FRANCISCO DE VITORIA AND THE PROBLEMS OF THE MODERN WORLD

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Francisco de Vitoria, though very often overlooked in the field of political thought, is a prominent figure whose influence is felt even in our modern times. Born about the year 1486 Vitoria joined the Order of Preachers in 1504. During seven years he studied in Paris, that cosmopolitan place of learning which no doubt helped to shape the universal, supranational outlook of his thought. Back in Spain Vitoria taught for three years at the College of St. Gregory in Valladolid, and in 1526 he was appointed to the " prima " chair of Theology in Salamanca University. His prestige as a teacher was enormous. The Emperor Charles V in one of his visits to Salamanca, is said to have attended one of his lectures. But no better testimony could be given than the names of some of his pupils, such as Melchior Cano and Domingo Soto, who were to be the glory of the Council of Trent.

As professor of Theology he made some innovations; for instance, he substituted for the text then in use, the book of SENTENCES of Peter Lombard, the SUMMA THEOLOGICA of St. Thomas Aquinas, thus reviving Scholaticism in Spain. But even in doing this Vitoria's approach was new. He knew how to separate the spirit from the letter: he knew how to coordinate the traditional teachings with the trends of his time. In other words " Vitoria went deeply into the anxieties of his time " and at the same time " reaffirmed the reality of the spiritual legacy of Christianity

applied to new situations "[1]. Here is seen one of his most outstanding features. This attitude enabled him to come down from the level of theory to concrete situations, from abstract and general thinking to the particular questions affecting the community of his time. And this work he did from his chair of Salamanca in his famous lectures "Relectiones", some of which, only fifteen, have come down to us in the form of notes taken by his pupils. These lectures, all of them concerning current questions, were prepared carefully by Vitoria. Nearly a thousand students gathered to listen to him. In them he gives us his own ideas—the thought of the theologian and the moralist tinging with delicate hues the problems of the jurist. Among his "relectiones" those dealing with the most general questions are: "De potestate Civili", delivered in 1528; "De matrimonio" (the divorce of Henry VIII and Catherine of Aragon was still a latent question in 1531); "De Potestate Ecclesiae" (two lectures), in 1532 and 1533; "De Potestate Papae et Concilii", in 1534; and "De Indis", also two lectures, read in January and June, respectively, of 1539. The second of them is also known under the title of "De Jure Belli". To the last two we shall refer in particular.

The two Readings "On the Indians" show us Vitoria as an internationalist. The question he deals with is a concrete one, that of the Indians recently discovered; the implications have, however, a universal bearing. His approach to the subject is that of a moralist. His Readings are in the nature of a manual of confessions; he always starts by regarding the individual first, and then applies the same teaching or the same rights or

duties, or whatever it may be, to the individuals grouped in States. Prof. J. Brown Scott says that Vitoria is the "protagonist of justice between nations and between individuals and hence the founder of the only adequate system of international law ever proposed."[2]

The first Reading is composed of three sections; in the first, which may be called an introduction, he makes a study of dominion, arriving at the conclusion that dominion is a natural right and therefore independent of grace, against what the Valdenses and Wycliff had held. The Indians, says Vitoria, "were true owners, before the Spaniards came among them, both from the public and the private point of view".[3] The second section deals with the illegitimate titles by which the Spaniards claimed the territories of the Indians; and the third, the legitimate titles by which the Indians could come into the possession of the Spaniards. These two sections, as Prof. Brown Scott points out, could make a kind of treatise on the law of peace, which would be completed by the second Reading, dealing exclusively with the law of war. The principal questions he proposes to discuss are four "first, whether Christians may make war at all; secondly, where does the authority to declare or wage war repose; thirdly, what may and ought to furnish causes of just war; fourthly, what and how extensive measures may be taken in a just war against the enemy?"[4]

This Reading on war is considered a wonderful example of morality in action. The whole of these two readings could make up Vitoria's treatise "On Peace and War" anticipating Grotius' treatise ON WAR AND PEACE which has had so much influence for almost a century.[5]

Although this is supposed to be a study of Vitoria's "De Indis et De Jure Belli", to be able to make a systematic survey of Vitoria's political ideas in them, I shall also refer to some other basic points, dealt with in other Readings. I hope this will help to a better understanding of Vitoria's doctrine.

The first point will be Vitoria's notion of the State and of political power. Usually we only look upon Vitoria as an internationalist, but besides that he was a great theorist of the State. Perhaps, as Prof. Truyol Serra says; "he was a great internationalist just because he was a great expounder of the theory of the State".[6]

The State appears in Vitoria to be in accordance with nature

> "Since civil society is of all societies that which best provides for the needs of men, it follows that the community is, so to speak, an exceedingly natural form of intercommunication: that is, a form thoroughly in accord with nature. For even though the various members be of mutual assistance, nevertheless a single family is not self-sufficing, least of all for the resistance of violence and injury."[7]

And again,

> "States and commonwealths had not their fount and origin in the invention of man, nor in any artificial manner, but sprang, as it were, from nature, who produced this method of protecting and preserving mortals."[8]

The need of living in society is, so to speak, a need of man's rational nature "which must be freely fulfilled."[9]

> "The State", he defines very simply, "is properly called a perfect community",[10]

and he explains

"A perfect State or community, therefore, is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own councils and its own maggistrates".[11]

The proof whether a political community is a State or not is given by its independence from other communities, its independent autonomy, its juridical auto-sufficiency.

The perfection of the State Vitoria talks about, is more juridical than ethical. The States of the Indians have not yet achieved a moral perfection, and nevertheless they are perfect communities. The reason is no other than the two elements of perfection, as given by Vitoria; external independence with regard to other states, and internal sovereignty. In the following text the two elements appear quite clearly:

"The temporal State is perfect, and complete in itself; therefore it is not subject to any outside force, since if it were thus subject, it would not be complete; therefore, it can create for itself a prince who is in no way subject (to any temporal authority)".[12]

As can be deduced from this passage, Vitoria's notion of sovereignty contains all the elements of Bodin's sovereignty.[13]

To understand Vitoria's idea of sovereignty better it may help to consider what he says about the possibility of the existence of several states under the authority of a single prince.

"There is no obstacle to many principalities and perfect states being under one prince".[14]

These states under one single prince do not lose their perfec-

tion; they are self-sufficient and as such can act independently of any authority. Vitoria applies this principle to the case of war.

This question is of great importance since, according to Jellinek, the historical evolution from the mediaeval to the modern state is intimately linked to the progressive knowledge of sovereignty.[15] And this sovereignty is better understood when the power of a particular State detaches itself from some superior power. So when, in the course of history, the States, conscious of themselves, fought for the emancipation of their power from the Empire or the Church, the concept of sovereignty developed.

Vitoria conceives the State, although he does not formulate it in these words, as a moral or juridical person. He sees it as an organic whole, complete in itself; and comparable to the human body.[16] He ascribes to it those functions which are proper to the person and makes it direct all its powers to the achievement of its final end, the common good.[17]

Now let us consider Vitoria's idea of political power within the State. Political power is for him "the faculty, authority or right to govern the civil State".[18] It already existed in the state of innocence, at least under the form of paternal power.[19] Power, like states and societies, has its origin in natural law and "since God is the sole author of the natural law—it becomes evident that public power is of God and that it cannot be contained within the limits of man's nature or of any positive law."[20] Consequently citizens cannot dispense with these powers.[21] The political power belongs to the community:

"The State, then, possesses this power by divine disposition;

but the material cause in which, by natural and divine law, power of this kind resides, is the State itself, which by its very nature is competent to govern and administer itself and to order all its powers for the common good".[22]

Thus, the authority of the Prince is derived from the State.

"Since the State possesses power over its own parts, and since this power cannot be exercised by the multitude...it has therefore been necessary that the administration of the State should be entrusted to the care of some person or persons".[23]

In the transference and exercise of power what rules is the principle of majority

"A State can appoint any one it will to be its lord and therefore the consent of all is not necessary, but the consent of the majority suffices".[24]

In the case of kingly power "the State transfers not merely the power but also its own authority"[25] in such a way that the king is over the state. Vitoria, as a scholastic, prefers monarchical government, though in fact he says it does not matter whether the power transferred by the State "is entrusted to one or to many".[26]

For Vitoria the prince is not "legibus solutus". He is bound by law.

"The laws which are made by kings have the same force...as if they were made by the whole State; but the laws made by the State are binding upon all, therefore even those laws made by the king, are binding upon the king himself".[27]

The reason he gives is based on the old Latin adage of "pacta sunt servanda"

"Although the act of creating the law be voluntary on the part of the king; nevertheless the fact that he is thereby bound or not bound, does not depend upon his own will: just as in the case of pacts; for he who enters into a pact of his own free will, is nevertheless bound thereby".[27]

Once the prince has "been set up by the State, any immoderate act of his is charged against the State" and "the State as a whole may rightfully be punished".[28] We shall see later the importance of this when coming to the study of international relations.

So far we have been regarding the State from within. But Vitoria sees also the State from without, that is, in its relations with other States, as forming one international community. This international community is necessary because no society is sufficient unto itself.

The first principle which governs the States in this international community is that of juridical equality. Everything lawful in the Christian States of Europe, is also lawful in the newly discovered territories, and vice versa. Neither the extension of territory, nor the degree of culture and civilization, nor the type of faith professed makes any difference at all between States. As Prof. Brown Scott says "in Vitoria's conception the international community composed of states without reference to geography, race or religion, replaced the large but still limited international community coextensive with Christendom".[29]

This international community is not a "superimposed" State but a mere union of states. Like any individual state, this universal State, if it is to be perfect, has to be self-sufficient and

therefore able to create laws.

> "The world as a whole, being in one way a single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law...It is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world".[30]

Let us study in some detail the conception and foundation of this law of nations. Vitoria defines it by saying: "what natural reason has established among all nations is called jus gentium".[31]

At first sight it seems just the same definition as that of Gaius, and yet the substitution for Gaius' "homines" of "gentes", in Vitoria's definition gives it a new character. He makes the "jus gentium" "jus inter gentes", or, in Truyol's words, "a juridical order binding human groups which are independent as such".[32] "Jus gentium" has thus a double meaning; law for people in Gaius, and law for States in Vitoria, though it also binds individuals.

The law of nations derives in many cases from natural law "and even if we grant that it is not always derived from natural law, yet there exists, clearly enough, a consensus of the greater part of the whole world, especially on behalf of the common good of all".[33] Here we find a distincttion between a "jus gentium naturale" and a "jus gentium voluntarium" which was later to be developed by Suarez and Grotius. As long as the "jus gentium" derives from natural law, it cannot be abrogated, sharing thus in the inmutability of the natural law; but in what it has of positive law, and this is the main part, it can be changed by an agreement of nations ruled by the principle of majority.

International relations can be summarized under two main headings: peace and war. In the first, one important point is that of the natural right of fellowship and communication from which Vitoria derives several conclusions. In his words

> "The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do not harm the natives, and the natives may not prevent them".[34]

> "So long as they do no harm to the country the Spaniards may lawfully carry on trade among the native Indians, as, for instance, by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance".[35]

> "If there are among the Indians any things which are treated as common both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them".[36]

Of course, Vitoria is dealing here with a concrete question which has, however, a universal bearing. It involves problems of unequal distribution of raw materials and natural wealth, and inmigration as a means of regulating the demographical inequality among nations[37]—all problems of modern times as well as of the sixteenth century.

Another important point is that of the right to choose citizenship, which involves the two problems of nationality and naturalization, part of our international law of today.

> "If children of any Spaniard be born there and they wish to acquire citizenship it seems that they cannot be barred either from citizenship or from the advantages enjoyed by other citizens. I refer to the case where the parents had their domicile there.

> And if there be any persons who wish to acquire a domicile in some state of the Indians, as by marriage or in virtue of any other fact whereby foreigners are wont to become citizens, they cannot be impeded any more than others".[38]

Vitoria also sets the principle of freedom of the seas which later was to be more fully developed by Grotius.

> "By natural law running water and the sea are common to all, so are rivers and harbours, and by the law ships from all parts may be moored there" (Inst, 2, 1); and on the same principle they are public things. Therefore it is not lawful to keep any one from them'.[39]

All these rights are but a consequence of the principle of unity in the nature of mankind. There is still another point of modern international law which already appears, at least in embryo, in Vitoria. I mean the theory of neutrality.

> "The spoliation of foreigners and travellers on enemy soil, unless they are obviously at fault, is in no wise lawful, they not being enemies".[40]

The novelty of Vitoria's ideas is quite remarkable.

The use of force in the dealings among nations also comes under "jus gentium". Vitoria makes a survey of it in his second Reading "On the Indians", "De Iure Belli".

He admits that it is lawful to wage war.[41] But to do this it is necessary to have a just cause. Neither the difference of religion,[42] nor the extension of the Empire,[43] nor the personal glory of the king, or any other advantage,[44] are just causes of war. The only just cause is the defence and preservation of the State.[45] Following St. Augustine he thus puts as the aim of war the

recovery of property or avenging of a wrong. This aim has, however, to be subordinated to the higher aim of the peace and security of the State; and he even goes further, setting as the highest aim the good of the whole world.[46] This noble idea is the core of his conception of international community.

> "Since one nation is a part of the whole world, and since the Christian province is a part of the whole Christian State, if any war should be advantageous to one province or nation but injurious to the world or to Christendom, it is my belief that, for this very reason, that war is unjust".[47]

The authority to make war resides in every individual,[48] in a defensive case, and in every State.[49] Yet as the State is an artificial conception, the authority is in the sovereign prince.[50] According to Vitoria, "a prince who is carrying on a just war is, as it were, his own judge in matters touching the war".[51] Therefore, if the prince is to be regarded as a judge he has necessarily to have jurisdiction over foreigners.

> "Princes have authority not only over their own subjects, but also over foreigners, so far as to prevent them from community wrongs, and this is by the law of nations and by the authority of the whole world".[52]

This authority is derived from the natural law—the primal source of the law of nations—, since "everything needed for the government and preservation of society exists by natural law".[52] This jurisdiction he acquires in two ways, by the right to resort to reprisals,[53] and by the right of the prince to exercise jurisdiction over foreigners.

This conception is incompatible with the theory of absolute

sovereignty of the State, absolute right to do what it pleases without reference to the rights of other nations or of the international community. And, if admitted, we find that in actual practice it is sometimes misused. Modern nations are used to acting as judges in controversies affecting them, but attention is not always paid to what Vitoria says, that this is lawful only when the war is just.

The whole doctrine with regard to this point of jurisdiction can be clearly expressed in Truyol's words

> "It is a logical consequence of the peculiar structure of the international community, since the States are at the same time subjects and members of this international community. While awaiting an eventual ulterior process of organization the world has to make use of States for the compulsory execution of international law: thus war is construed as an act of vindicative justice in which the just belligerent acts in the capacity of a judge with powers delegated to it by the whole world".[54]

The existence of an effective International Court of Justice would make war not only unnecessary but unlawful.

In the last part of the Reading Vitoria examines the justice of war. Careful attention should be paid to it by the prince and those responsible for the government.[55] For the subjects, it is enough that they follow the principle of good faith.

It would be endless to consider all the practical cases Vitoria refers to in his Reading. The general rules that must govern the affairs of war are three, according to him. The first is that the prince should not "go seeking occasions and causes of war"; the second, that the war "must not be waged so as to ruin the people against whom it is directed"; and the third, "the victory should be utilized

with moderation", the prince bieng not an accuser but a judge. These three golden rules, show, says Prof. Brown Scott, that for Vitoria "force is only to be used as the handmaid of justice".[56]

Another important point studied by Vitoria, and which leads to the question of colonization, is that of the illegitimate and legitimate titles by which the Spaniards could come into possession of the Indians. He proves that the Emperor is not lord of the world and therefore cannot have any dominion over the Indians. In a similar way he denies the right to the Pope, since the Pope has not proper temporal authority, only, as was later asserted by Bellarmine, an indirect temporal power, that is to say, where matters spiritual are involved. Neither is the conversion of the Indians to the Christian faith admissible as a reason for conquest. One lawful way by which the Spaniards could occupy the territory of Indians, is a lawful war. If the Indians denied to the Spaniards rights derived from "jus gentium", such as communication or commerce or citizenship, or, in another aspect, the right to preach the Gospel, or if the princes tried, by injust means, to make apostatise those already converted, then, the Spaniards could lawfully make war and come into possession of their territories, the annexation of territories after a war being a lawful way of acquiring them sanctioned by the laws of nations.

There is another title which may be called *intervention required by humanity.*

> It "is founded either on the tyranny of those who bear rule among the aborigines of America or on the tyrannical laws which work wrong to innocent folk there, such as that which

allows the sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes".[57]

This intervention by a State must have an exceptional character. It can only be admissible in case of some serious violation of the essential rights of humanity; in all other cases no interference in the domestic affairs of any nation can be admitted. The fact that Vitoria fixes the limits of this right of intervention can be deduced from his denying to the princes, even with apparent authorization from the Pope, of the right to punish the Indians for their sins against the law of nature.[58] This case is evidently a consequence of Vitoria's idea of sovereignty as limited by the objective principles of the natural law.[59]

Vitoria considers also the case of a *freely accepted Protectorate*,[60] in modern terminology.

"Another possible title is by true and voluntary choice as if the Indians, aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign. This could be done and would be a lawful title by the law natural too, seeing that a State can appoint any one it will to be its lord".[61]

The base of this free election rests on the theory of the immanence of power in the community itself, to which we have already referred. In the same way in which the community can elect its government, and give its authority to the prince, it can also concede part of its territory or the whole of it. Of course this is in open opposition to the policy of conquest, which in more recent times has been also condemned by The Atlantic Charter and the Chapul-

tepec Act. The key to this form of protectorate is that it has to be done freely. In fact, Vitoria has some misgivings about the liberty of the Indians in this particular case of Spain.

Another title may be found in the cause of allies and friends

> "As the Indians themselves sometimes wage lawful wars with one another, and the side which has suffered a wrong has the right to make war, they might summon the Spaniards to help and share the reward of victory with them".[62]

As Prof. Truyol points out, we have already here what will later on be called *collective security.*

Finally Vitoria examines another case about whose legitimacy he is not sure, though he approves of it. Using for it a modern term we can call it *colonization as a trust* or *mandate.* It is an intervention based on the incapacity of a people made under the initiative of a State, or, as it were, under a mandate from the international community.

> "They (the aborigines) are unfit to found or administer a lawful State up to the standard required by human and civil claims...It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit".[63]

Vitoria puts as the condition for the legitimacy of colonization the welfare of those peoples which have not yet reached cultural and political maturity. It is a trust and therefore it is supposed to cease when those peoples can manage their own affairs for themselves. Charity and not egoism is the precept on which Vitoria founds it.[64] That is why he insists once and again on the

limitation of such an interposition. It has to be "for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards".[65] This tutelary idea of colonization was, to a certain degree, present in the adoption of international mandates after World War I, and it seems to be also behind the idea of international trusteeship propounded by the U.N.[66]

From the work of Vitoria we have considered so far, we can gather two of his most outstanding characteristics: his balanced and broad mind and his remarkable love for truth. This idea seems to be present in Dr. Johnson's words, quoted by Prof. Brown Scott from Boswell's Life, which appear on the front page of his book THE SPANISH ORIGIN OF INTERNATIONAL LAW: "I love the University of Salamanca", Dr. Johnson said, "for when the Spaniards were in doubt as to the lawfulness of their conquering America the University of Salamanca gave it as their opinion that it was not lawful". The University of Salamanca stands here for Vitoria, and for what was his norm of conduct—the service of truth: He denied that the Emperor Charles V had the right of dominion over the world and that the Pope had the complete temporal power, so defended by his flatterers. He proclaimed the principle of the freedom of the seas, even against the interests of his mother land. When violence reigned everywhere he stood as the champion of human rights and dignity. When Spain at the peak of her greatness was enticed by the temptation of power, Vitoria prevented her from being led astray. Such was the meaning of Vitoria's work in his own day.

But his doctrine needs also to be developed still further in its

significant bearing on our own time. We should look upon him not merely as the real founder of modern international law but also as the prophet of a newer law of nations. And as such, the present world should draw from his doctrine those illuminating principles of justice, sincerity and truth which must govern the dealings of the nations among themselves, and which alone can bring peace to our troubled world of today.

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Notes

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