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Natural law and humanitarian intervention

The natural law themes

Natural law is the corpus of principles, precepts, values and inquiries concerning the nature of law which are traced back to the Greek world and transposed to modernity by the scholastic tradition.[1] Undoubtedly, within such a time span, marked by momentous events and inexorable changes, certain variations have surfaced. However, there are still strong identifications and commonalities concerning inquiries and analysis on law and morality or the continuous emphasis on humanity and human solidarity which make this tradition distinct.

The themes whose evolution or transformation over time circumscribed natural law have been introduced by Greek philosophy and this process needs to be considered. A persistent philosophical quest concerns the source of morality. Initially it was thought that morality springs from nature's normative order. For Homeric Greeks, this is the divine order of Gods and man satisfies his 'portion' of that order. Human and divine actions intermingle to procure both teleology and responsibility which is understood to signify the dawn of moral understanding.[2] Events hence acquire dual perspectives; the normative and the real are infused for the Greeks[3] whereas their bifurcation for the medieval Christian tradition justifies the imperfections of cosmic law against the perfect natural law. Later, the divine necessity of the normative order was replaced by rationality. The rational unity of the universe is the basis for both spirit and matter, consequently the source of moral and

[1] As D'Entrèves has observed, it signifies the unrelenting quest of man to rise above 'the letter of the law' to the realm of the spirit. A. P. D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (London, Hutchinson University Library, 1970), p. 127.

[2] J. Ferguson, *Moral Values in the Ancient World* (London, Methuen & Co., 1958), pp. 15–16.

[3] H. Lloyd-Jones, *The Justice of Zeus*, 2nd edn (Berkeley and Los Angeles, University of California Press, 1971).

physical laws.[4] Thus, reasonableness differentiates Greek from Christian ethics predicated on divine provenance.[5]

The clash between morality and human laws is central in Sophocles' *Antigone* and it is a perennial theme in the positivist-naturalist debate on the nature of law. Antigone, animated by her moral beliefs, buries her brother but eventually will be punished for defying the King's orders.[6] For Antigone, iniquitous laws are not laws whereas for others, however unjust, such laws will be enforced because they emanate from the right authority. The 'is'–'ought' distinction has thus been introduced. The conflict between law and nature has received another twist by the Sophists who explored the theme of legal sources.[7] Protagoras argues that societies promulgate laws in their process towards civilisation and that laws are necessary for social life. Thus, they are acquired and not given by nature; they have human origin.[8] A person can achieve her or his development only within a community and only laws and customs hold a community together. This statement indicates an acknowledgement of the sociability of human nature which in its different manifestations has represented one crucial aspect for legal evolution. Law is a human creation but there exists disagreement on the nature of man. On the one hand, there were those like Socrates who presented man as a social being fulfilled only in a social context and others for whom man is an egoistic and antisocial creature, consequently might is the source for law.[9] These themes have informed international relations theory and in connection with law, they have been developed currently by the Critical Legal Studies movement. Another area which the Sophists explored is the basis for morality. Because *physis* displays permanence and encompasses reality it serves as the source for objectivity in ethics. On the other hand, Callicles denies the existence of objective moral standards in nature which 'mankind are always disputing about . . . and altering . . .'.[10]

If rationality as exhibited in nature becomes the moral and legal source, man's capacity to reason has equally inspired legal and political philosophy since antiquity. For Plato, laws are reasoned thoughts (*logismos*) embodied

[4] G. S. Kirk, J. E. Raven, M. Schofield, *The Presocratic Philosophers*, 2nd edn (Cambridge, Cambridge University Press, 1983).

[5] E. Hatch, *The Influence of Greek Ideas and Usages upon the Christian Church*, ed. A. M. Fairbairn, 7th edn (London, Williams & Nordgate, 1988), p. 158.

[6] Sophocles, 'Antigone', in D. Grene, R. Lattimore (eds), *The Complete Greek Tragedies*, vol. II (Chicago, University of Chicago Press, 1959), p. 157, at p. 174.

[7] G. B. Kerferd, *The Sophistic Movement* (Cambridge, Cambridge University Press, 1981), pp. 112–14.

[8] W. K. C. Guthrie, *A History of Greek Philosophy*, vol. III (Cambridge, Cambridge University Press, 1969), pp. 63–84.

[9] Plato, *Gorgias*, trans. R. Waterfield, *The World's Classics* (Oxford, Oxford University Press, 1994), p. 66, 483 c–d.

[10] Plato, *Laws*, 10.889–890, in B. Jowett, *The Dialogues of Plato*, vol. V, 3rd edn (Oxford, Clarendon Press, 1931), p. 274.

in convention.[11] His ethical principles derive from a normative natural order, the idea of *Forms,* which includes human and metaphysical elements.[12] The *Forms* are particularised whereas their aggregation constitutes an organic unity with the *Form* of God as the final expression. This organic system is the source and explanation of the actual world. Human things are included in the *Forms* and could reach God. The harmony of the parts and their direction towards their proper end constitutes justice in the individual as in the state.[13] Similarly, Aristotle's vision of nature is ontological and teleological but not metaphysical. Our world is the real one and its purposiveness is realised in the Form of Things. Each thing has an unchanged element, the formal element. This element which is called the essence of the object is teleological, that is, it describes the function of the object by nature. The teleological interpretation of the universe thwarts ethical relativism since principles emanating from nature are objectively valid. Aristotle in his *Rhetoric* refers to universal law, the law of nature, as 'binding on all men, even on those who have no association or covenant with each other'.[14] The moral aspiration of law in promoting the common good has become another trait of the natural law tradition. For instance, Aristotle sanctioned wars when they serve the 'good life' and are precipitated by right judgment, acting thus as a precursor of the Christian just war theory.[15]

Aristotle solved the conflict between nature and convention by distinguishing potential from actual being. Virtue, being potential or natural, is received by human beings and becomes actual only by habit, education and training. Thus, laws are the actualisation of the potential-natural virtue. The Stoics attributed the disparities between ideal and human law to human decline from the ideal world, which also informs medieval Christian thought. Seneca, for instance, justified the disharmony between institutions with the law of nature as a degeneration from an original state of innocence.[16] On the other hand, the Stoics also envisioned a process from human fallibility to an ideal future which has inspired Thomas Aquinas' natural law theory. Either way, Stoicism facilitated the integration of the ancient and the Christian world.

[11] Plato, *Laws*, 9.875, pp. 259–60.

[12] L. L. Weinreb, *Natural Law and Justice* (Cambridge, Mass., Harvard University Press, 1987), p. 32; J. P. Maguire, 'Plato's Theory of Natural Law', 10 *Yale Classical Studies* (1947), p. 151; John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, University of Chicago Press, 1953), pp. 62, 134–56.

[13] Plato, *Republic*, trans. R. Waterfield (Oxford, Oxford University Press, 1993), pp. 131–56, 427–44.

[14] W. D. Ross (ed.), *The Works of Aristotle*, 'Rhetorica', vol. XI (Oxford, Oxford University Press, 1924), 1373b.

[15] Aristotle, *The Politics*, T. Sinclair trans., revised and re-presented by T. J. Saunders (London, Penguin, [1962] 1992), Bk. VII, Ch. 2, pp. 396–7 and Bk. I, Ch. 8, p. 79.

[16] R. W. Carlyle, A. J. Carlyle, *A History of Medieval Political Theory in the West*, vol. I (Edinburgh, W. Blackwood & Sons, 1903), pp. 23–5.

The Stoics define law as 'right reason in agreement with nature; it is of universal application, unchanging and everlasting'.[17] Nature for the Stoics has descriptive and normative connotations but also a pervasive causality which reveals its teleology.[18] In such a system, moral responsibility is attained.[19] The universality of law is based upon the common nature of men. All men partake of reason and, therefore, they are equal, which is different from the Christian notion of equality based on a common progenitor. The Roman *jus gentium* as the forefather of international law signified the extent to which it applied.[20] The relation between *jus gentium* and *jus naturale* has become a matter of disagreement. Ulpian distinguished *jus gentium* from natural law.[21] Gaius[22] or Cicero, on the other hand, identified *jus gentium* with *jus naturale*. The linkage is the universality of *jus naturale* and *jus gentium*, the former referring to its source and the latter to its application.[23] Their reduction into a single concept resolves eventually the quest of their practical and theoretical existence.[24]

The Christian natural law tradition: St. Thomas Aquinas and John Finnis

As was said above, early Christian writers explained discrepancies between actual and ideal law through a dogmatic theology of the Fall.[25] St. Thomas Aquinas liberated man from the vindicatory interpretation of human fallibility

[17] Cicero, *De Re Publica*, Bk. III, XXII. 33, trans. C. W. Keyes, *Loeb Classical Library* (Cambridge, Mass., Harvard University Press, 1928), p. 211.

[18] A. A. Long, *Hellenistic Philosophy: Stoics, Epicureans, Skeptics*, 2nd edn (London, Duckworth, 1986), p. 169. A. A. Long, 'The Freedom and Determinism in the Stoic Theory of Human Action', in A. A. Long (ed.), *Problems in Stoicism* (London, Athlone Press, 1971), p. 173, at p. 178; J. M. Rist (ed.), *The Stoics* (Berkeley, University of California Press, 1978), p. 204.

[19] Long, *Hellenistic Philosophy*, p. 165.

[20] A. Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillan, 1947), p. 19.

[21] 'Natural law is that which nature has taught all animals. . . . The law of nations is that law which mankind observes.' T. Mommsen, P. Krueger, A. Watson (eds), *The Digest of Justinian*, vol. 1 (Philadelphia, Pennsylvania, University of Pennsylvania Press, 1985), I, 1.

[22] Gaius, *Institutes* I.I, trans. Francis de Zulueta, *The Institutes of Gaius* (Oxford, Clarendon Press, 1946–53), pt. I, p. 3. '[I]t tacitly identifies *jus gentium* with *jus naturale*: it is the law common to all mankind as being the product of reason – common human reason or the divine reason ordering the world'. *Ibid.*, pt. II, p. 12.

[23] 'Cicero thus identifies the law of Nature with the *jus gentium*, in the sense of law common to all peoples . . .'. H. F. Jolowicz, B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn (Cambridge, Cambridge University Press, 1972), pp. 104–5.

[24] W. W. Buckland, *A Textbook of Roman Law From Augustus to Justinian*, 3rd rev. edn by P. Stein (Cambridge, Cambridge University Press, 1963), pp. 54–5.

[25] E. Troeltsch, *The Social Teaching of the Christian Churches*, trans. Olive Wyon, vol. I (London, Allen & Unwin, 1931), pp. 153–5.

and by rediscovering Aristotle, delivered a theory which integrated human and ideal natural law through reason.[26] The reconciliation between faith and reason is achieved by the inclusion of *lex naturalis* into the providential order of God, the *lex aeterna*.[27] As in Aristotle everything had an essence, for St. Thomas Aquinas the essence of man is reason. Being uniquely endowed with reason, man participates actively in eternal law and reason reveals the ends towards which he may direct himself.[28] On the other hand, being subject to the same physical laws as other creatures, he also participates passively in Eternal Law.[29] Moral order thus springs from the intersection of deontological and ontological order. The two are complementary because reason leads to faith, that is, God, whereas faith recognises reason.[30]

Law is 'an ordinance of reason for the common good, made by him who has care of the community, and promulgated'.[31] This definition contains a positivistic aspect, enactment and promulgation, but also a naturalistic one, rationality and good intent. For Aquinas, positive law derives its legal appellation from natural law[32] but he was in no doubt that iniquitous laws are still laws,[33] and that reasonable calculations would enforce obedience to such laws.[34] The opposite view that it is invalid has been perpetuated by positivism[35] by misinterpreting the distinction between the morality to obey

[26] A. H. Chroust, 'The Philosophy of Law of St. Thomas Aquinas: His Fundamental Ideas and Some of his Historical Precursors', 19 *American Journal of Jurisprudence* (1974), p. 1, at p. 2.

[27] T. Aquinas, *Summa Theologia* (London, Blackfriars, 1964), 1a, 2ae, 91.1.

[28] Aquinas, *Summa*, I – II, q. 71, a.2c: 'And so whatever is contrary to the order of reason is contrary to the nature of human beings as such; and what is reasonable is in accordance with human nature as such. The good of the human being is being in accord with reason; and human evil is being outside the order of reasonableness . . .'.

[29] Aquinas, *Summa*, 1a, 2ae, 91.1, 2.

[30] 'In St. Thomas's assertion, *gratia non tollit naturam, sed perficit*, there is the recognition of the existence and dignity of a purely 'natural' sphere of rational and ethical values.' A. P. D'Entrèves, *The Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker* (London, Oxford University Press, 1939), p. 21. W. Farrel, *A Companion to the Summa*, vol. II (New York, Sheed & Ward, 1945), p. 372.

[31] Aquinas, *Summa*, 1a, 2ae, 90.4.

[32] *Ibid.*, 1a, 2ae, 92.114.

[33] *Ibid.*, I – II, q. 92, a.1 ad 4.

[34] *Ibid.*, 1a, 2ae, 96.4; 2a, 2ae, 104.6. An exception is Origen who admits that the natural law of God invalidates any contrary civil law. W. A. Banner, 'Origen and the Tradition of Natural Law Concepts', 8 *Dumbarton Oaks Papers* (1954), p. 71.

[35] 'The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise'. J. Raz, 'Kelsen's Theory of Basic Norm', 19 *American Journal of Jurisprudence* (1974), p. 94, at p. 100.

and the morality to promulgate or enforce the law.[36] This contention has been challenged by Finnis who, reappraising Aquinas, restates natural law in order to reconcile law and morality.[37] He distinguishes the focal from the penumbral meaning of law. The focal meaning is the ideal purpose which law should serve towards the achievement of the common good and it has a moral element. The elevation of a particular instance therein requires 'a point of view in which legal obligation is treated as at least presumptively a moral obligation'.[38] Thus, if humanitarian intervention comes to enjoy the viewpoint of a moral ideal, as was overwhelmingly claimed during the Kosovo operation,[39] whereas non-intervention does not, the latter is defective in the focal meaning.[40] Legal orders do not always satisfy the ideal order and attribute the quality of law to rules which are outside the fringes of the focal meaning. However, unjust laws are not invalid because Finnis rejects the definitional and accepts the evaluative role of natural law.[41]

For Finnis, law is an instrument for societal transformation. Its function is to promote basic goods, the self-evident principles of life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion.[42] He infers these goods by inward speculation, an intelligent practical reasoning.[43] In a similar manner, the policy school projects the basic values

[36] H. McCoubrey, *The Development of Naturalist Legal Theory* (London, Croom Helm, 1987), p. xii.

[37] J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980), pp. 276–80, 359–60.

[38] *Ibid.*, pp. 14–15.

[39] See Televised Statement by President Jacques Chirac on the Situation in Kosovo (Paris, 6 April 1999) for whom the operation is 'in the name of morality and human rights'. http://www.info-france-usa.org/news/.

[40] This reverses the statement that humanitarian intervention resides in the realm of morality whereas the law is the non-use of force. T. M. Franck and N. S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *AJIL* (1973), p. 275, p. 304.

[41] N. MacCormick, 'Natural Law and the Separation of Law and Morals', in R. P. George (ed.), *Natural Law Theory* (Oxford, Clarendon Press, 1992), p. 105, at p. 109: 'But the positivist theory I have in view yields just the same conclusion – the law is a valid law, but if the duties it imposes are duties in violation of the demands of justice, it will follow that the moral issue whether or not to comply is *prima facie* an open one. . . . Finnis has put it beyond denial that the mainstream of the natural law tradition . . . affirms the possible existence of such (unjust) laws, while denying or downgrading their morally compelling quality and insisting on their essential defectiveness as law.'

[42] Finnis, *Natural Law*, pp. 85–9. Similarly for the policy school, law promotes certain pre-moral values. M. S. McDougal, H. D. Lasswell, W. M. Reisman, 'The World Constitutive Process of Authoritative Decision', 19 *Journal of Legal Education* (1966), p. 253.

[43] Finnis, *Natural Law*, pp. 31–4, 85–6. For Thomas Aquinas though it is Eternal Law which attributes self-evidence to principles of natural law. Aquinas, *Summa*, I – II, q. 94, a.6c; q. 99, a. 2 ad 2; q. 100, aa. 5 ad 1, 11c. N. MacCormick, 'Natural Law Reconsidered', 1 *Oxford Journal of Legal Studies* (1981), p. 99, at p. 103. Weinreb,

of human dignity as self-evident by employing in their case the methodological artifice of a framework for decision-making.[44]

Accordingly, natural law theory is 'the set of principles of practical reasonableness in ordering human life and human community'.[45] Morality is achieved through the interface of practical reasonableness with the basic goods.[46] Human rights emanate from the basic values and, therefore, they are absolute and exceptionless. 'Not to have one's life taken directly as a means to any further end'[47] is such a right. Exceptionless rights revisit Kant's Golden Rule that humans should be treated as ends and not as means[48] which is rooted in the decalogue and St. Paul's principle that evil is not to be done that good may come of it.[49] Hence the rejection of consequentialism, that one should pursue an act whose consequences are beneficial.[50]

The imbroglio though is evident. Any humanitarian disaster would create a moral impasse. Intervention to stop a human catastrophe may cause human casualties and become impermissible, whereas the situation is equally life-threatening for the intended recipients of intervention. Does the pursuit of morality warrant passivity? Does the attribution of absolute character to some rights accentuate individualistic motives?[51] Finnis excludes personal feelings or sympathy because reason requires that the basic values should be respected *in toto*. At a second level of inquiry, if action is morally reprehensible, is omission to act also morally censured? In a situation of humanitarian crisis, inaction to stop human loss may be equated with the action which provokes it. Both can be censured because they equally damage the value of

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Natural Law, p. 115: 'Even those who agree with him on the merits may suppose that he has confused self evidence with personal conviction.'

[44] H. D. Lasswell, M. S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest', 52 *Yale LJ* (1943), p. 203. M. S. McDougal, 'The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System', in H. D. Lasswell, H. Cleveland (eds), *The Ethics of Power: The Interplay of Religion, Philosophy, and Politics* (New York, Harper & Bros., 1962), p. 221, at p. 230.

[45] Finnis, *Natural Law*, p. 280.

[46] *Ibid.*, pp. 126–7. Also at p. 103: 'the requirements . . . express the "natural law method" of working out the (moral) "natural law" from the first (pre-moral) "principles of natural law"'.

[47] Finnis, *Natural Law*, p. 225.

[48] I. Kant, 'Theory of Ethics', in T. M. Greene (ed.), *Kant: Selections* (New York, Scribner's, 1957), p. 281.

[49] Karl Barth, *The Epistle to the Romans* (Oxford, Oxford University Press, 1933), p. 83, III, 7, 8.

[50] Finnis, *Natural Law*, pp. 111, 118. A. Ellis, 'Utilitarianism and International Ethics', in T. Nardin, D. R. Mapel (eds), *Traditions of International Ethics* (Cambridge, Cambridge Univeristy Press, 1992), p. 158.

[51] Thomas Aquinas has repudiated this position when he said that the captain would be moored at the port indefinitely, had the highest aim been the survival of the ship. Aquinas, *Summa*, I – II, q. 2, art. 5; L. L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969), pp. 184–6.

life, irrespective of any beneficial effects which positive action may produce. This conclusion, if true, is illogical. Condemnation of inaction presumes affirmative action but the latter is also condemned.

In order to overcome the impasse, natural law theory introduces the concept of intention which forms part of the just war theory as promulgated by Aquinas which also includes right authority and just cause.[52] It is not merely the objective act but also the subjective element, the intention to cause harm, which is important. This refers to the Christian doctrine of 'double effect'.[53] Consequently, it is only the act which intends to harm people which is morally impermissible whereas humanitarian intervention may harm people but has no such intention. In the recent Kosovo case, the moral dilemmas encountered by the protagonists mirrored the different manifestations of natural law tradition that have been developed above. There was a humanitarian catastrophe in progress and human life was the central value to be protected. The Western powers have reaffirmed their belief in the absolute character of this right but were hesitant to act, fearing human casualties. On the other hand, inaction would entail perpetuation of killings. Both sets of possibilities were morally reprehensible. The operation cut the moral Gordian knot appealing to 'intention' and consequentialism. NATO's action may cause casualties but these are side-effects of a morally condonable action against barbarism and there would be the added benefit of the restoration of the threatened values.[54] A strong component of the Kosovo operation was also a feeling of sympathy and empathy for the victims of persecution contrary to Finnis' attempt to exclude our 'feelings, sympathy and generosity' to be implicated in the articulation of the value of life.[55]

Hugo Grotius: international law and humanitarian intervention

The decline of theological explanations which permitted the advancement of secularism and rationalism characterised Grotius' era as well. For him, law

[52] Aquinas, *Summa*, II – I, 12, 1; J. Finnis, 'The Ethics of War and Peace in the Catholic Natural Law Tradition', in T. Nardin (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, Princeton University Press, 1996), p. 15.

[53] J. Boyle, 'Towards Understanding the Principle of Double Effect', 90 *Ethics* (1980), p. 527.

[54] For instance, Lionel Jospin enumerated the exigent values which promoted the intervention as freedom, democracy and respect for human rights to which the Serb regime does not subscribe. He added 'our determination must . . . be directed towards peace that respects the human person and the rule of law'. Address by Prime Minister Lionel Jospin in Response to Questions in the National Assembly (Paris, 6 April 1999), http://www.info-france-usa.org/news/.

[55] Lionel Jospin spoke of the 'basic solidarity' and 'our duty to protect them [Kosovars]'. Address by Prime Minister Lionel Jospin in Response to Questions in the National Assembly (Paris, 6 April 1999), http://www.info-france-usa.org/news/.

is immutable because it is the product of man's reason and it would be so 'even if we should concede that . . . there is no God'.[56] Writing at the end of a tradition, Grotius makes references to God as another source of law, distinguishing, however, between the grounds for the existence and those for the knowledge of natural law. God is the creator of human creatures and, therefore, of natural law but knowing the law of nature is independent of believing in God.

Natural law is a command of good reason (*recta ratio*) 'which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God'.[57] The independence of human reason from God is evident. It delimits God's authority by delineating the forbidden or permitted acts according to their consonance with good reason.

Human reason is the source of this knowledge and he identifies natural law through an *a priori* and an *a posteriori* method. The former concerns the consonance of a rule with man's reason whereas the latter infers the naturalness of a principle through empirical investigation from the theorem that a universal effect should have a universal cause.[58] Only *a priori* principles as the product of human reason are true natural law principles. The *a posteriori* principles are not immutable because they belong to human will, formed by general agreement. In international law, the *a priori* principles pertain to natural law whereas the *a posteriori* to positive law.[59] The conceptual bifurcation of international law sources initiated by Grotius has been revisited by Wolff and Vattel along with Grotius' rather Aristotelian assumption of 'societas humana'. Grotius distinguished between contractual societies as the product of human will with the state being the highest contractual society and the universal society of mankind as a bond of kinship between men who have common descent.[60] Thus, the universal community of mankind embraces the inter-individual and inter-state relations in a *status naturalis*.[61] The *appetitus societatis*, the societal nature of human beings, becomes the axiom which generates the natural law principles as the mathematicians deduce propositions from axioms.

[56] H. Grotius, *De Jure Belli Ac Pacis libri tres* (Amsterdam, 1646), trans. F. W. Kelsey, A. E. R. Boak, H. A. Sanders, J. S. Reeves and H. F. Wright, J. B. Scott (ed.), *The Classics of International Law* (Buffalo, N.Y., W. S. Hein & Co. Inc., 1995), vol. 2, Bk. I, *Prolegomena*, p. 13. para. 11.

[57] Grotius, *De Jure Belli*, Bk. I, ch. I, pp. 38–9, para. X(I).

[58] *Ibid.*, Bk. I, ch. I, p. 42. para. XII(I).

[59] T. Tadashi, 'Grotius' Concept of Law', in Onuma Yasuaki (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford, Clarendon Press, 1993), p. 32, at pp. 41–3.

[60] Grotius, *De Jure Belli*, 'Prolegomena', p. 14, para. 14.

[61] H. van Eikema Hommes, 'Grotius on Natural and International Law', 30 *Neth. ILR* (1983), p. 61, at p. 64.

Thus Grotius attaches responsibility to humanity to punish malfeasants by waging war.[62] If a state commits a crime, it makes itself inferior to any other nation, not only to the recipient of the injury. Any nation which in this sense represents the whole society of mankind is authorised individually or collectively to punish the culprit. As Suarez put it, 'just as the sovereign prince may punish his own subjects when they offend others, so may he avenge himself on another prince or state which by reason of some offence becomes subject to him; and this vengeance cannot be sought at the hands of another judge, because the prince of whom we are speaking has no superior in temporal affairs'.[63] Thus the problem of adjudication created by equal sovereign authorities is solved by the universal society.[64]

Another issue extrapolated from Grotius' work is his obsession with peace. He disapproves of any general right to rebellion because it is disruptive and he sanctions measures against threats to public order. Grotius defends the *bellum publicum solemne* in order to prevent the extension of war.[65] War for him is 'undertaken in order to secure peace'.[66]

The modern concept of humanitarian intervention follows the same doctrinal and operational pattern either as the *societas humana* which interposes to restore the forfeited standards of humanity and to protect maltreated individuals or the need to restore peace and order threatened by human rights abuses.

Human(ity's) solidarity

Considering whether there exists just cause for undertaking war on behalf of the subjects of another ruler, Grotius says that if 'a ruler inflict[s] upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded. . . . In conformity to this principle Constantine took up arms against Maxentius and Licinius, and other Roman emperors either took up arms against the Persians or threatened

[62] This is referred to as the 'Grotius' theorem'. C. Van Vollenhoven, *Grotius and Geneva*, Bibliotheca Visserianum, VI (Leyden, 1926), p. 13, at p. 21; P. H. Kooijmans, 'How to Handle the Grotian Heritage: Grotius and Van Vollenhoven', 30 *Neth. ILR* (1983), p. 81.

[63] F. Suárez, 'A Work on the Three Theological Virtues: Faith, Hope and Charity', Disputation XIII 'On Charity', Sect. II, para. 1 in *Selections from Three Works of Francisco Suárez S.J.*, in J. B. Scott (ed.), *The Classics of International Law* (Buffalo, N.Y., W. S. Hein & Co. Inc., 1995), vol. 2, p. 806.

[64] J. Finnis, 'The Ethics of War and Peace in the Catholic Natural Law Tradition', in T. Nardin (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives*, pp. 22–3.

[65] Grotius, *De Jure Belli*, Bk. III, ch. IV, p. 644, para. iv.

[66] *Ibid.*, Bk. I. ch. I, p. 33, para. I.

to do so unless these should check their persecutions of the Christians on account of religion.'[67] Religious solidarity assimilated human considerations in an era when ethnicity remained an inconspicuous political force. Faith functioned as the unitary principle beyond the local jurisdiction and also as the distinctive feature among nations. In *Vindicae Contra Tyrannos*, the author defends the unity of Christianity and the unity of humanity by justifying intervention 'in behalf of neighbouring peoples who are oppressed on account of adherence to the true religion, or by any obvious tyranny'.[68]

Vattel recognises a right to intervention on the above pattern of Grotius without the religious connotations. 'If a prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance.'[69]

Because humanitarian intervention is *prima facie* an assault on state sovereignty, it is legitimised by being integrated into a natural law theory which envisages an enveloping human society. As it is explained by Rougier, people live in a triple social organisation: national, international and the *société humaine* regulated by the *droit humain*.[70] A political society should satisfy, beyond the national and international interests of its members, those interests which are universal. Consequently, humanitarian intervention is the control of a state, 'au nom de la Société des nations', over the acts of another sovereign which are 'contraire aux lois de l'humanité'.[71] The concept of intervention to uphold minimum human standards was crystallised in the nineteenth century. Humanitarian considerations following the atrocities carried out by the Ottoman authorities justified the interventions of the Great Powers in

[67] *Ibid.*, Bk. II, ch. XXV, p. 584, para. viii (2).

[68] The *Vindiciae Contra Tyrannos* was published under the pseudonym of Stephanus Julius Brutus and written probably by either Hubert Languet or Duplessis-Mornay. W. A. Dunning, *A History of Political Theories: From Luther to Montesquieu* (New York, Macmillan, 1931), p. 47, pp. 55–6.

[69] E. de Vattel, *Le Droit des Gens ou Principes de la loi naturelle'*, *The Classics of International Law*, J. B. Scott (ed.) (Washington, Carnegie Institution of Washington, 1916), Bk. II, ch. iv, p. 298, para. 56.

[70] A. Rougier, 'La théorie de l'intervention d' humanité', 17 *RGDIP* (1910), p. 468, at pp. 489–97.

[71] Rougier, 'La théorie de l'intervention d' humanité', p. 472. A. Pillet, 'Le droit international public: ses éléments constitutifs, son domaine, son object', 1 *RGDIP* (1894), p. 1, at p. 13: 'Il existe un droit véritable en dehors des sociétés nationales et de leurs institutions jurisdiques, en dehors et au dessus de la société internationale et du droit qui lui correspond, droit inséparable de l'homme et qui mérite bien le nom de droit commun de l'humanité . . . un droit dont l'observation puisse être réclamée de chacun État ou individu, et imposée à chacun . . .'. 'Les divers groupes, Etat, communauté internationale ont quelque chose d'artificiel et de voulu: le bien de l'homme est leur dernier objet'. *Ibid.*, p. 19. 'Si la volonté et la force lui manquent, d'autres, de simple tiers, les rempliront à sa place dans les limites de leur intérêt'. *Ibid.*, p. 26.

Ottoman affairs.[72] Hence, France, Great Britain and Russia intervened in Greece (1827–30) when the Treaty of London (6 July 1827) for the protection of Greeks was dishonoured by Turkey.[73] In 1860, France was delegated to intervene in Syria to protect the Maronite Christians from being massacred by the Turks.[74] This intervention was approved by the Protocol of Paris (1860) which contemplated 'l'amélioration du soit des populations chrétiennes de tout rite dans l'Empire Ottoman'.[75] The European intervention in Bosnia, Herzegovina and Bulgaria (1876–78) was provoked by the harsh treatment of Christians. The Porte rejected the establishment of an International Commission whose mandate was to supervise administrative changes for the benefit of the Christian populations.[76] The Concert of Europe later signed the London Protocol (31 March 1877) according to which Turkey was required to adopt

[72] M. Ganji, *International Protection of Human Rights* (Geneva, Librairie E. Droz, 1962), ch. 1, pp. 9–45; J.-P. L. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter', 4 *Cal. WILJ* (1974), p. 203; T. E. Behuniak, 'The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey', 79 *Military Law Review* (1978), p. 157.

[73] *Treaty between Great Britain, France, and Russia, for the Pacification of Greece*. Signed at London, 6 July 1927. 14 *British and Foreign State Papers* (1826–27), p. 632, at p. 633. Under Article V of the same Treaty, they declared that they 'will not seek . . . any augmentation of Territory, any exclusive influence, or any commercial advantage for their subjects . . .'. *Ibid*., p. 636. Turkey emphasised that 'l'affaire Grecque est une affaire interne de la Sublime Porte, et que c'est à elle seule à s'en occuper; que désormais aucune Puissance ne doit plus se mêler de cette affaire . . .'. *Manifesto of the Sublime Porte, declining the Pacification with the Greeks, proposed by the Mediating Powers*. 9 June 1827. 14 *British and Foreign State Papers* (1826–27), p. 1042, at p. 1043. See also the *Proclamation of the Ottoman Porte, declining the Mediation of the Allied Powers, and the Proposed Armistice with the Greeks*. 20 December 1827. *Ibid*., p. 1052.

[74] I. Pogany, 'Humanitarian Intervention in International Law: The French Intervention in Syria Reexamined', 35 *ICLQ* (1986), p. 182.

[75] Rougier, 'La théorie de l'intervention d' humanité', p. 474, note 2; *Protocol of a Conference held at Paris, August 3, 1860*: 'les Puissances Contractantes n'entendent poursuivre ni ne poursuivront dans l'exécution de leurs engagements, aucun avantage territorial, aucune influence exclusive, ni aucune concession touchant le commerce de leurs sujets, et qui ne pourrait être accordé aux sujets de toutes les autres nations'. 51 *British and Foreign State Papers* (1860–61), p. 279.

[76] *General Treaty between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, for the Re-establishment of Peace*. Signed at Paris, 30 March 1856. In Article VII, it guaranteed the independence and territorial integrity of the Ottoman Empire. 46 *British and Foreign State Papers* (1855–56), p. 8, at p. 12. In Article IX, it made provision for certain fundamental civil and political rights for the benefit of the Christians which would be realised by Firman. It also attached the non-intervention principle on the implementation in 'good faith' of the Firman. See *Firman and Hatti-Sherif by the Sultan, relative to Privileges and Reforms in Turkey*. February 1856. 47 *British and Foreign State Papers* (1856–57), pp. 1363–9. Due to Turkey's disregard of her obligations, the Russian government communicated to the British that: 'We seem therefore to have an undoubted right formally to intimate to the Porte that we shall not hold ourselves bound to abstain from interference till

the necessary administrative measures for the protection of Christians while the Concert retained its right to take any action should Turkey fail to uphold the minimum standards.[77] Turkey rejected the provisions of the Protocol 'en sa qualité d'Etat indépendant'.[78] The impasse ended with the declaration of war by Russia aiming 'à mettre un terme à la déplorable situation des Chrétiennes sous la domination des Turcs et aux crises permanentes qu'elle provoque'.[79] In a previous communication, the Russian government spoke of its resolution to protect 'the principles that have been recognised as equitable, human, necessary by the whole of Europe'.[80] Another incidence, this time in the twentieth century, is that of Macedonia (1903–08, 1912–13) where Greece, Bulgaria and Serbia took action in order to put an end to the Turkification of the Christian populations. In a 'Note Verbale' to the British Government, Greece explained that the three Governments 'ne pouvant plus tolèrer les souffrances de leurs congérières en Turquie'.[81]

This pattern of interventions taking place in the interests of humanity antagonised sovereignty and has occasionally fallen into periods of hibernation or even disrepute. However, humanitarian interventions revived, particularly after events which shocked the conscience of mankind[82] because

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the reforms promised by the Hatt Houmayoun are fully carried out.' *Sir H. Elliot to the Earl of Derby (Recd. Nov. 4, 1876).* 67 *British and Foreign State Papers* (1875–76), p. 289, at p. 290. Pursuant to this, a Conference in Constantinople was held between December 1876 and January 1877 which provided for the establishment of the International Commission. *Protocols of Conferences between Great Britain, Austria-Hungary, France, Germany, Italy, Russia, and Turkey, respecting the Affairs of Turkey. (Servia; Montenegro; Bulgaria; Bosnia; Herzegovina; Reforms, & c.).* Constantinople, December 1876–January 1877. 68 *British and Foreign State Papers* (1876–77), pp. 1114–1207.

[77] '. . . d'affirmer de nouveau ensemble l'intérêt commun qu'elles prennent à l'amélioaration du sort des populations Chrétiennes de la Turquie . . .'. *Protocol of Conference between the Plenipotentiaries of Great Britain, Austria, France, Germany, Italy and Russia, relative to the Affairs of Turkey. (Christian Population, Reforms in Bosnia, Herzegovina, and Bulgaria. Serbia. Montenegro, & c.).* Signed at London, 31 March 1877. 68 *British and Foreign State Papers* (1876–77), p. 823.

[78] 'La Turquie, en sa qualité d'Etat indépendant, ne saurait se reconnaître comme placée sous aucune surveillance, collective ou non.' *Turkish Note, in reply to the Protocol relative to the Affairs of Turkey, signed at London, March 31, 1877.* Constantinople, 9 April 1877. 68 *British and Foreign State Papers* (1876–77), p. 826, at p. 831.

[79] Rougier, 'La théorie de l'intervention d' humanité', p. 468, at p. 475, note 6.

[80] The Note of the Russian Government was sent on 13 November 1876. 47 *British and Foreign State Papers* (1856–57), p. 321.

[81] 106 *British and Foreign State Papers* (1913), pp. 1059–60.

[82] '. . . the right of humanitarian intervention in the name of the Rights of Man, trampled upon by the state in a manner offensive to the feeling of Humanity, has been recognised long ago as an integral part of the Law of Nations.' *Speeches of the Chief Prosecutors at the close of the case against the individual defendants*, Cmd 6964, p. 63.

they betray the deeply felt interests of the international community.[83] As it was perhaps said with vision, when 'the feeling of general interest in humanity increases, and with it a world-wide desire for something approaching justice and an international solidarity, interventions undertaken in the interests of humanity will also doubtless increase. We may therefore conclude that future public opinion and finally international law will sanction an ever increasing number of causes for intervention for the sake of humanity.'[84] The Kosovo operation contains those ingredients which reproduce this genre of humanitarian actions. After almost a decade of warfare, horrific atrocities and human rights abuses committed in the territory of the former Yugoslavia and the prospect of another humanitarian crisis looming menacingly in Kosovo, NATO's action was justified on grounds of morality and human society. For example, the Czech President Václav Havel wrote that the action 'happened . . . out of respect for the law, for a law that ranks higher than the law which protects the sovereignty of states . . . for human rights'.[85] And the French

[83] '. . . when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.' L. Oppenheim, *International Law: A Treatise*, H. Lauterpacht (ed.), vol. I, 'Peace', 7th edn (London, Longmans, Greens & Co., 1948), p. 280, para. 137. H. Wheaton, *Elements of International Law*, 8th edn (Boston, Little, Brown & Co., 1866), p. 95, para. 69: 'The interference of the Christian powers of Europe in favour of the Greeks . . . affords a further illustration of the principles of international law authorising such an interference . . . where the general interests of humanity are infringed by the excesses of a barbarous and despotic government.' J. C. Bluntschli, *Le droit international codifié*, trans. M. C. Lardy, 4th edn (Paris, Librairie Guillaumin et Cie, 1886), p. 281, art. 478: 'On sera autorisé à intervenir pour faire respecter les droits individuels reconnus nécessaires, ansi que les principes généraux du droit international . . .'. J. Basdevant, 'Chronique des faits internationaux', 11 *RGDIP* (1904), p. 105, at p. 110: 'L'État . . . qui ne remplit par sa fonction de justice même à l'égard de ses nationaux, perd son droit au respect et les autres puissences sont . . . autorisées à substituer leur action à la sienne.' E. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Pub. Co., 1915), p. 14: 'where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorised by international law to intervene on grounds of humanity.' L. Le Fur, *Intervention pour cause d'humanité* (Paris, Pedone, 1935), p. 38: 'L'intervention, a pour but d'assurer aux individus qui en sont injustement privés, les libertés considerées aujourd'hui comme essentielles chez les peuples civilisés: liberté individuelle, liberté religieuse, droit d'usage de la langue maternelle. C'est à dire que l'oppression dont ils souffrent est en général imputable à l'Etat même dont ils sont ressortissants et que l'intervention émanera donc d'Etats tiers . . . Rejeter en principe l'intervention, serait une prime accordée à la violence et toute sécurité assurée à l'injustice.'

[84] H. G. A. Hodges, *The Doctrine of Intervention* (Princeton, The Banner Press, 1915), p. 91.

[85] V. Havel, 'Kosovo and the End of the Nation-State', XLVI *The New York Review of Books*, 10 June 1999, p. 4, at p. 6.

President Jacques Chirac spoke of 'une conscience universelle de ce que sont les Droits de l'Homme'.[86]

Peace and human rights

Grotius' other preoccupation was the maintenance of peace. He sanctions war against recalcitrant members of the international community in order to limit the effects of their actions and preserve peace. The intervention of the Great Powers in the Greek Revolution was dictated 'no less by sentiments of humanity than by the interest for tranquillity in Europe'.[87] The intervention in Bosnia, Herzegovina (1876–78) also invoked 'les intérêts de la paix générale'.[88] The modern articulation of such contingent factors urging for humanitarian actions is offered by the former British Foreign Secretary Douglas Hurd: 'If we really want a world that is truly more secure, more prosperous and more stable, then humanitarian problems may from time to time be seen not only as a moral issue but as a potential security threat as well.'[89]

Thus, according to a contemporary construction, human rights violations within a country constitute a threat to international peace and security justifying measures of redress by the international community.[90] Such violations can produce an array of complex problems such as refugee •flows which may destabilise neighbouring countries, internal dislocation which may cause economic hardship, or they may also export conflict.[91] The Representative of Canada to the Security Council followed this approach in the discussions concerning Kosovo. As he said, it is 'a recognition of the human dimension of international peace and security. . . . Humanitarian and

[86] Entretien du President de la Republique, M. Jacques Chirc, avec 'TF1', 10 June 1999, http://www.diplomatie.fr/actual/dossiers/kossovo/.

[87] *Treaty between Great Britain, France, and Russia, for the Pacification of Greece.* Signed at London, 6 July 1827. 14 *British and Foreign State Papers* (1826–27), p. 632, at p. 633.

[88] See *London Protocol* (31/3/1877), 68 *British and Foreign State Papers* (1876–77), p. 823, at p. 824: 'Si leur [contracting states] espoir se trouvait encore une fois déçu et si la condition des sujets Chrétiens du Sultan n'était pas améliorée . . . elles se réservent d'aviser en commun aux moyens quelles jugeront le plus propres à assurer le bien-être des populations Chrétiennes et les intérêts de la paix générale.'

[89] D. Hurd, 'The Search for a New Security System in Europe', 27 *Arms Control and Disarmament Quarterly Review* (1992), p. 33, at p. 35.

[90] G. Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial', 97 *RGDIP* (1993), p. 297; P.-M. Dupuy, 'Sécurité collective et organisation de la paix', *ibid.*, p. 617.

[91] The US Permanent Representative to the Security Council stated in relation to SC Res. 794 for Somalia that 'the international community is also taking an important step in developing a strategy for dealing with the potential disorder and conflicts of the post-Cold War world'. UN Doc. S/PV. 3145, p. 36 (3 December 1992).

human rights concerns are not just internal matters; they can and must be given new weight in the Council's definition of security and in its calculus as to when and how the Council should engage.'[92]

The assimilation of human rights violations with threats to the peace was involved in the imposition of sanctions on South Rhodesia (1968)[93] and the arms embargo on South Africa (1977).[94] A more recent demonstration of this construction is Resolution 688 (1991) responding to the Iraqi abuses against the Kurds.[95] On the basis of this resolution Western powers created safe havens in Northern Iraq.[96] Resolution 794 (1992) concerning Somalia[97] characterises internal human rights violations without international repercussions as a threat to international peace, whereas Resolution 688 was less explicit on this issue. According to Resolution 794, 'the magnitude of the humanitarian tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security'.

Resolutions 1199[98] and 1203[99] on Kosovo express the alarm of the international community at the 'continuing grave humanitarian situation throughout Kosovo and the impeding humanitarian catastrophe' and also affirm that the unresolved situation in Kosovo 'constitutes a continuing threat to peace and security in the region'. These Resolutions are taken under Chapter VII of the UN Charter which envisages collective enforcement actions but do not contain any such authorisation. The legal basis of the operation then becomes rather opaque with France justifying the NATO action on a perceived mandate by these Resolutions[100] whereas NATO's Secretary General

[92] Statement by Ambassador Robert R. Fowler, Permanent Representative of Canada to the United Nations (10 June 1999), http://www.un.int/cananda/.

[93] SC Res. 253, 23 UN SCOR, Res. and Doc., at 5 (1968).

[94] SC Res. 418, 32 UN SCOR, Res. and Doc., at 5 (1977).

[95] SC Res. 688, UN SCOR, 46th Sess., 2982d mtg, UN Doc. S/RES/688 (1991): '*The Security Council, Mindful* of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security, 1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; 2. *Demands* that Iraq, as a contribution to removing the treat to international peace and security in the region, immediately end this repression . . .'

[96] K. K. Pearse, D. P. Forsythe, 'Human Rights, Humanitarian Intervention, and World Politics', 15 *Hum. RQ* (1993), p. 290, at p. 303; J. Delbrück, 'A Fresh Look at Humanitarian Intervention under the Authority of the United Nations', 67 *Indiana Law Journal* (1992), p. 880; R. B. Lillich, 'Humanitarian Intervention through the United Nations: Towards the Development of Criteria', 53 *ZaöRV* (1993), p. 557.

[97] SC Res. 794, UN SCOR, 47th Sess., 3145th mtg, at 3, UN Doc. S/RES/794 (1992).

[98] SC Res. 1199, UN SCOR, UN Doc. S/RES/1199 (1998).

[99] SC Res. 1203, UN SCOR, UN Doc. S/RES/1203 (1998).

[100] 'L'action de l'OTAN trouve sa légitimité dans l'autorité du Conseil de sécurité. Les résolutions du Conseil concernant la situation au Kosovo ont été prises en vertu du chapitre VII . . . lequel traite des actions coercitives en cas de rupture de la paix.'

Javier Solana argued for a 'case by case' evaluation where 'it is necessary to act for humanitarian reasons, when a UN Security Council resolution will not be necessary or will not be even appropriate because the UN Charter does not contemplate humanitarian acts'.[101] His evaluation of the situation was similar to the aforementioned resolutions that 'the deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region' with the added important caveat that following this 'there are legitimate grounds for the Alliance to threaten, and if necessary, to use force'.[102]

Social contract theories and humanitarian intervention

Related to the rationalisation and secularisation of natural law is the projection of the individual who is for Grotius the ultimate unit in national and international law.[103] States are not anthropomorphic enjoying an autonomous moral standing but are composed of individual human beings.[104] We arrive thus at those questions relating to the construct of states and their rights which influence the theory of humanitarian intervention. If man is rational and free, the formation of society is explained only through his free will implied in the social contract. The social contract was the device used to legitimise the authority of secular entities and justify the institutions deemed necessary by man's reason. It is the configuration of individualism into a political force[105] and provides a premise for evaluating social organisations and questioning their justice. Hence, the criterion for humanitarian intervention is the condition of the contract. The contractors enjoy certain natural rights which they agree to transfer to the political community. If the community forfeits these rights, humanitarian intervention, it is argued, will restore the initial contract.[106]

Ministère des Affaires Étranères, Paris, 25 march 1999, http://www.diplomatie.fr/actual/dossiers/kossovo/.

[101] Cited in I. H. Daalder, 'NATO, the UN, and the Use of Force', Brookings Institution, March 1999. http://www.unausa.org/issues/.

[102] Cited in B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999), p. 1, at p. 7.

[103] P. P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague, Martinus Nijhoff, 1960), p. 239.

[104] H. Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYBIL* (1946), p. 1, at p. 27.

[105] As Hegel said, it afforded the revision of its (state) constitution 'purely in terms of thought'. G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, in A. W. Wood (ed.), *Elements of the Philosophy of Right*, trans. H. B. Nisbet (Cambridge, Cambridge University Press, 1991), p. 277, para. 258.

[106] P. Laberge, 'Humanitarian Intervention: Three Ethical Positions', 9 *Ethics & Internatioanl Affairs* (1995), p. 15; M. J. Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', 12 *Ethics & Internatioanl Affairs* (1998), p. 63.

Modern contractarians such as Rawls follow the tradition of natural law based on equality between human beings as rational entities. Justice is for Rawls 'the first virtue of social institutions'[107] and the principles of justice are those that free and rational persons accept in an initial position of equality.[108] The participants, ignorant of their special circumstances, under the veil of ignorance[109] choose as principles of justice the Principle of Liberty[110] and the Principle of Equality.[111] The veil of ignorance thus safeguards certain deprivations for the benefit of disinterestedness and generality. By analogy, the representatives of nations in a position of ignorance, unbiased as to their historical fate,[112] choose the principle of equality which is 'analogous to the equal rights of citizens in a constitutional régime'.[113] Self-determination, that is, 'the right of a people to settle its own affairs without the interference of foreign powers', is a principle which follows from the primordial choice.[114] This accounts for sovereignty and non-intervention is its derivative. Walzer in *Just and Unjust Wars*[115] starts from these premises to proscribe interference because it will undermine the self-determination of a community. He premises his theory on a 'fit' between the government and the community based on a somewhat historical approach to political communities. The metaphorical contract he employs reflects the union among the government and the people, 'the living, the dead, and those who are yet to be born' which constitutes the state.[116] Hence, according to Walzer, a state may be illegitimate at home but its international standing is hypothesised, *as if* it were legitimate.[117] The only remedy against tyrannical regimes is revolution through the domestic process, not foreign intervention. Otherwise, the citizens' rights

[107] J. Rawls, *A Theory of Justice* (Cambridge, Mass., Harvard University Press, 1971), p. 3.

[108] *Ibid.*, p. 11.

[109] *Ibid.*, p. 12.

[110] *Ibid.*, p. 60.

[111] *Ibid.*, p. 83.

[112] 'Now at this point one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states . . . these representatives are deprived of various kinds of information . . . [o]nce again the contracting parties, in this case representatives of states, are allowed only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special situation'. Rawls, *A Theory of Justice*, p. 378.

[113] *Ibid.*

[114] *Ibid.*

[115] M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, Basic Books, 1977).

[116] Walzer, *Just and Unjust Wars*, pp. 51–4; M. Walzer, 'The Moral Standing of States: A Response to Four Critics, 9 *Philosophy & Public Affairs* (1980)', p. 209. Also M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Ind., University of Notre Dame Press, 1995).

[117] Walzer, *Just and Unjust Wars,* p. 89.

to rebellion and to self-determination are curbed.[118] Walzer adheres to a rather emotional notion of contract and people's consent to form political communities, which if broken, can only be restored by the same people whereas in Rawls, there is a correspondence between the causes for internal civil disobedience and external intervention which is the infringement of equal liberty. Civil resistance is a corrective action addressed to the majority and its purpose is to re-establish the shared meaning of justice. Humanitarian intervention similarly reinstates the infringed social contract.[119] It seems that Walzer's theory of social contract resembles that of Grotius' which conceptualised the existing state of affairs.[120] Grotius' social contract appears as an attempt for the philosophical rationalisation of the *status quo*,[121] whereas for the contractual philosophers it is a means for scrutinising state power. Moreover Grotius tries to minimise the political repercussions of his theory by curtailing any general right of resistance unless a ruler 'shows himself the enemy of the whole people.'[122] Intervention is permitted by Walzer only in extreme cases of enslavement or massacre where the hypothetical 'fit' seems to be lacking.[123]

On the other hand, Rawls is more permissive towards humanitarian intervention. It is only states which satisfy the principles of justice at the national level which enjoy international equal liberty, that is non-intervention.[124] Assuming that both just and unjust nations participate in the original position, its hypothetical construction will be destroyed since the parties do not share the appropriate initial position.[125] Equality is not only the promulgation but also the substantiation of the original position.[126] Parties which do not satisfy national equal liberty are excluded and may be targets of intervention. This

[118] *Ibid.*

[119] J. Rawls, 'The Law of Peoples', 20 *Critical Enquiry* (1993), p. 36, at p. 47; Rawls, *A Theory of Justice*, pp. 363, 372. W. G. Friedmann, 'A Theory of Justice: A Lawyer's Critique, 11 *Col. J Trans. L.* (1972), p. 369, at p. 376.

[120] Rousseau described Grotius' method as deriving 'toujours le droit par le fait'. J. J. Rousseau, *Du contrat social*, 2nd edn, (Paris, F. Rieder et Cie, 1914), Bk. I, ch. II, 'Des premières sociétés', p. 122.

[121] 'Mais Grotius, préoccupé seulement d'établir l'obligation de l'obéissance chez les sujets, attribue une valeur absolue au prétentu fait du contrat social qui, comme tel, n'existe pas. L'hypothèse du contrat n'a donc, dans son système, aucune valeur rationnelle. Elle représente uniquement un expédient, ou une fiction destinée à valoriser et ratifier le fait établi.' G. Del Vecchio, *Leçons de philosophie du droit* (Sirey, Paris, 1936), p. 64.

[122] Grotius, *De Jure Belli*, Bk. I, ch. IV, p. 157, para. xi.

[123] Walzer, 'The Moral Standing of States', at p. 217.

[124] '. . . but now they are representatives of peoples whose basic institutions satisfy the principles of justice selected at the first level'. Rawls, 'The Law of Peoples', p. 41. T. M. Franck, S. W. Hawkins, 'Justice in the International System', 10 *Michigan Journal of International Law* (1989), p. 127, at p. 144.

[125] Rawls, *A Theory of Justice*, p. 12.

[126] Rawls, 'The Law of Peoples', p. 45.

position is supported by his articulation of permissible conscription which is 'for the defence of liberty' and 'for those of persons in other societies as well'.[127] If non-intervention applies only among states which start from an original position of justice, one should be wary of situations where those principles are abandoned later. Hence, following a common trait, humanitarian intervention is permitted against a state 'if it severely frustrates the interests of its populace' since 'the contractors are concerned . . . with the well-being of persons'.[128]

In the 'Law of Peoples'[129] Rawls appears more cautious and permits humanitarian intervention exceptionally against situations of tyranny.[130] His position approximates Walzer's theory, although it is more comprehensive than the incident-specific criterion of the latter's. However, it represents a reversal from his previous position whereby persons are the ultimate moral units and units for appraising societal justice towards a cautious acknowledgement of relativism.[131] His aim in international law is peace which a comprehensive concept of justice would threaten.[132] Hence, his tolerance of less just societies. For stability and order, there is need to reduce the scope of comprehensive justice to 'certain fundamental intuitive ideas viewed as latent in the public political culture'[133] and increase the systematic adjudication of incommensurable conceptions of justice.[134] The same approach informs the positivist envision of the state which is explored in the next chapter. State sovereignty was invented as a shield against any private ideas and understandings which endanger peace with their exhibited propensity for expansion and imposition.

[127] Rawls, *A Theory of Justice*, p. 380.

[128] D. A. J. Richards, *A Theory of Reasons for Action* (Oxford, Clarendon Press, 1971), p. 138.

[129] Rawls, 'The Law of Peoples', p. 36.

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