
took out their rulers and started measuring foreheads and
noses and making grandiose generalizations about the two
ethnic groups. They claimed that Hutus were physically
stronger, while the Tutsi were more intellectual and suited for
white-collar tasks. The Belgians organized Rwandan society
around these roles, which persisted even after Belgian colonial
rule over Rwanda ended with the country’s independence in
1962.38 This means that the Tutsi nation is, in many ways, a
category that is not internally self-generating, but rather
imposed externally by outside forces.39 Furthermore, this
imposition of group status was arbitrary and based on fiction
and prejudice.

The arbitrariness of these definitions need not trouble us.
Even if national identity is externally imposed by an outside
group motivated by a desire to oppress another group, the
oppressed group—arbitrary though it might be—is nonetheless
held together by how it is viewed by the rest of the world.
Their common persecution may be the most pressing
commonality they share. More specifically, the national group
negatively defined may have, ironically, the best case for
nationalism, because they must exercise self-determination to
create their own nation-state that will protect them from
groups that seek their destruction. Regardless of the origins of
the Tutsi national group, this group status was the reason they
were targeted and that a genocide was launched
against them.40 For this reason they have the right to defend
themselves.

The Genocide Convention restricts the definition of genocide
to conflicts among “national, ethnical, racial, or religious”
groups.41 At first glance, it is unclear if the Tutsis meet this
definition. It is difficult to precisely identify the exact nature of
the distinction between Tutsis and Hutus. The best candidate
is the broad category of ethnic or “ethnical” differences, in the
words of the Genocide Convention, although it is hard to
define ethnicity in such a way that it covers the social
differences imposed on these two groups by the Belgians. But
these difficulties need not concern us, for we ought to look to
the spirit of the Genocide Convention, its birth from
international disgust following the Holocaust, and the
international community’s concern with the killing of a human
“genos.”

We can see now the role that genocide plays in the argument
about humanitarian intervention. Ethnic groups have the right
to be free from oppression and genocide. They have the right
to existence in the most basic sense of the word and the right
to defend themselves in the face of any attempt to use military
force to destroy them, regardless of whether or not these
attacks cross an international border. These rights are droits
naturels. Self-defense is therefore the primary notion in our
analysis. Finally, the rest of the world has the right to come to
their aid as a function of legitimate defense. And this right is
entirely consistent with Article 51 of the UN Charter.
Humanitarian intervention is therefore justified as a limited
case of legitimate defense.

It is also clear now why state consent is not necessary in a
case of defense of others. In cases of humanitarian
intervention, the nation being defended may be the victim of
genocide by the very state whose borders are being crossed. It
would therefore be absurd to require state consent before
defense of others is undertaken. One might argue that the
nation that is defended—say, the Kurds or the Kosovars—
should issue the consent. But the victimized national group
may have no official channels through which it could offer
such consent, neither an assembly for democratic decisions
nor a diplomatic channel to communicate those decisions.
Remember, after all, we are dealing here with a nation, not a
state.
5. Applications
Having outlined our account of humanitarian intervention, we should return to the various examples discussed at the beginning of this chapter. (p.152) The NATO bombing that forced Milosevic and the Serbs from Kosovo was never authorized by the Security Council. As noted, this leaves two possibilities: either the bombing was justified by self-defense or it was illegal under international law. Our doctrine of legitimate defense confirms our intuition that the intervention in support of Kosovo province was justified. Although Kosovo was not recognized as a state with international legal personality, it was a defined geopolitical unit, represented by a coherent ethnic group seeking self-determination. Moreover, Kosovo’s population was under military attack because of its ethnic identity. If the inherent right of self-defense is to have anything other than a purely formalistic meaning, it must apply to an ethnic group seeking protection from ethnic cleansing and genocide. The fact that the Kosovars did not yet have their own state should have no bearing on our analysis. All that matters is that the Kosovo Albanians were a coherent enough ethnic group that another ethnic group sought their destruction. The Kosovars, as a people, had a natural right to defend themselves against genocide when the Serbian-supported militia started going door-to-door to collect ethnic Albanians for displacement, rape, and extermination. The doctrine of legitimate defense suggests that not only did Kosovo have the right to defend itself by launching a war of self-defense, but the world community had the right to intervene on its behalf as a legitimate exercise of defense of others to prevent the Serbs from annihilating the Kosovars. And all of this was consistent with le droit naturel de légitime défense.

Similar arguments apply to Rwanda. Had Clinton or other world leaders been motivated to act, our doctrine of legitimate defense would have justified an intervention on behalf of the Tutsi. Facing extinction at the hands of Hutu Power militia, the Tutsi nation had a natural right of defense against genocide, including the right of self-determination to create their own nation-state where their right to existence could be protected. By linking the inherent right of self-defense (in the UN Charter) with the right to be free from genocide (in the Genocide Convention) and the right to self-determination (in the Universal Declaration and the ICCPR), it is clear that the
rights of Tutsi were internationally recognized. Clinton could have launched a military attack to disarm the Hutus and engage in a legitimate defense of the Tutsi. Unfortunately, this was not to be the case, and the genocide continued without delay.

The case of Somalia is somewhat more complicated. Mogadishu was not gripped by warring ethnic groups, but rather rival warlords who ruled as criminal thugs with private militia. Loyalty was assured based on pragmatic considerations, such as food and money, rather than ethnic heritage. Consequently, it would seem that our doctrine of legitimate defense would not justify intervention on behalf of one warlord’s militia over another. Human rights advocates justified the intervention in Somalia on the grounds that civilians had no access to relief supplies, including food and medicine, because these were being blocked or stolen by the militias. But it is unclear if we can point to a nation or people in Somalia exercising legitimate defense against an armed attack either from within or without. The only possibility would be the Somali people themselves, although this seems implausible as a matter of self-defense. The situation seems best described as a failed government that collapsed into anarchy and civil war. It is therefore possible that our notion of legitimate defense does not justify humanitarian intervention in this situation. Some might count this as a defect of our account because it applies in only narrow factual circumstances. But far from being a defect, this only demonstrates that our account of humanitarian intervention is based on a theory of self-defense that is cognizable under international law, and the facts in any given circumstances must be scrutinized to determine if they fit the parameters of our account. The doctrine of legitimate defense is indeed a narrow one, but it is better to provide an account of humanitarian intervention that is legally convincing than a broad one that applies in many factual circumstances but has no basis in international law.

Finally, consider the case of Iraq. Although the stated rationale of the Bush administration was the existence of weapons of mass destruction, an alternative rationale, stated by some intellectuals, was the protection of Kurds and other ethnic minorities from Saddam Hussein’s wrath. Hussein gassed the Kurds in 1988 and was eventually put on trial for genocide, though he was executed for crimes against humanity before a
verdict could be reached in his genocide trial. Nonetheless, the Bush administration might have argued that the invasion was justified to protect the Kurds and other minorities (such as the less favored Shiites, who were the frequent targets of Hussein's policies) and that an invasion was an exercise of legitimate defense. Unfortunately, there are two problems with the application of the doctrine in this circumstance. First, it is clear that the U.S. government was not motivated by a desire to protect the Kurds. This was an ex post justification that was championed by liberal supporters of the invasion, but it had little bearing on the Bush administration’s conduct, which seemed more concerned with the possibility that Hussein might use weapons of mass destruction against the United States. Second, there is no evidence that an attack by government forces was imminent. Hussein had launched a genocidal campaign (p.154) against the Kurds in 1988 and also put down a Kurdish uprising after the first Gulf War. The Americans allowed Hussein to keep his helicopter gunships, which he used to suppress Kurdish forces in the north. At that point, the United States might have been justified in invoking legitimate defense to join the Kurds in their war of self-defense against Hussein. But the United States at the time had no interest in toppling Hussein and no appetite for more military action in Iraq. The Kurdish uprising was suppressed. One cannot then retroactively invoke legitimate defense a decade after the original attack.

Notes:


(3.) The Security Council authorized military intervention in Somalia with S.C. Res. 794 on December 3, 1992. The Chapter VII authorization was based on the “deterioration of the humanitarian situation in Somalia” and the need for a “secure environment for humanitarian relief operations.”

(4.) For a discussion of an obligation to intervene, see Gray, *International Law and the Use of Force*, at 40.
(5.) For example, the UN report on Darfur commissioned by the secretary general concluded that the war crimes and crimes against humanity committed in the Darfur region probably did not meet the legal requirements of genocide because the attacks were not motivated by genocidal intent. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 130–31 (2005).

(6.) For a critical discussion of the legality of the Kosovo intervention, see Louis Henkin, Kosovo and the Law of “Humanitarian Intervention,” 93 Am. J. Int’l L. 824 (1999) (“In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful”). See also Gray, International Law and the Use of Force, at 38.


(8.) For a detailed consideration of jury nullification, see chapter 9 in Fletcher, A Crime of Self-Defense.

(9.) See, e.g., Antonio Cassese, Ex inuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? 10 Eur. J. Int’l L. 1 (1999). Cassese argues that intervention can be justified only if it is in response to a serious crime against humanity.


(11.) Cassese makes an argument for humanitarian intervention, but the argument is external to the UN Charter. See also Bartram S. Brown, Humanitarian Intervention at a Crossroads, 41 Wm. & Mary L. Rev. 1683, 1740 (2000) (referring to the legal indeterminacy of humanitarian intervention); Daphne Richemond, Normativity in International Law: The Case of Unilateral Humanitarian Intervention, 6 Yale Hum. Rts. & Dev. L.J. 45 (2003) (arguing that unilateral
humanitarian intervention is surrounded by a “normative ambiguity” about its permissiveness under international law, not a strict legal regime governing its use).


(17.) For example, the 1974 *Definition of Aggression* states that nothing in the Definition should “prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right ... particularly peoples under colonial and racist regimes or other
forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter."


(19.) Kedourie puts the point this way: “The doctrine [of nationalism] divides humanity into separate and distinct nations, claims that such nations must constitute sovereign states, and asserts that the members of a nation reach freedom and fulfillment by cultivating the peculiar identity of their own nation and by sinking their own persons in the greater whole of the nation.” See Kedourie, Nationalism, at 71–72.

(20.) But see Christopher Heath Wellman, A Theory of Secession (New York: Cambridge University Press, 2005)


(24.) Philosophers sometimes express this as an inability to define a concept per genus and differentiam.


(27.) For a discussion of the contingent nature of nations and nationalism, see Benedict Anderson, Imagined Communities (London: Verso, 1991). Although nations are arbitrary constructs, it still may be the case that they play an important part in our lives. See also Eric Hobsbawm, The Nation as Invented Tradition, in Nationalism 76–83 (New York: Oxford University Press, 1994). For a stronger argument that nations and nationalism "remain the only realistic basis for a free society of states in the modern world," see Anthony D. Smith, Nations and Nationalism in a Global Era (Oxford: Polity Press, 1995).


(29.) Although individuals often exhibit significant rational disunity, it is nonetheless true that they demonstrate a commitment to rational unity, in the sense that most humans strive to unify their thoughts into a coherent mental picture, even if they ultimately fail to achieve it. Carol Rovane argues that this commitment to overall rational unity is what unifies a person over time. See her book, The Bounds of Agency (Princeton, N.J.: Princeton University Press, 1998), for a full treatment of this thesis.


(32.) See id. at 23–24.

(34.) Consider the following statement in 1987 of the Danish delegate to the UN General Assembly: "Wherever the exercise of the right to self-determination is violated, it is only natural that the matter be dealt with in the world organization. The denial of this right anywhere is a concern of peoples anywhere." UN Doc. 87/349. This statement, which offers a defense of military intervention in support of self-determination, is quoted in Cassese, *Self-Determination of Peoples*, at 156–57, although Cassese argues that military intervention, based on the denial of self-determination, is grounded in practical considerations, not legal assessment.


(36.) *See id.* at § 6.30 ("Although the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position").

(37.) The problem brings to mind the quote attributed to Charles de Gaulle: "How can anyone govern a nation that has 246 different kinds of cheese?"

(38.) The Belgian trusteeship of Rwanda had UN approval.


(43.) The issue is discussed in W. D. Verwey, *Humanitarian Intervention*, in Cassese, *Current Legal Regulation of the Use of Force*, at 46.