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The Ethics of Intervention: Two Normative Traditions

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The human rights focus of President Carter’s foreign policy has renewed interest in the idea of intervention among nations. The tone and orientation of the president’s policy was exemplified in his speech at the United Nations in March 1977:

All signatories of the U.N. Charter have pledged themselves to observe and respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation of freedom occurs in any part of the world.1

The clarity of this statement is intellectually and politically refreshing. The complexity of implementing it involves a host of questions, among them the relationship of intervention and human rights policy in a world still devoid of a centralized political or juridical authority. This paper examines two moments in the development of the normative doctrine on intervention. The purpose of the comparison is twofold: first, to show how different political premises led to diverse normative conclusions about intervention; second, to indicate how these traditions relate to the human rights-intervention debate. The two normative traditions will be compared in terms of (1) their idea of political community; (2) their ethic of war; and (3) their implications concerning intervention.

The Moral Tradition: The Just-War Doctrine and Intervention

The traditional normative doctrine on intervention flourished in the High Middle Ages. The political concept which sustained that tradition envisioned European society as the Respublica Christiana; within this Christian commonwealth the prevailing ethic of war was the just-war doctrine. These two ideas produced a normative case which made intervention a moral duty for political authorities.
The Political Concept: Respublica Christiana

The political system known as the Respublica Christiana took shape in the High Middle Ages. Its roots lay in the Carolingian period and remnants of its structure endured until the sixteenth century. The distinguishing note of the Respublica Christiana was that it was a political community and a religious entity; it was both church and state. Political loyalties were understood in terms of religious beliefs, and faith was a prerequisite for full participation and membership in the society. The unity of society was confirmed and consecrated by a shared perspective of faith visibly embodied in the role the church fulfilled. Both the role of law in society and the structure of authority combined to highlight the idea of a single organic community. The source of all law was the lex aeterna or divine plan for history. The lex aeterna was grasped through the medium of natural law, whose fundamental principles and deduced premises constituted the "higher law" against which all positive law was tested. The unified legal system in turn was reflected in the structure of political authority in the Respublica.

The problem of political authority was cast in terms of spiritual and temporal power, or church and state, but the unity of society was the presumption upon which all discussions of church and state were based. This presumption was reflected in the way medieval authors interchanged terms which today convey distinct and separate realities. One commentator on the period has found that "from Carolingian times onward the words 'world,' 'empire,' 'mankind,' 'Church,' and 'Christendom' were often used as synonymous." The convergence of these themes produced an ethical mind-set of solidarity in the Respublica that described societal relations in familial terms; this in turn imposed upon the members of society a duty of responsibility for others. This philosophical bond of duty in turn was then reinforced by the Christian ethic of love, and the church was the visible organizational structure through which the relations of responsibility were coordinated and exercised. The Pope as principal power in the Respublica insured solidarity by assuming the role of guardian of the rights of states, guarantor of treaties, and architect of the principles governing the laws of neutrality and the rights of neutrals.

The Ethic of War: Just-War Doctrine

The executive power of the papal office included the right to use coercive measures, including the ultima ratio, the use of military force. When faced with the dilemma of reconciling the use of lethal force with the Gospel ethic, the preeminent theorist of Respublica doctrine, Thomas Aquinas (1224-1274), argued that force could be used to protect the unique needs of the political community, namely, security, order, and defense. The right of the state to use force is based upon the responsibility of the state for the public order of society. The content of this public responsibility has two dimensions for Aquinas. The first is the police function of maintaining order within society. The second, closely patterned on the police model but distinct from it, is the power to make war against those threatening the commonwealth from outside. The ethical argument is cast in terms of a police power model. War is not a right of the state or the sovereign to be used at will for any and all purposes; it is a specifically delineated power to be utilized in well-defined circumstances. A moral consensus in the medieval system established a unified world of discourse for evaluating and justifying the use of force in the political community. Commonly recognized moral categories, authoritatively interpreted by the Pope, provided the means for designating specific forms of behavior as a threat to the community and for galvanizing other forces in the community to restrain, repel, and/or punish the culpable party. The just-war doctrine made it possible for states both to identify categories of action as substantial threats to the commonwealth and to legitimize the use of military force as a defensive or punitive measure. The final determination of which empirical situations called for the use of force was entrusted to the Pope as head of the Christian commonwealth.

Intervention in the Respublica Christiana

An exposition of the ethics of intervention based on the medieval model of Respublica Christiana can be divided into two distinct phases of development: The first phase is represented by Aquinas, the second by Francisco de Vitoria (1483-1546) and Hugo Grotius (1583-1645). The basis of the distinction between Aquinas and the later authors is the emergence of the modern state.

Aquinas on Intervention. Aquinas never explicitly evaluated intervention. In the face of this absence of explicit texts, we are forced to rely on inference. Aquinas justifies the use of force as a power inherent in the state for the purpose of protecting the political community. The limits on using force are set by the boundaries of the political community in question. The key question is: How broadly does Aquinas define the political community? Is it a local unit? Does it extend to all of Christendom? Does it extend to the welfare of those beyond Christendom?

To answer this question it is necessary to take account of two distinct themes in Aquinas's political writings which are held in tension and never explicitly resolved by him. On the one hand, as Ernst Troeltsch argues, Aquinas assumed the existence of a Christian society. The medieval themes of a universal society, characterized by moral solidarity, an organic conception of the social system, and the subordination of the state to the church within the social system were integrally woven into the fabric of Aquinas's political and social
The logic of these themes did move toward an interventionist position of universal scope: the bond of solidarity was the basis of the obligation, the note of universalism defined the scope of responsibility in terms of the known Christian world, and the doctrine of the just war as interpreted by the Pope specified the conditions under which the bond of solidarity became operative. The conclusion of this position was that every prince is somehow responsible for the welfare of the total Respublica as well as for his own specifically defined territory. Consequently, he may be called upon to resist aggression or unjust treatment of subjects anywhere in the Respublica Christiana. In these cases, intervention became a duty fulfilled in the name of the wider community.

The thrust of this dimension of Aquinas’s thought, however, cannot be analyzed in isolation from another less explicit but countervailing set of ideas. This second theme indicates that Aquinas was not unaware of the political forces that were to supplant the medieval form of polity. The fragile alliance which these themes created in the mind and thought of Aquinas is described by Thomas Gilby in the following manner:

As a theologian, St. Thomas proclaimed the unity of all men in the Church, and as a philosopher, the unity of the world under divine government; but he stood at a time when western Europe was breaking into separate nations, and as a political writer, he never refers to the universal empire desired by Dante two generations later. Instead, the political unit is the civitas, the regnum or the provincia, a self-governing, self-contained community, possessing the attributes of the Greek city described by Aristotle, but enlarged to territories much larger than those of Athens or Sparta.

The relationship between the regnum and the Respublica is the critical variable in determining the substance and scope of Aquinas’s conception of intervention. Because he assumed the existence of a unified Christian civilization, it seems inconceivable to think of Aquinas adopting anything resembling the later positivist doctrine of nonintervention which would isolate the regnum from the Respublica. On the other hand, Aquinas clearly did not identify himself with the prevailing canonist doctrine of his day which amounted to a papal monarchy, attributing to the Pope the right “to command and issue binding decrees to all nations,” and to intervene extensively, using the military forces of designated Christian princes in the affairs of territories, kingdoms, and regions, even beyond the frontiers of Christendom.

Somewhere between these polar types of the positivist and canonist positions, it is legitimate to infer that Aquinas held an interventionist position, tempered and limited by his sense of the rising demands of national sovereignty. The theological and philosophical premises of the Thomistic ethic would establish, first, an obligation toward the neighbor in need which would transcend the bounds of the regnum, encompassing not only the Respublica, but Christians living in non-Christian lands. Secondly, Aquinas limits the scope of exercise of the obligation in his discussion of the just-war doctrine. If the justification for the use of force is the requirements of the public good, the scope of the public good is defined not in terms of the Respublica but in the more limited trilogy cited by Gilby: regnum, civitas, provincia.

In addition, however, Aquinas proposes a specific set of reasons to justify religious wars, which often involve a form of intervention outside the frontiers of Christendom. Aquinas would legitimize, and even command, at times, an interventionary course of action beyond the regnum in the service of the Respublica.

We can conclude that the elements for an interventionist position are inherent in the political ethic proposed by Aquinas. The approval of intervention in principle does not appear to be a problematical issue for him. On the other hand, Aquinas had a fundamental respect for the rights of sovereigns which logically would preclude an interventionist position as broadly drawn as Regout and Beaufort assert. What we do not find in Aquinas is how this balance between an affirmation of the substance of the right of intervention and a limitation of its scope would work out in specific cases. The casuistry of intervention is found in two later authors, Vitoria and Grotius.

Vitoria and Grotius on Intervention. Francis de Vitoria (1483-1546) lived and wrote at a time when the political framework of Respublica Christiana, so congenial to the just-war premises, had collapsed, and the moral doctrine identified with that framework stood in need of a new defense if it was to remain viable. Vitoria, the first of the classical moralists to confront the modern doctrine of sovereignty, probed the question of intervention in a much more explicit and extensive way than Aquinas had. The reason for his interest derived first of all from the exploration of the New World by his Spanish countrymen. What right, if any, did the colonizers have to intrude into a new land and take possession of property, exercise political dominion, establish trading centers, and subordinate the native population to a status little better than slavery? How was the Christian world to evaluate this use of force?

Faced with these questions, Vitoria used the structure of the just-war teaching to articulate an ethic of intervention. He took the basic categories in terms of which just cause was defined (defensio, punitio, and recuperatio) and he extended their applicability beyond the regnum to a wider frame of reference. Vitoria expanded the standard medieval categories of defense to include the idea of defense of innocent people wherever they are in need. Using a text from the book of Ecclesiasticus, which reads: “God has laid a charge on every individual concerning his neighbor,” Vitoria comments, “and they are all our neighbors.”

In his commentary on Aquinas’s concept of just cause, Vitoria cites the
traditional reasons of recovering property, vindicating rights, and punishing crimes. Then he asks about the scope of these causes: is it permitted to use force to fulfill a treaty with an ally or to aid someone else who is suffering an injury? Vitoria responds affirmatively and gives two reasons for his response. The first justification for aid in these cases is that "a man's friends are in a certain sense one with himself." The second justification is drawn from the existing practice among nations: "If one should suffer injury, it would be permissible to call upon the Portuguese for aid; and therefore, it is in like manner permissible for us to aid them." 12

Vitoria used the ethic of solidarity and the biblical theme of the needy neighbor to define community in terms of the human community, thereby universalizing the principle of solidarity. His reasoning was that the people in question are innocent people and that, by natural law, princes may and can defend the (whole) world, lest injury be inflicted upon it. 13

In lieu of a centralized organ possessing the authority and means to act in the name of the world community, Vitoria proposes to invest each state with the authority to punish criminal action in the name of others under specified conditions. He analyzed eight cases that can be classified as legitimate interventional action. Two cases of intervention are clearly cases of defending innocent lives in which force is justified: to prevent human sacrifice or cannibalism. 14 Three other cases of intervention fit both categories of defense and punishment. They include the following:

1. the right to intervene by force to prevent the harassment of missionaries preaching the Gospel; 15
2. the right to use force to prevent the persecution of Christians by unbelievers; and
3. the right to guarantee that those seeking Christian faith are not hindered from conversion. 16

The sixth case involves intervention where a given populace is not capable of self-government. The dangers of rationalization inherent in such a judgment made Vitoria ambivalent about extending this right to outside powers; his marginal justification of the move was based on the precept of charity, requiring us to go to the aid of those who cannot provide for themselves. 17 Finally, Vitoria seeks to preserve the right of innocent passage and free trade, even at the cost of using force to do so. 18

Although these are very specific examples drawn from Vitoria's historical context, we can extract from them a substantive principle and a style of analysis. The principle is the extension of the right of using force beyond the instances of defense of one's own polity or vindication of its rights; Vitoria asserts this in much clearer terms than Aquinas. The method of analysis involves using the range of just-war categories to limit, qualify, and apply the substantive principle to concrete cases. This method of limitation or qualification is evident in Vitoria's discussion of the right to intervene to ensure the preaching of the Gospel and unhindered access to faith; this right is limited by the principle of proportionality and the principle of right intention in using force.

This mode of analysis, similar in style and substance to the just-war reasoning process, allowed Vitoria to formulate a doctrine of intervention based on the political premises of the Republica Christiana, but shaped to fit the conditions of the emerging state system.

Hugo Grocius, the Dutch jurist who spent most of his adult life in exile from his native land, lived almost a century after Vitoria's death (1583-1645). Although he is regarded as the founding father of modern international law, Grocius is classified here as a representative of the medieval rather than the modern period of international ethics. 19 The reason for this choice can be understood only if we distinguish the political views of Grocius from his ethical vision.

Politically, Grocius is very much a man of the modern period of interstate relations; he was confronted with the finished product of the process that Aquinas had intuitively sensed and Vitoria had grudgingly accepted, the development of the sovereign state. Ethically, however, Grocius was more an heir of the medieval tradition than the forerunner of the modern era. He recognized that the political structure which had supported the medieval ethic was incompatible with the fully developed doctrine of sovereignty, but he sought to rescue the substance of the medieval ethic by providing it with a new foundation. His doctrine of intervention is rooted in his desire to preserve the medieval moral vision.

By the time Grocius wrote De Jure Belli at Pacis (1625), the Republica Christiana had passed into history. The international system was not an interdependent community in which states had some independent existence, it was a group of independent states in search of some minimal form of community to halt the escalating violence engulfing seventeenth-century Europe. This transformation of political life was in part the result of the demise of the church as an acknowledged center of authority in the life of states. The religious and ecclesiastical context in which the natural-law and just-war ethic had held sway had been severely eroded by the combined influences of political change (sovereignty), religious strife (the Reformation), and cultural transformation (the Renaissance).

Grocius held to the natural-law ethic as strongly as Aquinas and Vitoria, but he faced a new problem which had both epistemological and organizational dimensions. Epistemologically, the unified religious world-view which had supported the natural-law ethic had been divided, if not dissolved, by the doctrinal struggle of the Reformation. If the natural-law ethic were going to stand, it would have to stand on its own (as it claimed it could), for it could no
longer rely on universally held religious beliefs for justification. Organizationally, the existence of a center of religious and political authority that served as both teacher and judge in the political community was now destroyed.

Grotius sought to save the moral and legal order from the demise of religious authority after the Reformation by creating a surrogate for the religious community, which had been the foundation of political community in the medieval period. He recognized a continuing bond of solidarity among Christians, but the source of that bond was no longer the Church. It was a legal bond, the law of nature, which created a universal legal community among men. This idea was analogous to the concept of Respublica Christiana, but the distinctive difference in Grotius is that there is no central authority to interpret or enforce the dictates of natural law. The new problem was to demonstrate the existence of a legal order among states: an order of international law. It was Grotius's attempt to grapple with this problem that earned him the title of "Father of International Law."

The fundamental purpose behind this elaborate intellectual exercise of preserving the medieval substance while accepting the modern structure of international life was to keep alive in the minds of people and the actions of states the principles of solidarity, responsibility, interdependence, and charity which Grotius believed were the enduring legacy of the Respublica Christiana. If these principles were to be preserved, the concept of intervention as a moral as well as a political reality also had to be preserved. Recognizing this fact, Grotius set forth his doctrine of the laws and limits of intervention in the international arena.

The basic principle governing intervention was, for Grotius, the right to punish wrongdoing. The extension of the right to punish into the right to intervene was made in Grotius's general discussion of punishment found in Book II of De Jure Belli ac Pacis:

It is also proper to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects. 20

As Grotius defined their role, kings, "besides the care of their own immediate states and subjects, may be regarded as protectors of the human race." 21 The scope of the right to intervene in the Grotian doctrine extended to every part of the human community.

Paradoxically, Grotius, the last of the medieval expositors, set forth the most fully developed articulation of the medieval model of interventionist policy, and cast it in much broader and less restrictive terms than either Aquinas or the later scholastics used.

The similarity between Grotius and Vitoria is clear. Under the rubric of the right of public authorities to punish crime, Grotius reinforced Vitoria's conclusions that the following cases were instances of justifiable intervention:

1. to prevent instances of human sacrifice or cannibalism, 22
2. to prevent harassment of believers or missionaries preaching the Gospel, 23
3. to guarantee the right of innocent passage, freedom of the seas and the right of free trade. 24

Additional possible causes for intervention, affirmed by Grotius and either omitted or disapproved by Vitoria, were:

1. to suppress idolatry and/or atheism in some forms if either or both were harmful to society; 25 to suppress immoral sexual conduct; 26
2. to punish, under specific conditions, a treaty violation or doing harm to diplomatic personages; 27
3. to punish those trading with an enemy belligerent; 28
4. to punish pirates. 29

Finally, Grotius supplemented his casuistic discussion of intervention and justifiable causes of warfare with an analysis of two other themes relating to intervention: "The Causes for Undertaking War for Others" 30 and "Respecting Those Who Are Neutral in War." 31 Both of these chapters served to emphasize the close connection of the just-war doctrine and the doctrine of intervention. The reasons for undertaking war in behalf of others are given in terms of just-war principles: "The causes therefore which justify the principles engaged in war, will justify those also who afford assistance to others." 32 Then Grotius proceeds to use just-war criteria to evaluate the following questions:

1. whom should we aid: a state is not bound to aid or support unjust wars, even of an ally; 33
2. when should we aid: a state is not bound to give aid if there is no possibility of success, 34 or if the use of force would violate the principle of proportionality. 35

The same just-war categories are highly visible in Grotius's discussion of the doctrine of neutrality, a subject which does not appear in either Aquinas or Vitoria. From the premise that no state could be absolved of the obligation of making a moral evaluation of the justice of warfare, Grotius established two rules for guiding the conduct of a neutral nation:

1. it is not permissible to aid the party devoted of just cause, nor to obstruct the party which has a just cause;
2. in cases of doubt, neutrals ought to observe strict impartiality. 36

In summary we can say of just-war teaching on intervention that the political premises of the medieval polity, most visibly embodied in the Respublica
Christiana of the eleventh to the thirteenth centuries, sustained the political and ethical vision of authors such as Vitoria and Grotius long after the polity had disappeared. The importance of this continuity for the doctrine of intervention resides in the fact that the political premises were the product of, and the channel for, a set of ethical values bearing upon intervention.

The Legal Tradition: International Law and Intervention

The post-Grotian tradition of international law moved decisively away from Grotius's teaching on intervention. International society was conceived as a world of sovereign states, each with the right and capability to resort to war in the diplomatic moment of truth. In this context nonintervention was affirmed as the duty of all states; the medieval normative doctrine had been reversed.

The Political Concept: State Sovereignty

The movement from the medieval commonwealth to the modern state system involved the interplay of three major forces: political structures, philosophical ideas, and religious institutions. The political dimension was the appearance and consolidation of the territorial state; the philosophical dimension was the development of a theory of sovereignty; the religious dimension was the division of Christendom by the Reformation.

Ernest Barker described the period from the thirteenth to the eighteenth century in Europe as the movement from Kingdom to State.37 The kingdoms recognized by Aquinas as distinct political entities rested securely within the Republika. The exact relationship of the regnum to the Republika was always less than clear, but the unity of the commonwealth was not seriously questioned. By the eighteenth century, when the kingdoms had become states, in fact and in law, the unity of the medieval world was evanescent.

The key element in the transition from kingdom to state was the emergence of the doctrine of sovereignty exemplified most notably in Bodin's Six Livres de la Republique (1576). Bodin located supreme authority within the nation. The consequence of this view for international relations was that the sovereign state accepted no higher political authority than itself. Faced with this new factual and theoretical reality, each of the normative theorists from Grotius to Vattel sought to salvage the role of natural law in the community of nations. Pufendorf (1632-1694) substituted the state for the role of moral authority previously played by the Church, while Wolff (1679-1754) left the formulation of positive law to scholars, since no universally accepted authority any longer existed.38 In a broadly drawn critique, Leo Gross evaluates the normative consequences of the transition from the Republika to the Westphalia system (1648) in the following manner:

Instead of heralding the era of a genuine international community of nations subordinated to the law of nations, it led to the era of the absolutist states, jealous of their territorial sovereignty to a point where the idea of an international community became an almost empty phrase and where international law came to depend upon the will of states more concerned with the preservation and expansion of their power than with the establishment of a rule of law.39

Each of the sovereign states possessed the attributes of independence, equality, and the right of self-preservation which formed the basis of the principle of nonintervention. The third attribute, declaring each state free to preserve its independence and sovereignty in ways it saw fit, provided the foundation of the new ethic of war: competence de guerre.

The Ethic of War: Competence de Guerre and the Norm of Nonintervention

The shift in normative doctrine from bellum justum to bellum legale was effected by the authors whom James T. Johnson calls the “secularizers” of just-war doctrine, principally Pufendorf, Wolff, and Vattel.40 In Aquinas the use of force is a police action which only those with proper authority can initiate in the name of the political community and in response to an act which is both objectively wrong and subjectively culpable. Vattel's conception departed completely from this penal model. The right to make war belonged to each sovereign ruler, who could resort to force whenever he judged it to be in the interest of his state. This is the substance of competence de guerre, which Johnson defines as the right and authority of each sovereign to decide when just cause for war existed.41 By the eighteenth century war was a policy measure and an act of self-help, not an instrument of vindictive justice.

The changing conception of war and politics is reflected in normative writings after Grotius. Lacking both a sense of international community and a substantive ethic of force, the post-Grotian authors shaped an ethic of intervention which was the antithesis of the traditional view. For Pufendorf, the only justification for intervention was an act of self-help to enforce a state's own rights. Both Pufendorf and Wolff rejected any intervention based on a penal model of community enforcement as an unwarranted intrusion on the equality and liberty of each state. In the name of protecting the independence and liberty of states, the post-Grotian lawyers affirmed a norm of nonintervention.
Nonintervention as the Norm

Emmirich Vattel (1714-1767) and the positivist school inherited and used the doctrines of state sovereignty and competence de guerre in their normative evaluations of intervention. Vattel established the framework regarding sovereignty, war, and intervention from which the later positivist position developed.

For Vattel the law of nations was simply the natural law applied to the life of states. The law of nations is in turn divided into the necessary and the positive law. The positive law applies the necessary law to the mutual relations of states: it differs from the necessary law in the kind of obligation it imposes and the content of its commands. As Vattel defines the necessary law of nations it seems to correspond in binding power and content to the full scope of natural law. The gap between the necessary and the positive law of nations is the concession Vattel makes to the independence of states. The weight that he gives to the liberty of nations requires that the necessary law be diluted to accommodate state behavior. Rather than the Respublica conception of international community within which members have a place and a degree of freedom shaped by responsibilities toward others in the society, Vattel’s conception assumes a situation of independent states whose responsibilities toward each other and relationships with each other are principally determined by the standard of preserving the maximum amount of liberty for each. In rejecting Christian Wolff’s hypothetical construct of a civitas maxima, Vattel contrasted the nature of domestic and international life.

It is true that men, seeing that the laws of Nature were not being voluntarily observed, have had recourse to political association as the one remedy against the degeneracy of the majority, as the one means of protecting the good and restraining the wicked; and the natural law itself approves of such a course. But it is clear that there is by no means the same necessity for a civil society among Nations as among individuals.

For Vattel, liberty was the concept which joined the idea of state sovereignty and the duty of nonintervention. To be sovereign is to be independent; since states equally possess this right of independence, the norm of nonintervention must govern their relationships so that each may enjoy liberty and preserve sovereignty.

Vattel’s evaluation of intervention involved two steps: affirming a rule of nonintervention, then specifying two exceptions to the rule. Following Grotius and Vitoria, he asserts that a state could use force for the three traditional reasons of defense, punishment, and the redress of grievances. Vattel proceeds immediately, however, to exclude intervention from the three legitimating reasons for using force:

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It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offense.

Some consequences of this nonintervention principle include: no state has the right or the responsibility to judge or seek to change the internal administration of another sovereign ruler, “no one may interfere, against a Nation’s will, in its religious affairs without violating its rights and doing it an injury”; and, finally, intervention could not be justified by the restriction or harassment of missionary activity.

In summary, Vitoria and Grotius defended both secular and religious reasons for intervention. Vattel rejected in principle both sets of reasons as infringements on the liberty of the sovereign state. The authors who stood in the Christendom tradition would probably have adapted as their commentary on Vattel’s work the observation of Albert de Lapradelle: “His work, permeated with the spirit of liberty, is not sufficiently imbued with the spirit of solidarity.”

Yet, even as Vattel laid the basic principles for the doctrine of nonintervention which prevailed in the next two centuries of international law, he acknowledged two exceptions to the principle. The exceptions illustrate how Vattel stands as a bridge between the natural-law tradition and the positivist school of international law. In one exception he reflected, almost in spite of the rest of his writing, a dependence on Grotius. The justifying cause in this instance was intervention on behalf of cities rebelling against tyrannical rule. Vattel makes clear that this is an exceptional case: the injustice on behalf of the sovereign must be an “insupportable tyranny”; the citizens themselves must revolt and request or accept outside aid; and Vattel adds the final caution that “this principle should not be made use of so as to authorize criminal designs against the peace of Nations.”

The second exception to the nonintervention principle acknowledged by Vattel was intervention to preserve the balance of power. In recognizing this exception Vattel was building upon Westphalia, which established the basis of the balance of power system, and he was anticipating the writings of the positivists who adapted the principle of nonintervention to succeeding forms of the balance of power system.

Nonintervention seemed to belong to the balance of power system. Yet, even the positivists did not hold to an absolute rule of nonintervention. In the view of T.E. Lawrence, author of a standard text of international law in the positivist period, an absolute adherence to nonintervention is unworkable in a community of states. Intervention should be used sparingly, but it needs to be used effectively at times. The determination of when intervention
should and could justifiably be used in a legal sense engaged all the major authors of the period. The structure of their normative response was patterned on Vattel's approach, but they significantly expanded the number of exceptions to the nonintervention principle. The principal categories of exceptions were: humanitarian intervention; counterintervention or intervention to preserve the balance of power; intervention to enforce treaty rights; and intervention in the name of self-preservation.[51]

Entering the twentieth century, the role of nonintervention was in possession; it was part of a whole systemic perspective on international affairs. World War I called that perspective into question and inaugurated a series of proposals and programs, from the League of Nations through the United Nations, designed to shape a different conception of sovereignty, the use of force, and the meaning of international community. The premises upon which the principle of nonintervention had rested were called into question. The principle today remains part of the contemporary international order, but it has been placed in a new context.

Two Traditions: The Implications for Foreign Policy and Human Rights

The prevailing normative doctrine on intervention is not identical to either of the positions we have examined here. The doctrine in possession today is the evaluation of intervention in the United Nations Charter. If one examines the charter on the three categories used in this chapter, however, it is clear that it draws selectively from the two traditions we have examined.

The charter's premise on sovereignty and force sets it off from the presumptions of unrestricted independence and competence de guerre which characterized the positivist doctrine. At the same time, the U.N. system is qualitatively less integrated and less restrictive of members' sovereign rights than the medieval normative doctrine. The limits on sovereignty in the charter are significantly more restrictive than Vattel or the positivists would allow, but substantially less constraining than the Republica of Aquinas or the societas humana of Grotius.[52] The restrictions on recourse to force in the charter contradict competence de guerre, but the model of collective use of force is much less ambitious than the penal model of Aquinas or Grotius.[53]

The ethic of intervention manifests the same reflection of the two traditions. It is set by two controlling texts, Article 2(7) and the declaration of nonintervention contained in the General Assembly Resolution 2125 (24 October 1970), which join the principle of nonintervention to other principles in the U.N. system. The two principles are directed toward two distinct sets of relationships within the international system. Article 2(7) controls the relationship of the U.N. as an organization toward its member states through the concept of domestic jurisdiction. The article reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[54]

In American political parlance this would be defined as a "states' rights" article; the presumption of political authority rests with the sovereign state's right to control its affairs; the burden of proof in this article rests with the U.N. to show cause for intervention.

It is possible to find in the U.N. Charter other reflections of the mix of the medieval and modern ethics. The medieval system, universalist in principle and procedure, accorded the presumption of law to the central authority; in the medieval relationship of regnum and Respublica, it was the regnum which was subordinate; the charter reverses this dynamic. At the same time the charter does place the domestic jurisdiction principle within a setting of law, responsibility, and obligation which the nineteenth-century understanding of sovereignty would not acknowledge.

The "states' rights" premise of the charter is tested most severely in the U.N. system by the case of human rights. The charter and the Universal Declaration of Human Rights are universalistic in intent, declaring each person to be the subject of a spectrum of rights which states are then bound in principle to respect. This assertion of the human rights of individuals in a document designed for the international community penetrates the traditional shell of state sovereignty and reflects the Grotian conception that the societas humana is first a community of persons, then a society of states.

The potentially radical nature of this conception of rights and law is tempered, however, regarding enforcement of rights. The enforcement issue brings human rights claims up against the domestic jurisdiction claims of states. The compromise, as Vincent has observed, is that for any measures beyond moral persuasion, the principle of domestic jurisdiction holds, unless it can be demonstrated that the denial of human rights constitutes a threat to peace and calls for enforcement procedures under chapter VII of the charter.[55]

This nuanced relationship between the themes of human rights and intervention in the charter severely restricts the capability of the U.N. itself to protect and defend the principles on human rights espoused by its member states. In this situation the burden of activity falls in large measure on what the states themselves are prepared to do in their separate foreign policy measures.

The human rights debate exposes contending conceptions of foreign policy. The school of classical diplomacy, whether reflected in the actions of statesmen or the analysis of scholars, has always found the human rights issue a problematical issue for foreign policy. The premises of the classical view accord closely with normative primacy of the state, the unique role of force, and the governing norm of nonintervention.
Although there have always been normative objections raised against this conception of policy, the striking fact today is that even policy analysts now question its adequacy. In a world marked by increased transnational activity and transnational problems, the role of the state and use of force are placed in a different context. The debate between the "classicists and modernists" (as Stanley Hoffman describes them) is now quite extensive.56

In his U.N. speech the president sided with the modernists in his emphasis on transnational responsibility for states. Such an affirmation neither decides the debate nor solves the problem of policy implementation. The state is still unique in world politics; force still functions as an effective instrument in some cases; transnational links are still fragile. But even to espouse the idea of transnational responsibility in a normative way brings back some of the premises of the older tradition about international community, force and justice, and solidarity among states and people. The guiding norm is still nonintervention, and there are empirical and ethical reasons to espouse this in a world of states. But the pressure on the principle will grow and the resource of the two normative traditions will be needed to determine in principle and practice how foreign policy should be conducted to keep the peace among states while still preserving the rights of people.

Notes

3. For an analysis of the church-state issue as it was perceived in the Middle Ages cf. Y. Congar, Catholicisme, Hier, Autour d'Outre, Demain, vol. III, s.v. Eglise et Etat, pp. 1430-1441 (1952); J.C. Murray, We Hold These Truths: Catholic Reflections on the American Proposition (New York: Sheed and Ward, 1960), pp. 197-211.
6. The political and juridical role of the papacy in the medieval system is extensively explored in M. Zimmerman, "La Crise de l'Organization Internationale a La Fin du Moyen Age," Academie de Droit International, Recueil des Cours, 44 (1933), 319-434; cf. also Wilks, cited.


8. R. Regout, La Doctrine de la Guerre Juste de Saint Augustin a Nos Jours d'Apres les Theologiens et les Canonistes Catholiques (Paris: A. Pedone, 1934); D. Beaufort, La Guerre Comme Instrument de Secours ou de Punition (The Hague: Martinus Nijhoff, 1933). While both authors assert that Aquinas would hold for the right of a state to intervene anywhere on behalf of those in need, neither indicates how, on the basis of texts from Aquinas, to justify intervention not carried out to defend or vindicate the state executing the intervention.


11. Vitoria established the rationale for intervention in his commentary, "On St. Thomas Aquinas, Summa Theologica Question 40: On War," in J.B. Scott, cited. (Future references to this work will be cited On War, with the article, paragraph number, and page number from the Scott edition.) In De Indis, Vitoria evaluated specific cases of intervention. This quotation is taken from DI, III, 15, p. 159.

13. On War, I, 6, p. cxvii.
15. DI, III, 9, 12; pp. 156, 157, 158.
16. DI, III, 12, 13; pp. 157, 158.
18. DI, III, 2, 3, 10; pp. 151, 152, 153.
D.C.: M.W. Dunne, 1901). Future references to this work will be cited JBP, with book number, paragraph number, and page number from the Campbell edition.
24. JBP, II, 2, pp. 95-96; II, 2, pp. 89-90; II, 3, p. 104; De Jure Praedae,
XII.
27. JBP, III, 20, pp. 393-400; II, 18, pp. 202, 212.
32. JBP, II, 25, p. 285. Having established the obligation to aid others in need, Grothus articulates a hierarchy of people who have a claim on a state; the list runs from subjects of the state, to allies, friends, and finally, those whose claim is "the common tie of our nature, which alone is sufficient to oblige men to assist each other." JBP, II, 25, pp. 285-288.
33. JBP, II, 25, p. 287.
34. Ibid.
36. JBP, III, 17, p. 49.
41. Johnson, cited, p. 16.
42. It must happen, then, on many occasions that nations put up with certain things although in themselves unjust and worthy of condemnation, because they cannot oppose them by force without transgressing the liberty of individual nations and thus destroying the foundations of their natural society. The Law of Nations or the Principles of Natural Law (1758). Edited and translated by C.G. Fenwick (Washington, D.C.: Carnegie Institute, 1916) 21, p. 8. Hereafter cited as LN, with section, paragraph, and page numbers.
43. LN, preface, p. 92.
44. LN, II, 54, p. 131.
45. LN, II, 55, p. 131.
46. LN, II, 59, p. 133.
47. The introduction to The Law of Nations in the Carnegie edition is by A. de Laprade, p. liv.
49. The preeminent author in the positivist tradition of international law described the relationship in the following manner: "Thus the natural antagonism between the most powerful states seems to guarantee the observance of the principle of nonintervention." Lassa Oppenheim, quoted in Schiffer, cited, p. 93.
52. R.J. Vincent surveys the contemporary legal literature and concludes that the prevailing view of the sovereignty today is that of "relative sovereignty." Within this perspective of the political order, the principle of nonintervention fulfills a dual role: "It expresses the idea that states are to be immune from interference by other states and it stands at the frontier between international law and domestic law—where international law respects sovereignty, but conceives it as 'that competence which remains to states after due account is taken of their obligation under international law.'" Nonintervention and International Order (Princeton: Princeton University Press, 1974) p. 297.
53. The controlling texts in the Charter governing the use of force are Article 2(4) and Article 51. Article 2(4) prohibits the use or threat of force against the territorial integrity or political independence of any state. The countervailing text, Article 51, reserves to states the right of individual or collective defense. Both of these provisions are then complemented by Chapter VII of the Charter, which provides for the authorization of collective defense through a competent organ of the United Nations.