

order divides the human race into social groups, nations or states, which are mutually independent in organization and in the direction of their internal life. But for all that, the human race is bound together by reciprocal ties, moral and juridical, into a great commonwealth, directed to the good of all nations and ruled by special laws which protect its unity and promote its prosperity'.

This universal common good implies order and peace among all peoples. And peace is primarily the work of charity, not simply of natural benevolence, but of supernatural charity. The new order of the world, says Pius XII, 'of national and international life . . . must rest on the unshakeable foundation, on the solid rock of natural law and divine revelation'. The preamble to the new Charter of the United Nations affirms once more the dignity and the value of human personality and the equal rights of nations large and small, and the need for justice and respect for international law, and the duty of men and States to practise tolerance and live together in peace as good neighbours.

The appearance of this preamble, and the reappearance in our time of the names of St Thomas Aquinas and St Thomas More, and of Franciscus de Vitoria are a sign and a pledge of our return, though slowly and painfully, in international life and law, to the principles of Christian philosophy and jurisprudence.

RICHARD O'SULLIVAN.

VITORIA AND INTERNATIONAL LAW TODAY

I

THE great Dominican Order of which St Thomas Aquinas is the finest flower may still be, in the minds of many Englishmen, 'in a special way associated with the Inquisition in Spain.'¹ It may therefore come as a surprise to those unacquainted with the work of Francisco de Vitoria, to learn that it was a Spanish Dominican, who died four hundred years ago, who was in his day Europe's foremost champion of the rule of international law and of human rights. Of Basque origin, Vitoria was an active university teacher at the violent epoch when the Spaniards, having defeated the Moors at home, were founding their American colonies. Vitoria's opinions commanded wide attention among his contemporaries; so much so, that his idealism incurred for him considerable opposition in powerful governmental

¹*Encycl. Brit.* 11th ed., vol. 8, p. 408.

circles² at a time when interests and passions combined to obscure impartial thinking on international affairs.

It may be instructive, in what follows, to compare some of Vitoria's principles (as set out and expounded in the collections of his works produced and introduced by J. B. Scott for the Carnegie Endowment for international peace)³ with the principles now to be found in the United Nations Charter, the latest constructive attempt to create an international order.⁴

No doubt the discovery of the Americas by Columbus in 1492, when Vitoria was young, was an event just as stupefying as the discovery of the atomic bomb is to us. The mariner's astrolabe of 1480 may be compared with the cyclotron of today. Neither of these wonders has prevented international lawyers from facing the future and applying their principles to new problems and unthought-of circumstances.

II

In Vitoria's day, as in our own, there were not lacking those who would have deprived human beings of their rights merely on account of racial theory, and would have denied the so-called racially inferior any legal or moral rights on the ground that he was not a man at all. Human prejudice can go fantastically far when it is accompanied by selfish interests or feelings of revenge. Who today, even, has not heard the Japanese referred to in opprobrious terms; some, supremely insulting, have even called them monkeys. This type of affront to human dignity, known today, was also current in Vitoria's day, but at that time it was applied to the American Indians, when Vitoria wrote:

If the Indians are not human beings, but monkeys, they are not susceptible to injury. But if they are human beings, and—as they themselves declare—vassals of the Emperor, I see no ground on which these conquerors may be acquitted of extreme impiety and tyranny.⁵

Vitoria's view is echoed in the preamble of the United Nations Charter, which sets out as one of the objects of the Organization:

to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .⁶

It is interesting that this long-term view was inspired by Field Marshal Smuts of South Africa, itself a country not without its racial problems.

It will be recalled that care for members of minorities and of refu-

2J. B. Scott, *Spanish Origin of International Law*, Pt. 1. Carnegie Endowment, p. 84.
3J. B. Scott, *op. cit.*

4H.M.S.O. 6666/465. 1/3.
5J. B. Scott, *op. cit.* p. 81.
6Cmd. 9999, p. 22.

gees was one of the most valuable functions of the late League of Nations: the principles underlying this work are to be followed by the United Nations Organisation, one of the aims of which is set out in Article 1:3 of the United Nations Charter:

'To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and *encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .*' Again, the *General Assembly of United Nations* is to initiate studies and to make recommendations for this purpose (article 13 (b)), and by article 62:2 the *Economic and Social Council of United Nations* 'may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.⁷

Indeed, the Economic and Social Council is *bound* to set up a Commission 'for the promotion of human rights'.⁸

In other words, international lawyers are now to return to considering human beings as subjects of rights in public as well as in private international law, which is indeed the view set out by Vitoria and the early writers,⁹ though it is a view lost sight of in the nineteenth century by writers who insisted on regarding States as the sole persons of international law, a view which arose from an extraordinary attempt to reconcile absolute state sovereignty with the rule of law. In the words of James Brown Scott¹⁰:

the State, however large, was a part of the international community, and that community—representing alike the individuals ungrouped, and the individuals grouped in States—was the culmination of his thought as it is the culmination of centuries of development in matters international. This international community—greater than any of its parts—was to possess the power to issue laws and to punish their violation. But the standard of the international community was to be moral; therefore the conception of the law of the international community and of the States and of the individual was to be a moral conception, and

⁷See also article 55.

⁸See article 68 and p. 10 of 'A Commentary on the Charter of the United Nations'. Cmd. 6666:45. H.M.S.O., 1/3. The work to be done by the Commission on Human Rights has been officially outlined. It includes the formation of an international bill of rights and conventions, on civil liberties, status of women, freedom of information, the protection of minorities, the prevention of discrimination on grounds of race, sex, language, religion and matters within the field of human rights likely to impair the general welfare or friendly relations among nations. Commentary on the Report of the Preparatory Commission of the U.N. Cmd. 6734/46. (4/-) p. 54, paras. 15-17. For an interesting recent attempt to anticipate this, see Lanterpacht: *An International Bill of the Rights of Man*. N. York.

⁹See the excellent article of V. Idleson, K.C. in *Transactions of the Grotius Society*. Vol. xxx, Law of Nations and the individual.

¹⁰Op. cit. p. 196.

the law imposed was of necessity to be moral, in the sense that it should not be unmoral.

Or, as President Truman broadcast to the San Francisco Conference: . . . 'the world has experienced a revival of an old faith in the everlasting moral force of justice'.

Vitoria made it clear then that the laws of a sovereign are of no avail if they transgress the fundamental human rights protected by the law of nations. This is brought out by article 6 (c) of the Charter of the International Military Tribunal for the trial of major war criminals of the European Axis, which declares there shall be individual responsibility for crimes against humanity, i.e.,

murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, *whether or not in violation of the domestic law of the country where perpetrated*.¹¹

III

Vitoria was able to shed the revealing light of his idealism upon the contemporary colonial problem. In an article published before the war, echoing Fr Yves de la Brière, we have already attempted to show how Vitoria anticipated, in relation to American Indians, the best principles of later Protectorates, Colonies and the League of Nations Mandates.¹² It is true that the principles expounded by Vitoria and Las Casas, and enshrined in the 'Leyes de las Indias', were often honoured in the breach, and that abuses developed in connexion with peonage which would have been repellant to Vitoria; nevertheless the Indian did survive and intermix with the white man far better in South and Central America than he did in North America. In the words of a recent English writer¹³:

in so far as legislation constitutes a guide, the general attitude of the Spanish government towards the Indians made very considerable advances in the years immediately preceding and immediately following the Junta of Valladolid (i.e., in the first half of the 16th century.) These advances were due in large measure to the agitation of the Dominican Order. . . .

Or again, the same writer says:

Vitoria was more uncompromising than the most modern exponents of the idea of trusteeship. Compare Lord Lugard, the Dual Mandate (London, 1920).¹⁴

¹¹Italics by the writer. Recall the Alabama Claims after the American Civil War.

¹²Wortley: *Idealism in International Law; A Spanish view of the Colonial Problem*. Vol. 24, Trans. of Grotius Society, p. 147.

¹³Parry: *The Spanish Theory of Empire in the 16th Century*, p. 45.

¹⁴Parry: op. cit p. 24, note 1.

Vitoria's views were expressed in his lectures 'On the Indians recently discovered'. He said:

they (the Indians) being our neighbours, and we being bound to look after their welfare, let . . . any such interpositions be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards. For this is the respect in which all the danger to the soul and salvation lies.

Suffice it to say that the principles laid down in the Charter of the U.N. in setting up the International Trusteeship System for former mandates, enemy colonies and territories submitted to trusteeship expound this idea (arts. 75-95 of the Charter) and further stress that ultimate self-government which has nowadays become the birthright of the former Spanish Colonies. Article 76 (b) reads:

to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence as may be appropriate . . . (c) to encourage respect for human rights. . . .

Again, article 73, which relates to non-self-governing Territories, recognizes 'the principle that the interests of the inhabitants of these territories are paramount' and accepts 'as a sacred trust . . . the well-being of the inhabitants'.

Once again, then, we see the law of nations, taking account of the rights of those groups who have not attained independence and who do not constitute self-governing states.

IV

Those publicists of the 19th century who tried to reconcile absolute sovereignty with the rule of law used to state that war was an instrument of policy and that all wars were equally lawful. Such a view was as repugnant to Vitoria as it was to the signatories of the League of Nations Covenant, or the Kellog-Briand Pact which expressly denounced war as an instrument of national policy. The vice of the modern dictator is essentially that he prevents his subjects from knowing that the war he prepares for may be an unjust one, and even teaches that *all* war is noble.¹⁵ Propaganda, political police, terrorism and the suppression of academic freedom are all means to prevent a dictator's subjects from appreciating issues¹⁶ in the way Vitoria would have them do.¹⁷

If it is evident that the war is unjust, or if this is known to be the case, or if the subjects are conscious that the war is unjust, they may not fight, even when the prince exercises compulsion

15V Nuremberg Indictment cmd. 6696/45, p. 5.

16See K. Bramstedt: *Dictatorship and Political Police*.

17J. B. Scott, op. cit. cxviii—cxix.

upon them. The reason for this is that such a prince is committing a mortal sin, and one must obey God rather than obey him. In the second place, I hold that the common people who are not admitted to the council of the prince, are not under obligation to ascertain the just cause of the war, but may (simply) follow their King. This fact is evident because they cannot all be informed of the cause of the war (this was in the 16th century). Thirdly, I hold that the magnates who are admitted to the council of the prince, are obliged to inquire into the cause of the war, for this is the proper course of action for them. And besides, it is their duty to admonish the King as to whether or not the war ought to be waged; for they should aid him with their counsel. In the fourth place I hold that when the cause of war is not clearly unjust, but doubt does exist, it is permissible for soldiers to engage in the war. . . . if there are indications that the war is not just—(if for example I am in doubt, but close my eyes, saying: 'What do I know of the matter?' because I feel affection for my king—then I may not be acquitted of sin. Therefore when we say that in a doubtful case the subjects may engage in war, it is to be inferred we mean 'when the doubt favours (the justice of the war)'. It should also be noted that when it later becomes clear that the war was unjust; when we were previously in doubt; when we followed our king in good faith . . . the soldiers are bound to make restitution for that which they have borne away, if they have become richer thereby. I do not say they are so bound with respect to damage inflicted . . . the king will perhaps be under an obligation to make restitution for the entire loss'.

I have quoted this passage at length because it is very relevant to the present agitated question of the trial of alleged war criminals, and of reparations and restitution, the adequate solution of which may go a long way to prevent further threats to peace; and one of the first purposes of the U.N. is 'the suppression of acts of aggression or other breaches of the peace'. (See article 1:1, article 2:4, and especially articles 39 to 51: 'action with respect to threats to the peace, breaches of the peace, and acts of aggression'.)

A pendant to this is the definition of Crimes against peace in article 6 (a) of the Nuremberg International Military Tribunal (18) as planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing . . .

Those Vitoria calls the 'magnates who are admitted to the council of the Prince' are those indictable at Nuremberg. (See also article 7 of the court's charter.) Superior orders may mitigate the punishment but do not excuse war crimes (*ibid.* art. 8); this also is in line with

Vitoria's principles set out above. Again, as we have seen, Vitoria recognized the duty of restitution of things taken in an unjust war.¹⁹ This too is recognized in the Nuremberg Court Charter, art. 28, and by the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, London, 5 January, 1943:²⁰

The Governments . . . reserve all their rights to declare invalid any transfers of, or dealings with property . . . in territories which have come under the occupation . . . whether such transfers or dealings have taken the form of open looting, or plunder or of transactions apparently legal in form, even when they purpose to be voluntarily effected.

Not only did Vitoria condemn an unjust war, but he also condemned unjust ways of waging warfare. If legal war is to enforce justice, then no more suffering must be caused than is absolutely necessary. 'The innocent may not be slain by (primary) intent, when it is possible to distinguish them from the guilty'.²¹

Again, Vitoria held that innocent hostages might not be killed.²² Prisoners might be taken but should not be slain;²³ nor enslaved, except 'pagans and Moors' taken in a just war.²⁴ Even this reservation, repugnant to us nowadays, might in Vitoria's day have been defended on the grounds of reprisals, since it seems to have been common enough for Moors to enslave Christians. As regards acts of destruction, not justified by military necessity, Vitoria is stern. Wantonly to set fire to cities and fields of enemies is 'diabolical; this is the fire of Hell; for such an act is not needful in the attainment of victory'.

All this is exactly in line with the definition of War-Crimes in the Nuremberg Charter, article 6 (b): i.e., 'violations of the laws or customs of war.

Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by *military necessity*.²⁵

V

The question of bombardment troubled Vitoria as much as it does us today. His solution was bold and must be read in the light of his

19J. B. Scott, op. cit. *Vitoria De Bello* cxix.

20Cmd. 6418/49.

21J. B. Scott, op. cit. *Vitoria, De Bello* cxxi.

22ibid. p. cxxv.

23ibid. p. cxxiv.

24ibid. cxxiv.

25Cmd. 6668/45, p. 5.

conception of a just war which is one to right a wrong when other means have failed and which must not be lightly undertaken. To attain victory in a just war, Vitoria said, frankly after mature deliberation and with great courage:

I hold that when it is necessary for the attainment of victory to slay the innocent, it is permissible to do so. For example, a city is besieged; it is necessary to bombard it; the death of the innocent is a consequence of this bombardment; let them die, since that consequence is incidental. . . . it is as if a fortress were being besieged.

This is of course the argument for Nagasaki and Hiroshima. In the Report of the Chief of Staff of the U.S. Army, July 1st, 1943, to June 30th, 1945, to the Secretary of War (H.M.S.O., 1945, 2/6d.), at p. 86, it is said, after discussing the plans for the final assault on Japan,

'these were our plans for final victory in World War II should Japan fight to a last-ditch national suicide. But we had other plans which we anticipated might bring a much speedier end to the war. . . . From Potsdam General Spaatz received orders to drop the atomic bomb on the industrial installation of one of four selected cities from which he could make his own selection according to weather and target any time after the 3rd of August. (1945). He chose the military base of Hiroshima. On 6 August the bomb was dropped. The results are well known. Two days later the Soviet Union declared war on Japan and within a few hours the Red Army was again on the march, this time driving with powerful blows into the pride of Japanese military power, the Kwantung Army of Manchuria. . . . then on the 9th August the Strategic Air Forces loosed a second atomic bomb on Nagasaki, which displayed greater destructive blast and fire than the Hiroshima bomb. The smoke of the Nagasaki detonation rose 50,000 feet into the air and was visible for more than 175 miles.

The week of 6 August had been one of swift and sudden disaster to the nation which fired the first shot in the series of conflicts that led to World War II. Japan was being made to pay in full for her treacheries at Mukden and at Shanghai, at Pearl Harbour and Bataan. The enemy situation was hopeless. On 10 August the Japanese Government sued for peace on the general terms enunciated by the Allied Powers at the Potsdam Conference'.

So ended the most destructive series of conflicts in modern history, and over the destruction rose the spectre of the atomic bomb, the force of which had, like the genii of the bottle, accomplished much, but threatened more.

If two atomic bombs can accomplish such devastating results, what of two hundred or two thousand? The mind recoils at such a

use of force. Sir Richard Gregory has recently summed up the matter in these words:

'there can never be moral sanction for the mass destruction of human life by atom bombs or any other frightful means. . . . It is an offence against the light, for whatever cause it is undertaken. The pursuit of natural or of supernatural truth is the noblest of human endeavours. The use of knowledge gained has enabled man to penetrate into the centres of stars, but it can carry him down into the pit to perish if his animal instincts continue to prevail over his moral understanding. It is for the leaders of thought and action in the nations of the world now to determine among themselves whether their hearts are strong enough to make the splitting of the hearts of atoms a means of improving conditions of life on the earth and the beginning of a new era, or utterly to destroy what faith and works have achieved in the history of civilization'.²⁶

The governing principles of the use of force can, however, be clearly derived from Vitoria and other publicists: force in any reprisals must be reasonable and proportionate to the wrong suffered,²⁷ and in legitimate warfare unnecessary cruelties and destruction must be avoided.

To decry the use of any force in the service of justice would of course go to advocate anarchy, and in such anarchy the weak can never call for the aid of the strong against the strong, nor indeed can there ever be any security or order.

The present writer passes no opinion on the use of the two atomic bombs against Japan, since he has not the full facts before him. So far as Vitoria was concerned the whole question, we think, would turn on his words 'necessary for the attainment of victory' in a just war, and he would have regarded the extent of the damage wrought in relation to the end to be attained. If the bombs had not been used against Japan it is arguable that more innocent lives would have been lost by the undue prolongation of the war. Must a policeman refrain from killing a group of homicidal lunatics, a menace to the community, because in the process an innocent person will be killed? These are terrible questions: they show the grave problems raised by the use of force to preserve order and maintain peace. The danger of future war should make all men of good will anxious to find a pacific solution for any disputes, but prepared, if need be, to put down an aggressor by force. Today no responsible person can fail to weigh the words of Vitoria, who said:²⁸ 'I maintain that those who

²⁶*Times* Newspaper, 22nd July, 1946. ²⁷Brierly: *Law of Nations*, 2nd ed., p. Address to the British Association. 261.

²⁸J. B. Scott, *Vitoria de Bello*, op. cit. cxix.

are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides more pay, and who are, moreover, not subjects (of that person), commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing'.

Though, mercifully as we have seen, this may not apply to a common man who follows his king, is not admitted to his council, and has no means to judge the justice of the war in which he is involved.

Thus may justice be tempered by mercy. In the Preamble to the Charter,²⁹ the peoples of the United Nations have declared themselves determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. . . .'

Woodward has pointed out that atomic warfare may mean the end of the 'civilisation' which has created it, in telling words:

'The danger now is that we should be plunged into anarchy at once, and that we could no more organise recovery than a finely bred dog could long fend for himself if he were turned loose in the jungle. Europe at this moment is much nearer to dislocation beyond recovery than we in England can imagine, but we may still hope for betterment because the area of dislocation—the number of cities destroyed—can be regarded as small in comparison with the area which still stands. We are, however, very near to the edge of an abyss, and at least for a generation to come—a longer time than our period of respite—we cannot risk a greater strain. A war in which atomic bombs were employed to destroy within as many days the twelve most important cities in the North American continent or the twelve most important cities now remaining in Europe might be too much for us. Human life would not disappear, but human beings would revert, helpless, without counsel, and without the physical means of recovery, to something like the culture of the late bronze age. Let us not delude ourselves on this point. We cannot just lower by a numerical percentage our standard of living. We are playing for the highest stakes: all or nothing'.

Let us remember, then, that all genuine efforts to promote a just peace are laudable, and no example is to be lightly cast aside. We have seen that even Vitoria of the turbulent 16th century has words of wisdom rightly relevant today, as have all the other great writers of the classics of international law, now generally available to all students through the splendid work of the Carnegie Endowment.

Let every man work and pray whilst it is yet day, lest the night

²⁹Cmd. 6666. p. 22.

take him unaware: let him work for a true humanism, one which, (to quote Sir Richard Gregory again):

'Takes account of all factors of cultural development, secular or sacred . . . understands clearly that the earth is but a temporary home, not only for the short span of individual life, but also for the whole human race. As tenants or trustees our duty is to make the best use of the resources of our heritage by the exercise of all our talents, and with the belief and hope that by so doing we are contributing to make men god-like, if not godly, in the sense of religious faith. So may the earth become part of the heavens of the universe, in spirit as in truth'.

B. WORTLEY.

HUMAN DIGNITY IN THE THOUGHT OF VITORIA

AS SEEN PRINCIPALLY IN THE RELECTIO DE INDIS

WITHOUT falling into the detestable errors of racialism, we can say that national cultures enshrine, at least in a measure, qualities both good and bad truly characteristic of the nation. Thus we may see in Spanish history, literature and art, a great emphasis on man's natural dignity, an emphasis which at times passes from virtue to vice in the pride which is at present so curiously insisted on by some who pretend to a special understanding of things Spanish. The great Spaniard, Francisco de Vitoria, although far from approving an unhealthy national pride, does in fact bring out very clearly that man, by his own proper nature, is invested with a dignity which is involved in the moral consideration of the most diverse activities.

In his day the Spanish tendency to boasting—pilloried in the *Rodomontades*—had real and marvellous achievements to rest on, and the reconquest of Christian Spain was at last an accomplished deed. Moralists and theologians were imbued with a feeling for man's greatness. Vitoria in particular was concerned in his thought with the dignity of man as such, rather than man as Spaniard. In the *Relectio de Indis* he brings out most clearly that the treatment of barbarians must be governed by what is worthy of man in himself. Nothing does so much credit to Spanish culture as that, even while the baroque style in sentiment and manners was elaborating its less admirable features—ostentatious display, excess of pride, of panache, and the absurdities of *pundonor*—Spain could still produce a man like Vitoria whose simplicity, austerity, and firm adherence to principle give us