HUMANITARIAN INTERVENTION, THE RESPONSIBILITY TO PROTECT, AND SOVEREIGNTY: HISTORICAL AND MORAL REFLECTIONS

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There is an inherent tension, not yet fully resolved in international law or the practice of states, between protecting state sovereignty and the idea of intervention across a state's borders to respond to abuses of fundamental human rights within those borders. This article reviews how this tension has presented itself and been addressed in the different frames of legal and moral discourse, then turns specifically to the concept of sovereignty itself, examining the pre-modern conception of sovereignty as responsibility for the common good as offering a suggestive model for rethinking the concept of sovereignty toward final resolution of the tension between sovereignty and humanitarian intervention.

I. HUMANITARIAN INTERVENTION IN RECENT MORAL THINKING AND
    LAW

The term humanitarian intervention can be used to refer to two different kinds of circumstances. The first, which is historically older, is interventionary responses by outside parties after a natural disaster of some kind, to alleviate suffering and assist in coping with the damages left behind by the disaster. Though military assets may be employed in the provision of such relief, their function is not specifically military but parallels that of international agencies, non-governmental organizations (NGOs), and private voluntary organizations (PVOs) in responding to the humanitarian needs left in the wake of the natural disaster, and their target is not the political structures of the affected state but the needs of the affected populace. While the government of the area of the disaster

may accept or reject particular aspects of such efforts, no fundamental controversy attends the provision of aid in the wake of such disasters.

Controversy does, though, attend a different use of the term humanitarian intervention: to refer to measures taken by outside parties to respond to crises involving serious harm to basic human rights, to protect the affected population from such harm, to remove the sources of that harm, and perhaps to punish those responsible for it in the past. Such measures may include a range of possible means, up to and including the use of military force; yet even when the interventionary means chosen are, say, economic, political, or legal, the possibility of use of military force remains as a further option. Humanitarian intervention in this sense is still relatively recent. Legally, it depends fundamentally on the emergence of international human rights law and the framework it provides for identifying harm needing amelioration other than the physical harm caused by natural disasters. Politically, it depends on the ending of the Cold War and the new international environment in which use of military force can be contemplated and carried through without triggering a third world war. Morally, its roots reach deeply into Western religious and philosophical values, and the best moral reflection seeks to draw out the implications of those values. Pragmatically, though, much recent moral assessment has also depended on the emergence of news reporting presenting real-time evidence of humanitarian abuses and the resulting harm, together with evidence of who is responsible. The controversy over humanitarian intervention in this sense arises from two directions: such intervention by use of military force may be argued to constitute aggression, forbidden in international law; and use of military force to respond to humanitarian need caused by the actions of particular parties—often the government of the affected state—is difficult or even impossible to separate from regime change and/or bringing those persons responsible to justice under international criminal law. Recent international law, centered on the doctrine of the responsibility to protect, has attempted to find an understanding of humanitarian intervention by means up to and involving military force that does not run afoul of the prohibition against aggression and that includes a satisfactory relationship to international criminal law; yet debate continues over whether, as matters now stand, the problematic issues have been resolved. Moral as well as legal issues are at stake in this debate because moral concerns have, from the beginning, been at the center of the

conception of humanitarian intervention to protect vulnerable populations from severe oppression.

Historically, benchmark examples of moral reflection on humanitarian intervention involving military force were offered by both the two major American thinkers, the theological ethicist Paul Ramsey and the political philosopher Michael Walzer, whose work on the just war idea initiated the revival of this idea as a focus for moral consideration of the use of military force.

Ramsey, in a chapter titled "The Ethics of Intervention" in his 1968 book, *The Just War*,[1] writing in the historical context of the early years of the Vietnam War, sought to identify the moral parameters for military intervention. He never used the term "humanitarian intervention," for it was not yet at that time in general use, but the parameters he identified for military intervention clearly included humanitarian concerns. His position on military intervention was forthright: though it is not always the "most choiceworthy" form of intervention, nonetheless it is "among the rights and duties of states unless and until this is supplanted by superior government."[2] No such government in fact exists, he continued, and moreover, "[t]he primary reality of the present age is that the United States has had responsibility thrust upon it for more of the order and realized justice in the world than it has the power to effectuate."[3] Thus, on his reasoning, the *right* of intervention follows not from the *power*, but from the *responsibility* to intervene in the cause of justice. As to the justifications needed for any particular intervention, Ramsey divided these into two sorts, the "ultimate" or "just war" grounds[4] and the "penultimate" or "secondary" ones.[5] The former include four considerations: the requirements of justice, order (both "terminal goals . . . in proper politics"), and service to both the national and the international common good, which need to be weighed separately and maximized in relation to each other. This last pair of criteria reflects the overall purpose of the use of justified armed force according to the just war idea, namely, service of the common good. But, as Ramsey presented them, they also involve considerations of proportionality,

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1. PAUL RAMSEY, THE JUST WAR 19-41 (1968).
2. *Id.* at 20.
3. *Id.* at 23.
4. *Id.* at 27-33.
5. *Id.* at 33-38.

which have loomed large in just war thinking from Ramsey forward to the present. Ramsey assumed here that what is justice can be universally known, if imperfectly; his argument was that even if imperfect, an approximation of justice is better than no effort at securing justice at all. The statesman, Ramsey concluded, "must determine what he *ought to do* from out of the total humanitarian *ought to be*."[6] Despite not using the term "humanitarian intervention," this makes it clear that he is thinking of intervention justified by humanitarian concerns.

Order, for Ramsey, must serve justice, which is the higher moral goal. His discussion of order turns to the subject of law, both domestic and international. Law, Ramsey comments, comprises "mankind's attempt to impose some coherence upon the order of power. But such coherence flows also from the justice that may be preserved, beyond or beneath the legalities."[7] This statement can imply that a principled action in the service of justice may trump the requirements of law, and indeed, Ramsey's discussion as a whole trends in this direction, especially with regard to international law, which he regards as deficient by comparison with domestic law, with the former's legalities "far more imperfect" and "the social due process for changing the legal system . . . even more wanting."[8]

The discussion of law, in Ramsey's discussion, points directly to what he calls the "penultimate" grounds for military intervention, which are in fact the two grounds allowed in international law: counter-intervention and intervention by invitation. The logic of his argument and the nature of his terminology both imply that these formal allowances are not the primary considerations for him: those considerations are justice, an order that serves justice, and the domestic and international common good.

Elsewhere, in a discussion of my own on intervention,[9] I have defined this matter of serving the common good more broadly, noting that in any interventionary action the intervening state must balance three distinct, if interrelated, kinds of competing responsibilities: obligations to the international order, including maintaining the territorial ideal of sovereignty defined in the UN Charter and serving the ideal of

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6.   *Id.* at 29-30.
7.   *Id.* at 30.
8.   *Id.* at 31.
9.   JAMES T. JOHNSON, MORALITY AND CONTEMPORARY WARFARE 103-16 (1999).

international consensus for such action; obligations to the domestic community(ies) of the state(s) that would intervene; and obligations to the society or societies targeted for intervention. My point is, I think, essentially an extension of Ramsey's: serving justice in any given instance of military intervention, including but not exclusive to humanitarian intervention, involves seeking to honor several sorts of obligations, both moral and legal, which are in some tension with one another. Intervention is inherently not an easy moral call. But in the end the law needs to be interpreted with reference to the moral values it serves or fails to serve, and the moral values are complex and often in competition with one another.

Nine years after Ramsey, Michael Walzer offered his own reflective analysis of the subject of intervention in a chapter of his book, *Just and Unjust Wars*.[10] Whereas Ramsey had worked centrally from the moral value of justice, Walzer began in this chapter with the frame set by what he called the "legalist paradigm" of international order, which he had earlier defined in six propositions:

1. There exists an international society of independent states.

2. This international society has a law that establishes the rights of its members—above all, the rights of territorial integrity and political sovereignty.

3.   Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.

4. Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.

5. Nothing but aggression can justify war.

6. Once the aggressor state has been repelled, it can also be punished.[11]

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10.   *See generally* MICHAEL WALZER, JUST AND UNJUST WARS 86-108 (1977).
11.   *Id.* at 61-62.

This listing establishes a rather different tone regarding international law from that of Ramsey's discussion, and it raises to central position two major concerns not specifically addressed by Ramsey: the territorial conception of sovereignty and the idea of aggression as any use of force that violates "the political sovereignty or territorial integrity" of another state. This legal definition of sovereignty implies *prima facie* a general principle of nonintervention by any state or body of states in the internal affairs of any other state. Between Ramsey's concentration on justice, then, and that of the "legalist paradigm" on sovereignty, there appears a fundamental tension that ever since has complicated efforts to deal with the matter of humanitarian intervention. Given that such intervention may occur without the approval of the targeted state or even against its will, and that the government of the targeted state may itself be responsible directly or indirectly for the humanitarian need that occasions the intervention, does the use of military force for the purpose of such intervention constitute aggression or not? This is a fundamental question, and I return to it and possibilities for its resolution later in this paper. For now, the question is where Walzer takes his discussion of intervention from this beginning-point.

The short answer is that he moves in the same direction Ramsey had taken, but through reference to different moral principles, writing, "those conceptions of life and liberty which underlie the paradigm and make it plausible . . . seem also to require that we sometimes disregard the principle" of nonintervention.[12] (Later in the chapter he also invokes the value of justice.) He continues, offering his own resolution of the tension identified above:

> No state can admit to fighting an aggressive war and then defend its actions. But intervention is differently understood. The word is not defined as a criminal activity, and though the practice of intervening often threatens the territorial integrity and political independence of invaded states, it can sometimes be justified. . . . [I]t always has to be justified.[13]

Walzer argues that there are three kinds of cases in which the prohibition of cross-border uses of military force "does not seem to serve

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12.   *Id.* at 86.
13.   *Id.*

the purpose" for which it was intended: intervention in civil wars in states where there are two or more political communities, when one community resorts to force for the purpose of secession or "national liberation"; counter-intervention in a conflict to offset a prior intervention by another power; and intervention to counter extreme violations of human rights by fighters in the course of an armed conflict or by a government against some or all of its people.[14] These three kinds of cases provide exceptions to the *prima facie* rule against intervention.

Walzer does not mention "intervention by invitation," in which a government invites another power to intervene in an armed conflict on its side, though he does mention counter-intervention. These are the two exceptions noted by Ramsey as "penultimate" grounds for intervention. Following his general practice in this book, Walzer further explores each of the three kinds of cases he identifies through historical examples: for the first, the Hungarian revolution of 1848-49; for the second, the American intervention in the war in Vietnam; and for the third, the United States' intervention in Cuba in 1898 and that of India in Bangladesh in 1971. It is not to our purpose here to examine his analysis of these cases in detail, but I have done so in another context.[15] Readers may agree with the analysis he provides of these historical examples or disagree with it (as I do in particular respects), but the point to note for the present is that his purpose in this analysis is dual: to interpret the history and to make a moral argument. In regard to the latter, the aim is essentially like Ramsey's effort to discern "politically embodied justice" in the case at hand, though his method is different and the values to which he refers his moral judgments are not the same. The important point for us to note is that Walzer, like Ramsey, argues that moral reasons determine when military intervention does not violate the terms of the "legalist paradigm."

There is, of course, a contrary case, and neither of these thinkers is interested in it: the case that the law is the law and violating it for whatever justification is forbidden. For Walzer this would mean denying that the obligations imposed by the law are merely *prima facie* but exception-less; for Ramsey it would mean denying that there is any higher moral reference point for justice beyond what the law establishes.

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14.   *Id*. at 90.
15.   JOHNSON, *supra* note 9, at 83-88.

If either is the case, room for humanitarian intervention would be severely limited or nonexistent, so long as the law remains the same. Walzer takes the opposite tack, arguing that the problem is with the law, and it should be changed or reinterpreted. His argument about this is spread over several pages, and his position is not finally stated until the end of the chapter. The argument begins with a stark judgment: "Governments and armies engaged in massacres are readily identifiable as criminal governments and armies (they are guilty, under the Nuremberg code of 'crimes against humanity')." He continues, "We worry that, under the cover of humanitarian intervention, states will come to coerce and dominate their neighbors," and he observes that accordingly "many lawyers prefer to stick to the [legalist] paradigm," arguing that "[h]umanitarian intervention 'belongs in the realm not of law but of moral choice, which nations, like individuals, must sometimes make.'"[16] He rejects this position, arguing that the law should provide a criterion for judgment of a particular state action. The law needs to embody morality; they should not be viewed as two separate realms. As he pursues his analysis, he writes, "humanitarian intervention is justified when it is a response . . . to acts 'that shock the moral conscience of mankind'"[17] and drives to this conclusion: "The legalist paradigm indeed rules out such efforts, but that only suggests that the paradigm, unrevised, cannot account for the moral realities of intervention."[18] Implicit here is that the paradigm should in fact be revised to take account of the need for humanitarian intervention in the sort of extreme cases noted.

The sticking point, of course, is that the prohibition of cross-border uses of armed force as aggression serves to prevent other evils: coercion and domination of the target state under cover of humanitarian purpose. The problem, though, is that, as Walzer observes at the beginning of his discussion of humanitarian intervention, "clear examples of what I have called 'humanitarian intervention' are very rare. Indeed, I have not found any, but only mixed cases where the humanitarian motive is one among several."[19] In the following pages[20] he provides several tests to be applied

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16.   WALZER, *supra* note 10, at 106.
17.   *Id.* at 107.
18.   *Id.* at 108.
19.   *Id.* at 101.
20.   *Id.* at 103-06.

to ostensible cases of humanitarian intervention to help determine whether they are really so. Any revision of the law would have to be crafted so as to sort out mixed motives and prevent coercion and domination. Walzer does not offer language for a possible revision, and it might be observed that ruling out coercion and domination is exactly what the language of Article 2(4) of the Charter seems, on its face, to do, prohibiting "threat or use of force against the territorial integrity or political independence of any state." Regarding any and all threats or uses of force against a state as "aggression" can be argued to go beyond this specific language. Defining aggression according to the language of the Charter clearly aims to prevent uses of force for coercion and domination, though when aggression is understood to mean any and all cross-border threat or use of military force, humanitarian intervention involving military force appears as aggression.

Both Ramsey and Walzer wrote in the historical context of the war in Vietnam. After the American involvement in this war ended, American and other Western moral reflection on the use of armed force shifted to other concerns than intervention until after the end of the Cold War and the emergence of humanitarian crises, especially those of the wars of the breakup of Yugoslavia and the Rwandan genocide of 1994. An important moral statement in this context was provided by the United States Catholic bishops' "reflection" on the tenth anniversary of their pastoral letter, *The Challenge of Peace*.[21] That pastoral letter had not treated the subject of intervention at all; its focus was nuclear weapons. The 1993 statement, though, devoted considerable space to humanitarian intervention, defined by the bishops as "the forceful, direct intervention by one or more states or international organizations in the internal affairs of other states for essentially humanitarian purposes," including alleviation of "internal chaos, repression and widespread loss of life." Such intervention, the statement observes, was termed "obligatory" by Pope John Paul II in situations "where the survival of populations and entire ethnic groups is seriously compromised."[22] The statement

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21.   NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (1983), *available at*
http://www.usccb.org/upload/challenge-peace-gods-promise-our-response-1983.pdf.

22.   UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE HARVEST OF JUSTICE IS SOWN IN PEACE 15 (1993), *available at*

continues with a longer quote from John Paul II: when diplomatic and other procedures short of force have failed, and

> nevertheless, populations are succumbing to the attacks of an unjust aggressor, states no longer have a 'right to indifference.' It seems clear that their duty is to disarm this aggressor, if all other means have proved ineffective. The principles of sovereignty of states and of noninterference in their internal affairs . . . cannot constitute a screen behind which torture and murder may be carried out.[23]

This papal language turns the concern expressed by Walzer about violating the prohibition of aggression on its head and shifts the burden of responsibility away from avoiding that violation to the obligation to meet the humanitarian need. The problem, as defined here, is not that of aggression being cloaked as humanitarian intervention, but that of serious oppression and harm aimed at elements of a state's population being cloaked in the principles of state sovereignty and noninterference in internal affairs. For the Pope, and the U.S. bishops in turn, there is an overriding moral responsibility for any and all states to act to end severe oppression and harm, and the government of the state affected may not appeal to the principles of sovereignty and noninterference for cover.

These papal statements and the U.S. bishops' seconding them for the matter of debate over humanitarian intervention by United States forces did not settle the matter of whether humanitarian intervention by force is aggression, but it provides a powerful illustration of the depth of the moral concerns challenging the idea that any and all uses of force across a national border constitute criminal actions of aggression in international law. Individual moral theorists like Ramsey and Walzer might be ignored, but it was hard to ignore the papal voice.

The moral arguments I have sketched were echoed in other contexts and provide a background for the emergence of the idea of the responsibility to protect, and continuing moral argumentation has been part of the debate over this idea and how it might be implemented. The focus here, as in the earlier discussions sketched above, has been on the justifications for humanitarian intervention, not on the conception of

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http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm.

    23.   *Id.* at 25-26.

sovereignty, though how this concept is understood is crucial for both the legal and moral status of such intervention. A closer look at the idea of sovereignty itself is needed to move the debates further.

II. STATE SOVEREIGNTY: ITS CONCEPTION, EXTENT, AND EFFORTS AT LIMITATION

The idea of sovereignty in current international law and most political and moral usage refers to a quality of the state and of the international system based on states that historically is identified with the European international order that came out of the 1648 Peace of Westphalia ("the Westphalian system") and is currently legally defined by the United Nations Charter.[24] In the latter, the language of Article 2(4) is critical, prohibiting "the threat or use of force against the territorial integrity or political independence of any state." With regard to the matter of intervention of any sort, this is reinforced by the language of Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." Yet also relevant to what lies within the scope of such matters is the language of Article 2(2), which charges all Members of the United Nations to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."

As to the Peace of Westphalia, three major points loom large in relation to the conception of sovereignty and its limits: the recognition by all parties to the Peace of the principle of *cuius regio,eius religio*, first established in the 1555 Peace of Augsburg and guaranteeing the right of the ruler to establish an officially supported religion within each state; notwithstanding this, recognition of the right of free practice of religion to Christians living in states where another faith is the established religion; and recognition by all parties of each party's sovereignty over its lands, its population, and its agents abroad. These three points anticipate the provisions just cited from the UN Charter, though the first two, because of the historical context, have to do specifically with the practice of religion. More broadly, the first point affirms the right of states to regulate their domestic affairs, while the second sets a limit on this—here, the recognition of the right of free choice of religious practice

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24.   U.N. Charter art. 2, para. 4.

by dissenting Christian groups—by mutual agreement of the parties. The third point defines sovereignty in terms of territory and the population living within that territory. This was a relatively new understanding of sovereignty, though one which responded well to the circumstances of the age. These parallels with Article 2 of the Charter are important to note, as they show the continuity in this understanding of sovereignty throughout the modern period. Let us look more closely at each of these matters.[25]

The second and third points established in the Peace of Westphalia were innovations in treaty law on the practice of statecraft in 1648, and the intellectual roots of the conception of sovereignty provided here first appeared not much earlier, in the work of Hugo Grotius (particularly his *De Jure Belli ac Pacis*, first published in 1625). The principle that exercise of sovereign powers could be limited by means of a treaty was much older. But to apply it to the exercise of domestic rule, not just interrelations with other sovereign entities broke new ground. This was especially striking in the context of the Peace of Westphalia because of the subject addressed there: religious practice and, implicitly, religious faith. After all, in 1648 much of Europe had been fighting indiscriminate and hugely destructive wars over religion for more than a century, and central to these wars was the very principle that came out of the earliest of these conflicts, the principle of *cuius regio, eius religio* that recognized the right of each ruler to set the parameters for religious faith and practice for his or her own domain. It is hard for us today to recognize how much of a cosmic shift the agreement on this principle was at the time, for though in general terms it affirmed the right of a ruler to determine domestic policy, historically choice of religion was not a matter of such policy; here, the principle made religious faith and practice a matter for regulation within the sphere of temporal political order, not something to be determined by a superior spiritual authority. But by itself this principle turned out to sow the seeds of further conflict, because dissenting minorities in each political community could appeal to the transcendent content of their own faith to resist the temporal ruler's disallowing any form of religious faith and practice than the one

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25.   *Cf.* JAMES T. JOHNSON, SOVEREIGNTY: MORAL AND HISTORICAL PERSPECTIVES 81-100 (2014).

chosen as the religion of the state, and neighboring rulers sharing the faith of the dissenters could intervene militarily on their behalf, giving rise to new wars. What such dissenting minorities were asserting at the time was a right that up till then had never been recognized in Europe, the right of free choice of religion, and in effect, the powers that intervened on their behalf were engaged in an effort to protect this right—though they certainly did not conceive their action in this way. To remove the temptation for war over religion, the idea of toleration of dissenting belief and practice introduced in the Peace of Westphalia was a necessary accompaniment to the principle of *cuius regio, eius religio*, expressing the agreement among the parties to the Peace that they were not going to fight over religious practices in one another's states any more. Given the devastation, suffering, and loss of life that warfare over religion had caused over the previous three generations and more, the need to limit the power of the state expressed in *cuius regio, eius religio* in this way was eminently understandable and desirable, and the provisions of the Peace quickly became customary law throughout Europe.

But this way of resolving the problem of warfare over religion also left a tension. On the one hand the governing authorities of each political community were affirmed to have the right to establish a given form of religion for that political community; this was a matter of the responsibility of government to regulate the domestic affairs of that community. On the other hand, these authorities were to allow dissenting Christian communities to practice their own form of religious faith. In the frame of treaty law, this latter was a limit on the former established by the positive agreement of each party to the treaty. Keeping to the agreement was a matter of the recognition by each party that doing so was in its own self-interest, but there was also the possibility of external enforcement by the other parties, if the agreement were violated by one party. That is, in this context, the implicit acknowledgement of a right to religious freedom was not embraced as such: toleration of dissident forms of religion was simply a formal treaty obligation, with adherence enforced as in any other treaty.

But this tolerance of religious difference easily gave rise to a conception of the right to religious freedom, and from the perspective of this right, it was unique in being created and protected, however implicitly, by a treaty among great and small states. By 1648 there was a long tradition of rights in European political and legal thought and

practice, with some rights being identified as rooted in natural law and others being created by consensual practices in particular communities. These could sometimes be in conflict: Grotius might argue for the defense of the "ancient rights and privileges" of the Dutch people in seeking their independence from Spanish rule, but apologists for that rule could counter this by citing the right of the Spanish King, defined in natural law, to govern so as to maximize the order, justice, and peace of everyone subject to that government. In the scholarly literature that treated such matters in the late Middle Ages and early Modern period, including the code of canon law, secular legal works, and theological reflection, many of the rights in question were never defined with specificity, and interpreting what they might require in any given instance was left to informed judgment. Most often this meant the judgment of the sovereign ruler, the temporal ruler with no temporal superior, for in just war tradition and the theory of politics associated with it from the late twelfth through the early sixteenth centuries sovereignty was understood as a personal quality of such a ruler and referred both to his status as judge of last resort in all cases of disputes and his responsibility to provide for the well-being of the whole society ruled (defined as its order, justice, and peace). This responsibility also included recognition and protection of the rights of those governed. An individual or a group might validly seek redress for violations of their rights, but if they disagreed with the sovereign ruler's judgment, they might not carry their efforts so far as to become sedition, which was understood as a mortal sin. On the other hand, a ruler had real responsibilities toward the individuals and the community governed, and any ruler who sought his own good rather than that of the community was a tyrant, unfit to rule, who ultimately was subject to removal.

This was, in sum, the idea of sovereignty that existed in Western thought and practice before the triumph of the Grotian-Westphalian alternative conception. The older understanding of sovereignty had coalesced as part of the same intellectual, legal, and political processes that produced a coherent, systematic idea of just war, and the two ideas, just war and sovereignty as responsibility, were closely related. Their intellectual roots were the same: classical political philosophy, which provided among other ideas the conception of politics as properly oriented toward the three goods of order, justice, and peace; the recovery of Roman law, which provided understandings of natural law, Roman law, and *ius gentium* and their interrelationship; the Gelasian principle,

which distinguished temporal authority from spiritual and defined the responsibility for political life in each community and the interactions among political communities, as belonging to the former; and the recovery of Aristotelian thinking, which as interpreted in Scholastic theology pulled all this together in a single intellectual synthesis. The thinking behind this synthesis was developed in the context of the realities of political order and relationships as they presented themselves. The same people were involved in reflection on just war and the idea of sovereignty: canon lawyers, civil lawyers, theologians, and not least temporal authorities engaged in government and military affairs. Their thought blended easily into a broadly recognized consensus.

The idea of just war that resulted was summarized in its classic form by Aquinas (building on the work of three generations of canonists before him) as requiring the authority of a prince, a just cause pertaining to the rectification of injustice and the punishment of wrongdoing, and the end of peace within and among political communities.[26] "Prince" (in Latin, *princeps*) here referred to a temporal ruler with no temporal superior; this same office was described in contemporaneous French and English as *souverain*, "sovereign." The responsibility of such a ruler was thus the definition of sovereignty: the personal moral responsibility to seek the common good.

Yet how to respond to the opposite of sovereignty defined this way, tyrannical rule? Aquinas, again, on guard lest resistance become sedition, urged subjects to bear up under tyranny if it was not too bad to bear. Determining whether an individual ruler was a tyrant and, if so, when and how to remove him, was a matter for other sovereigns in their role as judges of last resort in the interpretation and application of the natural law—or possibly within the community for a subordinate authority who might justifiably claim to have the right to exercise the responsibilities of a sovereign over the tyrant because of the latter's abdication of such responsibility. Aquinas, in arguing this, was taking a position not far different from that defined by John Calvin two and a half centuries later.

In this tradition of thought there were understood to be ultimate standards for political rule and for individual behavior, standards established in the law of nature. Responsibility, whether in personal life

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26. Thomas Aquinas, *Summa Theologiae* I/II Q.40, art. 1, *available at* http://www.newadvent.org/summa/3040.htm.

or in government, was understood in terms of the parameters set in this law. This meant, among other things, that in the exercise of governmental responsibility a sovereign ruler might act against a tyrant in another political community, but that same ruler could also act internally against sedition. The former action was valid only insofar as it served to reestablish a just, and therefore peaceful, order within the political community affected. The latter was justified only so long as it did not itself rise to the level of tyranny. However vague these standards may seem today, they were nonetheless standards generally accepted, and so long as the cultural consensus in which they were rooted held, the system worked.

The Modern Age, though, brought challenges from several quarters to this fund of commonality. The encounter with the Indians of the New World presented Europeans with cultures that held significantly different conceptions of the proper nature of all things, thus challenging the European conception of natural law as common across all humankind and knowable by reason by everyone regardless of cultural background. Even more importantly, the common culture of Europe itself was divided by the emergence of the Protestant Reformation. The former challenge took a while to have effect; the effect of the latter was more immediate and more traumatic. While the just war tradition had rejected use of armed force for religious conversion,[27] it understood attacks on religion as forbidden in natural law and regarded the use of armed force to counter such attacks as justified. So when a sovereign ruler faced threats or attacks against the form of Christianity he favored, he understood himself to have the right and the obligation to act to defend it. But the same right of self-defense of religion applied to the dissenters and those who might come to their aid. Warfare resulted between Catholic and Protestant rulers and people. Against this background, the principle *cuius regio, eius religio* was not an advance but a statement of the status quo. Undercutting the grounds for interreligious warfare required something different, and this is what Grotius provided by reframing elements from the inherited tradition.[28]

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27.   *Cf.* FRANCISCUS DE VITORIA, DE INDIS ET DE JURE BELLI RELECTIONES (1917) [Sect. 10: "Difference of religion is not a cause of just war"].

28.   JOHNSON, *supra* note 25, at 81-100.

First, Grotius returned to the idea of self-defense as permitted in natural law. The inherited tradition had understood self-defense as a natural right of everyone, from individuals to political communities, but only when the attack is imminent or already under way.[29] On this understanding just war, *bellum iustum*, had to do with rectifying an injustice and punishing wrongdoing after the wrongdoing had been accomplished. It was the sovereign's responsibility to determine when this was the case and to authorize force, if needed, to rectify the injustice and punish whoever was responsible for it. In the context of the situation in Europe after the beginning of the Reformation, not only self-defense against an attack against religion but also the responsibility to respond to the injustice it represented made for war based in religious difference. Grotius shifted the ground away from the assumptions in the inherited tradition, arguing that the natural law is clear only in cases of self-defense against an imminent or ongoing attack and that use of armed force is justified only to prevent or defend against such an attack. He thus took rectification of injustice and punishment of those responsible for injustice off the table with regard to justification of using armed force (though he reintroduced them in a later context in his discussion of postliminy). Moreover, he followed the same reasoning as others in the half-century before him in arguing that the authority of the ruler to act on behalf of the people's common good was drawn from this right of the people to be left alone, in person and property, to pursue their own best interests. On this reconstruction, sovereignty became no longer a property of the ruler defined by that person's moral responsibility to the natural law, but a property of the political community as a whole, defined in terms of the people making up the community, their "rights and privileges," and the territory they inhabited. On this conception the most fundamental measure of injustice was any attack across the territorial boundaries of a political community, and so the idea of sovereignty became defined with the responsibility to protect those borders. Any cross-border use of force thus constituted an injustice. With this way of thinking we encounter the modern conception of sovereignty, leading ultimately to the language of Article 2 of the UN Charter.

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29. *See* GREGORY REICHBERG, HENRIK SYSE, & ENDRE BEGBY, THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS 150 (2006); *but cf.* JOHNSON, *supra* note 25, at 28-60.

What was gained in this shift was, first, to remove the justifications provided in the inherited tradition for use of force to punish and rectify a state's infringement of the right of religious practice by persons dissenting from the established religion. The right to resist such infringement on the spot remained in the narrowing of the right to use force for self-defense; this, however, was countered by the assertion of individual rights as basic to the conception of sovereignty. The agreement to grant religious toleration in the Peace of Westphalia expressed this understanding.

In context these were very important gains, and their importance is attested by the strength of this conception of sovereignty over for what is now close to 500 years. But there were also losses. The older tradition had defined sovereignty in terms of each ruler's personal moral responsibility to uphold universal moral requirements defined in the natural law. But when European society split, the consensus as to what the natural law required suffered; this was why Grotius had to reduce the role of natural law in his own thinking to the matter of the right of self-defense against attack. This left the responsibility of those in positions of rule as defined only in terms of protecting the majority of those ruled from threat or attack. The idea of responsibility for the common good thus became refocused so as not to include persons in the community who could be viewed as threats to the good of the majority and of the political community as a whole. This pointed in the direction of "might makes right," with the rights of minorities ignored as members of minority groups were subjected to whatever forms of disadvantage they might be made to suffer, whether by the ruling authorities or by members of the majority.

In the context of the Peace of Westphalia, the rights of religious minorities to free choice and expression of religion was protected by agreement among the parties to the Peace, and as noted earlier, this protection spread throughout Western societies, not just those parties to the Peace. It remained, expanded into a more general conception of right behavior towards people generally in both developing thought on the law of nations and in what came to be called "customary law." These protections were not, however, always observed in relations between Western powers and societies and peoples in other parts of the world, and the door also gradually opened to their erosion in the West itself. The rise of ideologically driven politics (specifically Nazism and Marxist Communism) in the first half of the twentieth century effectively

returned the affected countries and peoples to a status much like that of the wars of the Reformation era, with specific groups of people being persecuted because of their ethnicity, status, or beliefs.

In various ways, the development of international law has given positive expression to protections due to certain classes of people. One form of this is the protection given civilians, their property, and public property with a civilian purpose in the law of war, the law of armed conflict, or international humanitarian law. A second form is the idea of crimes against humanity in the Nuremburg Code. A third, more specific, form is the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. The development of human rights law since the 1948 Declaration of Human Rights identifies specific examples of human rights and provides for their protection. The Rome Statute of the International Criminal Court pulls all this together summarily in its listing of the crimes over which the Court has jurisdiction: the first three are genocide, crimes against humanity, and war crimes; the fourth and last is the crime of aggression.[30] Taken all together, the development of international law in the United Nations era has moved in the direction of reinstating protections eroded or lost as a result of the modern definition of sovereignty. But gaps remain, and even when the protections are defined in terms of international criminal law, enforcement of the protections remains a problem. Humanitarian intervention offers a response, but it introduces problems of its own.

III. THE RESPONSIBILITY TO PROTECT INITIATIVE AND THE CONCEPTION OF SOVEREIGNTY

As the idea of the responsibility to protect has developed in international law and in legal and moral debate, it provides another kind of example of the effort given to positive expression in international law to basic standards understood historically as universal moral standards. The original formal statement of this idea appeared in the report of the *ad hoc* International Commission on Intervention and State Sovereignty

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30.   Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

(ICISS) under the title, *The Responsibility To Protect*.[31] It directly linked sovereignty to responsibility, as in the pre-modern conception of sovereignty described above, describing the "primary responsibility" as protection by each state of its people.[32] Yet the occasion for the work of ICISS was, after all, the serious failures of states to exercise this responsibility in a number of cases. Accordingly, the initial linking of sovereignty to state responsibility was followed by the assertion that in cases in which a state, for whatever reason, fails to discharge this responsibility "the principle of non-intervention yields to the international responsibility to protect."[33] The core of the Report has to do with justifying this argument and laying out the conditions for military intervention.

On its understanding of sovereignty, despite its definition in a way that corresponds to the pre-modern conception of sovereignty, the ICISS Report does not acknowledge the pre-modern understanding of sovereignty, rather presenting sovereignty as responsibility as a recently developing concept resulting from "[e]volving international law" and particularly "the emerging concept of human security."[34] It continues: "The defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people[,]" but rather "sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."[35] In operational terms this is surely a correct accounting of the concept of sovereignty as responsibility for the good of each state's populace, for positive international law is currently understood as the product of formal agreement among states. Yet earlier positive law was understood as reflecting an underlying value consensus, as in the evocation of the "interests of humanity" and the "needs of civilization" in the preamble to 1907 Hague Convention IV.[36] The question is how

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31.   INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

32.   *Id.* at XI.

33.   *Id.*

34.   *Id.* at 7, ¶ 1.33.

35.   *Id.* at 8, ¶ 1.35.

36.   ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 69 (3d ed. 2000).

such a consensus is to be known. In the pre-modern conception of sovereignty it rested in a broad cultural understanding of the requirements of natural law; as late as the 1907 Hague Conventions, it still reflected common values held across Western societies; today, such common understandings can be discerned through what states agree to in their interrelations. There is less difference between these two extremes than may appear at first look. When agreements occur, that signals deeper value commonality.

What this Report calls the external dimension of sovereignty is in fact the conception of sovereignty first defined by Grotius and operationalized in the Westphalian system. So far as other sovereign entities are concerned, it is fundamentally territorial in character, and one sovereign entity may not reach across the borders of another to try to influence its internal affairs. This leads to both the norm of non-intervention and the conception of such action as aggression. There remains a very basic and serious tension between this understanding of sovereignty and that defined in terms of internal responsibility, and to simply lay them side by side as "dual" responsibilities, as in the ICISS Report, does not resolve the inherent tension. The problem expressed in this tension is that each of these conceptions of sovereignty serves different fundamental values. An ultimate resolution of the tension would involve finding a frame in which these different values are reconciled. The ICISS Report does not do this, instead opting for describing sovereignty as the responsibility to protect as trumping sovereignty as non-intervention.

The majority of the ICISS Report in fact has to do with spelling out the terms of this option—the conditions for humanitarian intervention by military force. Once again, its basic expression of these conditions evokes and parallels a tradition of moral thought: the summary of "Principles for Military Intervention" employs the categories of the just war idea as they appear in recent reflection and reflects their organization: "just cause," several "precautionary principles," and "right authority." Whereas much recent just war thinking follows the Charter in defining just cause as self-defense against aggression, understood as the threat or use of military force against a state, the ICISS Report defines it in terms of violations of the internal obligations of sovereignty,

expressed in "large scale loss of life" and "large scale 'ethnic cleansing.'"[37] When these two descriptions of just cause are laid alongside each other, the contradiction between them is stark: military action to respond to these internal violations involves a violation of the sort that justifies military action to repel it. The ICISS Report attempts to sidestep this contradiction by limiting intervention for the purposes cited to "extreme and exceptional cases," following this with a statement about the importance of the principle of non-intervention.[38] It is in this connection that the criteria for military intervention appear.[39] In this discussion the question of authority is approached in various contexts, but a discrete treatment of the subject of right authority is put off till later.[40] Both the Synopsis and the body of the Report stress the value of authorization of such intervention by the Security Council but leave open other options if the Security Council fails to act: action by the General Assembly, by regional organizations of states, or even, though without "wide favour,"[41] possibly by single states. The reality, though, at the time of the ICISS Report, was that the most successful humanitarian interventions had not been U.N.-led or otherwise authorized by the Security Council, but rather that by NATO in Kosovo and several by individual states, including Vietnam in Cambodia against the army of Pol Pot and Tanzania in Uganda to overthrow Idi Amin. The dysfunction of the United Nations is nowhere noted.

Despite the effort in the ICICC Report to establish a case for the responsibility to protect and humanitarian intervention to support it, important segments of the international community were not convinced. While a number of states, led by Canada, Germany, and the United Kingdom, reacted favorably to the Report, the Non-Aligned Movement rejected it, as did China and Russia. The United States took a somewhat different tack from these critics, refusing to bind its actions by the criteria given in the Report, including giving pre-commitments for military action in cases in which the United States had no national

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37.   INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 31, at XII.

38.   *Id.* at 31, ¶¶ 4.10-4.11.

39.   *Id.* at 32-37, ¶¶ 4.15-4.43.

40*.   Id.* at 47-55, ¶¶ 6.1-6.40.

41.   *Id.* at 54, ¶ 6.36.

interests.[42] Debate continued, both inside and outside the context of the United Nations. The definition of the responsibility to protect in international law today stands as stated in paragraphs 138 and 139 of the 2005 World Summit Outcome document.[43] Paragraph 138 affirmed the responsibility of states to protect their populations against several particular kinds of harm defined as criminal in international law: "genocide, war crimes, ethnic cleansing, and crimes against humanity." The paragraph concludes with a charge to the international community: it should, "as appropriate, encourage and help States to exercise this responsibility." Paragraph 139 spells out more fully what should be the nature of this support: first, "appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter." Only then does it turn to the possibility of humanitarian intervention by military means, described as "collective action . . . , through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations." But Chapter VII does not address cases of egregious humanitarian abuses within a state; it has to do with "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," so that it would seem to allow for the use of military force in cases of humanitarian need only when the abuses producing that need rise to the level of threats or abuses of international peace or have effects across borders that might constitute aggression. This looks, on the face of it, to be very different from the kind of intervention the ICISS Report argued for. One critic summed up the result of the Outcome document's language by noting that "it essentially provided that the Security Council could authorize, on a case-by-case basis, things that it had been authorizing for more than a decade."[44] Since this definition was reached

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42.   Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20.2 ETHICS & INT'L AFF. 143, 151 (2006).

43.   2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

44.   Simon Chesterman, *"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya*, 25.3 ETHICS & INT'L AFF. 279, 280 (2011).

there has been only one case in which military intervention for humanitarian reasons has been authorized: that of Libya in 2011.

In terms of the two ideas of sovereignty identified above, the clear winner here is the definition of sovereignty in terms of territorial inviolability and, despite the positive things said about the responsibility to protect endangered populations from various specific kinds of crimes defined in international law, the clear loser is the definition of sovereignty in terms of the responsibility of government to serve the good of its people. For what is given up is the possibility of enforcement of this ultimately by threat or use of military force. This is the big difference between the pre-modern idea of sovereignty and the definition of sovereignty in terms of the responsibility to protect. For the focus of the first was a moral responsibility of the person or persons exercising ruling authority. If they ignored or failed in their responsibility for the common good, they were no longer, in moral terms, worthy to be called rulers; they became tyrants. As tyrants, they could, on a case-by-case basis, be removed. But the debate over the responsibility to protect studiously steered away from its implications for regime change. That seemed, perhaps, a bridge too far, as it would manifest a clear example of interference in the internal affairs of a state. By modern political theory, only the populace of a state can choose its rulers, and this means that other states, as individual actors or up to and including the international community as a whole, have no right to insert themselves into the matter. How this works out in practice is another matter. The pre-modern conception of sovereignty rooted the rights of sovereignty elsewhere, and so it made it possible to reach a different judgment on who might or might not have the right to exercise ruling authority and to act accordingly.

I suggest that something like this conception remains embedded in the thinking of various cultures about the matter of the conception of rulership and its responsibilities.[45] This is also signaled by the language of paragraph 138 of the 2005 World Summit Outcome document, which states forthrightly the responsibility of each individual state—and thus those in governing responsibility in each state—to protect its population from the named kinds of harm. So far as the fundamental concern remains to protect vulnerable populations from harm—especially

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45.   JOHNSON, *supra* note 25, at 117-36.

egregious harm—these cultural conceptions should be explored and their implications examined.

I would also note that the pre-modern conception of sovereignty as responsibility in the West carries significantly broader implications than the provisions of the Outcome document. To have responsibility for the common good of the society governed, as the pre-modern conception of sovereignty provided, is quite a broad responsibility. The common good here is shorthand for the three interlocked ends of political life as they were then conceived: order, justice, and peace. To serve these ends implied responsibilities to other political communities than the sovereign's own, for how well neighboring societies were governed necessarily impinged on the governing of one's own society. Thus, a ruler faithfully engaged in discharging the responsibility for the common good of his or her own society could not turn a blind eye to tyranny in a neighboring one. Tyranny, moreover, was itself a broad concept: willful failure to serve the responsibility to the ruler's own political community. By comparison, the provisions of paragraph 138 of the Outcome document are much narrower, leaving room for various kinds of serious malfeasance beyond the particular crimes noted. The question is whether more can be added to this to include the kinds of harm generally identified in recent moral thinking on humanitarian intervention: serious violations of the basic human rights of affected populations. This implies taking a hard critical look at the law in relation to the concept of such rights and also with reference to such fundamental values as justice and peace.

Paragraph 139 of the Outcome document may also draw the lines of enforcement rather too narrowly. The original iteration of the responsibility to protect left room, albeit with considerable caution, for action by individual states in case of the kind of compelling need identified there. The Outcome document, by contrast, explicitly reserves authority for such action to the Security Council and raises the bar for justification to that set by Chapter VII of the Charter. As observed earlier, the only case of humanitarian intervention on this model has been that in Libya; the most successful earlier examples were all by individual states or regional organizations. It will be, in any case, the task of individual states and/or regional organizations to carry out any future humanitarian interventions, and this suggests the need for more legal room for such actions. This would also be more in accord with the conception of sovereignty as responsibility for the national and

international common good, and so far as protection of basic human rights is defined as a core responsibility of the governments of states today, the door is opened toward more robust involvement by states and regional organizations in responding to depredations by neighbors.

In short, while the responsibility to protect now has been given legal formulation, there remain questions as to whether this formulation is the best that can be reached. In considering this question and how possibly to move toward a more adequate one, the implications of the pre-modern idea of sovereignty as responsibility for the common good provide important perspective that is lacking in the conception of sovereignty now generally accepted.