

Diálogos militares
by Diego García de Palacio:
The first American work
on the law of nations

by Alejandro Valencia Villa

Over the years the Americas have made significant contributions to the development of international humanitarian law. These include three nineteenth-century texts which constitute the earliest modern foundations of the law of armed conflict. The first is a treaty, signed on 26 November 1820 by the liberator Simón Bolívar and the peace-maker Pablo Morillo, which applied the rules of international conflict to a civil war. The second is a Spanish-American work entitled *Principios de Derecho de Gentes* (Principles of the Law of Nations), which was published in 1832 by Andrés Bello. This work dealt systematically with the various aspects and consequences of war. The third is a legal instrument, signed on 24 April 1863 by United States President Abraham Lincoln, which codified the first body of law on internal conflict under the heading "Instructions for the Government of Armies of the United States in the Field" (General Orders No. 100). This instrument, known as the Lieber Code, was adopted as the new code of conduct for the armies of the Union during the American Civil War.

However, during the period of the Spanish conquests and the spread of colonialism from the sixteenth to the eighteenth centuries, examples of humanitarian treatment were few and far between. Hostilities were directed not only against combatants, but against a whole newly discovered culture and the people and objects which embodied it. The aim of war was total destruction of the adversary, and pillage of enemy property was the rule. War merely begot war.

The classic Spanish School of international law, founded in the sixteenth century by Francisco de Vitoria, a Dominican friar who held the prime chair of theology at the University of Salamanca, gave rise

to a new perception of the law of nations in the period following the discovery of America. The question of Spanish rights and duties in the New World was also seen as a war issue. The principle of the legitimacy of the Spanish conquests had no meaning unless it rested on a general theory of the law of war. For Vitoria and his followers, the only justification for the conquest of America was that colonization of the New World by the Spaniards was aimed not at tyrannizing its inhabitants but at converting them to Christianity.

Vitoria, who curiously enough is believed to have been born in 1492, the year of the discovery of America, had a decisive influence on the entire legal tradition of sixteenth-century Spain, and his ideas naturally filtered through to the New World. The Spanish School also included several minor figures whose work, although far from original since it mainly summarized Vitoria's thought, was of some significance. One of them was Diego García de Palacio, who served as *Oidor de las Reales Audiencias* (judge at the royal high courts) of Mexico and Guatemala. García de Palacio wrote and published in 1583 a work entitled *Diálogos Militares, de la formación e información de personas, instrumentos y cosas necesarias para el buen uso de la guerra* (Military Dialogues: on the training, information and equipment necessary for the proper waging of war), the first treatise on the law of nations written and published in America.¹

Very little is known about the life of Diego García de Palacio, other than the fact that he occupied various posts in the New World. From 1573 he served as *Oidor de la Real Audiencia* of Guatemala, in 1579 he was appointed *Alcalde de Corte* (municipal magistrate) of Mexico and in 1583, the year that *Diálogos Militares* was published, he was appointed Captain General of the fleet that was launched to fight marauding British vessels which plied the southern seas under the command of Sir Francis Drake.²

Diálogos Militares comprises four volumes, each made up of several chapters, in which a native of the Santander region answers questions put to him by a Biscayan. The first volume, which describes the qualities, abilities and character required of a captain or soldier, discusses the legitimacy of war and the concept of just war. The

¹ This work was published in Mexico by Pedro de Ocharte in 1583. A facsimile edition was issued in 1944 by *Ediciones Cultura Hispánica, Colección de Incunables Americanos*, Vol. VII, Madrid.

² Luis García Arias, "La primera obra publicada en América sobre la guerra y su derecho", in *Estudios de Historia y Doctrina del Derecho Internacional, Instituto de Estudios Políticos*, Madrid, 1964, pp. 135 and 136.

second volume, which deals with the nature and composition of gunpowder, the proper use of the arquebus and artillery, the rules of perspective and the instruments necessary to apply them, is a veritable practical manual on the art of artillery at the time. The third volume, which focuses on the proper and most effective formations for the deployment of troops, contains admirable sketches of geometric formations described as “square, cross-shaped, two-pronged and octagonal”. The fourth volume, which highlights various instructions, institutions and laws that must be taken into account in discussing and waging war, deals with the organization, history and order of various battles.

It is mainly in the second chapter of the first volume, pages 9 to 23, that García de Palacio develops his theory on the law of war, to which only brief reference is made elsewhere in the work. Although *Diálogos Militares* is more of a soldier’s manual than a theoretical treatise on war, several of its points merit discussion.

In an article first published in 1951 and entitled “The first work on war and the law of war published in America”, Professor Luis García Arias divided the work of García de Palacio on the law of war into the following six themes: whether or not it is legitimate for Christians to make war; the various types of war; the conditions required for war to be just; the ending of war; whether soldiers have the duty to enquire into the legitimacy of a war; and permissible acts of war.³

García de Palacio, aligning himself with the thinking of Saint Augustine and Saint Thomas Aquinas, who defended the concept of just war, answered the question as to whether Christians may wage war in the following terms: “It is morally acceptable for a Christian to fight and war is justifiable in certain circumstances”.⁴ García de Palacio divided war into two categories, namely, defensive and offensive, and postulated that either may be just, “although it is easier to prove that a defensive war is just”.⁵

According to the teachings of Saint Augustine, a just war is one in which Christians may take part, that is declared by a lawful public authority and is waged in the name of justice to right an undeniably great wrong. For a war to be moral and just, the circumstances and motives leading up to it must be such as to warrant the recourse to force. For García Palacio, as for Vitoria, the basic conditions for a just war were that it be declared by a lawful public authority (“that it be

³ *Ibid.*, pp. 138 to 151.

⁴ *Diálogos Militares*, p. 11.

⁵ *Ibid.*, p. 13.

waged under the authority of a lawful republic or a sovereign who heads or represents such a republic),⁶ that it defend a just cause (“an injury done to one’s sovereign and his realm”)⁷ and that its aim be morally justifiable (“that the aim of war be just, that is, that it be motivated not by greed or cruelty, but by the desire to bring peace to the republic”).⁸

“War has two aims: its intrinsic and direct aim is to procure victory. This is the aim of the captain general. However, war also has a higher and nobler aim which victory, sought and won for the sovereign, simply serves. That aim, which is a natural attribute of the sovereign, is fourfold: first, to defend oneself, one’s property and all that one holds dear; secondly, to recover what has been stolen by the enemy; thirdly, to avenge all injury inflicted upon oneself; and fourthly, to bring peace and stability to the realm. The latter is the ultimate aim, to which all the others contribute, since thus to punish and intimidate the enemy will prevent him from inflicting further injury and thus lead to peace, the true aim of war”.⁹

Peace as the motive for and the aim of war, the concept defended by García de Palacio, is the very foundation of the theory of just war. This is the position of Saint Augustine, as quoted by Saint Thomas Aquinas, according to the marginal notes of Gratian’s *Decretum*: “Wars are permissible providing they are not motivated by ambition or cruelty, but by the desire to bring about peace, suppress evil and promote good”. Saint Augustine also said: “Peace should not be used to prepare for war, and war should be waged only to bring about peace (...)”.¹⁰

García de Palacio also established the universality of the law of nations when he replied to the question whether the law of war applied to Christians or infidels, by stating that “what he said held true for all nations”.¹¹ In other words he reaffirmed, in accordance with the thinking of Vitoria, that the law of nations governed the legal relations of all the communities and nations of the world. Today, supranational

⁶ *Ibid.*, p. 14.

⁷ *Ibid.*, p. 16.

⁸ *Ibid.*, p. 16.

⁹ *Ibid.*, p. 19.

¹⁰ Andrés Upegui Jiménez, *La Conquista de América y el Derecho de la Guerra: pensamiento jurídico de Francisco de Vitoria*, University of the Andes, Faculty of Law, Bogotá, pp. 96 and 97.

¹¹ *Diálogos Militares*, *op. cit.*, p. 17.

law applies primarily among nations, not to foreigners in foreign lands, as was traditionally the case until the sixteenth century.

The second chapter of García de Palacio's first volume deals with the means soldiers may justifiably use to bring war to an end.¹² Having established that peace is the ultimate aim of war, Vitoria defines permissible means of warfare as acts which entail the use of force, or acts of war proper, excluding any that are intrinsically evil or cause damage not strictly necessary to achieving the aims of a just war.¹³

García de Palacio affirms that the means used to wage war must be in proportion with its aims and that "all acts which are appropriate and conducive to bringing an end to war are permissible provided that they do not violate natural or divine law and are not prohibited by the Church".¹⁴ Among these he specifically includes acts intended to : "...recover all property stolen from the realm by the enemy, or its equivalent value, obtain reparation for all damage inflicted, confiscate enemy property, secure compensation for all expenditure incurred as a result of war and in general do everything necessary to ensure the safety of the realm, such as destroying enemy troops and installations, erecting fortresses or other installations on enemy territory, disarming enemy troops, capturing enemy fleets, taking enemy leaders hostage, and any other acts, provided that they meet the aforesaid conditions, designed to ensure the safety of the realm, avenge the injuries inflicted and thus punish the adversary."¹⁵

These are the principal aspects of the law of war dealt with by García de Palacio, much of whose work consists in recapitulating and in some instances merely reproducing various passages from Francisco de Vitoria's treatise on Indians, *De jure belli*. Unfortunately, the author of *Diálogos Militares* falls far short of providing as incisive a study of the subject as did the Dominican friar from Salamanca.

Nevertheless, García de Palacio's unusual book, which is more of a manual on the tactics of land warfare than a treatise on the law of nations, has the unique merit of being the first work on the concept of just war to have been written and published in the Americas. Its postulates, like all those of the sixteenth-century Spanish school of international law, are not only interesting from the historical and legal standpoint in relation to the development of natural law and the emergence

¹² *Ibid.*, p. 19.

¹³ Upegui Jiménez, *op. cit.*, p. 98.

¹⁴ *Diálogos Militares*, *op. cit.*, p. 20.

¹⁵ *Ibid.*, p. 20.

of the law of nations, but continue to be relevant in the context of modern warfare. Indeed, international and non-international armed conflicts today are far from being just, even where the motives of the parties may be considered justifiable or honourable, because the means used all too often violate the law of war and the basic humanitarian principles.

Alejandro Valencia Villa

Alejandro Valencia Villa holds a law degree from the University of the Andes, Bogotá (Colombia) and is a researcher in the Colombian chapter of the Andean Commission of Jurists and at the Centre for International Studies of the University of the Andes. He is the author of *La Humanización de la Guerra: Derecho internacional humanitario y conflicto armado en Colombia*, Tercer Mundo Editores y Ediciones Uniandes, Bogotá, 1991 (awarded the Paul Reuter Prize by the International Committee of the Red Cross in 1991), and *El pensamiento constitucional de Miguel Antonio Caro*, Instituto Caro y Cuervo, Bogotá, 1992.