

The Emerging Idea of Humanitarian Intervention

1500 - 1800

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Abstract

This thesis traces the emergence of the idea of what has become known as humanitarian intervention. The nascent concept of humanitarian intervention was present in the early modern period, and emerged in the writings of thinkers who wrote on the law of nature and the law of nations, such as Francisco Vitoria, Alberico Gentili, Francisco Suárez, Juan Ginés de Sepúlveda, Hugo Grotius, Samuel von Pufendorf, Christian Wolff, Emmerich Vattel, and Edmund Burke.

My claim is that the distinctive features of the idea of humanitarian intervention have changed considerably over the centuries, reflecting the historical circumstances in which these ideas were developed. Although, on the surface, modern conceptions of humanitarian intervention share certain similarities with their historical namesake, they are in fact conceived and justified very differently. When contemporary thinkers invoke the authority of this illustrious heritage they tend to neglect the different foundations and rationale given for intervention. I argue that if we want to understand what shocked the moral conscience of mankind during the emergence of the idea, we have to understand the general historical context, that is, the conditions of belief that formed our conceptions of the moral obligation to save strangers. Otherwise we fail to understand what constitutes our humanitarian urge. For the earlier writers, debates were framed within a fundamentally western and Christian context, which they purported were universal. Most discussions revolved around questions of intervening to convert heathens to save their souls, saving innocents from being slaughtered and other crimes against the natural law such as cannibalism or sodomy. Modern conceptions of humanitarian intervention rest their case on very different principles, and are firmly grounded in a human rights culture associated with the juridical revolution in international relations.

As such, this thesis explores the development of the idea of humanitarian intervention in the early modern period in order to highlight its distinctive character. To make such a claim I also identify some of the main features of the contemporary idea of humanitarian intervention. I suggest that the development of the concept has not been properly understood in the modern-day literature. There is therefore a considerable gap, which I seek to fill.

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Introduction

‘If you would understand anything,
observe its beginning and its development.’
- Aristotle

The purpose of this study is to explore the nascent emergence of what later became known as humanitarian intervention. The concept of intervening on humanitarian grounds emerged in the writings of thinkers on the natural law and law of nations. It became gradually more refined as disputes over what constituted a ‘just cause’ for intervention arose. This is something which has been overlooked or at best not properly understood in contemporary literature. As such, there is a silence in the literature that cries out to be heard, which will demonstrate that the notion of humanitarian intervention has a long historical lineage. The main claim that underpins this research is that humanitarian intervention has an unsettled and uneven surface, which reflects the historical circumstances in which the ideas were developed. What I am arguing is that if we want to understand what shocks the moral conscience of mankind, we have to understand the general historical context in which we discover our moral consciousness, and which gives content to our humanitarian urge. Thus, there is an historical context which is inescapable. For the earlier writers with whom I am concerned, debates were framed within a fundamentally western and Christian context although they purported to be universal. Many discussions revolved around questions of intervening to convert heathens to save their souls; saving innocents from being slaughtered and other crimes against the natural law such as cannibalism or sodomy. In contrast, modern conceptions of humanitarian intervention reject all but the most ‘urgent’ of reasons for intervention, namely genocide, and rest their case on very different principles.

An exploration of the history of the idea of humanitarian intervention is extremely interesting for several reasons. Firstly, it helps accentuate the distinctiveness of the earlier formulations in comparison with the modern. The issues to which humanitarian intervention refers have changed considerably. This demonstrates, ultimately, how such notions are historically contingent. Thus, issues pertaining to humanitarian intervention are historically bound and as such not easily transferable to the contemporary concepts we recognise today. Such historical sensitivity enables us to avoid comparisons and conclusions that assume that

the issues are perennial, and that modern day conceptions are related in some fundamental sense to the old.¹ What I instead want to say, then, is that issues of humanitarian intervention, past and present, share at best a language similitude. In this way, past humanitarian concerns merely echo today and is linguistically perceived rather than conceptual. Secondly, in demonstrating the distinctiveness of early modern conceptions of humanitarian intervention we discover how liable they are to be used as a form of cultural imperialism, despite the good intentions of those who advocate it. Thirdly, it alerts us to the fact that modern day conceptions are not immune from such considerations. And fourthly, the thesis demonstrates the wide range of what were considered grounds for humanitarian intervention.

In order to set this investigation in context I will, in this introduction, highlight some modern themes pertinent to the contemporary debate about humanitarian intervention and then draw out some issues that may assist us in understanding humanitarian intervention in a different historical context far removed from the human rights culture that grounds our moral consciousness today.

¹ This relates to the methodological debate about perennial problems. Here the historian Quentin Skinner is somewhat of an authority (see also historians such as Peter Laslett, W. H. Greenleaf, J. G. A Pocock, and John Dunn). Skinner emphasises that understanding the arguments of political philosophers entails reconstructing the language context in which they were formulated. As a methodological approach, I have, if only indirectly, been influenced by a pre-Skinner philosopher who very much influenced the latter. The English philosopher of history R. G. Collingwood famously contended in his *An Autobiography* that there are no perennial problems. There are only individual answers to specific questions. Moreover, no two statements could be viewed to be contradictory unless they were shown to be different answers to the same question. In Collingwoodian terms what this means is that the word remains the same in the question, but the meaning changes with the context. Collingwood illustrates this by noting that when Plato talked about the Greek *polis*, or state, he meant something very different than Hobbes, when the latter talked of 'the state' in 17th Century England. Questions about the state for Plato and Hobbes are not perennial. The two conceptions of the state are related, however, not as answers to the same question, but rather part of the same historical process. It is the process by which one conception of the state gradually transforms into the other. What Collingwood wanted to emphasise was that the business of the historian was not to envisage a timeless question to which there are different answers, but rather to trace and understand the process of change. See Boucher, David and Kelly, Paul (eds.): 'Introduction' to *Political Thinkers – From Socrates to the Present*, (Oxford: Oxford University Press, 2009, second edition), pp. 1 – 23, pp. 16 – 18. See also Collingwood, R. G. *An Autobiography*, with a new introduction by Stephen Toulmin, (Oxford: Clarendon Press, 1978), pp. 29 – 43, 60 – 64. Having this Collingwoodian approach to history of political thought in mind relates further to what Charles Taylor has called 'conditions of belief' (See Taylor, Charles: *A Secular Age*, (Cambridge, MA: The Belknap Press of Harvard University, 2007)). The thinkers I explore in this study retain such a heavy residue of theological absolute presuppositions that without this Christian world view their ideas and arguments would collapse at crucial times. The world they lived in was wholly saturated with religious imagery and explanation, and even in cases where a philosopher were less convincing in using this religious and theological obeisance, the utility of invoking God's name would still be there. However, these conditions of belief have changed between then and now. In this sense, for instance, asking questions of 'humanitarian interventions' entails careful scrutiny of the historical context and the conditions of belief informing that particular context.

Contemporary issues of humanitarian intervention

Contemporary issues of humanitarian intervention illustrate the competing tensions of the universalism of transnational moral standards versus the particularism of state sovereignty. The danger that is always to the forefront of issues of humanitarian intervention is the fear that it may be invoked as a pretext to disguise self-interested ulterior motives. Resistance to its establishment as a settled norm is the fear of Western, or American, hegemony in imposing a human rights regime that is alien, and the championing of individualism over the rights of the community. Recent instances of humanitarian intervention have blatantly demonstrated how the motivation to intervene stretches far beyond the moral. Intervention in Kosovo had as much to do with the stability of the West and maintaining order in the Balkans as it did with the prevention of ethnic cleansing. However, the blurring of political and moral considerations has been a persistent feature of debates about intervention. For example, the Jesuit Sepúlveda's justification of intervening to save the souls of the American Indians by providing the necessary discipline and guidance that natural slaves have a right to expect had the consequence of making a whole race of people subservient to Europeans and reduced to a condition of near slavery, while the Spanish enjoyed the fruits of the soil over which they alone, being in possession of their full faculties, could enjoy.

This is of course painting the issue with a rather broad brush, but it serves to accentuate some of the themes that underpin this study – namely what are the rights and duties of states as representatives of the international community acting in the interests of humanity? This thesis demonstrates that this is not a new question and that the issue of third party responsibility for the community as a whole was central to the concerns of early modern thinkers, both external and internal to Europe. It will help us frame the study by first asking how we currently understand humanitarian intervention.

Humanitarian intervention has proven to be one of the great challenges and moral quandaries of modern international relations due to what at a glance seems to be the irreconcilable tension between it and the principle of sovereignty; that is, between the implied sanctity of territorial borders, and the universal jurisdiction implied in doctrines of human rights. It is an issue that is currently high on the agenda of world leaders, but despite having emerged as a norm it is still not fully settled, or accepted. One may call it an unsettled norm. Over the past decades it has generated some of the most heated debates in international relations among theorists as well as practitioners. At the core of the debate is the central issue of state sovereignty which underpins the United Nation system and international law, versus

evolving international norms about human rights and the use of force in protecting individuals from the most serious of violations. In the complex web of issues pertaining to legitimacy, legality and morality a certain climate of permissiveness regarding humanitarian intervention has developed which is perceived to be one of the great challenges to sovereignty. In essence, humanitarian intervention is not enshrined in law but over a short period of time from the late 1980s it has become customary to give regard to its moral efficacy, and in so doing it has been thrust upon the international agenda. However, it has become apparent for several scholars such as Nicholas Wheeler, Thomas Pogge and Martha Nussbaum that mere permissiveness seems insufficient to deal with crimes that shock the very core of human moral consciousness, whereas many legalists retort that permissiveness is corrosive of the international order: unauthorised humanitarian intervention, meaning humanitarian intervention not sanctioned by the UN Security Council, remains illegal vis-à-vis state interests affirmed by the principle of non-intervention. As Jennifer Welsh notes, there is a legal divide on the question of humanitarian intervention: those arguing for legality are either addressing a political agenda or the nature of legal arguments are changing.² The ethical philosopher Tzvetan Todorov captures the underlying objections to humanitarian intervention when he argued in his 2001 Amnesty Lectures ‘individual human beings still get much more as citizens of a state than they do as citizens of the world.’³

The most prominent case example of an unauthorised humanitarian intervention was NATO’s military actions in Kosovo in 1999, which, following Kofi Annan’s retrospective endorsement, was subsequently approved at the UN Security Council. The principle of sovereignty so strongly held up in the UN, effectively ruled-out humanitarian intervention except in very limited cases, hence the conflict between different clauses in the Charter. It is only during the nineties and then against the wishes of the UN that a greater acceptance emerged and NATO’s intervention in Kosovo in 1999 was the most obvious example of this. However, theorists such as Rex Martin have clearly criticised this contention by stating ‘[w]e

² Welsh, Jennifer M.: ‘Taking Consequences Seriously: Objections to Humanitarian Intervention’ in Jennifer Welsh (ed.) *Humanitarian Intervention and International Relations*, (Oxford: Oxford University Press, 2004), pp. 52 – 58, p. 54; For good discussion on the legal approaches see Holzgrefe, J. L.: ‘The Humanitarian Intervention Debate’ in J. L. Holzgrefe and Robert O. Keohane (eds.) *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 15 – 52, p. 36 - 49

³ Cited in Welsh, Jennifer M.: ‘Taking Consequences Seriously’, p.53

must get beyond the point where we regard all rescues unauthorized by the UN as *illegal*'.⁴ He notes that the UN is not the exclusive authorising agent in matters of humanitarian intervention, and adhering to the doctrines of just war humanitarian intervention by an individual nation or by a coalition of nations to prevent genocide or other gross human rights violations is both legitimate and justified. Such views are shared by both John Rawls and Michael Walzer. However, that is not to say, that the UN for that reason does not have an appropriate role to play in matters dealing with humanitarian intervention. The point that is being made is that the UN's customary protection of sovereign integrity more often than not places impediments in the way of intervention, because of the perceived principle of non-intervention logically ascribed to state sovereignty. And it is states, on the basis of their sovereignty, that form one of the defining pillars of the UN system and international law. In this way, questions of authority, legality and jurisdiction implicitly falls with the states themselves. It is the notion of 'sovereignty as authority', meaning control over borders, which is being upheld as part of the UN's project for international security and peace. However, the atrocities of the Second World War saw an evolving international system's concern for human rights and the use of force. This has, then, entailed an evolution in the notion of sovereignty to focus more on 'sovereignty as responsibility' in which states bear a minimum respect for human rights. The result of this move has meant that massive human rights violations committed within the domestic jurisdiction of a state have been transformed into an international concern. The conjunction of an expanded definition of chapter VII of the UN charter of what constitutes a 'threat to international security and peace' to include human rights, has meant that the UN can legitimately authorise international action to address humanitarian crises, because they are understood as security threats.⁵ This is evidence of the partial acceptance of it as an emerging norm.

J. L. Holzgrefe has come up with a useful and broad enough description for the contemporary definition of humanitarian intervention. It is

⁴ Martin, Rex: 'Walzer and Rawls on Just War and Humanitarian Intervention' in Lee, Steven, P. (ed.) *Intervention, Terrorism, and Torture – Contemporary Challenges to Just War Theory*, (Springer, 2007), pp. 75 – 88, p. 86

⁵ Welsh, Jennifer: 'Introduction' in Jennifer Welsh (ed.) *Humanitarian Intervention and International Relations*, (Oxford: Oxford University Press, 2004), pp. 1- 7, p. 1- 2

‘the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.’⁶

The list of arguments for and against the justice of humanitarian intervention is long, and it seems that no single dichotomy adequately captures the principal views on the justice of the phenomenon. Thus, the main concern here is that these disagreements testify to the evident reality of the norm of humanitarian intervention as well as its apparent efficacy.

The ethical divides are mainly about the proper *source* of moral concerns surrounding humanitarian intervention as well as the appropriate *object* of these concerns.⁷ The source of the moral obligations for humanitarian intervention often emerges from the idea that human rights are intrinsic values and are therefore a primary concern. As such this is an overwhelmingly liberal argument supporting humanitarian intervention when human rights are being seriously abused or violated. And it is here that the principle of state sovereignty always seems to be the stumbling block. The international jurist Fernando Tesón has put forward such arguments and is emphatic that such choices have to be made over the mere instrumental value of state sovereignty. In this way, for him, states not only have a right to intervene, but also a moral obligation to do so. He criticises the contention that global stability has moral standing sufficiently to uphold a duty of non-intervention when states are engaged in ruthless human rights abuses. Although concerned with the effect of the military action that humanitarian intervention inevitably entails, he is nevertheless committed to marshalling arguments for the principle of humanitarian intervention which trump the principle of non-intervention.⁸

However, the international theorist Stephen Krasner has to a certain extent challenged this view by arguing that states have never enjoyed the sovereign integrity that is usually supposed. Thus, to question the continued viability of the sovereign state in the face of the acceptance of human rights, minority rights as well as the increasing role of international financial institutions, such as the World Bank, and globalisation, is to pose misleading questions. Throughout history, Krasner contends, rulers have not been motivated by some abstract adherence to international principles, but rather by a desire to consolidate their power. What he calls organized hypocrisy is the persistent violation of long-standing norms that are

⁶ Holzgrefe, J. L.: ‘The Humanitarian Intervention Debate’, p. 18

⁷ Ibid., p. 20

⁸ See Tesón, Fernando R.: ‘The Liberal Case for Humanitarian Intervention’ in J. L. Holzgrefe and Robert O. Keohane (eds.) *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 93 - 129

being frequently violated. What underpins his criticism is the basic contention 'that the international system is an environment in which the logic of consequences dominate the logics of appropriateness.'⁹ And the misconception of sovereignty is part of this predicament. Even so, what is important to note in support of cosmopolitan criticisms is that the principle of sovereignty has, in a foundational way, come to be understood as, and actually entails, non-intervention. This principle of non-intervention is deeply enshrined in the UN Charter. The critical provision of the Charter is found in Article 2(4) in specifying that

'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'¹⁰

And as Byers and Chesterman note, the ordinary meaning of Article 2(4) is clear: the use of force across borders is simply not permitted. There are, however, the two exceptions to the Article applied to the Kosovo intervention, but neither makes any mention of humanitarian intervention. The two exceptions deal with the necessary potential use of force to maintain and restore international security, adopted under the Chapter VII and the last resolution before the intervention Resolution 1203 of 24 October 1998. Thus, there is no doubt, as already alluded to, that along with the qualification of sovereignty, the use of force is the source of the problem in the context of international justice especially in the case of humanitarian intervention. What is notable here, then, is the realisation of just how little a role the idea of humanitarian intervention played in the development of the idea of sovereignty towards an almost sacrosanct principle between and after the two world wars. Concerns about the norm's potentially negative consequences, has meant that sovereignty has been rigidly privileged over humanitarian intervention. It is consequences such as the impact humanitarian intervention inevitably has on the territorial integrity of states, the negative side-effects of the use of force, the often unrealistic expectations put on an oppressed people and the potential of long term 'occupation' post settlement, which raises the concerns. Up until recently, sovereignty had of course been seen to be the most efficient way to protect a state from aggressors, however,

⁹ Krasner, Stephen D.: *Sovereignty: Organized Hypocrisy* (Princeton NJ: Princeton University Press, 1999), p. 6

¹⁰ Cited in Byers, Michael and Chesterman, Simon: 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in J. L. Holzgrefe and Robert O. Keohane (eds.) *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), pp. 177 – 203, p. 181

those calling for more interventionism in contemporary international relations emphasise the weakness, or even failure of state structures, many of which are conflict-ridden societies, where hiding behind sovereignty provides opportunities for criminal activity.¹¹

In this way, the political philosopher Henry Shue adamantly voices his concern for the proclaimed legal efficacy of the principle of sovereignty, and its perceived logical appendix non-intervention. He is one who firmly believes in sovereignty as responsibility and presents a convincing argument for a limited notion of sovereignty underpinned by the claim that rights necessarily imply duties. For Shue, sovereignty is inherently limited because the duties that are constitutive of the right of sovereignty essentially constrain the activity of states in the international society. Because sovereignty implies duties there can be no absolute right of non-intervention. He firmly notes that although '[m]orality's work is indirect [it is not] irrelevant.'¹²

Shue presents both a historical and philosophical argument. He uses Vattel and Wolff as his prime historical examples to illustrate that the first general law of international relations for these jurists was a positive duty of mutual aid limited only by duties to the state's own people and such assistance was not necessarily to be construed as intervention.¹³ Thus, Shue wants to argue that the modern principle of sovereignty has been eroded over time to something which it did not originally imply. What Shue ultimately wants to suggest is that if sovereignty is conceptually to be understood as a right it must be limited. As he states, 'the content of sovereignty blinds us to its form, but its form imposes unseen limits on its content.'¹⁴ Thus, sovereignty for states does not imply having indefeasible and total discretion. The difficult part is of course, to determine some specific limits, but Shue fervently emphasises that one of those constraints or limits on state sovereignty is fundamental individual rights. Such constraints are called 'default duties' and the point he is trying to make is that default duties 'do not come into play until some more fundamental duty has not been honoured.'¹⁵ And when the primary duty to protect basic core rights is not performed, a secondary, default duty, must immediately come into play. This, of course, raises the issue of who is obliged to discharge this secondary duty, and as we shall see, in almost all of the thinkers discussed in this thesis, they raised the same concerns. However, regardless of whether this can ever be resolved, Shue's arguments and

¹¹ Welsh, Jennifer: 'Introduction', p. 2

¹² Shue, Henry: 'Limiting Sovereignty' in Jennifer Welsh (ed.) *Humanitarian Intervention and International Relations*, (Oxford: Oxford University Press, 2004), pp. 11 – 28, p. 12 - 13

¹³ Ibid., p. 13

¹⁴ Ibid., p. 13 - 14

¹⁵ Ibid., p. 17

those of others who have presented similar propositions (such as for instance Fernando Tesón, Nicholas Wheeler, Allen Buchanan, Stanley Hoffmann, David Held, and indeed Stephen Krasner)¹⁶ relating to the need to rethink the doctrine of sovereignty, have, conceptually at least, done some mileage in thinking about international justice. Shue gets to the core of the issue by saying that ‘in my view it would be preposterous to suggest that there is a universal negative duty not to commit genocide, but that there is no positive duty to protect intended victims.’¹⁷ However, it would seem that in enforcing duties to prevent severe human rights violations, the most heinous being genocide, the reality of today’s international justice very much tips the scales in favour of non-intervention.

Even so, given this strong scepticism about the efficiency of the modern day doctrine of sovereignty John Rawls retains it as central for international justice in what he calls ‘a realistic utopia’ in his *Law of Peoples*. Rawls’s international project has been criticised by such liberals as Thomas Pogge, Charles Beitz and Martha Nussbaum for not taking the cosmopolitan doctrine far enough.¹⁸ One of their core criticisms is that Rawls puts too much emphasis on the sovereign state (or Peoples in his terminology), and in this sense, when it comes to humanitarian intervention his conception is not far removed from that of a communitarian such as Michael Walzer. Both theorists argue that as a response to serious human rights violations, a country can justifiably go to war on the grounds of it. This is the ‘supreme emergency’. Rawls’s notion of a duty to assist would, for instance, mean that against the South African apartheid ‘forceful’ diplomatic, cultural and economic sanctions, but not armed intervention, would be endorsed. The same would hold true in the case of violations towards women that falls short of genocide and mass rape. Such interventions are solely reserved for cases of mass murder such as genocide and instances of slavery. Rawls says ‘it may be asked by what right well-ordered liberal and decent (non-liberal) peoples are justified in interfering with an outlaw state on the grounds that this outlaw state has violated human rights.’ To this he answers ‘these

¹⁶ See, Wheeler, Nicholas: *Saving Strangers: Humanitarian Intervention in International Society*, (Oxford, Oxford University Press, 2003); Buchanan, Allen: *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law*, (Oxford: Oxford University Press, 2003); Hoffmann, Stanley: *The Ethics and Politics of Humanitarian Intervention*, (Notre Dame: University of Notre Dame Press, 1996); Held, David: *Democracy and the global order: from the modern state to cosmopolitan governance* (Cambridge: Polity Press, 1995)

¹⁷ Shue, Henry: ‘Limiting Sovereignty’ p. 18

¹⁸ See Pogge, Thomas W.: *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, (Cambridge: Polity, 2002); Beitz, Charles: ‘Does Global Inequality Matter’ in Pogge, Thomas W. (ed.) *Global Justice*, (Oxford: Blackwell, 2001), pp. 106-122; Nussbaum, Martha: *Frontiers of Justice – Disability, Nationality, Species Membership*, (Cambridge MA: The Belknap Press of Harvard University Press, 2007)

peoples simply do not tolerate outlaw states. This refusal to tolerate those states is a consequence of liberalism and decency.’¹⁹

This brings us to another relevant issue, namely, the communitarian arguments for a much more limited understanding of the norm of humanitarian intervention, rather than state sovereignty. This is seen not only to be the most effective way of protecting peoples’ right to self-determination, as Michael Walzer calls it, but is also recognised by communitarians who place an intrinsic value on state sovereignty itself. Walzer famously claims that there cannot be a just society, until there in fact is a society ‘and the adjective just doesn’t determine, it only modifies, the substantive life of the societies it describes.’²⁰ Most cosmopolitans would say that this is wrong for the reason that this is exactly what justice does – understandings of justice do, in a very foundational way, constitute and determine societies, and to suggest otherwise is the same as implying that it is only after a society has been formed that it becomes shaped by normative matters.²¹ For Walzer, the thin reiterated universalism from the thicker particular morals of a society would necessarily limit any cosmopolitan understanding of international justice. However, despite a very different conception of the universality (as it is the foundations) of norms, Walzer’s has restated his legalist paradigm to put more emphasis on the importance of the just and unjust use of force and does present an argument of humanitarian intervention. His hugely influential book *Just and Unjust Wars* has become a cornerstone in the conceptual debate about the legality of wars. Although he underlines the morally necessary idea of self-determination, he nevertheless revises the legalist paradigm to include humanitarian intervention in cases where genocide is taking place. As he says ‘[h]umanitarian intervention is justified when it is a response (with reasonable expectations of success) to an act “that shocks the moral conscience of mankind”.’²² However, Walzer notes that the formula for this kind of action is permissive. For him, just interventions always require constraint, but such constraints are often ignored. As a general rule it is best to insist on an absolute rule of non-intervention.²³

In sum, then, modern conceptions of humanitarian intervention exhibit these main features: the apparent irrevocable struggle between human rights and sovereignty, or as it is,

¹⁹ Rawls, John: *Law of Peoples with “The Idea of Public Reason Revisited”*, (Cambridge, MA: Harvard University Press, 1999), p. 81

²⁰ Cited in Shue, Henry: ‘Limiting Sovereignty’ p. 25

²¹ Ibid., p. 25

²² Walzer, Michael: *Just and Unjust Wars – a Moral Argument with Historical Illustrations*, (New York: Basic Books, fourth edition, 2006), p. 107

²³ Ibid., p. 108

the competing tensions of the universalism of transnational moral standards versus the particularism of state sovereignty; ideas about individual obligations to the wider international community in the interest of humanity; reconciling moral and political aspects of international relations; ideas about rights of people and their right to self-determination; saving strangers; third party intervention, and issues of just war and the use of force. What I want to suggest, as alluded above, is that these themes are identifiable and persistent through the early modern period; however, they pertain to a very different discourse. Let me illustrate this with some examples. For instance, the consideration of sovereignty is very different and depends on the perceived political contexts of the time. Shue seems to recognise this, with his explorations of Wolff and Vattel. This historicist exploration of sovereignty is central to his criticism of sovereignty, and from it emerges the interesting point that non-intervention and sovereignty were not always as inextricably tied as they are today. This goes to illustrate how by not understanding the full development of a norm, in this case sovereignty, leaves us conceptually impoverished because it assumes that the conceptual sacredness of sovereignty has always been the case. We see, then, how the idea of sovereignty is situated in a particular historical discourse, which is contingent upon its own development. Humanitarian intervention relates intimately to this development. By looking at the emergence of the idea of humanitarian intervention in the early modern period we are able to discover the extent to which the rise of the sovereign state and the principle of state sovereignty affected discussions of humanitarian intervention. As will be explored more in depth below, writing pre- Westphalia the idea of sovereignty is underdeveloped in the works of Grotius. For this reason, tensions relating to intervention and sovereignty appear to be negligible. This is very different from Pufendorf, who writing in the near aftermath of Westphalia, wrestled to come to terms with intervention, emphasising instead a stronger case for sovereignty as part of international justice. If one takes Burke's understanding of sovereignty, writing more than a century after Pufendorf, the sovereign states of Europe were part of a wider moral community, the Commonwealth of Europe, which prescribed an inherent duty to preserve its freedoms and values by intervention if necessary. Although the preponderance of power of any one state in the balance of power threatens sovereignty, for Burke, the concept of the commonwealth was more important than sovereignty. Incidentally, Burke adhered to a weaker idea of sovereignty than Pufendorf, because his idea of intervention in revolutionary France took precedence over its sovereignty in that it was part of the Commonwealth of Europe. This especially underlies the argument that

the doctrine of sovereignty has not always been formulated in such unqualified and absolutist terms of non-intervention. Burke will be discussed in chapter 6.

Another example of how the features of modern ideas of humanitarian intervention are identifiable in the past is the idea of just war theory. It is fair to say, that for thinkers such as Vitoria, Suárez, Gentili and Grotius their whole law of war projects are concerned with constraints on state or sovereign actions in international relations as will be discussed in chapters 1 and 3, respectively. For these natural law thinkers a crucial component of the *jus ad bellum* doctrine was the principle of right intent as well as a prudential outcome. These are ideas, which in particular have been central for Walzer's just war theory. Although endorsing the requirement that the moral motive should be the dominant in the mix, Walzer posits the idea of mixed moral motives for just war. What Walzer wants to argue is that humanitarian intervention is almost always undertaken with 'mixed motives' and he concludes that the fact of mixed motives 'is not necessarily an argument against humanitarian intervention [...] but it is a reason to be sceptical.'²⁴ Like the natural law thinkers, Walzer also emphasises the desirability or, as it is, the necessity of a humanitarian outcome as a strong condition for the justness of humanitarian intervention (*post jus bellum*). However, the key issue is that Walzer attempts to work out a secular theory of just war; this is, as we shall see, very different from the natural law thinkers, who retain a strong religious foundational just war theory, based on the law of nature.

Another theme is the perceived duty and right of the international community to intervene in another state where gross human rights violations are taking place, grounded on a common moral necessity. This is something that Rawls has argued in his stipulation that well-ordered liberal and decent peoples have a right to go to war against outlaw states. Although somewhat different from Rawls, Burke presented this as a justification for intervention in France, when he argues that not only does the states of Europe have a duty to go to war against outlaw states, they also have a right. As such, the broader theme of Burke's justification for intervention echoes in the work of Rawls but it is based on a very different platform of justification. What is key here is that they, although Rawls to much lesser degree than Burke, purport a moral international community within which states act and have duties towards if it is threatened. However, their two moral communities are perceived very differently, and so are

²⁴ Walzer, Michael: *Just and Unjust Wars*, p. 102; this idea is of course much debated in contemporary literature, and it is beyond the scope of this study to comment further on it here. It is sufficient to say that in debating political, legal and moral dimensions of intervention, one can see the potential predicament of not defining absolute motives for grounds for just war.

their justifications for humanitarian intervention. The moral community that Burke presents and which grounds his humanitarianism he calls the Commonwealth of Europe, which is morally grounded in the prescribed and immemorial customs and values of Europe.

Briefly stated, another modern identifiable theme that deserves mentioning here is perhaps the most obvious. The modern idea of saving people seems to be a very different concept from that of the early modern thinkers. For them, it was, more than anything else, a question of saving people's spiritual life.

These few examples testify to what I have been attempting to elucidate – namely that historically perceived, the very idea of humanitarian intervention is profoundly dissimilar to the one we recognise today. As such, the above exploration of contemporary understandings of humanitarian intervention and what is at stake sets the reference-point in the way the norm has developed but awaits further explorative analysis of how it developed in past times against different legal, political, and moral backgrounds. This will be elucidated further below; however, for the general justification of this study, I want to show next that although some scholars have taken a cursory glance at past conceptualisations of the duty to intervene, they have not taken the care to explore the theoretical justifications.

The Proper Trajectory for the Classical Text

With the ideas such as humanitarian intervention (and sovereignty), it is not only interesting but also necessary to return to the classic thinkers in order to get, at least, an overview of how ideas develop and moreover come to be understood, for better or for worse, in any given context. In the example of sovereignty, thinkers such as Shue recognise the importance of this and as we saw use the classical thought of Wolff and Vattel for the justification of his claim that the inviolability of sovereignty (the absolute emphasis of non-intervention) has been distorted in its modern context from what it was historically perceived to be. In his call for a more nuanced understanding of the concept of sovereignty, Shue implicitly argues that because non-intervention was not absolutely ascribed to past understandings of the principle of sovereignty this is conceptually relevant for how we should understand it today. As such, Shue's work illustrates the relevance of exploring these past ideas; however, it also illustrates how carelessly this can be done. This will be further elucidated below.

The relevance of the endeavour to look at the historical development and emergence of norms has only recently been recognised and explored, but not to any great extent. There has been over the past two decades a growing interest in the classical heritage of international

relations. Important works by authors such as Andrew Linklater, David Boucher, Martin Wight and Simon Chesterman, to mention only a few, sought to trace the development of issues pertaining to modern international relations by emphasising the relevance of a more historical framework within which to understand such issues, and we should not underestimate the mileage these theorists have done in suggesting that there is a particular role for the history of ideas in international relations theory.²⁵ For instance, by emphasising the importance of a historical framework within which to understand certain norms, say sovereignty, it means we have the tools to unlock how it has been understood and employed over time and in different contexts. However, there still seems to be a considerable gap in the literature in exploring certain of these ideas such as humanitarian intervention. Andrew Linklater has a valid approach for the historical trajectory of some of the most classical thinkers, such as Pufendorf and Vattel, and their renewed relevance for international relations theory. However, although he discusses some of the same thinkers as this study in his influential work *Men and Citizens in the Theory of International Relations*, he does not focus on humanitarian intervention, focusing instead on the perennial concern of the duties of citizens and the universal duties of men – a dispute in which, of course, humanitarian intervention is implied. David Boucher emphasises the importance of underlying the changing foundations of norms and understanding them in their proper historical context and recognises this in his recent book *The Limits of Ethics in International Relations – Natural Law, Natural Rights, and Human Rights in Transition* (2009), and while he sets out discursively to explore the highly misunderstood and contentious relationship between, as the title indicates, natural law, natural rights and human rights he only incidentally explores issues pertaining to humanitarian intervention in the early modern period.

With his work, Boucher has set the scholarly investigative precedence with which to conceptually explore these ideas; however, only a few other scholars can match such historically sensitive endeavours. Others, such as the famous international jurist Theodor Meron, who will be explored more in depth in chapter 3 in relation to Grotius, is an example of the type of superficial work that at times is being done within the field. In this way, although Meron recognises the importance of Grotius's intellectual heritage for international law it is

²⁵ See, Linklater, Andrew: *Men and Citizens in the Theory of International Relations*, (London: Macmillan, second edition 1990); Boucher, David: *Political Theories of International Relations – from Thucydides to the present* (Oxford: Oxford University Press, 1998); Boucher, David: *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, 2009); Wight, Martin: *International Theory: The Three Traditions*, Gabriele Wight and Brian Porter (eds.), (London: Continuum, 2002); Chesterman, Simon: *Just War or Just Peace – Humanitarian Intervention and International Law*, (Oxford: Oxford University Press, 2001)

always cursory and rather anachronistic. What he is doing, is justifying his conclusions on ill-conceived and historically distorted premises, by conflating natural rights with the modern conception of human rights, and hence assuming that humanitarian intervention is fundamentally the same over time. Meron's attitude to the past is not that of the historian but of a jurist whose interest in the past is to somehow illustrate its contemporary relevance. This is what Michael Oakeshott calls the practical past, in which present day considerations dictate the relevance, or importance, of what one investigates. This is also the case with the feminist and political theorist Martha Nussbaum, who, like Meron, fails to fully explore Grotius. Nussbaum seeks to support her foundational notion of human fellowship by drawing on Grotius's foundations.²⁶ This is central to her justification of the universality of the capability approach she is presenting - as indeed our natural state is one that seeks and flourishes in human fellowship. However, she does this without adequately developing her own or indeed Grotius's in the process. This becomes particularly problematic in employing Grotius as the foundational support in her endeavours to move beyond Rawls's weaker notion of humanitarian intervention and present a stronger account. Nussbaum is unable to accept the Grotian foundations for such fellowship because in her view they would limit universal applicability, hence the dichotomy in her Grotian origins. The root of this conceptual problem seems to be her assumption that Grotius secularised the natural law tradition. This, as will be made more explicit further below, is not the case. This contention is conceptually dangerous because with a secularised account of inter-human obligation, the Grotian conceptions of justice have no foundational basis. For Grotius, we are bound to this inter-human obligation through his interpretation of natural law, and it is ultimately derived from what God wills for us. Without it, Nussbaum needs to tell us why we should act in a Grotian manner, not just rely on her identification that we should act in a Grotian manner. We may be drawn to Nussbaum's suggestions intuitively, but that does not make it a strong comprehensive political theory. Nussbaum will be discussed in chapter 3. What Nussbaum and Meron in effect are doing, is seeking epistemic authority by using elements of Grotius to add more credibility to their projects. Although this is presumably done with the best intentions, in their search for an intellectual heritage they are instead doing it great disservice.

Simon Chesterman is another theorist who affirms that various international jurists in the early modern period present grounds for war founded upon humanitarian considerations.

²⁶ Nussbaum, Martha: *Frontiers of Justice – Disability, Nationality, Species Membership*, (Cambridge MA: The Belknap Press of Harvard University Press, 2007); see especially p. 255

However, this research is by no means adequately pursued. In his book *Just War or Just Peace – Humanitarian Intervention and International Law* he sets out to trace the genealogy of humanitarian intervention. However, his first chapter ‘origin of humanitarian intervention’ focuses more on what he calls actual examples of what could be claimed to be humanitarian intervention in the 19th Century, namely the joint intervention of Great Britain, France and Russia in aid of Greek insurgents 1827, French occupation of Syria 1860 – 1, and US intervention in Cuba 1898. He could, nevertheless, easily have added more examples to his list. One may argue, for instance, that Britain’s policing of the abolition of the slave trade and later on, slavery, was an act of humanitarian intervention. Slavery, for instance, was something Burke was vehemently against. It would seem that these particular events do give credence to his aim to emphasise the heritage of humanitarian intervention and the place it has within *pre-charter* international relations. However, this focus fails to provide us with the full picture of the principle – in so far as it does not say anything how these ideas emerged, developed and culminated in the various interventionists’ decisions that Chesterman highlights. Without a fuller picture, such examples remains impoverished, because we are missing important aspects of their historical development and heritage, both in a legal and of course in a moral way. Chesterman spends little time exploring humanitarian intervention in relation to Vitoria, Grotius and Pufendorf. He argues that ‘it is clear that the ethical and legal origins of this doctrine [i.e. humanitarian intervention] stretch back much further to the moral impetus to war over religious differences, and the legal restraints that came to be placed on intervention as sovereignty emerged as the axiom of an international society of equals.’²⁷ He notes, however, that the term ‘humanitarian intervention’ only emerged in the 19th Century as a possible exception to the rule of non-intervention developed in the 18th Century, but even so, its meaning was by no means clear.²⁸ There is no doubt that notions of humanitarian intervention can be traced before this, and as I intend to argue, this first came into existence as a direct consequence of the Discovery of the New World. Although, for this thesis, I make no assumptions of historical events that could be said to pertain to humanitarian intervention; what I am suggesting is that the norms and ideas were certainly present regardless of whether or not they had been acted upon. Thus, even though Chesterman recognises the historical aspect of the doctrine of humanitarian intervention, with this study I want to show that its derivation is much more complicated than vaguely expounding it as a principle reflected ‘in

²⁷ Chesterman, Simon: *Just War or Just Peace*, p. 25

²⁸ *Ibid.*, p. 3

the tension between the belief in the justice of a war waged against an immoral enemy and the emerging principle of non-intervention as the corollary of sovereignty,²⁹ and for such reasons deserves a much more detailed analytical exploration. This is what I set out to do in this thesis.

As such, the justification for this thesis is, in this respect, to fill the gap, and to look at the issues as they emerged in their historical contexts, and to show how the grounds for intervention change, along with the principles of justification. The point I wish to make is that ‘crimes that shock the moral conscience of mankind’, to use Michael Walzer’s phraseology, have always been a concern, and arguments about how to deal with it as part of international justice have been at the centre of the debate for centuries. From such moral and juridical debates amongst natural law thinkers, a norm of humanitarian intervention emerged. In this sense, there is a great tradition within the history of preventive warfare and collective security, issues that have been essential to United Nations (UN) projects post World War II. The concept of humanitarian intervention is still developing but remains a controversial issue ultimately because it inherently brings about conditions that clash with the legal, moral and political considerations of international relations. It is my claim that clashes pertaining to the principle of humanitarian intervention are traceable through history and have left in their wake the emergence of norms which today we would term ‘humanitarian intervention’. However, as emphasised, these norms are not related to the contemporary norm we today call humanitarian intervention, not even vestigially. We cannot assume that the principle as it developed in the 16th to the 18th Century is the same as the principle we recognise today; if we do so, we are back to the conceptual lacuna where we began.

The ideas are quite distinct, mainly because the conditions of belief in them have changed so considerably. A religious and theological context surrounded their early development, which was self consciously jettisoned in modern times in order to appeal to a universal audience. The implication is that humanitarian intervention is not a perennial, ahistorical principle that relates to the same issues over time and place. What is enduring is the conflictual relationship between legal, moral and political ideas. And there is no doubt that the controversy surrounding humanitarian intervention provides sufficient illustration of just how contentious this relationship is. The contentiousness between such ideas have always been at the centre of international ethics, indeed, it has conditioned the effectiveness of international ethics, thus informing or even constituting principles, such as sovereignty or humanitarian intervention. Let me briefly illustrate my point with an example: Sepúlveda, who I discuss in

²⁹ Ibid., p. 7

chapter 2, presented an argument for the forced Christianisation of the American Indians grounding it on the justification that all Christians had a duty to save the souls of unbelievers. This idea of saving the souls of Native Americans, as an instance of humanitarian intervention can only be properly grasped by understanding the religious background of the day, which in a highly foundational way informed the political and moral framing of international relations. This particular example also shows how influential Aristotle was in this Christian world view. Las Casas did not originally deny that there were natural slaves; he intimated that blacks fell into this category, but he wanted emphatically to deny that the American Indians did.

Ultimately, I want to emphasise that historical notions of humanitarian intervention rest firmly in just war theory and therefore the law of nature and of nations. The foundation of such a norm is much less clear today, perhaps due to anti-foundational aspirations that seem to be the expedient groundings of modern universalism. For thinkers such as Vitoria, Suárez, Gentili, Sepúlveda, Grotius, and Pufendorf, notions of humanitarian intervention are substantially grounded in natural law as well as in the religious aspects of the period. Thus, in order to have a richer understanding of how and why modern conceptions have arisen, it is important to understand in what respects they are continuous with or deviate from their predecessors. However, before illustrating the themes of how notions of humanitarian intervention can be understood and how they relate to the thinkers I explore, let me attempt to explain the moral framework of just war and the law of nature from which these issues were understood.

Disentangling the Vocabulary: Just War and the Law of Nature

It is gross violations of human rights that underpin contemporary justifications of humanitarian intervention. It is, then, important to somehow distinguish between vocabularies of human rights and early modern period doctrines of natural rights, to avoid making the same mistake as Meron and assume that natural rights were conceived in the same way as human rights are today. Conceptions of natural rights are not as easily transferrable to today's human rights. One main reason is that natural rights relate much more closely to the natural law than is usually thought to be the case, and as such are strongly foundational.³⁰ It is not the purpose of my thesis to explore the complex relations between conceptions of natural rights and conceptions of human rights. Natural rights are an ambiguous term and many thinkers play deliberately on that ambiguity. In relation to the natural law tradition, such rights are derivative

³⁰ See Boucher, David: *The Limits of Ethics in International Relations*

from that law that is they stand outside of the person. Although, modern conceptions of human rights seek to, by and large, to sever their connection with this foundationalism in ethics (which seems to have been the case since 1948), nevertheless, philosophically, the justification of the notion of human rights varies considerably. For the modern jurist, however, what matters is not the philosophical ground of such rights, but the fact that they have some basis in law, either customary or conventional.³¹ While David Boucher then sets out to disentangle the different and often indiscriminate vocabularies pertaining to the contemporary human rights culture, by clarifying what separates and what unites the natural law, natural rights, and human rights vocabularies within the field of international relations, I, although touching upon similar issues, am interested in disentangling the vocabularies pertaining to humanitarian intervention. I do this by using his conceptual framework.

What I am aiming to prove is that there is a discourse of humanitarian intervention, and it is necessary to explore the different context of how just grounds for war can be said to be based on humanitarian considerations. Firstly, it is relevant to explain the relationship between humanitarian intervention and just war theory. Second, determining that theories of just war at times were grounded in humanitarian considerations, where would such corresponding obligations or rights be said have their moral source - in the law of nature or in the law of nations? The moral source of humanitarian obligations forms part of the ethical dilemma of humanitarian intervention. If it can be said to be the law of nature, then for most of these thinkers, obligations of humanitarian intervention would be much more absolute and thereby understood to be 'perfect'. These two main questions will form the basis of my overarching structure for each thinker I explore.

To address the first issue: what is just war, and how can humanitarian intervention be understood as being an aspect of just war? Humanitarian intervention in such instances can be deemed to come under conventional *jus ad bellum*, or the right to go to war as it entails military intervention. For most of these early writers humanitarian intervention is part of the *jus ad bellum* as saving innocent people from tyrannical oppression was perceived as the obligations which constituted a right to go to war, or a just cause of war. Furthermore, the fact that humanitarian intervention is part of just war needs to be carefully differentiated from what

³¹ It is important to note that many of the documents in which our modern human rights are specified are conventions. Even the terms of reference of the International Criminal Court do not try to ground humanitarian and human rights in natural law or natural rights philosophies, but instead claim that they are declaratory of customary law.

we might call humanitarian aid. Chesterman aptly notes that humanitarian intervention must be separated from what could be termed humanitarian assistance (not to be confused with Rawls' duty to assist), which pertains to food, shelter, famine.³² This is an important point to make, for as will be apparent in chapter 5 dealing with Wolff and Vattel who use famine as an example of how this would pertain to a state's duty to assist other states, but only on request. Thus, in such instances humanitarian assistance is not an aspect of just war.

To address the second issue, the necessity of working out the moral source of international obligations: what is the distinction between the law of nature and the law of nations (or the *jus gentium*)? The relationship between natural law and the law of nations was one that perplexed even the most adept of philosophers. It was more often than not ambivalent and ambiguous in the early modern jurists, especially some of the thinkers explored in this thesis such as Vitoria, Gentili, Suárez and Grotius. The international jurist Samuel Rachel a contemporary of Pufendorf, was even more radical in proposing to eradicate the confusion and ambiguity by making a complete division between the two types of law. His arguments, however, did not prevail and largely went unacknowledged. Against his predecessors he, in his *De Jure Naturae et Gentium Dissertationes* noted

'I am afraid that [they have] addressed [themselves] to this task in order to pay homage to the texts of Roman Law and to give further support to the received division of the Law of Nations into Primary and Secondary. For the commentators are so much under the sway of the old jurists as to say that knowledge of the Law of Nature is obtained by Reason, and the knowledge of the Law of Nations by Reasoning.'³³

Although giving great importance to reason most of the early natural law theorists, such as Gentili and Suárez ground obligations to conform with the precepts of natural law in the firm belief that God is its author.³⁴ This central claim is based on the belief that reason alone cannot create or sustain the obligation. In fact it is otherwise difficult to comprehend the moral force of this argument if indeed the obligations and rights that individuals and nations have under the natural law is not brought about by the will of God. This is implicitly argued in Gentili when he asserts that people who do not worship God stand for this reason outside the natural law and cannot enjoy its protection.³⁵ As we shall see in the case of Suárez, reason was the instrument by which you discover or derive the precepts from the natural law and in this sense Suárez

³² Chesterman, Simon: *Just War or Just Peace*, p. 3

³³ Rachel, XXXV, p. 180

³⁴ Boucher, David: *The Limits of Ethics in International Relations*, p. 112

³⁵ Gentili, book I, chaps ix, p 65

argued that our moral obligation did not derive from reason alone. Reason is the foundations of natural law and provides the criterion of objective right and wrong – it is not itself law. According to him, then, reason did not give you obligation, it revealed it, and ultimately it is God's law that makes it obligatory. This is an important issue, because it is exactly by not recognising this fact in most natural law thinkers that some modern theorists have conflated issues of obligatory force. This is especially the case of Grotius where modern political theorists such as Richard Tuck, who argues that Grotius represented the shift where he secularised the natural law tradition. Martha Nussbaum, as already noted, asserts similar assumptions about Grotius, albeit more vague in her case, which leads her to overstate Grotius's argument for humanitarian intervention. This will be discussed in chapter 3. If in fact reason created the moral obligations pertaining to just war and humanitarian intervention, in the case of Grotius and other natural law thinkers, then their natural law theories would simply not have been forceful enough, as no foundation for obligations could be found.

It is widely held that the modern origins of the 'law of nations' are to be found in the early seventeenth-century works of Suárez's *Tractatus de legibus ac deo legislatore* (1612) and Grotius's *De jure belli et pacis* (1625/1631).³⁶ In an era of extreme growth of political statism and colonialism, they were aware of the basic problems of international diplomacy which included the just causes and conduct of war, state sovereignty, neutrality or intervention, maritime law, and treaties. The problem had been to determine to what extent international law was derived correspondingly from the universal *jus naturale* and from the states' various prescriptive *jus gentium*. It was assumed that the universal and ethical norm of the natural law applied equally and concurrently to inter-national and intra-national relations. The one great exception to this was Hobbes' theory that nations were related to each other as individuals in 'the state of nature'; thus his theory of international law being contractual, expedient and secular, natural law was defined as self-preservation.³⁷ It was then Hobbes who made the controversial move of completely identifying the two, the only difference between them being their different subjects. In this way Hobbes's importance for international relations lies in the way that he was framing the problem rather than providing the solution. It was up to his

³⁶ What is interesting, as will be apparent in subsequent chapters on Suárez and Grotius, is that from their attempt to distinguish these two systems of laws meant stirring a relatively middle path between the Intellectualists/Rationalists and the Nominalists/Voluntarists positions.

³⁷ Stanlis, Peter: 'Edmund Burke and the Law of Nations' in *the American Journal of International Law*, vol. 47, no. 3 (July, 1953) p. 397 – 413, p. 397

successors, namely Pufendorf, Wolff and Vattel to provide the solution.³⁸ Although Pufendorf had tried to reconcile the selfish tendencies of mankind, he only recognized international law as far as it was a denomination of the natural law, and in this way agreed with Hobbes. However, on an important point he differed from his English predecessor in asserting that natural law had a sovereign capable of enforcing it, making natural law, for Pufendorf, equally as morally obligatory as positive law. The genius move of Pufendorf was thus to make states morally subjective to the law of nature. Notwithstanding, natural law was seen as the moral basis of international justice, but once men had been separated into corporate nations, as Suárez asserted, it could never be applied directly and abstractly, but always indirectly through the justice of the various civil laws, customs, conventions, institutions and historical circumstances of each nation. This understanding of the law of nations became even more evident for 18th Century thinkers such as Wolff, Vattel and Burke, who took the necessary step to separate the two systems of laws and in conjunction of the doctrine of sovereignty the law of nations came more to the fore as states were seen to be the main actors of international relations. It was, in fact, Vattel who more than anyone else expressly established the law of nations solely as the law between sovereign states putting the emphasis upon the sovereign integrity of the state and thus placing it, and not individuals, at the centre of international law. From here on it was the state that became the subject of rights and duties, displacing the individual completely from the system of international law. In this way, the move from the more religious based *jus gentium* (or rights of peoples) was made to more modern customary law. Thus, from the early 19th Century international justice was grounded in a much more positivistic and legalistic framework. As such, for the purpose of my thesis it makes sense to stop at Burke.

Changing Reasons for Humanitarian Intervention - some historical themes

The Discovery of the New World and the juridical and theological reaction it brought in its wake provides ample illustration for the emergence of ideas of humanitarian intervention. In fact, this important event underlined the juridical debate on international ethics for the following three centuries and jurisprudential considerations such as the doctrine of *Terra Nullius* and theories of ownership and property rights were direct consequences of this normative and legal framing. It was these that determined the boundaries of the duties of

³⁸ Boisen, Camilla and Boucher, David: 'Hobbes and the Subjection of International Relations to Law and Morality', in Raia Prokhovnik and Gabriella Slomp (eds.), *International Political Theory after Hobbes*, (London: Palgrave, forthcoming 2010)

mankind, and in relation to the American Indians for instance, they were thus claimed firmly to be within this normative and legal jurisdiction. These are issues which continue to be contentious to this day in that the consequences of those earlier encounters in which debates about humanitarian considerations were discussed have continued to reverberate down the centuries in so far as ‘intervening’ to save souls, or to ensure personal safety entailed establishing sovereignty over foreign peoples and their permanent exclusion from the international sphere (consider for example cases such as the Aborigines in Australia or the Sioux Indians in North America). Thus, from this historical context and the perceived moral framework of the law of nature with which it was understood, the exemplars of humanitarian arguments I will explore in this thesis and the underlying development of how notions of humanitarian intervention change, revolve around issues of saving peoples from abhorrent practices such as cannibalism, human sacrifice, sodomy and worshipping false gods, suppressing people, to concern for rescuing people from themselves in the hope of saving their souls. Also, as emphasised, such issues are explored in the changing international framework with the emergence of the norm of sovereignty in the immediate wake of the Peace of Westphalia. This is to show how the grounds for intervention change, along with the principles of justification against a changing international context.

What is interesting for most of the earlier thinkers explored here; they purported that the universality of the law of nature gave rise to certain rights and duties. It was a strong Christian context from which not just certain obligations arose, but also certain questions about the worth and dignity of human beings, which otherwise would not have arisen without such a world view. And with the discovery of the New World, the Indians somehow had to be understood within such a context. From this theological jurisprudential framework the 16th Century Spanish Thomists Vitoria and Suárez attempted to justify Spanish imperial rule or as it was spiritual enterprises in the New World. From universal law of nature and of nations the Spanish had certain natural rights to wage war against the Indians if they denied them safe passage or trade. However, from this also followed that they had certain obligations to save the Indians, either from abhorrent practices such as cannibalism and other crimes against the law of nature, to save their souls. These mutual rights and obligations were derived from the universal sociability of individuals in the state of nature. But for Vitoria, wars grounded in humanitarian considerations necessarily presupposed the principle of right intent for its justification. The principle of right intent is also central for Suárez, who makes it central for his justification that the American Indians may be subdued to instruct them to lead more civilised

lives. The Protestant Gentili is one of the first jurists who tried to reconcile the religious schisms of the Christian Church by more emphatically expounding the common interests of mankind as a way of moving beyond Catholic jurisprudence. This common law of humanity dictates that on behalf of innocents, war against barbarians is justified, who with their lewd lifestyles breaks the natural bond of humanity and violates the natural law. The perceived universality of the natural law meant that none of the three thinkers were ready to sanction wars for the purpose of avenging crimes against God, nor to punish unbelievers in the hope of saving their souls. This, however, was not the case with the Jesuit Sepúlveda, who vigorously claimed that Christians have an absolute obligation to save souls that fall outside of Christian salvation - by force if necessary. As already mentioned, he thus promoted the forced Christianisation of the Indians, in essence, to save them from themselves. Ultimately, his argument was founded upon the Aristotelian contention of natural slavery, a category, to which Sepúlveda believed that the Indians belonged. Though never as forcefully or emphatically as Sepúlveda, this type of argument was also employed by Protestant Dutchman Grotius, who, although associated with basing his natural law ideas on more non-sectarian grounds, unlike the Spanish thinkers, still appealed to theological foundations to support his theory of universal punishment of crimes committed against the natural law or providing assistance to an oppressed people. For Grotius the crime against the law of nature of killing innocents, the sovereign of another state has a right to punish such crimes and thereby intervene in the affairs of another state. However, such acts, Grotius contends, are purely permissive because it can only be an imperfect duty as the law of nature does not prescribe who should do the punishing, and also, the duty to assist others comes second. Although he presents a strong case for natural sociability, we have, first and foremost, a duty to preserve ourselves. Following this, for post-Westphalian thinkers such as Pufendorf, who struggled to come to terms with the concept of sovereignty in the changing circumstances of Europe, the nascent conflict between the duty of citizens and of men to the wider moral community was very much to the fore unlike what it had been in the previous thinkers. In acknowledging the 'rights' of states, Pufendorf was reluctant to give carte blanche endorsement to the principle of intervention on humanitarian grounds. He is important in this context because, even though he denied any notion of humanitarian intervention, which to a certain extent was derived from his positivistic view of international law in so far as it was God who was the author, he nevertheless presented an idea of the moral person of the state whose sovereignty was grounded in the principle of eminent domain. In this way, Pufendorf, more than anyone else, made real conceptual groundwork to

protect the collective rights of the Indians, by claiming against thinkers such as Grotius and Locke, that they had sovereign rights to their territory. Pufendorf's understanding of sovereignty, or eminent domain, was, more than anything else, meant to be protective of the rights of the American Indians and emerged to accommodate such needs, as well as the the protection of religious rights in a war weary Europe after the Thirty Years War (1618 - 1648). We see then in Pufendorf the conflict between sovereignty and universal moral principles, that is, between the duties of citizens and of men. This claim, in itself, was far more humanitarian in its conceptual scope than, for instance, what Grotius presented. Following Pufendorf, 18th Century jurists such as Wolff and Vattel certified a new age, post-Westphalia, where the first serious attempts were made to move away from any religious foundations, emphasising the pinnacle of the sovereign state ultimately grounded in the principle of non-intervention, although with certain exceptions. Rather than emphasising the principle of humanitarian intervention, they instead present a 'pre-Rawlsian' call for the duty to assist, thus reaffirming the boundaries of the free will and equality of states as the limits for international ethics. For Wolff and Vattel there were circumstances when humanitarian intervention was justifiable, but there was no general principle to which to appeal, and any such norm had to be severely constrained, but this did not undermine the fact that states had a moral duty to assist one another. Edmund Burke, who will be discussed in the final chapter, was much more prepared to endorse humanitarian intervention, but one may argue that the circumstances were different, and based upon what he called the common law of Europe. This common law of Europe was constituted by the wider moral base of the Commonwealth of Europe. Interestingly, for Burke the moral base of this Commonwealth of Europe could be said to function in the same way as the conceptually reminiscent common rights of mankind perceived by thinkers such as Gentili and Grotius. For Burke, saving the French people from abstract natural rights thought alien to the prescriptive morals of the Commonwealth of Europe solidified the conduct of member states towards humanitarian intervention. But ultimately it was more for Burke than that: he thought he was saving Europeans and not just Frenchmen, and, moreover he argued that the British Commonwealth should encompass the rights of Englishmen in America and India.

What this research shows, then, is that it appears that a notion of humanitarian intervention was more widely accepted as part of international justice in the early modern period, especially in thinkers writing before the Peace of Westphalia, such as Vitoria, Suárez, Sepúlveda, Gentili and Grotius. There is, in fact, a remarkable shift in the development of the principle of humanitarian intervention from pre- to post Westphalia. This shift signals ideas of

sovereignty and non-intervention as foundational principles for international law and international relations with a notable impact on the development of the principle of humanitarian intervention. Unlike the modern day notion of humanitarian intervention, we see that the principle was highly developed in the thinkers of the 16th and 17th Centuries – and for reasons of the central position the state came to occupy in relation to the law of nations the justification of intervention became far more equivocal in 19th and 20th Century international jurisprudence.³⁹

Armed with an understanding of the historical heritage of the idea of humanitarian intervention and the thinkers who explored it, I am able to illuminate that history provides evidence for a discourse in humanitarian intervention, which stems back to the classic texts of the thinkers explored in this thesis. I intend not only to demonstrate the normative history of humanitarian intervention, but also to address claims about obligation, rights and foundational morality pertaining to the complex issues of the principle. The presentation of this discourse not only allows me to map the different paths and justifications for the development of humanitarian intervention, but can be used as a medium through which I can illustrate the irresolvable tension in international relations between the political, moral and legal. This identification therefore provides not only greater insight into the trajectory humanitarian intervention has taken and the development of (dis)agreed norms which are accepted today, but also illustrates a great tradition of tension within international relations.

³⁹ Something might need to be said why I do not include a discussion of Immanuel Kant (1724 - 1804). There are interesting comparisons to be made between Burke and Kant, and the expansion of the moral community. This would, however, fall outside the scope and focus of this study. One obvious reason why I do not include Kant in this study is that Kant had no real theory of humanitarian intervention. He argued for respecting the sovereignty of each country and explicitly argued against intervening in the affairs of another country on the basis of arguments of ‘helping’ or civilising them (see *The Metaphysics of Morals* and *Perpetual Peace*). Instead, he supports the idea of internal reform, and the idea of states voluntarily entering a peaceful federation. Although, from his work, one can read strict requirements about how the internal constitution of states should be (republican) because only human freedom and rights can be respected, and he also argues for some strict duties and rights, he nevertheless argues that only internal reform should happen, and that it is not the business of other states to ensure it through intervention. He argues for only one cosmopolitan right: the right to visit and offer ones services to other countries, but again, he does not really connect it to an enforcement mechanism. He also, at one or two places, talks of an enemy or evil states, that wages war, which other states might be entitled to go to war with, but these are scattered statements, and nothing like a theory of humanitarian intervention is present here. Although from Kant, using his strong moral theory to underlie the importance he gives to human freedom and dignity, one might be able to develop such a theory (which many neo-Kantians now try). Kant, however, did not; and in an attempt to develop such a theory I would make the same mistake as some of the theorists I challenge in this study.

Chapter 1

Francisco de Vitoria, Alberico Gentili and Francisco Suárez

‘If some earthly city should decide to commit
certain great crimes, it would have to be
overthrown by decree of the human race’,⁴⁰
- Gentili (1612)

Introduction

In 1511 the Dominican Antonio Montesinos, one of the first Dominicans to arrive at the Island of Hispaniola (what is today the Dominican Republic) launched an attack from his pulpit against the behaviour of the Spanish colonialists towards the natives

‘I am the voice crying in the Wilderness [...] the voice of Christ in the desert of this island [...] [saying that] you are all in mortal sin [...] on account of the cruelty and tyranny with which you use these innocent people. Are these not men? Have they not rational souls? Must you not love them as you love yourself?’⁴¹

This sermon was to change the whole discourse of the Spanish enterprise in the Americas and spark off a fierce debate about the rights of the Indians, because what Montesinos inevitably brought into question was the Spanish crown’s *right* in America. The debates that followed never centred on whether the Spanish Crown might *rule* the Indians -- no one questioned this -- but what Ferdinand, and later Charles V, sought from their advisors was rather what might be legitimately taken from the lands – so ultimately it became a question of property. Although the discovery of America precipitated atrocities perpetrated by the Spanish conquistadores, who, motivated by greed, sought to exploit and kill the Indians for that purpose, it also inspired a serious intellectual debate regarding the rationality and Christianization of the Indians, and

⁴⁰ Gentili, Alberico: *Three Books on the Law of War* (1612), trans. by John C. Rolfe (Oxford: Clarendon Press, 1933), book I, chap. xxv, §198 (Gentili citing St. Augustine)

⁴¹ Cited in Blackwell, Peter: *A History of Latin America – Empires and Sequels 1450 – 1930* (Massachusetts: Blackwell Publishers, 1997), p. 83

ultimately it brought to the fore questions of the legitimacy of European dealings with the rest of world.

In this chapter I want to explore notions of humanitarian intervention in the context of the discovery of the New World. I seek to do this in the writings of three very influential and important writers, Francisco Vitoria (1480 - 1546), Francisco Suárez (1548 - 1617) and Alberico Gentili (1552 - 1608). The main question is what obligations to intervene do these thinkers suggest that we have in relation to humanitarian intervention? This, then, is not merely the exploration of certain aspects of what could be labelled 'humanitarian' within the confines of just war theory, but also an exploration of the source of the moral obligatory nature of humanitarian intervention. In this way it is important to explore in some detail the relationship between the law of nature and the law of nations as the two systems of law from which such obligations would derive. However, as noted in the introduction, this relationship proved to be ambiguous in most of the 16th and 17th Century thinkers explored in this thesis. Many of them often conflated the law of nature and the law of nations, making them almost indistinguishable. Indeed, most thinkers deliberately exploit the ambiguity of the relationship. However, regardless of a proper distinction between the law of nature and the law of nations it was by applying the universal standards of these two systems of law that justifications could be given for waging war against the Indians either through conquest or humanitarian intervention. Humanitarian intervention was indeed integral to just war theory, and many of the justifications were derived from purported contraventions of the natural law. It was based on the claim that the natural rights of the Spaniards were somehow being violated by the American Indians who had a duty to respect them. If certain of their internal societal arrangements, such as human sacrifice and cannibalism offended humanity, intervention to save innocent victims could be justified. Even where such offences were not acknowledged, transgressing the law of nations or nature provided sufficient excuse. So for instance hindrances to the rights of passage, attempts to prevent the seizure of 'vacant land' and gold found in that land were done on the ground that the world was held in common, and as such these impediments were unjust and gave cause for war. Sepúlveda, who is the subject of the next chapter, went as far as to argue that the Indians were natural slaves, a contention he based on Aristotelian ethics, and if they resisted this natural order of dominion they gave their superiors grounds for just war against them. Based on this, it has been argued that regardless of the various legal and theological apprehensions at the time the fact remains that natural rights, instead of protecting the Indians against the brutality of the Spaniards, was used to justify their

subjugation.⁴² Considering the historical fact of violation and exploitation of these people this might even be an obvious conclusion to make after exploring these thinkers. Even the most sympathetic commentators such as Vitoria, Suárez, and Gentili believed that the Spaniards had just cause for waging war against the Indians on the grounds that they had violated the universal natural rights which were given by nature and therefore God. However, despite this, there are elements in their writings that constitute genuine attempts not just to apply just war theory to the case of the American Indians in such a way as to make the precepts of the natural law universal but also seek to protect innocents against unlawful aggression and usurpation. As we shall see, Gentili and Suárez more unusually favoured humanitarian intervention than Vitoria, who seems to have a much more subtle approach to this aspect of just war theory.

It is thus necessary to look more closely at the causes of just war and in this way explore what moral obligations do we have to assist other people and how would this come about? However, before I attempt to determine the moral basis for intervention, I first want to explore the obligations that these thinkers suggest we have in relation to humanitarian intervention.

The obligation to intervene - the law of war and humanitarian intervention

Francisco Vitoria

For Vitoria the only legitimate justification for war (excepting God's command⁴³) is the violation of rights and therefore the exercise of dominion over the Indians and their lands was justifiable on the grounds that they had in some way violated the rights of the Spaniards. Vitoria was clear that the case of the Indians was not related to the jurisdiction of the Pope nor the emperor, but was rather one of natural law and natural rights of the Indians. He considers the claim that the Indians did not enjoy possession of their lands and whether the Spanish on this account can wage just war. However, to use such justification he argues, the Indians had to be sinners, infidels or idiots, and he found no evidence to support such claims. Vitoria rejected the sinners and idiots arguments by expounding a central claim, namely that the authority of a prince did not depend on God's grace but God's law. This was important for this was one of the main arguments that the crown's apologists had used for the legitimate occupation of America. Vitoria stated that dominium must be independent of God's grace, and derived instead from man as a rational being, made in God's image, which was a fundamental characteristic which could not be lost through sin. As such, however irrational it might seem,

⁴² Boucher, David: *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, forthcoming 2009), p. 165

⁴³ Ibid., p. 168

no act could make you forfeit your natural right to property. Thus, sins such as cannibalism, human sacrifice, sodomy and incest were not sufficient grounds to justify intervention to subjugate the Indians and deprive them of their property. Further, Vitoria argued that war against Christians who commit such acts is not permissible, even though, they would in fact be more sinful. So why should such sinful practices entail just cause for war against the Indians when they are clearly ignorant that such practices are sinful?⁴⁴ Vitoria was adamant that the Indians were not devoid of reason and invoked a fundamental Aristotelian principle that ‘nature does nothing in vain.’

‘According to the truth of the matter they are not irrational, but they have the use of reason in their own way. This is clear because they have a certain order of their affairs, ordered cities, separate marriages, magistrates, rulers, laws [...] Also they do not err in things evident to others, which is evidence of the use of reason. Again, God and nature do not fail for a great part of a species in what is necessary. But the special quality in man is reason, and potency which is not actualized in vain.’⁴⁵

Brian Tierney argues very aptly that it is exactly this passage that Anthony Pagden has misunderstood in his argument that the Indians’ rationality was potential, like that of children, but not actual. As such, Pagden argued, invoking Vitorian jurisprudence, that the Castilian crown could claim the right to be the legal protectors of the Indians and their lands until they reached the age of reason under tutelage of the Spaniards. He even asserted that this could be considered an act of charity, for which we would have a moral obligation.

It is true that Vitoria rehearsed such an argument, but as Tierney maintains, this line of argument would be exactly the opposite of what the Spanish scholar meant. The Indians were not a people whose intellect was merely potential rather than actual; such a notion would imply that God and nature had somehow failed.⁴⁶ In fact, the logic of such an argument, as we shall see in the next chapter, was drawn-out by Las Casas in his defence of the Indians against Sepúlveda’s argument that they were natural slaves. Instead he considers the Spanish claim to jurisdiction in relation to the *jus gentium*, as we will see later. The claim of jurisdiction applied to the Spanish by something he called ‘right of society and natural communication.’⁴⁷ Vitoria contended that seashores and natural harbours are absolutely necessary for man’s survival;

⁴⁴ Vitoria, Francisco: *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press: 1991), p. 272 - 5

⁴⁵ Cited in Tierney, Brian: *The Idea of Natural Rights – Studies on Natural Rights, Natural Law and Church Law 1150 – 1625* (Cambridge: W. B. Eerdmans Publishing Company, 2000), pp. 269 – 270

⁴⁶ *Ibid.*, p. 270

⁴⁷ Vitoria, *Political Writings*, p. 280

these have therefore, under God, been exempted from the original division of property. This contention gave the Spanish the *right* to travel into the lands of Indians.⁴⁸ This right also, under the label ‘communication’ gave them the right to trade and the right to preach their religion without interference; although this did not entail its acceptance. Denial of these rights would give the Europeans a just cause for war. In this way, Vitoria concluded that a violation of these natural rights and subsequently the enforcement of them by just war was the only legitimate grounds for the Spanish presence in America. This is important because what Vitoria was in fact suggesting was that this ‘natural communication’ among men, from which were derived certain mutual rights and obligations precede the rights and obligations established within civil societies. These mutual rights and obligations derived from ‘natural communication’ sprang from the universal sociability of individuals in the state of nature.⁴⁹

Although we have certain obligations derived from our common rights of mankind, for Vitoria it seems clear that these obligations do not extend to waging war on the Indians either to punish them for cannibalism and sodomy, nor to save them from themselves. For the Spaniards to act in this way would be unjust, precisely because the natural rights of the Indians are inviolable. As a consequence arguments of humanitarian intervention are difficult to detect in his work. As he stated ‘Christian princes cannot wage war on unbelievers on the grounds of their crimes against nature, anymore than for other crimes that are not against nature [...] For example they cannot use the sin of sodomy anymore than the sin of fornication as a pretext.’⁵⁰ Intervention is not justified on the grounds that their practices of human sacrifice and cannibalism were against the natural law, but rather because they ‘involve injustice to other men.’⁵¹

The route by which Vitoria reaches this conclusion is by exploring the principle of innocence. What he is saying here is that Christian sovereigns can and should intervene and defend innocent people from being harmed, i.e. eaten or sacrificed in this case. Also, this cause would remain lawful even if the innocent did not seek or wish for such intervention. However, Vitoria continues to say that ‘even if they [the Indians] sacrifice criminals [not innocent] to eat, they still commit an injustice [...], since there is a law of nations (*ius gentium*), indeed a

⁴⁸ This conception of free travel and communication under the law of nations clearly reflect the pre-Westphalia period

⁴⁹ Aguilar, Jose Manuel de.: ‘The Law of Nations and the Salamanca School of Theology’, *Thomist – A Speculative Quarterly Review*, 9 (1946), pp. 186 – 221, p. 205

⁵⁰ Vitoria, *Political Writings*, p. 219

⁵¹ *Ibid.*, p. 225

natural law, that the bodies of the dead are exempt from this injustice.’⁵² This is an interesting argument because it serves not just to complicate Vitoria’s conception of who comes under the category of innocent, but also his view on the relationship between the law of nature and the *jus gentium*. It is difficult in this context to conclude whether such injustice, the eating and sacrifice of criminals, could entail the same sort of just cause for intervention as in the case of innocents. If this is the case, then, from what Vitoria argues, it would seem reasonable to suggest that it is also lawful to intervene when not so innocent people are being sacrificed. This contention underlines the importance of who are the innocent people that are to be the object of third party intervention to save lives and, in turn, punish the violators? What it also does, is to bring Vitoria’s ambiguity concerning against whom and by what means the injustice is being committed? What needs to be noted is that Vitoria in fact finds no conclusive precepts which absolutely prohibit the eating of human flesh. In quoting Genesis (9:3) ‘every moving thing that liveth shall be food for you’ Vitoria concludes that ‘this at least makes it clear that cannibalism is not a mortal sin, provided that it is not against charity to God or to one’s neighbour. [...] But on the other hand the law of nations (*ius gentium*) is against it, since all nations have always held it to be abominable’.⁵³

However, one may discern that Vitoria either retracts his defence of Indian rights, or is at least more ambiguous about them than he at first appears. For he in fact goes on (albeit timidly) to suggest that states’ tyrannical oppression of the innocent, or their practicing of human sacrifice, euthanasia or cannibalism, all provide just cause for intervention in ‘defence of our neighbours’. As he asserts

*‘In lawful defence of the innocent from unjust death, even without the pope’s authority, the Spaniards may prohibit the barbarians from practicing any nefarious custom or rite. The proof is that God gave commandment to each man concerning his neighbour.’*⁵⁴

The barbarians, Vitoria argued are all our neighbours. ‘If there is no other means of putting an end to these sacrilegious rites, their masters may be changed and new princes set up.’⁵⁵ This clearly suggests that Vitoria believed that crimes committed against innocents on such a scale warranted intervention to save them, although he previously had argued that such affronts to natural law could not give the Spanish just cause for war.

⁵² Ibid., p. 225

⁵³ Ibid., p. 207

⁵⁴ Ibid., p. 288

⁵⁵ Ibid., p. 288

I want to argue that Vitoria does not contradict himself here nor is he in fact ambiguous. Rather, it seems clear that Vitoria's just war theory is based on a principle of intention. If the intention is for appropriation of the Indians lands then using cannibalism, sodomy and other violations against natural law as a pretext for war is not justifiable. If on the other hand the intention is an attempt to save the innocents from these ungodly acts then war can be justified because it is our duty as Christians under the law of nature laid down by God. Thus, this contention underlines the fact that one of the conditions of just war theory is 'right intent'. This is an aspect which subtly informs just war theory and is extremely important in an argument relating to intervention based on humanitarian grounds. It seems clear, then that the 'just' of offensive warfare, such as intervention, is conditional upon the right intention of the intervener. As with Gentili, as will be evident below, Vitoria frequently expounds the utility of the common good as a necessary condition for waging just warfare. One of the main purposes of war is peace and security and thus, it is 'based on the purpose and good of the whole world.'⁵⁶ This can also be supported by emphasising what, for instance, Vitoria strictly forbids as causes of war, such as warring to enrich oneself, for personal glory and enlargement of empire. As such, Vitoria contends that 'the sole and only cause of waging war is when harm has been inflicted'⁵⁷, an issue that was explored above. Furthermore, right intent also includes the condition that the consequences should not be more harmful than the harm prevented. For instance, Vitoria emphasises that the effects of warfare are often cruel and horrible, not only is it therefore unlawful to start a war for every injury, even in justifiable wars there is a need to weigh the evil being fought against the outcome or consequences of war.

It is exactly the importance of 'right intent' and Vitoria's recognition of it, which the historian James Muldoon fails to apprehend in his article 'Francisco de Vitoria and Humanitarian Intervention.'⁵⁸ Although, Muldoon very appropriately points out that Vitoria was one of the first who went against mainstream thought and claimed that violations of the natural law did not authorise the pope to use force to compel adherence to its principles, he makes the curious contention that Vitoria 'did see the possibility of intervention but not on the basis of the just war theory but instead on the basis of human sociability.'⁵⁹ This contention is problematic in several ways. First of all, humanitarian intervention is usually based on right

⁵⁶ Ibid., p. 298

⁵⁷ Ibid., p. 303

⁵⁸ Muldoon, James: 'Francisco De Vitoria and Humanitarian Intervention' in *Journal of Military Ethics*, Vol. 5, no. 2, 2006, pp. 128 – 143

⁵⁹ Ibid., p. 139

intent, possibility of success and also, right authority, within the subject matter of just war theory. In approaching this subject Muldoon appears to separate any notion that Vitoria might have of humanitarian intervention from any conception of just war theory

‘While it is traditional to examine Vitoria’s thought in terms of the development of theories of the just war, it is also possible to deal with his work in terms of what we would now call humanitarian intervention, that is the right, perhaps even the responsibility, of Christians to punish violators of the natural law or to raise a primitive society to civilised status, in other words to intervene in another state for the welfare of those who live there.’⁶⁰

Muldoon’s argument here is wholly unfounded. As I have already demonstrated, questions of intervening against those who violate the principles of the law of nature, or as a third party claiming just title to intervene in the affairs of another country clearly pertains to just war; this is a firmly rooted conceptualisation of Vitoria’s own explorations of the subject. Muldoon fails to explain Vitoria’s basis and premises of human sociability, giving merely random remarks about the universal nature of human society within his ‘pre-Grotian’ categorisation. The underlying reason for these conclusions is to be found in Muldoon’s failure to develop Vitoria’s conception of the *jus gentium*. It will become clear from further expositions that without such an exploration any conclusions about the source of such moral obligation cannot have any value. He assumes that Vitoria has a clear view about what constitutes the law of nations, but, in fact, as will be proven elsewhere this notion remains highly ambiguous as Vitoria never satisfactorily makes a clear distinction between the law of nature and the law of nations. Thus, if it is not just war theory, then Muldoon needs to show that it is a direct set of principles substantively apart from the just war theory. Because he does not take into account Vitoria’s principle of right intent, he is left with Vitoria’s apparent contradictory claims about humanitarian grounds for intervention under the just war theory, which is why he claims it under an alternative, however unsubstantiated, notion which is meant to have its basis in human sociability. Thus, the problem is not that Muldoon does not argue that notions of humanitarian intervention cannot be traced in the works of Vitoria; on the contrary, the problem is rather that he misunderstands the subtle foundations on which Vitoria bases these notions on.

Attempting to move well beyond Vitoria’s subtle foundations of humanitarian intervention, the Protestant jurist Gentili presents arguments for just warfare against the

⁶⁰ Ibid., p. 133

Indians much more readily. Unlike his Spanish predecessor, Gentili viewed them as a barbaric race that needed restriction in the common interests of mankind.

Alberico Gentili

Gentili was an Italian jurist and Protestant and later became regius professor of civil law at Oxford University. Although he is not one of the most famous of the natural law jurists he nevertheless provides an important insight into jurisprudence in relation to the discovery on the New World. He was one of the first of the jurists to write extensively on the topic of piracy as well as developing a new doctrine of the rights and duties of ambassadors. Grotius was to a great extent influenced by him.

Apart from the law of self-defence in general, Gentili writes of what he calls 'natural causes' for declaring war. The grounds for these are based on considerations of necessity, utility or honour. Occupation of 'vacant land' for instance Gentili firmly asserts as a just cause of war out of necessity. Avenging injuries and preventing them from happening in the future, vindicating violated natural rights such as rights of passage, navigation and shelter, are wars of utility. Making wars on one's own account, but instead for the common good of every one, are wars of honour. Finally, he also lists 'human' causes for making war, which appear when reparations are made to vindicate violated positive rights.⁶¹

The principle of humanitarian intervention can first and foremost be traced in Gentili's work by emphasising his vision of the common interests of mankind, and is in this way characterised as wars undertaken for reasons of both utility - the utility of the common interests of mankind - and honour. He maintains that it is love of our neighbour and the desire to live in peace that confers a right to wage war against those who violate the 'common law of humanity' and wrong mankind.⁶² This idea was not limited to 'man's liberty' as he also supports the right to wage war to protect the freedom of the seas in evoking this principle. Gentili states that those who live according to the precepts of God will regard an injury to another as one done to themselves. We have an obligation to save the injured from the hands of the injurer, as long as we do not risk our own lives in the process.⁶³ He considers one such just cause to be intervention on behalf of the innocent against certain categories of crime in breach of the natural law, such as cannibalism and human sacrifice. He argued that intervention was

⁶¹ Gentili, *On the Law of War*, book I, chap. xvi - xix

⁶² Ibid., book I, chap. xxv, §202

⁶³ Ibid., §113-14

justifiable on a wide variety of grounds including the defence of subjects of another state against their ruler, if he is grossly unjust and cruel to them.⁶⁴

As an introduction to the chapter 'Of an Honourable Reason for Waging War' Gentili considers the just causes for making war with a discussion of the common interests of mankind.⁶⁵

'There remains now the one question concerning an honourable cause for waging war [...] which is undertaken for no private reason of our own, but for the common interest and in behalf of others. Look you, if men clearly sin against the laws of nature and of mankind, I believe that any one whatsoever may check such men by force of arms.'⁶⁶

Within these precepts Gentili maintained that the Spaniards were justified in waging war against the Indians by the fact that they practiced 'abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose.'⁶⁷ The justification for this was derived from the idea that the Indians in this way had broken the natural bonds of union which exist between all men by violating natural and divine laws.

'Therefore, since we may also be injured as individuals by those violators of nature [...]. No rights will be due to these men who have broken all human and divine laws and who, though joined with us by similarity of nature, have disgraced this union with abominable stains.'⁶⁸

In this way they forfeit their natural rights; a contention, we saw, with which Vitoria disagreed. For Gentili, then, there was an obligation on the part of civilized nations to act on behalf of the *societas gentium* in general in intervening where sodomy and bestiality were commonly practiced, and to come to the aid of victims of cannibalism and molestation. As will be explored in more detail later, the law of nations (or *jus gentium*) for Gentili is the law of this community of states, whose members are interdependent as well as independent and who shares common interests and have mutual relationships and understandings. From this community, then, certain obligations are derived and from this Gentili speak of the necessity

⁶⁴ Gentili, *On the Law of War*, book I, chap. xviii, and xix.

⁶⁵ Meron, Theodor: 'Common Rights of Mankind in Gentili, Grotius and Suárez' in Theodor Meron *War Crimes Law Comes of Age – Essays* (Oxford: Oxford University Press, 1998), pp. 122 – 130, p. 126 - 127

⁶⁶ Gentili, *On the Law of War*, book I, chap. xxv, §198

⁶⁷ Ibid., §198-99

⁶⁸ Ibid., §203

and utility of interfering in places where regimes perpetrated or condoned such abhorrent crimes. As he contends

‘Not only is the civil law an agreement and a bond of union among citizens, but the same is true of the law of nations as regards nations, and the law of nature as regards mankind. [...] To say nothing of the law that is common to us with brutes, of our dominion over them, we surely cannot deny that what is natural to men is common to all men.’⁶⁹

Thus, Gentili can assert that wars to restore violated natural law are thus wars ‘of vengeance to avenge our common nature.’⁷⁰ However, he does emphasise that to justify such interventions the grounds had to be sufficiently serious, and the violation of rights had to be by sovereigns or peoples, and not the random acts of individuals.⁷¹ To clarify then, if sodomy was widely practiced, but it was not actually against the will of anyone (i.e. consenting adults), which would nevertheless be an affront against God, who should be avenged by intervening to save the sodomisers against themselves.

Gentili is very clear that the pretext of religion cannot be appealed to when a ‘right of humanity is violated at the same time’ - for as he emphasises, ‘the innocent must be protected.’⁷² One of the only grounds where he denies Spanish causes for waging wars against the Indians is the ‘pretext of religion’, that is engaging in war against the Indians for refusing to receive the Christian religion.⁷³ As such, this is one of the only issues, where Gentili seems to follow up on the implications of Spanish intentions. In relation to warfare justified out of necessity he does seem to indicate that the Spanish in some parts are not aiming at commerce, but instead at domination. He says that the Spanish ‘regarded it as beyond dispute that it was lawful to take the possessions of those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be possessed by no one.’⁷⁴ Only vaguely exploring this point further, Gentili says that apart from some isolated cases (he talks here of for instance trading commodities which would be against the religion and custom of that particular country), interference with commerce provides justifiable grounds on which to make war and in support of this he claims that ‘it is a common characteristic of all uncivilised

⁶⁹ Ibid., §203

⁷⁰ Ibid., §204

⁷¹ Ibid., §207

⁷² Ibid., §200

⁷³ Ibid., §200

⁷⁴ Ibid., book I, chap. xix, §144 - 145

peoples to drive away strangers.’⁷⁵ Unlike Vitoria, therefore, Gentili seems to provide the Spanish with a conceptually open licence for just warfare against the Indians. Although, one cannot wage just war against the Indians on the ground that they are not Christians, he does believe it legitimate if they are atheists. Gentili views atheists in the same way he does pirates. He notes

‘Faith is a special gift from God and Jesus Christ is foolishness among the heathens; but natural things are known naturally to all. Some kind of religion is natural, and therefore if there should be any atheists, destitute of any religious beliefs, either good or bad, it would seem just to war upon them as we would upon brutes. For they do not deserve to be called men, who divest themselves of human nature, and themselves do not desire the name of men.’⁷⁶

This is also the main reason, according to Gentili, why you should not enter into a treaty with a barbarian, or brute, because they have no religion and are outside the bounds of normal morality. Importantly, for Gentili then, it is not just a question of these barbarians being non-Christians, but rather non-religious; a central notion in Gentili’s international jurisprudence which Richard Tuck fails to detect.⁷⁷ However, Tuck aptly argues that Gentili linked his idea of violators of nature, whom he then labels pirates or barbarians to the Aristotelian notion of natural slavery. Although, as Tuck notes, Gentili is cautious not to endorse the full Aristotelian notion in the sense that he believes that these barbarians are not born as slaves by nature. As he says ‘the objection is made, that natural reason, which is the basis of the law of nations, could not introduce slavery if we are all free by nature.’⁷⁸ Gentili takes this notion and follows Aquinas by noting that slavery is in this way in harmony with nature ‘not indeed according to her first intent, by which we are all created free, but according to a second desire of hers, that sinners should be punished.’⁷⁹ In this way, unlike Sepulveda’s argument, Gentili reached the conclusion that ‘although the philosopher [Aristotle] is speaking of those who have servile dispositions, yet his arguments also apply to those who become slaves because of their wickedness and sins.’⁸⁰ As such, for Gentili there certainly is an aspect of just war which can

⁷⁵ Ibid., §145

⁷⁶ Ibid., chap. xxv, §204

⁷⁷ See Tuck, Richard: *The Rights of War and Peace – Political Thought and the International Order from Grotius to Kant*, (Oxford: Oxford University Press, 1999), p. 35 - 36

⁷⁸ Ibid., book III, chap. ix, §538

⁷⁹ Ibid., §538

⁸⁰ Ibid., §539

be termed humanitarian grounded in obligations to avenge serious crimes against the natural law to save innocents and thereby the common bonds of humanity.

Francisco Suárez

Suárez was a Spanish Jesuit and is widely regarded as being the most influential scholastic after St Thomas Aquinas. Like most early modern jurists Suárez held that war prescribed for self-defence was natural and necessary. To this he also adds that sometimes an aggressive war may also be waged out of necessity and in such cases it is a right. Suárez was very clear that ‘war is permissible [only if] a state may guard itself from molestation; for in other respects, war is opposed to the welfare of the human race on account of slaughter, material losses, and other misfortunes which it involves [...]’⁸¹

Suárez lists two main reasons why offensive warfare (aggressive) is justifiable. One is that if an injury has been done to ensure reparation, such as the refusal to allow people to preach the gospel; set up missionary embassies, and observe the natural law. The second relates to the reason that whoever has inflicted injury, or violated a right, may also be duly punished. Suárez is adamant that this last reason is important and conducive to the overall welfare of the world

‘Just as within a state some lawful power to punish crimes is necessary to the preservation of domestic peace; so in the world as a whole there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another [...]’⁸²

Suarez was, in many ways, more attuned to Gentili in condemning barbaric practices such as cannibalism and human sacrifice, but was not willing to go as far as Sepúlveda, as will be apparent in the next chapter, in intervening on the grounds of converting the Indians into Christians, by means of forcing them to hear the Gospel. Suárez asserted that a just cause for war would be to defend the innocent.

‘In order to defend the innocent, it is allowable to use violence against the infidels [...] that they may be prevented from sacrificing infants to their gods; inasmuch as such a war is permissible in the order of charity and is, indeed, a positive duty if it can be conveniently waged.’⁸³

⁸¹ Suárez, Francisco: *Selections from Three Works*, Trans. by Gwladys L. Williams, Ammi Brown and John Waldron, (Oxford: Clarendon Press, 1944), Disp. XII, iv, p. 816

⁸² Ibid., Disp. XII, iv, p. 818

⁸³ Ibid., Disp. XVIII, iv, p. 770

Here, it can be noted that Suárez also invokes the condition that the consequence of war should not be more harmful than what it was intended to prevent. Elsewhere he asserts that ‘it is not every cause that is sufficient to justify war, but only the causes which are serious and commensurate with the losses that the war would occasion.’⁸⁴ However, even though Suárez recognises the importance that the sovereign who commenced the war is morally victorious, he does not find it essential to the further justness of the cause. One reason for this is that if this was absolutely true then it would be almost impossible for injured weaker states to declare war.

Concerning intervention to prevent sacrifice Suárez importantly asserts that the justice of such action is limited to cases where such killing is unjust. Exploring this issue further it becomes clear that Suárez only holds the justice of this cause valid if it is done to save innocent people. If on the other hand, he says, the infidels are sacrificing criminals already sentenced to death, then this would not prove a sufficient cause as there would be no reason to save them. Namely, in such cases, the infidels would not be sinning against justice, as would be the case if they were killing innocents, but would instead be sinning against religion.⁸⁵ To this he adds that it is unlawful to avenge God for injuries done to Him by those who are idolatrous and sin against nature. For in this instance, Suárez argues, we are dealing with ‘vengeance’ (in the strictest sense), which can never be grounds for a just war. In case of vengeance, war could become just on both sides, which is something Suárez is careful to refute as possible. This also underlines the principle of right intent. However, in what follows Suárez is much emphatic about the importance of this principle. He notes that to avenge God for sins which are against nature or which are idolatrous is a ground for war which has been virtually accepted by various authorities. In this case, they argue that it is allowable to make war upon that prince who commits such crimes on the grounds of defence against the innocent. Suárez contends that this argument would be valid if the prince in question submits his subjects to such crimes or if the whole state demanded assistance against their sovereign. As he says, ‘for where compulsion does not intervene, defence has no place’ - an affirmation which Suárez enforces by emphasising that if such reasoning was valid, then ‘it would always be permissible to declare such a war on the grounds of protecting innocent little children.’⁸⁶

⁸⁴ Ibid., Disp. XII, iv, p. 816

⁸⁵ Ibid., Disp. XVIII, iv, p. 770 - 771

⁸⁶ Ibid., Disp. XII, v, p. 824

Interestingly, Suárez rejects the argument, as did Vitoria, that since the Indians are not true believers they forfeit their right to their possessions. They also both deny that the Emperor has direct temporal dominion over the world. One of the main arguments against this for Suárez is that even if this title is valid, it would be impossible to ‘demonstrate its existence to the satisfaction of infidels, or to force them to believe in the existence of such dominion.’⁸⁷ For this reason then, they could never be forced to obey. This contention directly relates to Suárez’s rejection of the view that infidels are barbarians and are incapable of governing themselves properly. Such a contention is grounded in the Aristotelian idea that such war is just by nature when people who are by nature subservient, but refuse to accept the rule of more civilised people. This also relates to Aristotle’s conception of natural slavery, which will be explored more fully in the next chapter. Suárez denied natural slavery on the grounds that ‘the law of nature does not of itself prescribe such a procedure.’⁸⁸ Slavery presupposes imposition and is introduced by human usage. Also, Suárez was very clear that slavery pertained to positive law more than anything else: ‘Slavery [...] is a rule of positive law and does not depend on the force and exercise of natural reason, even if one assumes the existence of human communities; and therefore it does not pertain to the *ius genitum*.’⁸⁹

In relation to justifying warfare to civilise the Indians, Suárez rehearses its humanitarian merits, and claims that the argument that the Indians should be ruled by more civilised people cannot have any general application as the abilities of unbelievers are manifest and diverse, and some are adapted to political life. Secondly, if this argument is to have any force then it must also be proved that the said people live wretched lives in general and behave more like beasts than humans; by, for example, not wearing clothes or eating human flesh. However, in this case, then, just war may be brought against them, but not to subject them, but rather so they may be civilised and justly governed. Thus, again, Suárez’s appeal to right intent is an important condition for just war. This becomes even more evident when he asserts that such a ground for war should only rarely, if ever, be approved ‘except in circumstances in which the slaughter of innocent people, and similar wrongs take place.’⁹⁰ In this case Suárez argues that war would be defensive, not offensive.

⁸⁷ Ibid., Disp. XII, v, p. 824

⁸⁸ Ibid., book II, chap. xix, 8, p. 340

⁸⁹ Ibid., p. 340

⁹⁰ Ibid., Disp. XII, v, p. 826

The source of moral obligation - the law of nations or the law of nature

Francisco Vitoria

Vitoria is considered to be the founder of modern international law and that this is based on his discussions of the American Indians, where he, irrespective of religious beliefs, establishes the rights and obligations of political communities.⁹¹ However, this does not mean that, in a 'communitarian' sense, these political communities could somehow override the common rights and duties of mankind. Fundamentally, as we have seen, what Vitoria's arguments rests upon is his idea that universal rights take priority over those specific communities, the violation of which justifies the legitimate intervention of a foreign state to restore the rights and if necessary punish the wrongdoers.⁹²

Vitoria's account of the *jus gentium* only forms a small part of his work, and it is not wholly consistent. However, his notion of the *jus gentium* was outlined for his followers to come, such as Suárez, with regards to what he called the 'affairs of the Indians'. This issue was intimately related to the question of just war theory and Vitoria considered the *jus gentium* as a set of positive laws founded on the principle of natural justice.⁹³ Nevertheless, this notion only serves to underline the ambiguity of the concept. Vitoria implies that the law of nations and customary law are to be equated with human positive law and not the natural law. However, for Vitoria like, most of the early modern jurists, this contention encompasses the ambiguous relationship between the law of nature and the law of nations. Suarez tried to be more specific. For him the law of nations occupied a point mid-way between the natural law and human positive law and it is exactly this position which illustrates its ambiguity. Suárez clearly sought to scrutinise and explain this complex relationship more closely, but he was only moderately successful. For Vitoria, the law of nations covered the body of those laws which was said to be precepts endorsed by the power of 'the whole world, which is in a sense a commonwealth.'⁹⁴ He contended that the *jus gentium* was 'that which is not equitable of itself, but [has been established] by human statute grounded in reason'⁹⁵ and applicable to all nations. Although Vitoria wants to emphasise the juridical tie and interdependence between nations, the relation between natural law and law of nations for him is intimate. He contends that the law of nations

⁹¹ Jahn, Beate: *The Cultural Construction of International Relations – the Invention of the State of Nature*, (New York: Palgrave, 2000), p. 67

⁹² Boucher, *The Limits of Ethics in International Relations*, p. 167

⁹³ Pagden, Anthony: 'Introduction' to *Political Writings*, p. xvi

⁹⁴ Vitoria, *Political Writings*, p. 40

⁹⁵ Cited in Pagden, *Political Writings*, p. xvi

‘either is or derives from natural law.’⁹⁶ He suggests that some things in the law of nations are palpably derived from the law of nature: ‘there are certainly many things which are clearly to be settled on the basis on the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights.’⁹⁷ To underline the uncertain position of the law of nations, Vitoria is claiming, that occasionally, the law of nations is not derived from natural law, but is instead derived from ‘the consent of the greater part of the world’ which is enough to make it binding, especially, Vitoria asserts ‘when it is for the common good of all men’.⁹⁸ Also, such enactments most certainly would have the force of law. Pagden contends that Vitoria’s notion of the law of nations was closer to the primary principles of the law of nature than the enactments of individual rulers because the fact that the law of nations relied up a universal consensus made it practically impossible to repeal. As Pagden contends ‘(who could imagine a legislative assembly of all the peoples of the world?).’⁹⁹ However, Vitoria does imply that even if a small minority disagree with certain conventions the law of nations would still be inviolable.¹⁰⁰ Vitoria here, albeit very subtly, seem to lay the foundation for the move that things which manifestly do not derive from the law of nature but rest with the *jus gentium* would be based on customary law – an idea which both Gentili and Suárez tried to incorporate in their attempt to separate the two. Vitoria here, particularly sought to address, and to a certain extent solve, the problem of the authority in the *jus gentinum*, that is, as having the force of law – a notion which later greatly concerned Pufendorf, who came to the conclusion that law had to have the force of a superior.

Vitoria contended that ‘the very end and necessity, the very reasons of utility and use concur in respect to public power (authority) for the community and society.’¹⁰¹ This is the authority of the whole world, which in Vitoria’s thought is conceived in parallel to the individual state.¹⁰² However, this concept is only vaguely perceived by Vitoria, but as has already been suggested, the idea he is emphasising is nevertheless clear: that our rights and obligations go beyond the community we live in. As we have seen, from this idea there are then certain mutual obligations attached; but more than that: what Vitoria is emphasising, albeit in his own subtle ways, is the fact that because of this universal moral community of

⁹⁶ Ibid., p 278

⁹⁷ Ibid., p. 280 – 281 In this case Vitoria talks of property rights over things

⁹⁸ Ibid., p 281

⁹⁹ Pagden, *Political Writings*, p. xvi

¹⁰⁰ Vitoria, *Political Writings*, p. 281

¹⁰¹ Vitoria cited in Aguilar, ‘The Law of Nations’, p. 209

¹⁰² Ibid., p. 210

rights the rulers of states have a duty to intervene as representatives of the whole international community, sanctioned by the *jus gentium*. For instance, Vitoria notes that ‘enemies remain subject to the ruler as to their own proper judge.’¹⁰³ But more importantly, he asserts that ‘the prince has the authority not only over his own people but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world. Indeed, it seems he has this right by natural law: the world could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent.’¹⁰⁴ This is important, because not only does Vitoria emphasise that there is a duty to intervene, but also that the natural law provides the jurisdiction and the moral foundation for such interventions. However, as the above indicates, although there is a strong moral basis for such obligations under the natural law, which extends to the *jus gentium*, or is sanctioned by it, it is nevertheless, as Suárez was to make more explicit a generation later, imperfect obligations that comes under concessive or permissive natural law.

Alberico Gentili

Gentili sought to maintain the distinction between the law nature and the law of nations. He contends that civil law for instance is an agreement and a bond between citizens and the same truth can be said ‘of the law of nations as regards to nations, and the law of nature as regards to mankind.’¹⁰⁵ Given this endeavour it should seem strange that he in fact appears to equate the two when he in fact wished to separate them.¹⁰⁶

‘That which is not kept up disappears, and that which is not valued is not kept up. Therefore that branch of law [the law of nations] is buried in obscurity, and even its very existence will be called into question by some, who stoutly maintain that all law has its origin, not in nature but in human thought Accordingly, they will be found to be at variance with us, since we hold the firm belief that questions of war ought to be settled in accordance of the law of nations, which is the law of nature [...] I regard it as established that some law of nature exist and that in accordance with this subject of war should be discussed.’¹⁰⁷

Gentili is in fact even more ambiguous than most commentators of this era because he emphasises that international law is a part of divine law – a law, he recognises, which is difficult to come to know. It can be determined, nevertheless, by turning to authors and

¹⁰³ Vitoria cited in Aguilar, ‘The law of Nations’, p. 212 – 13n

¹⁰⁴ Vitoria, ‘On the Law of War,’ *Political Writings*, p. 305

¹⁰⁵ Gentili, *On the Law of War*, book 1, chap. xxv, §202 - 203

¹⁰⁶ Boucher, *The Limits of Ethics in International Relations*, p. 124

¹⁰⁷ Gentili, *On the Law of War*, book 1, chap. i, §5

founders of law, who make it intelligible. These laws have been ‘approved by the judgement of every age’ and ‘undoubtedly possess natural reason.’¹⁰⁸ They maintain that such law is that which is common to us all and which is in use among all nations and is the result of native reason ‘which has established among all human beings, and which is equally observed by all mankind.’¹⁰⁹ Such a law, Gentili terms natural law because an agreement made by all nations must be regarded as a law of nature. However, he very adamantly asserted that this was not to be understood that all nations actually came together at some given time and here established the law of nations.

However, to the German jurist Samuel Rachel (1628 - 91) there was a clear inconsistency which underlay Gentili’s general distinction between the law of nature and the law of nations. What Rachel pointed out was Gentili’s obvious confounding of the two systems of laws. The implication was that there could be no law of *all* nations other than the law of nature.¹¹⁰ And this was a notion which Rachel found to be absurd. Nevertheless, he concurred with Gentili’s notion that the way in which rules, which regulated the relationships between the nations, were consented to and received among nations was by usage. Gentili believed that the conception of usage of all nations should not mean absolutely every nation; rather, being unwritten law it is instead like a custom and is established in the same way. It should be regarded, as Gentili declares, ‘as representing the intention and purpose of the entire world.’¹¹¹ To emphasise this point further Gentili believe that such customary unanimity cannot fail to be recognised in the same way that all races of men are agreed to the existence of God. Thus, for him, the law of nations is those rules or standards which all, or the majority, of (civilised) nations employed with regard to regulating their relations. Because the laws derive from natural reason which dictate what is just and right they are not accidental. As with Vitoria, Gentili’s discussions on the law of nations are not consistent. As was common at the time, his methodological approach was to subject the law of nations to the test of natural law, but he did not elaborate on its content (although, he does give a few indications such as the law of nations comprises laws that regulate matters of trade and commerce). Instead, he was at pains to disassociate it from metaphysics and *a priori* methods and sought to secure the law of nations in common sense and the justice and harmony of mankind. Thus, even though Gentili’s

¹⁰⁸ Ibid., §16

¹⁰⁹ Ibid., §10 - 11

¹¹⁰ Rachel, Samuel: *Dissertations on the Law of Nature and of Nations* (1676), Trans. by John Pawley Bate, (Washington D.C.: Carnegie Institution, 1916), p. XXXVI, p. 180

¹¹¹ Gentili, *On the Law of War*, book I, chap. i, §11

conception of the law of nations has its basis in natural reason and natural law, it has an element of positive law as well, because of the emphasis put on its establishment by custom and general agreement. What is most notable about this inconsistency is Gentili's notion of relating the law of nations not always to nations but to the universal community of mankind. Nations comprised something he termed *societas gentium*, a community of states, which the law of nations was to regulate and embody the rights and obligation that existed among nations. Initially this meant that Gentili included both non-Catholic as well as non Christian nations as being part of the *societas gentium*. As such, infidels were afforded the common courtesies under the law of nations such as diplomatic immunity and treaty making powers.¹¹² The only ones who did not come under the protection of law, as explored previously, were atheists or people with no religion and for this reason were to be treated as pirates. And as we have already seen, the implications of this were far-reaching, because Gentili used the idea of a world community to justify the Spanish conquest of the New World. As with Vitoria, although he retained a notion of political communities that was much stronger than Gentili, the obligations which this 'world community' or *societas genitum* confers on people comes from the law of nature, which gives them their moral basis, but which is then regulated by the law of nations. But for Gentili, these obligations remain imperfect in the sense that saving the innocents from unnecessary violence or making reparations toward the broken bond of humanity is something we should do, but only if it does not cause unnecessary injury toward ourselves.

Francisco Suárez

Suárez took it upon himself to present a detailed study of the law of nature and the law of nations, for the purpose of proving a clear distinction between the two systems of laws. While Vitoria's international jurisprudence saw more the application of general principles of justice to bring the discovery of the New World within the law of Christendom, building upon his Spanish predecessor, Suárez sought to go beyond this and develop a philosophy of law applicable to all concrete situations. Thus, while Vitoria formulated the principles of the modern law of nations, Suárez attempted more explicitly to anchor their philosophical conception. For this reason, his writings on the subject are painstakingly detailed and much more comprehensive than Vitoria's and Gentili's. However, contrary to what he might have hoped, because of his ultimate contention that the law of nations had a close affinity with the

¹¹² Boucher, *The Limits of Ethics in International Relations*, p. 201

law of nature, he was equally culpable in maintaining its confusion. For the early modern jurists it is exactly this position which often posits the ambiguity of the law of nations. Consequently, the problem remains in Suárez's thought of incompletely distinguishing the law of nations and the law of nature. Although he endeavours to differentiate the two systems of law by explaining that they touch and overlap, nevertheless, he does not provide any substantive arguments showing how to work it out.

Suárez is clear that the law of nations is somehow part of the natural law and criticised jurists who argued otherwise.

'Jurists usually distinguish the natural law from the *ius gentium*, in that the natural law is shared in common with brute creation, while the *ius gentium* is peculiar to man. [...] Furthermore, it is said to differ from the natural law, because it is common only to men in their mutual relations.'¹¹³

The jurists criticised here were first and foremost the roman jurists of the *Digest* and *Institutes*. At the outset he criticises Aristotle and other ancient philosophers for simply not recognising the existence of the law of nations. He adopted St. Thomas Aquinas's acknowledgement that there were two modes of the natural law, the law of nature and the law of nations and it was the precepts of these that Suárez set out to examine more comprehensively. He rejected the naturalistic element of natural law theory by emphasising that it was possible to have a conception of natural law applicable only to humans, but which was also closely related to the law of nations. However, he also rejected the view of his fellow Thomist, Domingo De Soto, who contended that the existence of a natural law common to man and animals was not credible because brutes would not be capable of true obligation nor suffer true injury.

Suárez adamantly asserted that 'an understanding of the *ius gentium* depends upon its comparison with the natural law.'¹¹⁴ He alludes to this problem by claiming that even places where the two are distinguished, their relationship is very close, and similar to what Vitoria had posited, albeit more affirmative, he believed the '*ius gentium* constitutes an intermediate form [...] between natural and human law, a form more closely allied to the first of these extremes [...].'¹¹⁵ He in this way maintained that the law of nations was used in two senses. First, it is the law that people must obey in relations to other people. So like Vitoria and

¹¹³ Suárez, *Selections from Three Works*, book II, chap. xvii, p. 3

¹¹⁴ *Ibid.*, p. 2

¹¹⁵ *Ibid.*, p. 1

Gentili, Suárez is asserting the individual as the main actor of the law of nations. And second, it is the law that citizens within states obey, which is projected throughout the world, especially between civilized people. It was distinguished by its customary character unlike civil law, which was grounded in and written by a sovereign. What is important, is Suárez's idea that all human relations are primarily regulated by the natural law, which he believes to be of divine origin – the natural law is the sense in which human beings participate in divine law; the law of nations is a supplement to this, standing, as emphasised somewhere between the law of nature and civil law.

Suárez believed that the reason for the often different meanings ascribed to the concept, causing the confusion was partly due to the ambiguous nature of the term *ius*. The moral right (*jus reale*) which the term sometimes refers to was the true subject matter of justice. It refers to the moral right of acquiring or retaining something. The other meaning (*jus legale*), refers to the rule of righteous conduct, which establishes certain equity, equality, in things. This second meaning was understood on basis of affirming St. Thomas Aquinas's notion that the expression of a moral right is termed law. Both kinds of *jus* are divided into the natural law, the law of nations and civil law. However, Suárez argues that the moral right, which is founded upon the common usage of mankind can, in this respect, be said to be the law of nations. Thus, relating to the 'subject matter of justice' as Suárez terms it, the law of nations is a type of law - the type which is made by the precepts of nations. What Suárez here is conceptualizing is the often confusing idea of subjective rights and objective rights. Subjective rights are a kind of 'moral faculty'; it is, as Suárez explains 'bestowed upon a certain moral power which every man has, either over his own property or with respect to what is due to him.'¹¹⁶ Thus, it is understood to be an entitlement to something and is natural when it is rooted in nature, or it is positive when constituted by positive law. An objective right, in contrast, is derived from natural law and imposed on you. It establishes rules of right conduct. Thus, it determines what is fair and reasonable and is the same as an objective good before any law, either natural or positive and in this way it does not constitute that particular law but is instead declaratory of it.¹¹⁷ Objective rights are essentially rights and duties derived from a higher power. While subjective rights often ran side by side with conceptions of objective rights in the medieval period, as Tierney and others have argued, predominantly objective accounts persisted and

¹¹⁶ Suárez, *Selections from Three Works*, book I, chapter ii, p. 5

¹¹⁷ Doyle, John, P.: 'Francisco Suárez and The Law of Nations' in Janis, Mark, W. and Evans, Carolyn (eds.), *Religion and International Law* (Leiden/Boston: Brill Academic Publishers, 2004), pp. 103 – 120, p. 107

were dominant even in many exponents of natural rights, as Haakonssen has ably demonstrated. It would be naïve to characterise the transition from natural law to natural rights as a transition from a pre-modern to a modern conception of rights, the former having its basis in religion, and the latter a more secularised version, as Tony Burns has demonstrated in his work on Aristotle and the natural law.¹¹⁸

Today, as David Boucher notes, we have moved towards more of a subjective understanding of rights which the individual possesses and is universal for all.¹¹⁹ This differentiation is important because it ultimately determines the source of moral obligation in relation to just war, and humanitarian intervention because it is necessary to resolve to which law it refers. Does it derive its obligation from a moral right or a righteous act exercised on the basis of that right? For Suárez, as will be apparent despite his rather convoluted exploration of the nature of the *jus gentium*, humanitarian intervention is seen as a moral right relating to what is permissible by the law of nature from where it gets it, albeit, imperfect obligatory force. This is something Grotius builds upon and applied in relation to his theory of punishment; that individuals as well as sovereign rulers have a natural right to punish violations of the law of nature. What Suárez is doing, is in fact conceptualising two legal systems of the law of nations. One has its basis as a moral right and the other its basis as the exercise of that right. The law of nations, in this way, holds both natural and positive rights and subsequently corresponding obligations. However, Suárez adamantly emphasises that the (true)

¹¹⁸ Tony Burns has argued that Aristotle is a natural law theorist in contrast to other commentators. However, Aristotle cannot be placed within mainstream natural law theory. One important reason is that, unlike most natural law thinkers, including the ones explored in this thesis, Aristotle does not consider natural law to be a standard upon which positive law is to be assessed. However, briefly stated, he does make crucial comments on natural justice that are central for his political thought. (See Burns, Tony: 'Aristotle and Natural Law' in *History of Political Thought*, vol. XIX, no. 2, summer 1998, pp. 142 - 166) In this sense Tony Burns wants to argue that Aristotle embraces a natural law position which is secular and not religious, and of course not Christian. Aristotle's natural law theory does not use 'law' as we for instance see with some of the natural law theorists explored here, in particular Pufendorf, who employs the term 'law' as associated with the notion of the command of a superior, nor is it a theory based on the notion of 'natural rights.' Although I am constrained by the scope of my project, this is relevant to note when attempting to build a more nuanced picture of theories of natural law and natural rights, and also to place these ideas in a broader scholarly tradition. However, for what I set out to explore, these remarks will have to remain peripheral. For the thinkers I explore, and their natural law theories and corresponding sources of obligations the religious context of these theories are inescapable. Even, as I notice elsewhere, in cases where Grotius uses Aristotle it is in keep with Christian natural law tradition.

¹¹⁹ Boucher, *The Limits of Ethics in International Relations*, p. 152. For an in-depth study on this see this book. Boucher asks here the very important question 'The issue is essentially this: if a right can for all intents and purposes be re-described as a duty owed by someone else, derived from a higher law, or fundamental moral principles, then why is it necessary to have a separate language of rights at all? Wouldn't we be better off just sticking with the vocabulary of Natural Law?' (p. 151)

law of nations is the *jus reale*, so a moral right, which derives its moral title from its customary foundation.

‘The precepts of the *ius genitum* were introduced by the free will and consent of mankind, whether we refer to the whole of human community or to the major portion thereof; consequently, they cannot be said to be written upon the hearts of men by the Author of Nature; and therefore they are part of the human and not of the natural law.’¹²⁰

Suárez’s notion of subjective rights is therefore pivotal in relation to his overall natural law theory, and in relations to the obligations that the law of nature and nations prescribes. We will return to this in more detail further below. Firstly, his notion of subjective rights also brings to the fore Suárez’s positioning of himself in the wider medieval debate of voluntarism and intellectualism. Giving a full account of this debate is no easy task. No one thinker adopted either of the positions in their simple or pure forms. Paining with a broad brush, it can be said that voluntarism is the position from which moral standards are derived from the divine will, whereas intellectualists believed that divine will was determined or guided by independent standards. For the voluntarist, God is the absolute power, and His actions should not be explained or rationalised. The good is good because God has willed it. By an act of will God created morality. For the intellectualist, the good is willed by God in recognition of its intrinsic goodness.¹²¹ Suárez attempted to reconcile the two sides. What is interesting, then, is that he sought to construct the middle position between these two positions, and as we shall see, this is also where we find Grotius. This not only testifies to the intellectual influence the Spanish scholar had on his Dutch contemporary, but also assists us in understanding why Grotius has become the object of much debate on whether or not he laid the path for the secularisation of the natural law tradition. I will return to explore this point in more detail in chapter 3. For Suárez, choosing between these two positions meant that the precepts of the natural law related to what was intrinsically good and what was the intrinsically evil. But the natural law was discerned by reason, and from this it also commanded the one or forbade the other. In discerning the natural law, reason also discerned what God willed for humankind. Since God

¹²⁰ Suárez, *Selections from Three Works*, book II, chapter xvii, p. 8. John Doyle has emphasised that it is important that Suárez declare the customary character of the law of nations in order to differentiate it from the law of nature, because what his particular conceptualisation means is that subjective rights of the law of nations, in fact cause it to collapse back into natural law. He uses the instance of self-defence and the case of ambassadors, where this becomes apparent. States have a positive right (objective right) under the law of nations to send embassies. However, once these are sent and received they come under the law of nature. Doyle, John: ‘Francisco Suárez and The Law of Nations’, p. 108

¹²¹ Simmonds, N. E.: ‘Grotius and Pufendorf’ in Nadler, Steven (ed.) *A Companion to Early Modern Philosophy*, (Blackwell Publishing, 2002), pp. 210 – 224, pp. 217 - 219

deliberately created human beings and endowed them with reason, he intended them to act in accordance with their rational nature. Suárez then drew on the voluntarism of William of Ockham (c. 1288 – c. 1348), of what the latter had termed natural law by supposition: God's choice of creating rational creatures was a necessary presupposition to the natural law.¹²² As we can deduce, this middle ground between these two modes of thought underlined Suárez's theory of subjective natural rights. From the concessional law of nature, some natural laws come into play only as a consequence of certain human acts. The obvious example that Suárez gives us is that the precepts of natural law that forbade theft only comes into play on the presupposition that private property have been instituted by human acts. Another is, we have a moral right to action on the basis of the precepts of the natural law; however, as will be more apparent further on, the exercise of such a right has its basis in human agreement – enacted by human will. Thus, what Suárez gives us is a natural law that furnishes the opportunity for rational agents to freely choose the right action. By taking this middle ground, Suárez's notion of the law of nature combines elements from both extremes. The Natural law is both indicative of what is in itself good, and in itself evil. But it is also preceptive in the sense that it creates obligations in human beings to do good and avoid evil. As Haakonssen notes, Suárez natural law 'reflects the two inseparable sides of God's nature, namely his rational judgement of good and evil and his will prescribing the appropriate behaviour.'¹²³ This will become more apparent further below in relation to preceptive or concessive natural law.

From this, let us return to Suárez's enquiries into the law of nature and of nations, instead of irreparably separating the two systems of law, what he was doing is dividing the law of nature into two subcategories, grounded in the contention that the rational basis of the two laws is distinct, from the contention that the precepts relating to the two are different: the natural law originating from nature and the law of nations from customs. In this way, it can be fitting in giving them different titles. However, Suárez firmly asserts that the precepts of the law of nations are still very much natural and are therefore absolutely part of the natural law.¹²⁴ For the *jus gentium* to be properly distinguished from the natural law it is necessary that it is dependent on 'the intervention of human free will and of moral expediency rather than of

¹²² Tierney, Brian: *The Idea of Natural Rights*, p. 304 – 305

¹²³ Haakonssen, Knud: *Natural Law and Moral Philosophy – From Grotius to the Scottish Enlightenment*, (Cambridge: Cambridge University Press, 1996), p. 22. For further discussion on this, see Haakonssen's section on Suárez in this work pp. 16 – 24. He also addresses the paradox usually ascribed to Voluntarism: 'If natural law were simply a matter of God's will without need for reasons, then it would in principle be possible that God could allow humanity to hate him' (p. 21) – however, to think that God is the object of hatred must surely be a contradiction in terms? For this, see especially fn. 10 on p. 21.

¹²⁴ Suárez, *Selections from Three Works*, book II, chapter xvii, p. 4

necessity', and that its principles are not manifest conclusions from the natural law.¹²⁵ As such, Suárez is adamant that it is not enough simply to base the division either upon the natural law embracing only the most essential of precepts, of which its force is completely independent of the existence of human society or human volition, or the law of nations is constituted only by those precepts that are essential for the preservation of society. Suárez thus concludes:

'The *ius gentium* does not prescribe anything as being of itself necessary for righteous conduct, nor does it forbid anything as being of itself and intrinsically evil, whether [such commands and prohibitions] are absolute or whether they involve an assumption of the existence of a particular state and set of circumstances; accordingly, it is from this standpoint that the *ius gentium* is outside the realm of natural law; neither does it differ from the latter in that the *ius gentium* is peculiar to mankind, for that characteristic pertains also to natural law, either in large part, or even entirely, if one is speaking of right (*ius*) and law (*lex*) in the strict sense.'¹²⁶

This does not mean, however, that the law of nations only includes certain concessions or permissions to perform or not to perform a given act. This hinges on the argument that the law of nations is not viewed in an absolute manner, but rather as a law already constituted in civil society. Thus, if any acts pertain to prescription, that is if the command depends upon the force of natural reason, then it comes under the natural law. If on the other hand those concessions are there for the common good of men as a condition of, but not absolute, to living well in society then these pertain to the law of nations.¹²⁷ The point Suárez wishes to make is that natural reason not only dictates what is required, but also what is permissible. Thus, the important distinction to make is not of application but rather one of foundations.

'When it is said that the *ius gentium* confers the faculty to perform a given act righteously, I ask whether that faculty has its source – in so far as it is just and righteous – in natural reason, regarded absolutely, or in some human agreement. If it be answered that the source is in natural reason, then the law in question will be natural law, even though it be merely permissive in character. If on the other hand, the source is said to be in some human agreement, then, [...] to the said law is not *ius gentium*, as distinct from the civil law, [...]; or else if not withstanding this consideration it is possible for a concessive *ius gentium* [...] distinct from the civil law and constituting [...] an intermediate form between the natural law and the civil [...].'¹²⁸

¹²⁵ Ibid., p. 9

¹²⁶ Ibid., p. 9

¹²⁷ Ibid., book II, chap. xviii, p. 1

¹²⁸ Ibid., p. 2

From this, Suárez concludes that the source of the law of nations is natural reason; however it is integral for men not in an absolute sense, but instead for them as being part of a human society. As such, it is distinguished from the primary law of nature as a secondary kind, much like Grotius was to argue later on. Thus, war falls under the law of nations not necessarily because it is not rendered obligatory as under the natural law that is in an absolute sense, but because it is perceived as being righteous. It is instead, then, part of the permissive law of nature. This is important because the same is the case for humanitarian intervention. Suárez asserts, that this kind of law then, presupposes the presence of human society. Divisions of property and settlements of territory, for example, also come under this law.¹²⁹

However, Suárez wants to go beyond the thought that the law of nations is merely a concessive or permissive form of the natural law. He illustrates this point by mentioning the natural law concerning marriage. It is righteous and permitted under the natural law, but it not obligatory. One may choose to get married or not. As such, acts of occupation of land for settlements, building, fortification, and defence through just war theory are permitted by the natural law. The obligation here is upon the person not to violate such rights which pertain to nature. Importantly, then, the law of nations is understood as encompassing the actual exercise of these rights through the customs of all nations. Suárez also lists cases of acts of peace, truces and ambassadors as falling under this category:

‘For all the rules in these points have their foundations in some human agreement, in which both the power to contract a treaty or convention, and the obligations arising from that treaty or convention and demanding good faith and justice, have regard to the law of nature. Only the exercise of these powers may be termed a part of the *ius gentium*, owing accord of all nations.’¹³⁰

However, he is adamant that the exercise of such powers, then, is not law itself, but rather the effect of law. This is an important point, which will be explored in more detail below. He objects to the view that because the law of nations is common to all mankind, that it can

¹²⁹ With regards to the division of nations and kingdoms, this pertains to the law of nations as this clearly needs the force of human society and volition. Suárez really underlines the highly ambiguous nature of the system of law, by stating that although such divisions are not a necessity, it is still an act permissible by the force of natural reason but not in an absolute sense. Before this division the absolute existence of man in the state of nature is to be assumed, and as such in this instance it cannot always be assumed that the *jus gentium* always originates from some form of human community. It is also based upon the primary natural principle of man as a social animal and the principle that the best way human beings may preserve themselves is done by the division of property and ultimately states Suárez, *Selections from Three Works*, book II, chap. xviii, p. 2

¹³⁰ Ibid., p. 7

therefore possibly have its origin in human will. It would simply not be viable for all peoples to agree on its precepts. Against this Suárez firmly contends that the law of nations is established through the customs of all nations and in this way, as I suggested, differs from the written civil law. This underlying customary aspect of the law of nations was something, as we have seen, that both Vitoria and especially Gentili alluded to, but never really sought to develop systematically in the way that Suárez does.

Thus, for Suárez, the law of nations was not simply to be understood as being within the bounds of the natural law. Although they both are common to all mankind, Suárez believed that they were essentially different as the above exploration has showed. The critical point where the two systems of laws differed was with regard to source of necessity within a given precept. This question of the source of necessity within precepts is important and lingers on the further exploration of discovering the source of moral obligation relating to just war theory and more importantly for this study, humanitarian intervention. Suárez understands the law of nations as encompassing the actual exercise of a law of nature's concessive principle. This means that these concessive principles are imperfect obligations under the natural law, but acted upon, it is a right exercised through the customs of all nations. Thus, what Suárez is seeking to emphasise is the necessary connexion between concessive and prohibitive preceptive law. This point becomes obvious in the case of war. The existence of a precept prohibiting aggressive warfare must be a presupposition of the existence of the right to make war itself. In this context the right of defence not only results in the permission to make war, but also an obligation to make use of that permission. The examples that Suárez gives is the case of a prince who is bound to defend the state and, moreover, with regard to people are bound to act in defence of the common welfare, or the defence of their own lives. As Suárez states 'One might say that the permission or concession [...] falls under the *ius gentium*; while, on the other hand, the precepts attendant [there upon] are part of preceptive natural law.'¹³¹ Thus, just war grounded in self defence pertains to the natural law. Suárez points out that war have its foundation in some human agreement. Here there is an obligation arising from that agreement that demands good faith and justice, which in some way has regard to the law of nature. It is only the exercise of such powers, as has already been emphasised that may be deemed part of the law of nations. He concludes that the actual use of such powers is not in fact law but rather the effect of law; 'for the law under discussion does not spring from such

¹³¹ Ibid., p. 6

use; on the contrary, the use has its source in that law.¹³² The law Suárez is referring to is law as a moral right (*jus reale*). In this way the *jus gentium* is the moral right of peoples. Furthermore, both the law of nature and the law of nations include precepts and prohibitions and concessions and permissions, however, the law of nations differs primarily from the law of nature because it does not, as previously mentioned, derive the necessity for the precepts it includes exclusively from natural principles. If this were the case then it would pertain to the natural law. The necessity that may underpin the precepts of the *jus gentium* must instead be derived from a different source. Arguably, Suárez implies that the source would be human agreement. In affirmation of this distinction Suárez contends that ‘the *jus gentium* is not so much indicative of what is [inherently] evil, as it is constitutive of evil. Thus it does not forbid evil acts on the grounds that they are evil, but renders [certain] acts evil by prohibiting them.’¹³³ Suárez takes this distinction further in determining that the law of nations cannot be the law of nature properly and strictly speaking. In support of Cicero he asserts that because the *jus gentium* ‘came into existence not through [natural] evidence but through probable inference and the common judgement of mankind’¹³⁴ it must therefore be positive and human.

As such, this leaves us to relate Suárez’s conception of the law of nations more specifically to the moral obligations of humanitarian intervention: Consistent with the above, Suárez asserts that just war comes under the *jus gentium* and so must his particular notion of humanitarian intervention. It is clear that his understanding of just war depends not upon absolute moral conclusions; if this were so, then it would pertain to the natural law. Rather, just war is not a moral necessity as such, but, nevertheless, belongs in the realm of moral expediency. It depends on the imposition of a free will and in this way comes under the law of nations. In this sense it is a moral right. However, we also have an obligation to intervene when gross violations of the natural law occur. What Suárez seems to argue is that just war theory belongs to those concessions of the law of nature that conditions the common good of men, but are, however, not absolutely necessary for the welfare of societies. These precepts, therefore, pertain to the law of nations, but however, for this reason, implies an imperfect obligation. This then, is interesting in so far as it provides us with the source of the moral obligations to humanitarian intervention. In relation to just war it is clear for Suárez that this obligation comes from the common usage of mankind underpinning a moral right to action and the exercise of such a right has its basis in human agreement or some kind of civil

¹³² Ibid., p. 7

¹³³ Ibid., book II, chap. xix, p. 2

¹³⁴ Ibid., p. 4

arrangement. As we shall see in chapter 3, although Grotius did not acknowledge his Spanish colleague, he, nevertheless, reached similar conclusions.

Conclusion

It is evident that for the thinkers explored here all included elements of humanitarian intervention with justifications based on aspects of just war. Their humanitarian arguments revolve around issues of saving peoples from abhorrent practices such as cannibalism, human sacrifice and sodomy, but also a concern for rescuing people from themselves in the interests of the civilising process. The issue I have sought to outline in this chapter is the question of whether humanitarian intervention is preceptive or concessive; or to put it in other terms, whether it is a perfect or imperfect duty, either derived from the natural law or from the law of nations. From the above discussions of the three thinkers explored here, a notion of humanitarian intervention is certainly present and it is justified with reference to just war theories. They establish an obligation to intervene in another country on humanitarian grounds, but it cannot be a perfect obligation for the reason that it lacks the specification of who has the obligation to intervene. This also hinges on the fact that it is not deemed absolutely necessary for the common good. Although state practice in relation to humanitarian intervention did not exist at this time, arguable what these jurists affirmed is that in the absence of such a practice we still know what is right and wrong, which is derived from customary opinion under the *jus gentium*, a law which has its moral foundations in the natural law. And it is here we find emerging the precepts that in order to save innocent people from harm, or to punish them for crimes committed against the natural law, which stain the common bond of mankind, it is permissible to intervene for humanitarian reasons.

It is the complex foundational relationship of the two systems of laws which I have sought to explore above. What seems to be the case is that, humanitarian intervention has its moral foundation in the law of nature, but not in an absolute sense. Although Suárez was at pains to state that it cannot always be the case that the law of nations is part of the concessive precepts of the law of nature, it nevertheless appears to have been the case in relation to humanitarian intervention. For each thinker the complex relationship between the law of nature and the law of nations or the *jus gentium*, manifests itself in different ways in relation to humanitarian intervention. For Vitoria, in terms of determining the source of the moral obligation to intervene on humanitarian grounds, what was interesting was that, as the only legitimate justification for war was the violation of rights, to determine whether such violated

rights require intervention on humanitarian grounds, necessitates the determination of whose rights and what rights are being violated and by whom. The Spanish violated rights under the label of 'communication', do not, for Vitoria, seem to relate to this title. Although such rights belong to the *jus gentium* it is difficult, given Vitoria's ambivalent account of the relationship between the *jus gentium* and the law of nature, to conclude that violated rights, that would give just title to intervene on humanitarian grounds, would therefore pertain to the law of nature. However, for Vitoria, obligations of humanitarianism are derived from the natural law because violated rights concerning innocents pertain to natural law principles. But, such obligations must, nevertheless, be founded upon right intent. And the moral obligation assisting the innocent from being harmed is, nonetheless, actionable under the *jus gentium*, but has its moral basis in the natural law. In this way, it can be said that Suárez's meticulous explorations in relation to the natural law and the *jus gentium* are somewhat instructive in understanding his predecessor and fellow Thomist Vitoria.

Gentili more assertively than Vitoria emphasises the idea of a common bond of humanity, the *societas gentium*, which, if broken, is a serious crime against humanity and therefore against the law of nature. Such a breach should require action on the part of individuals or sovereigns to make reparations in order to restore the bond and punish the perpetrators. And it is from here we can deduce a strong notion of humanitarian intervention in relation to Gentili's just war theory. As we have seen, the question seems to be more complicated in relation to Suárez. For the Spanish Jesuit humanitarian intervention was not a moral necessity as such, in the sense that war is not a moral necessity. If a precept for Suárez can be said to be so, then it would be prescribed by the natural law. What he argued is that war can be deemed to be a righteous act, but not necessary. And in this way it falls under the law of nations because he understands it as encompassing the actual exercise of the law of nature's concessive principle. This then means that in the case of just war and humanitarian intervention obligations have their source in an imperfect obligation under the natural law. In effect Suarez grounded the law of nations on the principle that law could be permissive as well as preceptive. It was the argument that natural law too did not consist only of restraints on power, commands and prohibitions; it could also define an area of permissiveness where agents were free to choose the right action. For example, ships from the various nations of the world are free to seek shelter in any port, but they may not wish to avail themselves of the right. This, as we shall see, was something which the Dutchman Grotius developed from his Spanish predecessor, whether he was keen to admit it or not.

To summarise then, what all three thinkers seem to allude to is that humanitarian intervention is certainly permissive under the natural law. However, reasonable success is necessary, and the amount of good to be attained has to be weighed against potential harm. Thus, it is something that it is right to do, but it is not a sin if you do not. This is of course echoed in today's intellectual and juridical debates about the obligation to intervene on humanitarian grounds. In the next chapter we will see that for Sepúlveda, saving the souls of the Indians was an absolute obligation and a sin on the part of all Christians if you did not.

Chapter 2

Juan Ginés de Sepúlveda

‘The question is whether the barbarians whom we call Indians are rightfully being subjected to the rule of Spanish Christians so that by eliminating their barbarous customs, idol-worship, and impious rites, their hearts could be prepared to accept the Christian Religion.’¹³⁵
- Sepúlveda (1549)

Introduction

As was shown in the previous chapter the discovery of America brought in its wake a serious intellectual and theological debate about the capacity of the Indians and how they fitted in with the Christian world view. Highly respected theologians such as Vitoria and Suarez, as we have seen, sought to make sense of the issues by attempting to anchor the questions that were raised to firm philosophical and moral ground. In this way, they sought to prove that the universal laws of nature wholly encompassed such people. As we shall see in the following chapters, covering the subsequent two centuries, famous political philosophers and jurists such as Grotius, Locke, Pufendorf and Vattel were all, in varying degrees influenced by this single important historical event in their philosophical enterprises.

Historically, nevertheless, this debate had already reached its height as early as 1550, just after Vitoria’s death, when the king of Spain and Holy Roman Emperor Charles V ordered that all wars of conquest were to be suspended until a group of intellectuals grappled with the morality of Spain’s presence and activities in America. Debates on the morality of the colonization of the Americas were staged in the imperial Spanish capital at Valladolid in the spring of 1550, where the Emperor called a *Junta* (Jury) of eminent doctors and theologians,

¹³⁵ Sepúlveda, Juan Ginés de: *Apology for the Book on the Just Causes of War: Dedicated to the Most Learned and Distinguished President, Antonio Ramirez, Bishop of Segovia*, trans. Lewis D. Epstein (unpublished, Bowdoin College, 1973), p. xx. *Apology* was a summary of an explanation of *Democrates Secundus* (cf. page 60), which had been forbidden to be published. *Apology* was published in Rome in 1550 after the proceedings at Valladolid, and is the main work used here.

among others his own confessor, the famous Dominican Domingo De Soto (1494 – 1560), to issue a ruling on the controversy.¹³⁶ This conference, then, was to give an answer to whether or not the Indians were capable of governing themselves, and within these parameters determine the legality of war as a means of Christianization. However, its findings were highly inconclusive and it has subsequently become known as the great Valladolid Controversy. The fact that there was such a debate, officially sanctioned by the Crown, is testimony to the considerable unease felt in some quarters about the legitimacy of the Spanish occupation of the Americas.

In this chapter I first and foremost seek to elucidate the ideas and discussions pertaining to this very important debate, which I realize slightly chronologically deviates from the previous chapter in that Suarez and Gentili both commented almost two generations after this event took place. On the one side of the debate was the Dominican Bartolomé de Las Casas (1484 - 1566) who defended the Indians by arguing that they were free men in possession of the full range of rational capacities. He was a firm advocate of peaceful and persuasive conversion to Christianity. It is, however, his primary adversary the Jesuit Juan Ginés de Sepúlveda (1494 - 1573), who will be the main focus of this chapter. He, in contrast to Las Casas, justified conquest and evangelization by war. And it is here we first and foremost can detect a more fully developed strong principle of humanitarian intervention.

Las Casas's testified to the brutal behaviour of the Spanish towards the Indians and gave an impassioned defence of the capacity of the Indians for rational thought. Given the right education they could not be regarded as an inferior race merely fitted for slavery. Las Casas eventually persuaded Emperor Charles V to seek a resolution of the issue. In this way, Las Casas was able to convince the Spanish Court momentarily to stop the continuation of the infamous *encomienda* system, whereby Indians were allocated to the Spanish settlers on the understanding that they would attain the Christian faith in return for their labour. This feudal system was ruthlessly exploited to the point that the Indians became almost extinct.

There was much agitation in the days leading up to the Valladolid debates for the revocation of the New Laws. These laws owed much to the tireless work of Las Casas in petitioning for the encumbering limitation of the power of the colonial elite and the Spanish royal assertion of authority in the Indies. These laws were to prohibit the enslavement of rebellious Indians captured in war and severely restrict the use of the natives as purely

¹³⁶MacCulloch, Diarmaid: *Reformation – Europe's House Divided 1490 – 1700*, (London: Penguin Books, 2004), p. 69

‘working animals’ and indeed deprived the worst of the *encomenderos* of their Indian labourers.¹³⁷ So naturally there was much intense dissatisfaction about the implementation of such rules and regulations. In this tense atmosphere Sepúlveda had been encouraged by the president of the Council of the Indians to compose a treaty against Francisco de Vitoria and other Salamanca theologians, and of course against Las Casas’s treatises on the Indians, which were already proving potentially devastating to the Spanish colonial enterprise in the New World.

Sepúlveda had already proven himself a very apposite scholar in defending the interests of the empire when he, in the 1530s, had composed a treatise against developing pacifist protests among elite Spanish students at Bologna University. Protests contending that any war, including defensive war, was contrary to the Catholic religion, were dangerous doctrines at a time when one of Europe’s main preoccupations was warfare against the Turks. His reactive doctrine *Democrates Primus* was only recently published when similar problems, this time concerning Spanish colonial right in the New World, began to stir up and agitate powerful circles within the Spanish Court. It was not, therefore, surprising that certain groups, who were anxious that the wars against the Indians should be explained and justified, would turn to Sepúlveda for intellectual theological justification.¹³⁸ Within a few days Sepúlveda had completed his argument (*Democrates Secundus*) with which he sought to prove that the wars against the Indians were just and, moreover that they constituted the necessary and obligatory initial stage to their Christianization.

The sessions began in mid August-1550 and continued for about a month before the ‘Council of Fourteen’, the juntas appointed by Charles V to preside over the debate were to sit in judgement of the specific issue at hand. Namely, is it lawful for the King of Spain, in order to subject the Indians to his rule, to wage war on them before preaching the faith? Although there are no documents of the actual proceedings, it seems that the two opponents did not appear together before the council, but instead, presented their positions separately before the panel of judges. Sepúlveda was the first to present his arguments to the *junta*, and initiated the debate by speaking for three hours on the first day.¹³⁹ Sepúlveda replied meticulously to each of Las Casas’s twelve objections which he had previously raised regarding the treatment of the

¹³⁷ Lupher, David A.: *Romans in a New World – Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003), p. 112

¹³⁸ Hanke, Lewis: *All Mankind is One: A Study of the Disputation Between Bartolome De Las Casas and Juan Gines De Sepulveda on the Religious and Intellectual Capacity of the American Indians* (Dekalb: Northern Illinois University Press, 1994), pp. 60 - 62

¹³⁹ *Ibid.*, pp. 67 - 68

Indians. The main points he levelled against Las Casas all bore testimony to his general idea that the Indians were a barbaric race that needed to be saved from themselves and Sepúlveda underlined the necessity of subduing by war, if no other means were sufficient, those 'whose natural condition is such that they ought to obey others.'¹⁴⁰ The Valladolid debate brought Sepúlveda fame as the one who most prominently and very fervently emphasised the idea of slavery in order to deny that Indians had proprietary rights in justification of the appropriation of their lands.

The main purpose of this chapter is to explore Sepúlveda's notion of natural slavery as one of the foundational principle of his justification for waging just war against the Indians. However, as part of this contention I also want to argue that within Sepúlveda's just war theory there is a deep motivation, which can be termed humanitarian. He supplemented his argument with another which related to waging just war against the Indians in order to save the innocents from being slaughtered. Contrary to what one may expect, and perhaps giving support to modern suspicions about the efficacy of the principle of humanitarian intervention, Sepúlveda's motivation for enslaving the American Indians was to save them from eternal damnation. They needed to be subdued and forced to accept Christianity because they were incapable of rationally receiving the word of God through education. His justification for such action was that the American Indians fell into Aristotle's category of natural slavery; they were capable of understanding and carrying out instructions, but not of formulating and executing their own rational plans. It was therefore, natural, and humane, that the Spaniards fulfil their duty in guiding these unfortunate creatures who were barely better than beasts. Given the incapacity of the American Indians for rational thinking, the Spaniards were doing them a service in showing them the error of their ways and in making the land more productive by the efficient exploitation of nature.

Sepúlveda and the American Indians

The first thing to be established here, is why Sepúlveda thought the American Indians needed saving? The four main points where Sepúlveda advocated just war against the Indians is a strong indicator how he viewed the indigenous peoples of America. As will be apparent, all of the charges he brought against the Indians in his debate with Las Casas, served, as far as

¹⁴⁰ Cited in Adorno, Rolena: *The Polemics of Possession in Spanish American Narrative*, (New Haven and London: Yale University Press, 2007), p. 128

Sepúlveda was concerned, as a strong and incisive just means to submit the Indians to Spanish rule.

What he claimed first and foremost was that the Indians were barbarians, and this notion served as his main standard for how the Indians needed to be treated. Secondly, they committed crimes against the natural law with their abominations, such as cannibalism, devil worship and human sacrifice. Third, the Indians oppressed and killed innocents among themselves and as will be discussed later it would, in this way, surely be a necessarily charitable duty to come to their aid as innocent victims of oppression. And fourth, the Indians were infidels who needed to be instructed in the true Christian Faith and therefore any obstacles standing in the way of preaching the Gospel needed to be eliminated.

All of these indicated to Sepúlveda that the Indians were putting themselves, that is, their souls, in grave peril and needed to be saved. And one of the main steps to assure their salvation was to punish their crimes and force them to hear the Gospel. As we shall see, it is a misconception to claim that Sepúlveda believed that they could be forced to be Christians. His main theological rationale rested on the notion that you could not force anybody to accept Catholicism, but instead, only force them to hear the Gospel. And as far as Sepúlveda was concerned the pope not only had the power to force people to observe the laws of nature, but he could also compel them to hear the Gospel. As will become apparent, this is an important point to make because Sepúlveda from an early stage emphasises the Christian Church's jurisdiction over non-Christians and its right to punish them.

His strongest charge against the Indians, which to a certain extent necessarily presupposed all the other conceptions he held against the Indians, was that they were barbarians. For him, all barbarians were 'by habit and most even by nature, illiterate, imprudent and contaminated by many barbarous vices.'¹⁴¹ Because of their barbaric ways Sepúlveda believed that these people had been caught up in what he considered to be the most serious sins against the law of nature and therefore against God. The Indians practiced idolatry, blasphemy, impious superstition and what Sepúlveda was especially disturbed about was that the Indians sacrificed human victims.¹⁴² Those barbarians, Sepúlveda noted 'used to slaughter many thousand innocent people in a single year at impious alters to demons.'¹⁴³ According to the Jesuit, as many as 20,000 were sacrificed each year in New Spain alone. For Sepúlveda the Indians were irrational beings and their inherently inferior condition made them slaves by

¹⁴¹ Sepúlveda, *Apology*, p. 9

¹⁴² *Ibid.*, p. 11

¹⁴³ *Ibid.*, p. 17

nature. In this way then if the Indians refused to accept Spanish superiority and rule they could be enslaved. If the Indians denied this enslavement it would be legitimate for the Spanish to wage war against them and subject them to the natural order of things. As he famously contended:

‘Compare, then, these gifts of prudence, talent, magnanimity, temperance, humanity, and religion with those possessed by these half-men [homunculi], in whom you will barely find the vestiges of humanity, who not only do not possess any learning at all, but are not even literate or in possession of any monument to their history except for some obscure and vague reminiscences of several things put down in various paintings; nor do they have written laws, but barbarian institutions and customs. Well, then, if we are dealing with virtue, what temperance or mercy can you expect from men who are committed to all types of intemperance and base frivolity, and eat human flesh? And do not believe that before the arrival of the Christians they lived in that pacific kingdom of Saturn which the poets have invented; for, on the contrary, they waged continual and ferocious war upon one another with such fierceness that they did not consider a victory at all worthwhile unless they sated their monstrous hunger with the flesh of their enemies. This bestiality is among them even more prodigious for their great distance from the land of the Scythians, who also fed upon human bodies, and since furthermore these Indians were otherwise so cowardly and timid that they could barely endure the presence of our soldiers, and many times thousands upon thousands of them scattered in flight like women before Spaniards so few that they did not even number one hundred.’¹⁴⁴

Sepúlveda did not have the first hand experience of the Indians as Las Casas, which the latter exceedingly pointed out. Sepúlveda relied exclusively on the account of Gonzalo Fernández de Oviedo y Valdés’s (1478 - 1557) *General History of the Indians*, later appointed historiographer of the Indies. And he then, from what we today might describe fairly dubious, constructed his estimation and conception of the intellectual capacities of the Indians solely on the basis of Oviedo, a man who had accompanied Cortez on his warring missions in the New World. Las Casas considered Oviedo as ‘a deadly enemy to the Indians’ and remarked that the latter’s *History* contained almost as many lies as pages.¹⁴⁵ However, Oviedo’s work on the Indians had been approved by the Council of the Indies, and Sepúlveda therefore noted this as the adequate authority to which to anchor his opinions about the Indians. Sepúlveda also drew support for his further description of the Indians’ barbaric ways by looking to previous

¹⁴⁴Sepúlveda, Juan Gines de, *Democrates II, or Concerning the Just Causes of the War Against the Indians* 1547, extract translated and found in ‘the Latin Library’

<http://www.thelatinlibrary.com/imperialism/readings/sepulveda.html> (accessed 13/10 2008, 20:37)

¹⁴⁵ Cited in Hanke, Lewis, *All Mankind is One*, p. 34

authoritative views on barbarism and applied them to the Indians. He invoked the authority of Aquinas and noted that ‘for those are frankly called barbarians who are lacking in rational power either on account of environment from which dullness for the most part is found or due to some evil habit by which men become like brutes.’¹⁴⁶ But as we shall see, it was Aristotle who was to give him his main justificatory basis for subjecting the Indians to Spanish rule.

For many commentators on the colonisation of America, property relations were a product of civil society. All the aboriginal people in the Americas were pre-civil (state of nature) and were in constant violation of the laws of nature. Sepúlveda fiercely argued this particular point, by which he believed he had found the main fault of Vitorian jurisprudence and thereby a legitimate ground for the Spanish to engage in a just war against the Indians. Sepúlveda’s view of the capabilities of the Indians was to become infamous to such a degree that it is only recently that his books have been translated into languages other than Latin.

His argument rested ardently on this notion that the Spanish had absolute right to rule as they saw fit in the Americas. He fervently noted that ‘the Spaniards rule with perfect right over the barbarians who, in prudence, talent, virtue and humanity are as inferior to the Spaniards as children to adults, women to men, the grossly intemperate to the continent, I might almost say as monkeys to men.’¹⁴⁷ As such, Sepúlveda contended, that Castilian sovereignty in America was founded on the natural law precept that civil men are granted dominion over all those who do not belong to this category. Central to this argument, then, was his contention that the Indians could not belong to this category because they were in fact natural slaves (and also still in the state of nature).

As I intend to show in the following, all of these descriptions serve to underline Sepúlveda’s humanitarian reasons for saving the Indians. Not only, did the Indians need to be saved in terms of their ungodly acts and save their human victims from cannibalistic lewdness, they also needed to be saved by being brought to the true religion for eternal salvation. And for such reasons just war could be employed to save them. However, there is a much more sophisticated argument going on in Sepúlveda’s general view of the Indians, and that is his appeal to Aristotle and the Philosopher’s notion of natural slavery as the main justification to subject the Indians to Spanish rule. All other justificatory reasons for war seem to be of a secondary order for Sepúlveda, and indeed, this was also the first charge he brought against the

¹⁴⁶ Sepúlveda citing Aquinas, *Apology*, p. 9

¹⁴⁷ Cited in Tierney, Brian: *The Idea of Natural Rights – Studies on Natural Rights, Natural Law and Church Law 1150 – 1625* (Cambridge: W. B. Eerdmans Publishing Company, 2001), p. 272 – 273 (in the final version of the text, Sepúlveda dropped the phrase about monkeys).

Indians at Valladolid. What Sepúlveda had hoped for was, of course, the notion of natural slavery as a category in applying to the Indians to serve as the overall justificatory foundation for war against them. On this, however, Sepúlveda would be mistaken, because ultimately, as I will explore in the concluding remarks, applying the category of natural slavery to the Indians would be viewed as heresy.

What is important to take from this, then, is that Sepúlveda believed the incapacities of the Indians, as described above, were in fact a consequence of what Aristotle termed, natural slavery. In other words, they were not fully human. This brings us to explore the concept of natural slavery in more detail and how Sepúlveda employed this concept in relation to justifying war against the Indians.

Natural slavery and just war

The notion of natural slavery invoked the epistemic authority of Aristotle, whose teachings had been incorporated into Christian theology in the 13th century by St. Thomas Aquinas (1225 - 1274). One of Aristotle's fundamental claims was that a category person exists who may be considered natural slaves on account of the limited rational capacity. He argued that a certain part of humanity was born by nature to be slaves to others. According to Aristotle, these groups of people lacked a fundamental quality, namely practical reason. Thus, they did not have the capacity to understand and deliberate on the same basis as those who did.

Aristotle said

'Therefore whenever there is the same wide discrepancy between human beings as there is between their body and soul or between man and beast, then those whose condition is such that their function is the use of their bodies and nothing better can be expected of them, those I say, are slaves by nature. It is better for them [...] to be ruled thus. For the 'slave by nature' is he that can and therefore does belong to another, and he that participates in reason so far as he can recognize it but not so that he can possess it (whereas the other animals obey not reason but emotions)'.¹⁴⁸

The notion of natural slavery was central to the debate about the capacities of the Indians even before Valladolid. Vitoria had rehearsed such an argument some 20 years before Valladolid, but his contention remained vague and inconclusive even to his contemporaries. Vitoria at first seemed to accept Aristotle's notion of natural slavery, by saying that 'as Aristotle elegantly

¹⁴⁸ Aristotle *The Politics*, ed. Sinclair, T.A. and Saunders, T. J. (London: Penguin Classics, 1962), 1254a17–1255a3, pp. 68–69

and accurately observed, some are slaves by nature, namely those who are better fitted to serve than to rule.’¹⁴⁹ However as Tierney notes, Aristotle might have been surprised at how Vitoria interpreted this category. Vitoria had said that ‘to this I answer that Aristotle certainly did not understand that such people belong by nature to others and have no dominion over themselves and over other things.’¹⁵⁰ In this way, Tierney argues that Vitoria seemed to ignore or not assimilate Aristotle’s aspects of natural slavery into his political thought, but was instead ‘envisaging a status for those who were servants by nature radically different from the chattel slavery of Ancient Greece and Rome.’¹⁵¹ Vitoria as we have seen, did argue that the Indians had a natural right to property. Thus, the Indians may have been servants by nature, but this did not prevent them from holding true dominium, nor could it justify them being treated as civil slaves. When Vitoria talked of civil slavery he talked of slavery as a legal condition defined in law. His notion of civil slavery is therefore very different from that of natural slavery. As we have seen in the previous chapter, Vitoria was adamant that the Indians were in fact rational creatures who possessed natural rights to property (he believed they had ownership rights). What he sought with his exploration of Aristotle was to distinguish the idea of civil and legal enslavement under Roman law from Aristotle’s natural slavery, in order to demonstrate that in fact neither could justify appropriating the Indians’ land nor make them forfeit their ownership rights. Those who were legally enslaved, as prisoners of war, for example, could indeed own nothing, but no one was this kind of slave by nature.¹⁵²

The notion that such a category as natural slavery existed and perhaps that it could even be applied to the Indians was highly criticised by one of Vitoria’s pupils, Melchior Cano (1525 - 1560), who was later one of the presiding juntas (judges) at Valladolid. Cano was perplexingly disappointed that his master had not taken a more apparent stand against Aristotle’s doctrine of natural slavery. Cano rejected any Aristotelian authority on this point. In fact, he stated that Aristotle had misunderstood the very idea of slavery, by describing it as a category of nature, when it could only be a category under law. Also, in relation to this, even if Aristotle’s somewhat provincial claim that the wise (i.e. Athenians) should always rule the foolish was to be argued, this could never be transferred to the issue of dominion. To this he argued from Vitoria that in the same way that dominion was not derived from God’s grace,

¹⁴⁹ Cited in Tierney, Brian: *The Idea of Natural Rights*, p. 270

¹⁵⁰ Cited in *ibid.*

¹⁵¹ *Ibid.*, p. 270 - 1

¹⁵² *Ibid.*, p. 270

neither was it derived from wisdom.¹⁵³ Vitoria, as we saw in the previous chapter, had rejected one of the main arguments used by the apologist of the Crown for the legitimate occupation of America, namely that sinners and idiots forfeit their rights to property. He had done so by expounding a central claim that is, that the authority of a prince did not depend on God's grace but God's law. Vitoria, in arguing against Wyclif's radical notion of the doctrine of dominion, stated that dominium must be independent of God's grace, and derived instead from man as a rational being, made in God's image, which was a fundamental characteristic which could not be lost through sin. On this point, following Pope Innocent IV's defence of the rights of infidels in the mid-thirteenth Century, Vitoria in conclusion quoted the words of Matthew 5.45 'God makes his sun rise on the good and the evil [...].'¹⁵⁴ As such, however irrational the Indians might seem (and he argued that they were in fact rational), no act could make you forfeit your natural right. Barbarians, he contended 'are not impeded from being true lords (*domini*), publicly and privately, on account of the sin of infidelity or any other mortal sin.'¹⁵⁵ Sepúlveda, of course, was no exception in appealing to Aristotelian ethics as the basis for his theological jurisprudence. However, more than anyone else, Sepúlveda had the scholarly authority to invoke Aristotle as he did. He was, in fact, the foremost scholar of Aristotle, and his translation of the Greek philosopher's *Politics* into Latin remained one of the most widely read editions for decades to come.

It was especially by his argument that the Indians were a barbaric race that he sought to augment the Aristotelian notion of natural slavery. Being barbarians they were therefore slaves, for all barbarians were natural slaves and ought humbly to submit to their Spanish masters. If they refused to do so, war could be prosecuted justly in the same manner as one might hunt down a wild beast.¹⁵⁶ Among the Indians passion ruled over reason, so they must be servants by nature, for among human beings there are some

'who by nature are masters and others who by nature are slaves. Those who surpass the rest in prudence and intelligence, although not in physical strength, are by nature masters. On the other hand, those who are dim-witted

¹⁵³ Pagden, Anthony: *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory, 1513-1830*, (New Haven: Yale University Press, 1990) p. 23 - 25

¹⁵⁴ Cited in Tierney, Brian: *The Idea of Natural Rights*, p. 267

¹⁵⁵ Cited in *ibid.*,

¹⁵⁶ *Ibid.*, p. 277

and mentally lazy, although they may be physically strong enough to fulfil all the necessary tasks, are by nature slaves.’¹⁵⁷

Of the 18 references to Aristotle’s *Politics* Sepúlveda’s work, only three offered direct support to the doctrine of natural slavery; however he invoked Aristotle’s general principle that every composite entity has a dominant and a subordinate part. Moreover, one of the citations went hand in hand with Sepúlveda’s general aim of not only justifying war against the Indians but in addition the appropriation of their property and political dominium.

‘Therefore, the art of war also will be by nature in some sense an art of acquisition [...] since the art of hunting is a subcategory of the art of war that ought to be used against both beasts and those men who, though by nature for to be ruled, prove unwilling, since this sort of war is just by nature.’¹⁵⁸

Being aware of both Vitoria’s contrary use of Aristotle’s doctrine of natural slaves and of course the general notion that slavery was a category that pertained only to civil law, Sepúlveda was at great pains to distinguish the philosophical concept of servitude from that of the status of slavery found in legal and civil law. Indians who cooperated would share the fate of the non-Canaanite enemies of the Israelites as described in *Deuteronomy* 20 by being inclined to offer service under tribute and in time as they became more civilised they would receive better treatment. Naturally, for Sepúlveda, the subjugation of the Indians was principally for their own good. And thus, if they resisted the dominion of their ‘natural masters’, then they would be liable to become slaves by right of war.¹⁵⁹ In this sense then, Sepúlveda appealed to the law of nations with regards to enslavement of prisoners of war. Sepúlveda also formulated the notion of natural slavery as a general principle taken from St. Augustine and St. Thomas Aquinas, in the sense, as Aquinas had quoted (Prov.11:29) that ‘he who is foolish will serve the wise.’ However, Sepúlveda also sought to establish its authority by its historical confirmation. ‘Let it be established’ Sepúlveda noted that ‘therefore, with the authority of the wisest men, that it is just and natural for the wise, upright, and humane to rule of those who are unlike ourselves. For the Romans had this justification for ruling over many people with a lawful and just rule [...]’.¹⁶⁰

¹⁵⁷ Cited in Jahn, Beate: *The Cultural Construction of International Relations – the Invention of the State of Nature*, (London: Palgrave, 2000), p.53

¹⁵⁸ Cited in Lupher, David: *Romans in a New World*, p. 114

¹⁵⁹ Ibid., p. 114

¹⁶⁰ Cited in ibid., p. 115

Although David Lupher properly and aptly argues that Sepúlveda is rather cavalier in his use of Augustine, to the point where he suppresses some of his general opinions of the sinful behaviour of the Romans themselves, in particular their vices of their constant pursuit of worldly glory, Sepúlveda sought to establish the notion that the vices of these barbarians needed to be remedied or corrected by the wise and the noble in the world as decreed by God. ‘No law forbids us to seek glory – that is, good fame’, Sepúlveda expounded, ‘for as the Philosopher says (*Ethics* 10), the hunger for noble things is praiseworthy – though it ought to be sought rationally, not so much as an end of action as a cause of virtue.’¹⁶¹ This was to be a recurrent argument in Sepúlveda’s defence of the colonialists’ claim of just war in the New World, for what Sepúlveda was ultimately arguing was the unselfish duty and obligations on the part of the Spanish to civilise the natives.

However, Sepúlveda was not advocating war against the Indians in order to subject them to slavery itself; rather it was to forcibly restrain them from committing crimes against the natural order of things. War was a necessary mean to combat their resistance in obeying the natural law. As will be demonstrated in the following, Sepúlveda believed crimes against the natural law to be a direct affront to God and it was thus incumbent upon the Spanish to avenge and restrain such crimes. He noted that

‘The end of just war is to live in peace and tranquillity, with justice and virtue, and eliminating the opportunity for evil men to harm and sin: in sum, to provide for the public good of mankind. This is the end of all laws rightfully passed in accord with a state founded on a natural basis.’¹⁶²

Punishing crimes against the law of nature for humanitarian reasons

Sepúlveda insisted that the Indians’ blatant crimes against nature gives just cause for war and justifies the right of the Spanish to punish them. And as far as he was concerned, this would then also be the remedy to put them on the right path to salvation and in forcing them to follow the natural law. In fact, he argued that even if the Indians possessed natural rights, they had so blatantly misused them that they are now forfeited. The result is that they have no private property rights, and indeed no inviolable exclusive use-rights as a result of their ungodly practices.¹⁶³ As he contended, wars had to be waged ‘in order to uproot crimes that offended

¹⁶¹ Cited in *ibid.*, p. 116

¹⁶² Cited in Epstein, Lewis D. Introduction to *Apology*, p. xiii

¹⁶³ Boucher, David: *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, 2009) p. 172; Hanke, *Aristotle and the American Indians*, p. 35 - 42

nature.’¹⁶⁴ This was a humanitarian obligation which all Spanish, whether secular or religious had to observe. Thus, what Sepúlveda was doing was establishing the pope’s jurisdiction in the New World, a claim, which had been highly contested by most of the Spanish Thomists, including Vitoria and Suarez. In evidence of his argument he cited at length Pope Alexander VI’s bull of 1493, and thus firmly asserted that it was permitted for Christians by public as well as pontifical authority to persecute and punish idolatry

‘All power over humanity in heaven and earth was given to Christ, and Christ, moreover, communicated this power to Peter as his vicar and to his successors, as Thomas teaches, and if properly exercised in those matters that pertain to salvation of the soul and in spiritual benefits, nevertheless it is not excluded from temporal goods insofar as they are directed to the spiritual. The Pope therefore has universal power over nations not only to preach the Gospel but also to compel the nations, if the chance presents itself to preserve the law of nature, to which all men are subject [...].’¹⁶⁵

What Sepúlveda was arguing here was that the colonialists could also make use of the property and gold of the Indians in so far as their primary concern was directed towards spiritual matters, which meant the Christianization of the natives. Thus, in effect, what Sepúlveda seem to allude to here, is the notion of right intent as the basis of the just war against the Indians. But here, Sepúlveda was adamant that ‘if any nation perpetrates mortal sins, it must not immediately be said that it does not keep the law of nature.’¹⁶⁶ Indeed, if such a standard were demanded, it would not be possible to keep to the law of nature anywhere on earth. What Sepúlveda instead asserted was another Aristotelian notion that the acts and deeds of people ‘must be decided by their public customs and institutions, and not things rightly or wrongly done by individuals.’¹⁶⁷ He goes on to argue that such nations that by its institutions sanction and prescribe idolatry have not been destroyed by the judgement of God, but rather by the ‘common law of nature.’

As will be apparent in the following chapter, the notion of punishment was something Grotius particularly sought to emphasise as a principle of just war theory and humanitarian intervention. To punish human beings who transgress the law of nations, with gross violations such as cannibalism and unnecessary killings, is our natural right. Unlike Sepúlveda, Grotius

¹⁶⁴ Cited in Hernandez, Bonar Ludwig: ‘The Las Casas-Sepúlveda Controversy 1550 – 1551’, <http://userwww.sfsu.edu/~epf/2001/hernandez.html> (accessed 11/10 2008, 16:23)

¹⁶⁵ Sepúlveda, *Apology*, pp. 13 – 14.

¹⁶⁶ *Ibid.*, p. 15

¹⁶⁷ *Ibid.*, p. 15

presented a right to punishment what was permissive under the natural law; however, this was not an absolute duty. For Grotius, the imperfectness of the duty to punish crimes against the law of nature was rooted in the recognition of the difficulty in determining who should do the punishing. For Sepúlveda the right to punish seem to be anchored in an absolute duty prescribed by the law of nature and divine law. And furthermore, he seems to be perfectly clear to whom this duty correlates, namely, all Christians. The monstrous obscenities in which the Indians engaged demanded action and not only were the Indians' souls in grave peril, so too were those of Christians if they idly stood by, and so they needed to be forced, if necessary, to fulfill their duty to help these people. It is very clear, then, that Sepúlveda's jurisprudence places a perfect obligation upon all Christians to punish crimes against nature. With this in place, Sepúlveda's notion of humanitarian intervention becomes firmly rooted in this obligation, because, inevitably for Sepúlveda crimes against nature are serious crimes against humanity that demands moral and legal resolutions. As such, to punish perpetrators of the natural law is also to save them and their potential innocent victims. With this idea, Sepúlveda provided an absolute moral and legal basis for humanitarian intervention grounded in just war theory. This requires us to explore in more detail the foundations of such wars.

Sepúlveda's notion of humanitarian intervention

In one of Sepúlveda's main arguments for just war (his third levelled against Las Casas), he maintained that the Indians killed innocents among themselves, and it would therefore be a just enterprise to save them. He argues:

‘The proof of their savage life, similar to that of beasts, may be seen in the execrable and prodigious sacrifices of human victims to their devils; it may also be seen in their eating human flesh, their burial alive of the living widows of important persons, and in other crimes condemned by natural law, whose description offends the ears and horrifies the spirit of civilized people. They on the contrary do these terrible things in public and consider them pious acts. The protection of innocent persons from such injurious acts may alone give us the right, already granted by God and nature, to wage war against these barbarians to submit them to Spanish rule.’¹⁶⁸

Thus, Sepúlveda sought to uphold the traditional doctrine of the Church that all men are obliged to aid innocents who are being unjustly killed. He based this on the extension of papal power as written in Ecclesiasticus 17:12 ‘and he gave to every one of them commandment concerning his neighbour.’ In this aspect Vitoria had, albeit timidly, presented similar

¹⁶⁸ Cited in Hanke, *All Mankind is One*, p. 86

arguments (in relation to the principle of right intent). Here, Sepúlveda commented that the great 'Defender of the Indians' was not acting in the best interest of the Indians by denying any principle of intervention on this point

'I would contend that those who attempt to obstruct this expedition so the barbarians would not come to this Christians' terms do not humanly favour the barbarians as they themselves wish to seem but cruelly begrudge them most of the greatest goods, such goods that are either altogether removed or for the most part hindered by their cowardly and churlish proposal.'¹⁶⁹

Sepúlveda believed part of the many vicissitudes which are characteristic of human affairs were to encourage us, rather than deter us, from providing salvation for the barbarians. He importantly notes, that that which is necessary is established by laws and institutions and the rest 'is left to be administered at the discretion of just princes and righteous men, who as declared by the Philosopher [i.e. Aristotle], excel in handling matters insofar as the reason of the public good shall demand.'¹⁷⁰

From this argument of just war arose a second that Sepúlveda emphasised most vehemently. He argued that war would be a just means to preach the faith in the New World. He drew on the Bible for authority on this issue and concluded that pagans should be Christianized by force. The issue was, of course, that the Indians' souls were in grave danger. 'If anyone doubts' Sepúlveda contended 'that all men who wander outside the Christian religion will perish in eternal death, he is not Christian. Therefore, the barbarians are rightfully compelled to justice for the sake of their salvation.'¹⁷¹ This duty of Christianisation could be done in two ways: by peaceful ways of teaching and encouragement or by employing a certain degree of force and instilling fear of punishment. Sepúlveda, however, was adamant that the enterprise of converting the Indians by peaceful means would prove futile

'Certain [...] learned men'¹⁷² [...] have proposed that it is necessary to send deputies and warn the barbarians to desist from idolatry and publicly admit the Christian preachers before preparing for war so that if they acquiesce to our demands, the salvation of their soul could be provided without recourse to war; but if however, it should be impossible to obtain these concessions from them, then they may be compelled to perform these commands having been subdued by just arms of war. If such warnings [...] could be made without great difficulty and

¹⁶⁹ Sepúlveda: *Apology*, p. 40

¹⁷⁰ *Ibid.*, p. 41

¹⁷¹ *Ibid.*, p. 18

¹⁷² Here, Sepúlveda means Las Casas

expediently, it were not to be repudiated or overlooked [...]. Yet just as admonition must be abandoned as useless in the case of brotherly reproof [...] so in respect to this type of admonition in the war against the barbarians, it must be decided to abandon it altogether should it seem on prudent reflection likely to prove useless.¹⁷³

In fact, Sepúlveda noted that such warning might hinder any pious expedition in bringing salvation to the barbarians and would thus ultimately impede any intended conversion, which, he firmly asserts, is the purpose of such wars. If force were not employed in their Christianisation, but instead, for instance, they were impelled by fear, then once the source of fear were removed then the natives, Sepúlveda contended, would without a doubt cast out the preachers and revert to their old customs of idolatry. On this note he concluded that by using force against the Indians ‘more is accomplished toward their conversion in one month than would be accomplished in a hundred years by preaching alone without pacifying the barbarians.’¹⁷⁴ However, this would not be done to force them to believe, but would instead remove all obstacles in preaching the true word of the Gospel and its propagation. He argued, that ‘such force would be useless since nobody can be made faithful if the will, which cannot be forced, resists.’¹⁷⁵ Sepúlveda drew on several historical examples as his authority on this point, mostly on Constantine who had passed laws prohibiting the sacrifices of pagans. Sepúlveda’s key argument was that in prohibiting people from doing evil, a ‘great service’ is done to human kind. As we shall see in the next chapter, Grotius drew on similar arguments, but from a different perspective. As Grotius and Gentili did later, Sepúlveda was asserting the common bond of humanity established by divine and natural law to treat all men as our neighbours, if ‘we can do so without disadvantage to ourselves.’¹⁷⁶ God had given human beings commandments concerning their neighbours, and thus, for Sepúlveda, we have a duty to obey such divine laws. If we do not, then we commit heresy. Sepúlveda’s contention that the Indian culture was vastly inferior to that of the Spanish was, as we have seen, theoretically expressed in his use of Aristotle’s doctrine of natural slavery. I want to argue that it is also in similar terms that motivation for humanitarian war needs to be understood. Firstly, Sepúlveda profoundly believed that that Spanish dominion in the Americas should be viewed as a simple act of generosity. After all, as he contended, ‘for the barbarians it ought to be even more advantageous than for the Spaniards, since virtue, humanity and the true religion are more

¹⁷³ Sepúlveda, *Apology*, pp. 29 - 30

¹⁷⁴ *Ibid.*, p. 32

¹⁷⁵ *Ibid.*, p. 19

¹⁷⁶ *Ibid.*, p. 22

valuable than gold and silver.’¹⁷⁷ In fact, Sepúlveda asked how the Indians could ever truly and adequately repay the kings of Spain for the generosity they had bestowed upon the Indians who were indebted to their noble Spanish benefactors for introducing many useful and necessary things that were otherwise unknown in America.¹⁷⁸

However, it was ultimately more than mere generosity which underlies his just war theory. The Spanish has a clear moral obligation to civilise and Christianised the Indians. It seemed obvious that the Indians were not reasonable enough to be left to their own devices, and they thus needed rescuing – from themselves. As we shall see, unlike, Las Casas, Sepúlveda did not support the prevalent notion that the consequences of war should not be more harmful than what is being prevented. For instance, Vitoria emphasises that the effects of warfare are often cruel and horrible, not only is it therefore not lawful to start a war for every injury done; also outcomes need to be weighed. However, Sepúlveda, on the other hand, argued that ‘the loss of a single soul dead without baptism exceeds in gravity the death of countless victims, even if they were innocent.’¹⁷⁹ And it is from such statements that we find a clear notion of humanitarian intervention in the thought of Sepúlveda.

The last thing to explore in this chapter is Las Casas’s case against Sepúlveda to illustrate just how much the two thinkers differed. As we shall see, Las Casas had an extremely restricted view of the possibility of humanitarian intervention, in that he lamented its probable injustice rather than its potential efficacy. More to the point, what Las Casas in fact sought to prove in his case against Sepúlveda was that the Indians did not need to be saved from themselves, but rather from the brutality of the Spanish conquistadores.

The Case against Intervention: Las Casas’s case against Sepúlveda

Las Casas sought adamantly to disprove Sepúlveda on all the charges he had levelled against the Indians to justify Spanish Christian hegemony; especially Sepúlveda’s main claim that the Indians were barbarians and therefore could be considered as natural slaves. The Spanish could then, forcibly if necessary, civilise and rule. Las Casas was at great pains to refute this very issue; not the Aristotelian doctrine of natural slavery as such, but rather Sepúlveda’s argument that this category somehow applied to the Indians. He did this by arguing how Sepúlveda had not only grossly generalised Aristotle’s doctrine, but also completely falsified it. He demonstrated this by differentiating between the types of barbarism that Aristotle put forward

¹⁷⁷ Cited in Jahn, *The Cultural Construction of International Relations*, p. 54

¹⁷⁸ Hanke, Lewis: *Aristotle and the American Indians*, p. 53

¹⁷⁹ Cited in Jahn, *The Cultural Construction of International Relations*, p. 78

and then argued that Sepúlveda had misunderstood and conflated these. The only barbarians, Las Casas contended, who may be properly placed in Aristotle's category of natural slaves are the ones that

'Lack the reasoning and way of life suited to human beings [...] they have no laws which they fear or by which all their affairs are regulated [...] they lead a life very much that of brute animals [...] Barbarians of this kind (or better wild men) are rarely found in any part of the world and are few in number when compared to the rest of mankind.'¹⁸⁰

Thus, Las Casas sought to prove that natural slaves were few in number and are to be considered mistakes of nature much like those men born with six toes on their feet.¹⁸¹ He cited Aristotle by saying that 'nature always follows the best course possible [...] and lavishes greater care on the nobler things.'¹⁸² The Indians therefore could not possibly belong to this category because 'the works of nature are the works of the supreme intellect who is God [....]. For this reason it is in accord with divine providence and goodness that nature should always or for the most part produce the best and the perfect, and rarely and exceptionally the imperfect and very bad.'¹⁸³ In fact Las Casas more or less accused Sepúlveda of being a heretic from his untrue statements about the capacities of the Indians. 'Who', Las Casas noted 'except one who is irreverent toward God and contemptuous of nature, has dared to write that countless numbers of natives across the ocean are barbarous, savage, uncivilised, and slow witted when, if they are evaluated by an accurate judgement, they completely outnumber all other men?'¹⁸⁴ If then, the Indians were in fact the way Sepúlveda had described them, then this would be the same as saying that God's design is ineffective, because with such natural endowments the barbarians would not be able to seek Him out, know -, love -, or indeed be saved by Him. It is the will of God, Las Casas asserted, to save all men. And on this particular point the Junta at Valladolid agreed with Las Casas, and declared that to doubt the Indians rational capacities would be heretical.

The second point with which Las Casas strongly disagreed with Sepúlveda was his contention that crimes against the law of nature could be punished. Attempting to refute this

¹⁸⁰ Hanke, Lewis: *All Mankind is*, p. 83

¹⁸¹ Hanke, Lewis: *Aristotle and the American Indians – A Study in Race Prejudice in the Modern World*, (Bloomington and London: Indiana University Press, 1959), p.58

¹⁸² Las Casas, Bartholeme de: *In Defence of the Indians*, ed. and trans. Stafford Poole with foreword by Martin E. Marty (Dekalb: Northern Illinois University Press, 1992), p.34

¹⁸³ *Ibid.*, p. 34

¹⁸⁴ *Ibid.*, p. 35

claim, Las Casas went to the heart of the matter. He asserted that such punishment would require jurisdiction, and neither Charles V nor the Pope could claim such over the infidels. First of all, this was so because the Church could only punish the faithful. Christians could therefore not punish the Indians for their idolatry or human sacrifice. His basic argument here was that although Christian rulers had a right to punish heretics for failure to obey God's word, the Indians had never been instructed to the Christian faith and as such fell outside any such jurisdiction. For instance, Las Casas proclaimed that although idolatry was a serious crime, nevertheless, the act is done out of ignorance inasmuch as they think they are worshipping the true God. In this way then, the sin is done accidentally and not out of unbelief or maliciousness.¹⁸⁵ Thus, the Indians' sin of idolatry did not permit punishment even if the Church had jurisdiction.

What Las Casas was inevitably arguing was that Spain's only purpose in the New World was spiritual rather than political or economic. This is of course an important point to make, because this would in effect severely restrict all colonial enterprise in the New World. Moreover, in relation to this, neither did Las Casas believe that specific crimes such as cannibalism and human sacrifice committed against nature could warrant intervention. Although he argued that human sacrifice was a wrong, Las Casas firmly asserted that this could not justify intervention. He was especially against Sepúlveda's contention that the unjust death of innocent persons, for instance by the acts of cannibalism, could somehow justify war to save them. Las Casas noted that

'Although we admit that it is the business of the Church to prevent such an evil [the unjust death of innocent persons], it nevertheless must do this with such discretion as not to give rise to some greater evil to the other peoples that would be a hindrance to their salvation and would thereby frustrate the fruit and purpose of Christ's passion. [...] Since the rescue of this kind of oppressed persons, who are killed as sacrifice or for purposes of cannibalism, cannot be accomplished [...] unless we take up arms, we should most carefully consider the tumult, sedition, killing, arson, devastation, and furor of the goddess of war necessarily attend the prevention of evil.'¹⁸⁶

Thus, Las Casas's beliefs rested on a strong pacifist conviction that war should be avoided at all costs. In these arguments he drew on St. Augustine who opposed the use of force to punish crimes of nature. For Las Casas, then, one must choose the 'lesser of two evils', which in this case meant not going to war. Even though some persons would escape punishment, this would

¹⁸⁵ Ibid., p. 77

¹⁸⁶ Ibid., pp. 187 - 188

be the lesser evil, for would, 'he be a very good doctor who cuts off the hand to heal the finger?'¹⁸⁷ What Las Casas inevitable wanted to show was that in relation to Spanish policies against the Indians, this justification could hardly be just. Interestingly, what Las Casas voiced was not an absolute stand against any notion of humanitarian intervention, but his intuitive morality in this sense only went so far; for as he asserted, using the words of St. Augustine: 'God does not reward the good that is done, but the good that is done well.'¹⁸⁸ This of course, to some extent, resonates with the more modern just war theory of what Michael Walzer terms the importance of a 'humanitarian outcome'. What Sepúlveda was proposing, Las Casas believed, could hardly have an 'humanitarian outcome'. Lastly, following from these statements against the Indians, Las Casas was at great pains to argue against one of the most important of Sepúlveda's claims, namely that it was part of just war to force the Indians to hear the Gospel. Las Casas strongly believed that on this particular point Sepúlveda had misinterpreted the Bible. He had distorted God's word to such a degree that it lost its meaning. How could God, Las Cases asked, have commanded killing pagans in order to save them from their ignorance? Indians and pagans alike had to be, not violently punished, but rather peacefully converted to Christianity. Las Casas noted that

'Christ did not teach that those who refuse to hear the gospel must be forced or punished. Rather, he will reserve their punishment to himself on the day of judgement, just as he also reserves the punishment of those who refuse to believe. [...] Therefore, just as by punishing unbelievers who refuse to accept the gospel the Church would be usurping a right the Lord reserves for himself, so also would it be called a usurper if it forced unbelievers to listen to the gospel.'¹⁸⁹

However, as we have seen, Sepúlveda was adamant in his conviction that to convert the barbarians by peaceful means would be impossible. In the end then, it came down to the overall conviction of the rational capacities of the Indians, which remained the core foundational difference between the two thinkers.

Conclusion

Given the importance ascribed to the conference of Valladolid in being a culmination of philosophical, political and theological issues brought about by the discovery of a new world,

¹⁸⁷ Hanke, *All Mankind is One*, p. 89 - 91

¹⁸⁸ Las Casas, Bartholeme de: *In Defence of the Indians*, p. 189

¹⁸⁹ Ibid., p. 177

it is not only important to consider why the conference at Valladolid proved to be so inconclusive, but also why an important thinker such as Sepúlveda seemed to have been (purposely) forgotten by history. Firstly, one of the problems seem to be that no actual records of the proceedings have been found to this date, which therefore, to a certain extent, forces historians to rely on Sepúlveda's and Las Casas' later account. Not surprisingly, both claimed to have prevailed at Valladolid. It did, however, become clear that the debates resulted in the weakening of the *encomienda* system but ultimately not in the better treatment of the Indians by the Spanish.

In relation to my query, concerning Sepúlveda, it is interesting that Sepúlveda's views on the American Indians later earned him, albeit somewhat anachronistically, the designated title of 'the father of modern racism', which, to a certain extent goes a long way to explain his apparent obscurity compared with Las Casas.¹⁹⁰ Amongst scholars, Sepúlveda's real doctrine has long been in doubt. Additionally, Sepúlveda's was never satisfied himself that he was ever understood properly. In the years immediately preceding the conference in Valladolid Sepúlveda's treatise had found little support among the universities in Spain and he subsequently found it exceedingly difficult to have it printed anywhere. In fact *Democrates Alter* never received official approval for publication in the author's lifetime, and the edited version of it, *Apologia pro libro de justis belli causis* (the main work used for present study), in which Sepúlveda presented his main arguments from the Valladolid discussions, was ordered by Charles V to be confiscated within Spanish territories. It is notable, as Lewis Hanke asserts that even Las Casas had problems obtaining a copy in preparing his defence of the Indians at Valladolid.¹⁹¹ The explanation for such intellectual ostracism is markedly to be found in his Aristotelian philosophy. As we saw, it was Las Casas and in particular Vitoria who had put forward the strong belief in the common origin of mankind and God's will for the perfection of man and this had to be extended over the whole world (*oikumene*). And if this was to be so all peoples had to have sufficient enough intellect to grasp Christian teachings, otherwise the obligations God had given Christians would have been contradictory. For instance, Vitoria said that 'God and nature never fail in the things necessary.'¹⁹² As such, the Indians were eventually viewed as humans endowed with reason and the doctrine of natural slavery became heretical.

¹⁹⁰ Sepúlveda manuscripts were first republished in 1870, but only parts of it. It was not until the Latinist Ángel Losada in 1951 published a Latin edition a full version of Sepúlveda's works were available. Losada later did a translation of *Democrates Secundus* into Spanish; however, no published editions are available in English.

¹⁹¹ Hanke, Lewis: *All Mankind is One*, p. 63

¹⁹² Cited in Cited in Jahn, *The Cultural Construction of International Relations*, p. 66

Thus, Sepúlveda's use of Aristotle as a foundational principle for his just war theory against the Indians proved to be highly problematic and irreconcilable with the established teachings of the church despite his assiduous effort to prove otherwise. Arguably then, Aristotle's belief that natural slaves have the capacity for rationality must have been viewed inconstant with the demands of Christian doctrine and ultimately revealed the difficulties of reinterpreting Greek philosophy into Christian thought. However, Sepúlveda did not contend that the Indians had no souls. Following Aristotle, it was not that the Indians were animals, they merely acted like them. Although they could not possess reason they could still recognise it and in this way they were human, albeit a poor specimen, that ought to be instructed in the true faith - by force if necessary.

What I have sought to emphasise in this chapter, is that it is interesting that in Sepúlveda's just war theory seems to be a clear example where humanitarian intervention is not necessarily a good thing, which, given the pretentious efficacy the principle of humanitarian intervention claims today, is an important aspect – an aspect which often seems obscured in modern intellectual debates about international justice. The example of Sepulveda demonstrates that universalist principles derived from one culture (European) may be imposed on another culture in order to argue that they fall well below its standards and may therefore be forced to act in accordance with them. This was partly what Las Casas sought to contest.

Chapter 3

Hugo Grotius

‘It is in harmony with nature that man
should be helped by man’¹⁹³
- Hugo Grotius (1625)

Introduction

In this chapter I explore humanitarian intervention in the writings of the man who is widely regarded to have secularized the natural law tradition, the Dutchman Hugo Grotius. I will pay special attention to what looks like a particularly fruitful avenue of enquiry: the notion of third party intervention, which he, unlike his predecessors, spends a good deal of time surveying. In addition, I will contest the idea that Grotius presents a secular view of the international system, anchored somehow in the pre-Westphalian world. It is true, to a certain extent, that Grotius presents a novel idea of sovereignty which has been seen as the theoretical framework from which the Westphalian state system sprung. I will contend that despite claims of Grotius’s modernity, he was very much arguing within a natural law context. Rather than a secularisation of natural law, Grotius was instead offering a non-sectarian view of the natural law in an attempt to address not only the European religious disputes, but also disputes internal to the Netherlands, which had a profound impact on his political and personal life.

As with the previous chapters, exploring Grotius’s notion of humanitarian intervention entails looking at his just war theory and exploring the source of its obligations. If the obligation stems from the natural law then some obligations would, in some sense, be absolute, whereas if it is from the law of nations then it is voluntary. I want to argue here, that any notion of humanitarian intervention that Grotius has, will solely rely on his theory of punishment. We have a natural right to punish and obligation to punish human beings who transgress the law of nature, engaging in such gross violations as cannibalism and unnecessary killings. As we saw with Suárez, there was an argument in place for intervening to punish the Indians for crimes against the natural law. Grotius seems to place himself closer to Sepúlveda

¹⁹³ Grotius, Hugo: *On the Law (Rights) of War and Peace, Three Books* (1625), intro. James Brown Scott, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), book II, chapter xx, §viii

on this account; however he is not willing to go as far as the Jesuit in forcefully exposing them to the scriptures of Christianity. As will be apparent, although they both have a strong idea of punishment, there is an important difference between the two thinkers regarding their just war theories that sets them apart. Whereas Sepúlveda's principle of punishing the Indians for crimes committed against nature is a perfect moral obligation on the part of all Christians alike, Grotius nonetheless retains the notion that there is a strong moral obligation and a right to intervene on the part of states, but the obligation is 'imperfect', for the same reason that Sepúlveda's is 'perfect'; Grotius cannot prescribe who should do the punishing. This, of course, resonates in the more contemporary times of today in the debate of the enforceability of such interventions. However, for Grotius it was 'absolutely necessary to kill all those things which unjustly do us harm'¹⁹⁴, and as we shall see this included a notion of what we might term humanitarian intervention grounded in a strong principle of punishment.

The law of war and humanitarian intervention - the right of punishment

War for Grotius did not lie outside the realm of morality or law. On the contrary; he contended that 'where judicial settlements fail, war begins' and that these wars were based in actions of wrongs not yet committed or for wrongs already done.¹⁹⁵ Indeed, much of Grotius's work may be interpreted as subjecting international relations, including war, to the rule of law. Thus, Grotius saw war as an instrument of right.¹⁹⁶ Or more than that, just wars were as he noted 'customarily defined as those which avenge injuries.'¹⁹⁷ Unlike Michael Walzer, Grotius asserted that even if a war has been undertaken rightly, it must also be fought justly in order to be just. In this way he devotes the whole of book III of his work to the meticulous treatment of the topic of *jus in bello*, that is the right conduct of states in wars. From the outset, Grotius emphasises that his main reasons for writing about the subject of war is to argue against the notion that somehow being Christian forbade the use of all arms, and that a Christian's primary conduct was, instead, grounded in the duty to love all men. For Grotius, such thinking had been brought about by an extreme reaction to being confronted with ruthless and barbaric wars, which were characterised by a clear lack of restraint. He notes that such inclinations have especially been voiced by his countryman Desiderius Erasmus of Rotterdam (1466 - 1536),

¹⁹⁴ Ibid., §ix

¹⁹⁵ Ibid., book II, chapter I, §II

¹⁹⁶ Dumbauld, Edward: *The Life and Legal Writings of Hugo Grotius* (Oklahoma: University of Oklahoma Press, 1969), p. 73

¹⁹⁷ Ibid., book II, chap. xx, §viii

whose devotion to peace has taken him and his followers in an unnecessary pacifist direction. To this Grotius asserts that it is therefore necessary to bring such ideas back to a 'true middle ground', in an attempt to avoid undermining any actual restraining in war.¹⁹⁸ In this vein Grotius's writings are also a response to the whole of the Spanish Thomist tradition, which included thinkers such as Francisco Vitoria, Francisco Suárez and Domingo de Soto. On several occasions Grotius's discussions of the principles of just war theory sought particularly to refute Vitoria.¹⁹⁹ Vitoria, as we saw in the previous chapter, was vehemently against punishing violations of the law of nature such as cannibalism and sodomy. In contrast, Grotius argued that war may be waged upon those who sin against nature. He asserted

'The contrary view is held by Vitoria [...] and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either in person or his state, or that he should have jurisdiction over him who is attacked. For they claim that the power of punishing is the proper effect of civil jurisdiction [...].'²⁰⁰

Instead, Grotius argued that the power of punishment can also be derived from natural law. As such, states have a natural *right* to punish violations committed against nature, and besides cannibalism, for instance, these did also include inhumanity committed to one's own parents. Although Vitoria and Gentili had considered that a just cause of war could be waged to save innocents in relations to certain violations against the law of nature, it would appear that for Grotius such principles of just war applied regardless of whether the people you were saving were innocents or criminals. This, as we have seen, was of great importance to Vitoria and

¹⁹⁸ Grotius, *Rights of War and Peace, Prolegomena*, §28 - 30

¹⁹⁹ It is uncertain why Grotius does not refer to Suárez to the same extent as he does Vitoria, given Suárez's great authoritative status on issues of natural law. As is apparent, there is no doubt that Grotius must have been influenced by the Spanish Thomist, some scholars even suggest to the extent that Grotius merely 'echoes' principles which had already had a long standing in Spanish jurisprudence. However, such views clearly do not give the Dutchman credit enough, although it is certainly true that in Protestant jurisprudence it has been customary to treat Grotius as the 'single-handed founder' of modern international law. Despite his enormous influence, it is then usually overlooked that his work owes a great deal to a long list of notable precursors – and Suárez is certainly on that list. However, it would seem that Grotius would have had prudential reasons to not extensively refer to Suárez's writings, given the prejudice of both Protestants and Catholics, which after the reformation was such that any formed opinion could not be impartial. Grotius wrote the first edition of his great work in 1625 and Suárez's work had appeared some 13 years before, however, Suárez's lesser known political writings had greatly displeased the reigning monarchs James I, Louis XIII and Maria de Medici. Grotius was in England when he wrote part of his work and depended on the protection of James I and when it was published he was exiled in France and here he depended, this time, on the hospitality of the French king, even relying on an, albeit irregular, income from the royal treasury. As such, Grotius might have felt it unwise to cite Suárez at length, making only four references to the Spanish scholar in total. For further discussion on this see Villa, Sergio Moratitel: 'The Philosophy of International Law: Suárez, Grotius and Epigones' in *International Review of the Red Cross* (no. 320, 1997), pp. 539 – 552

²⁰⁰ Grotius, *Rights of War and Peace*, book II, chapter XX, §XL

Gentili, exactly because we do not have a natural right to avenge categories of crimes in breach of the natural law; however we do have a moral duty to protect the innocents. What matters for Grotius, then, is the right to punish and by this right the very interests of human society were being served. In this way, Grotius's theory of punishment becomes important in exploring his just war theory. As such, I want to argue that any notion of humanitarian intervention rests on his view of punishment.

What Grotius wanted to refute was the view that the law of nature requires the right of jurisdiction for exacting punishment. This was exactly what he argued against Vitoria and the Spanish Thomists. Violations of rights were not the only grounds that provided jurisdiction to just cause for war. Following St. Augustine of Hippo (350 - 430), the issue of jurisdiction does not apply, because wars of punishments are sanctioned by nature which holds the jurisdiction for the whole of mankind. St. Augustine had observed that in thinking that people 'should decree the commission of crimes of such sort that if any state upon earth should decree them, or had decreed them, it would deserve to be overthrown by a decree of the human race.'²⁰¹ Grotius noted that the natural right to punish originally rested with individuals but since the organization of states and courts of law has come to be it is in the hands of the highest authorities, namely, state rulers, who are subject to no earthly authority, to exercise this right. In this light, he remarked that 'truly it is more honourable to avenge the wrong of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind.'²⁰²

For Grotius, then, all states have a right and a duty to punish other states of violations committed against the law of nature. For him, war ought not to be undertaken unless it is for the enforcements of rights.²⁰³ Justifiable causes for undertaking war include defence, recovery of property and inflicting punishment. Like previous jurists Grotius upholds the right to self-defence and that the origin is found directly in the law of nature. However, this principle of self-defence is not an absolute right. Self-preservation is not the primary law of nature; other concerns come before, such as natural sociableness and the obligation not to endanger the lives of others in order to save your own. Thus, considerations such as these act as constraints.²⁰⁴

²⁰¹ Cited in *ibid.*, chapter XX, §xl

²⁰² Grotius, *Rights of War and Peace*, book II, chapter XX, §xl

²⁰³ *Ibid.*, *Prolegomena*, §25

²⁰⁴ Boucher, David: *Political Theories of International Relations – from Thucydides to the Present*, (Oxford: Oxford University Press, 1998), p. 210

From Grotius's notion of natural sociability we find his claim then that nature dictates that we should help our fellow man.²⁰⁵ As we shall see in the following chapter, Grotius's idea of natural sociability is not as strong as Pufendorf, but it is nevertheless a profound precursor for Grotius in terms of the universality of his principle of punishment. We are all sociable by nature and this entails a minimum of obligations upon us to come to the aid of each other. It is also by the law of nature that we find the origin of Grotius' second claim for causes of just war, namely that it is by this law that it is permissible to kill in defence of property.²⁰⁶

However, the right to inflict punishment acts as a somewhat different principle from the right to defend oneself and the right to recover property. Grotius, more explicitly than Vitoria and Gentili, transforms the notion of *ius* into something that we possess: it is instead a moral quality. This conception of rights then has reference to the person and differs from an objective right which in contrast is imposed on you by being derived from natural law. It, instead, establishes rules of right conduct. With regards to subjective rights, Grotius thus argues that 'in this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully.'²⁰⁷ This is important, because unlike the right to self-defence and the rights attached to one's property, the right to punish wrongdoers is strictly speaking not a moral power. Haakonssen notes that the suggestion that people have a natural right to punish is problematic. This is so because it cannot be regarded as a moral power in the same way as we hold other rights, and must therefore be understood as a kind of a second-order right. And this, Haakonssen asserts, is never adequately explained by Grotius.²⁰⁸

Grotius does, however, attempt to explain this problem in his discussion of attributive and expletive justice. Here, it is important to take a closer look at Grotius's criticism of Aristotle. It is well-known that Grotius seeks to distinguish between questions of entitlement and questions of worthiness or rights and aptitudes. Grotius notes 'when the moral quality is perfect we call it *facultas* [...]; when it is not perfect, *aptitudo*.'²⁰⁹ For Grotius, rights are a matter of expletive justice. They follow from the *basic* requirements of the social order, which is the source of law for Grotius. Aristotle is concerned with aptitudes for his distributive justice – which is directed toward those virtues which have as their purpose the good of others. The central point underlying this distinction between rights and aptitudes is the denial, for Grotius anyway, that

²⁰⁵ Grotius, *Rights of War and Peace*, book II, chapter XX, §viii

²⁰⁶ *Ibid.*, book I, chapter II, § 1-2

²⁰⁷ *Ibid.*, book I, chapter I, § iv

²⁰⁸ Haakonssen, Knud: 'Hugo Grotius and the History of Political Thought' in *Political Theory*, vol. 13, no. 2 (May, 1985), pp. 239 – 265, p. 242

²⁰⁹ Grotius, *Rights of War and Peace*, book I, chapter I, § iv

juridical rights and duties is derived directly from the requirement of the common good. For Grotius rights were in the domain of liberty – where one might pursue ones self-interests, but they could not be seen as being directly related to the requirement of the common good – even if one understand Grotius to have a ‘thicker’ understanding of natural sociability.²¹⁰ In relation to attributive justice, he argues that here it is untrue to say that all punishment comes from the whole to the part. The essence of such punishment is to take into account its notion of aptitude, which by way of definition ‘does not contain in itself right strictly so called, but furnishes an opportunity for it.’²¹¹

With this distinction in mind, it could be argued that Martha Nussbaum attributes a much stronger view of Grotius’s notion of humanitarian intervention than what can in fact be the case. It is worth noting that Nussbaum in her book *Frontiers of Justice* relies heavily on a Grotian foundation of what she terms ‘human fellowship’, however, it is a foundation she never fully explores. This becomes problematic in trying to discover her moral foundationalism. Nussbaum seems to rely on the misguided notion that Grotius secularised the natural law tradition, from which we find the move from natural law to natural rights. Grotius famous ‘impious hypothesis’ will be explored in more detail below. Here it is sufficient to emphasise that Nussbaum’s conscious theoretical selection of Grotius gets her into an argumentative fix, and this can be illustrated by taking a closer look at her argument that Grotius provides her with a strong moral claim for humanitarian intervention. On the face of it, Nussbaum wants to present a more robust justification for humanitarian intervention than Rawls – or at least she does not think that it is as morally problematic as he does. She criticises Rawls’s international relations projects, and notes, Rawls ‘is eager to conclude that we may respect hierarchical nations as members in good standing of the Society of Peoples’.²¹² She voices her concern that it is problematic what to do when the standards of given nations are defective (going back to her concerns of Rawls’s human rights list, ‘back ground structures’ and the fact that he uses peoples and not individuals as the main recipients of international justice)? In this way she says that ‘Rawls can give us no insight into why we might care about

²¹⁰ Grotius, *Rights of War and Peace*, book I, chapter I, § iv –ix; See also Simmonds, N. E.: ‘Grotius and Pufendorf’ in Nadler, Steven (ed.) *A Companion to Early Modern Philosophy*, (Blackwell Publishing, 2002) pp. 216 - 224

²¹¹ Grotius, *Rights of War and Peace*, book II, chapter XX, § ii

²¹² Nussbaum, Martha: *Frontiers of Justice – Disability, Nationality, Species Membership*, (Cambridge MA: The Belknap Press of Harvard University Press, 2007), p. 255

state sovereignty’²¹³. She thinks that Grotius can provide her with the stronger foundation that she needs. She appeals to the Dutch thinker’s idea of taking individuals as the main actors of international relations as well as to his strong notion of natural sociability (human fellowship).²¹⁴ She emphasises this point by asserting ‘[r]ecognition of the moral importance of the state as an expression of human autonomy is already a prominent feature of Grotius’s discussion of humanitarian intervention by forming sovereign states and giving themselves laws, human beings assert their moral autonomy.’ In this way Nussbaum sees Grotius as giving us ‘grounds that does not depend on our believing that we ought to express respect for the hierarchies which society has organized itself,’ which is her criticism laid against Rawls.²¹⁵ However, this understanding of Grotius’s notion of humanitarian intervention is problematic as might already be apparent. As we saw, any understanding of a notion of humanitarian intervention that Grotius might have is strongly linked to a theory of punishment. From Grotius’s idea of natural sociability it follows that it in fact does not provide states with an absolute obligation to intervene when gross violations of the natural law take place exactly because it is not ‘thick’ enough. This is why he talks of states’ or sovereign’s *rights* to punish not obligations as such. In this way, there is a much weaker foundation of obligations to punish crimes on breach of the natural law on humanitarian grounds than what Nussbaum assumes. This, I think, stems back from Grotius criticism of Aristotle and his notion of distributive justice as explained above. From the fact that state’s or the sovereign’s natural rights to punish is not *absolutely* derived from the requirements of the common good, but is rather found in the realm of the permissive. Thus, the point I want to make is that it seems that Nussbaum ascribes Grotius a much more robust obligation for humanitarian intervention than he actually does – he talks of (‘imperfect’) rights and minimal obligations at best. This becomes more obvious in the following. From the notion of aptitude, what seems to be the crux of the matter for Grotius here is that nature does not determine to whom punishment is appropriate; however, the law of nature does dictate that those free of crimes may exact punishment.

²¹³ Nussbaum, *Frontiers of Justice*, p. 258. Pogge of course voiced similar concerns; See Pogge, Thomas: *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, (Cambridge: Polity, 2002)

²¹⁴ How strong Grotius’s notion of natural sociability is, is contentious – there is no doubt that he does not present as strong a notion as Pufendorf later did, as will be apparent in the following chapter. However, it could be argued that Nussbaum seems to want to present a thicker conception of sociability that what could be ascribed to Grotius.

²¹⁵ Nussbaum, *Frontiers of Justice*, p. 256

‘But the subject of this right, that is the agent to whom the right is given, has not been definitely fixed by nature itself. For Reason declares that the criminal may be punished. It does not, however, declare who ought to inflict the punishment, excepting so far as this, that nature makes it clear enough that it is most suitable that punishment be inflicted by one who is superior [...].’²¹⁶

Thus, the right to punish is not obligatory in the positive sense of the word. It is difficult to specifically determine to whom this obligation should correlate. This relates intimately to the idea of humanitarian intervention in the sense that it can never be a ‘perfect’ obligation for this exact reason; a fact Grotius recognised. He to some extent explored this issue with some caution citing both Cicero and Plato in relation to a man’s duty to help or prevent a wrong, but came to the conclusion that ‘*the obligation to undertake war may be disregarded without wrong, if one fears for himself, or even for the life of an innocent person.*’²¹⁷ Thus, in close relation to this Grotius also argued, as did Vitoria and Suárez for instance, that such wars are only to be undertaken if there is an outcome without great losses for the subjects of the third party ruler who is intervening.²¹⁸ For these exact reasons, Grotius relayed a word of warning in relation to such wars saying that ‘wars which are undertaken to inflict punishment are under suspicion of being unjust, unless the crimes are very atrocious and very evident, or there is some other coincident reason.’²¹⁹ It is clear, then, that Grotius is not only emphasising the need of a proportionate outcome (something we today might term ‘humanitarian’), he is also asserting the problem of using such wars of punishments as mere pretexts. It seems that Grotius here is almost suggesting that if the crime is not palpably heinous, then one is in danger of being viewed as an opportunist, intervening under a pretext. He further asserted this concern by citing Mithridates²²⁰ that such wars of pretext ‘assail not the faults of kings’ but rather ‘the power and authority of kings.’²²¹ In relation to this, Grotius relays further precautions, namely that the law of nature must be distinguished from widely current national customs. He notes that ‘to wish to impose civilization upon uncivilized peoples is a pretext which may serve to conceal greed for what is another’s.’²²² Thus, to use the example of the American Indians; unless their ‘uncivil’ life constituted serious enough crimes against the laws

²¹⁶ Grotius, *Rights of War and Peace*, book II, chapter xx, § iii

²¹⁷ *Ibid.*, chapter xxv, § vii (Grotius’s italics)

²¹⁸ *Ibid.*, § ii

²¹⁹ *Ibid.*, book II, chapter xx, § xliii

²²⁰ Probably Mithridates (VI) the Great (132–63 BC) king of Pontus (what is today Turkey)

²²¹ Grotius, *Rights of War and Peace*, book II, chapter xx, § xliii

²²² *Ibid.*, § xli

of nature, waging wars against them could only be considered as being motivated by greed and ambition, not justice.

In recognising a right to inflict punishment, Grotius, in this way, does not deny that there are obligations that go beyond what is dictated by the natural law. We have virtues apart from justice that encourage us to work towards perfecting ourselves and the common good. These are, nevertheless, 'imperfect' which can only compel us if they are established in human law.²²³ As Grotius contends:

'That which we call moral goodness [...] at times it has a wider range, so that an act may be praiseworthy if performed, yet if it be omitted altogether or performed in some other way no blame would attach [...] it is with [...] this class [...] of actions that both divine and human laws are wont to concern themselves, in order that those acts which were in themselves merely praiseworthy might also become obligatory.'²²⁴

The aspect of moral goodness is part of the conception of permissions. As was explored in chapter 1, Grotius was not the first to assert the notion of permissions as part of the natural law. Suárez discussed this notion extensively. For Suárez there are instances in the law of nature of concessions, or permissions, which are conducive for the common good of men as a condition to living well in society. These are therefore not absolute otherwise they would pertain to the natural law. These, as was explored amply in chapter 1, belong to the law of nations.

Grotius takes the concept of permission and makes it central to his account of the law of nations and the law of war; this has to be understood in recognition that for Grotius war is the greatest human imperfection of all.²²⁵ Grotius recognises the morally problematic nature of permissions on several occasions and emphasises that giving way to permissions does not make it morally right; for instance in quoting Cicero Grotius stresses 'it is one thing to have regard to rights, and another to have regard to justice.'²²⁶ However, in *Prolegomena* he makes the necessary distinction between acts that are done with impunity and acts that are actually free from fault.²²⁷ As will be explored more explicitly later on, Grotius's account of the law of nations, underlined by an idea of the authority of agreement between human beings, suspends

²²³ Forde, Steven: 'Hugo Grotius on Ethics and War' in *The American Political Science Review*, vol. 92, no. 3 (Sept., 1998), pp. 639 – 648, p. 641

²²⁴ Grotius, *Rights of War and Peace*, book I, chapter II, §i

²²⁵ Forde, Steven: 'Hugo Grotius on Ethics and War', p. 644. Also see Forde for a good discussion on the differences between permissions and the law of war in Suárez and Grotius

²²⁶ Grotius, *Rights of War and Peace*, book III, chapter IV, §ii

²²⁷ Grotius, *Prolegomena*, §35; Forde, Steven: 'Hugo Grotius on Ethics and War', p. 644

the operation of the natural law. The law of nations, Grotius asserts ‘permits many things which are forbidden by the law of nature’; but, at the same time, Grotius is also adamant to emphasise that it also ‘forbids certain things which are permissible by the law of nature’, such as polygamy.²²⁸ In the case of war, the reason such permissions are necessary is to bring about peace. Grotius recognises that if strictly applied, the natural law just war doctrine could override any peace settlements with endless conflicts being reopened in service to justice. In this way having a right does not necessarily imply that it should be exercised on any given occasion.

The status of human permissions in the law of wars is something that greatly concerned Grotius and the last part of book III is a plea for states to follow the higher laws of nature or the morals found within Christian duties. Steven Forde notes whether this in fact means that Grotius, after all, denies to human law any permissions from the natural law. As he notes ‘in Grotius’s view, are permissions granted by human law through a true moral power it possesses, or do these permissions merely represent the impunity that results from the nations deciding in concert to ignore justice?’²²⁹ However, as he subsequently clarifies this does not seem to be the case as Grotius placed great limits on the ability of humans to abolish the law of nature, and thus permissions which happen to obstruct the enforcements of the law of nature is not on this account manifestly Machiavellian in scope. Thus, human law ‘cannot enjoin anything which the law of nature forbids, or forbid what the law of nature enjoins’; it can nevertheless, as Grotius explains, ‘set limits on natural liberty, and forbid what by nature was permitted.’²³⁰ In this way, human law may grant permissions which are unjust, but these permissions are not absolute.²³¹ As alluded to at the beginning of this chapter Grotius believes that presenting an utopian ideal for the international order is not a solution, neither is a pure just war doctrine. Thus, as will become apparent, Grotius wanted to emphasise the necessity of granting the law of nations the legitimacy of law.

If, as I argued, Grotius allows a permissive right to punish violations of the natural law, what exactly is the purpose of the punishment? There are a number of possibilities, of course. It could be retribution for committing a moral wrong, or a deterrent to prevent future violations, or indeed, it could be to reform the character of nations, to force them to see the error of their ways and act more morally. Primarily, his underlying assertion is that punishment

²²⁸ Grotius, *Rights of War and Peace*, book III, chapter IV, §xv

²²⁹ Forde, Steven: ‘Hugo Grotius on Ethics and War’, p. 646

²³⁰ Grotius, *Rights of War and Peace*, book II, chapter II, §v

²³¹ Forde, Steven: ‘Hugo Grotius on Ethics and War’, p. 646

has to have a deterrent effect. Unlike what Pufendorf later argued, as will be explicit in the following chapter, Grotius emphasised that punishment must have some advantage among men and must somehow be inflicted differently from the way God does it (in relation to humanitarian intervention that is). Following Plato, Grotius asserts that punishment is not designed for evil neither is it exacted because a wrong has been done. In other words he is denying the retributivist justification of punishment. Instead, the purpose of punishment is to prevent a recurrence, and deter others from similarly transgressing the natural law. In quoting Seneca Grotius says ‘no wise man punishes because a sin has been committed. For what has passed cannot be recalled, but what is to come may be prevented [...] we are not to do harm to a man because he has sinned, but that he may not sin.’²³² Here, in relation to the purpose of intervention for Grotius, it is necessary to take a closer look at its implications. If the only justification for intervention is deterrence, then it is not really a moral claim. What, then, would the reason for saving the innocent and preventing, for example, acts of bestiality and sodomy be? Punishments may deter, but there is something deeper going on there. To deter someone from consorting with animals would be to prevent him or her from committing a mortal sin, and to prevent an indelible stain on his or her soul. It is as Grotius says that ‘when man punishes a man who is his equal by nature he ought to have a definite purpose in view [...] for one man is so bound to another by ties of common blood that he ought not to do harm to another save for the sake of attaining some good.’²³³ For Grotius, then, punishment is not exacted for retribution or vengeance, but rather as a measure of precaution. The purpose needs to be for ‘some good’ and as such for Grotius there is this deterrent aspect attached to the principle of punishment. Such punishments are to be viewed as exemplary and are employed ‘so that the punishment of one may cause many to fear, and others may be frightened by the nature of the punishment.’²³⁴ Grotius stipulates that it is important to consider that punishment is not necessarily inflicted for the good of the wrongdoer, but for the good of the public. This is so, ‘partly by removing the wrong-doer or by restraining him from doing harm [and] partly by deterring others through the severity of punishment as an example.’²³⁵ In this way, Grotius’s general view of the principle of punishment can be viewed as humanitarian in the sense that it is good for the public.

²³² Grotius, *Rights of War and Peace*, book II, chapter xx, §iv

²³³ Ibid.

²³⁴ Ibid., §ix

²³⁵ Ibid., §x

As I emphasised above, for Grotius we have moral obligations that goes beyond the dictates of the law of nature and these are grounded in acts of permissions, grounded in a natural right, of which some can have humanitarian justifications. This requires us to explore what sort of acts of punishment is permitted on humanitarian grounds and ultimately Grotius's notion of third party intervention.

Third party intervention

From the notion that states have a natural right to punish crimes committed against the law of nature, such as cannibalism and inhumanity to one's own parents, Grotius emphasised that this would be the case regardless of whether such violations were committed against one-self or against others with whom there was no direct involvement. And as such Grotius has a clear idea that undertaking war on behalf of others was lawful in the sense that it was permitted by the law of nature. As he contends:

'Kings and those who possess the rights equal to those kings, have the right of demanding punishment not only on accounts of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.'²³⁶

Following from this, he thus asserted that most just wars were fought against 'wild rapacious beasts, the next against men who are like beasts',²³⁷ in accordance with what nature had sanctioned. These would then be cannibals, sodomites, and others that participate in licentious wicked acts. An assertion in obvious opposition to what Vitoria had previously argued.

Much has been written on whether Grotius is in fact an apologist for absolutism in the sense that even in cases of extreme necessity he asserted that subjects may not rebel against their ruler. It is not my place here to confirm or deny such arguments. In relation to the topic at hand is the fact that not only did Grotius recognised a principle of non-intervention into the internal affairs of other states; he also expressed the imperative need of lawful intervention by one state on behalf of seriously persecuted people of another. This was derived from Grotius's notion of punishment, as has already been shown, that by the law of nature an individual was justified in enforcing not merely his or her own rights, but also those of others. The causes, Grotius contends, 'which are just in relation to the person whose interest is at stake are

²³⁶ Ibid., §xl

²³⁷ Ibid.

[therefore] just also in relation to those who give assistance to others.’²³⁸ This, for Grotius is intimately related to his claim that the ‘most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men,’ which of itself, Grotius contends, ‘affords sufficient ground for rendering assistance’.²³⁹ In this way, Grotius was leaning on the same type of argument as Gentili, which had its origin in medieval thought of the common interests and duties of mankind. What Grotius in fact is arguing here, by evoking medieval Christian thought of a common humanity, is that we have a duty to assist one another irrespective of our right to punish. However, in circumstances such as these he, yet again, noted the potential danger of the ever-present abuse of this kind of intervention:

‘Seneca thinks that I may make war upon one who is not of my people but oppresses his own [...] a procedure which is often connected with the protection of innocent persons. We know, it is true, from both ancient and modern history, that the desire for what is another’s seeks such pretexts as this for its own ends; but a right does not at once cease to exist in case it is to some extent abused by evil men. Pirates, also, sail the seas; arms are carried also by brigands.’²⁴⁰

Theodor Meron notes that on this point Grotius owes much more to his predecessor Gentili than he gives credit; in fact, to such an extent that in today’s academic scholarship one might well term it plagiarism.²⁴¹ Even though it is certainly true, as we have seen, that many of Grotius’s passages are indeed very similar to Gentili’s, Meron’s critique is hardly pertinent. What Gentili was arguing is that crimes violating natural or divine laws would somehow result in the perpetrators forfeiting their natural rights; what Grotius instead is arguing is for the natural rights of individuals or states to punish such crimes.

One of the extensively discussed issues by Christian jurists and theologians, namely the issue of whether war can be waged on account of crimes committed against God, was considered to some extent by Grotius. As was discussed in relation to some of the Spanish Thomists the notion that we have a duty to undertake war to avenge crimes committed against God generally denied such wars as just saying that God is able to punish offences committed against Himself. However, Grotius’s argues that if this is the case then the same thing is true about other crimes. He denies the notion that these other crimes are punished by men in so far as these cause injury and endanger other men for as he remarks ‘men do not only punish the

²³⁸ Ibid., book II, chapter xxv, §i

²³⁹ Ibid., §vi

²⁴⁰ Ibid., §viii

²⁴¹ Meron, Theodor: ‘Common Rights of Mankind in Gentili, Grotius and Suárez’ in *Theodor Meron War Crimes Law Comes of Age – Essays* (Oxford: Oxford University Press, 1998), pp. 122 – 130

sins which directly harm others but also those which harm by their consequences, such as suicide, intercourse with animals [...],²⁴² which, as was demonstrated above testifies to the moral purpose of such punishments. What Grotius wants to argue is that injury to God consists of injury to human beings. He notes that ‘religion, although it is in itself effective in winning the favour of God, nevertheless has also in addition important effects on human society.’²⁴³

Thus, there is a strong notion of humanitarian intervention for undertaking wars for crimes against God, and that these are consistent with a just cause. In fact, Grotius feels very strongly that wars undertaken for such reasons are not only important but also necessary for the welfare of the common good:

‘Religion is of even greater use in that greater society than in that of a single state. For in the latter the place of religion is taken by the laws and the easy execution of the laws; while on the contrary in that larger community the enforcement of law is very difficult, seeing that it can only be carried out by an armed force, and the laws are very few. Besides, these laws themselves receive their validity chiefly from fear of the divine power; and for this reason those who sin against the law of nations are everywhere said to transgress divine law. Therefore, [...] religious corruption affects all to their hurt.’²⁴⁴

In this way, those who violate these common ideas of religion may be punished, even people who ‘are too dull-witted to be able to discover or understand positive proofs thereof’;²⁴⁵ for as Grotius argued, they have at some point been instructed and guided to the right path of reason. However, what does Grotius argue in relation to people who have not had such an instruction in the Christian faith? This argument weighed heavily on the minds of the Spanish jurists, and thinkers such as Vitoria came to the conclusion that punishing the Indians for crimes committed in ignorance against God would be unjust. Sepúlveda, on the contrary, believed that such people should be instructed in the true faith by force and coercion if necessary and wars undertaken for such purposes would be just.

Grotius disagreed on this point with Sepúlveda. Wars against those who are unwilling to accept the Christian religion cannot be waged justly because, as he argued, ‘Christ as the author of the new law desired that absolutely no one should be inducted to receive His law by punishments in this life, or by fear thereof.’²⁴⁶ However, Grotius was adamant that wars may be justly waged for crimes committed against Christians for the sake of their religion alone. In

²⁴² Grotius, *Rights of War and Peace*, book II, chapter xx, §xliv

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid., §xlvi

²⁴⁶ Ibid., §xlvi

arguing that there is nothing in the Christian teachings which is injurious to human society, rather the opposite, Grotius therefore emphasises that people of other religions have an obligation to recognise Christians. As such, wars can be justly waged against people who persecute another group of people on account of their beliefs. Grotius had had important political reasons for expounding such a point, not only considering Dutch relations with the Catholic Hapsburgs, but also in light of the political and religious feuds within the Dutch state itself. A dispute over seemingly arcane theological matters had broken out in 1618 between orthodox Calvinists, 'Contra-Remonstrants', and the reformers, the 'Remonstrants', who voiced more religious tolerance and this had quickly turned into a deepened political feud. Grotius, along with the leading Dutch politician of the day, Johan van Oldenbarnevelt (1547 - 1619), supported the latter movement, and when Prince Maurice of Nassau (1567 - 1625), leader of the Calvinist establishment, staged a coup and usurped power, he immediately sought to eliminate the Remonstrants and their supporters in government. Oldenbarnevelt was executed and Grotius was sentenced to life imprisonment; (although from which he later escaped).²⁴⁷

Another issue which Grotius discusses is the idea of ruling others for the sake of their own good. As we saw with Sepúlveda, this was one of his main arguments for just warfare against the Indians and also humanitarian in the sense that it was to civilise them and ultimately save them from themselves. And as was discussed, this was grounded in his idea of applying Aristotle's category of natural slavery to the Indians. Grotius, however, denies such justifications as being mere pretexts. As emphasised previously, he proclaims:

'Not less iniquitous is it to desire by arms to subdue other men, as if they deserved to be enslaved, and were such as the philosophers at times called slaves by nature. For even if something is advantageous for any one, the right is not forthwith conferred upon me to impose this upon him by force. For those who have the use of their reason ought to have a free choice of what is advantageous or not advantageous, unless another has acquired a certain right over them.'²⁴⁸

Thus, as was explained, only if the Indians committed crimes against the law of nature does a third party have a natural right to intervene and not, as Grotius asserted above, to civilise them,

²⁴⁷ For further literature on the life of Hugo Grotius see Dumbauld, Edward: *The Life and Legal Writings of Hugo Grotius*; Edwards, Charles S.: *Hugo Grotius: The Miracle of Holland*, (Chicago, Illinois: Nelson Hall Press, 1981); Van Ittersum, Martine: *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615*, (Boston: Brill Academic Publishers, 2006)

²⁴⁸ Ibid., book II, chapter xxii, §xii

even if it would be to do them 'good'. This is interesting in relation to today's notion of humanitarian intervention. Only genocide or crimes, which 'shock the moral conscience of mankind' are serious enough to precipitate a potential humanitarian intervention (or not as is more often the case), whereas, for instance, systematic violations against women in countries like Yemen or Saudi Arabia are not deemed serious, or criminal, enough for intervention.

Another important aspect here in relation to intervention, which deserves mentioning, is the issue of what has later become known as the doctrine of *Terra Nullius*. Grotius, like John Locke (1632 - 1704) after him, believed that everyone had a natural right to possess and inhabit uncultivated land. The condition was that due recognition was given to the appropriate political authority. This is of course not the case with Locke, where ownership rights to property does not depend on a system of law, whereas for Grotius, then, it could only have validity within such a context. Grotius distinguished between property and jurisdiction, where the latter was something that is exercised over people rather than things, but also extending it to all people entering within a given territory. This was also how Grotius justified his argument against the claim of the Portuguese to have a right to possess the East Indies.²⁴⁹ As he asserted 'the sea is *by nature* open to all.'²⁵⁰ Against William Welwod (1578 - 1622), his contemporary and professor of mathematics and civil law at the University of St. Andrews, Grotius restates his important argument that neither sea nor land is by nature the property of anyone. However, 'land through nature can become property, while the sea cannot.'²⁵¹ As has already been discussed, the violation of rights for Grotius is just ground for war against the perpetrators. What this in effect meant was that if the Indian authorities refused settlers their right of settlement or husbandry then this would be to violate the natural law and just war could be waged against them.²⁵² This also applied if the Indians somehow denied settlers and travellers the right of passage; access to harbours; the conduct of trade and commerce; or obtaining provisions. These are all rights granted to them by the law of nations. This view, as we saw, was also endorsed by Vitoria and Gentili. As will become apparent in the following chapter, this was something that Pufendorf was strongly opposed. Although, Grotius here recognises the political authority of the Indians, he nevertheless does not recognise the eminent domain, or sovereignty they hold over the land. Historically, this is of course because the notion of

²⁴⁹ See Grotius, Hugo: *The Free Sea* [1604] – including William Welwod's critique 'Of the Community and Property of the Sea' and Grotius's reply 'Defence of Chapter V of the *Mare Liberum*', edited and introduced by David Armitage, trans. Richard Hakluyt (Indianapolis: Liberty Fund, 2004)

²⁵⁰ *Ibid.*, p. 91

²⁵¹ *Ibid.*, p. 81

²⁵² Boucher, *The Limits of Ethics in International Relations*, pp. 188 - 189

sovereignty is not conceptually available to him in the same way that it was for Pufendorf. By emphasising the collective ownership of the land by the Indians, as we shall see, Pufendorf's theory severely restricted any colonial or settlement aspirations for the Europeans.

From the above analysis, it is apparent that Grotius does have a notion of humanitarian intervention which is inextricably tied to his theory of punishment as a right based on certain permissions to promote and maintain the interests of human society. However, a necessary question follows from this: what are the sources of these obligations, according to which we act? What law are they grounded in: the natural law or the law of nations? This will be explored in the following section.

The source of moral obligation - the law of nations or the law of nature

As was discussed above, the obligation (and right) to punish presents us with a difficult task in determining where such obligation is grounded, or the source of the obligation. Arguably, for Grotius, because the right of punishment was not an objective right as such, it is not derived explicitly from nature. Rather, it is permitted by nature; however, its enforcement depends on conventional law. This is emphasised by Grotius in his assertion that law is the sustainer of morality rather than its creator.²⁵³ As such, the obligation of humanitarian intervention depends on the law of nations for its imposition. But what constituted the law of nations for Grotius?

Unlike with Vitoria and Gentili, Grotius was much more careful to distinguish the law of nations from the law of nature, and make it more pronounced. In fact, Grotius criticised Gentili for not distinguishing the two systems of laws properly. Although acknowledging the value of Gentili's work, Grotius, nevertheless noted that he would leave it up to the Italian jurist's readers 'to pass judgement on the shortcomings of his work as regards method of exposition, arrangement of matters, delimitations of inquiries and distinctions between the various kinds of laws.'²⁵⁴ As was explored in the previous section of this chapter, Grotius's notion of rights is extremely important for his natural law theory and the way he conceptualises the law of nations. As was briefly stated, for Grotius, there was a universal moral order in which an individual's right was sustained by law. In this way the natural law becomes the declaration of respecting each other's rights and thus implies that others have a certain duty to respect them as well. As we saw, from our definite natural sociability fundamental rights of nature relating to property, self-defence, promise keeping and punishment follows. In this way the natural law

²⁵³ Haakonssen, 'Hugo Grotius and the History of Political Thought', p. 240

²⁵⁴ Grotius, *Rights of War and Peace, Prolegomena*, §38

stands as a foundation of all law, because without these, human society could not exist or flourish.²⁵⁵

Knowing the content of the natural law is firstly laid out by the dictates of our right reason, *a priori* which is consistent with our rational and social nature. Secondly, through *a posteriori* method it can be known with great probability, which directs all civilised nations towards a common cause, for as Grotius says ‘an effects that is universal demands a universal cause; and the cause of such and opinion can hardly be anything else than the feeling which is called common sense of mankind.’²⁵⁶ As has already been demonstrated, the law of nature for Grotius does not rest on the will of individuals, instead as Boucher points out ‘it has an objective existence as a criterion of human actions.’²⁵⁷ This is important to emphasise, because for Grotius, the law of nations does not have an objective existence and is not logically self evident from definite law of nature principles. Instead, it is derived from human will and receives its obligatory force from the will of all nations, or most of them as Grotius contend. He further notes

‘The distinction between these kinds of law is not to be drawn from the testimonies themselves (for writes everywhere confuse the terms law of nature and law of nations), but from the character of the matter. For whatever cannot be deducted from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man.’²⁵⁸

As such, the law of nations is a product of human agreement. In the same way as civil law is designed to benefit the state, so is the law of nations meant to benefit the society of humanity. It is observed and consented to by all civilised nations and in this way because it cannot be deduced from first principles it, instead, supplements the natural law. As Grotius himself expounds

‘But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate between all states, or a great many of states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.’²⁵⁹

²⁵⁵ Boucher, *Political Theories of International Relations*, p. 212

²⁵⁶ Grotius, *Rights of War and Peace*, Book I, chap. i, §xii

²⁵⁷ Boucher, *Political Theories of International Relations*, p. 212

²⁵⁸ Grotius, *Rights of War and Peace*, Prolegomena, §40; Boucher, *Political Theories of International Relations*, p. 213

²⁵⁹ Grotius, *Rights of War and Peace*, Prolegomena, §17

Unlike, what Pufendorf argued both laws regulate relationship between states. In fact Pufendorf criticised Grotius on this very issue. In arguing against Carneades (c. 214 – 129 BC) who had presented a similar view as Pufendorf, Grotius implied the illogic for such a view by saying that ‘just as the national, who violates the law of his country in order to obtain an immediate advantage breaks down that by which the advantage of himself and posterity are for all future time assured, so the state which transgress the laws of nature and of nations cuts away also the bulwarks which safeguards its own future peace.’²⁶⁰

Grotius then argues that the law of nations sometimes contains precepts which are created by nations themselves. These are then not derived from natural law and the obligation in such cases arises from tacit consent manifested through usage and custom. However, although they are not derived from natural law they cannot be in direct contradiction to it as has already been demonstrated. The law of nations can only set restriction or forbid what by the law of nature is permitted, not its absolute principles. Whether these precepts arise from divine instinct or mutual consent they have authority proven from their ancient usage of civilised nations and by the authority of the wisest men. As he said

‘The proof of the law of nations is similar to that for unwritten municipal law; it is found in unbroken custom and the testimony of those who are skilled in it. The law in fact [...] ‘is the creation of time and custom’.’²⁶¹

For Grotius then, much of the law of nations arises out of usage and custom which is a kind of positive law.

A secular law of nature tradition? Grotius and the impious hypothesis

Knud Haakonssen notes that it is clear that the natural law theories development in the 17th and 18th Centuries lost more and more of their theological manifestation and instead became more technically juristic. Subsequent attempts that try to pinpoint this development face the difficulty and danger of ‘premature secularization’ in the interpretation of the natural law tradition.²⁶² It seems clear, that for one reason or the other, no other thinker apart from Grotius has sparked such controversy in academic scholarship regarding this issue. If, indeed, Grotius did secularise the natural law tradition, this would have a profound effect on his notion of humanitarian intervention in the sense that if God was not the source of such obligations, then

²⁶⁰ Ibid., *Prolegomena*, §18

²⁶¹ Ibid., book I, chap. i, §xiv

²⁶² Haakonssen, ‘Hugo Grotius and the History of Political Thought’, p. 247

who was? As will be apparent in the following such contentions cannot hold, and Grotius's notion of humanitarian intervention provides a good example of this very issue. The answer seems simple: if God is not the source of the obligations to wage war on humanitarian grounds for Grotius, which I have discussed in this chapter, then his notion here would simply not have been strong enough; especially in light of the audience he was addressing at the time.

As did his successor Pufendorf, Grotius sought to separate the natural law from the Christian religion. He had already laid the path for his natural law theory in his unpublished work *De Indies*, which he began as early as 1604. And in his *Prolegomena* Grotius clearly contended that the natural law could not be identified with either the Old or the New Testament.²⁶³

'The New Testament I use in order to explain [...] what is permissible to Christians. This, however, contrary to the practice of most men, I have distinguished from the law of nature, considering it as certain that in most holy law a greater degree of moral perfection is enjoined upon us than the law of nature, alone and by itself, would require. And nevertheless I have not omitted to note the things that are recommended to us rather than enjoined, that we may know that, while the turning aside from what has been enjoined is wrong and involves the risk of punishment, a striving for the highest excellence implies a noble purpose and will not fail in its reward.'²⁶⁴

This was of course contrary to what Suárez had argued and he, unlike Grotius, saw the *Decalogue* as containing the natural law,²⁶⁵ and he, in this way, retained a religious based natural law content. It is this move from a religious based conception of the natural law that has also been seen as epitomizing a secular conception of natural law. Haakonssen notes that it is not until we come to Hume that all modern natural law thinkers ceased to believe that it was God who created the world and in so doing created the law by which people should live. However, Haakonssen goes on to state that such notion can only fully be comprehended by taking into account the religious basis, i.e. Catholicism, Orthodox or Protestantism, in which such claims can be grounded. With this argument then, Haakonssen is, to a certain extent, in danger of oversimplifying the issue by stating that the secularization of the natural law tradition amounts to nothing more than the relative neglect of religion; an argument he himself

²⁶³ Haakonssen, Knud: *Natural Law and Moral Philosophy – From Grotius to the Scottish Enlightenment*, (Cambridge: Cambridge University Press, 1996), pp. 31 - 32

²⁶⁴ Grotius, *Rights of War and Peace, Prolegomena*, §49

²⁶⁵ Haakonssen, *Natural Law and Moral Philosophy*, p. 31

rejects for being a 'poor substitute for an explanation'.²⁶⁶ He notes that the main shift in the foundation of natural law must arise in other areas and not simply in its ground of existence.

David Boucher has noted that the secularization of the natural law tradition emphasised the need for a natural law in a theory of morality based upon natural rights. The purpose of the law of nations and civil law, then, was to protect and facilitate the free use of these rights.²⁶⁷ As we saw, Grotius, to a certain extent, holds a subjective notion of the concept of natural rights. It is precisely this that Haakonssen sees as a main indicator of Grotius's move to secularising the tradition. Or rather, as he terms it, Grotius's natural law theory has a secularising effect. Haakonssen notes that honouring rights, perfect and imperfect, is for Grotius a good in itself and although it is prescribed by God it is obligatory in itself. Haakonssen continues to emphasise that logically this means the natural law is obligatory without God. He goes on to conclude that for Grotius the natural law is morally insufficient in the sense that it only prescribes negative justice and not positive virtues and obligations. From this he deduces that without the moral intervention of God into human life there is no moral community between the two. This is to be understood in the idea that although Grotius accepts the authorship of God his conception of human sociability is such that God says nothing about the form of this sociability. This, as will be demonstrated further below, is a misreading of Grotius. To present Grotius's conception of human sociability without God is not taking into account the whole argument.

The notion that Grotius represents the move to a secularised conception of the law of nature is also presented by James Muldoon, who was criticised in chapter 1. His arguments are undeveloped, unsophisticated and vague, unlike Haakonssen's. Muldoon, seems to overstate Grotius's jurisprudence as a clear move away from natural law theory towards a more secular based international system composed of sovereign states. The purpose of his contention is to give force to his categorisation of a pre-Grotian international society into which he wanted to fit Vitoria. In this way, Muldoon more or less presents Grotius as a modern legal positivist; a claim which is hardly fitting. Although Grotius is usually seen as this early example of seeking to secularise natural law and natural right within the context of international relations, it is in fact an anachronistic contention.

For Grotius, as has been shown, the natural law is self evident, the proof of which is found in human sociability. In this sense natural law is so inextricable tied to human nature that

²⁶⁶ Haakonssen, 'Grotius and the History of Political Thought', pp. 247 - 248

²⁶⁷ Boucher, *Political Theories of International Relations*, p. 209

even if it were the case that God did not have an interest in the welfare of humanity, the law prescribing this welfare would remain valid. As Grotius himself stated

‘What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him. The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages.’²⁶⁸

It is this particular argument which has been held to give evidence to Grotius’s secularisation of the natural law and in this way leading the way to modern international law. However, such reading of Grotius is impoverished in the sense that it does not take into account the complete logic of the argument. It is God that has implanted the principles which spring from human nature. The obligation we have to accept these principles is to God, proving that the source of natural law in Grotius is undoubtedly God.²⁶⁹ As he, himself, stated immediately following the famous quotation:

‘We must without exception render obedience to God as our Creator, to Whom we owe all that we are and have; [...] Herein, then, is another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reason tells us we must render obedience. But the law of nature [...] comprises alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man, can nevertheless rightly be attributed to God, because of His having willed that such traits exist in us.’²⁷⁰

So the source of the natural law is indisputably God for Grotius, however, its contents are based upon and comes from human nature and those traits which are implanted in us by God.²⁷¹ Grotius contends that there are compelling reasons for ascribing the principles of the

²⁶⁸ Grotius, *Rights of War and Peace, Prolegomena*, §11

²⁶⁹ Boucher, David: *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, forthcoming 2009), pp. 115 - 118

²⁷⁰ Grotius, *Rights of War and Peace, Prolegomena*, §11- 12

²⁷¹ Boucher, *Political Theories of International Relations*, pp. 211 – 212. This view is also shared by the political philosopher John Finnis. In relation to Grotius’s famous passage, Finnis underlines the carefully wording of Grotius. Grotius ascribes only ‘a degree of validity’ to his posed hypothesis if God did not exist. Finnis’s conclusion is that Grotius was not adopting a firm intellectualist position as could be taken from his impious hypothesis. Rather, it places him in a less extreme and more orthodox position mediating between intellectualism and voluntarism. In this way, natural law’s obligatory force is derived from the divine will, but its content may be determined independently. As Finnis notes ‘What is right or wrong depends on the nature of things (and what is *conveniens* to such nature), and not on the decree of God; but the normative or motivating significance of moral Tightness or wrongness, in particular the obligatoriness of the norm of right and wrong, depends fundamentally upon there being a decree expressing God’s will that the right be done (as a matter of obligation) and that the wrong be avoided

Natural Law to God. He has made them so evident and clear even to those ‘less capable of strict Reasoning’ that He forbids us to give in to impetuous passions that are contrary to our own and others’ interests and which divert us from conforming to the rules of reason. In the *Mare Liberum* (*The Free Sea*) Grotius goes further and suggests that God directly insinuates certain precepts into men’s minds, which are ‘sufficient to induce obligation even if no reason is apparent’.²⁷² As such, to reiterate, for Grotius you cannot have a human condition without God. This could be termed to be secularizing in effect, but clearly not the effect for which Haakonssen is arguing. His argument seems to state a much more fundamental secularizing of Grotius’s natural law, in which, there is no moral community between God and humans, which is then deemed to be secularizing. This has been proved to be a misunderstanding. Grotius even analogically asserts that the word ‘law’ holds per definition that God is its source. Immediately following the passage cited above Grotius notes ‘in this sense, too, Chrysippus and the Stoics used to say that the origin of law should be sought in no other source than Jupiter himself; and from the name Jupiter the Latin word for law (*ius*) was probably derived.’²⁷³ In relation to humanitarian intervention, then, our human condition, presupposed by a natural sociableness is meaningless without God, so must any obligations arising out of this sociableness. The fact is that we have obligations to help our fellow man and punish others that transgress the natural law is then evidence that the source of such obligations is undoubtedly God.

In the same vein as Boucher, the political theorist Brian Tierney has also argued that to present Grotius as inaugurating a new era of ‘modern natural law’ is a misunderstanding. The idea that Grotius epitomizes the substitution of a new theory of natural rights for the old idea of natural law in the sense then, that natural law is merely derivative from natural rights is ‘not really true’ as he says. In explaining the origin of the contested passage in Grotius Tierney argues

‘In the work of Grotius, as in that of his scholastic predecessors, we find natural rights and natural law side by side, both associated with traits of human nature that were taken to be implanted by God. [...] [W]e now understand that the famous “impious hypothesis” (“Even if there was no God....”) was a rather common topos of

(likewise), See Finnis, John: *Natural Law and Natural Rights*, (Oxford: Oxford Clarendon Press, 1980), p. 44; See also, Simmonds, ‘Grotius and Pufendorf’, pp. 219 - 220

²⁷² Cited in Boisen, Camilla and Boucher, David: ‘Hobbes’s and the Subjection of International Relations to Law and Morality’ in *International Political Theory After Hobbes* eds., Prokhovnik, Raia, and Slomp, Gabriella (London, Palgrave: 2010 forthcoming); (Grotius, *Rights of War and Peace*: Preliminary Discourse, §13); (Grotius, *The Free Sea*, p. 105)

²⁷³ Grotius, *Rights of War and Peace*, *Prolegomena*, §12

late scholastic discourse and that Grotius could have picked it up from Suárez or from any one of half a dozen sixteenth-century authors.²⁷⁴

Thus, Tierney sees Grotius's proposed secularising effect for what it is: a particular method of arguing which, rather than placing Grotius in a new tradition of secularised natural law, serves instead to cement his place in the Thomist Medieval tradition of natural law, which he inherited alongside thinkers such as Suárez and Vitoria.

Richard Tuck gave credence to the secular interpretation of Grotius more forcefully than Haakonssen. The centrality of Tuck's argument is his suggestion that Grotius reinterpreted the universal notion of self-preservation as a moral standard that could be the basis of a new natural rights and natural law doctrine. However, Tierney argues that Tuck in this instance does not take into account the whole of Grotius's doctrine of natural rights and natural law. Certainly, one of the main principles here is indeed self-preservation or self-love as Grotius sometimes terms it, and also sociability. In this sense, Grotius presented a similar argument as some of the medieval jurists and theologians in contending that God intended that individuals should have regard for their fellow-human beings in order for to live in reciprocal harmony with each other. And thus, Grotius states that 'love is twofold, love of self and love of others.'²⁷⁵

As Tierney argues, the legal jurist N. E. Simmonds also notes that Grotius's impious hypothesis, rather than giving credence to a new foundation for the natural law, locates him instead in the long running debate within Christian theocentric natural law writing, which highlighted the two positions of voluntarism and intellectualism. We briefly touched upon this in chapter 1 in relation to Suárez. Like his Spanish contemporary, Grotius takes the middle position of the two. Simmonds notes, that those who seek to defend Grotius's originality – that the Grotian natural law has a new and somewhat secular character – will not find the impious hypothesis a fruitful avenue to pursue. Rather, the impious hypothesis instead begs the question of whether Grotius was an intellectualist. Pufendorf certainly interpreted Grotius as one. However, as Simmonds argues, it might be too easy to assume an equation between the impious hypothesis and intellectualism; Grotius intention may simply have been to argue, as I

²⁷⁴ Tierney, Brian: *The Idea of Natural Rights – Studies on Natural Rights, Natural Law and Church Law 1150 – 1625*, (Cambridge: Cambridge University Press, 2000), pp. 319 - 320

²⁷⁵ Cited in Tierney, Brian: *The Idea of Natural Rights*, p. 323

have also attempted to argue here, that the dictates of the natural law were not arbitrary, but founded upon the nature of man and the circumstances of the world.²⁷⁶

This idea that Grotius somehow signalled a new era of secular international law, also brings out the tendency to exaggerate Grotius as presenting an international society underpinned by sovereign states. For instance having loosely alluded to Grotius's secularised natural law theory, Muldoon emphasises his legal positivist views by confirming that instead of a medieval hierarchal structure encompassing a world order directed by the pope 'Grotius constructed a system of a European order composed of sovereign states, all legally equal, without any overarching authority that could authorise intervention in their affairs'.²⁷⁷ This is a complete overstatement on Muldoon's part as this chapter has shown. Also, it seems clear that Grotius sought to fashion a law of states without a single Christian denomination; but saying this, as has already been made obvious, did not imply that God was taken out of the equation. As Mark Janis has observed 'it is doubtful, given his time and character, that Grotius meant to effect a strictly secular refashioning of the medieval Catholic natural law tradition'.²⁷⁸ Rather, Grotius presented a law that could appeal to and bind both Catholic and Protestant states alike. Such ideas emerged at a critical time in Europe. It was clear that to settle Catholic – Protestant disputes underlying the Thirty Years War, the Treaties of Westphalia of 1648 had to recognize the sovereign authority of the princes and states of Europe. And for reasons already contemplated, Grotius sought to restrict the temporal justification of the Church in practice as in theory, by emphasising a non-sectarian law of nature and sovereign states as right holders. As Tierney emphasised that although Grotius does not represents the secularisation of the natural law tradition, he, nevertheless, played a significant role in the transition from a medieval conception of natural rights to a modern. Grotius's 'vigorous creative' imaginative handling of the medieval natural law tradition he inherited, was put to good effect in addressing the problems of a new century in a different way from his predecessors by writing in a new style in an attempt to deal with a whole new audience made up of mainly Protestants and Humanists.²⁷⁹

²⁷⁶ Simmonds, 'Grotius and Pufendorf', p. 219 - 220

²⁷⁷ Muldoon, James: 'Francisco De Vitoria and Humanitarian Intervention' in *Journal of Military Ethics*, Vol. 5, no. 2, 2006, pp. 128 – 143, p. 130

²⁷⁸ Janis, Mark W.: 'American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition', in Mark W. Janis and Carolyn Evans (eds.) *Religion and International Law*, (Boston: Martinus Nijhoff Publishers, 2004), pp. 211 – 233, p. 217

²⁷⁹ Tierney, Brian: *The Idea of Natural Rights*, p. 324

What is notable is that these theorists that presents Grotius as being the pivotal point where the natural law traditions becomes secular, seems to do so wholly uncritical without regard for the consequences it will have for Grotius's theory as a whole. As the above has shown, Grotius's arguments, for instance, about obligations of humanitarian intervention, would collapse at crucial points.

Conclusion

What I have tried to show with this chapter, is that ultimately, for Grotius, the source of fulfilling our obligations has to be God, whether grounded in our objective rights or subjective rights. Grotius is presenting not a secular law of nature, but rather a non-sectarian version that may be applied not only to Catholics and Protestants, but to the whole of humanity. If Grotius had indeed presented a secular natural law tradition, as we have seen various scholars seem to argue, then the moral obligation of humanitarian intervention for him has its source either in rationalism, that is, reason determines for us what is right, and right dictates obedience, or in human agreement. It is certainly the case that Grotius believed that certain of the permissive or voluntary law of nations precepts may be obligatory because of agreement, but as I have argued Grotius did not rest his case for obligation on right reason. Indeed, he goes as far as to say that the precepts of natural law are impressed on men's consciences irrespective of whether they are capable of discovering them through reason. They are right and obligatory because God has willed it so.²⁸⁰ Given that many of the issues relating to international law, the rights of the seas and of the appropriation of large tracts of the Americas, a natural law that was not firmly grounded in more than custom a convention would simply not have been robust enough. And furthermore, part of what those obligations, albeit imperfect at times, entail is for a third party to intervene to punish crimes against the law of nature. Grotius deems that crimes such as cannibalism and the sacrifice of people should be punished and what is more, states have a natural right to do so. In this sense, for Grotius, third party intervention to prevent such crimes are grounded in obligation, and expressed through right. I have therefore argued that any

²⁸⁰ If the obligation does not rest on agreement, then one may want to steer Grotius in the direction of Aristotelian ethical deontology. This would be consistent with abstract metaphysical thought, and would give further credence to the view that Grotius is a 'secular' natural law thinker – in so far as we can argue that from Aristotle we have a secular doctrine of natural right or law. However, as I have been at pains to argue here, this is not consistent with how I or many other readers interpret Grotius. For Grotius, obligations are derived from what God wills for us, and not from reason itself. Although Grotius makes reference to Aristotle in several places, in his *Prolegomena* among other places, it is not necessary in the context of my argument to further explore Grotius's Aristotelian foundations. Of course, this is not to say that a thoroughgoing examination of Aristotle's influence on early modern thought would not yield fruitful and surprising results.

notions of humanitarian intervention that Grotius has are grounded in his theory of punishment. Unlike what Pufendorf was to argue some two generations later, states have the right to punish crimes committed against nature, and contrary to what Vitoria argued, for instance, rights of jurisdiction are not relevant. Wars of punishments for Grotius are sanctioned by nature, which holds the jurisdiction for the whole of mankind. Pufendorf developed Grotius's notion of states being the main actors within international relations, by grounding their obligations and rights on the principle of sovereignty, which for this very reason had a very different effect on the obligations for intervention on humanitarian grounds. Although, Grotius is one of the first thinkers to address the issue of states as the main actors in law of nations, and also developing the notion of a specific moral person of the state with rights and obligations different from the individual, states are for Grotius not founded upon the principle of sovereignty, which is exactly why he is able to present a theory of universal punishment. Humanitarian intervention for Grotius, then, is only an imperfect obligation in so far as it is difficult to determine who should exact the punishment, but the act itself does not constitute an infringement of sovereignty, which, as we shall see in the next chapter, it certainly does for Pufendorf.

Chapter 4

Samuel von Pufendorf

‘To ready oneself for others’ assistance one makes
grandiloquent appeals to the claims of humanity [...] however [this] often elicits but a sterile sympathy or procure assistance that is too ineffectual to dispel one’s difficulties’²⁸¹
- Samuel von Pufendorf (1678)

Introduction

In the highly contentious debate about the character and even the existence of international law, which is interesting because it constitutes the legal framework in which humanitarian intervention is realised, the German moral philosopher Samuel von Pufendorf (1632 – 1694) can contribute significantly by his particular view of the law of nations. Among his writings on the law of nature and nations he made the unusual contention that they are indistinguishable. Pufendorf promoted the law of nature as the moral constraints regulating the relationships between states. One of the main arguments to be stated here is that Pufendorf’s denial of a (positive) law of nations has to be understood by accentuating his idea of ‘sovereignty’ as the key foundational and informing principle. It is this foundational principle of sovereignty, which serves as the theoretical framework for Pufendorf against any argument which can justify the violation of the rights of the Indians.

The aim of this chapter is firstly to identify the reasons why he denied the separate existence of a law of nations, and if in doing so he undermined the idea of humanitarian obligation in international relations. The issue is, then, whether Pufendorf’s just war theory suggests intervention on humanitarian grounds to aid the Indians? To accentuate his view on international law it is useful comparing his views with his lesser-known contemporary, Samuel

²⁸¹ Pufendorf, Samuel von: *On the Natural State of Men*, trans. and intro. by Michael Seidler (New York: The Edwin Mellen Press, 1990), p. 131

Rachel (1628 – 1691), who made a very clear distinction between the two types of law, but whose scholastic endeavours went more or less unnoticed. Pufendorf, nonetheless, denied the existence of a positive *jus gentium* distinct from the law of nature. He maintained that states were universally subject to the law of nature only. There were of course rights based upon treaties and also customs observed between civilised states; but they were only valid between the states that had concluded the treaties. States might at any time renounce these customs, which would for Pufendorf be an immoral act, but only insofar as they violated the law of nature that governed agreements between sovereigns. Pufendorf contended that it would not be possible for a custom gradually to assume the force of law. For him, it is absolutely presupposed that all law has an author, and, in order to qualify properly as law, it must also be enforceable. This is the Hobbesian element that many have attributed to him; at least as far as human positive law is concerned. Law requires a sovereign to enact and enforce it. For Pufendorf, going beyond Hobbes, both natural law and human positive law satisfied this criterion; the law of nations did not, and could not.

Rachel directly opposed him on these issues in his work *Dissertations on the Law of Nature and of Nations* (1676). He emphasised the arbitrariness of basing the law of nations solely upon the principles of natural law established by à priori reasoning and against Pufendorf, among others, he set out to demonstrate that coexistent with natural law there also existed a positive law of nations. This aspect of Pufendorf, then, is of extreme importance as it helps accentuate his particular view on the relationship between morality and law: If law presupposes an author to enforce it, and for Pufendorf the law of nature meets these requirements, does that entail an obvious case regarding non-intervention on humanitarian grounds? Thus, the second aspect to be explored in this chapter is, given this particular view of international law, whether Pufendorf's exacting articulation of sovereignty allows for the notion of humanitarian intervention. It will be argued that clearly it does not. He, more than any other thinker, promoted the collective rights of a community in a highly systematic way and presented them differently from those of the individual. This highlights the particular singularity of Pufendorf contrary to other natural law thinkers, thus, giving greater priority to the rights of states. What Pufendorf ultimately emphasised was that states are the absolute titleholders to property in the realm. I will argue that Pufendorf conceptualises the Indian community as a sovereign entity and ultimately a sovereign state. This idea was imperative to his denial of any justifiable appropriation of the Indians' lands in the New World precipitated

by the claim that indigenous people in America did not fulfil the moral requirement of title to property.

By positing natural sociableness as a feature of man in the state of nature and through 'sovereignty' Pufendorf argued that the Indians collectively owned the land as a whole, something that he called 'eminent domain', which constrained any use of private property not consistent with the bounds of the common good. He thus denied the principle of *terra nullius*.²⁸² As we shall see, this provided the moral foundation for maintaining the illegitimacy of the European enterprise of violating the rights of the Indians by occupying their lands. Thus, one aspect to be explored here is to what degree this aspect of Pufendorf's theory is linked up with his theory of the moral quality of property. On what basis does Pufendorf ground his moral judgements in relation to the rights of the Indians? He clearly wants to say that we can make moral judgements on local practices such as cannibalism and Spanish treatment of the Indians. One aspect, which is necessary to highlight is the innate difficulty in a theory that surprisingly holds the same contemporary concerns for the inherent moral and legal difficulties of humanitarian intervention. Pufendorf asserts a clear moral view for the rights of the Indians, including their practices of cannibalism, and the subsequently moral condemnation of the Spaniards' violation of these rights, but, however, there seems to be no room to suggest in his law of war theory intervention on behalf of the Indians. This I argue has to be understood on two accounts. Firstly, it has to be understood on the basis of emphasising what 'rights' Pufendorf is conceptualising. He defends sovereign territory of the Indians, and thus promotes the communal sovereign rights of the Indians. And this is of course very different from Grotius, as we saw in the previous chapter, who had a theory of punishment which related to the crimes they committed against nature. Pufendorf seems eager to emphasise in his work the importance of the Westphalian moment and its enshrinement of sovereignty in the European system of states; and he transferred this Westphalian system of states' religious rights (sovereignty) to the New World. In his later historical works, however, Pufendorf does seem to have an argument in place for humanitarian intervention. He insists, for example, that it is lawful to militarily aid suppressed Protestants of a neighbouring state.²⁸³

²⁸² See Boucher, David: 'Property and Propriety in International Relations: the Case of John Locke', in *Classical Theory in International Relations* ed. Beate Jahn, (Cambridge: Cambridge University Press, 2006), pp. 156 – 177

²⁸³ Pufendorf, Samuel von: *Of the Nature and Qualification of Religion in Reference to Civil Society* (1687), ed. Simone Zurbuchen and trans. Jodocus Crull, (Indianapolis: Liberty Fund, 2002), p. 121

The fact that Pufendorf emphasise the sovereignty of the Indians as a mean to protect their rights is important. However, it might be to read too much into Pufendorf by using Walzerian language to stress the importance of the sovereign community as a prime vehicle for the Indians' self-determination. This is of course one of the main bases for Michael Walzer's communitarianism.²⁸⁴ Thus, labelling Pufendorf a humanitarian would be a precarious task. Secondly, although it seems that Pufendorf does not have a just war argument in place for intervention, this has to be understood in terms of his conception of obligation in international law. States have moral obligations to adhere to the law of nature; however, these are necessarily imperfect because there is no sovereign at an international level. For this reason humanitarian intervention or punitive actions against such perpetrators cannot be prescribed nor actualised. However, what is important for Pufendorf and what, to a certain extent set him apart from thinkers such as Suarez and Grotius is that imperfect and perfect rights are equally morally obligatory. What this mean then is that if the American Indians violate the rights of each other (e.g. practice cannibalism) Pufendorf clearly wants to say that we can make moral judgements about it, regardless of whether we can (or agree to) act on that judgement.

The nature of obligation and law - law as necessitating a moral order?

Arguably, what captures the whole of Pufendorf's moral philosophy is his constant reflection on the foundations and sanctions of law, from which he bases his moral judgements. First of all, for Pufendorf, natural law qualified as law because it has a sovereign who enforces it. And secondly, no moral action or moral judgement was independent of that law. He argued that 'the obligation of Natural Law is of God, the creator and final governor of mankind, who by His authority has bound men, His creatures, to observe it.'²⁸⁵ As to the reason why law needed a sovereign to enforce it, Pufendorf maintained that a divine legislator is needed to explain law's obligatoriness, which means its character as law. Thus, all law needs a sovereign to enforce it, and God is the sovereign in regard to Natural Law. This is also the case with human positive law, which may codify or enact many of the precepts of Natural Law. What is important in relation to this is Pufendorf's outright denial of 'the existence of any law of nations arising

²⁸⁴ See Walzer, Michael: *Thick and Thin: Moral Argument at Home and Abroad*, (Notre Dame: University of Notre Dame Press, 1994); *Spheres of Justice: a Defence of Pluralism and Equality*, (Oxford: Basil Blackwell, 1983)

²⁸⁵ Pufendorf, Samuel von: *Of the Law of Nature and Nations, Eight Books* (1672), Trans. C. H. Oldfather and W. A. Oldfather, intro. Walter Simons (Oxford: Clarendon Press, 1934), Book II, chapter iii, §20

from a superior.²⁸⁶ What formed the background of such contentions, unlike Thomas Hobbes's (1588 - 1679), was his idea that the fundamental laws of nature were 'sociableness', and thereby the sociality of human beings; from this key idea all others followed. In this also lies the asserted secularity of Pufendorf philosophy, by grounding natural law on the social life of man to avoid the disputation of rival religious doctrines. Thus, Pufendorf's natural law theory had dual foundations, the Hobbesian idea of man's self-preservation and the Grotian idea of man's social nature.²⁸⁷ In the Grotian element of Pufendorf's theory we also find the universality of his moral order; in the fact that human sociality is universal. Although by ridding the law of nature of any of its metaphysical foundations, he, nevertheless, sought to retain its function as a moral basis for civil law and the state. Pufendorf did not merely characterise sociality as a negative duty of respecting other people's property rights. It was, in this sense, different from what Grotius termed *appetites societatis*, a natural disposition to live together, Pufendorf's law of sociality was a prime principle of social behaviour.²⁸⁸ Hence, sociableness prescribed an inclination towards peace as our natural condition and makes us disinclined towards the sort of war of all against all that Hobbes was describing. The dual foundations of Pufendorf's natural law theory have sparked off a debate of the moral necessity - obligatoriness - of the law of nature. It is contentious as the political theorist Knud Haakonssen suggests whether the idea of man's social nature is fully independent from man's need of self-preservation or is man's sociability a way of self-preservation and in this way preconditioned? The core claim is, then, that human beings are instrumentally sociable rather than inherently sociable. Haakonssen emphasises that Pufendorf's constant attempts to distance himself from Hobbes, as well, and more importantly, his idea that the moral necessity of obligation is based on the person's rational awareness of the justifiability of the imposition of threat if an obligation is breached. As such, this points to the argument that the principle of sociality has an independent status. However, in further exploring these inconsistencies in Pufendorf's theory Haakonssen argues that if sociality is taken to be an independent principle, and it is clear that Pufendorf wants to hold such a position, then being the ultimate feature of human nature it would allot any argument of God excepts as a creator according to Haakonssen. This would consequentially mean a total segregation of theology from natural

²⁸⁶ Ibid., §23

²⁸⁷ Boisen, Camilla and Boucher, David: 'Hobbes and the Subjection of International Relations to Law and Morality', in Raia Prokhovnik and Gabriella Slomp (eds.), *International Political Theory after Hobbes*, (London: Palgrave, forthcoming 2010)

²⁸⁸ Boucher, David: *Political Theories of International Relations – from Thucydides to the present* (Oxford: Oxford University Press, 1998), p. 228 - 230

jurisprudence, given the fact that morals would be an independent and inherent part of human endeavour.²⁸⁹

Although, this is an important concern for Pufendorf, given that he sought to address and also mediate the religious disputes of the day, he could then settle for conceptualising sociality as a natural inclination. However, as Haakonssen asserts, this would render the idea of sociableness as law nonsensical in the sense that the very idea of obligation would lose its effect because it would be meaningless to invoke God. Thus, what seems to be Pufendorf's core idea of moral obligatoriness is that sociability is God's will for humanity, which clearly emphasises our obligation to God.²⁹⁰

For Pufendorf, then, the provisions of sociableness (due to the needs of human nature) necessarily relates to the law of nature. From the fact that human beings were peaceful, followed that the fundamental laws, or the obligations, were necessarily congenital, and therefore not of men's making. We owe duties to each other by the mere fact that we are human and because we are subject to God's sovereignty. As Pufendorf stated

'Now by our assertion that the maintenance of peace towards all men as such is a natural state of man, we mean that it has been instituted and sanctioned by nature herself without any human intervention, and that it rests therefore, upon that obligation of Natural Law, by which all men are bound, in so far as they are endowed with reason, and which does not owe its original introduction to any convention of man.'²⁹¹

As a consequence of human agreement other fundamental laws may arise these can be described as natural insofar as they are consistent with our human nature but are for that very reason adventitious obligations, not congenital. We acquire these as a result of agreement and these obligations are necessarily adventitious. This distinction is important to emphasise as it relates to Pufendorf's theory of property and rights, which will be explored in more depth below. On a general note, this distinction refers to the origin of the obligation,²⁹² and thus for Pufendorf, the notion that we should come to the aid of our fellow men is congenital because it is an obligation we owe to each other by the mere fact that we are human.

²⁸⁹ Haakonssen, Knud: *Natural Law and Moral Philosophy – From Grotius to the Scottish Enlightenment*, (Cambridge: Cambridge University Press, 1996), p. 42.

²⁹⁰ *Ibid.*, p. 43

²⁹¹ Pufendorf, *Of the Law of Nature and Nations*, Book II, chapter ii, §11

²⁹² Boucher, *Political Theories of International Relations*, p. 227

So, following from the above, Pufendorf emphasised that the ‘good’ can never exist independently of law, because all action according to law is necessarily a moral action. Since moral necessity is the affections of human beings, he claims, and arises from their conformity or non-conformity to law, it cannot be conceived to exist prior to that law.²⁹³ The point that Pufendorf makes is that natural law may be described as a ‘dictate of reason’, and so it is a law that is absolutely compatible with human nature. As Pufendorf argued:

‘Whatever is deducible from the requirements of human nature we refer to the natural law as, since we are unwilling to deduce it from a conformity with rational nature, inasmuch as by such a procedure reason is set up as its own rule, and any demonstration of natural laws undertaken in this way is merely arguing in a circle.’²⁹⁴

So the fact that natural law is a dictate of reason does not in itself entail obedience. Nevertheless, the underlying point, which Pufendorf is making, is that if natural law, or the dictate of reason, is not already morally obligatory, the enforcement of obligations in civil law cannot take place. As Pufendorf asserts

‘The mere authority of men does not seem able to endow these dictates [dictates of reason] with the power of obligation. [...] It does not appear how any human authority could arise endowed with power to assert the force of obligation, unless the dictates of reason had beforehand the strength of law. [...] It must, therefore under all circumstances be maintained that the obligation of natural law is of God, the creator and final governor of mankind, who by his authority has bound men, His creatures, to observe it.’²⁹⁵

However, law is the essential reference point and not reason itself when judging the morality of an act. There can be no morality without reference to law and without this law also being enforced by a supreme sovereign; law, Pufendorf quite clearly asserted, entails the ‘binding of a superior’.²⁹⁶ This requires sanction, which means a power necessarily needs to impose itself. Thus, the force of law, which demands obligation, unambiguously presupposes its imposition by a superior. God has created us and destined for us a nature in accordance with which we have certain obligations consistent with rules or laws; it is ultimately God’s will that we cultivate ourselves. The moral order that Pufendorf conjectures here is one where we are all

²⁹³ Pufendorf, *Of the Law of Nature and Nations*, Book I, chapter ii, §6

²⁹⁴ *Ibid.*, Book II, chapter iii, §23

²⁹⁵ *Ibid.*, Book II, chapter iii, §20

²⁹⁶ *Ibid.*, Book I, chapter ii, §6

subjects to God's sovereignty and we all have duties to each other by the mere fact that we retain a sociableness human nature that wills peace.

Pufendorf's theory conceptualises morally good actions as proceeding purely from the motive of duty; thus, the contention that one does the right thing for the sole reason that it is the right thing, because it is in the law.²⁹⁷ In essence it was in agreement with Hobbes that the dictates of reason could not have the force of law without the command of a superior. From this, Pufendorf is quite clear that states being in a 'mutual state of nature' can have no common superior. As with Hobbes, Pufendorf suggests that individuals cannot enjoy their natural liberty and so they form societies, forming a common sovereign for states is on the other hand impossible.

'And so Commonwealths and their officials may properly claim for themselves the distinction of being in a state of natural liberty, when they are girded with the powers which allow them its secure enjoyment, while it is a thing of little joy or use for those who enjoy individuality a pure state of nature to have no superior, since the weakness of their own resources makes their safety hang by a thread.'²⁹⁸

Pufendorf and the law of nations

Because there is no sovereign, then, to enforce law, Pufendorf irrevocably denies that any voluntary or positive law of nations could ever have the force of law. In his *De Jure Naturae et Gentium* he sides with Hobbes in quoting from *De Cive*. The natural law, Hobbes contended, can be divided 'into the natural law of men and the natural law of states. The injunctions of both [...] are the same; but because states, upon being constituted, take on the personal properties of men, the law, which we call natural when speaking of the duties of individual men, on being applied to whole states and nations or peoples, is called the law of nations.'²⁹⁹ Hobbes's natural law, however, is descriptive. Neither in the state of nature, nor in the sphere of international relations does a moral condition prevail. Thus, when they are instituted states assume the personal properties of men. They both saw the law of nations and laws of nature necessarily being made up of the same precepts but they would have been different precepts. Hobbes talks about artificial men and Pufendorf about 'moral' men. In fact, neither Pufendorf

²⁹⁷ Korsgaard, Christine: 'Reflective Endorsement' in Onora O'Neil (ed.) *The Sources of Normativity*, (Cambridge: Cambridge University Press, 1996), p. 7 – 49, p. 24

²⁹⁸ Pufendorf, *Of the Law of Nature and Nations*, Book II, chapter ii, §4; Boucher, *Political Theories of International Relations*, p. 239

²⁹⁹ Pufendorf, *Of the Law of Nature and Nations*, Book II, chapter iii, §23

nor Grotius subscribed to Hobbes's extreme individualism, nor is Pufendorf's state of nature characterised by a war of all against all. And as we saw with Grotius, man is naturally sociable and originally ignorant of vices.³⁰⁰ In attempts to place Pufendorf in the history of the foundations of modern international law it is especially this distinction which is sometimes confused in the literature. Recently, S. James Anaya, for instance, contended that from what he calls 'Hobbes's vision of humanity as a dichotomy of individuals and states' Pufendorf (among others) 'began developing a body of law focused exclusively on states under the rubric "the law of nations".'³⁰¹ As is already evident this is a misconception on a number of counts. The international sphere for Hobbes is equivalent to the state of nature, and the only natural laws there are of the descriptive kind. Without a sovereign there could be no 'law of nations', only prudential agreements or accommodations which do not have the force of law. In relation to Pufendorf it is slightly more complicated. Strictly speaking, for Pufendorf, and this will become more clear later on, the natural law does the work of the law of nations. What we see in practice is that he does develop rights that relate only to communities (moral persons). So you have (natural) laws that relate to individuals and to the moral persons of states. What can be said about Pufendorf is that he stands in that transitional stage where the individual ceases to be the subject of the law of nations and is instead replaced by the state. This is the genius he saw in Hobbes. However, he transcended Hobbes, by making states morally subject to the law of nature. Hence, for Pufendorf, the law of nations, in so far as it deviates from natural law, has no sovereign and therefore it does not have the character of law. The law of nature governs agreements among sovereigns, and the obligations that arise are those regulated by natural law. Therefore, there are moral constraints on breaking these agreements. Morally there is just as strong an obligation to adhere to them, as there is to obey civil law. Because there is no earthly sovereign over them to enforce the agreements, those agreements are not strictly speaking international law. For instance, Pufendorf talks about all sorts of considerations why sovereigns should adhere to their agreements, and why they often do not. Thus, natural law is the creation of God, and should we transgress, He punishes our actions. This contention becomes important in the arguments founding the hypothesis that Pufendorf would not have endorsed intervention on behalf of the American Indians against violations of their rights.

³⁰⁰ Boisen, Camilla and Boucher, David: 'Hobbes and the Subjection of International Relations to Law and Morality'; For Grotius on the state of nature see Grotius, *Law of War and Peace*, book II, chap. II, §i-ii

³⁰¹ Anaya, S. James: *Indigenous Peoples in International Law*, (Oxford: Oxford University Press, 2004), p. 20

For Pufendorf, then, customary law is not enough to demand obligation. Such customs entail observances due to the mere consent of people and not of the law of nations. They only appear to be observed by a certain tacit agreement, especially in warfare; which Pufendorf holds to be the origins of that sort of ‘customary law’. The interest and security of nations lie not in customs but in ‘the observance of the law of nature, which is much more sacred.’³⁰² If the law of nature is intact, mankind, Pufendorf asserts, has no need, whatsoever, of the law of nations. An important aspect here, then, is to emphasise that a custom’s origin is important for Pufendorf, irrespective of its presumed authority. If any custom, Pufendorf states, ‘is based upon the natural law, without a doubt far more is done to give it dignity than if its origin is based upon the simple agreement of nations.’³⁰³ This illustrates Pufendorf’s greater project, that there is a universal moral order that demands obligation from states, and thus he, in his own peculiar way, denies the arbitrariness of morality by contending that it is simply not a matter of convention between states.

It is uncertain whether Pufendorf’s 1688 edition of *The Law of Nature and Nations* is specifically referring to Rachel’s doctrine of the positive law of nations. Rachel explicitly distinguishes the law of nations from the *jus naturale*. His work is not merely directed against Pufendorf, but also, more particularly, against Hobbes and Grotius. He recognises that states do not necessarily accept definitive obligations from the natural law, but rely instead on their free consent and agreement. In this way, according to Rachel the law of nations is based either upon agreements or customs and is part of the *jus arbitrium*. Obligations between states can only come into being by agreement in the sense that they are independent from each other. Thus, in customs, Rachel found an implied agreement. However, the implied agreement (i.e. the custom) does not need to be concluded between all nations; all the requirements are met when, especially, the civilized nations recognize a definite rule. This is contrary to Pufendorf’s view of the improbability that the consent of all nations ever established any arbitrary law among them. This deduction in Pufendorf goes after his contention that no general custom or usage of all nations is apparent for law to be deduced and presumed, because it lacks enforcement. In this, Rachel discerns between two sides of the law of nations, for alongside of the general law of nations, the *jus gentium commune*; there also exists a *jus gentium proprium* operating only between separate individual nations. In fact, it is likely that Rachel contended

³⁰² Pufendorf, *Of the Law of Nature and Nations*, Book II, chapter iii, §23

³⁰³ Ibid., Book II, chapter iii, §23

that the *jus gentium commune* had its origin in the *jus gentium proprium*, through the development of fitting customs.

What Rachel is emphasising is that it is imperative that the arbitrary law of nations be taken into consideration; for the law of nature demands that only legitimate means be resorted to in war but this needs to be considered with the tacit consent of nations. In essence the sort of inveighing arguments that Rachel makes in defence of an existence of the law of nations is in order to stress the dangers of denying and ignoring the common bond that exists between nations. Rachel explicitly objects to Pufendorf's contention that not all nations are expected to be bound by the law of nations. Here the two theorists' conceptions of law come to the fore, for Rachel contends that this objection is met by stressing that the rules of the law of nations cannot be traced back to specific treaties. The mere proposition that a tacit consensus exists is sufficient that something is accepted and observed as law, regardless of the uncertainty of its origin. Rachel, thus, relies upon the force of customs as law on the basis of their authority and not their enforcement.³⁰⁴ The voluntary law of nations had independent integrity because Rachel promoted a law without a sanctioning authority. The idea that authority somehow prescribes perfect obligations among states without enforcement is a key part in Pufendorf's criticism. His consideration of this point emphasises that perfect obligations are enforceable among themselves. Thus, the sovereign, set up by the people, and enacts laws, is able to enforce them. States, having no sovereign among them, cannot enforce the law that regulates them.

Rachel makes the point that some precepts that are not derivable from the law of nature are nevertheless accepted as precepts of the law of nature. As he states

'Pufendorf admits that by tacit consent certain usages concerning war prevail among many Nations; also that these usages seemingly contain an obligation based on agreement, at any rate of the tacit kind; and yet that they can be neglected by one who is engaged in lawful war, so long as he observes the Law of Nature.'³⁰⁵

The explanation for this in Pufendorf is clear. Such tacit agreements are contrary to the Law of Nature. The end of war is peace, and once just cause has been given for war, the moral laws of nature are in abeyance. States are permitted to do anything they can to restore peace. The

³⁰⁴ Rachel, Samuel: *Dissertations on the Law of Nature and of Nations* (1676), trans. John Pawley Bate, intro. Ludwig von Bar, (Washington D.C.: Carnegie Institution, 1916), § LXXXV - LXXXVIII

³⁰⁵ Ibid., § CII

reason why they do not is for prudential reasons. Should circumstances change the enemy may be similarly harsh in its treatment of you. This will become clearer in the following sections.

Rachel, in response to Pufendorf's contention, accuses him of being a slave to his hypothesis that there is no law of nations, or that the law of nations is based in part on the law of nature and so there is no need to feign an arbitrary law of nations. To this, Rachel claims that states are always careful not to violate the law of nations, even when they carry out unjust schemes, whereas the law of nature is more often not observed. In Rachel's view, if certain conduct by states under the law of nations is abrogated by destitution, it is most likely because it has not been 'firmly settled in the usage of free nations'.³⁰⁶ Rachel does grant Pufendorf's contention that the law of nations does not take the form of laws of the sort that are decreed by a superior, but as he says 'the Law of Nations does not for that reason fall to the ground.'³⁰⁷ As Rachel explains 'Granted that, [...] Law means a rule of human conduct imposed by a law-giver upon his subjects, still pacts are not on that account to be barren from all Law, and not even from Law properly so called.'³⁰⁸ Nature has conferred law-givers with liberties to settle by reference to the law of nature matters that are not covered by legislation; that same liberty is to be found by the free consent of nations, on whose considerations the law of nations is established.³⁰⁹ Rachel contends that even if one nation is not the superior of another all nations are nevertheless, by the choice of binding themselves in pacts, reciprocally bound just as if by true law. Breaking a pact, by a nation committing fraud against the agreement may be restrained by juridical authority integral to that particular pact.

In the case of the law of embassy, Rachel asserts that the law of nations is too clear for doubt. But as he says 'yet even here a dissonant note is heard from Pufendorf.'³¹⁰ Pufendorf contends that 'by the very Law of Nature Ambassadors are inviolable even among their enemies. [...] For functionaries of this type are necessary for the making and preservation of peace [...] the peace which the Law of Nature [...] bids us strive after [...] and so beyond all question, that same Law of Nature contain provisions for the security of those persons [ambassadors] [...].'³¹¹ As such Pufendorf emphasises the primary injunction of the law of nature, which is to hurt no one, and to include the 'law of ambassadors'. However, Rachel

³⁰⁶ Ibid., §LXXXVIII

³⁰⁷ Ibid., §XCI

³⁰⁸ Ibid., §XCI

³⁰⁹ Rachel cites Johann as his reference on this point from his *On Grotius (In Hugonis Grotii, &c. Comentatio*, Strassburg, 1633)

³¹⁰ Rachel, *Dissertations on the Law of Nature and of Nations*, §CIV

³¹¹ Pufendorf, *Of the Law of Nature and Nations*, Book II, chapter iii, §23

adamantly states that the provisions of security and safety for ambassadors even if they are sent as enemies to declare war ‘must unquestionably be attributed not to the Law of Nature, but to the deliberate choice of Nations.’³¹² To this Rachel further asks whether it can always be presumed that ambassadors are sent for the purpose of making peace. No he says; right of embassy is referred to by all as belonging to the law of nations, which originates from their own assent. The security, dignity and immunity of ambassadors are, thus, not found in the law of nature, but in the arbitrary rules of nations.³¹³ However, Pufendorf’s denial of the law of nations can be characterised as a strained argument. The inconceivability, for Pufendorf, of the idea that implied agreements between states somehow entailed perfect obligations, which Rachel had promoted, seem to leave us to wonder what sort of ‘enforcement’ he is envisaging? As emphasised, states for Pufendorf are in the state of nature because they have no earthly sovereign and just as important they have not agreed to a social contract. Obligations in the state of nature are imperfect because there is no temporal supreme sovereign to enforce them but, nevertheless, they are just as morally obligatory as perfect obligations enforceable in civil law.

Rachel’s criticism of Pufendorf is important. Not only is Rachel a contemporary of Pufendorf, who criticises his theory directly, but also, and more importantly, his criticism serves to highlight the contentious debate about the force of international law. And this conceptual debate, as we have seen, was just as much to the fore in 17th Century jurisprudence as it is today, and was equally contentious. And of course, as already asserted, issues of humanitarian intervention holds a central place in this debate. It is interesting that Rachael’s *Dissertations on the Law of Nature and of Nations* went almost unnoticed, whereas Pufendorf became one of *the* most widely read moral philosophers of the 18th Century. Rachel, of course, thought he had severely damaged the logic of Pufendorf’s arguments, but it took almost another century for thinkers such as Wolff and Vattel, who will be explored in the following chapter, to follow the theoretical path laid down by Rachel and emphasise that there was a law distinct from the law of nature, which states were subject to. Pufendorf, however, clearly asserts that the law of nature regulates the relationships between states, resting on the idea that God is the supreme sovereign. This is, however, an underlying problem in that Pufendorf seem to characterise the natural law as any other law, even though it has no prescribed punishment. Impossibility in itself, for Pufendorf it is always difficult to know what God wills. This is an

³¹² Rachel, *Dissertations on the Law of Nature and of Nations*, §CIV

³¹³ *Ibid.*, §CV

important point to make as it relates to Pufendorf's affirmation of non-intervention, which, as will be explored below, becomes conceptually problematic.

Another highly important point to consider in this context is Pufendorf's idea of sovereignty. Part of what underlines his legal positivist view is his strong notion of sovereignty. As has already been noted the idea of sovereignty in Pufendorf's theory is of extreme importance because it laid the premise for his idea of law, and also, as will become clear, was central to the contention that the American Indians exercised certain rights even though taking them to be living in the state of nature, as Grotius and Locke did, and in this way intervention, for instance, to save their souls or to cultivate their lands could not be justified.³¹⁴ In this way, Pufendorf appears to be protective of the rights of the Indians and leaves very little scope the justification of colonisation, or indeed, for intervention on the grounds of humanitarianism.

For Pufendorf sovereignty animates 'the soul of the state'.³¹⁵ Sovereignty, Pufendorf implies, has its immediate origin in human agreement by which it is founded. As he contends 'If sovereignty is established in fact, some human agency must precede, and a natural aptitude for ruling does not of itself give a man the rule over him who is constituted'.³¹⁶ However, as previously discussed, this human action is necessarily authorised by or based on divine right. Pufendorf argues that sovereignty 'came from God as the author of natural law [...] for what men have contrived under the guidance of sound reason' so 'that they might fulfil the obligation enjoined upon them by God'.³¹⁷ What is important is the idea that because sovereignty is grounded in the free consent of citizens it 'comes about as a moral quality'.³¹⁸ Thus, sovereignty proceeds from God but not without the intervention or the imposition of the will of men. It is part of human sociality and right reason and facilitates the intelligibility of the natural law. Sovereignty, then, is both human and divine and fulfils the purpose to assist in our association and institutionalisation of political society. Our interests are best served by instituting a civil sovereign, who as a moral person is subject to no human authority and

³¹⁴ See Boucher, 'Property and Propriety in International Relations'

³¹⁵ Pufendorf, *Of the Law of Nature and Nations*, Book VII, chapter iii, §1

³¹⁶ Ibid., Book III, chapter iii, §8

³¹⁷ Ibid., Book VII, chapter iii, §1 - 2

³¹⁸ Ibid., Book VII, chapter iii, §1. The doctrine of sovereignty that Pufendorf presents brings about a denial of putative religious impositions and thus, relates to the secular law of nature that he is presenting by placing sociality as the first principle of the said law. Pufendorf implies that sovereignty is the operational moral quality of the composite moral person, which it constitutes. From this follows its indivisible and absolute character, which prohibits the external and internal limitation of state power by means of the church. See Dufour, Alfred 'Pufendorf' in Burns, J.H. and Goldie, Mark (eds.), *The Cambridge History of Political Thought 1450 – 1700* (Cambridge: Cambridge University Press, 1988), pp. 561 – 588, p. 576 - 577

conducts his authority in accordance with what reason dictates, and is in this way exercising natural liberty.³¹⁹ Peace and safety, Pufendorf contends, would be impossible without the establishment of states, which subsequently are ‘unintelligible without supreme sovereignty.’³²⁰ Pufendorf conceptualises the idea of sovereignty very differently from, for instance, Hobbes. Unlike the English philosopher, Pufendorf sees it as being the attributor of moral entities, or moral persons as he terms them. Hobbes presented the ‘artificial’ created sovereign as being the unity of the people, and thus fully exercising his will on behalf of the people. Moral entities Pufendorf defines as individual persons or a collection of persons all united by a moral bond. The former he characterises as *simple*, the latter *composite*.³²¹ Pufendorf is in effect taking the idea of the sovereign representing the people much further than Hobbes. As Boucher, contends, Pufendorf’s three stage social contract, comprising two contracts and one decree, institutes a new moral entity by endowing the state with individuality and a personality that is different from the individuals who set up the state and the ruler who is exercising his authority.³²² The state, being the most powerful of moral societies, thus has a personality of its own and holds rights and duties in its own right. This is important because in here lies the very idea that the Indians encompass sovereignty; a composite moral person with certain rights and privileges which the individual cannot claim for himself.³²³ As Pufendorf states

‘In compound moral bodies something can be attributed to the body which cannot be attributed to all the members, that is, to them taken individually, or to any one of the individuals; and, therefore, the whole is an actual moral person distinct from individual members, which a special will, as well as actions and rights, can be attributed, which do not fall to the individuals.’³²⁴

What Pufendorf is arguing is that states having an actual will different and independently from the individuals that comprise it, and as such it is also an actual legal entity, which retains a

³¹⁹ For a discussion of whether Pufendorf’s theory allows no right of resistance see Boucher, *Political Theory of International Relations*, p. 237. Basically, the contention is that the people expect the sovereign not to enact civil laws that were contrary to the laws of nature. Only a sovereign with the exact purpose of destroying the state would enact such laws.

³²⁰ Pufendorf, *Of the Law of Nature and Nations*, Book VII, chapter iii, §2

³²¹ *Ibid.*, Book I, chapter i, §12

³²² Boucher, *Political Theories of International Relations*, p. 236

³²³ Pufendorf, *Of the Law of Nature and Nations*, Book I, chapter i, §13

³²⁴ *Ibid.*, Book VII, chapter v, §5

juristic moral person that is subject to the moral laws of nature.³²⁵ Thus, Pufendorf designated states to be constrained by natural law. There is, then, a qualified moral order at the international level comprising states which is consistent with the endeavour to live in peace. In this respect, Boucher observes that 'conceiving the state as a moral person inevitable generated its own logic of explanation and justification of international conduct.'³²⁶ In emphasising this, it will become evident that these prescriptions of an 'international law of nature' to regulate the relationship between states provides us with an interesting set of discursive foundations as to Pufendorf's putative idea of humanitarian intervention.

Pufendorf's particular legalistic view of international law and its appendix of a strong notion of sovereignty leave me to discuss the implication this has for international relations. The issues are essentially: What obligation has a third party to intervene if the rights of the Americans are being violated by another state, say by the Spanish or indeed in aiding an oppressed people in defence of their religious rights? Although, as we shall see, if the American Indians violate the rights of each other Pufendorf clearly wants to say that we can make moral judgements about it, however, he does not think it permissible to intervene to convert them to Christianity or to prevent them from eating each other. However, he seems to be more inclined to justifying intervention to secure an oppressed people their religious freedom. This, as we shall see, is derived from the constraints the natural law puts on the sovereign in relation to human freedom.

The rights of the Indians – sovereignty as a moral quality

By presenting sovereignty as a moral quality preceding from the consent of free individuals, Pufendorf could argue that irrespective of *terra nullius* and ownership arguments, the Indians retains sovereignty rights.³²⁷ From this followed a reciprocal moral obligation, which emphasises Pufendorf's idea of sovereignty as the intrinsic moral (and legal) effect of obligation to property. His theory on property is, for this reason, very different to for instance Locke and Grotius. God gave the earth in common to men; however, this was not equivalent to collective ownership, rather granting a right to use it. In this no one has property rights and it is what Pufendorf called a negative community. A positive community in term is one where property is communally owned. Scarce resources and increasing population results in the

³²⁵ Boucher, David: 'Resurrecting Pufendorf and Capturing the Westphalian Moment' in *Review of International Studies* (2001), 27, p. 557 – 577, p. 567

³²⁶ Ibid., p. 573

³²⁷ Boucher, 'Property and Propriety in International Relations', p. 169

emergence of private property, which thus arises to avoid disputes over-use rights. In specifying the origin of dominion Pufendorf explains that ‘proprietorship and community are moral qualities which have no intrinsic effect upon things themselves, but only produce a moral effect in relation to other men; and that these qualities, like the rest of the same kind, owe their birth to imposition.’³²⁸ In this way, rights to property are not congenital but adventitious. Although property is a social construct, arising with the needs according to sociality, it can nevertheless be called a natural right because it is consistent with the nature God has set forth to us.³²⁹

This is unlike Grotius who holds that a use right entails an exclusive right to that which is used; as such, occupancy is all that is required and not agreement. In disputing this Pufendorf says that ‘no credit should be given to any such idea as that God at the beginning instituted a positive community, from which men later withdrew on their own initiative.’³³⁰ It is the complexities of communities which necessitate the development of private property and a deviation from the original use right.³³¹ Thus it is clear that Pufendorf takes the opposite view, by emphasising that although God has granted use rights to the products of the earth, this is not equivalent to dominion. Dominion ‘presupposes absolutely an act of man and an agreement, whether tacit or express.’³³² This contention significantly constrains colonial expansionism exercising arguments founded on the idea that use right and labour expending somehow creates title to property.³³³ Pufendorf is adamant that only an external act or imposition can ‘produce a moral effect’, which is ‘an obligation on the part of others to refrain from a thing already seized by someone else [...]’.³³⁴

Private property, then, is conducive to peace in so far as sociality entails a moral duty to respect others’ property rights as part of our self-preservation. An express act is required to divide the land among communities or nations; however Pufendorf at the same time suggests that agreements were made to assign first occupancy to land not already assigned to a definite individual ‘by the first dividers of things.’³³⁵ Property is not a precept of natural law where things are commanded in such a way that each man ‘be allotted his own separate and distinct portion’ rather natural law approves conventions were such agreements are made according to

³²⁸ Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter iv, §1

³²⁹ Boucher, *Political Theories of International Relations*, p. 231

³³⁰ Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter iv, §9

³³¹ Boucher, ‘Property and Propriety in International Relations’, p. 167

³³² Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter iv, §4

³³³ Boucher, ‘Property and Propriety in International Relations’, p. 167

³³⁴ Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter iv, §9

³³⁵ *Ibid.*, Book IV, chapter iv, §9

the advantage of human society.³³⁶ This is important as no right can be conferred upon first occupancy in itself before the existence of conventions. Pufendorf acclaimed the absurdity in the idea that the occupancy of one person should in an extreme necessity exclude the use right of a second acquired by way of first occupancy. The same argument would be equally true of the idea of occupancy effecting occupancy.³³⁷ We have seen in the previous chapters the central role property theory has for the justification of just war and the colonisation of the Indians lands. As will be apparent in the following, exploring Pufendorf's property theory brings his 'humanitarianism' to the fore, in the sense that it serves to underline his arguments that the Indians had sovereign rights to their territory, which could not be violated for any reason. As such, this discussion is important in relation to the American Indians and any arguments about the appropriation of their lands as it was presented by Grotius and, especially, Locke. From here on, Pufendorf restricts any notion of *Terra Nullius*. From the idea of positive community Pufendorf develops his property theory further yet. People as a whole can nonetheless collectively own lands not hitherto assigned any property ownership³³⁸. This he called 'eminent domain', 'occupancy as a whole', or 'universal dominion'. Eminent domain is very different from an individual's title to property in that the whole group, or community, is entitled to dominion in a particular territory. Interestingly, this means that the 'universal domain is preserved only in the state' whereas individual private property can pass to someone outside the state.³³⁹ The idea then, of eminent domain considerably constrains the idea of the use of private property not consistent within the bounds of the common good of the community.³⁴⁰ Eminent domain is therefore conceived as being a precondition of the common entitlement to property before private property rights are acquired and is consistent with the idea that the community, or state, has a right over property that no one outside it has. Thus, occupancy is not attained through mere cultivation or signs of seizure, neither is it, as Grotius contended, in need to being divided into recognisable parcels or plots among individuals.³⁴¹

Pufendorf here directly denies the idea of *terra nullius*. In expressing this effect of eminent domain Pufendorf asserts that 'it is not necessary that all things which are occupied in this universal manner should be divided among individuals and pass into private hands.

³³⁶ Ibid., Book IV, chapter iv, §4

³³⁷ Ibid., Book IV, chapter iv, §5

³³⁸ This would then be lands, which normally would have been considered to be wastelands by the Europeans colonists.

³³⁹ Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter vi, §4

³⁴⁰ Boucher, 'Property and Propriety in International Relations', p. 168

³⁴¹ Ibid., p. 169

Therefore, if anything be discovered in such an area that is still without a private owner, it should not at once be regarded as unoccupied, and free to be taken by any man as his own, but is to be understood to belong to the whole people.³⁴² The idea of 'eminent domain' then is profoundly related to Pufendorf's idea of sovereignty and circumscribes the contention that even if the Indians were recognised to have certain ownership rights, the colonising country would still deny sovereignty to the natives by the claim that it retained rights to eminent domain. Pufendorf's theory, on the other hand, propounds that shared sovereignty is inconceivable. Whether the effect of communal sovereignty was absolute or limited each constituted an instance of supreme sovereignty.³⁴³ This idea conceptually constrained any grounds that an intervening force has for subduing the Indians.

The widely held position that the law of nature required a duty of hospitality and evidence of the contrary for almost every write seems always to have been, Pufendorf notes, 'one of the earmarks of the inhumanity of uncultivated peoples'.³⁴⁴ Nevertheless, Pufendorf questions this, and contends that a stranger need an honourable reason to stay away from home; and also that no obligation could be derived from the law of nature to entertain people who visit merely out of curiosity; and if granted such visits need to be necessary and with a good reason. So, in essence, the duty of hospitality is conditional on the moral integrity of the foreigner. In this, he directly opposed Francisco Vitoria's position, which, as we saw, grounded the Spanish's entitlement to subdue the Indians. Vitoria's presumption that the Spaniards had a right to live in the lands of the Indians, on the condition that no harm was to come to them, weakened the very idea of property rights for Pufendorf, as it is the property holder's decision whether he wants to share it with anyone. Again, sovereignty is the underlying conception that underpins this contention. Pufendorf invokes the same kind of argument in discussing the obligation of free trade and admission of foreigners, however he upholds that to expel without good reason guest and strangers, once they have been admitted 'savours of inhumanity and disdain'.³⁴⁵ Thus to restrict the access of foreigners would not constitute in itself a just cause for war. This leaves us to explore in more detail, how his strong notion of sovereignty relates to any notion of humanitarianism he might have.

³⁴² Pufendorf, *Of the Law of Nature and Nations*, Book IV, chapter vi, §4

³⁴³ Boucher, David: *The Limits of Ethics in International Relations – Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, forthcoming 2009), p. 207 - 208

³⁴⁴ Pufendorf, *Of the Law of Nature and Nations*, Book III, chapter iii, §9

³⁴⁵ *Ibid.*, Book III, chapter iii, §9

Pufendorf's notion of humanitarian intervention

The idea of communal sovereignty, conceptualised by Pufendorf as 'eminent domain', whether presented as a simple moral person or a complex moral person, i.e. the state, is significant because it follows that the right of the Indians can only be theoretical sound collectively and not individually, which is what Pufendorf is basing his moral judgement on in regard to the denial of encroachment into the Indians' lands. The fact that Pufendorf is asserting a method of formulating a set of norms for the juridical community of 'moral beings' makes it clear that he is not differentiating between actual physical subjects and juridical subject, nor is he differentiating between private subjects and subjects under public law. This also conditions international law as being a set of general natural law principles valid in the same way as for individuals. Thus, what I want to emphasise is that the humanitarian basis for Pufendorf's moral arguments in condemning colonial expansion apply not to the individual natural rights of the American Indians, but rather to the right a community (or state) attains by the mere fact of being a sovereign moral person and capable of bearing such rights.

What seems to be the argument, then, is that Pufendorf's humanitarianism is grounded in the moral autonomy of the community (or the state) conceptualised through his idea of sovereignty, and not the individual. In this sense, the moral person of the state necessarily brings to light questions of the character of moral agency as well as the development of natural right, or in Pufendorf's instance natural communal rights, to human rights. Inevitably, this is interesting for exploring any notion of humanitarian intervention that Pufendorf might have, and leaves us exploring this very issue: if, according to Pufendorf, it is the right of the community as a moral person that is being violated, how does this relate to any notion of humanitarian intervention? Another point to consider in relation to this is also Pufendorf's moral objection to various abominable practices of the American Indians. This is an important because it relates to the widely held assertion that a sufficient cause for waging war against the Americans can be found in their human sacrificial and cannibalistic customs. This will be explored more in depth in the next section, which deals with Pufendorf's law of war. If the practices of the American Indians were grounds enough to wage just wars then consideration of property rights would be redundant. Pufendorf, unlike Grotius and Vitoria, did not necessarily find the practices of the American Indians abhorrent to the extent that it gave just cause for war. As we have seen, these arguments were based on the contention that the law of nature condemned their actions. Pufendorf is not explicitly condemning as immoral the customary practices of the Americans, such as sacrificing men and eating human flesh. The

consenting Christian morality would render such expressions superfluous. Also, Pufendorf's 'scientific' moral theory of prescribing sociality as a prime natural law principle so as to separate it from any moral theology would render such arguments that the Indians were living in a state of sin invalid. The Danish writer and philosopher Ludvig Holberg (1684 – 1754) was an ardent admirer of Pufendorf. He asserted, curiously in his critique of Barbeyrac, who held that the Indians, on the basis of their practices by their very nature affronted the enemies of a common humanity, that if the Indians were aware that their practices were contrary to the laws of nature and as such sinful, they would without a doubt refrain from such actions. All that foreigners are obliged to do, although not without the approbation, or consent, of the Indians, is thus to educate them on the error of their ways and to dispel their delusions; for to wage war on a people and kill many thousands of human beings on account of their delusions is, Holberg argues, 'to violate the nine Commandments to enforce the 10th'.³⁴⁶

From this, let us consider in more detail Pufendorf's law of war in relation to intervention, just war and general humanitarian considerations in terms of states' obligations to each other. As a general rule, Pufendorf did not question the legitimacy of war, the same as most of his contemporaries, if a serious enough violation of the fundamental laws of nature necessitated it. However, as previously argued, despite Pufendorf's denial of international law there were obligatory moral restrictions on the conduct of states, this meant that Pufendorf was not, as such, concerned with the legality of war, but rather with the moral claims to it.³⁴⁷ Stephen Neff is concerned precisely for those reasons and argues that Pufendorf recognises the force of humanitarian considerations but is persistent in placing them on a moral rather than a legal plane. He contends that Pufendorf's 'humanitarian consideration operated outside the legal framework of the war contract and hence exerted only a moral constraint, not a legal one'³⁴⁸; however, Neff never concerns himself with what those 'humanitarian considerations' might be, or more importantly, how Pufendorf structures and arrives at those moral considerations. As we shall see, such apprehensions illustrate a misinterpretation about

³⁴⁶ Holberg, Ludvig: *Introduktion til Naturen og Folkerettens Kundskab (Of the Law of Nature and Nations)*, 1716, Bk II, Chapt. XIV. 'Alt derfor, hvad Fremmed med Billighed kand gjøre, er at søge Leylighed at oplyse dem, og bringe dem af deres Vildfarelse; thi, at Paaføre et Folk Krig, og myrde mange tusinde Mennesker formedelst deres Vildfarelser, er at overtræde 9 bud for at Haandhæve det Tiende.' Holberg's work is far from an independent jurisprudential work, but rather a systematic rewriting of Pufendorf's *Officio Hominis et Civis Juxta Legem Naturalem Libri Duo* (Of the Duty of Man and Citizen) (1673) supplemented with Nordic law decrees and materials, especially Christian V's *Danske Lov* (The Danish Law, 1683). Holberg explicitly asserted that the intention of the publication of the work was never scientific but instead practical as applied law. (Present author's translation)

³⁴⁷ Boucher, *Political Theories of International Relations*, p. 240

³⁴⁸ Neff, Stephen: *War and the Law of Nations – A General History*, (Cambridge: Cambridge University Press, 2005), p. 150

Pufendorf's moral philosophy based on a more modernist legalist position and thus Neff risks opening himself up to charges of anachronism. Although initially wary of placing Pufendorf in his 'contractual school of thought' (where war is perceived as a contract between two parties to settle a dispute by armed force, i.e. similar to a duel) due to Pufendorf's otherwise conventional just war theory, he nevertheless proceeds to uphold him as a representative of this school.³⁴⁹ The explanation for this is to be found in the following: '[T]he belligerents at the outset made an agreement to rest their case with the fortunes of battle. And this is thought to be the case, when peaceful means are rejected [...] and both sides enter the conflict with the thought: 'Either I will revenge my right or injury in a war, or else I will lose still more.'³⁵⁰

Following this, Pufendorf concludes that 'practically all forms of wars, certainly those where a peaceful agreement have been rejected by both sides, [...] appear to suppose an agreement that he upon whose side the fortune of war has rested can impose his entire will upon the conquered.'³⁵¹ Neff argues that given that the contractual school prescribed the contents of the law of wars, which was then wholly man-made, Pufendorf as a representative of the school could be able to compile some code of rules; as such Neff builds into Pufendorf's theory the normative contention that such rules should have been prescribed. He, accordingly, concludes that 'Pufendorf [...] offered heartbreakingly little hope [...] to moderate the sufferings of war. He offered nothing significant in the way of specific rules of war, while also rejecting any notion of limitations based on the general concepts of necessity and proportionality.'³⁵²

In this way, what Pufendorf is in fact theorising is an open license to war, which arguably cannot be refuted. This needs to be looked at more carefully. Pufendorf is very clear on the fact that 'a state of hostility of itself grants one the license to do another injury without limit.'³⁵³ The very violation of the duty of peace against another provokes the licence of any force necessary to bring the war to an end and achieve peace; without this licence, Pufendorf argues, the end of war could never be feasible. Thus, Pufendorf does not subscribe to the same moral criteria for *jus in bello* as *jus ad bellum*. Peace is defined as 'a state especially reserved to human nature as such, since it springs from a principle which belongs to man, as distinct

³⁴⁹ Neff asserts that the contractual school of thought by accepting the medieval just war idea that peace was the normal condition of human beings even in the state of nature, it was a less radical departure from mainstream natural law theory than the Hobbesian one. *War and the Law of Nations*, p. 138

³⁵⁰ Ibid., p. 138; Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter viii, §1

³⁵¹ Pufendorf, *Of the Law of Nature and Nations*, Book V, chapter ix, §3

³⁵² Neff, *War and the Law of Nations*, p. 149

³⁵³ Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter vii, §2

from animals, while war arises from a principle common to them both.³⁵⁴ Peace conditions the duties of humanity to be ‘that none unjustly do another hurt or damage.’³⁵⁵ In the analogy that states are conceptualised the same way as individuals in the state of nature their natural liberties are effecting to ‘defend themselves against an unjust threat of violence.’³⁵⁶ To, then, protect one’s own security, property and right, Pufendorf prescribes any means necessary that ‘will best prevail against such a person, who, by the injury done to me, has made it impossible for me to do him an injury, however I may treat him, until we have come to a new agreement to refrain from injuries in the future.’³⁵⁷ Thus, the sovereign who is conducting the just war can invalidate any agreement among nations that restrains the intemperance of war.³⁵⁸ The main reason for this is to be found in Pufendorf’s rejection of international law, an important observation in his theory, which Neff fails to elucidate. This has the unfortunate consequence that Neff appears to assume that Pufendorf holds the law of nations as law, which Pufendorf, then, somehow fails to apply. As such, Neff’s theoretical foundation is anachronistically assuming that there already is such a consensus in place, or rather a consensus what such legal commitment ought to be. By focusing on the consequences of Pufendorf’s natural law theory Neff is forced to expound a more modernistic conception on international law, which is, chronologically irreconcilable with Pufendorf’s general exposition. However, Pufendorf, as we saw, holds that there are moral obligations by which states should abide, and they are just as obligatory as legal ones. In this way, as will be explored further in his just war theory and which have already been suggested, Pufendorf expresses the moral as the legal.

To reiterate, Pufendorf did not conceive of war as natural, and it was thus permissible but only as a last resort to secure ones rights. He expressly conditions a war as just because ‘nature permits war, on the condition that he who wages it shall have as his end the establishment of peace.’³⁵⁹ As such there is an emphasis on the right intention as underlying the justice of the cause of war. Pufendorf is adamant that offensive wars are always difficult to justify, but is suggestive that for instance pre-emptive wars could be justified. Fear, he writes ‘alone does not suffice as a just cause for war, unless it is established with moral and evident certitude that there is an intent to injure us.’³⁶⁰ Nevertheless, Pufendorf maintains that it is

³⁵⁴ Ibid., Book VIII, chapter vi, §2

³⁵⁵ Ibid., Book VIII, chapter vi, §2

³⁵⁶ Ibid., Book VIII, chapter vi, §1

³⁵⁷ Ibid., Book VIII, chapter vi, §7

³⁵⁸ Boucher, *Political Theories of International Relations*, p. 242

³⁵⁹ Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter vi, §2

³⁶⁰ Ibid., Book VIII, chapter vi, §5

against nature to plunge into war at the slightest sight of provocation, even when an injustice has been done. Every other recourse for a peaceful solution should be exhausted first.³⁶¹ Pufendorf is sensitive to the sort of pretexts adduced to promote colonial expansion and stressed that such justification as Grotius asserted provided too readily a pretext for war. In line with his conceptualisation of sovereignty rights and the entailment thereof, he argued against Grotius by declaring that it would be an unjust cause to wage war against the Indians for the mere reason that it is their custom to sacrifice and eat human flesh.

‘On this matter we should carefully consider whether a Christian prince can attack the Indians, as condemned by nature, merely because they eat the flesh of men of their own religion, or because they eat that of strangers. And in connexion with their treatment of strangers we must again inquire, whether those foreigners come to their shores as enemies and robbers, or come as innocent guests, or driven by storms. For only in the last case does a right of war lie with those whose citizens are treated with such cruelty, not in others.’³⁶²

Thus, only if they do unnecessary and conspicuous harm to a stranger, who has either come with good intention or by accident is an intervention justified. Although, Pufendorf here talks of a right of intervention to punish innocent strangers from unnecessary cruelty, it applies, as the above illustrates, only to the prince whose subjects have been inhumanely treated to do the punishing. This, as we have seen, is quite different from what Grotius was stating, that to punish those who commit crimes against the law of nature was a universal natural right of states. Thus, Pufendorf imputes colonial motives to foreigners whose actions can rarely be justified. He questions the lawfulness of intervention on behalf of people caught up in the ceremonial practices of their own people, the Indians. This again illustrates the forcefulness of Pufendorf’s conception of sovereignty. Pufendorf leaves no room to suggest that foreigners have a moral obligation to prevent the Indians from hurting themselves by intervention. In the same way Holberg contends that Protestants cannot wage war against Catholics who burn all the unfaithful in the name of God, so too is it true that the Spaniards cannot wage war against the Americans for mere reason that they ate and sacrificed people in their own lands out of blind superstition.³⁶³

³⁶¹ Boucher, *Political Theories of International Relations*, p. 241; Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter vi, §4

³⁶² Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter vi, §5

³⁶³ Holberg, *Introduktion til Naturen og Folkerettens Kundskab*, chapter XIV

However, it must be said that Pufendorf is somewhat ambiguous. In discussing obligations he envisages circumstances when war can justly be waged on behalf of other people. He notes

‘But can a man also take up arms to protect another’s subject, that is, from the injuries of their own sovereign? On this point one may consult Grotius [...] In our opinion the safest principle to go on is, that we cannot lawfully undertake the defence of another’s subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors.’³⁶⁴

This indirectly relates to Pufendorf’s idea of punishment, and his theory of sovereignty also becomes important. By denying voluntary international law as regulating the relationships between states, this is necessarily also a denial that the atrocities and crimes of states require punishment, or rather that wars waged with such a purpose are legitimate. This is the contention of Grotius, as was demonstrated in the previous chapter. However, for Pufendorf, the principle of sovereignty prescribed, necessarily means that punishment requires a supreme sovereign and therefore is only applicable in civil law. This contention is important because it is along the same lines that Pufendorf asserts that the purpose of waging war is not, unlike what Grotius had argued, to punish for the purpose of retribution and to reform the offender. This is because the force inflicting such punishment does not emanate from an authoritative superior in the international context.³⁶⁵ As such, neither could there be grounds for reforming the practices of the Indians.

‘By having said that punishment is imposed ‘by the authority of the state’, we separate it from those evils to which men are exposed involuntary in war, or a fight, and from the stubbornness or open injury of another. [...] The power to exact penalties is a part of sovereignty, and so no one can impose upon another a penalty, properly speaking, unless he have sovereignty over him.’³⁶⁶

However, when it comes to aiding an oppressed people to protect their religious freedoms, Pufendorf seems to be much more favourable. First of all, for Pufendorf the state is not founded for the sake of religion, rather religion is part of natural human freedom, which, unlike Hobbes contention, cannot be entrusted to the sovereign. This is why one of the main duties of a sovereign is respect for the religious freedom of his or her subjects. This is, in fact, a very

³⁶⁴ Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter vi, §14

³⁶⁵ Boucher, *Political Theories of International Relations*, p. 242

³⁶⁶ Pufendorf, *Of the Law of Nature and Nations*, Book VIII, chapter iii, §4 - 7

interesting assertion; because Pufendorf rejects the Revocation of the Edict of Nantes of 1598, also known as the Edict of Fontainebleau 1685 that had granted the French Huguenots the right to practice their religion in the state without persecution. As he said 'Civil Society was not instituted for Religion's sake; neither does the Church of Christ participate of the nature of a Temporal state; and therefore a Prince that embraces the Christian Faith, does not thereby acquire an absolute Sovereignty over the Church or Men's Conscience.'³⁶⁷ This led Pufendorf to conclude that if the sovereign rulers contravene the bounds of their power, the subjects have a right to defend their religion, by force if necessary.³⁶⁸ The question is, however, is there an obligation of foreign sovereigns to come to aid of oppressed religious peoples against their sovereign? Pufendorf notes

'And, as for such Princes and States, as have shaken off the yoke of Popish Slavery, if they seriously reflect, how their fellow-Protestants are persecuted, and in what barbarous manner they are treated, will, questionless without my Advice, take such measures, as may be most convenient for to secure themselves from so imminent a Danger.'³⁶⁹

Pufendorf is ambiguous here. Although, recognising that some measures must be taken to help your fellow Protestant against Popish oppression, he remains unclear about how far such aid should extend. But, there is, nevertheless, room to suggest that there is a duty upon a third party to come to the aid of a people suffering from religious persecution.

We have already explored the basis on which Pufendorf contends that the Spaniards are violating the natural rights of the Indians. Moreover, what has also been emphasised is the importance of Pufendorf's conception of sovereignty as underpinning his denial of international law and how this related to his view on punishment and intervention. It is evident that Pufendorf does not have an argument in place for intervention not only because this sort of intervention is not enshrined in the law of war, but also, and even more relevant, is the fact that the legal context for such an enterprise does not exist. However, Pufendorf's moral contentions do not entail a moral obligation for intervention. Bear in mind, as what noted earlier, our moral obligations, whether they can be said to be imperfect or perfect are equally obligatory, which means that Pufendorf think that we can make universal moral judgements about what is right and wrong. What Pufendorf is in fact emphasising, is the authority of the moral, which

³⁶⁷ Pufendorf, *Of the Nature and Qualification of Religion*, §54

³⁶⁸ Ibid., §2 – 5 and §52; 'Introduction', p. xi

³⁶⁹ Ibid., §54

explains his assertion that the moral presupposes the legal; what seems to be a clear view in Pufendorf's thought, is that moral authority cannot prescribe perfect obligations. The possible judgements Pufendorf evokes regarding a principle for humanitarian intervention can only be in relation to the law of nature. One main contention here is that intervention from a third party on behalf of the Indians against any European encroachment into their lands is rendered invalid. The reason for this is that Pufendorf is arguably justifying humanitarian intervention under natural law, which has the necessary authority; it comes about as a moral obligation, where it is God that intervenes and punishes the wrongdoers. Also, war in itself is not an inherently moral action; it is rather, as we saw, a necessary mean to bring about peace. But this inevitably raises the question of whether humanitarian intervention, for Pufendorf, can even constitute a moral action? For without law there is no room for the possibility of moral judgements in the sense that moral action for Pufendorf is entirely correlated to legal prescription. Hinted at earlier, these contentions seem to emphasise the fundamental ambiguity in Pufendorf of positing the law of nature as any other law, although with no prescribed punishment. Inherently, a moral action comes about as an action prescribed by the lawgiver, either in form of punishment or reward. However, it is an inconsistent argument that God, as the eternal lawgiver punish wrongdoers, when such moral transgressions require prescribed legal punishment. This inconsistency is mainly the result of Pufendorf's foundational conception of sovereignty. Pufendorf's main reason of not considering rights as being primary to law is based on his initial criticism of what he found to be a strained scholastic essentialism, in that they placed moral values as inherent to human nature. Pufendorf wants to argue that this cannot be done before the moral legislation of God.³⁷⁰ This would be entirely incompatible with Pufendorf's specific views on sovereignty. This is important to consider because it serves to highlight Rachel's criticism of Pufendorf fundamentally relating to the potential predicament of denying any international law independent of the law of nature. However, as the contemporary development of humanitarian intervention has contentiously demonstrated, it does not necessarily require a legal premise to promote the moral force of such considerations. Nevertheless, for Pufendorf, the moral considerations for humanitarian intervention were there, but such consideration might not be acted on within the international sphere, regulated by natural law, but may be enforced by God.

³⁷⁰ Haakonssen, *Natural Law and Moral Philosophy*, p. 41

Conclusion

What I have tried to show in this chapter is that Pufendorf did not have a notion of humanitarian intervention as such because its viability was in question because it could not be enforced by international law. He nevertheless presents us with a view that, in spite of this, that we can make strong moral judgements when we identify instances of 'humanitarian' crimes in international society. His differentiation of congenital and adventitious obligations is important in this sense, because although they are not equally enforceable, they are nonetheless equally morally obligatory and from this, then, moral obligations for Pufendorf are what we today might term aspirational in the international realm.

Because of his strong notion of sovereignty and its implied legal positivism, Pufendorf is often held as the historical proponent for what today is termed statism, whereas, for instance Kant is often invoked to represent the other side of the argument in defence of cosmopolitanism. A recent article does exactly this by proposing that 'the rivalry between these two positions is reprised in current debates between cosmopolitanism and statism over humanitarian intervention.'³⁷¹ However, although neo-Kantians today might view the statism Pufendorf is positing as inherently overly conservative to deal with the humanitarian crises of the world, the fact is that it is incredibly anachronistic and fallacious to refer to Pufendorf's theory in this way. Such authors seem to have fallen into the trap of not reading and understanding the text in the context of its time and place. However, as I have argued, the positing of a strong principle of sovereignty for Pufendorf implied a very strong notion of humanitarianism, which conceptually served to limit any atrocity committed by colonialists against the American Indians or indeed in relation to the overall religious intolerance of the time. It was exactly to address such humanitarian issues that a strong principle of sovereignty had to be proposed in the first place. Although Pufendorf's notion of international ethics cannot be more than aspirational from today's point of view, there is no doubt that his theory of sovereignty at the time seemed conceptually to offer more protection to groups like the American Indians, unlike theorists such as Grotius, who had a very strong notion of humanitarian intervention tied up with his theory of punishment.

As we shall see in the next chapter, Pufendorf inspired thinkers such as Christian Wolff and Emmerich de Vattel, who build on his idea of the moral person of the state. However, unlike Pufendorf, they did not deny the existence of the law of nations nor the belief

³⁷¹ Devetak, Richard: 'Between Kant and Pufendorf: Humanitarian Intervention, statist anti-cosmopolitanism and critical international theory' in *Review of International Studies* (2007), 33, pp. 151 – 174, p. 151

in its enforceability, although this was done while still retaining an equally strong notion of sovereignty. What was different was their theoretical positioning of the moral person of the state as subject to the law of nations. However, in terms of international ethics they both sought each in their own way, to bridge the potential gap between the principle of sovereignty and international justice, by placing certain duties on states in their interaction with each other; however, such duties and obligations were mainly confined to the sphere of 'imperfect' duties.

Chapter 5

Christian Wolff and Emerich de Vattel

‘The object of the great society established
by nature between all nations is
the interchange of mutual assistance’³⁷²
- Emerich de Vattel (1758)

Introduction

In this chapter I explore the notion of humanitarian intervention in the writings of two highly influential thinkers, Christian Wolff (1679 - 1754) and his disciple Emerich de Vattel (1714 - 1767). The focus will be the way they sought to present a natural law tradition that was secularised and to a certain extent succeeded compared with their predecessor Grotius, about who, as we saw in chapter 3, there is much doubt as to whether or not he lay the foundation for such a conceptual move. Wolff and Vattel are important because in the almost immediate post-Westphalian period it is apparent, as it is with Pufendorf, that there is much more emphasis on the sovereign state, which considerably framed both thinkers’ notions of the duties nations have towards each other, especially in relation to the topic of this investigation – grounds of humanitarian intervention. Unlike what I have discussed in relation to Grotius, who forcefully retained the old natural law principle of the common rights of mankind, from which derived a strong notion of universal jurisdiction to avenge crimes against the law of nature, Wolff and Vattel instead maintained a strong emphasis on the duty to assist, which in more recent theories of international relations John Rawls has developed in his *Law of Peoples*. The duty to assist becomes central for Wolff and Vattel because they put emphasis on the sovereign state as the main actor of international relations. There is of course an important distinction here: whereas for Vattel it is the state that has moral capabilities, being a deliberative agent with separate rights and duties from the individual; for Rawls it is peoples who have this moral

³⁷² Vattel, Emmerich de: *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an introduction by Bela Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), Preliminaries, §12

capability and the state acts as their representative on whose behalf it is exercised.³⁷³ The way that the state moves to the centre of the theories of Wolff and Vattel helps accentuate to what extent the individual become less important and how this effect their general notions of individuals' duties in relation to humanitarian considerations.

Peter Remec contends that the concept of the personified sovereign state happened as part of the development of international legal theory starting with the legal and political philosophies of among others Hobbes and Benedict de Spinoza (1632 - 1677) who saw the state as the ultimate summit of human organisation.³⁷⁴ As we have seen, thinkers such as Hobbes and Pufendorf, although in very different ways, believed that law was only true law if it could be enforced by a superior power. Since such power and enforcement, they claimed, were clearly lacking in international society, international law could therefore not be conceived as true law at all. And as was argued in the previous chapter, this meant for Pufendorf that to conceive of a separate law of nations from the law of nature was a misleading notion; it was only the latter that regulated the relationship between states. In this way Pufendorf was the first to perceive of states as moral subjects to the natural law, whereas, as we shall see in this chapter, Wolff and Vattel took a step further, and made them moral subjects of the law of nations. Although Vattel hardly mentions Hobbes, he does acknowledge that in his work we discover the 'hand of a master, notwithstanding his paradoxes and detestable maxims'³⁷⁵ and recognises his importance to be one of the first philosophers who, although flawed, had a distinct idea of the law of nations. What Vattel sought to emphasise was that both Hobbes and Pufendorf were wrong in thinking that the law of nature did not undergo any transformation when it is applied to states.³⁷⁶ The move to personifying the state came from this positivistic view of international law that law being the body of normative rules presupposes 'reason' because its application is impossible unless rational beings are capable of understanding it and obeying it. Of course, individuals possess such reason and are in this way conceived as clear subjects of the law, and in order that states may be envisaged as such they must, of course, be

³⁷³ Boucher, David: 'Uniting What Right Permits with What Interest Prescribes: Rawls's Law of Peoples in Context' in Rex Martin and David A. Reidy (eds.) *Rawls's Law of Peoples – A Realistic Utopia*, (Oxford: Blackwell Publishing, 2006), pp. 19 – 37, p. 25

³⁷⁴ Remec, Peter Pavel: *The Position of the Individual in International Law According to Grotius and Vattel*, (The Hague: Martinus Nijhoff, 1960)

³⁷⁵ Vattel, Emmerich de [1758]: *The Law of Nations or the Principles of Natural Law applied to the conduct and to the Affairs of Nations and of Sovereigns*, transl. by Charles G. Fenwick (Washington: Carnegie Institute of Washington, 1916), Preface, §9

³⁷⁶ See Boisen, Camilla and Boucher, David: 'Hobbes and the Subjection of International Relations to Law and Morality', in Raia Prokhovnik and Gabriella Slomp (eds.), *International Political Theory after Hobbes*, (London: Palgrave, forthcoming 2010)

endowed with reason and a will, which therefore means that they must be personified. As Oppenheim emphasised, once this fiction is in place there is no hindrance to why international law should not be represented as body of rules for the conducts of states.³⁷⁷ As was apparent with the Spanish Theologians as well as Grotius, they still contended that the *jus gentium* personally bound sovereign princes and others in their participation in international associations. However, as Remec noted, this idea became gradually eroded by the concept of the person of the state. The conceptual move was clear: the actors of international relations were not individuals represented by the sovereign, but the sovereign state itself. And it was Vattel who more than anyone else expressly established the law of nations solely as the law between sovereign states. There was a strong emphasis upon the sovereign integrity of the state and in this way it is the state that is central and not the individual. In this sense the state became the subject of rights and duties in displacing the individual completely from the system of international law – something which of course in recent time is being reassessed in discussions about human rights, crimes against humanity, and international justice. However, the various implications especially for the development of modern international law, practical as well as theoretical, of this conceptual move are beyond the scope of this thesis. It is sufficient for this present study to emphasise that such a shift came to be and explore the effect it had on the emergence of ideas pertaining to humanitarian intervention compared to its pre-Westphalia political thought and jurisprudence. This is, thus, what I seek to do in this chapter. From the writing of Wolff and Vattel I will elucidate how the development of the idea of humanitarian intervention change against the backdrop of a changing international society, when the emphasis was put on the state as the main actor of international relations instead of the individual. It seems clear that for Vattel, in particular, that there is a strong humanitarian aid aspect in his general notion of the duty to assist but only in so far as it is not detrimental to the whole of the sovereign state. (This was also a similar condition for Grotius, although, as we saw he based his idea on very different premises). The question is how far does Vattel take the notion of the duty to assist, when ultimately underpinning such a principle, is the sovereignty of the state?

For both Wolff and Vattel nations have clear duties to each other, but first of all towards themselves and it is from these duties that the duty to assist arises. Thus, firstly in discussing the concept of the duty to assist I explore under what conditions, especially in relation to just war theory, such duties arise; and secondly, the source of the obligations that underpin a

³⁷⁷ Remec, Peter Pavel: *The Position of the Individual in International Law*, p. 22 - 23

nation's duty to assist. What is important here is Wolff's positing of the legal fiction of a *civitas maxima*, a republic of states, where the natural society of states has as its source the law of nature, the so-called *necessary* law of nations, but what regulates it is the positive *voluntary* law of nations. Vattel, on the other hand, as will be apparent, vehemently opposed such an idea and thereby looks for a much firmer distinction between the *necessary* and the *voluntary* law of nations. This is important to note because this means that the two thinkers present two different foundations to their very similar conceptions of nations' obligations towards each other – their duty to assist.

The duties of nations towards each other

Derived from natural law principles, for both Wolff and Vattel, nations have clear primary duties toward themselves but these duties also, secondarily, extend to other states. A nation has a duty of preservation toward itself and owes to itself the perfection of government, but also owes as much to other nations in this regard. As Wolff contends

'Since every nation owes to every other nation that which it owes to itself, in so far as the other does not have this in its own power. While the first nation can perform this for the other nation without neglect of its own duty to itself; one nation is bound to contribute whatever it can to the preservation and perfection of another in that which the other is not self-sufficient.'³⁷⁸

In this instance, Wolff is at pains to note that it is a misconception to think that the destruction of another nation somehow helps a nation in its own self preservation. Although, Wolff is adamant that the preservation of equilibrium, the balance of power, among nations is not a just cause for war, both him, and more in particular Vattel, were some of the first to take into consideration the importance of the existence of a balance of power to regulate states in the international state system.³⁷⁹ As will be demonstrated in the following chapter, this notion was something Burke, almost a generation later, was much more eager to expound as his main justification for intervention in Revolutionary France. Thus, by assisting in other states' self-preservation and the perfection of their governments, a commonwealth or federation of equal states could be achieved and peace could be maintained. According to Wolff, this would

³⁷⁸ Wolff, Christian [1764]: *The Law of Nations Treated According to Scientific Method in which the Natural Law of Nations is Carefully Distinguished from that which is Voluntary, Stipulative and Customary*, trans. Joseph H. Drake (Oxford: Clarendon Press, 1934), chap. II, §166, p. 88

³⁷⁹ *Ibid.*, see chap. VI, § 646 – 651, pp. 330 - 336

naturally lead to something he termed a *civitas maxima*; nations, like individuals, are to make themselves greater and better through united effort and because of this, nature has founded a society of nations to which they must necessarily belong.

For Wolff then, there is a strong duty to assist where a country lacks the resources to perform such duties towards their own self-preservation; he also insists that it is a duty of the failing nation to accept assistance. The reason for this is that changing the government of other nations necessarily presupposes the perfection of the assisting nation itself and its government. Without this, it cannot perform its duties towards other nations. This is an important point to make because Wolff is adamant that failure to perform the duties a nation has to itself means failing in its duties towards humankind as whole. As will be apparent below, the implication of refusing to accept assistance is that it constitutes grounds for waging just war.³⁸⁰ Thus, every nation is bound to preserve and perfect another. From this, we see that Wolff retains the familiar natural law notion of sociability in his thought, which extends to nations as well as individuals. In fact, for Wolff it was apparent, whether regarding individuals or nations, that the state of nature was sociable in character, and as we saw with Pufendorf the quintessence of such a notion was the need for mutual aid.³⁸¹ Thus, in Wolff we see that the concept of the moral person of the state is expressed much more emphatically than what was the case from his predecessor Grotius.

This has to be understood in the context of post-Westphalia Europe where such strong notions of the 'state', the sovereign state that is, become conceptually available. As with Pufendorf, Wolff extends his analysis of the state of nature to the relationship between nations and views nations as moral persons. It is from the social contract only that their rights and duties arise. Here Wolff asserts 'it is enough to recognise that nature herself has combined nations into a state, therefore whatever flows from the concept of a state, must be assumed as established by nature herself.'³⁸² However, Wolff is aware of the differences between nations and individual physical persons in the state of nature and necessarily acknowledges that the law of nature must be adapted to accommodate the relationship between the moral persons of nations. From his initial understanding of the premises of the law of nature the obligations of self-preservation and perfection are obligations that individuals and nations primarily owe to

³⁸⁰ Boucher, David: *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition*, (Oxford: Oxford University Press, 2009), p. 180

³⁸¹ Tuck, Richard: *The Rights of War and Peace - Political Thought and the International Order from Grotius to Kant*, (Oxford: Oxford University Press, 1999), p. 187

³⁸² Wolff, *Prolegomena*, §9, p.13

themselves, and, thus, the obligations we have towards others are secondary. Wolff repeatedly notes that ‘every nation owes to every other nation that which it owes itself, in so far as the other does not have that in its own power, while the first nation without neglect of duty toward itself can perform this for the other.’³⁸³ This is logically deduced from the notion that nature has established a society among all nations in so far as it has also been established between all human beings. This society of nations has a specific purpose of giving mutual assistance to each other, and by its combined powers to promote the common good.

‘Since nature herself unites men and compels them to preserve society, because the common good of all cannot be promoted except by their combined powers, so that nothing is more beneficial for a man than a man; the same nature likewise unites nations together and compels them to preserve society, because the common good of all cannot be promoted except by their combined powers, so that nothing can be said to be more beneficial for a nation than a nation. [...] Just as man ought to aid man, so too ought nation to aid nation.’³⁸⁴

However, the obligation of nations to promote the common good is imperfect. The main reason for this is one of judgement. Wolff asserts that by the virtue of the natural liberty of any nation it must be allowed its own judgement in determining an action of assistance, because it has to take into account its duty toward itself. As such, the right of nations to things owed to them must necessarily be imperfect. Wolff uses the example of scarcity of crops and illustrates the problem of what would happen if the nation that has an abundance of grain was impelled to sell or give its grain away so as to leave itself in a condition where it would suffer the same disaster?³⁸⁵ Because a nation’s natural duties to others are imperfect, such obligations cannot for that very reason be compelled. A nation capable, but unwilling, to assist another nation would be disregarding its natural duties; this is unfair, but not a wrong. As he explains, ‘it is plain of itself that what is contrary to an imperfect right of another is not contrary to his perfect right.’³⁸⁶ But Wolff clearly alludes to the immorality of such indifference by saying that when a nation fails to assist another, to which it is naturally bound to perform duties, its failings are those of charity rather than of justice, which does not make it a wrong, nevertheless, it is a sin. ‘It is quite plain’, Wolff says, ‘that here we speak only of the moral impediment, since there is

³⁸³ Wolff, *The Law of Nations Treated According to Scientific Method*, chap. II, §156, p. 84

³⁸⁴ Wolff, *Prolegomena*, §8, p. 11 - 12

³⁸⁵ Wolff, *The Law of Nations Treated According to Scientific Method*, chap. II, §157, p. 85

³⁸⁶ *Ibid.*, chap. II, §159, p. 85

no obligation to do the impossible.³⁸⁷ It is important, of course, to assess the limits of a nation's duty when discussing morality. As demonstrated above, declining to fulfil your duty if you can is a sin. In this way, what Wolff is doing, is making the morally impossible equivalent to that, which is physically impossible.³⁸⁸ Thus, a nation merely has an imperfect right to aid - in this sense, the right to request it, but as I will explore later in relation to the source of the moral obligation for assistance, a nation may acquire a perfect right to such aid by means of a treaty. What is significant here, of course, is Wolff's highly controversial notion of *civitas maxima*: because what happens to these obligations of mutual assistance when Wolff assigns the necessary law of nations to positive international law? Surely, if the natural law that regulates the relationship between nations is perceived as positive law, this necessarily means that it can be enforced by common law and as such the distinction between imperfect obligations and perfect obligations would become much less obvious? It is exactly on the point that states need a particular commonality, the *civitas maxima*, to pursue and promote the common good that he differed from Pufendorf, who instead maintained that the law of nature is the only moral and legal regulator of the relationships between states.

We turn now to Wolff's disciple Emmerich de Vattel, who was highly influenced by Wolff's international jurisprudence. Like his mentor, he too strongly emphasised the moral person of the state and asserted that 'a moral being can have obligations towards itself only in view of its perfection and its happiness.'³⁸⁹ The preservation and perfection of oneself is the sum of all duties to the self or the nation. Vattel recognised that although nations have rights to self-preservation and independence, nevertheless, he also asserted that they have international duties

'Since the universal society of the human race is an institution of nature itself, that is to say, a necessary result of man's nature, all men of whatever condition are bound to advance its interests and to fulfil its duties. [...] When therefore, men unite in civil society and from a separate State and Nation [...] their duties towards the rest of the human race remain unchanged. [...] [I]t devolves thenceforth upon [...] the State, and upon its rulers, to fulfil the duties of humanity towards outsiders in all matters [...] and it peculiarly rests with the State to fulfil these duties towards other States.'³⁹⁰

³⁸⁷ Ibid., chap. II, §160, p. 86

³⁸⁸ Ibid., chap. II, §160, p. 86

³⁸⁹ Vattel, *The Law of Nations or the Principles of Natural Law*, book I, chap. II, §14, p. 13

³⁹⁰ Ibid., intro. §11, p. 6

As with human beings, the end of the great natural society among states, as Vattel terms it, is advancement in itself, which requires mutual assistance of all states towards each other to perfect themselves and thereby each other.

Vattel put the same emphasis on the hierarchy of duties as Wolff, in the belief that a nation's duties toward itself clearly take precedence over its duties towards others. Because states are free and independent of each other they themselves have to be the judges of what their conscience demands of them in relation to what they can or cannot do and therefore 'it is for each Nation to consider and determine what duties it can fulfil towards others without failing in its duties toward itself.'³⁹¹ Any enforcement on this point would be an encroachment on the natural liberty of nations; 'we may not use force against a free person, except in cases where this person [or nation] is under obligation to us in a definite matter and for a definite reason not depending upon his judgement; briefly, in cases in which we have a perfect right against him.'³⁹²

The important aspect, in relation to the topic at hand, is of course what those particular cases would be for Vattel (and Wolff), which will be explored further below. Vattel notes that the obligations nations have and the correlating rights that they produced can be divided into internal and external obligations. Internal obligations are what could be termed the conscience of each nation and are deduced from the rules of their duty towards themselves and other nations. When such obligations are considered relative to other nations they become external by producing some right on the part of particular nations. It is from external obligations that the duties nations have toward each others are deduced. These external obligations are divided into perfect and imperfect obligations. In this way, Vattel argues '*[p]erfect obligations* are those which give rise to the right of enforcing them; *imperfect obligations* give but the right to request.'³⁹³ However, there is a clear difference in the way Wolff and Vattel use the term 'imperfect' obligations compared to Pufendorf. As we saw in the previous chapter, Pufendorf thinks imperfect obligations no less obligatory than perfect one; the only difference is that perfect obligations are part of the positive law and backed by sanctions. Applying Pufendorf's particular conception of moral obligation to Wolff and Vattel would mean that a nation's duty of assistance would have an equal force as to its own preservation, which is clearly not what we find in their writings. For Wolff and Vattel a nation is free to act as it wills as long as it does not violate the perfect right of other nations and it acts under internal obligations without

³⁹¹ Ibid., intro. §16, p. 6

³⁹² Ibid., intro. §16, p. 7

³⁹³ Ibid., intro. §17, p. 7

any perfect external obligation. As Wolff also says: if it abuses its liberty, in this sense its internal obligations, then such acts are wrong, however, other nations cannot complain, because that would be to infringe upon the internal rights i.e. sovereignty of the particular nation.

As I have attempted to show, for Wolff and Vattel the mutual duty of nations to assist is crucial for the continuing relationship between states in promoting the common good within the society of states. However, it is only morally obligatory to the extent that it is so far as it is not detrimental to a nation's own preservation and survival. Both thinkers employ the strong analogy between individuals and states in the state of nature, thus emphasising that individuals have first and foremost a duty to preserve themselves before their natural sociableness dictates that they should assist other. However, for Wolff and Vattel, the need for mutual assistance is even less needed for states because they are more self-sufficient entities than individuals. Having then explored the conceptual possibility for a duty to assist, I will now seek to more specifically determine from what source such duties are grounded in.

The source of moral obligation: the voluntary or necessary law of nations?

As was demonstrated in chapter 3, there is much disagreement as to whether Grotius effected the move to a more secular natural law and natural rights tradition. The principal support for such a claim was to emphasise his use of subjective natural rights. With Vattel, and to a certain extent also Wolff, there is no doubt that such a secular move was being made. Unlike Grotius, Vattel makes only few references, generally only in passing, to religion. In his statement that every nation has a duty to preserve its corporate existence he asserts that the obligation was 'natural to the individual whom God has created'; however, nations are formed by civil compacts and believed that the obligation of self-preservation was brought upon them by 'human acts' and not nature.³⁹⁴ Mark Janis astutely notes that 'in considerable contrast to Grotius, Vattel in his treatment of promises, good faith and treaties, never rested their effectiveness on any sort of religious foundation. Instead, his cement of obligations was a rational mixture leavened by natural law.'³⁹⁵ Rather, Vattel saw religion as having a specific social purpose, noting that the state would 'profit greatly' by its people's religious

³⁹⁴ Janis, Mark W.: 'Religion and the Literature of International Law: Some Standard Texts', in Mark W. Janis and Carolyn Evans (eds.) *Religion and International Law*, (Boston: Martinus Nijhoff Publishers, 2004), pp. 121 -144, p.126

³⁹⁵ Ibid., p. 126

sentiment.³⁹⁶ As we will see in the following chapter, this notion of religion was very ‘Burkean’ in its prescription, where religion was noted for its social usefulness, rather than its appeal to any abstract truth.³⁹⁷

This secular move is important to emphasise in order to accentuate the conceptual conditions under which to understand the source of the obligations that nations have toward each other. What Wolff intended to do with his system of international law was, as Otfried Nippold notes in his introduction to Wolff’s *The Law of Nations*, to liberate international law ‘from the shackles of natural law.’³⁹⁸ As we have already seen, this had of course occupied many theorists’ minds grounded, as was the case with Grotius, in a wish to address the religious disputes of the day and also purport its universal applicability.³⁹⁹ Given the philosophical tradition he inherited, Wolff was no exception. What Wolff did, was to present international law as a discipline existing separately from the law of nature,⁴⁰⁰ and with this move, he thus followed in the conceptual footstep of Samuel Rachel. As was explored above, Wolff agreed with Pufendorf that states were moral persons and from that, they were in this way bound by the natural law. However, he was unwilling to support Pufendorf’s assertion that the principles of the law of nature affecting individuals were the same for states.⁴⁰¹ Thus, Wolff did not subscribe to Pufendorf’s contention that the law of nature was the only law regulating the relationships between states and as we have seen, by doing this the latter thereby denied the separate existence of a law of nations. In opposition to Pufendorf, then, Wolff asserted that there was a positive international law, which he named, as did Grotius, the voluntary law of nations.

What Wolff sought was to succeed where Grotius had failed, and give the voluntary law of nations firm foundations.⁴⁰² Wolff argued that there existed within the international

³⁹⁶ Vattel, *The Law of Nations or the Principles of Natural Law*, book I, chapt. XII, §126, p. 53; Janis, ‘Religion and the Literature of International Law’, p. 127

³⁹⁷ Emphasising the social utility of religion was not, of course, uncommon. Machiavelli, Hobbes and Rousseau, to name but a few, were convinced of the social efficacy of religion. Marx was also well aware of this efficacy, but saw it as an instrument, or opiate, of the ruling class in placating the people.

³⁹⁸ Wolff, ‘introduction’, p. xxxvi

³⁹⁹ This is something which of course echoes today, and is evident in some of the contemporary scholarship surveyed here, in particular on Grotius, as has already been discussed. Grotius seems to have suffered the slings and arrows of fortune to serve contemporary scholarships’ need to base human rights and international ethics on an anti- foundational platform. This is expressed in, for instance, various interpretations on ‘the impious hypothesis’ (Muldoon, Tuck, and Haakonssen), and Nussbaum’s use of a ‘Grotian’ human fellowship.

⁴⁰⁰ Ruddy, Francis Stephen: *International Law in the Enlightenment – The Background of Emmerich de Vattel’s Le Droit des Gens*, (New York: Oceana Publications INC., 1975), p. 36

⁴⁰¹ Ibid., p. 35; see Ruddy for further discussion on Wolff’s differences on this to Pufendorf and Leibniz.

⁴⁰² Ibid., p. 97

society, a *civitas maxima* – the supreme-state – which had its basis in the voluntary law of nations. And unlike Grotius and the Thomists, for instance, Wolff's voluntary law of nations is set part from the law of nature. Although thinkers like Rachel and Richard Zouche (1590 - 1661) had already taken this positivistic stance, Wolff's importance cannot be underestimated in applying to his system of philosophy an acknowledgement of the positive character of international law. However, as we have seen, Wolff did not discard the existence of the natural law; rather he discusses the natural law applied to states as the *necessary* law of nations, basing it on the general elucidations of doctrines about the laws of nature and man (or nation). As already explained, from the natural obligations we have as individuals, nations are bound by the same obligations and duties to themselves and to other nations, and it is from these duties that certain rights arise, which we then all originally possess from nature. It is these rights that form the necessary law of nations as applied to nations. However, the rights that nations have as corporate moral persons are somewhat different from those of individual persons. On behalf of their citizens, the nation exercises the duties that individuals have to the common good of mankind as whole.⁴⁰³ It is also from this that Wolff then deduces the fundamental rights of states, in that, like individuals, all states are equal by nature and as such no nations have privilege or precedence over others. No nation has the right to decide the actions of another state and the natural liberty of states may not be used to impede other nations. This in turn means that every nation has a right to defend itself against a looming injury or to avenge a committed injury. Importantly, nations also have rights to bind others to fulfil their obligations. Doing this they may thereby acquire rights which may not be taken from them. Lastly, nations have the right to resort to war if its rights are being violated.⁴⁰⁴ This was the general content of his natural or necessary law of nations. We turn now to his voluntary law of nations, which as has already been implied, met with considerable criticisms not least from his own pupil Vattel.

First of all, for Wolff, the voluntary law of nations did not remove the original obligations pertaining to the law of nature. As he explains

'[T]he only law given to nations by nature is natural law, or the law of nature itself applied to nations. This then can be changed by the acts of nations voluntarily, so far as concerns those things which belong to permissive law, and so far as concerns the performance of those things which belong to mankind. [...] But far be it from you to think that therefore there is no need of our discussing in detail the law of nations. For the principles of the law of

⁴⁰³ Wolff, *Prolegomena*, §3, p. 9; Boucher, *The Limits of Ethics in International Relations*, p.133

⁴⁰⁴ Nippold, introduction, p. xxxix

nature are one thing, but the application of them to nations another [...] in so far as the nature of nations is not the same as human nature. For example, man is bound to preserve himself by nature, every nation by the agreement through which it is made a definite moral person.⁴⁰⁵

From this it is clear, as has been noted, that he was firmly opposed to any notion that the law of nations should be conflated with the law of nature. Furthermore, from this last passage, Wolff also hints at an important postulate, which relates closely to his further explorations of nations' duties towards each other. He emphasises that nations are different from individuals, and it is on this basis that Wolff has a particularly restricted view of intervention. His apparent assumptions about the sufficiency of nations means that the duties of nations can only be morally obligatory, that is imperfect, not only because he sees the nation as having absolute sovereignty, but also, in part, because he contends that the nation is more self-sufficient than the individual. This led Vattel to give even greater emphasis to his departure from Wolff's idea of the *civitas maxima*: exactly because nations are not as vulnerable as individuals, they do not need to enter into an international civil society.⁴⁰⁶ For Wolff, then, the voluntary law of nations did not go against any original obligation of the natural law, rather it dealt with permissions derived from the natural law which could be enforced. The issue of permissive duties will be explored further below in relation to intervention. Thus, as we saw with other thinkers, the law of nations could not go against the law of nature and it could not demolish the moral obligations derived from it. The voluntary law of nations affected only externals and in this way the original obligations of the natural law were left unimpaired.

It remains to explore in more detail Wolff's notion of *civitas maxima* from which the voluntary law of nations is derived. Wolff explains that:

'All nations are understood to have come together into a state, whose separate members are separate nations, or individual states. For nature herself has established a society among all nations and compels them to preserve it, for the purpose of promoting the common good by their combined powers. Therefore since a society of men united for the purpose of promoting the common good by their combined powers, is a state, nature herself has combined nations into a state. Therefore since nations, which knows the advantages arising therefrom, by a natural impulse are carried into this association, which binds the human race or all nations one to the other [...] what can be said except that nations also have combined into society as if by agreement? So all nations are understood to have come together into a state, whose separate nations are separate members or individual states.'⁴⁰⁷

⁴⁰⁵ Wolff, *Prolegomena*, §3, p. 9 - 10

⁴⁰⁶ Boucher, *The Limits of Ethics in International Relations*, p. 142

⁴⁰⁷ Wolff, *Prolegomena*, §9, p. 12

The state, that Wolff understands nations to have combined into, he calls the supreme state. Its meaning is to be understood as a universal society or civil association, and he criticises Grotius for not having derived his own law of nations from such an idea. Wolff was aware that this would be a contentious idea and is careful not to promote it as a 'super state' as such; rather, he notes that it is a 'certain sort of state', meaning a society. Wolff is adamant that within this society of nations there exist rights to facilitate and promulgate laws that concern the society in general. As is the case with the particular states, civil laws are prescribed as a means of maintaining the good of the state, so too, Wolff contends, ought there be laws that prescribe the means by which the good of the *civitas maxima* can be maintained. What Wolff is proposing here, is in fact to include the necessary law of nations that is the natural law applied to states, into positive international law. 'No difficulty will appear', Wolff asserts, 'in establishing a law of nations which does not depart altogether from the necessary law of nations, nor in all respects observe it.'⁴⁰⁸ What he seems to be saying here, is that the obligations that nations have towards each other are all within the bounds of the good of the *civitas maxima*, and in this way, such obligations can never go against the purpose of the nation itself or the *civitas maxima*. Wolff explains this in the following way:

'Since in any state the right of the whole over the individual must not be extended beyond the purpose of the state, so also the right of nations as a whole over individual nations cannot be extended beyond the purpose of the supreme state into which nature herself has combined them, so that forthwith individual nations may be known to have assigned a right of this sort to the whole.'⁴⁰⁹

Just as when a state is established the individual assigns him or herself to the whole in order to promote the common good, so it is with nations, because it is nature that has brought nations together in this society. It is nature that has imposed certain obligations to promote the common good of the society of nations. This necessarily entails that nations ought to agree to be bound to the whole and as such it may thus be presumed that they have agreed. Thus, the voluntary law of nations rests on the implied agreement of nations. As mentioned, the law at the basis of this society of states is the voluntary law of nations; just as in a state the civil law it ultimately is reducible to the natural law, so must the civil law of the society of nations be reducible to the natural law. And as explored above, Wolff believes in the existence and force of such a law even by a state that denies its existence. As such, the voluntary law of nations for Wolff is conceived on a similar basis as that of civil law in municipal society.

⁴⁰⁸ Ibid., §11, p. 13

⁴⁰⁹ Ibid., §14, p. 15

The voluntary law of nations comprises two laws, the stipulative, or particular, which is treaty law and thus rests on the explicit consent of nations. The other law included in the law of nations is customary law, which he defines as the law so-called 'because it has been brought in by long usage and observed as law.'⁴¹⁰ This, as implied, rests upon the tacit consent of nations. All three laws, the voluntary, the stipulative, and customary law comprise the positive law of nations. The reason for such a detailed analysis here, is that, it is important for the topic at hand to note that Wolff's *civitas maxima* forms the basis for the supreme right of nations, which he terms *imperium universal sive gentium*. From this 'empire' the society of nations can for the good of the welfare of the society determine the actions of individual nations and importantly force them to fulfil their obligations. This will be further explored below in relation to Wolff's law of war. It would seem that to determine the source of the moral obligations and corresponding duties that nations have towards each other is the necessary natural law of nations for Wolff, which would mean that falling under the permissive natural law such duties are not absolutes, but instead imperfect moral obligations. However, because of Wolff's peculiar and highly original conception of the *civitas maxima* grounding the voluntary law of nations, it would seem that any moral obligations nations have toward each other could have more of a force within the society of states, if such obligations were deemed necessary for the common welfare of the society. Before, we explore in more detail from which obligation nations are inclined to resort to war, and whether there can be any humanitarian grounds underpinning such obligations, we turn to Vattel's conception of the law of nations.

Vattel begins his seminal work by noting that although the law of nations is a great and important subject, through time international thinkers have underestimated its importance, or rather, the ideas regarding it have been undervalued. He notes that by limiting the law of nations to those rules and customs resulting from mutual consent, their true origin has been degraded.⁴¹¹ Vattel notes how Grotius correctly had distinguished the law of nature and the law of nations, by asserting the law of nations as an established law based on the common consent of nations, but failed in distinguishing properly the law of nature as applied to individuals and the law of nature as applied to nations. He proceeds to assert that Grotius, if he had been more careful, would have noted that merely basing the law of nations on the consent of nations does not provide the full picture of what regulates the mutual relationship between states. Rather, the consent of nations forms the foundations and the source of the arbitrary law of nations,

⁴¹⁰ Ibid., §24, p. 18

⁴¹¹ Vattel, *Preface*, p.3a

which is a particular division of the law of nations.⁴¹² To elucidate his notion of the law of nations and the true foundation upon which he bases the voluntary law of nations, he seeks first of all to emphasise his departure from Wolff's international law system.

Like Wolff, the states that Vattel considers are like independent persons, naturally free and have the same rights. On the basis of this equality Vattel constructs a law of nations which is derived from the nation's right to self-preservation in which the first principle is the principle of the mutual independence of sovereign states. In the political climate after the Thirty Years War Vattel's fears about the possible hegemony of an emperor or pope are understandable. And this is also one of the main reasons why he opposes Wolff's *civitas maxima* because he suspects that such a civic federation of states would obstruct the independence and freedom of sovereign states, because it necessarily would entail the rule of a common superior. He immediately credits such notion as pure fiction, but nonetheless notes, that one day it might come to be a reality if it was exploited by clever politicians. Wolff's system of international law, then, left Vattel unimpressed due to the former's insistence on the *civitas maxima*.⁴¹³ That the voluntary law of nations would act as the civil law of one great republic was therefore an absurd notion for Vattel. As he said

'This does not satisfy me, and I find the fiction of such a republic neither reasonable nor well enough founded to deduce therefrom the rules of a Law of Nations at once universal in character, and necessarily accepted by sovereign States. I recognise no other society among Nations than that which nature has set up among men in general.'⁴¹⁴

Although, Vattel notes, nature has constituted for man a general society, where, given their natural sociableness they require assistance from their fellow men, nature cannot be said to have imposed or prescribed the perfect obligations of uniting them together into civil society. This is obvious for Vattel because it is no where as near a necessity for civil society among nations as it is among individuals.⁴¹⁵ What Vattel is saying, is that the reciprocal relationship between nations in terms of assistance, mutual intercourse and communication can be sufficiently regulated by the natural law.

⁴¹² Ibid., p.5a

⁴¹³ Ruddy, Francis Stephen: *International Law in the Enlightenment*, p. 36

⁴¹⁴ Vattel, *Preface*, p.9a

⁴¹⁵ Ibid., p.9a

Thus, even though Vattel departed from Wolff on some key issues, he was very much inspired by him in the contention that the law of nations is in fact a modification of the natural law applied to states. What he did first was to distinguish the law of nations into the *necessary* and the *voluntary*. Vattel believed the necessary law of nature was that which bounded the conscience of sovereigns and the positive law of nations relied on the will of the sovereign and included all the practical and prudential consideration in dealing with and alleviating the effects of war.⁴¹⁶ From this, as his criticism against Grotius shows, he wants to emphasise that nations' rights and duties are more fundamental and morally obligatory than merely resting upon the consent of individual nations in dictating the conscience of sovereign states towards such obligations. Vattel explains this in the following

'I shall reason much as Mr. Wolff has reasoned with respect to individuals in his treatise on the Law of Nature. That treatise shows us that the rules which by reason of man's free nature may govern *external* right do not destroy the obligation which the *internal* right imposes upon the conscience of each individual. It is easy to apply this doctrine to Nations, and to teach them by careful distinctions between internal and external right, that is to say between the *necessary* Law of Nations and the *voluntary* Law of Nations, not to feel free to do whatever can be done without impunity, when it is contrary to the immutable laws of justice and the voice of conscience.'⁴¹⁷

From this, then, Vattel deduces the necessary law of nations as the inner law of conscience of nations, whereas the voluntary law of nations recognises the need for certain modifications and exceptions, as for instance regarding war, in the exacting application of the necessary law of nations. However, Vattel is eager to demonstrate that they both have their origin in the natural law although their applications are quite different. His differentiations become clear from his definition below

'The *necessary* Law of Nations and the *voluntary* law have therefore both been established by nature, but each in its own way: the former as a sacred law to be respected and obeyed by Nations and sovereigns in all their actions; the latter as a rule of conduct which the common good and welfare oblige them to accept in their mutual intercourse. The *necessary* law is derived immediately from nature; while this common mother of men merely recommends the observance of the *voluntary* Law of Nations in view of the circumstances in which Nations happen to find themselves, and for their common good.'⁴¹⁸

⁴¹⁶ Ibid., p.10a – 11a; See also Boucher, *The Limits of Ethics in International Relations*, p.140

⁴¹⁷ Vattel, *Preface*, p.11a

⁴¹⁸ Ibid., p.11a

But what is important, and what lies at the core of Vattel's separation of the law of nations from the law of nature is his contention that the natural law does not derive its obligatoriness from God, but rather from reason itself. This is, as we recall, the secular move that some scholar misleadingly ascribed to Grotius. Vattel instead criticises Grotius and notes that 'men would be obliged to follow natural laws even by setting aside the will of God, because they are praiseworthy and useful.'⁴¹⁹ Unlike Pufendorf, for instance, for Vattel this did not undermine the enforceability of the obligations because he presents the law of nations as law, which states are subject to.

Thus, the voluntary law of nations is effectively positive international law because it results from the will of the sovereign. Furthermore, Vattel asserts, as did Wolff, that nations may, by will or consent give rise to the *arbitrary* law of nations, whereas treaties, agreements, and promises institute the *conventional* law of nations. The conventional law of nations binds the contracting parties, whereas implied in tacit consent lies the subscription to common practices, which establishes custom, in which common practises are accepted on the basis of 'long usage'. However, what grounds the obligatory nature of the arbitrary law of nations is the necessary law of nations which prescribes the honouring of tacit promises and as such it acts as a standard by which to judge the lawfulness and justice of treaties and customs.⁴²⁰

Vattel asserts the imperative need that justice is observed among nations, exactly because of the terrible nature of war. Thus, the justice of the universal human society among all mankind which underpins the necessary law of nations depends upon the mutual assistance and respect that nations afford each other.⁴²¹ However, it is improbable that having the right to judge their own moral obligations on the basis of their own conscience that this is sufficient to prevent conflicts as each nation would claim justice on their side. However, enforcing the necessary law of nations is another matter, one which Vattel sees as only exacerbating a conflict. And this is where Vattel sees the voluntary law of nations as far more certain in its application to fulfil this function.⁴²² Vattel, therefore, sees the voluntary law of nations as a much more practical expedient, and given the fact that it cannot judge the justness of a war, it is rather invoked to deal with issues relating to the conduct of war. Unlike the more traditional

⁴¹⁹ Vattel, Emmerich de: 'Essay on the Foundation of Natural Law and on the First Principle of Obligation Men Find Themselves Under to Observe Laws' in *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an introduction by Bela Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), pp.747 – 772, p. 760

⁴²⁰ Boucher, *The Limits of Ethics in International Relations*, p. 142

⁴²¹ Vattel, *The Law of Nations or the Principles of Natural Law*, book II, chap. V, §63, p. 135

⁴²² Boucher, *The Limits of Ethics in International Relations*, p. 143

natural law thinkers explored in the previous chapters, Vattel holds that it must be presumed that each side has equal justification in war exactly because states are perfectly equal. However, to reiterate, the voluntary law of nations cannot make right what is naturally wrong:

*'It must never be forgotten that this voluntary Law of Nations, established from the necessity and for the avoidance of greater evils, does not confer upon him whose cause is unjust any true rights capable of justifying his conduct and appeasing his conscience, but merely makes his conduct legal in the sight of men, and exempts him from punishment.'*⁴²³

From this, it is clear then, that in terms of the source of the moral obligations, although imperfect, the duty to assist other nations comes from the necessary law of nations, however, what regulates the discharge of such obligations is the voluntary law of nations. From the above exploration there are clear parallels to be made between the issue facing international humanitarian justice today and the problems which Wolff and Vattel sought to address for international relations of the 18th Century. Although they present a secular natural law tradition, the perfect obligations of humanitarian intervention have their source solely in human agreement and conventional international law, whereas the imperfect moral obligation of nations is derived from the law of nature.

As we have seen from the above discussion, for Wolff and Vattel the duty to assist is an important issue relating to international law. By positioning the principle of sovereignty as taking priority over any duty to assist such duty can only be imperfect at best. However, as we shall see, Vattel presents a conceptual solution to Wolff's absolute principle of non-intervention in the internal affairs of another state, however despotic its ruler may be. Thus, having explored the conceptual possibility for a duty to assist and the source of such duties, I will now turn more specifically to the conditions under which such duties arise.

Notions of humanitarian intervention and the case against intervention

As was explored above, for both Wolff and Vattel there was a clear duty to assist, however such moral obligations were imperfect. Although the principle exists for both thinkers the conditions under which such duties arose varies, especially in relation to intervention as

⁴²³ Vattel, *The Law of Nations or the Principles of Natural Law*, book III, chap. XII, §190, p. 305

grounds for just war. Christian Wolff makes a very clear distinction between barbarous and civilized nations. Civilised nations have a duty under the natural law to assist these less civilised nations in deficiencies that impede their progress to a more civilised way of life. In this then, as already demonstrated, there is a strong duty to assist, but equally there is also a strong duty on the part of the potential recipient to accept assistance where a country lacks the resources to perfect itself. This is because to refuse assistance impedes the nation's fulfilment of its duty toward itself and towards humanity. About such states Wolff notes that 'these will be the ones whose hearts are still void of the universal love of all toward all, and who have not yet realised in their hearts that there is a society which nature herself has established among men, and much less do they recognise that society which this same nature is understood to have established among all nations.'⁴²⁴ Thus, Wolff's principle of a duty to assist less resourceful nations, for instance 'barbarous' states, is a potential strong principle of humanitarian intervention however imperfect the obligation might be. What seems to be the case of Wolff's theory is that for the nations that met and conformed to the standard of civility and civilised conduct and culture the principle of sovereignty is sacrosanct.⁴²⁵ What of the nations that do not meet such standards? Wolff is adamant that barbarism and an uncultivated way of life do not constitute grounds for just war against a nation and notes that this would be a mere pretext for war. From this argument then, he takes a clear stand against Vitoria and in particular Grotius

'Approval is not to be given to the opinion of Grotius, that kings and those who have a right equal to that of kings have the right to exact penalties from any who savagely violate the law of nature or of nations, nor is there need for correcting this, to employ the warnings which he puts forward in §§41 and following ['Wars of Punishments']. The source of the error is found in the fact that the evil seems to him of such a nature that it can be punished and that it is quite in harmony with reason that it may be punished by him who is not guilty of it.'⁴²⁶

Wolff emphasises this criticism that any nation has a perfect right to *seek* the services of humanity, but no man has the right to compel another to accept such service. Thus, although there is a strong notion of humanitarian aid there is an even stronger notion of the case against intervention. This also means that Wolff is resolute that neither should there be interfering in the government of another, because government exists unconditionally for the exercise of its

⁴²⁴ Wolff, *The Law of Nations Treated According to Scientific Method*, chap. II, §160, p. 94

⁴²⁵ Boucher, *The Limits of Ethics in International Relations*, p.180 - 181

⁴²⁶ Wolff, *The Law of Nations Treated According to Scientific Method*, chap. II, §169, p. 89

own sovereignty and as such no ruler has the right to interfere in the government of another to.⁴²⁷ Wolff rehearses his argument where a ruler of a state burdens his subjects too harshly and treats them in this way. Wolff reaffirms his argument that a ruler of another state may not resist such a tyrant by force; however, he may intercede on behalf of the subjects in question. But such intercession should not be grounded in force but rather belongs to the realm of politics and diplomacy. But, as he notes, sometimes even intercession is not an option because it can be rightly refused if offered and all that is left then is for the pleading nation to 'endeavour by its prayer to persuade him to change his mind.'⁴²⁸ For Vattel such a stand was hardly good enough in dealing with tyrants and he puts forward certain conceptual possibilities for grounds of just war against tyrants and third party intervention regarding civil wars, as will be apparent later on.

Furthermore, Wolff also has a strong argument against any nation forcing another nation to embrace its religion. Force, Wolff notes, 'is a means not suited to inculcate truth.'⁴²⁹ Wolff argues that the issue here is not whether or not religion can be propagated by force, this seems beside the point for him, but the important issue relates instead to the right of nations towards nations. But part of a nations' duty toward itself and toward others is to promote the true worship of God, as Wolff calls it, but this cannot be done by force, only by persuasion. Such persuasion is done through teaching and missionaries, but it is in a nation's right to deny any admittance of missionaries in its territory. This was in clear opposition to Vitoria and Sepúlveda who believed that treating missionaries badly gave rise to just cause of war. Although Vitoria did not believe that the Indians could be forced to submit to a Christian God, he nevertheless put forward the strong belief in a common origin of mankind. This was grounded in the so-called Christian notion of *oikumene*: God's will for the perfection of man and the natural world had to be extended over the whole world. It was for exactly this reason, as we have seen, that Vitoria argued that the Indians possessed reason, because if this notion of *oikumene* was to be so, all peoples had to have sufficient enough reason to grasp Christian teachings; otherwise the obligations God had given Christians would have been contradictory. Vitoria had said that 'God and nature never fail in the things necessary.'⁴³⁰ This was also one of the reasons that Sepúlveda's doctrine of natural slavery inevitably was viewed as heresy. Sepúlveda, as we have seen, firmly believed in justifying war against the Americans Indians on

⁴²⁷ Ibid., chap. II, §257, p. 132

⁴²⁸ Ibid., chap. II, §258, p. 132

⁴²⁹ Ibid., chap. II, §259, p. 132

⁴³⁰ Cited in Jahn, *The Cultural Construction of International Relations*, p. 66

account of them being heretics and sinners and to save their souls by forcing them to conform to the true religion. As such, he presents one of the strongest notions of humanitarian intervention on the basis of religion. Arguments like these were something both Wolff and Vattel viewed with great suspicion; it was partly for such reasons that missionaries did not have special status. For Wolff no nation has a right to punish missionaries or treat them badly unless they have disturbed the public peace or are unwilling to leave if asked. Indeed, neither is atheism a just cause for punitive wars. Here it is apparent that Wolff takes a much more non-sectarian stand away from religious matters than his 16th and 17th Century predecessors. Nations are bound to perform the duties towards each other regardless of religious preferences

‘For the love of mankind, or charity, which embraces all duties of one man towards others, extends to all men generally, without any regard to religion. And there is no one of us who does not recognise this, and who does not condemn the perverse belief of the ancients, which bids us hold in scorn those who devoted to another religion.’⁴³¹

Wolff then seems to have a strong notion of non-intervention, even in cases where a people is oppressed by its sovereign ruler. However, he notes that in cases where there are persuasive reasons for undertaking war, which are for the good of the state or common good of citizens, and also, in this case, accompanied by just causes, then such wars are just. However, this is articulated very vaguely. As mentioned, the purpose of the state is to preserve and perfect itself and others, and in this way contribute to the common good. However, Wolff is wary that such motives could be misused as mere pretexts. As he notes ‘it is by no means sufficient that wars should be waged justly, but it must also be waged with righteous motives. Therefore one must also be on his guard lest in the consideration of persuasive reasons something vicious may be admitted.’⁴³² Importantly, then, Wolff alludes to right intent as an important part in the justifications of war.

For Wolff a just cause of a war only arises between nations when a wrong has been done, or is likely to be done – in this sense war in relation to pre-emptive strikes. This is prescribed by the natural law as it exists between nations. In relation to humanitarian intervention then, grounds for just war here would mainly arise if there existed some convention between nations that had instituted a perfect obligation of assistance. Although posited as a kind of legal fiction in Wolff’s idea of the *civitas maxima*, the necessary law of nations is conceived as positive international law for the good of the welfare of the society of

⁴³¹ Wolff, *The Law of Nations Treated According to Scientific Method*, chap. II, §263, p. 135

⁴³² Ibid., chap. VI, §628, p. 320

nations. This society can determine the actions of individual nations and force them to fulfil their obligations. By this, if a duty of assistance in a particular situation is perceived to be necessary for the common good, then, theoretically, this could be enforced.

I will now turn to Vattel and how he devises, what he clearly saw, as deficiencies of Wolff's arguments against intervention. Vattel also presented the principle of the duty to assist, however, as with Wolff, this duty to assist relies on the nations own judgement of self-preservation and capability to assist. In practice this would mean, that when a neighbouring state is attacked unjustly by a powerful enemy, which threatens to destroy it, Vattel notes that if the state without causing great harm to itself can come to the aid of the attacked state, there is no question as to why it should not do so. We find the same duty of assistance in relation to famines

'If a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity. To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so.'⁴³³

Because, as we explored above, Vattel's notion of human society imposed obligations on nations to contribute not only to their own advancement and happiness but also to others, it is important that such contributions to the general good of humanity are brought about peacefully and not through violence. Thus, if an uncivilized state asks for assistance to improve its condition, a state should not refuse it the necessary assistance of teachers etc to assists it in its own self-perfection. But as Wolff also argued forcing such assistance upon the state is a violation of its natural liberty. Here, Vattel makes a clear argument against the Spanish theologians as well as Grotius himself.

'Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them and have them instructed in the true religion – those usurpers, I say justified themselves by a pretext equally unjust and ridiculous. It is surprising to hear the learned and judicious Grotius tell us that a sovereign can justly take up arms to punish Nations, which are guilty of grievous crimes against the natural law.'⁴³⁴

⁴³³ Vattel, *The Law of Nations or the Principles of Natural Law*, book II, chap. I §5, p. 115

⁴³⁴ Ibid., chap I §7, p. 116

Grotius's mistake, Vattel argues, is that he confused the freedom attributed to the individual and the sovereign state somehow gives rise to a right to punish crimes against violations of the law of nature, when in fact those crimes do not affect its own rights or safety. For Vattel, a nation's right to punish only exists against those who have injured it; otherwise it violates the autonomy of the moral person of the sovereign state. The right to punish crimes against nature as Grotius conceives it, gives for Vattel, states ruled by ambitious men too easy a pretext for waging war and 'opens the door to all the passions of zealots and fanatics.'⁴³⁵

Vattel notes that it is truly impossible for nations to fully realise their duties of mutual assistance if they do not love each other. Thus, here, Vattel alludes to, as did Wolff, that offices of humanity should advance from a 'pure source', meaning that the intentions must be grounded in just motivation of charity and morality. From this point, it must be questioned whether Vattel, in fact, is a proponent of the principle of *terra nullius*, which Grotius and in particular Locke advocated as grounds for just acquisition. In contrast to Pufendorf, Vattel was much more permissive in allowing for appropriation of 'uninhabited' lands, believing that when the nations of Europe came upon the lands 'which the savages have no special need of and are making no present continuous use of, they may lawfully take possession of them and establish colonies in them.'⁴³⁶ However, he firmly notes that this is to be done only as a means of sustaining life in accordance with the natural law and, unlike Locke, mere occupancy for Vattel is not enough. As he notes

'But it is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence the Law of Nation will only recognise the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or make some actual use of them.'⁴³⁷

Thus, from this then, Vattel was in fact much more nuanced on the point of *terra nullius* than what is usually recognised, mainly because he believed that history had shown that such occupations were mere pretexts employed by Spain and Portugal, in particular, to colonise the

⁴³⁵ Ibid., book II, chap I §7, p. 116

⁴³⁶ Ibid., book I, chap XVIII §209, p. 85

⁴³⁷ Ibid., book I, chap XVIII §208, p. 85

Americas for individual gain and exploitation. Against the 16th Century conquest of South America, he contrasts 'the moderation of the English Puritans' who were the first to settle New England, and holds William Penn (1644 - 1718) and his Quaker colony as praiseworthy examples of how land, they wished to occupy, was bought from Indians.

As has been emphasised, Vattel has a strong notion of state autonomy and sovereignty, however, although he is very clear that if a rule violates his state's fundamental laws and the law of nature this would give his subjects just cause to resist him. If the ruler's insufferable tyranny should bring about a national revolt against him, *pace* Wolff, Vattel asserted that any foreign power 'may rightfully give assistance to an oppressed people who ask for its aid.'⁴³⁸ Vattel gives the example of the William III of Orange (1650 - 1702) coming to aid of the English against James II (1633 - 1701) in 1688 bringing about the Glorious Revolution. Thus, when such circumstances reach the state of civil war, nations may assist whatever two parties seem to have justice on their side. However, 'to assist a detestable tyrant, or to come out in favour of an unjust and rebellious people, would certainly' as Vattel notes, 'be a violation of duty.'⁴³⁹ The grounds for such intervention has to be found in Vattel's argument that when such a situation occurs the principle of sovereignty of the state is temporarily suspended in the sense that the political bonds between a sovereign and his people are broken and as such constitute two distinct parties. They are both to be conceived as independent of foreign authority and judgement, and until the issue is resolved they must be allowed to act as if they possessed the same equal rights as any other nation. This is an important point to make because as has been demonstrated here, for both Wolff and Vattel it is the principle of states' equal natural liberty and as such sovereignty which provide the conditions for the principle of the duty to assist. However, by presenting a different application of the principle of sovereignty Vattel furnishes the opportunity for humanitarian intervention in cases of grievous oppression of a people. Vattel readily seems much more concerned with the problems of tyrants and the historical evidence for the need to deal with such instances than Wolff. 'As for the monsters' Vattel notes 'who, under the name of sovereigns, acts as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth.'⁴⁴⁰

As with tyrants, Vattel is also particularly concerned with hegemonic powers, such as the Holy Roman Emperor shaping the power relations of the European state system in the 16th

⁴³⁸ Ibid., book II, chap IV §56, p. 131

⁴³⁹ Ibid., book II, chap IV §56, p. 131

⁴⁴⁰ Ibid., book II, chap IV §56, p. 132

Century, and was one of the first international jurists more carefully to address the notion of the concept of the balance of power. The notion of an all powerful or too powerful sovereign in the European state system was also the reason why he took such a strong stand against Wolff's idea of the supreme state. In relation to this, Nicholas Greenwood Onuf has argued that Vattel creates a problem for himself because, while the natural society of states can remain as a foundation for the *necessary* law of nations, the voluntary law has nothing to compare, and thus Vattel's solution is to found it on the balance of power.⁴⁴¹ Although misconceived, this is an important observation, because this would change the condition under which obligations to assist might arise, especially in viewing the balance of power as way to promote and maintain the common good of the society of states. However, unlike Burke, who will be explored in the next and final chapter, Vattel did not allude to the balance of power ever having such a moral purpose. Vattel's view of the balance of power is mainly descriptive. He saw inter-state relations as being more analogous to human beings governed by a natural law and thus obliging them to respect each other's rights.⁴⁴² It was in this framework, which he believed the principle of the balance of power operated. The descriptive balance of power was referred to, more as a system or mechanism than a policy, created by the treaties, which had ended the War of The Spanish Succession (1701 - 1714); sometimes it was even referred to as the 'System of Utrecht'. It was the idea that despite the complexity of interactions, there was a direct relationship between the set of structures, which described the international system of states and the behaviour of individual states within the system.⁴⁴³

Vattel based the principle of the balance of power on the absolute right, especially of smaller states, to combine for the purpose of safeguarding their independence against the threat posed by their greater neighbours.⁴⁴⁴ Thus, he comes very close to argue that a war taken up for the sake of the balance of power would be a just war. This of course has to be understood in connection with his idea that the states of Europe constituted some sort of Republic, where the forming of confederations and alliances would be a just method to make a stand against very powerful sovereigns and prevent them from dominating. He claimed that the states of Europe 'each independent, but all bound by a common interest – unite for the maintenance of order

⁴⁴¹ Onuf, Nicholas Greenwood: 'Civitas Maxima: Wolff, Vattel and the Fate of Republicanism', in *American Journal of International Law*, vol. 88, no. 2, 1994, pp. 280 – 303, p. 301

⁴⁴² Knutsen, Torbjørn L.: *A History of International Relations Theory* (Manchester: Manchester University Press, 1997), p. 120

⁴⁴³ Sheehan, Michael: *The Balance of Power – History and Theory* (London: Routledge, 1996) p. 76

⁴⁴⁴ Anderson, M. S.: 'Eighteenth-Century Theories of the Balance of Power' in Ragnild Hatton and M. S. Anderson (eds.) *Studies in Diplomatic History – Essays in the memory of David Bayne Horn* (London: Longman Group, 1970) 183 – 198, p. 190

and the preservation of liberty. This is what has given rise to the well-known principle of the balance of power, by which is meant an arrangement of affairs so that no State shall be in a position to have absolute mastery and dominate over the others.’⁴⁴⁵ Thus, the idea of a balance came to be centred on the idea of natural rights and any war, which was said to defend this principle, could be morally justified. As such, it followed that lesser goods, such as alliances and successive principles, had to be sacrificed for its preservation. The logic behind it was that just as an individual had to sacrifice some of his personal wealth and rights for the good of the community, so too had states (or sovereigns). This idea is especially promoted by Burke. However, unlike Burke, as will be apparent in the next chapter, Vattel does not present the ‘Republic of Europe’ as a Commonwealth of Europe as Burke does, which was viewed as a wholly moral essence founded on the ethical and cultural unity of states, and it is for this reason that his conception of the balance of power is mainly descriptive. Invoking the balance of power as a just cause in itself is not what Vattel is directly advocating, whereas for Burke, this was to be his main justification for intervening in Revolutionary France. As Vattel notes

‘Considerations would be a sure means of preserving the balance of power and thus maintaining the liberty of Nations, if all sovereigns were constantly aware of their true interests, and if they regulated their policy according to the welfare of the State. But powerful sovereigns succeed only too often in winning for themselves partisans and allies who are blindly devoted to their designs. Dazzled by the glitter of a present advantage, seduced by their greed, deceived by unfaithful ministers, how many princes become instruments of a power which will one day swallow up either themselves or their successors. The safest plan, therefore, is either to weaken one who upset the balance of power, as soon as a favourable opportunity can be found *when we can do so with justice* [my italics], or by the use of all upright means, to prevent him from attaining so formidable a degree of power.’⁴⁴⁶

The justice of war that Vattel refers to, is, as already explained, nations’ right to assist the weaker state against any formidable sovereign and prevent him from too easily oppressing the state. Although, the last sentence in the quote above is ambivalent, in that it potentially reads that safeguarding of the balance of power itself is ground for just war, Vattel seems to argue that by acquiring such a degree of power is an act of more or less aggression. To prevent this from happening, Vattel notes that ‘all Nations should be on their guard above all not allow him to increase his power by force of arms, and this they are always justified in doing. For if a prince wages an unjust war every Nations has the right to assist the oppressed State; and if he wages a just war, neutral Nations may interpose to bring about a settlement [...] and [...]

⁴⁴⁵ Vattel, *The Law of Nations or the Principles of Natural Law*, book III, chap. II, §47, p. 251

⁴⁴⁶ *Ibid.*, book III, chap. II, §49, p. 251

prevent it from being subjugated'.⁴⁴⁷ Thus, the balance of power is never promoted directly as a just cause for war but is rather viewed as an important consideration with which to promote a stable system of states as the basis for international peace.

Conclusion

What has first and foremost been elucidated in this chapter is the place for humanitarian considerations within new conceptual frameworks for international relations which were emerging with the theoretical emphasis on the idea of the sovereign state as the main actor in international society. Both Wolff, and especially Vattel, who sought to popularise and systemise Wolff's jurisprudence, brings about the modern era when the state becomes the subject of international law. This has clear ramifications on views pertaining to notions of humanitarian intervention. Unlike Grotius who still retained the individual as the main subject of international law, which then ultimately carries his theory of punishment for crimes against the natural law, for Wolff and Vattel the consequences of conceiving the sovereign state as subject of international law and the main actor in international relations is that grounds for humanitarian intervention are considered in purely imperfect terms. There is no question in the two thinkers that sovereign states have a duty of assistance towards each others, but the sovereign integrity of the state comes before considerations of humanitarian assistance and duties. Although, Vattel saw to redeem what he viewed to be deficiencies of Wolff's theory in relation to assisting the oppressed subjects of a tyrant, such intervention was still envisaged in terms of a strong principle of state sovereignty. And also, Vattel does not seem to have taken the argument beyond general notions of civil war. Burke on the other hand was acutely aware of the need to address what he viewed as the problems of the Revolution in France. Although he, as we shall see, saw at first to draw on Vattel's justification of intervention in a civil war, he ultimately found this theory wanting and went beyond Vattel in his attempt to make war against the French system of 'alien' values and justify a regime change. Such justification was grounded in his underlying idea of a Commonwealth of Europe, which had as its moral basis, exactly for this reason, a very different conception of customary law than what Vattel was expounding.

⁴⁴⁷ Ibid., book III, chap. II, §49, p. 252

Chapter 6

Edmund Burke

‘When bad men combine, the good must associate;
else they will fall one by one, an unpitied sacrifice
in a contemptible struggle’,⁴⁴⁸
- Edmund Burke (1770)

Introduction

One central claim within Burke’s anti-revolutionary political philosophy was that not only was it necessary to defeat France militarily, but that it also called for regime change and the restitution of the *ancient regime*. This required a right of intervention in the domestic arrangements of another country. Burke based his case not on traditional foundations such as the natural law, and its modern derivative natural rights but upon the premises of customary law. At the core of Burke’s political thought was a resounding dismissal of the idea of natural rights. He used the term ‘law of nations’ as the principal component in the laws common to Europe – the similitude of religion, laws and manners to which all European nations were bound, and which were not the result of abstract thinking, but emerged in the course of historical relations among the family of European nations.

This family, Burke called the Commonwealth of Europe. For him moral prudence was the regulator of social change and the premises for intervention in France was the prescriptive framework of the ‘publick law of Europe’ in which all meaning for what he calls the law of nature must be sought. What I want to explore first is the notion that Burke thought that Europe was a family of nations sharing common sympathies; these nations were bound together not so much by natural law, and abstract principles, but instead by customary law. This was superior to what Vattel called ‘the voluntary law of nations’ that is, express agreements. On a general note, it is clear that through his works Burke is rehearsing arguments for intervention whether using Vattel as a main authority to persuade the government into action or emphasising a specific balance of power policy that needed to be sought. The historian Iain Hampher-Monk voices his concerns in a recent article against scholars who

⁴⁴⁸ Burke, Edmund: ‘Thoughts on the Cause of the Present Discontents’ (1770), in Canavan, Francis (ed.): *Selected Works of Edmund Burke* (a new imprint of the Payne edition (1875)) vol. 1 (USA: Liberty Fund Press, 1999), p. 146

present Burke's justification for intervention as deriving from an unchanging theoretical position. Correctly, he argues that Burke 'soft-pedalled any outright championship for intervention for strategic reasons' and although he increasingly relies on Vattel for authority the restorationist context of intervention, which Burke sought, it could never be congruent with the grounds Vattel offered.⁴⁴⁹ Hampsher-Monk argues that international law provided Burke with no apparent grounds for the kind of ideological campaign he was pursuing and that he in the end develops an interventionist argument based on Roman law in conceiving nations not as part of international law, but rather domestic law.⁴⁵⁰

This chapter endeavours firstly to emphasise the important distinction between Burke's justifications for intervention, which frequently, as Hampsher-Monk so aptly illustrates, resonates in Burke's rhetoric and political necessities, and the premises for intervention, which he expounds within the tradition of customary law. What Burke was stressing was the recognition of the moral claims of the Commonwealth of Europe against revolutionary France, which was enforced through norms and customs. The idea that Burke positioned was that the spirit to which a law is implemented is important and thus this became the crucial element in the customary international law that Burke was articulating. One of the main questions I want to examine is what is the moral basis of this Commonwealth? The answer is that it has the same basis as any other society: prescription, presumption and prejudice as embodied in the common practices of a people, and manifest in its common law. Thus, I want to argue that customary law was the informing principle of Burke's thinking. Customary law, then, provides the moral constraints regulating the commonwealth of Europe. In basing the 'law of nations' on customary law Burke stands, on an important point, in contrast to what the international jurist Vattel called 'the voluntary law of nations', which was effectively positive international law expressing agreements rather than underlying moral norms and values. In this sense Burke is shifting the ground of obligation, because his idea of obligation is very different from many the natural law thinkers in that it is grounded in prescription and as such Burke presents a theory that moves past the impregnability of the principle of sovereignty that was presented by Vattel. What I ultimately want to show with this is that it is customary law theory that provides Burke with the justification for intervention in France, and indeed in any country that upsets the balance of the commonwealth of Europe.

⁴⁴⁹ Hampsher-Monk, Iain: 'Edmund Burke's changing justification for intervention' in *The Historical Journal*, 48, 1, (2005), pp. 65 – 100, p. 66

⁴⁵⁰ *Ibid.*, p. 97

This intervention was, above all, grounded in humanitarian considerations, which was so, exactly because of the customs underpinning the Commonwealth of Europe.

Edmund Burke is perhaps one of the most notable critics of revolutionary politics. The theoretical and ideological arguments presented in his celebrated work *Reflections on the French Revolution* continue to this day to inform modern conservatives.⁴⁵¹ What is interesting is that given this legacy, he had, in fact, far from 'conservative' views on international relations; Burke is instead much more of a radical in relation to intervention. Ultimately, Burke adhered to a weak idea of sovereignty because his idea of intervention in France took precedence over its absolute liberty and independence in that it was part of a wider moral domain – the Commonwealth of Europe.

The Commonwealth of Europe and International Order – A Family of Nations

For Burke, international society was state-based⁴⁵², and these states each had their own peculiar prescriptions, prejudices and customs, which subsequently meant that there was no fixed pattern of development through which the state had to go.⁴⁵³ The state was not just a geographical entity, but in it was incorporated a sense of continuity, which was based on prescription, historical social circumstances, and divinity. As Burke asserted, the "Nation is a moral essence, not a geographical arrangement, or a denomination of the nomenclator."⁴⁵⁴ In this way, so too were commonwealths.⁴⁵⁵ According to Burke, there existed a fundamental social, political, and cultural sympathy extending across sovereign borders, which sustained order among the members of the European international society.

In his *Letters on a Regicide Peace* he maintained that Europe is "virtually one great state having the same basis of general law, with some diversity of provincial customs and local establishments. The nations of Europe have had the very same Christian religion, agreeing in the fundamental parts, varying a little in the ceremonies and in the subordinate doctrines."⁴⁵⁶ In this way Europe was seen as constituting one large state or a society of nations.⁴⁵⁷ He termed

⁴⁵¹ Haddock, Bruce: *History of Political Thought - 1789 to the present*, (Cambridge: Polity Press, 2005), p.26

⁴⁵² Burke also often talk of nations

⁴⁵³ Boucher, David: *Political Theories of International Relations – from Thucydides to the present* (Oxford: Oxford University Press, 1998), p. 319

⁴⁵⁴ Burke, Edmund: 'Letters on a Regicide Peace I, II, III, IV' (1795 - 1797) in Canavan, Francis (ed.): *Selected Works of Edmund Burke*, (a new imprint of the Payne edition (1875)) vol. 3 (USA: Liberty Fund Press, 1999), 'Letters on a Regicide Peace I', p. 139

⁴⁵⁵ Ibid., p. 63

⁴⁵⁶ Ibid., p. 133

⁴⁵⁷ Boucher, *Political Theories of International Relations*, p. 320

this vision of European international society, the Commonwealth of Europe, in which these thoughts on diversity and unity came together. Despite an acknowledgement that each state possessed its own national character, he believed that this autonomy and diversity was made possible precisely because these states also possessed a sense of community and thus, a collective commitment to maintaining order.⁴⁵⁸ At the foundation of this ethically and culturally united community was the Christian religion and the state's attachment to the monarchical form of government – 'the spirit of European Monarchy', which generated a solidarist consensus among the states in nurturing and maintaining order.⁴⁵⁹ Moreover, Burke emphasised common customs and legal heritage and just as important, 'manners' shared by all the peoples in the European Commonwealth. Consequently, Burke, accentuated the cultural similitude throughout Europe, comprising these above-mentioned elements, as forming part of the long-standing tradition of Christian European civilisation, which the states would dedicate themselves in preserving. Here, a significant aspect is that Burke's definition of Commonwealth relied on his differentiation of European civilisation from the outside world,⁴⁶⁰ because it was these ancient manners, which distinguished Europe from the non-European societies in Asia, the New World, and the Ottoman Empire. This has to be understood in conjunction with Burke's overriding need to reinforce the uniqueness of the European identity.

Burke held that manners were ultimately more important than any laws, because, in a great measure, laws depended on manners, not the other way around. As such, in addition to the spirit of religion his idea of the 'spirit of a gentleman', associated with the prescriptive and presumptive manners and sentiments, deriving ultimately from ancient chivalry, became imperative to the maintenance of order among European states.⁴⁶¹ In this way, Burke conceded that, more than anything else, it was the deep bond of affection between the European states, which arose from their similitude

'Men are not tied together to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. [...] Nothing is too strong a tie of amity between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. They are obligations written in the heart. [...] The secret, but irrefragable bond of habitual

⁴⁵⁸ Fidler, David P. and Welsh, Jennifer M. (ed.): *Empire and Community – Edmund Burke's writings and speeches on international relations* (USA: Westview Press, 1999) p. 48 - 49

⁴⁵⁹ Welsh, Jennifer M.: *Edmund Burke and International Relations – the Commonwealth of Europe and the Crusade against the French Revolution* (London: Macmillan Press, 1995), p. 70

⁴⁶⁰ *Ibid.*, p. 70

⁴⁶¹ Boucher, *Political Theories of International Relations*, p. 320

intercourse, holds them [men] together, even when their perverse and litigious nature sets them to equivocate, scuffle, and fight about the terms of their written obligations.’⁴⁶²

The ties and obligations were therefore stronger than any treaty, and although these common sympathies and shared sentiments were not sufficient enough to prevent war, they did produce certain equanimity, which helped to curtail the animosity between nations.⁴⁶³ As Burke asserted, it was due to this similitude that ‘peace is more of peace, and war is less of war.’⁴⁶⁴

Importantly, therefore, what held Europe together was, for Burke, not so much the more procedural aspects of international relations, such as diplomacy and international law, but rather the ‘substantive horizontal links of culture.’⁴⁶⁵ It was the political and social considerations, which accentuated the underlying homogeneity of Burke’s European Commonwealth, and in this way his international society presupposed a common culture. For him, European international order was premised on conformity with the standards of European civilisation,⁴⁶⁶ which fits in with Burke’s acknowledgement of diversity in religious, social and political matters within the European Commonwealth. However, there was always a limit to Burke’s homogeneity: In rejecting doctrinal uniformity Burke strived more for international order than international perfection. ‘We are not to look’ Burke contended, ‘for perfection in anything that we are capable of understanding. All human relations are intermixed with evil and error, and all that is in our power, is to adopt those which are the clearest from both.’⁴⁶⁷

There is a conservative limit to his idea of ‘similitude’.⁴⁶⁸ In *Remarks on the Policy of the Allies* (1793) Burke shows a scepticism towards the more radical doctrines of ideological homogeneity or as he termed it here ‘the tiresome uniformity of fixed principle’⁴⁶⁹, by accepting certain diversity among the European states as part of maintaining international order. Thus, his ‘unity in diversity’ is much less ambitious, because he denied the fixed ideological principles of the Revolutionaries; retained a Realist aversion to progressive philosophy; and denied that European solidarity can do away with war; but at the same time he

⁴⁶² Burke, ‘Letters on a Regicide Peace, I’, p. 132

⁴⁶³ Boucher, *Political Theories of International Relations*, p. 320

⁴⁶⁴ Burke, ‘Letters on a Regicide Peace, I’ p. 133

⁴⁶⁵ Welsh, *Edmund Burke and International Relations*, p. 74

⁴⁶⁶ *Ibid.*, p. 80 - 81

⁴⁶⁷ *The Annual Register or a view of the history, politics and literature for the year 1772* (London: printed for J. Dodsley, Pall Mall [1760?] – 1838) p.3

⁴⁶⁸ Welsh, *Edmund Burke and International Relations*, p. 82

⁴⁶⁹ Edmund Burke, ‘Remarks on the Policy of the Allies’ (1793) in David P. Fidler and Jennifer M. Welsh, (ed.), *Empire and Community – Edmund Burke’s writings and speeches on international relations* (USA: Westview Press, 1999) 264 – 286, p. 273

believed that the underlying homogeneity of his European Commonwealth would eventually prevent any irreversible schisms provoked by various commercial and dynastic disputes.

This relates intimately to what I would want to argue, as will become apparent below, Burke's idea of the law of nations applies distinctively to the Commonwealth of Europe and that Burke envisaged his 'publick law of Europe' an intricate part of this commonwealth. It is the idea of 'similitude' that Burke is pronouncing as binding the nations of Europe together that becomes interesting and how it corresponds to Burke's conception of the law of nations. I want to argue that Burke's idea of the law of nations applies distinctively to the Commonwealth of Europe, where this underlying 'similitude' expresses Burke's customary law tradition. And it is this customary law tradition that gives us the humanitarian urge in Burke and underlying justification for intervention in France. The next to explore then is Burke's idea of customary law.

Burke and customary law

It is evident that for Burke the 'publick law of Europe' was derived from common practices of the European states as 'ancient conventions' and was constituted as customary law. As he stated, it had a 'kind of connexion in virtue of ancient relations.'⁴⁷⁰ The constitutional law of individual states was related to the European law of nations as shown above. According to Burke 'constitutions furnish the civil means of getting at the natural.'⁴⁷¹ Burke followed in the tradition of William Blackstone (1723 - 1780) who held that the common law of England regarding life, liberty, and property was inevitably more binding than any statute of king or parliament. Burke was adamant in stating

'We entertain a high opinion of the legislative authority; but we never dreamt that parliaments had any right whatever to violate property, to overrule prescription, or to force a currency of their own fiction in place of that which is real, and recognized by the law of nations.'⁴⁷²

Common law theory had arisen in response to law-making mostly guided by the exercise of centralised power in the arbitrary assessment of the demands of justice, expedience and the common good. It reasserted the medieval idea that law was not something made by the king,

⁴⁷⁰ Burke, 'Letter of a Regicide Peace III', p. 248

⁴⁷¹ Cited in Canavan, Francis J. : 'Prescription of Government' in Daniel Ritchie ed., *Edmund Burke: Appraisals and Applications* (Transactions Publishers, 1990), pp. 251 – 274, p. 259

⁴⁷² Cited in Stanlis, Peter J.: 'Burke and the Law of Nations', in *The American Journal of International Law*, Vol. 47, No. 3 (Jul., 1953), pp. 397-413 p. 409

parliaments or judges, but was rather the idiom of a deeper social reality. Thus, it was given a distinctive historical force not embedded in universal rational principles but rather in national custom. As such, customary law is common and immemorial and handed down through generations by use and experience. In the fact that it is used and relied upon therein lies its authority. This is an important point to make because in its practice, public participation and acceptance lies also its validity. Thus, in this sense, the 'goodness' of customary law refers to its validity, legality and authoritative status as well as the wisdom, justice and the reasonableness of the custom.⁴⁷³

The English common law writer Edward Coke (1552 - 1634) in the early 17th century contended that common law was nothing but reason; the common law values were not themselves validated by reason, but were a product of the process of reasoning. This, therefore, rested on a shared sense of reasonableness. Being shared also meant that it is mutually recognised, which is essential in giving it validity and authority.⁴⁷⁴ Also, the historical appropriateness and expression of common law makes it continuous and dynamic and it was therefore to be located within the 'living body of law' in the context of historical development. In this way, common law is already an existing prescriptive order, being a distinctive expression of common life. From this contention, the common law provides the framework, which makes liberty possible and in this comprehensive sense rests the consent of the people.⁴⁷⁵ It was generally regarded as having a foundational status, and consequently, in the case of Burke, it served a direct purpose in his attempt to provide justification for intervention in France, and also and more importantly provided him with the logical premises for such an act. The sort of argument I want to emphasise is that Burke regarded customary law holding a foundational status for the commonwealth of Europe. This corresponds well with Blackstone's assertion that common law decisions confirmed, affirmed and maintained social unity but, however, it did not create it.⁴⁷⁶ Thus, what becomes an imperative idea here, especially in relation to Burke is, as the 17th century jurist Matthew Hale (1609 - 1676) stressed, that the question of the origins of customs is not the legitimating matter; what mattered was continuous and present usage, acceptance and practice of the rules.⁴⁷⁷ Common law, more than anything

⁴⁷³ Postema, Gerald J.: *Bentham and the Common Law Tradition*, (Oxford: Clarendon Press, 1986), p. 3 -

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⁴⁷⁴ *Ibid.*, p. 8-9

⁴⁷⁵ *Ibid.*, p. 13 - 16

⁴⁷⁶ *Ibid.*, p. 19

⁴⁷⁷ *Ibid.*, p. 21 - 22

else, is grounded as an important form of social solidarity,⁴⁷⁸ and Burke particularly appealed to this spirit of social solidarity tradition in his reaction against the French Revolution.

In the traditions of common law theory, Burke regarded the constitution, and the relation of power defined by it, as ancient custom by arguing, 'our constitution is a prescriptive constitution [...] it is a constitution whose sole authority is, that it has existed time out of mind [...] Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to government.'⁴⁷⁹ Burke used prescription, first and foremost in a juridical sense, but also, importantly, in a moral sense. Therefore, in civil as in moral law, possession held over a long period of time was a sufficient reason for legitimate ownership; to the possessor of real property as well as to the possessor of political authority. And it was through presumption that people obeyed this authority.⁴⁸⁰ Again, in his campaign against the revolution Burke contended in the fortitude of common law

'The right of denunciation does not hold, when things [the French Revolution] continue, however inconveniently to the neighbourhood, according to the *ancient* mode. There is a sort of presumption against novelty, drawn out of a deep consideration of human nature and human affairs [...].'⁴⁸¹

The idea of 'human nature' and 'human affairs' here was imperative for Burke's premises to intervene in France because it pronounced the unnaturalness of the revolutionary dogma. Burke's notion of 'humanity' clearly involved that people's mutual exchanges were to be regulated by just precepts law; human beings for Burke were made for communities and as such the authoritative task of the common law is to ensure the corporate pursuit of common goods and goals. What resonates in Burke's thought was the idea that custom was the primary source of law. The authority to order according to the common good rested with the whole people and expressed the common reason of the community.⁴⁸² What is interesting here is that for Burke this common reason is the objective rational normative order embedded in the customs and rules of the society. This is for instance in direct opposition to Hobbes who argued that customs and precedents had no particular authority, unless they were so termed by the sovereign. As such, unwritten law (customs) can only have authoritative status in so far as

⁴⁷⁸ Ibid., p. 23

⁴⁷⁹ Burke, 'Speech on Reform of Representation in the House of Commons', June 1784

⁴⁸⁰ Boucher, *Political Theories of International Relations*, p. 318

⁴⁸¹ Burke, 'Letters on a Regicide Peace I', p. 136

⁴⁸² Postema, *Bentham and the Common Law Tradition*, p. 45 - 46

it is validated by natural reason – the natural reason of the sovereign.⁴⁸³ This stands in sharp contrast with Coke's distinction between the ordinary faculty of reason, 'natural reason' and the special reason of law or rather reason *within* law, which he termed 'artificial reason'. It is not a result of philosophical manifestation, but rather the accumulations and refinements of experience. This concept of law is essentially Burkean and it becomes clear that the foundations of his thoughts were laid in the common law theory of the late 16th century; in the definition of common law being in opposition to written law.⁴⁸⁴ Thus, Burke's perennial appeal to 'the wisdom of the ages' was conceptually an articulation of the idea of 'artificial reason'. When Burke contends that the law of nations have been established by consent, it is exactly this ancient consent embodied within the law as 'artificial reason' that he is expounding. It was in 'our hearts' that the words and spirit of immemorial law laid.⁴⁸⁵ This is important to emphasise because it is exactly this institutionalised presumptive law that Burke is appealing to against the revolutionaries. Thus, he reasoned that the constitution and therefore the law of nations had no original principles; it was immemorial and prescriptive, and it was the ancient usage that necessarily legitimated the present state of affairs. Burke was using the title of the authority of antiquity, in exploiting the concept of the immemorial; however, it was the modern that he was presenting as immemorial, not the antique.⁴⁸⁶

'To ask whether a thing which has always been the same stands to its usual principle seems to me to be perfectly absurd; for how do you know the principles but from the construction? And if it remains the same, the principle remains the same.'⁴⁸⁷

Burke then, appealed to the ancient customs and rules of the Commonwealth of Europe, which was itself legitimised by these customs upholding it. Burke's whole philosophy is a recovery of the concept of the customary law tradition, which fits well in with his general doctrine of

⁴⁸³ Ibid., p. 47 - 48

⁴⁸⁴ Pocock, J. G. A.: *The Ancient Constitution and the Feudal Law – A study of English Historical thought in the seventeenth century*, (Cambridge: Cambridge University Press, 1987), p. 35 - 36

⁴⁸⁵ Burke, Edmund: 'Reflection on the Revolution in France' (1790) in Canavan, Francis (ed.): *Selected Works of Edmund Burke – a new imprint of the Payne edition* (1875) vol. 2 (USA: Liberty Fund Press, 1999) p. 107

⁴⁸⁶ Pocock, *The Ancient Constitution and the Feudal Law*, p. 80

⁴⁸⁷ Cites in *ibid.*, p. 380

tradition.⁴⁸⁸ Although the European states in the commonwealth had certain diversity in customs and establishments their polity and economy was derived from the same source:

‘It was drawn from the old Germanic or Gothic customary; from the feudal institutions which must be considered as an emanation from that customary; and the whole has been improved and digested into a system and discipline by the Roman law.’⁴⁸⁹

To summarise: What was important to emphasise for Burke is that the moral basis of the Commonwealth of Europe has the same basis as any other society; prescription, presumption and prejudice as embodied in the common practices of a people, and manifest in its common law. In this sense, for Burke, any traditional conception of a law of nations would be inadequate to effectively regulate the relationships of the nations of such a commonwealth, and Burke clearly recognises this. Thus, what Burke is proposing is a very specific conception of the law of nations based on international customary law. It is customary law, then, that provides the moral constraints regulating the commonwealth of Europe. Thus, what I have attempted to show so far is the importance of emphasising Burke’s idea of customary law as the main underlying principle for understanding Burke’s international relations theory. With this in mind, this leaves us to explore his conception of the law of nations, and how it gives Burke the necessary justification for intervention in France. Given the customary law aspects in Burke’s thought, grounded by his essential ideas of similitude and prescription as underpinning the European society of states, it may already be apparent that it, for this exact reason, differed fundamentally from Vattel’s conception of the law of nations.

The law of nations in Burke

As has already been shown, Burke’s conception of the law of nations was very different from some of the previous thinkers explored here exactly because of his underlying belief in the Commonwealth of Europe and thus its underlying law of customs. Thus, although, he drew on Vattel for authority on this point, he in fact presented a very different conception of the law of nations and how it was to be applied from the Swiss jurist. Rather, what informed Burke’s notion of the law of nations was not the abstract principle of natural law, but rather customs and manners.

⁴⁸⁸ Ibid., p. 243

⁴⁸⁹ Burke, ‘Letters on a Regicide Peace I’, p. 133

As was demonstrated in the previous chapter, Vattel had argued that the law of nations was an application of the natural law to the moral person of the state in its mutual relations with other states, and he categorised the law of nations into a the necessary and voluntary. He wished to make a clear distinction between practices that were good and obligatory in themselves and practices tolerated out of mere necessity. The voluntary law of nations had to observe the necessary law of nations in that the obligatory precept of it is contributory, in the mutual relations of nations, to the common good. The voluntary law of nations was effectively positive international law. For Vattel, our natural interdependence is consistent with agreements to establish communities or nations and this society of nations, thus, requires mutual assistance.⁴⁹⁰ As such the natural law was perceived as a continuous arbitrator between international and constitutional law. It was the normative moral code, to which all nations and individuals alike should adhere, but in international law, in the external legal and political relations between nations, this moral law was termed the law of nations. As we have seen, it was the idea that beyond the constitutional national laws nations, in safeguarding their moral right to independent existence, a law should apply in these relations.⁴⁹¹

Before we go on exploring Burke's particular conception of the law of nations, which was clearly conceived very differently from Vattel it is important to have a closer look at Burke's theoretical standing with the natural law tradition. On an important note and although contested (by Peter Stanlis in particular), it in fact remains doubtful whether it is proper to place Burke in the natural law tradition, despite his appeal to it. Peter Stanlis argues, 'The law of nations was for Burke the first qualification of the natural law, in the process of applying its eternal and universal moral imperatives to concrete, practical political affairs of men and nations.'⁴⁹² God and religion in Burke's writings seem on a whole to divide his interpreters.

⁴⁹⁰ Boucher, *Political Theories of International Relations*, p. 263

⁴⁹¹ Stanlis, 'Burke and the Law of Nations', p. 398

⁴⁹² Stanlis, Peter: *Edmund Burke and the Law of Nature – with a new introduction by V. Bradley Lewis* (New Brunswick: Transaction Publishes, 2003), p. 87. Stanlis belongs to the group of scholars who have sought to root Burke's thought in the principles of the natural law, and also in the dictates of scholastic prudence. Others include Russell Kirk, *The Conservative Mind* (Chicago, 1953); Kirk, 'Burke and Natural Rights', *Review of Politics*, XIII (1951), 441-56; Kirk, 'Burke and the Philosophy of Prescription', *Journal of the History of Ideas*, XIV (1953), 365-80; Charles Parkin, *The Moral Basis of Burke's Political Thought* (Cambridge, 1956); Father Francis P. Canavan, S. J., *The Political Reason of Edmund Burke* (Durham, North Carolina, 1960); John C. Weston, Jr., 'Edmund Burke's View of History', *Review of Politics*, xxiii (1961), pp.203-29; R. R. Fennessy, *Burke, Paine and the Rights of Man* (The Hague, 1963), pp. 117, 130 ff. For a good criticism of such contentions see Paul Lucas: 'On Edmund Burke's Doctrine of Prescription; Or, an Appeal from the New to the Old Lawyers', *The Historical Journal*, Vol. 11, No. 1 (1968), pp. 35-63, in particular pp 35 - 39. Of particular interests is his argument that the natural law was

However, while Burke maintains that God is the source of all authority, this idea in his writings is ambiguous. Christianity in Burke is highly instrumental and serves more than anything else to be politically and socially useful, rather than appealing to some abstract truth. David Boucher astutely contends that Burke uses natural law for political ends; for instance, in the case of the impeachment of Warren Hastings (1732 - 1818) the prescriptive authority of the British Constitution was 'reinforced [by Burke] with the rhetorical weight of Natural Law.'⁴⁹³ Frank O'Gorman notes 'that it is strange that a conception [natural law] which Burke alludes to only on a few occasions should be credited with such significance.'⁴⁹⁴ Indeed, on those occasions he invokes natural law, as for example in his speeches on the impeachment of Warren Hastings, he does so for the purpose of driving home very specific political points, such as not even the universal law of God upholds the exercise of the sort of arbitrary power that Hastings exercised. Another scholar, Stephen K. White, argues that the interpretation of Burke as essentially a proponent of the classical and scholastic moral natural law is ultimately unsatisfying. Also, a further reason to desist from placing Burke in this tradition is that it is usually understood that within the natural law tradition, God is conceived as stable and unchanging in His relation to the world. As already alluded to, although far beyond the scope of this study to develop this with more care, in his philosophy, certainly for Burke God ordains the moral order he seeks to uphold. This is what he calls 'the Great Chain of Being'. However, there is a sense in which this moral order cannot be taken in any absolute way. Providence, that is, for Burke, God's relationship with the world, is uncertain. Humans do not follow a knowable script; rather our lives unfold according to the unexplained will of its divine instructor.⁴⁹⁵

Natural law in Burke is, then, not the perpetual arbitrator in international relations in the profound way that Stanlis argues. As we have seen, Grotius contended that there were two ways of coming to know the natural law; by exercising right reason, *a priori*, and by the *a posteriori* method; the idea that the common good believed by all civilized nations must be

by no means a monolithic 'unchanging corpus of moral wisdom' (p. 36), and in such cases the historian must discriminate between the several schools of natural law. Most scholars that place Burke in this tradition of thought do so indiscriminately. Thus, statements which attempt to relate Burke to a single natural law tradition needs careful qualifications.

⁴⁹³ Boucher, *Political Theories of International Relations*, p. 315

⁴⁹⁴ O'Gorman, Frank: *Edmund Burke: his Political Philosophy*, (London: Routledge, 2004, first published 1973), p. 13

⁴⁹⁵ White, Stephen K.: *Edmund Burke: Modernity, Politics and Aesthetics*, (Oxford: Rowman & Littlefield Publishers, INC., 2002), pp. 26 – 27. White further notes that it is interesting 'that one of the leading contemporary defenders of a Thomist position in political philosophy, Alisdair MacIntyre, summarily dismisses Burke as having nothing of value to say on the topic of natural law. (p. 38, fn. 19)

derived from the same source, which is God. The occasional appeals that Burke makes to the natural law are of this second order.⁴⁹⁶ This idea can be better pronounced in relation to the presumed antithesis to abstract speculative thought, which Burke held to be moral (political) prudence, referring to it as the 'first of virtues' and 'the God of this lower world.' This idea, then, of moral prudence, is more of a natural arbitrator in international relations, than abstract principles of natural law. This way of looking at Burke's relationship to the natural law is hardly the profound foundational natural law basis that some of his interpreters seek to place him on. As will become evident later, Burke relied on customs as a basis for international law, which clearly shows the workings of this idea of moral prudence in his political thought. Evidently, Burke followed Vattel (and Grotius) in pursuing symmetry between the individual and the nation, rather than the conceptions of the law that applied to and regulated them. The intercourse between nations, Burke asserted, were considered to rely too much on the instrumental part and claimed, 'it is with nations as with individuals'.⁴⁹⁷ As indicated, he expounded a common nature in man, which was substantially adapted by history, religion, manners, habits, institutions and customs. Unlike Grotius and Vattel's use of the individual as an abstract analogy to an equally abstract conception of the state, Burke's emphasis on the idea of the civil social man is important. The question of to what extent is there a universal nature, and in what it consists, is in Burke determined by his particular view of the civil social man in the Commonwealth of Europe and by the inherent similitude and manners they share.

He thus seems to suggest that we owe much more to the cultural inheritance that we share, and it is this notion that more than anything else establishes the mutual bond that exists between the individuals and nations. As he considered nations as moral essences and not merely geographical arrangements, the historical diversity of nations became a crucial moral fact, which emphasised Burke's idea of 'unity in diversity' and the importance of appealing to prescribed international law, like the balance of power, to uphold the moral order of the commonwealth of Europe. The law of nations was not a mere pretence of treaties and conventions; the law was made for 'great kingdoms; for the religion, the morals, the laws, the liberties, the lives and fortunes of millions of human creatures.'⁴⁹⁸ In Burke's view, it was in common jurisprudence that the elements and principles of the law of nations were contained;

⁴⁹⁶ Boucher, *Political Theories of International Relations*, p. 316 -317

⁴⁹⁷ Burke, 'Letter of a Regicide Peace I', p. 132

⁴⁹⁸ Ibid., p. 90

this he asserted as ‘the great ligament of mankind.’⁴⁹⁹ On logical premises, therefore, he contended that international law was derived from constitutional law

‘It has ever been the method of public jurists, to draw a great part of analogies on which they form the law of nations from the principles of law which prevail in civil community. Civil laws are not all merely positive. Those which are rather conclusions of legal reason, than matters of statutable provision, belong to universal equity and are universally applicable.’⁵⁰⁰

This particular quote is often used to suggest that Burke’s ideas falls nicely within the natural law tradition. However, as I have sought to explain, this is not the case. First of all, this is an example of when a thinker is cited out of context – this was also the case with Grotius and his ‘impious hypothesis’ quote. What Burke wants to emphasise is that ‘distance of places does not extinguish the duties or the rights of men’⁵⁰¹, and that something more than merely treaties and conventions underlies the law of nations. In this instance he appeals to previous public jurists whose method has been ‘to draw a great part of the analogies on which they form the law of nations from principles of law which prevail in civil community.’⁵⁰² However, this does not mean that his political philosophy is a recovery of these public jurists’ natural law, or that he subscribes to it. Rather, this example is used as a rhetorical devise; the Burkean method of appealing to previous juridical authority to support his case. When Burke talks of ‘legal reason’ here it is the idea of ‘artificial reason’ he is referring to. This reason is, as explained, not a result of philosophical manifestation, but instead the accumulations and refinements of experience. This analogy between civil laws and the law of nations, as will become clear, was vital for Burke’s premises of intervention in France, for as he argued, ‘[t]he right of man to act anywhere according to their pleasure, without moral tie, no such right exist. Men are never in a total state of independence from each other. It is not the condition of our nature [...]. The *situations* in which men relatively stand produce the rules and principles of that responsibility, and afford directions to produce in exacting it.’⁵⁰³ Thus, Burke argued that the French Revolution had no precedent in the prescriptions of constitutional law or therefore in the law of nations. In this way he asserted, ‘[w]hat in civil society is a ground of action, in political

⁴⁹⁹ Ibid., p. 124

⁵⁰⁰ Ibid., p. 135

⁵⁰¹ Ibid., p. 135

⁵⁰² Ibid., p. 135

⁵⁰³ Ibid., p. 135

society is a ground of war.’⁵⁰⁴ The exercise of such jurisdiction was for Burke a matter of moral prudence. The law of nations in his writings was an incorporated part of what he termed ‘the law of civil vicinity’, which corresponds to his idea of a wider moral international social context – the Commonwealth of Europe. The proximity and habitual association of states subsequently meant certain rights and responsibilities. In civil law this was the law of neighbourhood, which was the right of a neighbour to protest and present his case to a judge when he ‘sees a *new erection*, in the nature of nuisance, set up at his door’.⁵⁰⁵ Burke, thus applied this precepts of civil law to the relations among states

‘Now where there is no constituted judge, as between independent states there is not, the vicinage itself is the natural judge. It is, preventively, the assertor of its own rights; or remedially, their avenger. Neighbours are presumed to take cognisance of each other’s acts. [...] This principle, which, like the rest, is as true of nations as of individual men, has bestowed on the grand vicinage of Europe a duty to know, and a right to prevent, any capital innovation which may amount to the erection of a dangerous nuisance.’⁵⁰⁶

Intervention

Burke’s idea of the law of vicinity resonates in the fact that he could not conceive of state sovereignty as an absolute value as the guiding principle of order.⁵⁰⁷ This, as we have seen, stands in a somewhat contradiction to Wolff and Vattel, who exactly saw the principle of sovereignty as the guiding principle of law and order for international relations. As such, importantly for Burke then, the notion of reciprocal non-intervention could be overridden. For Burke, this ‘false principle’ clearly went against historical precedent, custom and thus the law of nations itself.⁵⁰⁸ As he stated ‘the rule of law, therefore, which comes before the evil, is amongst the very best part of equity, and justifies the promptness of the remedy [...] as it is well observed.’⁵⁰⁹

Although Burke writes only occasionally about the rules of war, it is unmistakably a principle which concerns him as a formulated principle embedded in the law of nations. During the so-called St. Eustatius affair in 1781, where Burke advocated against Britain’s, what he believed to be, unlawful seizure of private property in the Dutch island. This policy of

⁵⁰⁴ Ibid., p. 136

⁵⁰⁵ Ibid., p. 133

⁵⁰⁶ Ibid., p. 136 - 137

⁵⁰⁷ Fidler and Welsh, *Empire and Community*, p. 51

⁵⁰⁸ Burke, Edmund ‘Heads for Consideration on the Present State of Affairs’ (1792) in David P. Fidler and Jennifer M. Welsh, (ed.), *Empire and Community – Edmund Burke’s writings and speeches on international relations* (USA: Westview Press, 1999) 254 – 264, p. 258

⁵⁰⁹ Burke, ‘Letters on a Regicide Peace I’, p. 136

confiscation, Burke contended was an ‘unprincipled violation of the law of nations’⁵¹⁰ and he continued to avow that rules of war and conquest among civilized nations rests on these principles of law. Individuals as well as nations, as corporate bodies, were entitled to justice when caught up in war. As Burke emphasises, ‘[i]t was a first principle in the law of nations, as laid down by every writer, that to expound the rights of war, we must conceive each party to have justice on its side [...]’⁵¹¹ In this, Burke followed Vattel. In presupposing that states were individuals in a state of nature they retained a natural equality. Vattel had emphasised that a nation retained a clause of non-interference on the part of other states into its internal affairs. However, he had argued that there was justification for intervention on one side of an ‘irrevocably broken’ social union, which was the extreme case of civil war, and only on the side of justice.⁵¹² It became one of Burke’s forensic justifications for intervention in France to convince the British administration that in the case of a divided kingdom (i.e. France) by the law of nations, Britain had the right to intervene and was ‘free to take any part she pleases.’⁵¹³ However, nowhere did Vattel concede that parties could intervene according to their interests and invariably not in the way that Burke asserted. As already described, for Vattel other states can intervene, but armed conflict must already exist and a third party can intervene only on the side of justice. Thus, the use of Vattel as an authority in this particular instance serves to illustrate Hampsher-Monk’s point that Vattel could not provide Burke with the justification he needed for intervention in France. What Burke, as has been emphasised really needed was grounds for intervention on the basis of a regime change. But as we have seen, given Vattel’s strong adherence to the principle of sovereignty, which, as was argued, was also at the basis of his civil war theory, each party in a civil war has sovereignty under the law of nations, therefore, no one can judge the internal affairs of a state even if they are two competing parties in a civil war.

In summary as should already be clear, written authorities for Burke were the least binding evidence of the law of nations. As he says ‘This is a principle inspired by the Divine author of all Good; it is felt in the heart; it is recognized by reason; it is established by consent

⁵¹⁰ Cited in Stanlis, ‘Burke and the Law of Nations’, p. 402

⁵¹¹ Cited *ibid.*, p. 404

⁵¹² Cited in Hampsher Monk, ‘Burke’s changing justification for intervention’ p. 75-76; See also Vattel, Emmerich de [1758]: *The Law of Nations or the Principles of Natural Law applied to the conduct and to the Affairs of Nations and of Sovereigns*, transl. by Charles G. Fenwick (Washington: Carnegie Institute of Washington, 1916), book II, chap. IV §56, p. 131

⁵¹³ Burke, Edmund, ‘Thoughts on French Affairs’ (1791) in David P. Fidler and Jennifer M. Welsh, (ed.), *Empire and Community – Edmund Burke’s writings and speeches on international relations* (USA: Westview Press, 1999) 236 – 254, p. 236

[....] By conventions of parties, this law of nations was established and confirmed.’⁵¹⁴ The ‘consent’ that Burke is talking about, as we have seen, is in the tradition of customary practice and therefore in a Burkean sense much more fundamental and morally obligatory than the principles of the law of nations that Vattel was expounding. What Burke was referring to, was not the arbitrary law of nations, rather the opposite: for him, tacit consent implied subscription to common practices and long usage, that is, customary law. What binds the European nations was not so much the natural law and abstract principles, but rather customary law. Thus it is evident that Burke presents a very different law of nations and that on a foundational level it was superior to what Vattel called ‘the voluntary law of nations’, that is, express agreements, in terms of regulating the relationship between states. Thus, it was Burke’s notion of customary law as basis for the law of nations that gave him the justification he needed for intervention in France. Before I explore how and to what extent he justified intervention in France, two other generally contested principles of international political thought need to be elucidated within Burke’s thought. They are his conceptions of reason of state and the balance of power, both of which serve to illustrate the conditions under which intervention in France could be justified.

Burke: the reason of state and the balance of power

In the case against Warren Hastings Burke argued that the exertion of arbitrary power, whether it be government or the individual was acting against justice and authority and thus substituting will for law.⁵¹⁵ For Burke, all power ‘is limited by law, and ought to be guided by discretion and not by arbitrary will.’⁵¹⁶ Burke contended that the true grounds of a policy could justify any necessary concealment by reference to the reason of state; however it could never justify that the rule of law was subverted by arbitrary will. Burke was sure to emphasise that ‘reason and state and common-sense are two things’, otherwise it would not appear to be an absolute necessity that had the British government pressing on with the peace negotiations with France.⁵¹⁷ In the classical formulation of the reason of state political expediency should displace moral law and if so formulated, Burke would, as indicated, have been a strong

⁵¹⁴ Burke speaking in the House of Commons on the St. Eustatius affair May 14 1781. Cited in Stanlis, ‘Burke and the Law of Nations’, p. 403

⁵¹⁵ Boucher, *Political Theories of International Relations*, p. 313

⁵¹⁶ Cited in *ibid.*, p. 313

⁵¹⁷ Burke, *Letters on a Regicidal Peace III*, p. 202

contender against such a doctrine.⁵¹⁸ Although Burke argues, throughout his career for a conception of the reason of state in several different contexts, it is clear, however, that his conception conforms to a wider idea of customary law.

David Armitage argues that it may seem a categorical error to identify Burke within a doctrine famously identified with Machiavelli. But he contends this Machiavellian schism between morality and politics is closed in Burke when one considers him as the heir to modern natural law tradition, revived by Grotius who followed the Stoics' foundational principle of self-preservation. They, particularly Cicero, determined the limits of self-preservation as a practical principle by strictly limited appeals in these cases to necessity in the interest of the common good.⁵¹⁹ Ciceronian 'necessity' was very different from Machiavellian expediency. It depended on the criteria deployed and the circumstances in which it was invoked. Thus, the assertion that the consequentialism of a state's self-preservation and natural jurisprudence are opposed at a deep level is therefore not necessarily true. The idea that necessity has no law meant that reason of state could not be codified or legislated. Consequentially, circumstances that were cases of extreme necessity could not be determined and so, neither could occurrences where it could be permitted to override custom and law. Only the norms of which such exceptions applied could be laid down. As Burke pointed out, to act in the same manner in all cases would be to turn necessity into law. Matters of prudence, he argued, 'are under the dominion of circumstances, and not of logical analogies. It [would be] absurd to take it otherwise.'⁵²⁰ Gentili, for instance, argued that there was a dialectic distinction between the idea of state interests and general objective. By his general objective he was expounding more precisely an interest of the common rights of mankind, which in this way was not limited to natural rights. As such, he distinguished between state interests and objective humanitarian causes. For instance, in commenting on the war waged by the Athenians against the Lacedaemonians he asserted '[t]his is an honourable cause for war and one which is based upon the common sentiments of humanity.'⁵²¹

The idea that necessity had no law, made the reason of state, in a moral sense, highly ambivalent. Legitimately contained within the doctrine was a natural necessity, which hence

⁵¹⁸ Armitage, David: 'Edmund Burke and Reason of State' in *Journal of the History of Ideas* nr. 61 vol. 4 (2000) pp. 617 – 634, p. 619

⁵¹⁹ Ibid., p. 619 - 620

⁵²⁰ Burke, 'Letters on a Regicide Peace I', p. 144

⁵²¹ Gentili, Alberico: *Three Books on the Law of War* (1612), trans. by John C. Rolfe (Oxford: Clarendon Press, 1933), book I, chap. xxv, §202, p. 124

was justifiable and a mere reputed one, which were not.⁵²² The Marquis of Halifax argued in 1684

‘There is a natural reason of State, an undefinable thing grounded upon the Common good of mankind, which is immortall, and in all changes and Revolutions still preserveth its Originall right of saving a Nation, when the Letter of the law perhaps would destroy it.’⁵²³

Burke asserted these same concerns regarding the reason of state doctrine by stating that ‘[n]ecessity, as it has no law, so it has no shame; but moral necessity is not like metaphysical, or even physical. In that category, it is a word of loose signification, and conveys different ideas to different minds.’⁵²⁴ In this sense, necessity was only justifiable if it benefited the whole community and therefore ultimately had the purpose of preserving society itself. Burke argued against Richard Price that the Glorious Revolution of 1688 had been ‘an act of *necessity*, in the strictest moral sense in which necessity can be taken’ and as such could not be held as constitutional precedence.⁵²⁵ This reason of state in the Grotian tradition of self-preservation did provide Burke with the justification that the French Revolution presented the same imminent danger as the case of the Glorious Revolution and that it therefore fulfilled the conditions of ‘necessity’, and that this for that reason warranted intervention. As Armitage contends ‘1789 was indefensible for just the same reasons that 1688 had been justifiable.’⁵²⁶ He argues that Burke could then present his case that the French Revolution was exceptionally threatening because it endangered the states of Europe’s natural reason of state, which were their true interests.

However, are these the premises that Burke uses in his justification for intervention in France? Burke was very adamant in saying that the war against France was both ‘just and necessary.’⁵²⁷ What seems to be the case is that in this instance Armitage grounds his arguments on the historical and theoretical misapprehension brought to the fore by Hampshire-Monk. For although Burke had referred to Vattel’s just war theory, that the aggrandisement of a neighbouring power would be sufficient reason for just war, this sort of reason of state argument did not, as has already been demonstrated, provide Burke with the sort of

⁵²² Armitage, ‘Edmund Burke and Reason of State,’ p. 621 - 622

⁵²³ Cited in *ibid.*, p. 622

⁵²⁴ Burke, ‘Letters of a Regicide Peace III’, p. 254

⁵²⁵ Cited in Armitage, ‘Edmund Burke and Reason of State’, p. 625

⁵²⁶ *Ibid.*, p. 626

⁵²⁷ Burke, ‘Letters on a Regicide Peace I’, p. 88

justification he needed; an internal regime change in France. The idea that the common interests of states codified in international common law translates into natural reason of state seems to construe the doctrine of reason of state into customary law. As we shall see, it was more the norms of such contended exceptions of 'moral necessity' that Burke expounded in conjunction with his reverence for international customary law. Integral to international customary law was, for Burke, the balance of power, which to a high degree provided the justification for manoeuvres in international relations in terms of 'moral necessity'.

As with the concept of the reason of the state, Burke's conception of the balance of power was inevitably differently conceived from more traditionally conceived ideas of balance of power precisely because Burke viewed it in terms of customary law – that is it had a moral purpose to regulate and maintain the Commonwealth of Europe. Far from viewing it in terms of 'power politics', or in realist or Hobbesian way, Burke emphasised a balance of power that was historically constituted and emerged in response to the need for certain constraints in the state system. It was for Burke one of the key foundations of a European state society and was imperative in regulating and maintaining the order of this system. Because it was grounded in the very complex vision of the European commonwealth it was much more complexly conceived than that of his contemporaries; it presupposed, not only a composite functional balance of power policy, but also gave it a predetermined purpose towards maintaining this Commonwealth of Europe. Thus, Burke's conception of the balance of power in fact reflected not only an international order, but also a moral order, and as such could not be purely descriptive, in contrast with what Vattel envisaged, and morally neutral, but was instead prescriptive and normative.

Burke clearly illustrated this by his direct statement that this new Revolutionary Empire could not be supported in any balance, nor could it be expected to be subject to the 'publick law of Europe.' As he noted, '[e]xploding, therefore, all sorts of balances, they avow their design to erect themselves into a new description of empire, which is not grounded on any balance, but forms a sort of impious hierarchy, of which France is to be the head and the guardian.'⁵²⁸ As with his conception of the reason of state, Burke's conception of the balance of power was related to the principle of non-intervention hierarchically so it could be justified as part of international law and thus allow for intervention in Revolutionary France, on military as well as ideological and moral grounds. And it was exactly because of such considerations

⁵²⁸ Burke, Edmund: *Works* (World's Classics; London, Henry Frowde for Oxford University Press, 1907), 6 vol., 'Letters on a Regicide Peace, I, II, III, IV', *Works*, iv, III, p. 260

that Burke positioned the idea of the balance of power at the heart of his justificatory arguments for intervention in the internal arrangements in France. Burke had to discursively emphasise a conception of the balance of power as contributor to, not only peace in the international society, but also maintainer of the moral order of the international system itself, which was part of his idea of the Commonwealth of Europe.

Burke presupposed that all countries accepted the balance of power. According to him it 'had been ever assumed as the known common law of Europe at all times, and by all powers'.⁵²⁹ His idea of the balance of power, was delicate and multiple.⁵³⁰ Burke even claimed that in the complex systems of the balance of power, Britain was entrusted with the balance as it 'was the power to whose custody it was thought it might be most safely committed.'⁵³¹ France, on the other hand, 'as she happened to stand, secured the balance or endangered it.'⁵³² Indeed, Burke described her as the 'author of the Treaty of Westphalia.'⁵³³ Therefore, it was always in the interests of Britain to ensure that French power 'should be kept within the bounds of moderation.'⁵³⁴ For Burke, the regulation of power in the international system was achieved by carefully controlling, directing and balancing it, so that its function became one of order and not disorder. He was very clear that it was owing to this system that 'this small part of the western world [had] acquired so astonishing (and otherwise unaccountable) a superiority over the rest of the globe'; it was precisely in want of this balance of power system and policy that other civilisations had perished.⁵³⁵ Hence, it was a vigilant maintenance of the balance of power to which Europe owed its pre-eminence.⁵³⁶

'The same principle that make it incumbent upon the patriotic member of a republic to watch with the strictest attention the motions and designs of his fellow citizens, should equally operate upon the different states in such a community as Europe, who are also the great members of a larger commonwealth.'⁵³⁷

The balance of power was for Burke the main stabilising institution in European politics; managed prudently it would preserve interstate order and international peace. He saw this

⁵²⁹ Burke, 'Letters on a Regicide Peace, III', *Works*, iv p. 259

⁵³⁰ Boucher, *Political Theories of International Relations*, p. 321

⁵³¹ Burke, 'Letters on a Regicide Peace, III', *Works*, iv p. 259: Burke supported the later common held belief that Britain was the balancer of Europe precisely because she did not have any specific territorial entanglements on the European continent (Hanover being the exception).

⁵³² Burke, 'Letters on a Regicide Peace, III', *Works*, iv p. 259

⁵³³ Edmund Burke, 'Thoughts on French Affairs', p. 242

⁵³⁴ *Ibid.*, p. 242

⁵³⁵ *The Annual Register* 1772, p.2,

⁵³⁶ Welsh, *Edmund Burke and International Relations*, p. 34

⁵³⁷ *Annual Register* 1772 p.3

management as being facilitated by several factors: firstly by international law, which he, as we have seen, called the 'great ligament of mankind' and secondly by various communal values. These were the 'similitudes' that the European nations shared. As suggested, these formed the basis of the European states' underlying sense of unity, and by that they provided a collective commitment (and interest) to maintaining order.⁵³⁸ Thus, in Burke's mind it was a regulatory mechanism that operated within the European international system, justifying both war and armed intervention in the internal governance of states, when such states constituted a general threat to the European Commonwealth. It was precisely these elements that for Burke constituted the balance of power as the common law of Europe.⁵³⁹

As the balance of power constitutes a vigilant commitment by states in defence of Europe, he claimed that such cases of intervention 'fill half the pages of history.'⁵⁴⁰ Several treaties 'affirm the principle of interference' as he calls it, which, alongside the principle of the balance of power comprised the public law of Europe. Thus, for instance, Burke argued that it is to well-timed and prudent policy and interference that Britain owes its laws and liberties, and indeed King George.⁵⁴¹ Burke believed that international law allowed for intervention, both as a means of self-defence and against hostile intention. But importantly and rather unconventionally, in justifying preventive intervention he included not only military-, but also political and social threats.⁵⁴² Thus, a threat does not necessarily come in the form of military aggression, but can also be in the form of maxims and doctrines, the kind that Burke found particularly destructive. In this way, a prudent balance of power policy accounts for both actual aggression from an aspiring hegemon, as well as an imminent threat, which exist in 'pernicious maxims.'⁵⁴³ In such confrontations it is not only members of the international society who have the duty to respond, but it is also their right. Burke willingly goes much further than Vattel in emphasising that in situations such as this, the nations of Europe have a 'perfect' obligation to maintain the Commonwealth of Europe. To respond in the interest of preserving the European balance was for Burke, 'so much the interest and duty of every nation.'⁵⁴⁴ Although Burke recognises that there is a principle of non-intervention in international law, he

⁵³⁸ L. Knutsen, Torbjørn L.: *A history of International Relations theory* (Manchester: Manchester University Press, second edition: 1997), p.160

⁵³⁹ Boucher, *Political Theories of International Relations*, p. 320 - 321

⁵⁴⁰ Burke, 'Letters on a Regicide Peace, III', *Works*, iv p. 222

⁵⁴¹ Cited in Welsh, *Burke and International Relations*, p. 127. For Burke, the Glorious Revolution of 1688 is an example of this

⁵⁴² Here, he extended Vattel's legal interpretation of international law. More on this see Fidler, *Empire and Community*, p. 50.

⁵⁴³ Welsh, *Burke and International Relations*, p. 127

⁵⁴⁴ Burke, 'Letters on a Regicide Peace, III', *Works*, iv p. 237

at the same time believes that it can be overridden in special circumstances. Any attempt to upset the general balance of the European system conferred a just cause of war, and war was for him the 'sole means of justice among nations.'⁵⁴⁵

Hampsher-Monk contends that Burke's need for internal intervention for regime change is directed *against* the balance of power policy, and he bases his argument on the fact that, ostensibly, Burke was not interested in weakening or containing France militarily.⁵⁴⁶ However, it seems clear that Burke was concerned about the threat French hegemony posed militarily, even though he mainly lamented the ideological threat. This I find particularly problematic, because as I have sought to demonstrate, Burke's understanding of intervention is clearly part of his conception of the balance of power. It seems reasonable to suggest that his *Letters on a Regicide Peace* is aware of the delicate balances and the need to ensure that regimes do not upset it. What Burke in fact was seeking, was to provide a justification for why the balance of power principle should be attended to and upheld. It was not arbitrary and (ideally) it did not accentuate random policies, but rested instead on prescriptive vigilance and reinforced by presumption. It could not be descriptive because Burke did not view the balance of power as a system, which primarily had come about by various treaties; it was the common sympathies, which constituted ties and obligations. Also, it seems clear that Burke's views on the balance of power were not a conception of intervention to preserve peace as such, but rather a conception to preserve the Commonwealth of Europe, which in this sense constitutes the greatest humanitarian urge as we shall see. Therefore, being part of Burke's overall understanding of the international customary law underpinning the relationship of the European States, it served to predetermine the overall purpose of the balance of power toward prioritising the value of the Commonwealth of Europe above the independent interests of individual states in the system. This is shown by the fact that he emphasised the balance of power as being common law not universal law. As with his conception of the reason of the state, he set it up as a moral good, which was not based on mere prudence or on any abstract ideas, but instead reflected the community interests; and this community good came about through prescription.

Burke's balance of power served an ideological function in that he raised it to a set of symbols, which in consequence provided a structure for, not only explaining state actions but also explaining policies in term of moral rightness. In this way, Burke's balance of power was

⁵⁴⁵ Burke, 'Letters on a Regicide Peace, I', *Works*, iv p. 156

⁵⁴⁶ Hampsher-Monk, 'Edmund Burke's changing justification for intervention', pp. 76 – 77

part of the moral dimensions of intellectual politics, because he clearly deemed it a force of good and a producer of peace and independence. Burke's conception of peace went beyond peace treaties and was not the mere non-existence of an armed struggle. It was a precondition in terms of establishing a permanent connection through the common 'similitude' underlying the Commonwealth of Europe. For Burke then, as we shall see in the following, the international order could never be a mere question of security, as it rested more on international morality in terms of preserving the Commonwealth of Europe, rather than upon any arbitrary peace treaty or immediate territorial dispute. In the sense that the balance of power was prescriptive, equilibrium was not produced or presented without it being willed by states. So to reiterate: As with his conception of the reason of state, Burke's conception of the balance of power was related to the principle of non-intervention hierarchically so it could be justified as part of international law and thus allow for intervention in Revolutionary France, on military as well as ideological and moral grounds. And it was exactly because of such considerations that Burke positioned the idea of the balance of power at the heart of his justificatory arguments for intervention in the internal arrangements in France. Burke had discursively to emphasise a conception of the balance of power as contributor to, not only peace in the international society, but also maintainer of the moral order of the international system itself, which was part of his idea of the Commonwealth of Europe.

What I have established so far is that this idea of similitude and custom was underlying Burke's conception of the law of nations and its political articulations of 'reason the state' and the balance of power. Now I will go on to analyse what this exactly meant for Burke's idea of 'humanity', how it gave Burke the justification he needed for intervention in Revolutionary France and in what way this intervention was in essence humanitarian.

Premises for intervention in France – 'moral necessity' and humanity

Intervention for Burke worked on two levels of humanitarianism. On the one level atrocities were being committed in France that affronted the conscience of any decent man, and intervention was justified in order to save the violated. The violators, too, needed to be saved from themselves. On the second level, and related to his law of vicinity, or vicinage, intervention was necessary in order to avoid the destruction of the *ancienne regime* of Europe. France constituted a threat to humanity, or at least to the civilisation of Europe. As we shall see below, it is this second level of humanitarianism that carries the weight in Burke's argument and justification for intervention.

In *Thoughts on French Affairs* Burke called 1789 the 'Revolution of doctrine and theoretick dogma.'⁵⁴⁷ He asserted that the Jacobin design was to institute 'an universal empire, by producing a universal revolution.'⁵⁴⁸ For Burke, the French Revolution was driven by three precepts, which he found completely alien to European civilisation: Jacobinism, Atheism, and Regicide. Combined with the new revolutionary system of manners, he believed these posed a serious threat to the bases of order in European international society and directly accused the French Revolution of corrupting the manners and sentiments, which underpinned the Commonwealth of Europe. Burke pronounced that 'the savage' French system of manners 'is a war with all orderly and moral society.'⁵⁴⁹ Thus the Revolution of 1789 'violates the right upon which not only the community of France, but those on which all communities are founded.'⁵⁵⁰ As such, Burke believed that the French Revolution disturbed the core foundations of order and stability in Europe. In the reality of the violent spirit of the revolutionaries, he purported, that it was only a matter of time before all the other states of Europe would fall to Jacobinism. By inciting rebellion, France had placed herself outside the traditional public law of Europe by demolishing 'the whole body of that jurisprudence which France had pretty nearly in common with other civilised countries.' In this way they had 'not only annulled all their old treaties; but they have renounced the law of nations from whence treaties have their force.'⁵⁵¹ France had morally separated herself from her geographical entity,⁵⁵² basing its 'impious' empire not on 'principles of treaty, convention, possession, usage, habitude, the distinction of tribes, nations, or languages', but instead on 'physical aptitudes.'⁵⁵³ Thus, peace with the Jacobins was the same as defeat by them.⁵⁵⁴ But more profoundly, what Burke was implying was that because France had so radically departed from the customary foundations of European society it did not even speak the same language as other European states when it came to their mutual relations

'Before men can transact any affair, they must have a common language to speak, and some common recognized principles, on which they can argue; otherwise all is cross-purpose and confusion. [...] They professed a resolution to destroy every thing which can hold states together by tie of opinion [...] [and] avow their design to erect themselves into a new description of Empire, which is not grounded in any balance, but forms a sort of

⁵⁴⁷ Burke, 'Thoughts on French Affairs' (1791), p. 237

⁵⁴⁸ Burke, 'Letters on a Regicide Peace, III', p. 248

⁵⁴⁹ Burke, 'Letters on a Regicide Peace, I', p. 132

⁵⁵⁰ Ibid., p. 138

⁵⁵¹ Ibid., p. 124

⁵⁵² Burke, 'Remarks on the Policy of the Allies' (1793), p. 270

⁵⁵³ Burke, 'Letters on a Regicide Peace, IV', p. 350

⁵⁵⁴ Harle, Vilho: 'Burke, the International Theorist – or the War of the Sons of Light and the Sons of Darkness' in *European Values in International Relations* (ed Vilho Harle, London: 1990), p. 67

impious hierarchy, of which France is to be the head and the guardian. The law of this their Empire is anything rather than the publick law of Europe, the ancient conventions of its several States, or the ancient opinions which assign to them superiority or pre-eminence of any sort, or any other kind of connexion in virtue of ancient relations.’⁵⁵⁵

The main argument of this chapter is the key notion that in the light of this threat Burke extended his theory of customary law into a duty to prevent violations of rights, and duty for a call of humanity. As he contends ‘it is one of the greatest objects of human wisdom to mitigate those evils, which we are unable to remove [...] Distance of a place does not extinguish the duties or the rights of men.’⁵⁵⁶ Burke then, appealed to the law of vicinity, and recognised that custom establishes, or helps to establish, a specific determination and duty, considered part of the law of nations, in order to react against this evil. As was argued above, prescribed customary law is thus the basic premise by which Burke justifies intervention in France. What is important here is that because Burke appeals to a law of nations being part of a wider customary international law it is adequately obligatory and it cannot be arbitrary abrogated. In this way, what is apparent in Burke’s political thought is his presumption of the validity of intervention in France. Customary law was laid down before the French Revolution and thus it was in the interest and duty of every nation in the name of ‘good faith and public integrity.’⁵⁵⁷

Through all Burke’s writings on the French Revolution, in particular his *Letters on a Regicide Peace*, what is particularly noticeable is the language of ‘humanity’ and human sufferings that Burke is, rhetorically perhaps, employing. However, in using Burke’s discourse it seems reasonable to suggest that what he in fact argued, in the same way as Sepúlveda had in relation to the Indians, was to save the French from themselves, and for the sake of humanity. Burke contended that a war against France would be ‘paying tribute to humanity’⁵⁵⁸ and was pleading with the British government to ‘open its ears to the voice of humanity.’⁵⁵⁹ Along these lines he further stated that the revolutionary faction in France was ‘directly contrary to the common sense and common feeling of mankind’⁵⁶⁰ and reasoned that it was the common interest and duty of the nations of Europe to ‘furnish the happiness of mankind.’⁵⁶¹ In this it can be argued that Burke is following Gentili in expounding the interests of the common rights

⁵⁵⁵ Burke, ‘Letter of a Regicide Peace III’, p. 247 - 248

⁵⁵⁶ Burke, ‘Letter of a Regicide Peace I’, p. 133 - 134

⁵⁵⁷ Burke, ‘Letters on a Regicide Peace III’, p. 224

⁵⁵⁸ Burke, ‘Letters on a Regicide Peace IV’, p. 325

⁵⁵⁹ Burke, ‘Letter of a Regicide Peace I’, p. 99

⁵⁶⁰ Burke, ‘Letters on a Regicide Peace IV’, p. 324

⁵⁶¹ Burke, ‘Letters on a Regicide Peace III’, p. 271

of mankind; or rather for Burke, the common rights of all Europeans. Against any 'regicide' peace he therefore lamented:

'It [the French Revolution] is not a revolution in government. [...] It is a destruction and decomposition of the whole society [...]. This Republic is founded in crimes, and exists by wrong and robbery; and wrong and robbery, far from a title to any thing, is war with mankind. To be at peace with robbery is to be an accomplice with it.'⁵⁶²

Promotion of ideas and laws that are not embedded in any customs is, for Burke, a violation of the common rights of mankind – the true general objectives prescribed by customary law. As Burke firmly asserts, 'example is the school of mankind'⁵⁶³ and the French Revolution was a war against that example. These peace negotiations were not only against the public law of Europe, but have steered the European nations away from common prudence.⁵⁶⁴ Being accomplished to the revolutionary dogma, this 'treacherous peace' was 'malignity towards humankind.'⁵⁶⁵ I want to argue that in emphasising a common right of mankind, Burke was thus arguing for a humanitarian intervention which premise was part of observing the common law of nature and nations. As Burke states many times, the French Revolution was aiming at the universal rule of theoretic dogma as it was 'the social nature of man that impels him to propagate his principles, as much as physical impulses urge him to propagate his kind.'⁵⁶⁶ In this context the analogy between the common constitutional law and the common law of nations is further pronounced in the light of this continuing revolutionary communication across borders: 'Our humanity, our manners, our morals, our religion, cannot stand with such a communication: the constitution is made by those things, and for those things; without them it cannot exist; and without them it is no matter whether it exists or not.'⁵⁶⁷ This is the effect of the regicide 'vicinity' and in this sense, as is indicated above; the moral prudence of intervention embedded within the law of nations is the only remedy towards this 'enormous evil'. It is enforcing the sentiments of the truest humanity, as Burke contends, and here he is not only appealing to the common manners and sentiments, which prescribe our human nature and thus enforces our common humanity, but also to the divinity of that nature. In the shrill tones of his voice at time bordering on hysteria running through *Letters on a Regicide Peace*

⁵⁶² Burke, 'Letters on a Regicide Peace I', p. 139

⁵⁶³ Ibid., p. 143

⁵⁶⁴ Burke, 'Letters on a Regicide Peace III', p. 243

⁵⁶⁵ Burke, 'Letters on a Regicide Peace IV', p. 326

⁵⁶⁶ Burke, 'Letters on a Regicide Peace II', p. 170

⁵⁶⁷ Burke, 'Letters on a Regicide Peace IV', p. 380

Burke is lamenting the revolutionary faction is an evil spirit that informs the soul, lying deep 'in the corruption of our common nature.'⁵⁶⁸ In this way the near argument Burke is employing here in his justification for intervention is the saving of the souls of these people, which, although it aptly illustrates the desperation of his polemics against the French Revolution, it is also an indicator of something Burke truly believed. He adamantly claimed '[t]he world knows that in France there is no publick, that the country is composed but of two descriptions; audacious tyrants and trembling slaves.'⁵⁶⁹ Not only was slavery, in Burke's mind, abhorrent and immoral, but also what he was opposing was a revolutionary faction that would enslave all of Europe. In Burke's own words France 'prescribes the forms of peace to nations, and dictates laws to a subjected world.'⁵⁷⁰ Intervention was thus to save the liberties of Europe.⁵⁷¹

The unnatural 'cannibalism' of the revolutionaries reveals a new species who 'craft virtues on vices' and 'strike at the root of our social nature', which will result in the total corruption of all morals and 'the total disconnection of social life.'⁵⁷² What is important in this context is that Burke endeavours to demonstrate the legality of intervention in France within the existing law of nations. This reflects his respect for established wisdom, but moreover resonates with Burke's belief in customary law being the guiding authority in terms of which justification must be sought. In direct reference to the natural and justifiable intervention policy Burke invokes the validity of customary law by remarking 'the hand of authority is not always the most heavy hand',⁵⁷³ However, in the 'diversified mass of human misery' our minds must make a choice; it is a choice between our community or a state of hostility.⁵⁷⁴ By this statement Burke clearly made his case for humanitarian intervention in France, justifying it on the grounds that the common rights of mankind were being violated, in particular, the personal liberty arising from the system of manners and the habitudes of life rather than from laws of the state.⁵⁷⁵ Thus, the moral necessity of intervention is firmly embedded in customary law and consolidates Burke's emphasis on the universal equity of such an action. The threat that France posed was to alter the whole social state of Europe and conceptually Burke was appealing to the customary law of nations as a means of social justice.

⁵⁶⁸ Burke, 'Letters on a Regicide Peace II', pp. 154 - 155

⁵⁶⁹ Burke, 'Letters on a Regicide Peace III', p. 253

⁵⁷⁰ Burke, 'Letters on a Regicide Peace IV', p. 365

⁵⁷¹ Burke, 'Letters on a Regicide Peace III', pp. 270 - 271

⁵⁷² Burke, 'Letters on a Regicide Peace I', pp. 126 - 130

⁵⁷³ Burke, 'Letters on a Regicide Peace III', p. 261

⁵⁷⁴ *Ibid.*, pp. 209 - 210

⁵⁷⁵ Burke, 'Letters on a Regicide Peace II', p. 181

Summarily, the historical methodological approach that Ian Hampsher-Monk employs by illustrating Burke's changing justification for intervention does show a certain inconsistency in Burke's arguments regarding intervention; arguments which exemplify Burke's need for rhetorical leverage against the background of a changing political situation, however, it does not change the premises of Burke's appeal for humanitarian intervention in France, which has been the main topic of this chapter. The critical point is, then, that the fact that Burke is arguing within the context of customary law, the origin of the law, in this case the right of intervention becomes less relevant than the authority of that right. Thus, for Burke there was a clear obligation and a right to intervene in France, which was based on strong humanitarian grounds. It was part of the law of nations and declaratory of what was already embedded in the international community – a moral necessity to preserve and maintain the moral basis of the Commonwealth of Europe for the sake of our shared humanity. And this humanity, as should be clear, was defined specifically in relation to this commonwealth.

Conclusion

What I have attempted to show in this chapter is the importance of Burke's notion of international customary law as the informing principle of his political philosophy, and that it was this idea of international customary law that formed the moral basis of the Commonwealth of Europe. In this way, Burke appealed to the ancient customs and rules of the Commonwealth of Europe, which itself were legitimised by these customs. Burke's whole philosophy is a recovery of the concept of the customary law tradition, which fits well with his general doctrine of tradition.⁵⁷⁶ Although the European states in the commonwealth had certain diversity in customs and political arrangements their polities and economies were derived from the same customary source which gave them their moral basis. And it was this moral basis which ultimately provided Burke with the justificatory grounds of intervention in France. However, for such reasons, it was not any conventional military intervention that Burke promoted. The deep customs and moral values that the nations in Europe shared provided the premises for the idea of intervention in France, that is, an unparalleled moral necessity. From this that we can begin to understand the deep underlying humanitarianism, which grounded Burke's thought. The 'inhumanity' of the French revolutionary doctrine was inhumane because it was alien to the shared morals and norms which lay at the heart of this Commonwealth of Europe. And so, following from this, Burke's call for intervention in Revolutionary France

⁵⁷⁶ Pocock, *The Ancient Constitution and the Feudal Law*, p. 243

was based on strong humanitarian considerations. It was these considerations which provided him with the justification for such an undertaking exactly because of the wider moral obligations and laws regulating the relationship between the states of Europe. The clear duties that the European states had in maintaining this Commonwealth were much more obligatory than what Vattel had advocated. Burke's idea of the Commonwealth of Europe presupposed that in times of great moral necessity any non-intervention principle grounded in state's sovereignty could be set aside in order to address anything that would upset the moral balance of this Commonwealth. And the revolution in France did just that. It was for this reason, that Burke would advocate humanitarian intervention.

Conclusion

I have argued that a nascent idea of humanitarian intervention was developing during the early modern period, but that its development was contingent on a particular historical context. This context was theologically laden and related fundamental rights and duties to obligations we owe to each other as members of humanity, nations and in personal relationships, in which a God given principle of self-preservation and natural sociability played significant roles. In this way it is quite distinct from the one we recognise today, because the conditions of belief have changed so significantly. Humanitarian considerations for intervention are contingent upon different moral belief systems. It is apparent that the doctrine has undergone a modern day renaissance in a different guise. In tracing the history of the norms pertaining to humanitarian intervention it is clear that the concept of humanitarianism is historically transient and holds little conceptual resemblance to its contemporary namesake. Whereas today it is foundationally embedded in a human rights culture, which gives it its conceptual intelligibility, in past times it was anchored in very different foundation, the product of a different world view often grounded in a strong religious belief-system. In this way, what I set out to do in this study was to discover the different discourses that surround the idea of humanitarian intervention, which would be conceptually removed from the human rights culture that grounds our humanitarian urge today. I demonstrated that such a discourse emerged in the early modern period, and that there is in fact a gap in the literature regarding its proper exploration.

For the early modern thinkers humanitarian intervention was a key notion in their writings on just war. They wrote after the discovery of the New World and this event was instrumental in setting the reference point within which they formulated their jurisprudential ideas. Although the discovery of the Americas precipitated unprecedented atrocities on the part of the Spanish conquistadores against the native people, it also inspired a serious intellectual debate regarding the rationality and Christianization of the Indians. Also, it brought to the fore questions of European legitimacy in their dealings with the rest of world. This study has shown that a nascent notion of humanitarian intervention played an integral part of this early intellectual debate. Many of the justifications were derived from purported contraventions of the natural law, and were based on the claim that the natural rights of the Europeans were being violated by the American Indians who had a duty to respect them. Cases such as human

sacrifice, sodomy and cannibalism were an affront to humanity and intervention to save innocent victims was justified. However, as was the case with Vitoria, where such offences were not recognised as sufficient cause, contravening the law of nations provided ample justification. The examples were hindrances to the rights of passage and trade, but were most importantly formulated within the doctrine of *terra nullius*, where attempts to prevent seizure of 'vacant land' gave just cause for war. This was done on the ground that the world was held in common. The fact remains, however, that despite the various legal and theological trepidations at the time, natural rights, instead of protecting the Indians against the brutality of the Europeans was used to justify their subjugation.

The Spanish Thomists retained a strong belief that the Spanish colonialists had just cause for waging war against the Indians on the grounds that they had violated the universal natural rights which were given by nature and therefore by God. Despite this, they were some of the most sympathetic commentators of the day. There were elements in their writings that constituted indisputable endeavours to move beyond the application of just war theory to the case of the American Indians to make the precepts of the natural law universal, while at the same time seeking to protect innocents against unlawful aggression and usurpation. For Vitoria and Suárez their humanitarianism had its moral foundations in the natural law, from which obligations of intervention were derived. Although their humanitarian arguments revolved around serious issues such as saving people from abhorrent practices like cannibalism, human sacrifice and sodomy, to concerns for rescuing people from themselves in the interests of the civilising process, it nevertheless belonged to the concessive law of nature. As such, concerns such as these established obligations to intervene in another country on humanitarian grounds. But for two main reasons these were not perfect obligations. Firstly, humanitarian intervention lacked the specification of who has the obligation to intervene, which was a concern for most of the early modern thinkers. This, of course is something which echoes in contemporary ideas of international ethics. Secondly, the enforcement of humanitarian intervention hinged on the fact that it was not deemed absolutely necessary for the common good. Except for Sepúlveda and Burke, this was the case for all the early modern jurists explored here.

Vitoria and Suárez affirmed a strong idea of universal morality, which was grounded in the law of nature. From the law of nature, precepts emerged which underlined the acceptability of intervention for humanitarian reasons when innocents were being harmed, or to restore the common bond of humanity by punishing crimes against the natural law. For both thinkers, but Vitoria in particular, right intent was absolutely central for the idea of humanitarian

intervention. The only legitimate justification for war was the violation of rights. However, to determine whether such violated rights precipitated intervention on humanitarian grounds, first it had to be established whose rights and what rights were being violated and by whom. Obligations of humanitarianism were derived from the natural law because violated rights concerning innocents pertained to natural law principles. But, such obligations were conditional upon right intent. This moral obligation of helping innocents from being harmed was actionable under the *jus gentium*, but it had its moral basis in the natural law. Thus, in absence of state practice humanitarian intervention was derived from customary opinion under the *jus gentium*.

More emphatically than Vitoria and Suárez, Gentili's idea of humanitarian intervention was founded on the notion of the common bond of humanity, the *societas gentium*, which, if broken, was a serious crime against humanity and therefore against the law of nature. Such a breach should require action on the part of individuals or sovereigns to make reparations in order to restore the bond and punish the perpetrators. This idea echoes later on in Burke's thoughts on humanitarian intervention. What seem to have been the most central aspects of humanitarian intervention for these early writers, Sepúlveda being the exception, were that humanitarian intervention was not deemed to be a moral necessity. It was from the meticulous work of Suárez that humanitarian intervention was perceived to be a righteous act, but not an absolute moral precept. In this way it fell under the law of nations because it was understood as encompassing the actual exercise of the law of nature's concessive principle. Suárez's original contribution was, thus, that natural law did not consist merely of restraining power, commands and prohibitions; it also defined an area of permissiveness where agents were free to choose the right action. Whether Grotius was keen to admit it or not, this formulation was imperative for his later development of the idea of humanitarian intervention.

What was particularly interesting with Grotius was his conceptual attempt to mitigate the religious disputes of the day, by positing a non-sectarian law of nature. This has led some modern scholars such as Richard Tuck, Knud Haakonssen, and also Martha Nussbaum to misinterpret his scholarship as signalling the beginning of the secularisation of the natural law tradition. However, such misconceptions have led to a serious misunderstanding of Grotius's political philosophy, and the conceptual implications are far-reaching. If Grotius had indeed presented a secular natural law tradition, then the moral obligation of humanitarian intervention would solely have its source in human agreement and conventional international law. Given that many of the issues relating to international law, the

rights of the seas and of the appropriation of large tracts of the Americas, a natural law that was not firmly grounded in more than custom and convention would not have been forceful enough to apply. For Grotius, the source of fulfilling our obligations was to God, whether grounded in our objective rights or subjective rights. Those moral obligations of humanitarian intervention required a third party to intervene to punish crimes against the law of nature. For Grotius crimes such as cannibalism and the sacrifice of people demanded punishment, and states had a natural right to do so. There is a moral obligation for third party intervention, which is mandated through our natural rights to punish crimes against nature. For Grotius, any notions of humanitarian intervention are grounded in his theory of punishment. In this way, states have the right to punish crimes that violate the natural law, and the issue of jurisdiction is irrelevant. Wars of punishments were sanctioned by nature, which holds the jurisdiction for the whole of mankind. Grotius was one of the first thinkers to address the issue of states as actors in the law of nations, and developed an emerging idea of the moral person of the state with rights and obligations different from the individual. Nevertheless, states were for Grotius not founded upon the principle of sovereignty, which is exactly why he was able to present a theory of universal punishment. Because it is difficult to determine who should exact punishment, humanitarian intervention remains for Grotius in the sphere of imperfect obligations. Humanitarian intervention does not, for these very reasons, constitute an infringement of sovereignty, which it undoubtedly did for Pufendorf.

Pufendorf developed Grotius's notion of states but grounded their obligations and rights on the principle of sovereignty. This conceptual move had a remarkable effect on an obligation on the enforcement of humanitarian intervention. In fact, for Pufendorf, humanitarian intervention was not justified because it could not be enforced by international law. However, that did not mean that this excluded a strong universal morality; on the contrary, his political theory presents us with a strong moral basis grounded in the natural law from which we can identify instances of 'humanitarian' crimes. His differentiation of congenital and adventitious obligations was important here because although they are not equally enforceable, they are nonetheless equally morally obligatory. In this sense, moral obligations for Pufendorf were aspirational in the international sphere. Pufendorf's strong theory of sovereignty and legalism have made him the historical proponent of statism, but this is yet another example of scholarly misconceptions not adequately developing an idea in its proper time and place. I have argued that the positing of a strong principle of sovereignty for Pufendorf implied, instead, a very strong notion of humanitarianism. It conceptually served to

limit atrocities committed by colonialists against the American Indians, and was formulated to address and protect religious dissent of the time. It was to address such humanitarian issues to begin with that a strong principle of sovereignty had to be proposed. Although Pufendorf's ideas of moral obligations towards our fellow man could not be enforced internationally, his theory of sovereignty offered more protection conceptually to groups such as the American Indians, than theorists such as Sepúlveda and Grotius had proposed.

Thinkers such as Wolff and Vattel were inspired by Pufendorf, and built on his idea of the moral person of the state. However, unlike their German predecessor, they did not deny the existence of the law of nations nor the belief in its enforceability. Instead, both Wolff, and especially Vattel brought about the modern era of international law and subjected the moral person of the state to the law of nations. The consequences of conceiving the sovereign state as subject of international law and as the main actor in international relations had a strong impact on the idea of humanitarian intervention. Both thinkers posited that sovereign states had a duty of assistance towards each others, but the sovereign integrity of the state came before considerations of humanitarian assistance and duties to others. This was the core of formulating states' humanitarian duties in imperfect terms. However, what was notable with the newly formulated principle of sovereignty was that unlike Grotius there was no longer a conception of a right to intervention. Furthermore, Vattel sought to redeem what he viewed to be deficiencies of Wolff's theory in relation to assisting the oppressed subjects of a tyrant. Such intervention was nevertheless envisaged in terms of a strong principle of state sovereignty, and he did not take the argument beyond civil war.

Unlike the other thinkers explored here, Sepúlveda and Burke are extremely interesting because they formulated their ideas of humanitarian intervention in absolute terms – but for very different reasons. Sepúlveda's ideas, in particular, demonstrated how the purported universalist principles derived from the Christian culture was imposed on the Native American culture in order to argue that they fell well below its standards and would therefore be forced to act in accordance with them. Sepúlveda first and foremost presented his argument for humanitarian intervention as a mean to save the Indians from eternal damnation in the hope of saving their souls. In this way, the imperative was the need to rescue them from themselves and bring them into the bounds of Christianity. This was therefore the obligations of all Christians alike. The Indians needed to be subdued and forced to accept Christianity because they were incapable of rationally receiving the word of God through education. His main justification for such action was that the American Indians fell into Aristotle's category of

natural slavery; they were capable of understanding and carrying out instructions, but not of formulating and executing their own rational plans. Given the incapacity of the American Indians for rational thinking, the Spaniards would be doing them a service in showing them the error of their ways and in making the land more productive by the efficient exploitation of nature. It was therefore, natural, and humane, that the Spaniards fulfil their duty in guiding these unfortunate people.

Burke also posited a strong underlying morality, the Commonwealth of Europe, which bound the European states. This gave his idea of humanitarian intervention particular force. What formed the moral basis of this commonwealth was his idea of customary international law. Burke appealed to the ancient customs and rules of the Commonwealth of Europe, which itself were legitimised by these customs. Although the European states in the commonwealth had certain diversity in customs and political arrangements their polities and economies were derived from the same customary source which gave them their moral basis. The deep customs and moral values that the nations in Europe shared made humanitarian intervention in France an absolute moral necessity. There was, in this, a deep underlying humanitarianism which grounded Burke's thought. The French revolutionary doctrine was 'inhumane' because it was alien to the shared morals and norms which lay at the heart of this Commonwealth of Europe. Burke's call for intervention in France was therefore based on strong humanitarian considerations. The wider moral community which regulated the relationship between the European states had clear duties to maintain this Commonwealth. Burke's idea of the Commonwealth of Europe presupposed that in times of great moral necessity any non-intervention principle grounded in state's sovereignty could be set aside in order to address anything that would upset the moral balance of this Commonwealth. The revolution in France did just that. It was for this reason, that Burke could advocate humanitarian intervention.

From the above, we see that the ideas of humanitarian intervention in these thinkers are conceptually contingent upon a specific historical period. I have argued that contemporary scholarship seems to somehow have taken a wrong turn in not recognising this, and that the mistake lies in the fact that modern ideas pertaining to humanitarian intervention do share similar features to the ones found in the early modern period. Both Gentili and Burke presented ideas about individual obligations to the wider international community in the interest of humanity. Pufendorf recognised the nascent tensions of the universalism of moral standards versus the particularism of state sovereignty and sought to reconcile the two by making the moral person of the state subject of the former. Grotius, for instance, proposed strong

obligations of third party intervention on the basis of obligations and natural rights to punish moral transgressions. Vitoria and Suárez presented ideas of just war and the use of force and emphasised the importance of right intent. However, as emphasised, although appearing to be similar on the surface; early modern ideas of humanitarian intervention and contemporary humanitarian intervention contain deep foundational and conceptual differences. It is clear, that modern thinkers such as Martha Nussbaum, Theodor Meron, and James Muldoon have been complicit in such scholarly misconceptions by assuming that these similarities hold a common conceptual base, and are therefore the same. This present study has shown that this is not the case; they are, instead, conceptual dissimilar. In fact, we even notice the changing conceptual justifications of the idea of humanitarian intervention in the early modern period itself. For instance, Burke's humanitarian considerations bear very little conceptual resemblance to the Spanish Thomists'. Saving the souls of the French through military intervention meant something very different from what Sepúlveda proposed, when he advocated intervention to save the souls of the American Indians. Striking at the root of the social nature of humanity by the unnatural 'cannibalism' of the French revolutionaries is far removed from Sepúlveda's anxiety of the Indians' unnatural behaviour of cannibalism and sodomy. In this way, the epistemological authority that Nussbaum and Meron seek in past understandings of humanitarianism for their contemporary projects, are misguided. The faint echoes of Grotius's 'human fellowship' and its underlying moral obligations of humanitarian intervention are just that, mere echoes, and do not do the foundational groundwork that Nussbaum wants.

As such, the idea of humanitarian intervention has a long historical heritage. By understanding the general historical context in which we discover our moral consciousness, we come to understand what shocks the moral conscience of mankind, and how, for centuries, the idea of humanitarian intervention was at the centre of international ethics. Our humanitarian urge for such interventions changes, but the central place it holds in international debates remains unchanged.

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Images

Front page: The great seal of the Massachusetts Bay Colony 1629⁵⁷⁷

⁵⁷⁷ King Charles I granted the English colonists settling in what is today Massachusetts a charter in 1629, and gave them the authority to use a seal. This seal was used until 1686, shortly after the first charter was revoked, and again from 1689-1692. It features an Indian with the words 'Come over and help us.'

