PART I

Non-Intervention

CHAPTER 3

The Intersection of the Libertarian Non-interference Principle and International Relations

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Introduction

Traces of the libertarian 'non-aggression principle' are reflected in international law. Such reflections acknowledge the need to limit aggression between State actors. A primary example is the United Nations Charter. Enacted as a response to World War II, the United Nations Charter puts forth measures of settling conflicts among States while also binding States to non-violent dispute resolution. Additionally, the United Nations Charter reflects the age-old adage "don't hit them first, but if they hit you—hit them back." However, academic libertarians scantly apply the non-aggression principle to international affairs. Moreover, the non-aggression principle has largely gone understudied because academics find

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it unfeasible in application. This article aims to acknowledge the principle's place in international law and respond to its criticisms through the backdrop of the contemporary Iran-Afghanistan water conflict.

First, in attempt to set the foundation for the discussion on the non-interference principle, which I will later adopt, I will survey the various conceptions of the non-aggression principle and address its criticism. I will conclude that Zwolinski's latter critique identifies a crucial shortcoming of the non-aggression principle but that is remedied by adopting Christmas's non-interference principle. After adopting Christmas's non-interference principle, I will respond to the preemption argument through addressing its 'certainty' component. Concluding the preemption argument fails to undermine the non-interference principle, I will apply the non-interference principle to the existing conflict between Iran and Afghanistan regarding the Helmand River. Lastly, I will survey two other international libertarian theories. Here I will conclude that while Republican Security Theory is incompatible with the NIP the Libertarian Interstate Federalist Tradition is compatible. Ultimately, I aim to demonstrate that the libertarian non-interference place has a role in resolving international disputes.

Theoretical Background Discussion

Defining the Non-aggression Principle

Libertarian theorists and critics of libertarianism have argued the 'non-aggression principle' ("NAP") is the foundation on which the political philosophy rests.[1] And while said foundation may be conceded, there is debate among libertarians as to the limits of the NAP and definition of aggression. Murray Rothbard advocates the NAP as prohibiting man or men from aggressing against another person or property.[2] Subsequently, he defines aggression as "the initiation of the use or threat of physical violence against the person or property of anyone else."[3] Ayn Rand, another prominent contributor to libertarian thought, defines the NAP as

[1] *See* Matt Zwolinski, *The Libertarian Nonaggression Principle*, 32 SOC. PHIL. & POL'Y 62 (2016).

[2] MURRAY N. ROTHBARD, FOR A NEW LIBERTY THE LIBERTARIAN MANIFESTO 27 (Ludwig von Mises Institute eds. 2 ed.).

[3] *Id.*

"no man may initiate the use of physical force against other."[4] She defines the prohibition of aggression as "no man—or group or society or government—has the right to assume the role of a criminal and initiate the use of physical compulsion against any man."[5] Lastly, Robert Nozick, who is credited with reviving academic libertarianism, defines the NAP as a "prohibit[ion] [of] aggression against another."[6] Noteworthy, is that each theorist provides an exception in the case of self-defense. Billy Christmas aptly notes, the NAP is rooted in a "natural enforceable duty we have to other persons" to not forcefully aggress against them or their property.[7] Simply stated, if another does forcefully aggress, the aggressee then has the right to defend themselves. In the next section, I will survey and respond to two criticisms of the non-aggression principle, redefine the NAP, and conclude that said principle is rooted in property rights.

Response to Criticisms of the NAP

Matt Zwolinski argues that the NAP fails because, "we cannot know who holds the relevant property rights without making a moral judgment."[8] However, Zwolinski's attack presupposes the truth of moral cognitivism or moral cognitivist subjectivism by arguing "'aggression' is not a morally neutral term."[9] Here, Zwolinksi fails to consider that the NAP may be understood in the framework of moral non-cognitivism. More specifically, the NAP can be viewed against the backdrop of emotivism.[10] Zwolinksi's argument assumes when libertarians cite the NAP they are in the "state of

[4] AYN RAND, THE VIRTUE OF SELFISHNESS 36 (Penguin Group eds. 1964).

[5] *Id.*

[6] ROBERT NOZICK, STATE, ANARCHY, and UTOPIA 33 (Basic Books eds. 2013).

[7] Billy Christmas, *Rescuing the Libertarian Non-Aggression Principle*, 5 MORAL PHIL. & POL. 305, 306 (2018).

[8] Id.

[9] Zwolinski, *supra* note 1, at 67.

[10] *See generally* MATTHEW CHRISMAN, EMOTIVISM (International Encyclopedia of Ethics eds. 2013) (describing emotivism as "a form of non-cognitivism because it holds that ethical words and statements have a distinctive kind of emotive meaning, which distinguishes them from other words and statements, whose meaning is purely cognitive or descriptive").

mind of accepting a moral judgment" they believe.[11] But it may be that when libertarian utter "moral predicates" they instead express "beliefs in the same way [as] other sentences with ordinary descriptive predicates."[12] When actions do not conform to the NAP it can be said that the speaker, such as Rothbard, means to express his disapproval of aggression as opposed to the moral truth or falsity of aggression itself. Noteworthy is the fact that such a position can only be maintained if expressions "only possess meaning insofar as the society which they are used is agreed on what things it approves" or condemns.[13] Luckily for libertarians, society has largely agreed on condemning aggression. The following example is illustrative of the point:

> *A* and *B* live in a society where aggressive acts are looked down upon. When *A* hits *B* – *C* then states that *A* should not act aggressively toward *B*.

In the example, it can be said that *A* did in fact act aggressively toward *B*. However, when *C* says that *A* ought not to act aggressively toward *B*–*C* is conveying its and societies disapproval of *A*'s action. *C* is not asserting the moral truth or falsity of *A*'s action. Furthermore, Zwolinski assumes the law determining who has the property right is "neither here nor there for the libertarian" if the law "asserts the existence of a property right that comports with the moral standard of natural justice.[14] He argues that if the law does not recognize the proper existence of the right, the libertarian will deem the law "illegitimate and void."[15] Such stance again presupposes moral cognitivism. While Zwolinski is correct by acknowledging the libertarian holds the law illegitimate and void if it fails to comport the right to the proper party, Zwolinski is incorrect by asserting the NAP declares a moral truth. Rather, 'aggression' can be viewed as a reflection of libertarian attitudes toward unnecessary aggression. But in rejecting Zwolinski's criticism—I will next, address what Zwolinski calls 'the first punch theory of aggression.'

[11] Mark van Roojen, *Moral Cognitivism vs. Non-Cognitivism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 23, 2004), https://plato.stanford.edu/entries/moral-cognitivism/#Emo.

[12] *Id.*

[13] W.H.F. Barnes, *A Suggestion about Value*, 1 OXFORD UNI. PRESS 45 (1934).

[14] *Id.*

[15] *Id.*

He argues that libertarians link "the concept of aggression to direct, physical violence."[16] The consequence of the link is it leaves out cases libertarians would claim violate property rights. Thus, Zwolinski correctly argues, "libertarian defenders of property rights are supporting something less."[17] He rightly states, "The truth is that physical violence against persons is one thing, and the violation of property rights in external resources is something else."[18] In an attempt to 'rescue' the non-aggression principle, Billy Christmas argues that the NAP should become the non-interference principle ("NIP"). Christmas observes, aggressions are a smaller subset of interferences.[19] He defines interference as one's action "altering those objects and spaces which are subsumed into ongoing activities in such a way as to conflict with those activities by frustrating their intended trajectory."[20] For example, if X is to remove a bowling pin each time Y goes to bowl. While such an example demonstrates interference, it does not demonstrate aggression. But if X is to threaten to push Y while bowling or *actually* push Y while bowling, *X's* action could be deemed aggressive. The current NAP would condemn the latter example while not condemning the former. To remedy this problem, Christmas first grounds non-interference in property rights. He rightly asserts that the NIP "must protect our intelligible possession of things, and not merely our empirical possession."[21] A consequence of Christmas's NIP, "there is very little a third party could do" without being deemed to have interfered.[22] Thus, at first glance, Christmas's NIP would result in constant violation. However, given the globalization of modern times, it is inevitable that there will be some degree of interference between States. But as it is crucial to respond to Zwolinski's critique of the NAP, the NIP is the best theory to achieve the international goal of

[16] Zwolinski, *supra* note 1, at 69.

[17] *Id.*

[18] Zwolinski, *supra* note 1, at 70.

[19] Christmas, *supra* note 7, at 309–10.

[20] Christmas, *supra* note 7, at 310.

[21] Christmas, *supra* note 7, at 314.

[22] Christmas, supra note 7, at 314 (Christmas, as well as most libertarian scholars, fail to extend their theories to an international context which is arguably crucial given our current state of interdependence. Instead, Christmas only applies the NIP to individual agents. Thus, as will later be elaborate, it is important that there is some framework and recognition that States can be deemed autonomous actors).

"least overall interference."[23] But to achieve this goal requires a distinction be made between passive interference and active interference. Passive interference, while not ideal, is a reality of the interdependent world in which we live. Passive interference hinges on the actor not being willful or intentional about said interference. Broadly stated, passive interference can be said to be a consequence of some other intentional act. Contrarily, active interference is the willful or intentional inference of an actor of another. This is when an actor has the intent either by direct means or indirect to interfere with another actor. The prior is not actionable because one must consider the reality of international circumstance. One such example is shared water sources. Thus, for the principle to serve its intended purpose—there must be some limit. Having address Zwolinski's critiques, and adopting Christmas's NIP, I will now briefly explore free will and then turn attention toward what I will call the "preemption argument."

Free Will Applied to States

States as autonomous actors is a far from settled matter, especially in the international context. Some theorists argue that States are autonomous actors, and the relative question is the degree of autonomy.[24] On the other end of the debate are those that argue that States are non-autonomous and are merely agents. However, for the purposes of the paper, I will not delve into the depths of the debate. Rather, I will proceed on the premise that States without some form of autonomy would not be considered actors.[25] Thus, I will incorporate Harry Frankfurt's conception into my brief sketch that States autonomous and blameworthy actors.

Frankfurt's conception of free will argues that a person's will is composed of their desires. Inherent in people are the ordering of said desires. The first level desire, first-order desires, "have as their objects an

[23] PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 10 (Cambridge Uni. Press eds. 2012).

[24] P.A. Reynolds, *Non-State Actors and International Outcomes*, 5 CAMBRIDGE UNI. PRESS 91, 92 (1979) (arguing that State actors have autonomy or else they would not be considered actors).

[25] *Id.*

action."[26] Furthermore, people have second-order desires as well. "The objects of second-order desires are first-order desires."[27] But someone could want their desires to be effective or ineffective.[28] It is when the individual wants their second order desire to be effective that this is called a second-order volition.[29] Frankfurt argues that to have free will, a person must want their second-order desire and to want to act on their first-order desire.[30] However, inquiry does not cease here. Frankfurt's free will is a concept normally only applied to individuals as opposed to States. Therefore, it must now be argued that the above-mentioned conception of free will is applicable to States.

Because the type of governance is important in determining whether a State acted freely and thus is blameworthy—I will begin by mapping out how Frankfurt's conception of free will broadly applies. If a State is governed by a dictatorship or monarch, then the free will principle is easily applied. Essentially, one sovereign is saddled with the responsibility of making the decision for the entire State. Thus, any action that they choose to take is done so freely. More complicated are the matters of States that have some form of popular control.[31] Here, however, Locke's social contract prevails. Locke advocates that "governments exist by the consent of the people."[32] This means, that the people are the source of legitimacy for the government, and it is only with the consent of the governed can government exist. Moreover, there is a social contract between the governments where representatives are elected by the people. Theoretically, people vote for those who believe reflect their values and opinions and act accordingly. Thus, when we think of an acting State, we think not of the individuals that compose the populous of said State,

[26] Federica D. Grotta, The Freedom of What We Care About: Revisiting Frankfurt's Hierarchical Theory of Free Will (Jun. 2017) (LLM dissertation, University of Cambridge) (Cambridge University Library).

[27] Federica, *supra* note 26, at 20.

[28] *Id.*

[29] Federica, *supra* note 26, at 21.

[30] *Id.*

[31] Here I use the term popular control to reference democracies, republics, and government's which utilize a majority of elected representatives. Moreover, 'control' is best understood in the context of Republican Philip Pettit.

[32] Alex Tuckness, *Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Oct. 6, 2020), https://plato.stanford.edu/entries/locke-political/.

but the State as a whole. But there is another problem that must be addressed—that is what if the State, domestically, disagrees about the decision to actively interfere. It is the case in many countries that power is divided among different branches of government. Here I think it would be helpful to explore two examples. The first example is if the President of the United States unilaterally sent troops to another country not out of retaliation. This would clearly be a case of active interference. But can we say that the United States acted freely in sending troops? The answer to such question is yes. The president of the United States acts as the figure head of the State and represents the United States in matters of foreign policy. Because of this rulethe president's actions are not solely their actions on the international stage. On the international stage—their actions are the United States' actions. Thus, it would be reasonable to conclude that States are autonomous actors that can be held blameworthy for their actions. Having concluded such, I will now survey the preemption argument and aim to demonstrate it poses no problem for the NIP.

Preemption Argument

Generally, the preemption argument presents a "gut reaction" dilemma for proponents of the NAP. It poses the question: *what should a State, holding the NAP true, do when said State is certain of an imminent attack?* This argument appeals to one's desire to prevent attacks and morally justify a 'first-strike.' But while the preemption argument may seem to present a dilemma for the NAP and thereby the NIP, after examining its reliance on 'certainty' the dilemma fails. Moreover, addressing the preemption argument also provides another useful inherent limitation on the NIP. First, the term certainty must be addressed, which nearly resolves the dilemma. Then, I will address the exceptionally rare cases that the certainty discussion does not resolve.

Broadly categorized, the two types of certainty are psychological and epistemic. Thus, so as not to misrepresent the preemption argumentthe grounding of said argument is imperative. If it is the case 'certainty' in the preemption argument is rooted in psychology, proponents of such argument face an uphill battle. Psychological certainty occurs when one

is "supremely convinced of its truth."[33] However, this position lends itself to the error of false belief being accepted as true. For example, one can hold a false belief and be said to be certain of such false belief so long as one is convinced that the false belief is true. Certainly, this cannot be what preemption argument seeks to put forth. If such was the case, the preemption argument would put forth no dilemma.[34] Therefore, the preemption argument must be grounded in epistemology due to its implicit reliance on outside empirical evidence supporting a claim of certainty. In attempting to defend epistemic certainty with respect to empirical statements, Frankfurt rightly argues that the "'cash value' of a claim of certainty lies in the claimant's willingness to take the risks he associates with accepting the statement for which he claims certainty."[35] Alternatively stated, a person is willing accept the potential consequences of risks associated with certainty. But mere "willingness to take the risks" associated with a certainty claim "does not mean that he regards the statement as certain or even that he regards it as probably true."[36] Frankfurt then correctly distinguishes between reasonable claims of certainty as opposed to unreasonable claims. "It is reasonable for a person to regard a statement as certain only if his willingness to take the risks associated with accepting the statement is justified by evidence he possesses in favor of the statement."[37] For it would be unreasonable for someone to proclaim certainty while simultaneously being afraid they are wrong. Moreover, Frankfurt correctly observes that certainty requires a person willing to

[33] Baron Reed, *Certainty*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 2, 2008), https://plato.stanford.edu/entries/certainty/.

[34] An example is necessary to further clarify and justify the point. Let's posit the president of the U.S. was psychologically certain that Iran would attack. However, there is no evidence that Iran was even capable of warfare generally. This example would miss the point that the preemption argument is attempting to present. Generally, all would argue that the U.S. president is not justified acting without any evidence of an impending attack. Rather, it would be asserted that the U.S. president is suffering from some fault in rational thinking. Moreover, psychological certainty could lend itself to proclaim certainty even when there are 'medical' or psychological deficiencies in one's mental processing capabilities.

[35] Harry G. Frankfurt, *Philosophical Certainty*, 71 PHIL. REV. 303, 317 (1962).

[36] *Id*. at 319.

[37] at 319.

risk *anything* on its truth and supportive evidence which justifies the willingness to take the risk.[38] In short, claiming certainty requires one to risk even that which they hold most dear *as well as* if anyone else possessing the same available evidence regarding the statement as certain.[39]

In the international context, if we assume States are rational actors that weigh evidence thereby deciding on the certainty of an imminent attack, said State must be willing to risk anything on its claim.[40] This bar is quite high given the murky enterprise of intelligence. While the primary mission of the intelligence community is to reduce uncertainty—there is just "too much information in which truth hides in plain sight."[41] Generally speaking, certainty plays the most prominent role in what Everett Dolman categorizes as the third loop in the intelligence cycle, 'processing and analyzing.'[42] Internationally, information evaluation "has undergone little change since its inception" in the 1940s.[43] This has been the basis for growing criticism. One such example is the processing and analyzation of the North Atlantic Treaty Organization's ("NATO") intelligence information synthesis process. Irwin and Mandel observe that NATO's information synthesis, which forms the basis of their intelligence, suffers from accuracy/truthfulness and the lack of "mechanisms for comparing multiple items of varying quality."[44] Therefore, it is reasonable to conclude that troubled or faulty information leads to faulty proclamations. Conceptually, when States make uncertain judgments, such

[38] 323.

[39] *See* Frankfurt, *supra* note 35, at 319, 323.

[40] It is worth noting that for the purposes of this paper, I will assume that States are autonomous actors who are responsible for their actions. Briefly sketched, one can apply Frankfurt's conception of free will in conjunction with Locke's 'social contract' to hold States as legitimate autonomous actors that can be held responsible for said actions.

However, I cannot provide a full defense of such theory provided it is beyond the scope of this paper.

[41] Baruch Fischhoff & Cherie Chauvin, Intelligence Analysis for Tomorrow Advances from the Behavioral and Social Sciences 5 (2011); Jane Harman, *Good Intelligence Is a Key Ingredient to Good Foreign Policy*, https://www.aspeninstitute.org/wp-content/uploads/2020/11/Chapter-19_Harman_Good-Intelligence-Is-a-Key-Ingredient.pdf.

[42] Everett Carl Dolman, *Military Intelligence and the Problem of Legitimacy: Opening the Model*, Routledge: Taylor & Francis Grp. 26, 31 (2000).

[43] Daniel Irwin & David Mandel, Standards for Evaluating Source Reliability and Information Credibility in Intelligence Production 1 (2020).

[44] 8.

judgments usually "fall under the category of estimative intelligence," which according to Frankfurt, would not rise to the highest level of certainty.[45] Friedman and Zeckhauser provide the example of another State assessing the status of Iran's nuclear program.[46] They correctly argue, "The intelligence community lacks direct access to high-level officials and relevant facilities" intelligence analysists are forced to "work with incomplete information" which prohibits them from drawing definitive conclusions.[47] Additionally, "intelligence analysts will rarely possess determinative evidence about every aspect of a given situation."[48] These observations lend themselves to the conclusion that intelligence practicalities impede the necessary level of certainty required under the NIPthereby rendering the preemption argument ineffective in application. However, as Friedman and Zeckhauser note, it is 'rarely' the case that analysts will possess determinative evidence.[49] But this rarity leaves room for the exceptional case.

In those rare instances when a State does possess determinative evidence of a State intending to actively interfere, there must be some act that the offending State has committed. If no act had occurred to alert the possible 'first-striking' State, then the criticism of the NIP amounts to nothing more than the condemnation of failure to read minds. Thus, it may be definitively asserted that some act, *X*, must occur. If analyzed under Christmas's interference definition, the act does not amount to interference, then said act can only be understood as a risk or threat of interference depending on the intentionality of the actor. Here one can rightly raise the objection that the dilemma the NIP poses is only pushed back. Reformulated—*what if the act does not rise to the level of interference, but is necessary to accomplish said interference? Can the State preemptively strike?* What the reformulated preemption argument tries to employ is the notion of 'threat.' Can a State threaten interference through non-interfering acts? Historically critics of the NAP, not the NIP, have focused on the physical force requirement while largely ignoring the

[45] Frankfurt, *supra* note 35, at 324.

[46] Jeffrey A. Friedman & Richard Zeckhauser, *Assessing Uncertainty in Intelligence*, 27 Routledge: Taylor & Francis Grp. 824 (2012).

[47] *Id.* at 825.

[48] at 825.

[49] 825.

'threat' aspect of the principle.[50] Common parlance has played a role by narrowing the conception of 'threat' to "a *statement* in which you tell somebody that you will punish or harm them."[51] But threats are not limited merely to statements. Threats are also defined as "a person or thing that is *likely* to cause trouble, danger, etc."[52] Here, NIP libertarians take refuge. This alternative definition does not require a statement be made but rather an assessment of circumstances. It is important to distinguish, however, that the latter definition of threat does not include risk. The conception of threat and risk can be distinguished by the intentionality of an actor. Threats require an ill intent on behalf of an actor whereas risk is a circumstantial byproduct thereby requiring no intent.[53] Thus, risk can be defined "as the outcome of positively oriented human decisions" that are created by "deliberate choice between alternative courses of action."[54]

Having provided and responding to the most damning theoretical critiques facing the NAP and subsequently adopting the broader NIPI will succinctly state the working principle. *No man, group, society, or government may intentionally interfere with another unless said man, group, society, or government is certain another may threaten or initiate intentional Interference.*

[50] Here critics ignore the 'threat of physical violence' and instead focus on 'the initiation of the use of threat of physical violence.'.

[51] *Threat*, Oxford English Dictionary (3d ed. 2003).

[52] Id.

[53] Fabrizio Battistelli & Maria Grazia Galantino, *Dangers, Risk, and Threats: An Alternative Conceptualization to the Catch-All Concept of Risk*, 67 CURRENT SOCIO., 70 (2018).

[54] 65.

Iran–Afghanistan Water Conflict

The dispute between Iran and Afghanistan, over the Helmand River ("the River"), dates back to the 1870s.[55] "A British officer drew the Iran-Afghan border along the man branch of the river," thereby incorporating it into the modern-day border.[56] There have been three attempts to resolve the dispute over the River's resources that have failed. The reason the River has been subject to various disputes is due to the "strong link between socio-economic development and the stability of various groups of people with the availability of water."[57] With respect to Iran and Afghanistan, "the River has provided water for agriculture for over 5000 years" thereby sustaining "the cultural and natural life of the region."[58] The River acts as the only water resource in the eastern provinces Sistan and Baluchestan of Iran.[59] Thus, lack of insufficient water has a direct or indirect impact on agricultural production, food supply, desertification, and livestock.[60] Most recently, conflict between the two States arose out of Afghanistan's construction of the Kamal Khan dam.[61] Iranian government officials are concerned that dam construction "will cause environmental damage" to the Sistan and Baluchestan provinces.[62] However, Afghan officials argue that the dam's construction will "ensure water security in consideration of the 1973 water treaty."[63] Thus, the question of inquiry can be framed as the following: *Has Afghanistan violated the NIP by constructing the Kamal Khan dam?*

[55] FATEMEH AMAN, WATER DISPUTE ESCALATING BETWEEN IRAN AND AFGHANISTAN 1 (Atlantic Council: South Asia Ctr. eds. 2016), https://www.atlanticcouncil.org/wp-content/uploads/2016/09/Water_Dispute_Escalating_between_Iran_and_Afghan istan_web_0830.pdf.

[56] *Id.*

[57] Farnaz Shirani Bidabadi and Ladan Afshari, *Human Right to Water in the Helmand Basin: Setting a Path for the Conflict Settlement between Afghanistan and Iran*, 16 UTRECHT REV. 150, 152 (2020).

[58] *Id.*

[59] *Id.* at 153.

[60] *Id.*

[61] Said Hashmat Sadat and Nasrat Sayed, *Afghanistan and Iran: From Water Treaty to Water Dispute*, THE INTERPRETER, (Oct. 14, 2020, 6:00 AM), https://www.lowyinstitute.org/the-interpreter/afghanistan-and-iran-water-treaty-water-dispute.

[62] *Id.*

[63] *Id.*

Original Ownership

To address the question entirely within a libertarian framework would require tracing the origins of both States to determine the 'homesteader.' Then it would require discussion on whether homesteaders of the River have an entire claim to the River or simply that which they have used in such a way as to transform said resource. However, because such topic is beyond the scope of the paper, I will posit that Iran and Afghanistan "yield relatively uncontested and effective jurisdictional powers in a particular territory."[64] Historically, and rightly, State territory has been treated like property.[65] Therefore, consistent use of and effective exercise of State functions over a territory are central notions" of determining title, including "resources within its own territories."[66] Furthermore, borrowing from Locke, whatsoever resource the State "removes out of the state of nature that nature hath provided" the State has mixed with its labor and "joined to it something that is [its] own, and thereby makes it [its] property."[67] The mixing of the State's labor "excludes the common right" of other States.[68] But resources returned from whence they came resume their status as the state of nature and is subject to common rights.[69] With respect to Iran and Afghanistan, Iran's territory is limited to its consistent use and effective exercise over a designed tract of land. Such land includes the start of the River, however, it does not extend to the entirety of the River. Since the start of the River is located within Iran's border, it does have the advantage of utilizing its resources more heavily than Afghanistan but such location does not necessitate the right to exclusively utilize the River because it has returned some of its resources back the 'state of nature.' Thus, any remaining resources provided by the River that come within the territory of Afghanistan may be utilized exclusively. But the solution provided does not consider the

[64] Lea Raible, *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, 31 LEIDEN J. INT'L L. 315, 322 (2018) (defining original acquisition of territory by a State).

[65] Id.

[66] Richard B. Bilder, *International Law and Natural Resources Policies*, 20 NAT. RES. J. 451, 452 (1980).

[67] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 217 (1690).

[68] *Id*.

[69] At 216.

binding treaty between the two States. Therefore, a libertarian theory of contract will be posited, and the circumstances reevaluated.

Libertarian Contract Theory and Helmand River Water Treaty

The Treaty between Iran and Afghanistan can be characterized as a relation between the two States "which includes 'legally' enforceable obligations."[70] The Treaty provides that Afghanistan shall deliver to Iran, during an average water year, "twenty-two cubic met[ers] per second" and an "additional amount of an average flow of four cubic met[ers] per second" "as an expression of goodwill and brotherly relations."[71] However, as with all treaties, it begs the question of what should occur if Afghanistan refuses to comply? With respect to private parties, as opposed to international actors, libertarian theory would permit the promisee to sue the promisor for damages with the goal of placing the promisee in the position said party would have been in had the promise been fulfilled. However, with respect to land, the law would dictate specific performance due to its unique character.[72] In the case of international actors, Iran could attempt to pursue negotiations, meditation, or suit demanding specific performance, however, the state of international law is abysmal. Therefore, as the discussion below will explore—Iran does have a claim interfere if Afghanistan does not act according to the stipulations in the Treaty.

Non-interference Application to Iran

If Iran does not receive its allotted amount of water per the Treaty, legally and theoretically, it will be generally undisputed that Afghanistan violated the terms of the Treaty. This violation has altered those objects and spaces which are subsumed into the ongoing activities of Iran in such a way as to conflict with its activities by frustrating its intended trajectory. In other words, by not providing the resource Afghanistan would

[70] N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17 J. OF LIBERTARIAN STUD. 11, 12 (2003).

[71] The Afghan-Iranian Helman-River Water Treaty, Afg.-Iran, art. II, 1973, https://www.internationalwaterlaw.org/documents/regionaldocs/1973_Helmand_River_Water_Treaty-Afghanistan-Ir an.pdf.

[72] 14.

have transferred title of a future interest, on which it consented, and unilaterally revoked said interest to the detriment of Iran. However, and most noteworthy, is the fact that the Treaty takes the form of a future conditional transfer of title. That is to say—the Treaty governs not only contemporaneous exchanges but future exchanges of title as well. Thus, as Kinsella notes, "there would seem to be no way to compel someone to perform an agreed-upon action."[73] The only actual way to enforce a promisor "to perform a given action is to have the right to inflict force."[74] However, such right is limited under libertarian theory to three ways: (1) if the promisor consents to force; (2) if the promisor is or has committed aggression; or (3) the promisor is owned by someone else.[75] In the context of international relations, it is unlikely that the promisor, in this case Afghanistan, will consent to force by Iran. Furthermore, Afghanistan, for the purposes of this article, is not owned by another State thereby rending option three of recourse unavailable. Thus, the only way for Iran to guarantee its future conditional title through a libertarian framework is by a claim of interference.

If Afghanistan violates the terms of the Treaty by not providing Iran with the amount of water stipulated, Afghanistan has interfered with Iran. The Iranian provinces have come to reasonably rely on the specified water amount. More specifically, if Afghanistan does not comply with the provision of the Treaty, by restricting water flow, it is possible that the Iranian provinces relying on said water may experience a decrease in agricultural production, a decrease in sanitation, and increase livestock mortality.[76] Such consequences may be said to alter the end of Iran building a thriving domestic economy in conjunction with maintaining the general welfare of its citizens, both of which have been argued by many to be the role of the State. However, this argument needs to be distinguished from Kinsella's 'detrimental reliance' argument. Kinsella argues that "conventional theories of contract enforcement are defective" in part because of the circularity of detrimental reliance.[77] But Kinsella's argument is predicated

[73] Kinsella, *supra* note 94, at 24–25.

[74] Kinsella, *supra* note 94, at 25.

[75] 25.

[76] *See* Bidabadi and Afshari, *supra* note 79, at 153.

[77] 19.

on the conception that violation of a contract does not amount to aggression. While Kinsella is correct in asserting violation of a contract does not necessarily equate to an act of aggression, the same cannot be asserted in the case of interference. For inherent in a breach of contract is some type of interference to another party. Thus, while Afghanistan may not have implicated Kinsella's second method of enforcing a promise, Afghanistan has implicated such under the non-interference principle.

Intersecting Theories

While the NIP is one of many theories that libertarians may include in their foreign policy framework, I want to mention two others, namely, republican security theory and libertarian interstate federalism. Here, the goal is not to defend or dismiss either theory, but rather to see if the NIP can be incorporated into the already existing bodies of work. I will first survey republican security theory but conclude that the NIP is both theoretically and practically incompatible with such. Second, I will survey libertarian interstate federalism. Here I will conclude that the NIP is compatible but accepting such would require a major shift in international theory.

Republican Security Theory

Republican security theory ("RST") has as its foundational principle, "security from political violence is the first freedom… of all primary political associations."[78,79] Otherwise stated, security cannot exist if there is a threat of violence. As Daniel Deudney notes, RST "focuses most of its energies on achieving security from the application of violent force upon its bodies."[80] At first glance, the NIP seems a snug fit into this overarching theory. However, closer examination reveals the irreconcilable tension between the republican based theory and liberal one.

[78] Daniel Deudney, *Publius before Kant: Federal-Republican Security and Democratic Peace*, 10 EUR. J. INT'L REL.

[79] , 139 (2004).

[80] *Id*. at 321.

RST must be situated in the larger Republican framework before the two theories can be reconciled. Philip Pettit, the most notable contemporary scholar on Republicanism, characterizes the political theory as concerned with limiting the ability of States to interfere on an arbitrary basis.[81] To accomplish this goal, it is imperative a theory of non-domination is put forth. Putting aside the specifics of Pettit's non-domination formula, the basic premise of such formula is to prevent the *ability* of the State to interfere as any ability equates to the absence of freedom.[82] The NIP's basic premise, however, accepts interference as a reality and that freedom exists despite the ability of interference. Fundamentally, these two conceptions cannot be reconciled. Additionally, there is the outstanding problem posed by Zwolinski regarding "aggression." RST seems only to be concerned with direct physical aggression. But as established previously, libertarians are also concerned with property rights. If violence is the sole and primary concern of RST, then the NIP is not compatible insofar as it accounts for property right violations.

Lastly, any viable theory attempting to regulate interactions between States must account for the intricacies of interference and the limits of such interference. This is simply due to the current state of international affairs. But again, if the RST is understood in the broader context of Republicanism, interference itself is a problem as Republicanism is concerned with limiting even the ability for governments to interfere. Thus, RST can be implemented alongside the NIPpractically.

Libertarian Interstate Federalism

The second theory is libertarian interstate federalism. Best defined, the libertarian interstate federalist tradition is concerned with shifting the focus from State sovereignty to State cooperation under "an effective

[81] *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–52 (Oxford Uni. Press 1997) (2010).

[82] *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 209–219 (2012).

international order of law."[83] However, the current goal is not necessarily to weigh in on that debate. Rather, the goal is to determine whether the NIP is a viable theory to be incorporated in the libertarian interstate federalist tradition.

At the outset, there seems to be little difficulty with reconciling the two theories. Generally, the libertarian interstate federalist tradition seeks to broadly structure international relations whereas the NIP's goal is to provide a principle by which to base action specific action. Otherwise stated, it may be the case we adopt the position that we move toward a new social order by which we adopt a "Philadephian federal order"[84] and the NIP. However, there is some question regarding the conceptualization of how the NIP fits into the libertarian interstate federalist tradition. More specifically, if the libertarian interstate federalist tradition seeks to move us away from understanding Westphalian notions of sovereignty to a federation understanding, how do we understand State actors? As previously discussed, States can be thought of as actors with exclusive national determination. But in essence, this is the very thought the interstate federalist tradition is trying to refocus.

In a limited sense, the NIP can apply to federations. The inquiry would be whether a country's actions constituted a risk or threat to the federation. If answered in the affirmative, then then there is justification for use of force. This is because the premise is no longer based on Westphalian notions of sovereignty. In other words, if Westphalian notions of sovereignty are used, then recognition of a collective right to defense is not justified as it may be the case that an entering party has no legitimate claim for interference. Under the interstate federalist tradition, Westphalian notions of sovereignty are not present thereby allowing for the federation as a whole to respond. However, one concern remains—practical considerations.

[83] Brandon L. Christensen, *Reviving the Libertarian Interstate Federalist Tradition*, 26 INDEP. REV. 429, 431 (2021).

(citing Fredrick Hayek, *The Economic Conditions of Interstate Federalism, in* INDIVIDUALISM AND ECONOMIC ORDER 255–72 (Uni. Chi. Press, 1976).

[84] Brandon L. Christensen, *Reviving the Libertarian Interstate Federalist Tradition*, 26 INDEP. REV. 429, 444 (2021).

The "concept of state sovereignty is a very long lasting one and is still in practice is many areas of foreign policy today."[85] For present purposes, the most important example is in the United Nations Charter, which states, "the organization is based on the principle of the sovereign equality of all its Members."[86] Here, among countless other examples, the idea of state sovereignty is presented as a pillar of international law. Thus, while there is no theoretical difficulty with reconciling the NIP with the libertarian interstate federalist tradition, the plausibility of moving toward an international federation of States does not seem feasible at such time. But this does not serve to discount the theory. While it may be at present a difficult feat to enact, for our purposes, the libertarian interstate federalist tradition is compatible with the NIP and offers us a path forward toward a unified libertarian international theory.

Conclusion

Borrowing the words of Christmas, Zwolinski has exposed the NAP "to some rigorous questioning."[87] But such questioning "need not lead us to a rejection of the axiomatic nature of the NAP."[88] Zwonliski erroneously presupposes a foundational understanding of cognitivism where in fact the NAP can stand on the foundation of non-cognitivism, namely emotivism. But Zwolinski does provide the much-needed criticism that 'aggression' is too narrow a conception to protect the property rights that concern libertarians. Responding to such, I adopt Christmas's broader NIP to ensure that the essence and spirit of the NAP is not forgotten while simultaneously broadening a principle to include the forgotten rights.

Additionally, I aimed to demonstrate that the preemption argument's requirement of epistemic certainty is an extremely high bar for the murky practice of intelligence and cannot be practically satisfied. In those rare instances where certainty can be satisfied—I aimed to demonstrate that with the proper distinction between risk and threat and incorporating the already existing threat exception of the NAPthat even those rare

[85] Steven Patton, *The Peace of Westphalia and its Affect on International Relations, Diplomacy and Foreign Policy*, 10 HISTORIES 91, 96 (2019).

[86] U.N. Charter art. 2, 1.

[87] Christmas, *supra* note 7, at 321.

[88] *Id.*

instances when a State is certain that another will actively interfere that the responding State may use preemptive interference to prevent interference. Next, I applied the NIP to the current Ukrainian-Russian conflict and its possible implications with the aim of demonstrating that the NIP is not merely an academic theory. Moreover, I further applied the NIP to a 'non-violent' conflict to demonstrate its continued usefulness. Lastly, I demonstrated that while the NIP is compatible with libertarian interstate federalism, it is incompatible with RST. This further advances the goal of putting forth a unified libertarian theory regarding international relations. Ultimately, the goal of this article is to respond to the critique that libertarianism is merely an academic theory that offers no practical guidance.

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