The Spanish School of the new law of nations

by Sergio Moratiel Villa

Introduction

Pain and suffering are as old as mankind, but so are compassion and clemency. In whatever mythology, the god of war is not always cruel, vengeful and ferocious. There have always been good Samaritans — even when the parable was first told it was spoken in the past tense. The history of humanitarianism runs parallel to that of mankind. Cruelty and kindness are opposites but inseparable.

If all men are brothers then all discord, strife and wars from Cain onwards have been fratricidal. Individuals may fight like wild beasts, but when the fighting is done there is nothing to stop them from acting humanely. There are countless examples of brutes who after the fray have shown leniency towards the vanquished and the disabled, and respect for the dead. In all cultures and some "non-cultures" there would seem to be a natural law that it is nobler to pity the unfortunate than to join freely in immoderate mirth. In the beginning was envy, and out of envy came progress.

It may at first seem strange that St. Thomas Aquinas should consider war and peace in his treatise on charity rather than in his treatise on justice, but there was no place for them in the latter because there was then no objective equality between individuals and nations.[1]

Nearly all the controversies of the last five centuries about which scholar first wrote this or that, or what principle can be attributed to

[1] "Pax est opus justitiae indirecte; sed est opus charitatis directe, quia secundum propriam rationem charitas pacem causat". *Summa Theologica*, Secunda Secundae, Quaestio XXIX, Art. III.

which school of thought, stem from confusion between humanitarian law and international law. There has always been humanitarian law. Before writing was known it was transmitted by word of mouth. International law first appeared (in writing) in Christopher Colombus' journal. It reappeared in the will of Isabella the Catholic, Queen of Castile and Leon. Antonio de Montesinos proclaimed it on the fourth Sunday of Advent in the year 1511 from the pulpit of a humble church in the recently discovered territories of America. The Dominican Francisco de Vitoria taught it from his chair of theology at Salamanca University from 1523 onwards. The Jesuit Francisco Suárez confirmed it in 1612 and Grotius compiled and codified it in 1625. In our day it has been ratified by the community of nations in The Hague, Geneva and New York.

Before Spain's discovery of America and the first circumnavigation of the globe (by the Spaniard Juan Sebastián Elanco), there was, strictly speaking, no universally accepted international law. Indeed, even in the broader sense it did not exist, because when it came to applying the law of nations one "power" claimed supremacy, as did Greece in the time of Alexander the Great, and later, the Roman Empire. Wars were fought around the Mediterranean — Mare Nostrum — or in the valleys of rivers of lesser international importance, mainly for commercial or cultural hegemony (like the Persian and Punic Wars) or to further tribal interests (as in India, China, Mongolia and Africa). Of the wars of religion, paradigms of intolerance and fury, the less said the better. The philosophical discourses of Plato and others, with their Utopian overtones, were and still are mere working hypotheses.

In the traditional distorted vision of the world, Western culture has been given exaggerated importance. This is known as "Eurocentrism". It is now readily conceded that the European West should no longer be considered as the hub of the world, as it is not the only source of historic initiative and global ideas. It is nevertheless an incontrovertible fact that nearly all the first works dealing (jointly) with humanitarian law and international law were written by Spanish authors in Spanish or Latin, and published from 1492 onwards. Latin eventually gave way to Spanish, and Elio Antonio de Nebrija's first *Castilian Grammar* is a valuable key that opens new horizons.

The foundations of modern international law were laid by the missionary zeal of the religious orders (not only the Dominicans, but also the Augustinians, Franciscans and Jesuits). The new learning and the spread of knowledge by Vitoria, Urdaneta, Zumárraga, Suárez and a galaxy of philosophers, theologians, jurists, ecclesiastics and soldiers

were paralleled by the exploits of the Conquistadores and the fervour of the Church in the New World.

This epic, successively Spanish, Iberian and European, was a prelude to the exploration and colonization of the entire globe. The conquering nations of Europe soon became rivals on the ocean vastness open to all. Two fundamental questions arose: (a) What rights did discovery give the discoverers? (b) What rules could conquerors impose on the conquered? The answers to those questions led to the simultaneous formulation of the basic principles of humanitarian law and international law.

Over the centuries, the untiring labours of a long line of great statesmen, learned professors and eminent writers have rid the law of war and, indeed, the law of nations as a whole of much muddle, outdated ethics, biblical references, antiquated citations of Justinian law, canonical precepts, feudal codes, chivalresque ideals, and the like. As Huizinga might have said, a flash of Renaissance lightning occasionally lit up the darkness of mediaeval Europe. Written law did not take hold or flourish in its present form until Spain, the first politically modern State, began two centuries — its Golden Age — of colonization and conquest in the Americas and elsewhere; and the consent of peoples, and the customs of the States forming the "family of nations", reinforced these sound foundations of legal practice throughout the known world, as is clear from the vigorous application of custom and the general acceptance of treaties and conventions.

The history of the law of war can be traced back through the Renaissance to Roman and Greek times, to the ancient civilizations of Egypt, Chaldea, Persia and Babylonia, to Genesis, and perhaps even further. Ancient texts provide irrefutable proof that those peoples applied certain standards and respected certain dictates of a rudimentary form of customary law in their relations with "barbarians", especially as regards declarations of war, the sending of emissaries, truces to bury the dead, the ransom and exchange of prisoners and the spoils of war. Successive groups of tribes and peoples cohabited in the Middle East, Greece, Rome, China, India and regions under Islamic and Western Christian influence, where some remarkable civilizations sprang up. The concepts of dignity and freedom have been with us since man first walked the earth, but there was no civilized form of "human rights" until the advent of the Renaissance and modern Europe.

Cohabitation as neighbours confers rights and duties which in the course of time natural law and tacit agreement between peoples turn into a system of human relations.

Before discovering America, Spain lived for eight centuries with the great civilization of Islam, against which it also waged the most extensive war of national liberation of all time. Europe would not be what it is today without the Greek heritage brought by the Arabs, mainly from the 10th to the 15th centuries. The great European intellectuals of the time studied at Toledo, Cordoba, Seville and Granada, the major centres of Muslim culture in Spain. Due credit must be given to Muslim civilization for paving the way for progress in western Europe at the dawn of modern times.

The Muslims applied the Koranic law known as *siyar*, a code of rules and customs governing the cessation or suspension of hostilities, peace treaties, and the transfer of people from one territory to another.

The Muslims had no international law as distinct from the sacred law of the Koran governing relations between believers and non-believers. They were obliged, however, for reasons of reciprocity, to apply some of their neighbours' rules, for example for exchange and ransom of prisoners, diplomatic immunity, and customs dues.

The community of nations as it had been understood in Europe since Greek and Roman times was not a consistent whole. The system of military and economic relations, alliances, protectorates, domination and submission imposed by religion and force could exist only under dictatorial regimes and disintegrated with the onset of the Renaissance. Vestiges of customary law nevertheless continued to exist, and were in part accepted by the dominant Christian society of the Middle Ages. Modern international law arose from the ruins of the absolutist State, throwing off the shackles of Emperor and Pope in the process. It was at first almost exclusively a Spanish science. Its intellectual and practical origins are now generally attributed to Las Casas, Vitoria and Suárez rather than to Grotius.

Las Casas, a man of prayer and action

The Dominican friar and bishop Bartolomé de Las Casas came to social and intellectual maturity at a time when Spain was in the midst of the transformation from the Middle Ages to the Renaissance. Christians, Arabs and Jews lived side by side — admittedly not always peacefully — among peoples with Iberian, Celtic, Phoenician, Carthaginian, Roman and Gothic blood in their veins. It was hardly a propitious environment for the development of a radical reformer, the first to raise his voice in outrage, who provoked the very first crisis of

colonialism. Pablo Neruda, winner of the Nobel Prize for Literature, regards Las Casas as the standard-bearer of America's liberators:

Father Bartolomé, we thank you
for this gift from the bitter night,
we thank you because your thread could not be broken...
In the oneness of time,
in the course of life,
your hand pointed the way,
a sign from the heavens, a sign of the people.[2]

The biography of this agitated agitator has been styled "the anthropology of hope". The "rebels" in the universities of Salamanca and Alcalá deserve all the more credit because the world they lived in when the colonial upheaval took place was one they regarded as well-ordered; the philosophical and theological synthesis of Aristotelian and Thomist thought made possible an almost perfect Christian concept of life and the cosmos. In reinventing colonialism, Spain invented criticism of colonization. Not all of the later "colonizers" did it any better. The authors of the "black legend" of Spanish exploitation, genocide, and "ecocide" saw the mote in their brother's eye but not the beam in their own.

Spain, and the King of Spain, by no means evaded the issue of the legality of the "conquest" just beginning. In 1550-1551, in Valladolid, Sepúlveda, Charles V's confessor, faced Las Casas in an open debate on the subject. It must be remembered that the pacifist ideas of Erasmus of Rotterdam were then much in vogue, in Spain and elsewhere. The destruction of Amerindian beliefs, their forcible conversion to Christianity and consequent subjugation were unjustifiable on theological grounds alone. The native rite of human sacrifice, for example, could not be invoked as sufficient or legitimate grounds for war, since the resulting war would cause more deaths than the atrocities it was intended to punish, and would alienate the indigenous population from Christianity, which was born of the evangelical mandate: "go forth and preach... to all creatures".

To plead the cause of the Amerindians, Las Casas crossed the Atlantic fourteen times. In 1550 the burning question was: is it right to make war for the purpose of evangelization? Sepúlveda, in his zeal to justify Spanish domination in the Indies, went so far as to affirm, in his *Democrates alter, sive de justis belli causis apud Indos*, that the

[2] *Canto General*, English translation by the ICRC Languages Division.

Amerindians were to the Spaniards as monkeys were to men. He quoted Aristotle (already cited by the Scottish Dominican John Mayr to justify the Spanish evangelization of America) in support of his contention that some men were by their nature free and others servile. Thus the Amerindians, naturally inferior beings — he went so far as to call them "hominicules" — of limited capacities and barbarous customs, should serve the Spanish, "who had greater gifts of intelligence, religion and government". Charles V and Philip II authorized Las Casas to publish his works (which described Spanish cruelties in the recently discovered territories and even cast doubt on the very right of jurisdiction of the Iberian monarchs over the Indians), but categorically opposed the publication of Sepúlveda's defence of Spanish domination. Las Casas triumphed over Sepúlveda, but only on paper, for the real clash of interests was going on far from the Spanish court, in places where the "baddies" knew nothing of the law of nations and the "goodies" often refused to apply it. But it may be asked whether at the time international law was in fact a law at all. At the very least one can say that Las Casas was a social reformer and to some extent a precursor of modern liberation theology.

The real founders of international law are Spanish missionaries, philosophers, theologians, jurists and soldiers. Quite rightly, they considered the law not as an independent subject of study or practice, but always in the broader context of global human problems and the moment in history. They wrote of the "peaceful evangelization" of the world as a part of a scheme of things whose landmarks were Scholasticism, the Renaissance, the Reformation, Erasmian thought, the papacy and the monarchy.

There were in Spain at that time three main schools of philosophical / theological / legal thought: (a) the Dominican school (Montesinos, Las Casas, Vitoria, Soto, Cano); (b) the Jesuit school (Suárez, Molina); and (c) the independent school (Covarrubias, Ayala, Vázquez de Menchaca).

Montesinos affirmed the universal equality of mankind, without distinction based on race, religion or degree of civilization: he taught that there are no inferior beings, for all have a rational soul. This, in the second decade of the conquest, was the first express recognition of human rights and of the legitimate aspiration of peoples to peaceful co-existence.

In his earliest written work Las Casas set forth the classic notion of natural law, in detailed proposals and advice to the King of Spain. The indefatigable missionary bishop, over three centuries ahead of his time, urged what was then unimaginable: decolonization. He listed

twelve causes of the "destruction of the Indians", which can be summarized as follows: in general, the violation of civil, political, social, cultural and commercial rights; specifically, the hard labour imposed on the Amerindians by the rapacious Spaniards, and ill-treatment, above all in terms of hygiene, food and clothing.

In keeping with the Dominican school of thought, Las Casas proclaimed that war, however just in principle, was "a plague to body and soul", and was subject to certain limitations. His *Apologetica* expounds a list of rules for the protection of the innocent and the most vulnerable. Like Henry Dunant centuries later, he proposed principles for a body of legislation which anticipated to astonishing extent, for both peace and war, the philosophy underlying the four Geneva Conventions and their two Additional Protocols with regard to: (a) women, children and the elderly; (b) chaplains and religious observance; (c) agriculture, markets and labour; (d) foreigners in general; (e) the duty to give prior notice, and the prescribed duration of declarations of war; (f) the institution of neutralized and demilitarized zones; (g) the right of requisition; (h) the lawfulness of plunder; (i) decent burial; and (j) the exchange and ransom of prisoners.

Las Casas has been accused of Manichaeism; for him all Amerindians were good and all Spaniards were bad. He conceded, as the Bible does, that war may be waged: (a) if unbelievers hinder evangelization or trade; (b) if unbelievers have previously committed a grave offence; (c) for the just recovery of goods taken by force. But there is a blot on his enlightened pages: he suggested that for hard labour the weak and innocent Amerindians should be replaced by black slaves (who were stronger and apparently not so innocent). He asked that "the King should deign to allocate 500 or 600 blacks to each of these islands, to be shared out among the Spanish colonists for labour, especially in the mines; this is the only way to save the Indians from extinction, repeople these islands and so increase profits in gold and revenue for the Crown".[3]

The Flemings at the court of Charles V secured a monopoly of the black slave trade with the Indies, and later handed over this lucrative business to the Genoese. Spaniards were rarely involved in the black

[3] Las Casas, *Memorial al Consejo de Indias*, 1531, Biblioteca de Autores Españoles, vol. 110, No. 7, pp. 54-55. This is an obvious reference to the *encomenderos* who, with official licence, exploited the labour of groups of natives in America or levied taxes on them, albeit always with the obligation to "endeavour to defray the cost of their instruction in the Christian religion". Las Casas, who never distinguished between immediate interests and the general rights of the natives, denounced this as the "cause of all the trouble".

slave trade, mainly for religious reasons. Officially, they could not deal in slaves; in private, they undoubtedly committed abuses.

The Dominicans of Salamanca, in particular Domingo de Soto, vigorously condemned the slave trade initiated by Portugal before Philip II annexed that country.

Since the Dominican Las Casas was the first to denounce the abuses committed in America, the Spanish Dominicans, especially those of San Esteban College in Salamanca, felt obliged to deal with the matter without delay.

Vitoria: the gentle rebel

When in 1925 the Dutch universities celebrated the tricentenary of the publication of Grotius's principal work, *De jure belli ac pacis*, they sent a commission to Salamanca to "place a wreath on the grave of Vitoria and deliver to the University the gold medal struck in honour of this celebrated Dominican, the founder of international law".[4]

Vitoria doubted the sincerity of the conquerors turned settlers for the legitimacy conferred by the right to preach the gospel was subject to conditions to prevent its abuse by unscrupulous oppressors bent on enlarging their lands. He would not accept that he was merely a man of law; and he was right, for it took more than legal expertise to make the subject-matter clear. One looks in vain in the instruments of modern international humanitarian law (particularly the Conventions of The Hague and Geneva) for an explicit link with natural law, with man's common heritage, with the ontological unity and solidarity of mankind and the inalienable dignity of every human being, but that link is immediately obvious in the writings of 16th and 17th century Spanish internationalists and in the "social" encyclicals of the Popes of the past two centuries.

Vitoria was a theologian and at the same time a "practical" man with no time to waste. He had to find the answers. He wanted to find them; he therefore needed the relevant arguments and principles then and there to give the precise and sensible answers the situation required.

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[4] Letter, undated, delivered to the Office of the Rector of the University of Salamanca.

His reputation as an internationalist is due to his correct application of the basic principles of justice to the major events of his generation (discovery, exploration, conquest, pacification, colonization, and the development of America). In any given situation, Vitoria formulated the principles of modern international law and paved the way for the appropriate philosophical concept. He held the Prime chair of theology in Salamanca, but was also an "armchair" missionary; he added his voice to the controversy about the Amerindians, who until then were unknown in Europe. He was consulted personally by Charles V on the advice of Las Casas (in three letters to the King between 1539 and 1541). Vitoria was well informed about what was happening in the New World, by his former students who were missionaries there.

With Vitoria, international law really took shape as the law *between States*, the States of the whole world. He attributed to the Amerindians entire possession, "private and public", of the lands inhabited by them and maintained that these could not be taken away from them, even if they refused to become Christians, or committed crimes, and although they were heretics. But the Spanish were entitled to preach, travel and trade in America *(jus comunicandi, jus peregrinandi, jus negotiandi)*; the children of Spaniards born in the New World could not be expelled *(jus soli)* nor denied their economic, cultural or political rights.

In Vitoria's view, the right of navigation derives from the general principle that the sea, like the air, is by nature open to all and that nobody can claim exclusive rights to it. Likewise, coasts, river banks, international waterways, bays and ports must be open to all for refuge and replenishment of supplies, and as a guarantee of reciprocal rights and the duties of hospitality. The local sovereign has only supervisory and administrative powers. To reach America the Spanish had to cross the sea: by virtue of natural law the rivers and oceans belong to all mankind, and under the law of nations, ships of any flag are entitled to cast anchor and berth in any waters. Since waterways belong to all, they are public property, and no one can lawfully be deprived of them. This is the concept of *mare liberum*, a basic principle attributed to Grotius but transcribed by him from Section III of Vitoria's *Relectio I*. In Chapter one, paragraph one of *Mare Liberum*, Grotius puts forward Vitoria's doctrine as the basis of his own arguments, but without mentioning him. It might be thought that Grotius elaborated this doctrine unaided, but at the end of the chapter he quotes Vitoria by name on the same subject. Maritime law was also dealt with — and Grotius knew this, as is clear from certain passages of his work — in *Consolato del Mare*, a work probably dating from the 12th century

but first published in 1474 in Barcelona, in Catalan, which contains the relevant legislation of Castile, France, Syria, Cyprus, the Balearic Islands, Venice and Genoa.

Grotius also adopted Vitoria's views on the judgement of conscience. For example, the visible tribunal in The Hague notwithstanding, he called on the invisible tribunal of conscience in support of Dutch rights, against Portuguese opposition, to sail the high seas and trade freely both on the mainland and on the islands of the Indian Ocean. National courts, he said, judged breaches of the law committed within their jurisdiction, but it was the Creator's prerogative to punish the offences of nations and those governing them. He added that there was one court no sinner, be he ever so fortunate, could escape. By this he meant one's conscience or self-esteem and public opinion or the esteem of others. Grotius put before this dual tribunal a new case, one of paramount significance, since it concerned practically the entire high seas, the right of navigation and freedom to trade. In this controversy (with the Portuguese), he called upon Spanish jurists particularly well versed in both codes of law, divine and man-made. In fact, he invoked nothing less than the laws of Spain (and Portugal).

Before Vitoria, the code for regulating relations between nations drew on Roman and canon law, the laws of chivalry, custom, and (mainly Christian) morals.

The Spanish architects of the modern law of nations were the first to propound that States are subjects of transnational relations, and that their freedom of political action is limited only by international law.

Vitoria treated inter-State relations as "matters of conscience". He was the first to use the expression *jus inter gentes* to mean the rules imposed by reason on all peoples. In Vitoria's view (as he says in his treatise *De justitia*, also written on Las Casas' pressing recommendation), the Amerindian chieftains were on an equal footing with Charles V (who did not dispute this). It took courage to say so, challenging the medieval tradition of imperial and papal absolutism. Vitoria's attitude to the pretensions of the Pope was not only admirable, but extraordinarily courageous. He said that the legitimacy of Spanish authority in the New World could be argued on grounds other than those put forward by the staunch supporters of Pope and Emperor. The Pope was not the universal sovereign (contrary to Alexander VI's *Inter caetera* bull of 1493, giving Spain and Portugal rights of conquest and jurisdiction in the Indies), and the Emperor was not the ruler of the world.

If necessary, the Spaniards could defend their rights by the sword, but war had to be a last resort. Serious hindrances to the propagation

of the faith could be a just cause of war, and if converted Indians were harassed, they could be defended.

So much for *jus ad bellum*. Now let us look at *jus in bello*.

Even the noblest idea needs more than its own virtue to survive. St. Isidore of Seville in his *Etimologías*, and Raimundo Lulio in many of his writings, speak of the energy with which Spain pursued its policy of creating by fair means or foul a multilingual, multiracial, plurireligious culture that would, as so many people ardently desired, gain universal acceptance. Just causes of war were stated by Plato, Aristotle, Cicero (the first to speak of "just war"; 16th century Spaniards preferred to speak of "unjust war"), St. Ambrose, St. Augustine, St. Isidore, St. Thomas, Legnano, Macchiavelli, Luther, Erasmus, Thomas More, Bacon, Vitoria, Ayala, Suárez, Vázquez de Menchaca, Belli, Gentili, Rousseau, Kant, Grotius, Zouche, Pufendorf, Rachel, Textor, Bynkershoek, Moser, De Martens, Wolff, and De Vattel.

A new era began with the discovery of America and the opening of new lands to the European and Christian West. Christian States, Castile, France and Venice for example, used a number of written and unwritten rules to settle disputes and controversies amongst themselves and govern their relations with non-Christian States. Canon law still prohibited treaties with Islamic powers, but when papal supremacy was strongly challenged Spanish jurists took the bold and praiseworthy step of proclaiming that the law applied to all peoples and religions alike. Although in 1519 the King of Castile and Leon declared that the Amerindians were his subjects by virtue of the bull of Pope Alexander VI, Las Casas, Vitoria and Suárez were guided by their own law of nations.

This is all the more remarkable because (a) it was not until 1924 that Congress recognized the right to citizenship of Indians born in the United States (the granting of that right has not always sufficed to preserve the Amerindian population from non-discriminatory treatment; indeed, special laws and statutes — *ubi injuria ibi jus* — have had to be enacted ever since for its protection, and (b) Czarist Russia did not start to free its serfs until the 1880s.

It would not be an exaggeration to say that in international relations before Vitoria "primitive" or "savage" peoples were subjected to the "civilized" law that might is right. The most important of Vitoria's tenets on natural law was not that peaceful entry into foreign countries was a right, but the recognition that American natives were a part of the international system although they were "savages"; that Indians had the same rights as Spaniards. He even went so far as to say that

the Indians could legitimately resist the Spaniards by waging a "just war" on them. On the one hand were legitimate rights and on the other insuperable ignorance, and *"par in parem non habet imperium"*.

The general doctrine of justified intervention (to protect rights of communication, free passage and trade) is another of Vitoria's internationalist innovations. Some Protestant jurists (De Vattel and Pufendorf, in particular) later rejected it on grounds of national sovereignty and non-intervention, a view clearly reflected in the Monroe Doctrine. In practice, however, some European States have set an example soon followed by others, by using innumerable pretexts to justify their interventionist, and especially imperialist, policies. At present, the right, and even the duty to interfere (referred to by some as "humanitarian intervention") is tending to gain acceptance as a means of defending basic rights violated in a given territory, as Vitoria suggested. This concept is one of the pillars of the international community's legal framework as endorsed by the Charter of the United Nations. Humanitarian intervention is based on respect for freedom and human rights; it should not be a cloak for colonialism imposed by a State and maintained by force.

Gayo, in his *Instituta Justiniani*, writes of law *"inter homines"*. Vitoria changed this to law *"inter gentes"*, thus introducing a vitally important change; for law *inter gentes* has the binding force of a convention or pact on all peoples *(communitas totius orbis)*. More exactly, it has force of law. In a way, the whole world is one political community, with the power to enact just laws for the common good. These form the law between nations, *jus inter gentes*, which is therefore a natural international law, that becomes positive law by dint of custom and conventions between peoples, nations and States. The dichotomy between the natural and positive aspects of the law was used, first by Suárez and later by Grotius, to make the well-known distinction between *necessary* and *voluntary law* of nations. Vázquez de Menchaca distinguished between *jus gentium primaevum*, natural law, and *jus gentium secundarium*, which is the positive law derived from custom.

Since a republic or State is part of the universe and a (Christian) province is part of the republic, if war serves one province or republic to the detriment of the universe *(totus orbis)* or Christianity, Vitoria says that for that reason alone it is unjust. Thus any subjective right to make war that one member of the world community might have must be relinquished when it entails violating the objective right to law and order which is the paramount right of the entire community. Thus, the internal laws of a State are subordinate to international law.

Vitoria clearly distinguishes between the "internal order" of each State (municipal law), whose aim is the common good of the citizens, and the "common universal good". This is the richest and most original of his ideas: the "common good of the orb" limits the activities and consequently the sovereignty of States by subordinating them to a higher principle. This is hardly ever mentioned because it does not figure in either of Vitoria's two famous *Relectiones.*[5]

Vitoria's *lectiones* and *relectiones* deal with topics of practical and current interest. As well as an abstract mental exercise, they are a study of serious matters whose resolution was (and still is) of utmost importance to the entire human race. The *relectiones* are a sequel to the *quaestiones disputandas* which summarized his lectures. Vitoria gave fifteen *relectiones* of which thirteen have survived. Two of them, the fifth, entitled *De indis noviter inventis*, and the sixth, *De jure belli*, are of signal importance to the law of nations. They are revisory essays on various subjects treated as problems of casuistry. They were not published by Vitoria, but by his disciples, and there were six editions. The first appeared in 1557 in Lyon, the last in 1626 in Venice. Vitoria read the fifth in his Salamanca classroom in January 1539, and the sixth in June of the same year.

In *De indis*, Vitoria asked four questions:

(a) May Christians make war?
(b) What authority is entitled to declare war?
(c) What are just causes for war?
(d) What can lawfully be done to the enemy during and after the war?

Vitoria quoted passages from both Testaments which appear to condemn the use of force, but he says they are advice, not precepts. Thus he refutes Luther's doctrine, which prohibited war even against the Turks because "If God so wills, the Turks will invade us".

Like St. Augustine, Vitoria conceded that there were just causes for war, namely (a) self-defence; (b) to fight evildoers and seditious persons; (c) to repel attacks; (d) to maintain and defend public safety; and (e) to preserve general peace from tyranny and oppression. The purpose of war is not to destroy the enemy, but to maintain peace and security. Some laws are just in time of war, and some are unjust in time of peace. It is not unjust to use force against those who refuse to meet honourable requests or are impervious to reason. In this, Vitoria echoes St. Augustine's dicta over ten centuries earlier: that Moses,

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[5] See *De potestate civili*, Art. 13.

David and other just men did not refrain from using force (they agreed to truces, shared out plunder, and took ransom for prisoners, etc.); that the Apostle Paul exhorted slaves to obey their masters and serve them "single-mindedly"; and that intellectual honesty has led wise and just men to the natural belief that human depravity can be repressed by war, captivity, enslavement and coercion.

Vitoria says, correcting Ovid: "Man is not a wolf to man, but a man", and adds: "The Indians (the 'savages') cannot stop the Spaniards from taking things that are common property — for example, gold from the mines, fish from the river, or pearls from the sea". He accepts that opportunities for trading must be assured by suitable penalties. The Spaniards could live, travel, preach and trade in America, so long as they did not harm person or property. Denial of hospitality or of leave to trade was a just cause for war; sovereignty was acquired by right of conquest confirmed through voluntary cession (as when Hernán Cortés occupied the lands of the Toltec and the Tlascaltec peoples, who had been dominated for decades by the Aztecs).

So much for the fifth *relectio, De indis*. The sixth, *De jure belli*, deals solely with the rules applicable in time of war. Vitoria answered the four questions raised in the previous relectio as follows: (a) a *defensive* war may be waged to repel force with force or to recover property; an *offensive* war may be waged to obtain fair compensation for injury or damages suffered; if mere individuals have a right to act in self-defence, States have a much greater right to do so, for they are independent collectivities having their own laws and judicial systems (he gave as examples Castile, Aragon and Venice); (b) only the monarch or the highest authority in the State may declare an international war; (c) war may not be waged against a (hypothetical) enemy because he is an unbeliever, nor to satisfy the desire for vainglory or advantage of the sovereign, who must govern for the common good; injury sustained is the only just cause for war, and not all injuries are serious enough to warrant recourse to war (just as in civil law not every offence is punishable by death, exile, confiscation etc.); in the great society of nations, a slight affront is not to be punished by killings or devastation, which are tantamount to war; (d) it is legitimate, in war, to do everything necessary to preserve and defend the State or recover goods stolen by the enemy and obtain reparations; enough may be taken to cover the cost of the war and compensate for damage unjustly suffered; and enemy territory and fortresses may be occupied to punish the enemy for injuries received, and to achieve peace and safety from his hostile designs.

Those are the rights of the contender in a just war. But, Vitoria asked himself, is it enough for him to believe he is fighting a just war? His answer: not in every case. The belligerent must consult learned men and give due consideration to enemy motives. Subjects are not obliged to follow their monarch in what they perceive to be an unjust war, since no temporal authority can force them to kill innocent people (women, the elderly, or children), "even if they are Turks". Innocents may not be imprisoned, but the people of a nation which has despoiled another may in turn be despoiled (he gives the example of France despoiling and Spain despoiled). Prisoners of war may not be held if a ransom has been paid for them and there is no need to hold them any longer. Hostages, depending on whether they bore arms or are women, elderly persons, children and suchlike, must be respected. During the war, anyone bearing arms may be killed. But if victory is assured, the killing must stop. Vitoria excepts unbelievers, because there is no hope of coming to terms of peace with them. The offended party may appropriate movable property (money, clothing, gold and silver) but not real property (land, towns or fortresses). Fortresses may be occupied until adequate satisfaction has been obtained for the injury inflicted. Vitoria expounds the conditions for peace treaties, and discusses possible tributes and taxes, but warns that decisions must be honest and moderate.

In conclusion he propounds three valuable principles: (a) the sovereign must try to keep the peace with all; (b) once he has won the war he must act with moderation; (c) if he has to go to war his purpose must not be to destroy the enemy but to ensure peace (the war is then a *necessary war).*

Since the world as a whole is in some respects a single State, it can enact just and appropriate laws for all individuals, such as the rules of international law. Clearly, anyone violating those rules on the international scene, whether in peace or war, commits a breach. In key areas such as the inviolability of ambassadors no country may refuse to be bound by the law of nations, because that law has been established by the authority of the world as a whole. This was the basis for the complicated machinery of the League of Nations and later of the United Nations, and for The Hague Conventions of 1899 and 1907, and was the starting point for the 1949 Geneva Conventions and many resolutions adopted by UN conferences and meetings of the International Red Cross and Red Crescent Movement. The will of the international community must be taken as the foundation of obligations in international law *(pacta sunt servanda).*

Even in the absence of treaties, some States have claimed the right to interfere in the affairs of other States. Vitoria approved of interference "if the population is converted and its leaders oblige it to return to idolatry". This is the ideological basis of many interventions (i.e., cases of non-humanitarian interference) by some Powers. History can show plenty of examples, not every one of them a legal quibble to gloss dubious political ends.

Vitoria ends his sixth *relectio* by quoting (or rather, misquoting — he changed *plectuntur* to *plectantur)* Ovid: *"Quidquid delirant reges plectantur Achivi"* — "The Greeks bewail the folly of their kings".

Vitoria's genius lies in the art with which he justifies colonization by appealing to man as a social animal. The scholar and theologian in him wrote down the dictates of his conscience as a free man in Renaissance and Baroque Spain.

He was in no position to denounce Jews, Saracens, "Indians" and unbelievers in general, for he was on his mother's side a Jewish "New Christian".

Amerindians, friars and conquistadores enriched humanitarian law and originated international law, which was born of the discovery and colonization of America. International law is the brainchild of Vitoria the theologian. He is concerned with virtually only one subject, war. War, he says, is "just" because it is "necessary", as the last resort to defend a right that has been violated; and the means used to defend that right must not be out of all proportion to the offence.

> "The Seventh International Conference of American States,
> *resolves*:
> To recommend that a bust of the Spanish theologist Francisco de Vitoria, be placed in the Pan American Union Building, at Washington, in homage to one who in the Sixteenth Century and from the University of Salamanca, laid the foundations of modern International Law".[6]

Suárez hands on the torch to Grotius

Vitoria and Suárez were the founders of the philosophy underlying all law, Vitoria for one branch of law, Suárez for law in general. The

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[6] *Records*, 24 December 1933. Unanimously adopted by the representatives of the American Republics. Published by the Carnegie Endowment for International Peace, 1940.

"great and pious" doctor Francisco Suárez, Spanish Jesuit, academician, philosopher, theologian and jurist, formulated for the first time in history those two most fruitful of principles, already clearly delineated by Vitoria, on which the entire structure of modern international law is based: (a) there does exist a society or family of nations; (b) the body of rules applicable to that transnational (the word "international" came into use only in the 18th century) association is not so much a common body of laws for all peoples, as in the old and still predominant Roman law, as a code of regulations between nations, observed by all. That is the doctrine which much later became widely known through the efforts of Grotius, heir and follower of the internationalists of the Spanish school of the new law of nations. But that is another story...

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BIBLIOGRAPHY

Bataillon, M. and Saint-Lu, A. *Las Casas et la défense des Indiens*, Juliard, Paris, 1971.

Carbía, R. *Historia de la leyenda negra hispano-americana*, Madrid, 1944.

Carro, V. *La teología y los teólogos-juristas españoles ante la conquista de América*, 2nd ed., Biblioteca de Teólogos Españoles, Salamanca, 1951.

Hanke, L. *The Spanish struggle for justice in the conquest of America*, New York, 1947.

Höffner, J. *La ética colonial española del Siglo de Oro. Cristianismo y dignidad humana*, Ediciones Cultura Hispánica, Madrid, 1957.

Martínez, M. *Fray Bartolomé de Las Casas, padre de América*, Madrid, 1958.

Menéndez Pidal, R. *El Padre Las Casas. Su doble personalidad*, Espasa Calpe, Madrid, 1963.

Pereña Vicente, L. *La Universidad de Salamanca, forja del pensamiento político español en el siglo XVI*, University of Salamanca, 1954.

Truyol, A. *Los principios del derecho público en Francisco de Vitoria*, Ediciones Cultura Hispánica, Madrid, 1946.

Urdanoz, T. *Obras de Vitoria. Relecciones teológicas*, B.A.C., Madrid, 1960.

Villey, M. *La formation de la pensée juridique moderne. Le seizième siècle*, Paris, 1968.

Zavala, S. *La defensa de los derechos del hombre en América Latina (siglos XVI-XVII)*, UNESCO, Paris, 1963.