

## VITORIA'S "LAW OF WAR"<sup>1</sup>

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IT IS PRINCIPALLY in his *Relectiones* or Readings that we find Vitoria's thought on international law expressed. Of these, the ones which chiefly merit our attention are the complementary tracts *On the Indians* and *On the Law of War*. The first of these considers the ordinary, the other the extraordinary relations between nations. They were written at the time of the colonization of America to answer the question which was then troubling minds throughout Europe, whether the Europeans had a right to seize lands in America which were held by the Indians, especially in view of the fact that the Indians were unwilling to give them up. Although these treatises were written in reply to pressing problems of his day, the principles on which Vitoria based his answer have as practical and universal an application today as they did then.

Indeed, the treatise *On the Indians* has much to recommend it to our study, for we have seen the dreadful results of the theory of *lebensraum* applied by Germany and Italy, but the treatise *On the Law of War* is of much greater interest to us at the present time when the minds of many Christians are still troubled by basic questions raised by the war and the current efforts to arrive at an equitable peace. These questions, relating to the justice of war, the fate of prisoners of war, the capture of enemy property, reparations, the formation of consciences, and conscientious objectors, each and every one has been discussed and answered by this theologian, with a remarkably realistic approach, and with conscience and the moral law as his supreme guides.

Vitoria proceeds in traditional scholastic fashion; first, he sets forth the objections, then he gives the proof of his doctrine, and after this he answers the objections and difficulties. As will be seen, they are real problems, and not at all straw men. He sets for himself four basic questions. They are as follows:

- 1) May Christians wage war at all?
- 2) Where does the authority to declare and wage war repose?
- 3) What may and ought to furnish causes of just war?
- 4) What and how extensive are the measures which may be taken against the enemy in a just war?

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<sup>1</sup> For the most part this paper is a paraphrase and summation of the translation of Vitoria's "De Jure Belli" by John Pawley Bates, Carnegie Foundation of Washington, Washington, D. C., 1917.

*(1st Question)* War seems to be prohibited entirely by certain Gospel texts used by many Christian pacifists today: for instance, the words of our Lord: "I say to you not to resist the evildoer; on the contrary, if someone strike thee on the right cheek, turn to him the other also" (Matt. 5, 39); and "all those who take the sword will perish by the sword." (Matt. 26, 52) Moreover, says Vitoria, it is no sufficient answer to say that these words of Christ are not of precept, but of counsel, for it would be a grave enough impropriety if every war undertaken by Christians was contrary to the counsel of our Lord.

The answer to this question Vitoria sets down in a single terse proposition, as is his custom: Christians may serve in war and make war. He proves this (1) on the authority of St. Augustine, who has thoroughly considered the question in many passages of his writings; (2) on the authority of St. Thomas also; (3) he cites examples from the Old Testament to show that just war was allowed by the law of nature and by the written law, and consequently war is justifiable under the law of the Gospel, which forbids nothing allowed by the natural law. (4) Just as in a defensive war force may be employed to repel force, so also in offensive war, in order that we may avenge ourselves for an injury done us. Moreover, (5) even a defensive war could not be waged satisfactorily, were no vengeance taken on enemies who have done or tried to do us a wrong; for they would be emboldened to a second attack if they had no fear of reprisals. Then too, (6) the end and aim of war is the peace and security of the State. This could not be secured if all that the State could do when enemies attack it was to ward off the attack, yet be forbidden to follow it up by further steps, for there can be no security in the State unless enemies are made to desist from wrong through fear of reprisals. A further proof (7) comes from the end and good of the whole world, which demands the power of recourse to war, for there could be no happiness but rather utter misery, if oppressors could with impunity commit their crimes on the good and innocent and these could not punish the guilty. Lastly, (8) we have the example and authority of good and holy men at all times who have not only defended their country, but also in offensive wars have sought reparation for wrongs done or attempted by their enemies.

*(2nd Question)* Here Vitoria raises an important question: In whose hands rests the authority to declare and make war? He answers: Every State has this power, since, as Aristotle says, a State ought to be sufficient unto itself. But it could not sufficiently conserve

the public good and the position of the State, if it were unable to avenge a wrong and take measures against an enemy, for wrongdoers would be more prepared to commit evil if they could do so with impunity. Moreover, a ruler has the same authority in this respect as the State has, for the ruler holds his position only by the election of the State. As such, he is its representative and wields its authority.

*(3rd Question)* In this question Vitoria touches on a very delicate point, as he himself indicates in passing, namely, the causes of a just war. He lays down a series of propositions that may well have caused ruffled tempers in the royal court, in view of its colonizing efforts:

- 1) Difference of religion is not a cause of just war.
- 2) Nor is the extension of empire. This is too well known to need proof, for otherwise each of the two belligerents would have an equally just cause, and so each would be innocent, which would involve a contradiction.
- 3) Personal glory of the ruler or any advantage accruing to him is not a just cause of war. For a ruler ought to subordinate both peace and war to the common welfare of his State and not to spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account. For herein lies the difference between a true king and a tyrant, that the latter directs his government to his individual profit and advantage, but a king to the public welfare. For the king derives his authority from the State and therefore must use it for the good of the State.
- 4) The only just cause for commencing a war is a wrong received from the enemy. Vitoria holds this on the authority of St. Paul (Rom. 13, 4), St. Augustine, St. Thomas. Even an offensive war is for the purpose of avenging a wrong and taking measures against an enemy. For there can be no vengeance without a preceding wrong and injury. Hence it is clear that we may not turn our sword upon those who have done us no harm, the killing of the innocent being forbidden by natural law.
- 5) Only a very grave wrong done to a State is sufficient reason for commencing war. Since the evils inflicted in war are all of such a severe and atrocious character, such as slaughter and fire and devastation, it is not lawful on the grounds of slight wrongs to pursue the authors of the wrongs with war, for the degree of the punishment ought to correspond to the measure of the offense.

*(4th Question)* The author now concerns himself with the prosecution of war, asking what and how extensive are the measures which may be taken against the enemy in a just war. He replies: (1) whatever the public good requires is lawful, since the aim of war is the defense and preservation of the State; (2) lost territory may be recovered; (3) reparations may be exacted from the enemy for the expenses of the war and all damages wrongly caused by the enemy; (4) the ruler may destroy enemy fortifications, keep an army of occupation, erect his own fortifications to insure the pacification of the enemy; (5) he may take against the enemy measures sufficient to deter him from like conduct in the future, and to preserve the peace and tranquillity of his State.

Many difficulties will be raised in the minds of conscientious objectors by what has just been said. Vitoria foresees these objections and now proceeds to consider them in order.

*(1st Difficulty)* Very emphatically Vitoria declares that it is not sufficient that the prince believe himself to have a just cause for war, for the opinion of an individual is not enough to render an act good; but it must come up to the standard of a wise man's judgment. It is essential for a just war that an exceedingly careful examination be made of the justice and of the causes of the war and that the reasons of those who oppose it on grounds of equity be heeded. For truth and justice in moral questions are hard of attainment, and so any careless treatment of them easily leads to error, an error which will be inexcusable, especially in a concern of great moment, involving danger and calamity to many, and they our neighbors, too, whom we are bound to love as ourselves.

*(2nd Difficulty)* But what of the subject, is he bound to examine the cause of a war or may he fight without any careful scrutiny of it? Vitoria answers: (1) if a subject is convinced of the injustice of a war, he may not fight in it, even on the command of his ruler, for no one is authorized to kill the innocent, and in this case the enemy are innocent. Consequently, subjects whose conscience is against the justice of a war may not engage in it. 2) The advisors of the king are all bound to inquire into the causes of a war to determine its justice and the king ought to hear their counsel. Whoever can save his neighbor from danger and harm is bound to do so, especially when the danger is that of death and greater ills as is the case in war. If by their neglect an unjust war is entered into, they are consenting parties thereto, for that which a man could and ought to prevent is imputed to him, if he does

not prevent it. 3) The common people, however, are under no obligation to examine the causes of a war, but may serve in it in reliance on their leaders. For them it is sufficient proof of the justice of a war (unless the contrary is quite certain) that it is being waged after public counsel and by public authority.

(3rd Difficulty) In this place Vitoria treats the somewhat academic question of the mode of determining the justice of a war when there are apparent and probable reasons on both sides. His general conclusion is that the *status quo* should remain when one country is in possession of territory to which neither it nor a contending country has a clear title, since in doubtful matters the party in possession has the better position. If, however, neither is in possession, and both have an equal right, and if one party wishes to make a settlement the other is bound to accept his proposal; even if that be the stronger and able to seize the whole by armed force; for when the merits of a quarrel are equal, one side does no wrong by claiming an equal part of the thing in dispute. So long as the doubt remains the possessor may lawfully retain his territory. What has just been said applies to rulers seeking to know the justice of their causes.

Vitoria now returns to a more thorough treatment of the formation of conscience of the individual subject. He is bound to follow his prince to war not only in the case of defensive but even of offensive war, and this when the justice of the war is doubtful. For the ruler is not able, and ought not, always to render reasons for the war to his subjects, and if subjects cannot serve in war except when they are first satisfied of its justice, the State would fall into grave peril. In doubtful matters the safer course ought to be followed. If such subjects do not go to war, they expose themselves to the risk of betraying their State to the enemy, and this is a more serious thing than fighting the enemy in spite of the doubt they have.

(4th Difficulty) Can a war be just on both sides? On the part of the war itself, this is clearly impossible, for if the right and justice of each side be certain it is unlawful to fight against it, either in offense or defense. Yet assuming a probable ignorance either of fact or of law, it may be that on the side where true justice is, the war is just in itself, while on the other side the war is just in the sense of being excused from sin by reason of good faith, because invincible ignorance is a complete excuse. This often takes place on the part of subjects even if the ruler who is waging the war knows of its injustice, for the subjects may in good faith follow their ruler and in this way the subjects of both sides may be doing what is lawful when they fight.

(5th Difficulty) If one has gone in ignorance into an unjust war, and is subsequently convinced of its justice, is he bound to make amends for it?

- a) The ruler, if he could easily have learned of the injustice of the war, is bound to restore all he has taken when he learns of its injustice, but he need not return what he used up, for he has used it while in good faith.
- b) The subject is not bound to make good what has been used up any more than the other side would be, because his fighting was lawful and in good faith.

Vitoria now renews his discussion of the difficulties which have arisen from the fourth question, the degree of force that can be brought against the enemy.

(1st Difficulty) Is it lawful in war to kill the innocent? He answers: the deliberate slaughter of innocent parties is never lawful in itself, and this on the authority of Sacred Scripture, "the innocent and righteous slay thou not" (*Exod.*, 23). This, however, does not mean that innocent parties may not defend themselves against those who try to kill them. Women and children are considered as noncombatants, but this obviously does not hold in the case of an individual woman who commits hostile acts. The same is true of harmless farmers, and the rest of the civilian population, for these are all presumed innocent until the contrary is shown.

Yet sometimes it is right to slay the innocent even knowingly, as when a fortress or city is stormed, although it is known that there are innocent parties in it, and although cannon cannot be discharged or fire applied to buildings without destroying innocent together with guilty. But it is never right to slay the innocent, even as an indirect and intended result, except when there are no other means of carrying on the operations of a just war.

Nor is the killing of guiltless persons such as youths who are not yet soldiers yet will carry arms hereafter, lawful, even when they may be expected to cause danger in the future. As Vitoria says, I believe it is in no wise right, seeing that evil is not to be done, even in order to avoid still greater evil, and it is intolerable that anyone should be killed for a future fault.

(2nd Difficulty) Vitoria here touches upon the legality of seizure of property of innocent enemy subjects. He grants that it is lawful to

seize things that the enemy would use against us, such as arms, ships, etc., otherwise we could not insure our victory. It is also lawful to take the money of the innocent, to burn and destroy their grain and to kill their livestock, if this is requisite in order to sap the enemy's strength. If the war drags on for an indefinitely long time it is lawful utterly to despoil all enemy subjects, guilty and guiltless alike, for it is from their resources that the enemy is feeding an unjust war, and on the other hand his strength is sapped by the spoliation of his citizens. If, however, the war can be carried on without spoliation of innocent folk, they ought not to be despoiled. Yet whatever has been seized lawfully is not subject to restitution.

(3rd Difficulty) This difficulty treats of the lawfulness of reducing the innocent to slavery. Vitoria carefully distinguishes in his answer, that although it is permissible in the same way to carry the innocent into captivity as it is to despoil them, since liberty and slavery are included under the goods of fortune, still it should be only as a last resort, and even then not into slavery as such, but that we may further weaken the enemy by demanding a money ransom from them. Yet even this, he says, must not be pushed beyond what the necessity of war may demand and the custom of lawful belligerents has allowed.

(4th Difficulty) Is it lawful to kill hostages taken from the enemy, if the enemy do not abide by their promises? If the hostages are in other respects among the guilty, as, for instance, if they have borne arms, they may rightfully be killed in that case.

(5th Difficulty) Is it lawful to kill all the guilty? In the actual heat of battle, all who resist may be killed indiscriminately, as long as affairs are in peril, for combatants could not properly effect their purpose save by removing all who hinder and resist them. Here the difficulty to be solved is whether, when the victory has been won and the enemy are no longer any danger to us, we may kill all who have borne arms against us. Vitoria answers yes, on the authority of *Deuteronomy* 20. For war is ordained not only for the recovery of property, but also for the avenging of wrongs. Therefore the authors of a past wrong may be killed for it. Yet merely for the avenging of a wrong it is not always lawful to kill all the guilty. We must take into account the nature of the wrong done by the enemy and the damage they have caused, and with that in mind, to move to our revenge and punishment without any cruelty and inhumanity.

Yet the measure of the punishment must be proportionate to the

offense, and vengeance ought to go no further. For in the matter account must be taken of the consideration that subjects are not bound and ought to scrutinize the cause of a war, but can follow their ruler into it in reliance on his authority and on public counsels. Hence, in the majority of cases, although the war be unjust on the other side, yet the troops engaged in it . . . are innocent on both sides. And therefore after their defeat when no further danger is present, they may be not killed, not only not all of them, but not even one of them, if the presumption is that they entered the strife in good faith.

*(6th Difficulty)* Is it lawful to slay those who have surrendered, or been captured, supposing them to have been guilty? There is nothing, absolutely speaking, to prevent the killing of these, so long as equity is observed. But according to the rules of war which have been fashioned by the law of nations, captives, after the victory has been won, are not to be killed.

*(7th Difficulty)* Does everything captured in a just war become the property of the seizer? Yes, up to the amount which provides satisfaction for the things wrongfully seized, and which covers expenses also. All movable goods vest in the seizer by the law of nations, even if in amount they exceed what will compensate for damages, but only in a manner proportionate in kind and degree to the wrong one, according to the estimate of a good man. Moreover, the sacking of cities is not to be permitted, without the greatest necessity and weightiest reasons, and soldiers who loot or burn without authority are bound to restitution.

Yet there is no doubt about the lawfulness of seizing immovables of the enemy, such as land and fortresses and towns, so far as is necessary to obtain compensation for the damage he has caused. Likewise, in order to obtain security and to avoid danger from the enemy, it is also lawful to seize and hold a fortress or city belonging to him which is necessary for our defense or for taking away from him an opportunity of harming us. However, if necessity and the principle of war require the seizure of the larger part of the enemy's land, and the capture of numerous cities, they ought to be restored when the strife is adjusted and the war is over, only so much being retained as is just in way of compensation for damages caused and expenses incurred, and of vengeance for wrongs done, and with due regard for equity and humanity, seeing that punishment ought to be proportionate to the fault.



(8th Difficulty) Is it lawful to impose a tribute on conquered enemies? Yes, and not only in order to recoup losses, but also as a punishment and revenge.

(9th Difficulty) Is it lawful to depose the rulers of the enemy and to appoint new ones, or to keep the rule for oneself? This is not unqualifiedly permissible, for punishment should not exceed the degree and nature of the offense. Sometimes, however, there may arise sufficient and lawful causes for such an action, especially when security and peace cannot otherwise be had of the enemy and grave danger from them would threaten the State if this were not done.

Vitoria terminates this *relectio* with three canons for waging war properly, so wisely formulated that, in the words of James Brown Scott, "they will stand alone as long as war is permitted in the enforcement of justice."<sup>2</sup>

First canon: Assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should, if possible, live in peace with all men, as St. Paul enjoins on us (*Romans*, xii). Moreover, he should reflect that others are his neighbors, whom we are bound to love as ourselves, and that we all have one common Lord, before whose tribunal we shall have to render our account. For it is the extreme of savagery to seek for and rejoice in grounds for killing and destroying men whom God has created and for whom Christ died. But only under compulsion and reluctantly should he come to the necessity of war.

Second canon: When war for a just cause has broken out, it must not be waged so as to ruin the people against whom it is directed, but only so as to obtain one's rights and the defense of one's country and in order that from that war, peace and security may in time result.

Third canon: When victory has been won and the war is over, the victory should be utilized with moderation and Christian humility, and the victor deem that he is sitting as judge between two States, the one which has been wronged and the one which has done the wrong, so that it will be as a judge and not as an accuser that he will deliver the judgment whereby the injured State can obtain satisfaction, and this so far as possible should involve the offending State in the least degree of calamity and misfortune, the offending individuals being chastised within lawful limits; and an especial reason for this is that in general among Christians all the fault is to be laid at the

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<sup>2</sup> Scott, *The Spanish Origin of International Law. Francisco de Vitoria and His Law of Nations*. Oxford, 1934. p. 241.

door of their princes, for subjects when fighting for their princes act in good faith and it is thoroughly unjust, in the words of the poet Horace, that "for every folly their kings commit the punishment should fall upon the Greeks."

In the words of Brown Scott, "The rules which Vitoria here has laid down are often harsh, for war is cruel. But on the reading on war Vitoria restates the rules as they should be in accordance with his moral conception of things. He no doubt looked upon the reading in question as an imperfect performance, in that the time at his disposal would not permit him to discuss the subject according to "the amplitude and dignity of the theme." Therefore he could deal with only the main propositions, and with "very brief proofs"; and, as the disquisition was in the form of a series of notes on fundamental points, a conscious limitation caused him to "abstain from touching on the many doubtful matters which might otherwise be brought into this discussion."<sup>3</sup>

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<sup>3</sup> *ibid.*, p. 197.