

## Arbiter Mundi?: Commentary on James Turner Johnson's "Just War Tradition and Low-intensity Conflict"

by  
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### Introduction

**A**ssuming that the responsibility of the appointed commentators at the Conference is merely to initiate discussion by drawing attention to inviting topics for consideration, I have chosen to focus on that section of Professor Johnson's essay which is at once most policy relevant and most theoretically engaging. Perhaps the most illustrative passage in this section of the argument is the claim that:

Specifically, I think the result is to open the door to clearly defined police-like activities involving the use of force to resist or remove what are broadly recognized threats to particular people or to international order as such. Just war tradition as a whole has always been much more open to such interventionary action than positive international law has become in the twentieth century. . . . I suggest that under certain conditions now — conditions of egregious and unpunished violations of rights or threats to the security of others — the burden of proof has shifted so as to distinguish between aggression and temporary, interventionary use of force to set right such violations and threats.

As a possible stimulus to discussion, let me suggest some historical reservations about the comprehensive accuracy of the claim: "Just war tradition *as a whole* has always been much more open to such interventionary action than positive international law has become in the twentieth century." While it may be true that certain periods in the development of just war tradition have indeed been permissive in regard to State intervention beyond its borders (or the borders of an ally), it does not seem readily apparent that just war tradition *as a whole* "has *always* been much more open to such interventionary action than positive international law has become in the twentieth century." Indeed there seems ample evidence that in two of its most distinguished stages of development, the Paris School of the 13th and early 14th centuries and the closely related Salamanca School of the 16th century, the just war tradition was unequivocally hostile to external intervention by State authorities. It might even be justifiably claimed, I

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would suggest, that the characteristic contribution of the authors of these two Schools (St. Thomas Aquinas and his disciple John of Paris, and Vitoria of Salamanca) was precisely to challenge the interventionist claims of the Holy Roman Empire in the 13th and 14th centuries, and of the Spanish Crown (and Roman Emperor) in the 16th centuries. If this historical claim can be established, it might be more accurate to assert that some (but not all) leading thinkers of the just war tradition were more interventionist than contemporary international law would allow. Such a modification of the profile of just war tradition might conceivably have consequences for our larger policy discussions throughout these days.

### Contemporary International Law

The teaching of the just war tradition is presented in Professor Johnson's paper as a set of standards more open to intervention in the internal affairs of other sovereign nations than the stance enshrined in contemporary international law.<sup>1</sup> Our analysis, then, must begin with a minuscule summary of the comparatively restrictive standard of the international legal tradition. A familiar summary of that tradition is found in the United Nations Charter (Chapter I, Article 2 (4)):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . .

Since the minimal content of the term "political independence" is the nation's right to the government of its own choice, efforts by other governments to depose extant regimes (even dictatorial or drug trafficking regimes) unequivocally violates the prohibition stated in Article 2 (4).

This international legal restriction of the threat, or use, of force in order to change or coerce other governments is, of course, an annoyance to powerful nations with a strong confidence in the superiority of their own sense of justice and in their own distinctive political institutions. A sense of the recent history of the evolution of the principle of nonintervention, as it is now articulated in the Charter, reveals that it was formulated precisely in reaction to the continuous intervention by the United States against its neighbors to the south in the early 20th century. Robert Klein traces the emergence of the principle to the insistent demand by Latin American government officials for guarantees against threats to their political independence. Specifically, it was U.S. interventions in the staple of U.S. hemispheric policy, namely, Nicaragua, that ignited the Latin American demand for a principle of nonintervention (Seventh International Conference of American States, Montevideo, 1933).<sup>2</sup> The United States voted for the resolution of nonintervention at this Conference. President Roosevelt subsequently refused to intervene to protect the President of Nicaragua, Juan Sacasa,

from removal by U.S.-anointed General Anastasio Somoza, head of the U.S.-designed National Guard.<sup>3</sup>

Klein then traces the origins of the U.N. Charter's fundamental principle of "sovereign equality" directly to the influence at the war-time conference planning the U.N. of Sumner Welles and Cordell Hull, whose own endorsement of the principle of sovereign equality had been nurtured by their decade-long diplomatic dealings with officials of Latin American nations who had experienced, or feared experience, of U.S. intervention.<sup>4</sup> The Charter's prominent support of the principle of sovereign equality, and its corollary of nonintervention, may then be seen as evidence of "the sins of the fathers being visited on their sons." U.S. interventionism thus sowed the seeds of the sovereignty principle now enshrined in the U.N. Charter.

The principle of nonintervention is now under attack, or at least subject to continuous erosion. Alongside the history of recent controversial cases of U.S. interference in Nicaragua (1979-1986),<sup>5</sup> and Panama (1989)<sup>6</sup> one might only refer to two documents on low-intensity conflict which seem to assume the irrelevance of the international legal principle of sovereign immunity from intervention. The first is the Final Report "Joint Low-Intensity Conflict Project" prepared by the Project at the U.S. Army Training and Doctrine Command, Fort Monroe, Virginia (1 August 1986): ". . . the U.S. can provide support for . . . an insurgent force seeking freedom from an adversary government."<sup>7</sup> More explicitly still, a subsequent Initial Draft of "Some Thoughts on Low-Intensity Conflict," originating at the Army-Air Force Center for Low-Intensity Conflict (Langley Air Force Base, Virginia (August, 1989)), seems to endorse assistance to insurgents seeking to overthrow the national government:

The U.S. may assist a government or insurgent forces against a government. . . .  
The U.S. supports selective insurgencies opposing oppressive regimes who work against U.S. interests.<sup>8</sup>

Both these documents seem clearly to challenge the present academic understanding of the legal norms concerning intervention. Both John Norton Moore in *Law and Civil War in the Modern World* and, in a more philosophical vein, Michael Walzer in *Just and Unjust Wars*, spell out the principles that allow outside assistance (up to a certain level and moment) to governments facing local insurgencies while condemning assistance to such insurgencies.<sup>9</sup>

The argument presented by Professor Johnson challenges Walzer's interpretation of just war theory with two broad claims: that the tradition allows outside intervention against "petty dictators" and "drug traffickers" *even apparently in the absence* of any indigenous insurgencies challenging such regimes.<sup>10</sup> Professor Johnson's permissive approach to the morality of cross-border reforms appears to represent a certain innovation in just war thinking, although it would be a

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familiar argument from the more liberal “cosmopolitan” views of Charles Beitz and many others.<sup>11</sup>

Without entering at this point into the compelling question of whether such a “liberalization” of just war tradition would be politically and morally wise, I will confine myself to analyzing the historical claim that Professor Johnson presents for his more permissive approach to reform intervention in the name of the just war tradition.

In arguing that the just war tradition *as a whole* cannot legitimately be said to favor a permissive approach to cross-border State actions designed to remove from power petty dictators and/or drug traffickers, I propose to draw attention not to the specific teachings about rights in warfare (*jus ad bellum, jus in bello*) but to the overarching and controlling notion of *justice*, which is inextricably intertwined with the analysis of just wars in any era. For just war theory is obviously a corollary of theories about political justice itself. What, then, was the conception of just politics in the eyes of St. Thomas (and John of Paris) and later in the age of St. Thomas’ disciple Francisco de Vitoria? From such a foundational inquiry we might come to a different interpretation of just war theory than Professor Johnson has arrived at for the tradition as a whole.

### Justice and the School of Paris: St. Thomas Aquinas and John of Paris

The defining struggle of mid-13th and 14th-century Europe was the century-long political and intellectual confrontation between the Holy Roman Empire, on the one hand, and the forces of nationalism (in the Kingdoms of France, Spain and Naples), on the other. Among the many conspicuous political contributions of St. Louis IX of France was his steady defiance of the legal claims made against his authority by the Emperor. As early as 1254, Louis affirmed that his support of imperial legal codes in France was a sovereign choice of the French Crown, anxious to avoid distracting his realm by unnecessary legal innovation required to fashion a new legal code for France alone. King Louis’ decree on the law explicitly negates the imperial contention that the legal force of the ancient codes was a symbol of imperial sovereignty in France.<sup>12</sup>

In this political context, St. Thomas lent the weight of his own considerable authority to King Louis’ cause by providing a philosophical argument for a culture-bound and historically unique political order for the various ancient realms constituting Europe.<sup>13</sup> St. Thomas’ own political, and consequently moral, philosophy was largely particularistic and relativistic. King St. Louis’ successful effort to shield his own regal authority from the imperial pretensions of legal uniformity throughout Europe had the good fortune to be able to call upon the theological reasoning of one of the leading figures of the age.

These joint (political and theological) efforts to limit the legal authority of the emperor to “his own region” (Germany) bore fruit finally in the following century when the Emperor of the time had the poor judgement to summon the King of Naples to his court on the grounds of treason (*laesae majestatis*). The King, alongside the King of France, appealed to the Pope to rule on the canonical prerogatives of the Holy Roman Emperor. The Pope ruled that the Emperor enjoyed no legal authority in Naples or France. The claim of sovereignty for the several nations of Europe was thus ratified in canon law and entered into the political consciousness of Europeans. The meaning of sovereignty was precisely, then, the defiance of the universal pretensions of a particular realm, i.e. the Holy Roman Empire. The consequence of this theological and canonical revolution was the vindication of an international system of States.

It appears, then, that the 13th and 14th century notion of justice (and of its corollary the just war) was shaped precisely to condemn interventionism on philosophical and theological grounds. This period cannot then be included in any catalogue of ages when concepts of justice encouraged interventionism.

#### Justice and the School of Salamanca: Francisco de Vitoria

It is perhaps coincidental that the leading architects of the natural law conception of justice (and its corollary, the just war theory) thought and taught in moments of great cultural crisis. Aquinas happened to be lecturing on theology in Paris at the dawn of the post-imperial age in Europe. In response to the moral challenge arising across the continent to choose between the traditional (and canonical) weight of imperial authority and the emergence of political pluralism within Christendom, Thomas had opted for the supremacy of regal sovereignty (immunity from the customary imperial claim of suzerainty in France). Thus, the new moral and political principle of national sovereignty constituted a declaration of independence for France (and the other kingdoms) from the constraints of empire. This cardinal development in the natural law tradition shaped all subsequent interpretations of justice (and just war thinking).

Two centuries later, another cultural crisis gripped Christendom, namely, the opportunity to navigate the seas and explore “the Indies.”

Spain, sailing to the New World, sent with its *conquistadores* their Dominican chaplains, who quickly discovered the moral ambiguity of the unexpected cultural encounter with alien civilizations. The missionaries included Fra Bartolomeo de las Casas, an early colonial landlord himself who became a crusader for Indian rights.<sup>14</sup> By his correspondence with Spain, he engaged the Court, and equally decisively, theologians of Valladolid and Salamanca in the challenge of justifying, or denouncing, the imposition of Spanish rule in America. Among his Dominican colleagues unsettled by the lurid accounts of the tragic circumstances of the newly conquered

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peoples was the young Dean of the Faculty at Salamanca, Fra Francisco de Vitoria.<sup>15</sup>

Vitoria was amply prepared to undertake the task, for his own theological studies had been made at Paris, where he benefitted from a renaissance of Thomistic political and moral thought. He was, then, from an early age imbued with the Thomistic insistence on the right of national sovereignty, that is, the conviction that the several disparate European realms were independent of any overlord, including the Emperor. The base line of Vitoria's analysis of the ethics of "the conquest," then, was the primordial principle of sovereignty, the nation's immunity from external intervention.

Vitoria's own decisive contribution to the natural law understanding of justice was to conclude that sovereignty was a two-edged sword: just as Thomas had elevated the principle as a check against German imperial claims against the independence of France, so Vitoria insisted that the still unfamiliar nations and tribes encountered across the seas were sovereign in their own right and immune from coercion by the Spanish Crown. Vitoria's cardinal contribution to the tradition may have owed more to his strength of character and his penchant for intellectual consistency than to any intellectual genius. For it took a man of considerable fortitude to stand up to the pressure of public (and royal and ecclesiastical) zeal for the conquest in his defense of the newly discovered people in the Americas from the claim that, as barbarians, they had no rights. Affirming the Spanish right to travel, to trade, and to preach in the Indies, Vitoria nevertheless challenged the wider claims of political and religious superiority and jurisdiction in the Indies.

Vitoria's explicitly drawn corollaries on the justice of war in the Americas were that wars fought against the native peoples, except in self-defense, were unjust, while Indian defensive wars against the Spanish were justified.<sup>16</sup>

The School of Salamanca, like its inspiration at Paris, contributed to the understanding of the principle of sovereignty by insisting that the right which defies rule from abroad likewise must renounce the aspiration to rule from abroad by coercion. At least these two decisive centers of just war thinking represent a challenge to, rather than a justification of, intervention.

### Conclusion

It might be preferable if the ethical question of whether the U.S. should unilaterally depose governments which it perceives as dictatorships and/or drug traffickers were merely an academic matter. For better or worse, this is not the case. In the "low-intensity" intervention dubbed "Operation Just Cause," U.S. citizens saw a classic demonstration of the dynamics of U.S. hemispheric house-cleaning in the post-Cold War era. It was to some a chilling exhibition of the self-righteous application of overwhelming force against a hapless and

despicable despot/drug trafficker. Military victory was swift, yielding a prisoner in the docks at Miami awaiting the judgment of his non-peers.

What were the consequences of this perhaps precedent-setting engagement in low-intensity conflict? At Congressional Hearings in July, 1991, the unanimous judgment of witnesses was dismal. Eva Loser (Fellow, The Americas Program, Center for Strategic and International Studies), captured the spirit of the hearings in her assessment: One-year-after-the-invasion-type articles trumpeted the cynical joke within Panama that General Noriega has been replaced by "General Discontent."<sup>17</sup> Other witnesses concluded that neither the judicial process, the national administration, the legislature, the new Public Defense Force, nor the economy is functioning. To add a dash of irony to this assessment, Dr. Richard Millett of Southern Illinois University adds that a notable consequence (or sequel) to Operation Just Cause has been the emergence of an exacerbated domestic drug problem in Panama.<sup>18</sup> Additionally, the witnesses warned the Subcommittee that Panamanian dependence on the U.S. has been heightened, and the U.S. responsibility for the failings of the new government which it installed during the invasion was cited as a claim for further reform intervention and additional financial support.

Even before these wholly predictable indigenous consequences became evident, the Organization of American States on December 23, 1989 in an unprecedented resolution, condemned the invasion by a vote of 20 to 1.<sup>19</sup> The response of the U.S. State Department was: "We are disappointed that the O.A.S. missed an historic opportunity to get beyond its traditional narrow concern over non-intervention. The resolution is unbalanced. It does not cite the root problem—Noriega—and it fails to recognize the threat to Americans."

I am inclined myself to believe that the condemnation of the invasion by twenty Latin American governments is much closer to the genius of the just war tradition than the U.S. State Department deploring of the O.A.S.' "traditional narrow concern over non-intervention."

## Afterword

### Ethical Considerations Relevant to the Possibility of Low-Intensity Conflict Used to Resolve Problems of State-Sponsored Terrorism or Proliferation of Weapons of Mass Destruction

Much less problematic ethically than the use of force to depose dictators or drug traffickers is the possibility of such limited military response to State-sponsored terrorism or proliferation of nuclear weapons.

**(1) State-Sponsored Terrorism: The Government Sponsored or Supported Use of Force Against Civilians of Other Nations.** By just war

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standards, such acts are acts of war (the employment of force to coerce other governments) which violate the traditional standard of non-combatant immunity. They are therefore immoral and may be resisted and/or punished by military means, observing the traditional limits of proportionality and discrimination. Such conclusions seem relatively uncontroversial corollaries of the just war tradition.

Additional questions about the justice of such means (for example, against Libya in 1986) may be raised on two counts:

(a) Chance of success. Since the exercise of this right in the Libyan case has yielded ambiguous results, judgment must be deferred on the question of feasibility.

(b) Unilateral authorization. It seems reasonable to ask whether some concerted multilateral efforts (e.g. sanctions approved by the Security Council) might be more effective. One might even contemplate the possibility of excluding from the U.N. all members proven to be sponsors of terrorism.

**(2) Proliferation of weapons of mass destruction.** This newly surfacing question is intellectually daunting. The chance of resolving it by recourse to the just war tradition is slight. For those States most likely to be able to execute low-intensity conflict attacks against such proliferators are almost certainly armed themselves with weapons of mass destruction. This double standard, which is morally intelligible and defensible, represents a novel challenge to the just war tradition for which that tradition may not indeed have any constructive response.

The present urgent case of response to Iraqi refusal to honor its cease-fire treaty is easily resolved. Signing the treaty was a legitimate sovereign choice by Iraq, the execution of which is a matter of legal and moral obligation. Failure to fulfill these treaty obligations would, I believe, be a just *casus belli*.

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### Notes

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1. Johnson, *supra*, 147 at 160. The same argument is adumbrated earlier in the essay 158-159.

All this historical reasoning argues strongly that just war tradition allows the use of force on legitimate sovereign authority against the sorts of adversaries encountered in low-intensity conflict contexts: terrorists, drug traffickers, petty dictators who use the resources of their countries for their own purposes and against the good of their people. Indeed, historically there is more than a mere *allowance* to be found in the historical record: there is *downright hostility* toward such threats to the order, justice, and peace of good political communities and of the natural rights of innocent people victimized by such activities.

Nor, in principle, does the 'right authority' to use force to combat such threats extend only to a nation's borders, so that the wrongdoers in question can take refuge in an international 'no man's land' or behind the legal wall of another nation's formal sovereignty. Rather, force may be employed across borders in cases of serious threats that can be dealt with in no other way.

2. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA 98-99 (1974).

3. *Id.* at 100-01.

4. *Id.* at 109-13.

5. This entire period is narrated in KINZER, BLOOD OF BROTHERS: LIFE AND WAR IN NICARAGUA (1992). The destabilization of Anastasio Somoza Debayle in July, 1979, is narrated in LAKE, SOMOZA FALLING: THE NICARAGUA DILEMMA: A PORTRAIT OF WASHINGTON AT WORK (1989), and in PASTOR, CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA (1987). Pastor's early history (Chapter II, "A Fractured History") reveals the continuum of "reform-intervention" throughout the twentieth century.

6. Cf. *infra*, Conclusion, at 176-177.

7. Final Report, *Joint Low-Intensity Conflict Project*, U.S. Army Training and Doctrine Command, Fort Monroe, Virginia (1 August 1986), at 4.

8. Initial Draft, *Some Thoughts on Low-Intensity Conflict*, Army-Air Force Center for Low-Intensity Conflict, Langley Air Force Base, Virginia (August, 1989), at 2-7, 2-8.

9. MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD (1974). Compare Moore's Chapter I, *Toward an Applied Theory for the Regulation of Intervention*, 26-27 with WALZER, JUST AND UNJUST WARS 86-108 (1977), seeks to interpret the substance of international law on intervention for a layman.

10. Walzer and Johnson agree that the right of sovereignty is not absolute, for it is generally understood in the natural law tradition that sovereignty, like all other human rights, is an instrument of human welfare. Non-intervention is, therefore, a moral and legal prohibition which may, under some circumstances, be overridden by the prior imperative of the common good, or occasionally by the possible threat to the good of neighboring nations. The decisive question, which evokes the specter of casuistry which accompanied the natural law tradition at its best moments, is to define or identify those exceptional circumstances in terms general enough to serve as a standard for decision-making.

Johnson points to at least two such cases in which he seems to argue that the just war tradition lends support to principled abrogations of sovereignty: (1) "egregious violations of generally accepted human rights" (page 29); [cf. 47: "systematic and ongoing violations of human rights"] and 2) "Broadly recognized threats to a particular people or to international order as such" (p. 30); [cf. p. 47: "threats to international order and the security of other States by regional hegemony, and the global traffic in narcotics"]. Elsewhere, Johnson specifically identifies the perpetrators of these violations as "petty dictators who use the resources of their countries for their own purposes and against the good of the people," and "drug traffickers" (pp. 26-27). Against such offenders, one may legitimately appeal to the just war tradition to invoke the use of force (p. 26), according to Johnson.

These two claims seem to me to constitute novel (if perhaps desirable) extensions of the just war tradition, rather than ready corollaries of it. The claim for the use of force against drug traffickers within another country rests on the premise that officials of foreign governments (e.g., the U.S.) should "give and enforce the law" about drug production/distribution in nations such as Colombia and Peru, even without the agreement of the governments, "as a last resort." (p. 35). I regard this claim as possibly unprecedented in the literature on the just war tradition and probably contrary to the views on sovereignty of at least Thomas Aquinas and Vitoria. (cf. footnotes 12-16, *infra*, with accompanying text). (There may indeed be other leading authorities in the tradition who would support such a position, although I am unfamiliar with such sources.)

The associated claim, that military force may be invoked against "petty dictators who use the resources of their countries for their purposes and against the good of the people" (pps. 26-27), seems to me equally unfamiliar as a traditional stance of the just war tradition. For the determination of the fact of "tyranny" in medieval political culture was a judgment reserved strictly to those people themselves who were its victims. The little-understood medieval tradition of a right to revolution was historically understood as an exclusively domestic prerogative and obligation. (Several brief passages representative of a vast literature may be found in: CARLYLE AND CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST (1928 and after), III, 122-146; V, 36, 92, 105-120, and 460-469; and, VI, 75-78; GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, at 74-77 (Maitland trans. 1938); and WILKS, THE PROBLEM OF SOVEREIGNTY IN

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THE LATTER MIDDLE AGES at 108, 121-24, 211, 222-223 (1963). In these passages, references to judgement by the community are constant.

The extension to non-nationals of the right to make judgements about the presence of tyranny on the part of officials of governments may (or may not) be a sound instinct of the present age. I am aware, however, of no historical grounds to argue that such a trans-border extension can be supported on the authority of the just war tradition.

For these reasons, I would judge that Johnson's appeal to the tradition as an authority to support low-intensity coercive actions against the States guilty of dictatorship or drug trafficking represents an extension, rather than an application, of the tradition itself. Walzer seems closer to the historical tradition when he limits intervention to a response to "massive violations of human rights," identifying such violations as: "the enslavement or massacre of political opponents, national minorities, and religious sects." (JUST AND UNJUST WARS, at 101.) From my reading of the authors, I would judge Walzer's restriction of intervention to quasi-genocidal acts to represent a more traditional instinct than Johnson's proposed use of force against "petty dictators and drug traffickers."

11. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979).

12. Ullmann, *The Development of the Medieval Idea of Sovereignty*, *The English Historical Review* 1-33 (1949).

13. The same insistence on the cultural determinants of moral obligation and political systems in St. Thomas' political philosophy' is found in WILKS, THE PROBLEM OF SOVEREIGNTY 140 (1963).

14. For a concise summary of the career and contribution of de las Casas, see Collard's Introductory Essay to his translation of de las Casas' *History of the Indies*, ix-xxiv (1971).

15. For the life and teaching of Vitoria, cf. HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (1949).

16. An interpretation of Vitoria's teaching can be found in Winters, *Freedom to Resist Coercion*, *Commonweal*, 369-72 (1991).

17. Testimony presented before the Subcommittee on Western Hemisphere Affairs, U.S. House of Representatives, 17 July 1991, page 2.

18. *Id.* at 4-5.

19. *The Washington Post*, 23 December 1989, at A7.

20. *Id.*