Chapter 4

Vitoria, the common good and the limits of political power

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Abstract
The chapter focuses on the relationship between Vitoria's notion of the common good (deeply embedded in the Thomist tradition but bringing with it some significant innovations) and his understanding of the limits of political power, both conceptually and in terms of its practical exercise. In order to shed light on that relationship the chapter starts by laying out the fundamental aspects of Vitoria's traditional understanding of the common good in the context of a developing notion of individual rights that was to become central in modern political thought. The main theoretical implications of this understanding concerning limits on the extension and exercise of legitimate political power as understood by Vitoria are analysed and four prominent applications of Vitoria's conceptions about the limits of political power are discussed, namely concerning the controversial issue of legitimate resistance to abuses of political power, the role of *ius gentium* in establishing universal limits to the power of states in international affairs, the just war theory, and the autonomy of Church and state. The chapter concludes with a brief reflection on the relevance of Vitoria's contributions in this specific area of political thought.

1. Introduction[1]

Francisco de Vitoria is justly regarded as the founder of the School of Salamanca given the incredible scope of his contributions across a wide range of disciplines and his pivotal role in the development of late Iberian scholasticism.

What is in contemporary times described as "interdisciplinarity" was at the core of the vast contributions of the Salamanca School that brought together, analysed and integrated very diverse areas of human knowledge[2]. It should therefore come as no surprise that Vitoria's political contributions are deeply linked with sociological, anthropological and juridical insights. In addition, his reflections on the legitimacy of

[1] This chapter partially builds upon sections of the book *The Salamanca School* (co-authored with José Manuel Moreira, 1st ed. Continuum, 2010, paperback ed. Bloomsbury, 2013), and earlier versions were presented at the International Seminar "At the origins of modernity: Vitoria and the new world" (2-3 - July 2015, Convento San Esteban, Salamanca) and at a CIEP Research workshop (23 September 2015, Catholic University of Portugal, Lisbon). The author would like to thank José Manuel Moreira, the participants in the sessions mentioned and two anonymous referees for their valuable comments on and constructive criticism of various versions of this paper. Responsibility for any and all errors and shortcomings remains solely with the author.

[2] Alves and Moreira 2013a.

the conduct of states and individuals in the course of international affairs give him a strong claim to being one of the founding fathers of international law. The main features of his political contributions are set out clearly in three of his surviving *relectiones*: *De potestate civili* (on civil power), *De indis* (on the Indians) and *De iure belli* (on the law of war). Also of special interest are his commentaries to Aquinas' *Summa*, particularly on law and justice.

The present chapter is specifically focused on the relationship between Vitoria's notion of the common good (deeply embedded in the Thomist tradition but bringing with it some relevant innovations in political theory) and his understanding of the limits of political power, both conceptually and in terms of its practical exercise. In order to shed light on this relationship the following section lays out the fundamental aspects of Vitoria's traditional understanding of the common good in the context of a developing notion of individual rights that was to become central in modern political thought. The section after that deals with the main theoretical implications of this understanding concerning limits on the extension and exercise of legitimate political power as understood by Vitoria. The following four sections in the chapter analyse four specific and prominent applications of Vitoria's ideas about the limits of political power, namely concerning the controversial issue of legitimate resistance to abuses of political power, the role of *ius gentium* in establishing universal limits to the power of states in international affairs, the just war theory as a constraint on the action of states, and the autonomy of Church and state. The chapter concludes with a brief reflection on the relevance of Vitoria's contributions in this specific domain of political thought.

2. The common good, "objective right" and individual rights

One of the key defining features of modern political thought was the development of a notion of individual rights that was seen as a departure from traditionally established conceptions of what can be described as an 'objective right' (usually understood in the sense of justice and the common good).

The tension between the perceived demands of an "objective right" and a respect for individual (subjective) rights can be identified throughout Francisco de Vitoria's writings, and particularly when he deals with political issues. Depending on how one views Vitoria's political thought, he can be regarded either as one of the last traditional Thomists or as putting forward an account of personal autonomy and liberty

that attempts to deal with the challenges of the Modern period without jeopardizing traditional Thomist approaches to justice and the common good.

It is important at this point to recall that the precise origins of the theory of subjective rights is a controversial matter and this chapter certainly does not aim at solving that issue. An influential perspective, first laid out by Michel Villey in the 1940's, holds that the Roman jurists failed to contribute to the development of the concept of subjective right and points to the 14th century nominalism of William of Ockham as the proper origin of natural rights theory.[3] Villey's main argument is that the Romans did not have the concept of subjective rights, thinking only in terms of objective right. The thesis – or at least its reach – is disputed by those who claim that the Roman jurist well aware of the *notion* of subjective rights even if they did not have an explicit *theory* of subjective rights. Regardless of the debate about the precise geneology of subjective rights theory, it would appear that the pragmatic legal approach of the Romans limited their theoretical contributions to political thought in this regard. In terms of political theory, this means that it would indeed be only in the period of late scholasticism that the underpinnings of subjective rights theory start to be developed and it is in this concept that Vitoria's balance between the traditional concepts of objective right and the arising notions of (subjective) individual rights ought to be considered.

Vitoria, like later members of the Salamanca School, held what can be described as an organic view of political society, with the common good as its overriding goal. This view is however qualified by a general recognition that the binding character of natural law extends not only to individual subjects but also to positive law and to the rulers themselves. The result is a peculiar combination of a largely organic conception of the promotion of order and the common good with an emphasis on local and individual rights. The promotion of order is deemed a priority but this common goal coexists with a wide range of individual, family and local rights which limit both the power of temporal and spiritual rulers and which are seen as prevailing over unjust legislation[4].

Although the notion of common good was essential for the definition of individual rights, it was mostly taken for granted and seldom subject to intense explicit

[3] See Garnsey 2012, particularly Chapter 7 ("Property as a legal right"), for a developed summary of the debate between Villey and his critics and its implications.

[4] Hamilton 1963, 30.

scrutiny. While this may be regarded as odd by contemporary standards, one should note, as pointed out by Höpfl[5], that the question "what is the common good?" was not usually a main topic of investigation in the Thomist tradition. The precise meaning and content of the concept was in practice the result of a mix of other related concepts and was also influenced by the specific circumstances of the social problems to which it was applied. More than a fully fledged and defined set of goals for social order, the notion of common good operated as an element of general guidance for reflections about political matters and political action.

Vitoria combines a strong adherence to the traditional Thomist conception of the objective right with a nuanced and in some ways innovative understanding of personal autonomy associated with a distinct sphere of individual freedom. As noted by Brett[6], this is particularly clear in Vitoria's discussion of hunting and homicide. Thus Vitoria explicitly objects to local lords enacting limitations on the people's liberty to hunt wild animals even if it is claimed that the limitations are in the interest of the subjects (for example by helping them not to waste their time), because he regards the general preservation of liberty as taking precedence over the private good in a setting such as this.

The autonomous direction of each individual towards his conscientious perception of the good is seen by Vitoria as a liberty worth preserving even if from the perspective of an external political authority the real good is conceived differently and the person in question is judged to be in error.

In a similar vein, when discussing the act of killing in self-defense, Vitoria rejects the notion that only public or divine authority can justify killing and asserts a crucial role for private authority and private responsibility. In other words, Vitoria regards individual rights as indispensable components of a well-ordered society and therefore rejects limiting the notion of right to the obligation of acting in accordance with the law or the dictates of an external authority. Without neglecting the sense of objective right and political obligation, Vitoria's understanding of rights also includes the notion of a personal sphere of liberty that – while framed by natural law – relies primarily on the individual's authority and responsibility to use reason and freely decide his course of action in his particular circumstances.

[5] Höpfl 2004, 283.

[6] Brett 1997, 132-134,

In the same way that individual liberty is bound by natural law and must not lead to arbitrary acts, legitimate political power must not degenerate into absolutist or tyrannical forms. It is this dynamic and intertwined understanding of both the common good and individual rights that constitute the main limits on the extension and exercise of legitimate political power as understood by Vitoria.

3. The commonwealth and the limits of political power

Vitoria's conception of individual rights in the context of the common good led him to hold very strong views on the necessary limits of political power. In some ways, Vitoria may even be considered a constitutionalist (or at least pre-constitutionalist) author even though he did not elaborate his political arguments according to the (contemporary) technical definition of the term. The scholastic tradition which he furthered tended to either reject or strongly qualify the notion of a self-sustaining sovereignty of the ruler over and above the sovereignty of the people. In this tradition, the relationship between the citizens and the ruler is of a contractual or quasi-contractual nature, meaning that the exercise of political power is legitimate only if it respects the terms of the implied contract.

The medieval political maxim *Populus maior principe* meant that whatever the form of government, there remained an element of popular sovereignty that no ruler could dispose of at his own will. It is worth remembering here that in the context of the Thomist framework within which Vitoria operated, positive human laws are only held to be genuine laws to the extent they do not violate the general principles of natural law. As can be readily seen, there lies a first – and very significant – limitation on the exercise of political power: unjust pieces of legislation (i.e. those in opposition to natural law) are not to be considered law and do not in themselves command obedience (though, depending on social circumstances and the consequences of disobedience there may be other compelling reasons to obey them).

In his *relectione* on civil power (*De potestate civili*), Vitoria accepts that public power is from God in the sense that it is founded upon natural law but then adds that "the material cause on which this naturally and divinely appointed power rests is the

commonwealth", which "takes upon itself the task of governing and administering itself and directing all its powers to the common good"[7].

The commonwealth delegates to political agents the authority to legislate but for Vitoria[8] it's clear who originally holds legislative power:

> *(...) positive law derives from the commonwealth, and therefore the existence of the commonwealth itself and of its power to make laws must precede the existence of positive laws; consequently it may be deduced that this legislative power itself exists in the commonwealth by divine and natural law.*

This process of delegation is of a secular nature and does not imply direct divine intervention in setting up governments. In fact, the idea that worldly governments are directly instituted by God was regarded not only as wrong, but as a dangerous heresy. But here Vitoria faces an apparent difficulty for he appears to wish to continue affirming that the power of legitimate kings proceeds from God while simultaneously clearly pointing out that the original authority to legislate positive human law lies with the commonwealth, not the ruler.[9]

The solution to this paradox comes from the distinction between *potestas* (power) and *auctoritas* (authority). If power is understood as the royal capability to rule, then it may be said that, like other human capabilities, it is an innate endowment derived from God. However, if we think about authority (understood as executive "power"), then it lies originally with the commonwealth and is only exercised by the ruler upon delegation – even though it may be a non-explicit form of delegation[10].

The distinction has important implications for the legitimate uses and boundaries ascribed to political power, which is no way unlimited. The ruler cannot in any way become the "owner" of the commonwealth: he merely receives (from the commonwealth) the authority to administrate collective affairs in accordance with the promotion of the common good. As summed up by Fernandéz-Santamaria[11]:

> *The ruler, for example, may not alienate any portion of the national territory because the commonwealth is not his property. What has been transferred into royal hands, then, is not the*

[7] Vitoria 1991, 10-11.
[8] Vitoria 1991, 12.
[9] Brett 1997, 136.
[10] Pagden and Lawrence 1991, xix-xx.
[11] Fernandéz-Santamaria 1977, 74.

state's potestas properly speaking, but its authority; the commonwealth does not invest the ruler with dominium over its parts but with the authority to act as its administrator. In other words, the prince is the nation's minister and caretaker; to rule means to fulfill the obligations implicit in the commonwealth's trust.

Although his capability to rule is derived from God, the political ruler is conceived by Vitoria[12] as an agent of the commonwealth entrusted with solving perceived problems of collective action.

The commonwealth as such cannot frame laws, propose policies, judge disputes, punish transgressors, or generally impose its laws on the individual, and so it must necessarily entrust all this business to a single man.

In the original condition or state of nature, however, there was no political power to be found and all men were free and equal. Man is a social animal that requires life in community both to better face the hazards of nature (because of his physical limitations) and to flourish fully, since justice and friendship can only be practiced and experienced by living in society with other persons. However, political society does not derive directly from the social inclinations of man. Rather, the emergence of the state is explained by historical circumstances and not rooted directly in natural law.

Political power provides a solution to specific human needs – and to that extent it is not in contradiction with natural law – but the justification for the existence of the state must be sought in history and not directly in the general principles of natural law. From the perspective of natural law, both (hypothetical) pre-political and political societies are held by Vitoria to be in a somewhat similar position. Both are consonant with natural law but apply to different contexts and answer different needs. In pre-historical society, the state's coercive power was not necessary but the conduct and requirements of actual historical man impose the establishment of political organization. This means that political power is affirmed as necessary in actual history but also that both the state and positive human law are only justified in so far as they contribute to the fulfillment of natural law.

In the process of arguing in favor of monarchy as the best form of government Vitoria[13] provides another crucial insight about the relationship between liberty and political regimes. He starts by asserting that the claims of enjoying greater liberty by democratic "civil societies" are unfounded:

[12] Vitoria 1991, 14.

[13] Vitoria 1991, 19.

> *Civil societies which have no sovereign and are ruled by a popular administration often boast of their liberty, accusing other civil societies of being the servile bondsmen of sovereigns. There are even some within this kingdom who subscribe to this view.*
> *Against this stupid and ignorant idea I offer my first corollary, which is that there is no less liberty under a monarchy than under an aristocracy or timocracy* [rule of the multitude].

Vitoria[14] proceeds to justify his position on terms that show a sophisticated understanding of the distinction between the form of government and the way political power is exercised:

> *I demonstrate the major premise from what has been said already: under any type of government, each private individual is subject to the public power, which he is bound to obey, whether that power resides in one man or in a number of men or in the whole multitude. This power is the same, whether it be exercised by one man, or by the whole community or commonwealth, or by the nobles; there is clearly no greater liberty in being subject to three hundred senators than to one king. Indeed, men who are subject to the decree and government of the crowd have, by that token, all the more masters – unless anyone is so mad as to believe himself a slave when he obeys one wise king, and fancy himself free when he is subject to a barbarous mob.*

This theoretical conception of the state is markedly distinct from absolutist and patriarchalist approaches but leaves two important questions insufficiently answered. The first is what the specific historical motivations may have been for men to give up their original condition of freedom. The second is about the conditions under which the establishment of political power may be regarded as legitimate. Vitoria did not provide full and complete answers to these questions, but the later Jesuit members of the Salamanca School would further develop ideas in this regard[15].

It is nevertheless possible to state that even if tacit primordial consent was held to be sufficient, the widespread and consistent emphasis on the role of consent in the establishment of political power implicitly strengthened the notion that there were limits to government and to the exercise of political power. Limits which also justified– at least in extreme circumstances and when no other workable options were available – the people legitimately resisting and even deposing and killing tyrannical political rulers.

[14] Vitoria 1991, 20.
[15] Skinner 1978, 158-166.

4. Legitimate resistance to abuses of political power

The issues of legitimate resistance and tyrannicide were – understandably – two of the most controversial problems of the time. First, because they obviously risked jeopardizing the stability of existing political regimes and triggering the anger of rulers; and second because the discussion necessarily involved the problematic distinction between regicide (the unlawful killing of a legitimate monarch) and tyrannicide (the killing of a tyrant, an act which might be justified under some circumstances). The prevailing notion on this matter came to be that in extreme circumstances a ruler might be legitimately deposed[16].

The common thread of the prevailing view was that rulers abusing their power in a tyrannical fashion could be deposed and even killed but only if the offences against the common good were sufficiently grave and if it was done through a valid judicial process. The judicial procedure, however, tended to be identified in strong terms as a requirement but was only vaguely defined, particularly in terms of defining who was supposed to have the final decision on the judgment in order for it to be considered valid. The requirement of grave violations against the common good essentially meant that given the risk of generating strife, disorder and civil war, the option of tyrannicide should by no means be taken lightly but only under fairly extreme circumstances.

Vitoria[17] evidences an affirmative but nevertheless reluctant attitude towards the possibility of legitimately deposing and even killing a tyrant. This is best exemplified when he states that although the commonwealth cannot reclaim its authority from a legitimate monarch if it has "transferred it unconditionally and in perpetuity to the king and its successors", it nevertheless retains by natural law a right to resist and if necessary depose a tyrannical ruler:

> *(...) it remains true that if a king proves to be a tyrant in government the commonwealth can depose him, because even if the commonwealth has given away its authority it keeps its natural right to defend itself; if there is no other way, it may reject its king.*

[16] Gierke 1987, 45.

[17] Vitoria 1991, 200.

The imprecise definition of the conditions under which resistance would become legitimate and the process through which they could be determined obviously generated a practical tension between the general duty to obey legitimate authorities and the right to resist tyranny. Nevertheless, it is clear that also in this regard Vitoria's approach is consistent with his broader notions about the limits of political power.

5. *Ius gentium* and limits to state power in international affairs

Francisco de Vitoria is generally and accurately regarded as having played a leading role in the foundation of modern international law. The application of the traditional Roman law concept of *ius gentium* was extended to a global setting, with universal application that was supposed to be independent of the will of particular rulers or legislators. The *ius gentium* as Vitoria conceived it was thus common to all mankind and could be recognized by reason even though it was not created through the deliberate will of any human legislator.

The *ius gentium*, with its universal applicability, assumed a crucial role in Vitoria's theory of international law and, indirectly, was also an important element for the limitation of the power of rulers and states. But since in this conception international law mostly assumes the form of unwritten law two additional questions arise: the first is about the binding force of the *ius gentium*; the second is about how to enforce it in practice[18].

Vitoria[19] is clear in affirming the binding force of the *ius gentium*, and associating it with a notion of (presumably tacit) consent by all mankind:

> *The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes, at any rate in the case of graver transgressions such as violating the immunity of ambassadors. No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.*

This meant that basic individual rights and fundamental principles of justice were not circumscribed to particular nations, empires or specific groups of people. This

[18] Fernandéz-Santamaria 1977, 97-100.

[19] Vitoria 1991, 21.

law of nations included basic rights to self-preservation, private property, diplomatic immunities, and slavery as a form of safeguarding human lives in times of war. Vitoria – although not all members of the Salamanca School – went as far as considering the free movement of people and freedom of commerce as integrating the *ius gentium*, which led him to be fiercely critical of restrictions imposed in these areas[20].

Vitoria's understanding that all peoples are in some way part of a global *societas naturalis* led him to uphold the existence of a universal *ius communicationis*. This meant individuals possessed universal rights of free movement in order to allow mutual communication and trade. The vigour of Vitoria's defense of *ius communicationis* as a binding restriction on the legitimate power of states and empires can be illustrated by the fact that Grotius to a large extent built his own defence of the positions of the Dutch Republic in its conflict with Portugal and Spain in Asia by resorting to Vitoria's authority and to his reasoning in defence of free trade and open access to markets. As explained by Borschberg[21]:

> *It should not escape attention that Mare Liberum specifically invoked the ius communicationis, or right of [free and unimpeded] communication, mentioned by Vitoria. (…) Vitoria's position was firmly anchored in a discourse that explored the right to evangelize and enter into contact with the indigenous peoples of the New World. Grotius' contribution (if this is even the appropriate expression) was to amplify the underlying intentions and programmes of Vitoria by heightening the emphasis on free trade and market access.*

Denying or disregarding the *ius communicationis* was deemed by Vitoria a just cause for war which – irrespective of the appropriateness of later interpretations and extensions of the argument by Grotius and others – evidences the importance the founder of the Salamanca School attached to it as a safeguard of universal rights and as a limit to the actions of states in the domain of international relations.

6. Just war theory as a constraint on states

A particularly important application of *ius gentium* pertained to the regulation of military conflict. In line with the Thomist just war theory tradition, Vitoria stated that in order to be legitimate war must be declared for a valid motive and that it must also

[20] Alves and Moreira 2013b.

[21] Borschberg 2011, 89.

be waged justly to remain legitimate. Vitoria[22] summarizes his views on just war in his notable concluding statements to his lecture on the law of war (*De iure belli*):

> *From all this we may deduce a few rules and canons of warfare:*
> *1. First canon: since princes have the authority to wage war, they should strive above all to avoid all provocations and causes of war. (...) It is a mark of utter monstrousness to seek out and rejoice in causes which lead to nothing but death and persecution of our fellow-men, whom God created, for whom Christ suffered death. The prince should only accede to the necessity of war when he is dragged reluctantly but inevitably into it.*
> *2. Second canon: once war has been declared for just causes, the prince should press his campaign not for the destruction of his opponents, but for the pursuit of the justice for which he fights and the defence of his homeland, so that by fighting he may eventually establish peace and security.*
> *3. Third canon: once the war has been fought and victory won, he must use his victory with moderation and Christian humility. (...) He must give satisfaction to the injured, but as far as possible without causing the utter ruination of the guilty commonwealth.*

It was recognized that the death of innocent people might be unavoidable but it was only admissible if it came about as an accidental effect of an action essential to secure victory and every reasonable effort was made to avoid endangering the lives of peaceful non-combatants. Thus Vitoria[23] provides the example of the bombarding a 'fortress of a city where one knows there are many innocent people, but where it is impossible to fire artillery and other projectiles or set fire to buildings' without harming the innocent and affirms that this is legitimate provided the action is essential to pursue victory in a just war and that care is taken to minimize the evil effects of the war. Moderation and proportionality are also required in case of victory when it comes both to extracting reparations to imposing punishment[24]. Both should be reasonable and proportional to the wrongs inflicted by the guilty. Vitoria[25] goes as far as explicitly recognizing a right (and a duty) of individuals who firmly believe in conscience that a war is unjust to refuse to take part in it: "if the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince".

[22] Vitoria 1991, 326-327.
[23] Vitoria 1991, 315-316.
[24] Hamilton 1963, 150-152.
[25] Vitoria 1991, 307.

For Vitoria, every reasonable effort should be made in order to avoid war, given the huge and terrible human costs it involved. Nevertheless, pacifism was regarded as an unrealistic and even irresponsible option. In some circumstances, there were just causes that made war legitimate. In those instances, war itself should be fought – as much as possible – within moral boundaries and humility and moderation was recommended to victors, so that peace and security might be fostered in its aftermath.

7. Autonomy of Church and state

Building upon a Thomist framework, the independence and autonomy of secular power in its proper order (*in suo ordine*) was affirmed and positions arguing for the direct intervention of religious authorities in temporal matters were rejected. Vitoria[26] rejects the notion that the pope has temporal power and draws a clear distinction:

> *Civil and temporal power is that which has a temporal end; spiritual power is that which has a spiritual end. I mean, then, that the pope has no power which is ordered to a temporal end, which is merely temporal power. (...) It is proved by argument that, as stated above, spiritual power is distinguished from temporal power by its purpose, because spiritual power aims at a spiritual end; but the supreme pontiff is nothing but the person or priest in whom the supreme power of the Church is vested; therefore he has no power which has a temporal purpose.*

Unlike the clergy, secular authorities do not derive their temporal power from the pope nor do they answer to him on temporal matters. The pope possesses no temporal powers through which he could alter civil laws, interfere in non-spiritual matters related to civil government or depose secular rulers.

While Vitoria[27] points out special instances where civil power may be subject to spiritual power – namely in situations where civil policy is "detrimental to the spiritual ministry" – he clear leans towards the autonomy of Church and state, a position that has two effects. Firstly, it limits the Church's scope for direct intervention in political affairs. Secondly – and most significantly from the perspective of limiting political power – it confines the actions of the state to a temporal sphere, subject to evaluation according to the pursuit of temporal ends, and bound by the notion of the common good and the rules derived from natural law.

[26] Vitoria 1991, 88.

[27] Vitoria 1991, 90-91.

8. Conclusion

In its heyday the Salamanca School, of which Francisco de Vitoria is generally considered to be the founder, was probably the most influential force in shaping political ideas, at least in the West and in the regions of the world under its domain. Part of this influence was a result of the status of Portugal and Spain as prominent global powers in the 16th and early 17th centuries and so unsurprisingly the decline of the Iberian powers largely coincided with a decline in the influence of the School[28]. A conjunction of military, administrative, and economic problems combined to produce this decline but the influence of Vitoria's ideas proved more enduring than Iberian global dominance.

Among these ideas, Vitoria's conceptions about the limitation of political power in connection with the common good and his outspoken application of that doctrine to a number of salient issues are certainly among the most important for his and our own times. As shown in this chapter, Vitoria's ideas about the limits of political power are both traditional – to the extent they are broadly in line with the Thomist framework – and new – in the way that they anticipate and introduce some of foremost concerns of modern political thought in this area. Finally, Vitoria's contributions on the common good and the limits of political power are also relevant because of their universality and applicability in domestic and international affairs.

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