THE PRINCIPLES

OF

POLITICAL AND INTERNATIONAL LAW IN THE WORK

OF

FRANCISCO DE VITORIA

EXTRACTS, WITH AN INTRODUCTION AND NOTES

BY

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ON THE FOURTH CENTENNIAL CELEBRATION OF THE DEATH OF FRANCISCO DE VITORIA

I

1. Francisco de Vitoria was granted long ago a place of honour among the classics of political philosophy. Many writers—and some of them distinguished by great authority—have exalted his memory and given him unsparing praise, making his name familiar beyond the scope of the University and among widely scattered cultural circles. The majority of those who have written about Vitoria have shown him to be the undoubted and authentic founder of the science of international law in his two readings *De Indis,* which are of permanent value and greatness. And this is truly his most genuine title of glory. But Vitoria's fame as an internationalist^ must not lead us into overlooking other aspects of his work which show the same vigour and greatness of genius. Some commentators, for instance, have stressed the important role played in political law by his *relectio de potestate civili,* a masterpiece which in no way can be considered as less valuable than those previously mentioned. Others remind us that Vitoria was the restorer of the theological studies in Renaissance Spain;

the commentator of the *Summa theologica* of St. Thomas Aquinas, the respected and beloved master of a whole school of famous theologians and jurists; that he awoke in youth vocations and enthusiasms. And it would even be possible to bring out the unjustly diminished excellence of his contribution to ecclesiastical public law with his two readings *De potestate Ecclesiae* and *De potestate Papae et concilii,* which, when the doctrinal storms provoked by the counciliary movement had hardly subsided, had anticipated in general lines the decrees of the Council of Trent and the learned disquisitions of Suarez and Bellarmine. Monographs and studies of uneven value and quite different sources have spread the ideas of this illustrious Spanish Dominican friar and revived his noble and captivating personality, which came gradually to the fore amongst his now clear and unmistakable characteristics (1). This general recognition of his significance gave rise in Spain to the foundation of the Asociaciôn Francisco de Vitoria (1926) and the Francisco de Vitoria chair in the Law Faculty of the Salamanca University (1927), subsequently filled by distinguished professors, both Spanish and foreign. The organ of expression of this Vitorian movement was the *Anuario* of the above mentioned Association. Outside Spain, the Vitoria-Suarez International Association was founded in 1932, animated by that same spirit, which found in the eminent American internationalist James Brown Scott its most enthusiastic supporte*-, whose work could never be overemphasized.

For this reason, and because in the following pages we offer an outline of Vitoria's philosophico-political thought by means of a commented selection or his own texts, we shall; devote this short introduction only to stressing the persistent! modernity of Vitoria, the human and doctrinal value which! his example and work have for us of the twentieth century, j in one of the most serious cultural crises mankind has ever' witnessed. But it will not be useless to say a few words previously about Vitoria's life: The externally simple life of a Do-

ti) See the bibliographical note at the end.

minican friar devoted to study and teaching, but always fruitful, because of a great inner dynamism. In order to outline it with proper accuracy, in spite of the gaps which historical research still has to admit, Father Beltran de Heredia, the author of a most authoritative biography, will serve us as a sure guide.

2. There is no known and exact date for his birth, although the year of 1486 appears to be quite likely (2). At about 1504 he entered the Order of Friars Preachers. He went to Paris some years later, undertaking studies there in the famous house of St. Jacques. He counted among his teachers with men like Crockaert and Fenarius. He was initiated there into a life of theological teaching, which he was going to be devoted to with unselfish enthusiasm to the day of his death.

In the seven years which he spent in Paris he covered a wide field of educational ground, for the capital of France was then a meeting place for all kinds of systems and ideas and intellectual endeavours. Vitoria was able to secure for himself such a wide cultural background that he was already admired by his contemporaries; in fact, his great learning was the indisputed ornament of his penetrating and sagacious mind. After his return to Spain,. Vitoria taught for three years (from 1523 to 1526) in the College of Saint Gregory at Valladolid. When the *prima* chair of the Faculty of Theology in the Salamanca University was vacant, he passed the examination required to fill it, beating the Portuguese Pedro Margallo, on the 7th of September 1526, after a memorable contest. From then on, his whole life will be devoted entirely to the teaching of theology within the noble frame of the convent of San Esteban, in the most celebrated chair in any Spanish University.

Vitoria introduced several effective ideas of his own in

(2) The discussions to which the fixing of the date and place of birth of Vitoria as well as his real family name have led, are well known. It was only while this book was in print, that we have learnt that Rev. Father Beltrân de Heredia will be publishing a new article on one of these subjects in the *Anuario de la Asociaciôn Francisco de Vitoria*.

the field of teaching, aiming at giving renewed vigour to traditional methods; he gave priority to St. Thomas' *Summa theologica,* for instance, to Peter Lombard's *Sentences.* On the other hand, the pupils began to take notes from his lectures. Unfortunately, most of these notes, together with Vitoria's own lectures, originally written by himself, have been lost. These years of teaching were marked by the famous fif-j teen *relectiones,* thirteen of which have been saved. The fixing of their respective dates has given rise to numerous! difficulties.

Some of the well-known episodes of this period of academic maturity and fruitful splendour are Vitoria's interventionin the dispute between the followers and antagonists of Erasmus, which then divided Spanish intellectual circles, and in which Fray Francisco gave expression to a great breadth of mind without overstepping to bounds of Catholic orthodoxy; Charles V's attendance to Vitoria's class during! a visit to the Salamanca University; the wide echo aroused, in Spanish opinion by his two readings in the Indians, the influence of which was largely to be felt in overseas colonization activities, above all in the field of legislation. But Vi-i toria's health, weakened by the strain of unflagging work, deteriorated fastly from the academic year of 1538-1539 on, and in spite of the tenacity with which he struggled against the sickness, he was forced to appear in class with ever increasing irregularity. Charles V's invitation to attend the Council! of Trent found him lying in a bed of pain and it is probable that, save for a few and short intervals, he remained there to the day of his death. After much and long suffering, Vitoria died on August 12, 1546.

3. If we turn now to the historical moment in which he played such an outstanding role, we are sure to find many an unquestionable resemblance with the one in which our own collective existence is carried on: Vitoria's time was, like ours, an epoch of transition and spiritual crisis. The process of disintegration of the medieval world in every phase of cultural life then reached its climax. New forms of thought

and life emerged gradually in the West, with a whole train of new problems for the thinker conscious of his own responsibility. Scholastic philosophy, weakened by school rivalries and an empty fineness, languidly vegetated in classrooms deprived of human warmth, while natural sciences, apart from, if not against it, started an overwhelming ascendancy, offering undreamed-of possibilities to man at the precise moment in which he was extricating himself from traditional moral bounds. With the coming of the Reformation an end was decisively in sight, as far as its dogmatic roots were concerned, for that religious unity which was outwardly already shaken by the agitations caused by the Western schism. Wide sectors of the world of humanism pretended to restore the force of the ideal of wisdom elaborated in the schools of ancient Greece and therefore without the sense of the supernatural. The sense of solidarity, which had led the *respublica Christiana* to the Crusades, was awakened by this loss of the religious unity, and the rulers began then to seek in the mechanic principle of the balance of powers for a precarious substitute for the former organic cohesion. The medieval political universalism was substituted by a number of sovereign States, in which the centralization of power put an end to feudal pluralism. Similarly, natural economy had given way before the unrush of an ever more flourishing money economy. This evolution, on one side, insured for the urban bourgeoisie an increasing personal influence. On the other, it opened the doors, with its individualistic principle of free competition, to the examination and discussion of the very foundations of the guild organization, in which the sense of community was stronger. Finally, the discovery of the New World which suddenly widened the geographical horizon to undreamed-of dimensions, opened to the enterprising initiative of the period an apparently unlimited field of activity and urgently posed the problem of the juridical treatment to be given the peoples therein settled: a true spacial revolution which rendered insufficient the medieval concept of Christendom and which Vitoria knew how to grasp in wholesale manner with his'

genial idea of the *totus orbis,* of the world as a whole, as a moral unity of peoples politically organized under natural law (3). The whole social order—national and international—seemed to be shaken to its very foundations themselves. To build these foundations anew was the inexorable imperative of the century, an imperative that no thinker conscious of his responsibility could sidetrack.

Vitoria's attitude towards this imperative of the century in which he lived is what we should like to suggest as a matter for serious consideration. We find in it, in fact, that delicate sense of proportion, of historical continuity, of intellectual and moral equilibrium which avoids alike the unattainable utopia and the surrender to the factitious. Against those who, frightened, lazily clung to the mechanically repeated and already decaying formulae, thinking that by so doing they could spike the wheel of history, Vitoria went deeply into the anxieties of his time. But, against those who, enebriated with change and novelty, pretended to do away with the spiritual legacy of Christianity, which centuries before had already assimilated the best elements of ancient culture, Vitoria re-affirmed the validity of this legacy applied to new situations. His work is, in this respect, a further demonstration of the permanent actuality palpitating in the fund of Christian culture, with immutable principles which each generation must bring back again to life for the satisfaction of their own needs.

Our generation also finds itself facing a huge task of spiritual reconstruction, taxing its intelligence and will-power with extremely complex and arduous problems, many of which are stated in terms hitherto unknown. Our times are also times of transition and of crisis. To repeat this once more might seem trivial, had it not been thrust upon us as the unavoidable necessity of our own collective existence and were we not reminded of it every day by the great number of books which seek to reveal its meaning. As in the age of

(3) See texts no. XXXV, XXXVI, XXXVIII (particularly this one), LXVIII, and note 21 corresponding to tex no. XLIII.

Vitoria, public law strives to find new institutional bases on which to stand after the break-down of the bourgeois liberal State and the totalitarian State. In the international sphere, two gigantic wars have shaken tremendously the very foundations of the political reorganization of the whole world. And, if the Western consciousness was then stirred by the sudden appearance of men and peoples previously unknown, but meriting the recognition of their juridical personality, our times are now witnessing the uneasiness of others, awakening from the lethargy or servitude of centuries to enter vigorously the vortex of world politics.

Certain it is that to-day the vital general attitude is very different. If the world of that time could see its widening frontiers vanishing practically before the prow of the Spanish carabels, modem technique has again shrunk this world of ours by shortening distances to an incredible degree, giving rise to a spacial revolution of a kind wholly opposite to that brought about in the age of discovery. And, on the other hand,j man no more expects salvation from technique, as did the; candid optimist of a former age. Man has recognized its merely; instrumental nature, its moral neutrality- and its appalling indifference. Technique has been unable to forestall the present evils; on the contrary, it has aggravated them in certain ways. A nihilistic and discouraging philosophical attitude; the problem of a power politics which falls a victim; of its own slavish cult of power; a total war leading natio-j nal enmities to their maximum strength; a contempt for the human person, whose imprescriptible rights seem to have vanished altogether; whole populations condemned to death by starvation in a world where, not many years ago wheat was used as fuel; a shocking inequality in the distribution of material goods among the different classes—these are, among many others, tragic realities of our times which no technique will of itself succeed in eliminating with thoroughness and decision. Salvation can be expected only from a spiritual rebirth, for to the spirit we shall always have to look, in the last analysis, for an explanation of the mystery of light and

shadow which illuminates or darkens the culture of a definite historical period, the key in the end to splendour or decay, as the case may be. And such a rebirth must come from an effective and sincere, not merely verbal, return to Christian principles for the arrangement of social life. Only thus will human values be enhanced and served by technique, whose progress in the century of atomic energy paradoxically increases man's tremendous responsibility for the future of civilization. We are at a veritable historical crossroads from which our eye is yet unable to see the precise outline of the horizon which is to be the very framework of mankind's future existence, and in which Vitoria's message may be read with that stress of calm persuasion and urgent encouragement that even the most inattentive reader will not fail to notice.

4. We are referred above to thé intellectual and moral equilibrium with which Vitoria faced the problems· of his time. It is unquestionable that mental clearness has seldom been matched to such an extent by a high moral inspiration. Being a true mind of the Renaissance, Vitoria knows how to get at the essential data of each phenomenon, the universal significance of any event. But the brilliancy of his intellect is welded to a manly humanitarism, deeply rooted in Christianity, which, in an iron age like ours, shines with a golden and unfading light. Vitora's conceptual accuracy is not to be confused with a cold logic which would only strive for the solid union of impeccable reasonings; it is a something vitally pulsating with a sense of justice and charity, and animated by striving for the highest ideals. In a century of general violence, Vitoria stood up as the champion of human right and dignity. And this defence of human rights and dignity was poured out from thence with· oecumenical generosity upon all men, welded into an indissoluble unity of origin, nature and destiny, equal in essence before God, their Creator. When the nation of which he was a citizen reached the climax of power, Vitoria contributed more than anybody else to preventing it from letting itself be led astray by the temptations of power, always proclaiming its submission to moral

law. He wanted to march ahead of power, not to follow in itsi train, in order to be able to pave its way for the accomplish-t ment of its natural ends, not to be dragged by it to justify! any unlawful claims. This is an aspect of his greatness which ought now to be brought'out, particularly at a time in which intelligence is too often quite satisfied with the role of servant to private ambitions and interests, forgetting thus that its duty lies in striving for truth. The incorruptible firmness withi which the illustrious Dominican friar searched for truth and/ proclaimed it when he sincerely thought he had found it, together with the delicate respect he always had for good faith wherever found, is one of the noblest features of his personality. It always captivated those who approached him, and accounts for so many immortal pages such as those reprinted below about the equality in treatment and reciprocity which must determine and guide relations among men and peoples.

Finally, a scholar cannot but devote a few words to Vitoria's example as a teacher. It is highly significant that his generous ideas have passed on to us almost exclusively through the notebooks written and lovingly preserved by his own pupils. As to the excellence of his lectures, enough is found in his marvellous *Relectiones,* which still palpitate, four centuries after, with scholarly life and warmth; but were this insufficient, there is that galaxy of illustrious theologians and jurists who were proud of having followed the way paved by their master. «If the tree is known by the fruit it gives», writes Cardinal Gonzalez, «the names of his pupils would be a sufficient argument in favour of the beneficent restoring influence exercised in the class-room by the illustrious Dominican professor» (4).

II

Since the beginning of the century, *reprints* and *translations* of Vitoria's most important writings have been nume-

(4) *Historia de la filosofia,* reprinted 1886, Madrid, volume III, P. 120.

rous. Some of those deserving special mention are Ernest Nys' publication of *De indis* and *De jure belli,* in the Latin original accompanied by an English translation (the excellent work of John Pawley Bate), in the fine collection «The Classics of International Law» of the Carnegie Institution, directed by James Brown Scott (Washington, 1917). Scott has reproduced the English text of this edition, as well as the English translation (due to Miss Gwladys L. Williams), of the reading upon the civil power and of a part of the reading upon the power of the Church in his important work *The Spanish Origin of International Law,* vol. I: *Francisco de Vitoria and his Law of Nations* (Oxford, 1934). The two readings *De Indis* and *De jure belli* were also translated into French by Alfred Vanderpol in his book *La doctrine scolastique du droit de guerre* (Paris, 1919). More recently, Jean Baumel has published a critical edition, with a French translation, of the *Leçons de Francisco de Vitoria sur les problèmes de la colonisation et de la guerre* (Montpellier, 1936). In Spain the classical edition of Vitoria's readings is that of Father Alonso Getino, O. P., with the two texts, published ip 3 volumes by the Asociaciôn Francisco de Vitoria (Madrid, I, 1933; II arid III, 1934). Father BeltrÅn de Heredia's edition of Vitoria's lectures upon the *secunda secundae* of the *Summa theologica,* in the «Biblioteca de teôlogos espafioles» is also worthy of our special attention. The treatise De *justitia et fortitudine,* belonging to these lectures, was also published by the Asociaciôn Francisco de Vitoria (Madrid, vol. I-IÏI, 1934-1935). The reading of these comments is of great interest, for they complete the doctrines stated in the *relectiones,* chiefly as far as other branches of law are concerned. In his work mentioned above, James Brown Scott has also reproduced some, important extracts of them from the English translation made by Miss Gwladys L. Williams and Francis Crane Macken.

To these re-editions and translations, we must add the *anthologies* of the thought of Vitoria about certain matters. Outside Spain, for instance, the anthology contained in the

work *Vitoria et Suarez, Contribution des théologiens au droit international moderne,* published under the auspices of the Association Internationale Vitoria-Suarez in cooperation with the Carnegie Endowment, in Latin and French, with a prologue by James Brown Scott and an introduction by Rev. Father Yves de la Briere (Paris), 1939). Many extracts of Vitoria's readings are also reproduced in the great work by James Brown Scott, *Law, the State, and the International Community,* vol. II: *Extracts Illustrating the Growth of Theories and Principles of Jurisprudence, Government, and the Law of Nations* (New York, 1939). In Spain we have the selections of his texts by Father Alonso Getino in the series «Breviarios del pensamiento espafiol», entitled *Sentencias morales* (Madrid, 1939) and *Sentencias de doctrina international* (Madrid, 1940). The last one and the texts included in *Vitoria et Suarez* deal only with theories of international law of the great Dominican, as the titles themselves reveal.

The selections which we give in this book include also chapters on political power and the relations between Church and State. We have been animated by the wish of presenting the reader with a complete summary of Vitoria's political philosophy, as far as this was possible within the narrow limits assigned to this book. We have already insisted upon the fact that Vitoria was not only a great internationalist, but also a great State theorist; and perhaps he was a great internationalist just because he was a great expounder of the theory of the State. As to public ecclesiastical law, we have omitted its more special internal and canonical aspects (concept of the Church, power of the Pope, theory of the council, etc.), and we have limited our scope to the problem of the relations between the spiritual and temporal power. We are aware of the fact that for every choice we make there comes in necessarily a larger or smaller measure of subjective factors, both in regard to the value attributed to the respective texts and to the order in which they are presented. Our intention has. been, above all, to put before the reader a Vitoria who mayi

appear at one and the same time both *historical* and *modern.* Therefore, we have followed, as far as possible, the order in which Vitoria himself propounded his doctrines; and, in any case, we have grouped the extracts under general titles, which may be found in every handbook or treatise about the philosophy of law and the State. On the other hand, we have omitted those questions which were important at the time, but which have lost much of that importance since then. In the extracts themselves, our interest was centered chiefly in the conclusions and propositions -in which Vitoria expressed his personal points of view, reducing to a minimum the proofs and examples which he marshalled in support of his arguments. Any reader anxious for a fuller account may turn to the complete editions already mentioned.

The *extracts* are preceded by Roman numbers. Save for extracts II, III and IV, they belong to the *rèlectiones De potestateEcclesiae prior, De potestate civili, De Indis recenter inventis,* and *De Indis, sive de jure belli Hispanorum in Barbaros,* better known under the title De *jure belli,* which we here adopt. The extracts of the last part of the former *relectio* (section V, or, according to our division, quaestio 3.*, pars 3.') and those belonging to the three others, are reproduced according to the excellent English translation of John Pawley Bate and Miss Gwladys L. Williams, already quoted. The extracts of the other parts of *De potestate Ecclesiae prior* (no. XIV, XV, CXV, CXVI, CXVII) and the extracts' II, III and IV, belonging to the *Commentary to the secunda secundae, tract, de justitia,* edited by Father Beltran de Hereda, have been translated directly into English. For certain matters dealt with in the *relectiones,* which are also studied in these commentaries, we refer in the notes to the respective *quaestiones.* Let us point out here that the commentary to the *quaestio* 40 rounds up and confirms in its main aspects the *relectio De jure belli.*

Finally, in our *notes* we have sought to offer the reade~, as already said, a picture of Vitoria which may be at once historical and modem. On the one hand, they fix the place in the

history of political philosophy which belongs to his conceptions; on the other hand, they underline their significance with regard to the later evolution of doctrines and institutions and also to the great problems of contemporary political and international law. Vitoria's texts are so suggestive and so plentiful in doctrinal content that any adequate comment would have to be of itself a complete treatise of public law. We have narrowed our notes down to the field of mere suggestions about what seemed us more necessary. We should consider ourselves fully satisfied, if they would contribute to a fuller and better knowledge and appreciation of Vitoria's work, certain as we are that through these, a greater admiration of the man and his work will be an inevitable consequence.

We wish to express our acknowledgement to Mr. José Maria Gimeno, who made the English translation of the introduction and notes, together with the proof-reading. The thanks of the Instituto de Cultura Hispanica, as well as those of the author, are also due to Professor Walter Starkie, Director of the British Institute in Madrid, for the kind help afforded in the revision of the text.

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Antonio Truyol Serra

PRELIMINARY CONCEPTS

THE PHILOSOPHICAL STARTING POINT

I. First of all, we should take note of the admonition of ... Aristotle, in the *Physics:* not only in matters relating to nature, but also in all man-made constructions, «necessity» should be considered from the view-point of purpose, which is first of all causes, and the principal one. This doctrine, whether invented by Aristotle ... or taken by him from Plato, was a most important philosophical argument, and shed a great deal of light on all subjects.

Let us believe that neither the sky nor the land nor the remaining parts of the world, nor man himself, was the beginning of the world; but rather that all that is contained in the heavens was appointed for some useful purpose, and that all things have been created, and necessarily created just as they are, for a purpose, whence are derived the nature and the necessity of all things (1).

(De pot. civ., 2.)

1) Philosophically speaking, Vitoria gravitates within thei orbit of the Aristotelian-Thomistic thought, which he So' efficiently contributed to restore in Spain. This thought is. a spiritual factor usually known as *philosophia perennis;* an expression which Leibniz liked to use, although it was: not conceiveii by him. We, however, do not think that *such!*

an expression, full of implied meanings, may be applied exclusively to a definite historical system, however great its.content,of truth might be. Among the attempts to give the *philosophia perennis* a precise concept, systematic rather than historical, the one advanced by Hans Meyer, which we consider most successful, deserves to be pointed out .As Meyer notes, the idea of a perennial philosophy is based upon a primary datum: «The rational character of reality, the property of every given thing of having a sense or meaning *(Sinnhajtigkeit)* of its own, and the capacity, for transferring the essential content of things to the form of spiritual human knowledge.» From this, a number of consequences which fix the limits within which speculation must arise, crop up: «There is no thought without something thinkable. The foundation of the logical is the ontological. Every truth dwells in reality, for reality itself is the realization of a spiritual content, of an idea. Accordingly, things have a sense and an aim. The *logos,* the idea in reality, is only intelligible from a supreme *logos,* from the spirit of God. A realistic theory of knowledge in the sense of the ideal-realism, a teleological consideration of the world, the affirmation of the absolute character of the validity of knowledge and of values and rules of behaviour, a theistic metaphysics, are secondary elements of the concept of the *philosophia perennis (Das Wesen der Philosophie und die philosophischen Problème,* Bonn 1936, p. 178-179). Historically, these are the essential contents of the philosophic tradition which, starting from Plato and Aristotle, proceeds, enriched and assimilated by Christianity, with St; Agustine, St. Thomas Aquinas and Suarez, and carries oh to the present time with modern contributions along the same line. The *philosophia perennis,* rather than a historical! system (for none of them is wanting in obsolete elements),! is a continued and huge work of spiritual integration and: synthesis which it is mainly the business of Christian thought to perform, since that thought is protected from basic errors by Revelation.

Natural law (2).

2) Without modifying it, Vitoria adopts the medieval conception of the natural law elaborated by St. Agustine and

later developed by St. Thomas. Its basic element is that of' the *lex aeterna,* which expresses the idea of God's universal government over the whole universe, since it is, as St. Thomas says, «The circumspect reason of God inasmuch as it directs every action, every movement». *(Sum. theol.* la-ijae, q, 93, a. 1). Man partakes eminently of the eternal! law in his capacity as a rational being: In this way the con-(cept of *lex naturalis* springs up: the natural law is nothing else than «the rational creature's participation in the eternal law» *(ibid., ibid.,* q. 91, a. 2); that is to say, the eternal law itself impressed in man. The *lex naturalis* embraces both moral and natural law as it rules and governs human acts either as regards the final aim and end of man or in relation to other men; the *jus naturale is,* therefore, that part or the *lex naturalis* which governs social life, and, accordingly, it was studied by the schoolmen when dealing with Justice. The *lex* ■'*positiva humana* is derived from; natural law by way of conclusion or inmediate determination of its principles. Finally, positive divine law *(lex divina^ positiva)* was directly issued by God in the Holy Scriptures. Its study was consequently a theological matter. This Christian philosophy of law was to find its most perfect expression in Suarez's immortal treatise *De legibus ac Deo legislatore* (1613).

II. Everything which in the light of natural reason appears to all men to be clearly just, being unjust that which is opposed to it, such as, for instance, not to steal, kill an innocent person or do to anyone that which we would not suffer others to do to us, belongs to natural law.

(In IIam-Hae de just., q. 57, a. 2, 4.)

III. To [the realm] of natural law belongs also all of that which by the way of manifest implication can be inferred of self-evident principles.

(In IIam-IIae de just., q. 57, a. 2, 4.)

Natural law and positive law. Subordination of positive law to natural law.

IV. Everything which by the nature of the thing itself is right belongs to natural law.

That which is right by the force of law or because of private conventions, but not through the nature of the thing itself, belongs to positive law.

Natural law and necessary law are one.and the same thing; that is, natural law is that which is necessary and does not consequently depend upon any will. And all that which depends upon the will and approval of men, is called positive law.

(In IIam-IIae de just., q. 57, a. 2, 1-2.)

V. If there were any human law which without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law.

(De Ind., de tit. leg., 2.)

3) This doctrine is reasserted in the texts no. IX, XIII, LI and LII.

The natural foundations of society. The state as a perfect (sovereign) society.

VI. Since human societies have been established for this purpose—namely, that we should bear one another's burdens—and 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.

(De pot. civ., 4.)

VII. A State is properly called a perfect community. But the essence of the difficulty is in saying what a perfect community is.

By way of solution be it noted that a thing is called perfect when it is a completed whole, for that is imperfect in which there is something wanting, and, on the other hand, that is perfect from which nothing is wanting. 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 arid its own magistrates.

(De jure belli, 'I.)

VIII. 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].

(*De pot. Eccl. pr.,* q. 3.·, p. 3?, 4.)

Moral necessity and divine origin of political power.

IX. All power—whether public or private—by which the secular State is governed, is not only just and legitimate, but is so surely ordained of God, tlîat not even by the consent of the whole world can it be destroyed or annulled.

(De *pot. civ.,* 1.)

X. 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... (4). The same purpose and necessity underlie the existence of public powers. For if councils and assemblies of men are necessary to the security of mortals, it is also true that no society can continue to exist without some force and power to govern and provide for it; the use and the utility of public power, and of the community, and society are absolutely the same.

(De *pot. civ.,* 5.)

4) The need of living in society does not appear in man as a blind force which fatality impells, but as a need of his rational nature which must be *freely* fulfilled. Man, unlike the ant or the bee, chooses social life with full knowledge and free will, because the attainment of his final end requires it. That is why· Aristotle said, and the schoolmen after

him, that he who refuses to live in company with his fellow creatures must be either more than man or less than man, but not a man. But free will is not properly a constitutive element of society, as Hobbes and Rousseau claimed later; it is, we may say, merely declarative, inasmuch as it consciously externalises man's social tendency. In this sense it can be spoken of as a «social pact», according to Vitoria and to the schoolmen in general, as can be easily inferred from this and the other texts collected here. (See mainly no. XI, XIII, and XXI.

XI. If we prove that public power has been set up by natural law. then—since God is the sole author of 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 (5).

{De pot. civ., 6.)

5) This conception, common to the schoolmen, gives the correct interpretation of St. Paul's principle *non est potestas nisi a Deo (Rom.* XIII, 1): for God is not the immediate, but the remote cause of power, inasmuch as He is the creator of human nature. In the same sense is natural law said to be divine law since it is based upon the rational human nature created by God; instead, positive divine law issues immediately from God by revelation. The Scholastic conception is opposed to the theory of the divine right of kings (supported, for instance, by James I of England), according to which the prince receives his power directly from God. A less rigid form of this theory is that of the providential divine law (Joseph de Maistre, de Bonald) according to which the all-ruling providence promotes to power those who should occupy it (cf. J. Leclercq, *Leçons de droit naturel,* vol. II, *L'Etat ou la politique,* 2nd. ed., Louvain, 1934, IV chapter). While from the Scholastic point of view the community, acting as an immediate cause, has the right to choose its own definite form of government (cf. no. XXI), a thing which leads logically to a limitation of power, the other conception encourages autocracy and absolutism, since the ruler, receiving his power directly from God, is responsible to Him alone.

pi

XII. God ... has so fashioned the nature and disposition of man that he cannot prosper unless he dwell in a social state...

And if States and societies are established in accordance with divine of natural law, the same is true of power, without which States could not exist.

{De pot. civ., 6.)

XIII. If all the citizens should agree to dispense with these powers, in order that they might be bound by no law and that there should be no one to command, the agreement would be null and void, being contrary to natural law.

{De pot. civ., 10.)

Power in itself is not the fruit of sin.

XIV. ... I deny that there is no power in the state of innocence. Were there, neither magistrates nor princes who would control men through the fear of punishment, there would certainly be still a directing and ruling power, as, for instance,'the paternal power, to which children must submit.

(De pot. Eccl. pr., q. 1.», 13.)

XV. It must be borne in mind that, even if there were no coercitive or coactive domination or power in the state of innocence, ... when mankind would multiply itself, property would be divided up and there would be princes; there would be some directing and ruling power, as, for instance, teachers to educate young people, and provosts for putting order in practical affairs. If this were not the case, utter confusion and disorder would ensue, even when everyone lived rigthly, w;th

each one living after his own fancy, observing customs and habits contrary to those of the rest... There can be no doubt that, if the state of innocence had subsisted, laws and rules would have been given both for civil and spiritual life and chiefly for the divine worship... (6).

6) As it will be seen, political power, for the schoolmen, is not in itself the fruit of sin. Nor is it a mere remedy against sin instituted by God in order to ameliorate its effects. What sin brought with it was the *juridical coaction,* which becomes necessary whenever men do not spontaneously accept legitimate authority. Adopting Troeltsch's well-known distinction, both in Stoic and Christian natural law, between an absolute natural law (of the «Golden Age», and of the «state of innocence», respectively) and a relative natural law (subsequent to the corruption of mankind, and the original fall), we might say that if power itself belongs to the realm of absolute natural law, coercitive power belongs to that of relative natural law. While this idea appears clearly expressed in medieval scholasticism, the thought of the Fathers of the Church, and particularly that of Stl Agustine, shows a certain lack of precision, which has given rise to utterly different interpretations. We believe, however, that on the whole, their standpoint is the same as that of schoolmen, although tempered by the force with which they stress the effects of sin on human nature. Particularly as far as the Eagle of Hippone is especially concerned, see our work, *El derecho v el Estadd en San Agueti*n, Madrid, 1944.

Definition of power. Power (potestas) and force (potentia).

XVI. Power and force are [two) different things. We do not call matter, nor sense, nor intellect, nor the will, «powers», but «forces».

Instead, we call powers, and not forces, the magistrates, priests, and any other authority... [As St. Thomas wrote]

power, apart from the force to act, involves.a certain [amount of] preeminence and authority.

(De pot. Eccl. pr.,q. 1.*, 1-2.)

XVII. Public power is the faculty, authority or right to govern the civil State.

(De pot. civ., 10.)

The purpose of political power: the common good.

XVIII. If all were equal, and subject to no power, each individual would draw away from the others in accordance with his own opinions and will; the commonwealth would of necessity be torn apart; and the State would be dissolved —unless there were some providential force to provide for the common welfare and consider the common good...

Just as the human body could not be preserved in its integrity, without some directing force to regulate the* various members, making them of mutual use and—what is more important—of service to the whole man; even so the State would necessarily lose its integrity, if every individual were solicitous for his own welfare, and every citizen were heedless of the public good (7).

(De pot. civ., 5.)

7) Vitoria maintains a superindividualistic—«universalisée», as Spann would say—conception of the State, without incurring in the exaggerations of the modern organistic theories. The image of the organism, of classical growth, so magnificently applied by St. Paul to the Church *fl. Corinth.,* XII) offers a handy and profound simile to show us 'that the State is something more than the sum of the individuals which form it.

XIX. A prince ought to subordinate both peace and war to the common weal pf his State... Herein, indeed, is the difference between a lawful king and a tyrant, that the latter directs his government towards his individual profit and advantage, but a king to the public welfare, as Aristotle says *(Politics,* bk. IV, ch. 10).

(De jure belli, 12.)

XX. The will of the legislator does not suffice to render human law just and binding, for the precepts of the latter must also be advantageous to the State and in harmony with the other laws (8).

(De pot. civ., 16.)

8) With this concise formula, Vitoria sums up as it were his objective groundwork, the «institutional» (Delos) foundation of law, inherited from St. Thomas Aquinas,'and which he will later, and audaciously, apply to the international sphere (cf. no. XXXVIII).

The power belongs to the community.

XXI. 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. The proof of this fact is as follows: since by natural and divine law there must be *a* power for the government of the State, and since—if common, positive, and human laws are laid aside—there is no reason for depositing that power in one person rather than in another; it necessarily follows that the community is self-sufficing and that it has the power to govern itself.

For if—before men gathered together into a State—no one person was superior of the others, it is in no way reasonable that in the assembly, or civil council, one individual should assume power over the others; especially not, in view of the fact that every man has by natural law the power and the right to defend himself, there being nothing more natural than to repel force by force. And certainly there is no reason to prevent the State from exercising this power over its citizens (as if they were the various members of one body), in order to preserve the integrity of the whole, and in a spirit of devotion to the public good (9).

(De pot. civ., 7.)

9) The doctrine which is set up here is the one generally adhered to by the schoolmen: power being necessary, and men being equal by nature, power is a common good of political society; the expressed or tacit appointment of Its own government falls, therefore, on political society; but, once this government is established, general obedience is due to it. This is clearly a *moderate democratic conception,*. It opposes the autocratical thesis of the divine right of kings (cf. note no. 5); but it is also different from the *radical democracy* of Rousseau, based solely, on the free will, for Rousseau makes of rulers mere mandatories of unlimited popular will, rulers who can be deposed at any moment, whenever this will has changed. It must be borne in mind, on the other hand, that the solution given to the problem of who is to wield power does not necessarily anticipate that which may be given to the problems of the exercise and limitations of power, which are different things altogether. For schoolmen, the democratic conception as applied to the immediate origin of power is bound, when reference to the exercise of power is made, to a theoretical preference for monarchy (cf. no. XXIX); and, when related to the limitations of power, to the rejection of absolutism (no. XXX). Instead, radical democracy may perfectly well lead to the absolutism of one man or party, provided power is granted to them by the majority. The democratic conception is precisely one of those which are nowadays most loosely applied, because the different problems referred to are not clearly stated. In his Christmas Message, 1944, Pope

Pius XII gave expression to the postulates of a true democracy. He particularly emphasized at a most suitable moment that «democracy, if understood in a wide sense, admits of a variety of forms and may exist both in monarchies and in republics»; that is to say, it is not restricted to a definite form of government.

A Transference and exercise of power. Forms of government.

XXII. Since the State possesses power over its own parts, and since this power cannot be exercised by the multitude (which could not conveniently make laws and issue edicts, settle disputes and punish transgressors), it has therefore been necessary that the administration of the State should be entrusted to the care of some person or persons (and it matters not whether this power is entrusted to one or to many)...

(De pot. civ., 8.)

XXIII. Aristotle *(Politics,* III) classifies the various sorts of rule thus: monarchies, or the rule of one; aristocracies, or the rule of a select number; and democracies, or popular rule—that is, the rule of the multitude.

(De pot. civ., 11.)

The principle of majority in the transference and exercise of power.

XXIV. If the State may entrust its power to some one individual, acting thus for its own advantage, it is certain that the dissent of one or of a few could not prevent the rest from caring for the welfare of the State; otherwise—that is, if the

consent of all were required—insufficient provision would be made for the good of the State, since unanimous consent is rarely or never found among a multitude.,It suffices, then, in order to do anything legitimately, that the majority should agree on the course in question.

This point can be satisfactorily demonstrated. For if two parties disagree, it must necessarily result that the sentiment of one party should prevail; and inasmuch as their desires conflict, the sentiment of the party which is in the minority ought not to prevail; therefore it is the sentiment of the majority which should dominate. Moreover, if the consent of all is required in order to create the king, why is it not also required in order that he be not so created? Why is unanimous consent more to be required in an affirmative than in a negative matter?

(De pot. civ., 14.)

XXV. A State can appoint any one it will to be its lord, and herefor the consent of all is not necessary, but the consent of majority suffices. For ... in matters touching the good of the State the decisions of the majority bind even when the rest are of a contrary mind; otherwise naught could be done for the welfare of the State, it being difficult to get all of the same way of thinking (10).

(De Ind., de tit. leg., 16.)

10) That the majority-principle is limited by the needs of the common good is the natural conclusion from the objective groundwork of law itself, as is brought .out in the note no. 8. The acceptance by Vitoria of the majority principle does not presuppose, therefore, any concession to juridical free will; the majority principle is valid only within the framework of the common good; moreover: it is, within these limits, a postulate of the common good itself.

The monarchy (11).

11) Vitoria devotes his whole attention to monarchy, dealing only occasionally with aristocracy and democracy. This is explained by the historical moment in which he wrote, for monarchy was then the most general form of government and, at the same time, the target of the most bitter attacks by its enemies.

XXVI. Not only is monarchy, or royal power, just and legitimate; but, in addition to this, the power of kings is derived from divine and natural law, not from the State itself, nor directly from men (12). The proof is as follows: 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 (and it matters not whether this power is entrusted to one or to many); it has not been impossible, then, to transfer a power identical with the power of the State.

(De pot. civ., 8.)

12) There seems to be a contradiction between this text and the following two In relation to those reprinted above, regarding the immanency of power in the community itself (no. XXI) and the transference of power by the latter to one or more persons (no. XXII). A careful examination of the context shows, however, that no such contradiction exists, as Professor E. GalXn recently stressed in «La teorfa del poder politico segùn Francisco de Vitoria» (reprint from the «Revista General de Legislacidn y Jurisprudencia», July-August 1944). The controversy with those who attacked on grounds of natural law the legitimacy of the monarchy (writes GalXn) moved Vitoria «in his reaction, to go here further in words than in thought». Vitoria himself explains

the precise scope of his thought when, on referring to the transference of power to the prince, he points out that the power of the prince is the same as that of the State, «and, as this is justified both by natural and divine law, therefore, consequently and in the last resort, the position of the former is justified from the same point of view» (p. 18-24). In our opinion, Vitoria also wishes to point out another question: that the king is not a mere mandatory of the State (as every ruler is, according to Rousseau) but an organ of the State, which, once constituted as such, cannot have his power rescinded while the prince is exercising it for the benefit of the common, good. This comes out clearly from text no. XXVIII (mainly in its closing sentence).

XXVII. It is apparent, then, that kingly power is not derived from the State, but from God Himself... For even though this power is established by the State (since the latter creates the king), nevertheless the State, in this very act, transfers not merely the power, but also its own authority; so that there are not two sorts of power—one, that of the king; the other, that of the community. Therefore, just as we say that the power of the State is established by God and by natural law, so of a surety we must say the same of all kingly power...

(De pot. civ., 8.)

XXVIII. Such a king rules over the whole State: that is, in a monarchical government, the king rules not only over the individual citizens, but also over the State as a whole, which is to say, over all the citizens at one time... For if the State were over the king, the result would be a democracy —that is, popular rule—and consequently not a monarchy, which is the rule of one individual.

(De pot. civ., 14.)

XXIX. There is no less liberty in a monarchy than in an aristocracy, or a democracy...

The proof is as follows: since power itself is the same...

whether it be invested in one or in many, and since it is better to be subject to one than to many (for there are as many masters as there are superior authorities), therefore, there is not less liberty where all are subject to one, than where all are subject to many; especially in view of the fact that where there are many rulers there are many who are ambitious for power, so that the State—because of their diverse purposes—will necessarily be afflicted with frequent insurrections and dissensions... The best rule, therefore, is the rule of one, just as the whole world is governed by one all-wise King and Master (13).

{De pot. civ., 11.)

13) The theoretical preference for ïhe monarchical form of government, tempered *by* state representation, was the traditional attitude of the Sholastic world. In the government of one person the schoolmen saw the image of God's own universal government over the whole of creation. But, from the historical standpoint, it was admitted that any one of the three forms might be the most advisable, according to the circumstances, the character or the preference of the people themselves, etc. In any case, the essential condition was that the use of government should be for the common good. This attitude of indifference towards concrete forms.of government so long as they aim at the common good, is also in line with the attitude of the Catholic Church proclaimed, for example, by Leo XIII in his encyclical *Libertas, 1888,* and by Pius XII in his Christmas Message, 1942.

CIVIL· LAWS ARE BINDING UPON THE LEGISLATORS.

XXX. Finally, this question arises: Whether civil laws are binding upon legislators, and in particular, upon kings. For some persons are of the opinion that these legislators and kings are not so bound, inasmuch as they are over all the State and no one can have an obligation imposed upon him unless it be by a superior; but it is more probable that kings and legisla-

tors are bound by the laws. The proof of this is, first: that a legislator of this sort injures the State, and the other citizens if, being himself a part of the State, he does not bear a part of the burden — in a manner that accords, to be sure, with the person, his quality, and his rank.

But since this obligation is indirect, we shall offer another proof. 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 which are made by the king, are binding upon the king himself.

This argument is confirmed as follows: Under an aristocratic form of government, the decrees of the Senate are binding upon the very senators who issued them; under a popular government the plebiscite is binding upon the whole people; and therefore laws made by the king are in like manner binding upon the king himself. Moreover, 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 (14).

(De pot. civ., 21.)

14) This text, which faces courageously the problem of what will later be called «State of Law» closes the door to absolutism and arbitrariness in monarchical government, opposing therefore theories such as that of the divine right of kings and enlightened despotism, with their motto *princeps legibus solutus est.* The context shows that the thesis stated here must be applied to every form of governmnt.

Whether the laws of tyrants have a binding force.

XXXI. Another question arises, namely: Whether the laws of tyrants are binding. It might seem that they are not binding, since tyrants have no power at all.

Nevertheless, the contrary is true: For if the State is oppressed by a tyrant and is not *sui juris;* and if the tyrant has not the power to create laws, while at the same time it is impossible to put into execution the laws laid down before his time: then, unless obedience is rendered to the tyrant, the State must perish.

It seems indeed that those laws which are acceptable to the State are binding, even when they have been created by a tyrant — not, to be sure, because he established them, but by the agreement of the State; for it is better to obey the laws created by a tyrant, than to obey no law at all. It is certain and obvious that the State would suffer injury if, owing to the fact that princes possessed of no just title have seized the country, there should be no provision for judicial trials, and no way in which to punish or restrain malefactors; for if the laws laid down by a tyrant are not binding, then he is not a legitimate judge (15).

(De pot. civ., 23.)

15) Vitoria's attitude towards the problem of tyranny, the traditional object of passionate controversies and, at that time, conspicuously in evidence, is characterised by its cautious moderation. Apart from this, Vitoria does nothing more here than suggest one aspect of the question.

Responsibility of the state for the acts of his agents.

XXXII. The State as a whole may rightfully be punished for the sin of the monarch. Wherefore, if any king make unjust war upon another ruler, the injured party may plunder and make lawful war upon and slay the subjects of the unjust king, even if all these subjects be innocent; for when the king has once been set up by the State, any immoderate act of his is charged against the State; since the latter is bound to entrust

this power only to him who will be just in the exercise and use of power, and since, in doing otherwise, the State lays itself open to danger.

(De pot. civ., 12.)

XXXIII. If great spiritual injury to Africa should result from the civil administration of the Spanish State, the Spanish prince would be bound to correct that form of administration.

(De Pot. Eccl. Pn, q. 3?, p. 3.', 10.)

Conception and foundations of the law of nations. The

NATURAL AND THE POSITIVE LAW OF NATIONS.

XXXIV. What natural reason has established among all nations is called the *jus gentium* (16).

(De Ind., de tit. leg., 2.)

16) We see in this definition the difference between Vitoria's *jus gentium* and the Roman *jus gentium:* the latter was above all a universal common law, founded upon the unity of rational human nature, and in which there was a mixture of public and private elements. Its conception is not univocal in Roman sources. Gaius had given the famous definition *Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium,* a definition which Vitoria uses as his starting point. But, on substituting his own *gentes for Gaius', homines* (with which he seemed to have committed a tautology) Vitoria gives the *jus gentium* the character of a *jus inter gentes,* a juridical order binding human groups which are independent as such; he creates, in short, the modern concept of international law. The transition from the Roman to this modem concept of the law of nations can already be found in the definition of the *jus gentium* given by St. Isidore of Seville: *Jus gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, indutiae, legatorum non violandorum religio, connubia inter alienigenas prohibita. Et inde jus gentium, quia eo jures*

omnes fere gentes utuntur. (Etym., V, 6). This definition, although defective in form (since it arises from a mere enumeration of headings) is remarkable with regard to its contents (for the headings therein listed are in fact, and for the most part, typical of modern international law); and moreover it deserves attention for its final reference to «usage in almost every nation *(gente).»* But the idea of international law itself had gained ground apart from the definitions of the schools: it was St. Augustine who, somewhat earlier than St. Isidore, expressed it in a famous passage where he said that it would be a blessing for the world if there were, instead of a universal empire such as the Roman, numerous kingdoms which could live together in peace within their natural frontiers, just as there are in a city many houses Inhabited by a large number of citizens *(De civitate Dei,* IV, 15). St. Thomas, on the other hand,, contributed nothing towards this question because he confined himself to the fruitless and arduous undertaking of trying to conciliate the discordant classifications and definitions of the Roman jurists. Vitoria's definition finally! shows how inaccurate it is to ascribe to Zouch the paternity of the term *jus inter gentes,* as some contemporary! internationalists do. The substitution of *gentes* for *homines* in the definition of Gaius was wholly conscious. As Nrs had already observed, the context is by itself a proof for this. But we have another proof in the *Lectures upon the secunda secundae de justitia,* q. 57, a. 3, 3, where we read that the *jus gentium* as a positive law springs out of the «general consent of the *gentes* and nations> («Ita de jure gentium dicimus, quod quoddam factum est ex communi consensu omnium *gentium et nationum»).*

XXXV. And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. 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 in behalf of the common good of all (17).

(De Ind., de tit. leg., 4.)

17) This Vitorian distinction between *a jus gentium naturals* and a *jus gentium voluntarium,* developed later by Suarez and Grotius above all, stands in contrast with the unilateralness in which the rationalistic school of the natural law and the daw of nations (Pufendorf, Thomasius) and the nineteenth-century juridical positivism will later incur: while the former only admits law founded on reason, the latter acknowledges nothing but positive law, a manifestation of the will of the legislator. Criticizing juridical positivism *avant la lettre,* Vitoria aptly defines also the role played by the will, which is one and the same in international as in municipal law. The will of the State, even when in accord with that of other States, is not the foundation of international law, as juridical positivism pretends, but an instance of the determination of positive law, which receives from natural law its compelling force. As in the problem of the social pact (although there is here a far wider margin of liberty), the will is declarative, not constitutive: it is also limited in its determinations by an objective principle, the common good of the whole world. Needless to say, it is express in treaties and implied in international customs.

XXXVI. International law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one 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 (18).

(De pot. civ., 21.)

18) Naturally, this applies only to *common* international law. Particular international law escapes, by definition, the principle stated here.

The principle of «pacta sunt servanda».

XXXVII. He who enters into a pact of his own free will, is nevertheless bound thereby (19).

(De pot. civ., 21.)

19) The precept *pacta sunt servanda* is not in itself the foundation of international law, as certain authors pretend; it is nothing but a precept of natural law which is applied both to' inter-individual and to 'inter-social relations, to private and to municipal law (cf. text ho. XXX), as well as to international law. Although not expressly pointed out here, the legitimacy of the object, together with freely given consent, is an indispensable requisite for the validity of this precept.

The COMMON GOOD OF THE WHOLE WORLD.

XXXVIII. 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 (20).

(De pot. civ., 13.)

20) The idea so nobly and daringly expressed in this text is nothing but the application to the world, conceived as a moral unity, of the principle of common good which is defended in municipal law. His energetic formula implies the condemnation of policy based on national egoism.— Vitoria's general doctrine on this matter in re-affirmed in the *Lectures upon the secunda-secundae de just.,* q. 62, a. 1, *28.*

Extension of the general principles of public law to non-christian nations. universality of the law of nations.

XXXIX. There is among the pagans complete temporal and civil authority.

(De pot. Eccl. pr., q. 1,‘, 8.)

XL. The people in question (the Indian aborigines) were in peaceable possession of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown.

(De Ind., sect. I, 4.)

XLI. Unbelief does not prevent anyone from being a true owner.

The proposition is also supported, by the reasoning of St. Thomas, namely: Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law dr on human law; therefore they are not destroyed by want of faith...

(De Ind., sect. I,' 7.)

XLII. The barbarians in question can not be barred from being true owners, alike in public and in private law, by reason of the sin of unbelief or any other mortal sin.

(De Ind., sect. I, 19.)

XLIII. The Indian aborigines are not barred on this ground [want of reason] from the exercise of true dominion.

This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason: they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason... Accordingly I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing, for even among oürselves we find .many peasants who differ little from brutes (21).

...The upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not beeing true owners.

(*De Ind.*, sect. I, 23-24.)

21) The application of the general principles of public law to any given political community and, consequently its recognition as a member of the international community will be, according to this text, a mere *question of fact:* it will depend on the fulfilment by the community of those minimum organizational requisites demanded for the normal development of a human existence worthy of the name. The Stoic and Christian principle of the essential equality of men, based on their common nature and destiny, implies, according to Vitoria, the need of supposing that even barbarians are endowed with a like condition. Only when the lack of this is clearly established, the negation to them of a full juridical-international capacity would be justified, and, consequently, their being kept in a colonial status. In another place, (cf. no, LXXII) Vitoria gives expression to most clearly stated reservations about this supposition due to the dangers of abuse therein contained. It is well known that Ginés de Sepûlveda held the opposite position on this important issue, sticking to the view—and basing himself

for this on Aristotle—of the natural inferiority of barbarians with respect to Europeans.

With this extension of a full juridical-international personality to non-Christian peoples, especially to those in the recently discovered New World, Vitoria decisively overturned the Medieval idea of Christendom, with a solidly religious foundation, which he now substituted by the idea of the world as a universal community of peoples organized in States and founded on natural law. Within this universal community, Christendom continued to exist as a narrower community, distinguished by the profession of one and the same religious faith, although bound later on and gradually to lose that inner cohesion owing to the Reformation and to the evergrowing prominence of political nationalism. Upon the theoretical basis established here by Vitoria the principle of the *juridical equality of States* could be built. With the exception of the Three-Power Pact (in which a hegemonical conception of international relations witmn the «great areas» or «vital spaces» with one or several ruling powers found expression), this principle informs the great documents of contemporary international law (thus the Chapultepec Act, point no. 1 of part I; also the Charter of the United Nations Organization) and the Pope's doctrine of peace (Pius XII Christmas Message, 1939, point no. 1). However, in face of the undeniable fact of the effective inequality of States, intermediate formulae have been sought with the end in view of harmonizing the principle of juridical equality with the reality of a greater or lesser participation in the responsibility for the maintenance of peace and the eventual application of sanctions. Hence the distinction between permanent and non-permanent members in the Council of the late League of Nations and the present United Nations Security Council. What does not appear to be justified, on the contrary, is the power of veto granted to the «Big-Five», for in matters in which these are directly concerned, they are at one and the same time judges and integral parts, a principle which the very creation of international organizations such as the U. N. O. tends precisely to suppress.

XLIV. The Emperor is not the lord of the whole earth (22).

(De Ind., de tit. non leg., 1.)

22) Vitoria takes sides against the medieval political; universalism of a hierarchical and Unitarian type, which, as it is known, reached its climax in Dante's treatise *De monarchia.*

XLV. The Pope is not civil or temporal lord of the whole world in the proper sense of the words «lordship» and «civil power» (23).

(De Ind., de tit. non leg., 3.)

23) The theory of the curialists (Aegidius Romanus, Alvarus Pelagius) and of the canonists who attributed to the Pope a direct jurisdiction in temporal affairs and a universal; temporal power, is rejected in these words and in a most energetic fashion. Vitoria considered such a theory as so utterly absurd that he described it as «a mere invention to please and flatter the Popes». *(De pot. Eccl. ret. prior,* q^ 3.*, p. 3.a, 2.) Apart from this, the argument has no more than a historical significance, since it was hardly defended; after the Council of Trent.

XLVI. ... When princes are at variance with one another about some right of sovereignty and are rushing into war, he can act as judge and inquire into the claims of the parties and deliver judgment, a judgment which the princes are bound to respect, lest those numerous spiritual evils should befall

which are the inevitable results of a war between Christian princes (24)

(De Ind., de tit. non leg., 5.)

24) Vitoria attributes to the Pope this judicial function because in war spiritual values are at stake the safeguard of which is entrusted to him by divine law. It is one of the consequences of the principle of the Pope's indirect power in temporal affairs (no. CXVIII to CXXIII).

The natural right of fellowship and communication, a consequence of the universal community of mankind.

XLVII. The first title to be named [whereby the Indians might have come under the sway of the Spaniards] is that of natural society and fellowship.

(De Ind., de tit. leg., I.)

XLVIII. The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them.

It is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.

... It appears that friendship among men exists by natural law and it is against nature to shun the society of harmless folk.

... If it were not lawful for the Spaniards to travel among them, this would be either by natural law or by divine law, or by human law. And if there were any human law which without any cause took away rights conferred by natural and

divine law, it would be inhumane and unreasonable and consequently would not have the force of law (25).

(De Ind., de tit. leg., 2.)

25) The natural right of communication finds its corrective in the legitimate interests of the respective peoples, although these cannot arbitrarily hinder it. Vitoria, with his usual generosity and nobleness of mind, attacks in these pages the problems—to-day more pressing than ever due to the ever increasing industrialization of the world—originated by the just distribution of the natural wealth and raw materials of the world, immigration as a means of regulating the demographical inequality among different countries, etc.: problems which, if not considered *sub specie orbis,* in relation to the actual needs of different peoples, integrated in the common good of the whole world, will continue to be a bone of dissension, friction and war, just as the unequitative distribution of property and an excessive social inequality within a given State are the bones of internal dissension and revolution. Since both hypotheses involve one and the same problem, the solution must be sought under one and the same guiding spirit. In a like manner, this was recognized also by the authors of the Atlantic Charter: according to point no. 4 of this generous document, the United. States and Great Britain will spare no effort to help every State, large or small, victorious or defeated, to have, on grounds of equity, access to the trade and raw materials of the world; and, according to no. 5 of the same declaration, they will seek to attain a cooperation between all nations with a view to securing better conditions of labour, economical progress and social security for all. It seems useless to say that all the requirements demanded by Vitoria support also the Pope's peace doctrine. (Christmas Message 1939, point 1st. and 1941, point 3rd.)

XLIX. *As* is said in *Dig.,* 1, 1, 3, «Nature has established a bond of relationship between all men», and so it is contrary to natural law for one man to dissociate himself from another without good reason. «Man», says Ovid, «is not a wolf to his fellow man, but a man» (26).

(De Ind., de tit. leg., 3.)

26) This phrase from Ovid, adopted by Vitoria, is a reply to Plautus' sentence, used and circulated by Hobbes, according to which man is a wolf for man *(homo homini lupus).* If the former gives poetical expression to the Aristotelian conception of man as a naturally social being, fitted therefore with inborn altruistic feelings (obviously compatible with the wider or narrower play of egocentric tendencies), the latter in turn reflects a pessimistic conception, arising from Sophist and Epicurean roots, a conception which does not admit of the existence in man of any other stimulus for human acts than those springing from egoism. The most celebrated antecedent for the idea of an unsocial «state of nature», dominated by the idea of all fighting against all, is undoubtedly, in Antiquity, in the myth which Plato puts in the mouth of Protagoras, in the dialogue which bears this name (322 a-c).

L. 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.

(De Ind., de tit. leg., 4.)

Freedom of international trade and navigation.

LI. «By natural law running water and the sea (27) are common to all, so are rivers and harbors, and by the law of nations 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.

(De Ind., de tit. leg., 2.)

27) Here is in outline the principle of the freedom of the seas which Vazquez de Menchaca and Hugo Grotius were to develop at length later on. It is a well-known fact that the

principle in question did not gain general recognition until the nineteenth century (and even then, it was confined to peace time). Its interpretation has given rise to much disputation, for it affected interests which were considered vital by the sea powers. The practice of the belligerents during World War II implies a restrictive tendency with respect to previous development, mainly in so far as neutral shipping is concerned. Vitoria's adherence to the principle of the freedom of the seas is particularly significant since the opposite thesis was at that very time far more useful for Spain (as it was to be later on for England). The Atlantic Charter, in point no. 7, proclaims the principle of freedom of the seas in peace time.

LII. The Spaniards may lawfully carry on trade amopg the native Indians, so' long as they do no harm to their country, 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.

It is an apparent rule of the *jus gentium* that foreigners may carry on trade, provided they do not hurt to citizens.

It is clear that if the Spaniards kept off the French from trade with the Spaniards, and this not for the good of Spain, but in order to prevent the French from sharing in some advantage, that practice would offend against righteousness and charity.

(*De Ind.*, de tit. leg., 3.)

Equality of treatment and reciprocity (28).

28) *Equality of treatment* and *reciprocity* are, like the right of communication, a direct consequence of the Stoic and Christian principle of unity in the nature of mankind. Thus it is explained that any ideological deviation from this principle and from the Christian conception of the world in general has done nothing but build up more and

more impassable barriers among men, based on racial, national, social, religious and political differences. Are these not the reasons for the painful set-backs which are too much in evidence in this world of ours? An interesting side light of Vitoria's consistent attitude on this point is his non-acceptance of the rights of discovery as giving a title for the seizure of lands already inhabited by the Indians, for this title «in and by itself gives no support to a seizure of the aborigines any more than if it had been they who had discovered us». (De *Ind.,* de tit. non leg., 7.) See also *Leet, upon the secunda secundae,* q. 62, a. 1, 28. But few things are so difficult to man as equanimity in comparing actions, when one of the terms of comparison are our own actions or those of the society to which we belong. (See an allusion to this in Pius XII Message to the Cardinal College, Christmas 1945.)

LIII. It is manifest that it is not justifiable to take anything that they possess from either Saracens or Jews or other unbelievers as such, that is, because they are unbelievers; but the act would be theft or robbery no less than if it were done to Christians.

(De Ind., sect. I, 7.)

LIV. [Vitoria adopts the doctrine of St. Thomas and Cajetan] that unbelievers can not be deprived of their property, save only that the subjects of temporal princes can be deprived for reasons known to the law and rendering their subjects in general liable to deprivation.

(De Ind., de tit. non leg., 7.)

LV. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives.

And, in sum, it is certain that the aborigines can no more

keep off the Spaniards from trade than Christians can keep off other Christians.

(*De Ind.*, de tit. leg., 3.)

LVI. If the natives allow the Spaniards to traffic peaceably among them, the Spaniards could not allege in this connection any just cause for seizing their goods any more than the goods of Christians.

(*De Ind.*, de tit. leg., 8.)

Option to citizenship. Domicile.

LVII. If children of any Spaniard be born there and they wish to acquire citizenship, it seems they can not be barred either from citizenship or from the advantages enjoyed by other citizens — I refer to the case where the parerits had their domicile there.

Aye, 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 other foreigners are wont to become citizens, they can not be impeded any more than others, and consequently they enjoy the privileges of citizens just as others do, provided they also submit to the burdens to which others submit.

(*De Ind.*, de tit. leg., 5.)

The right to preach the Gospel.

LVIII. Christians have a right to preach and declare the Gospel in barbarian lands.

(*De Ind.*, de tit. leg., 9.)

LIX. If the Indians allow the Spaniards freely and without hindrance to preach the Gospel, then whether they do or do not receive the faith, this furnishes no lawful ground for making war on them and seizing in any other way their lands.

(De Ind., de tit. leg., 11.)

LX. If the Indians—whether it be their lords or the populace—prevent the Spaniards from freely preaching the Gospel, the Spaniards, after first reasoning with them in order to remove scandal, may preach it despite their unwillingness, and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the Gospel. And the same pronouncement must be made in the case where they allow preaching, but hinder conversion either by killing or otherwise punishing those who have been converted to Christ or by deterring others by threats and fears.

[But this must occur always] with a regard for moderation and proportion, so as to go no further than necessity demands, preferring to abstain from what they lawfully might do rather than transgress due limits, and with an intent directed more to the welfare of the aborigines than to their own gain.

Careful attention must, however, be paid to what St. Paul says (I *Corinthians,* ch. 6): «All things are lawful unto me, but not all things are expedient». So everything said above must be taken as spoken absolutely. For it may be that these wars and massacres and spoliations will hinder rather than procure and further the conversion of the Indians (29).

, *(De Ind.,* de tit. leg., 12.)

29) Vitoria's delicate sense of historical responsibility should be noted here, conscious as he is that even the best; of reasons are liable to be unduly detracted by those who, in bad faith, make them their own. Hence his concern for

giving precision to the theoretical and practical scope of, the titles which he admits and which must in every case[be sifted by prudence (cf. also no. LXI, LXII, LXV). His constant generosity towards the innocent and the weak, even though they be unbelievers, should also be noted.

LXI. War is no argument for the truth of the Christian faith. Therefore the Indians can not be induced by war to believe, but rather to feign belief and reception of the Christian faith, which is monstrous and a sacrilege.

(*De Ind.,* de tit. non leg., 15.)

Intervention based on incapacity. Colonization as a trust.

LXII. There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so 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 inter-! ests the sovereigns of Spain might undertake the administra-! tion 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.

And surely this might be founded on the precept of charity, they being our neighbors and we being bound to look after their welfare. Let this, however, as I have already said, be put forward without dogmatism and subject also to the limitation that any such interposition 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 soul and salvation lies (30).

(De Ind., de tit. leg., 18.)

30) The problem of the *legitimacy of colonization* is stated here, with Vitoria conditioning the only admissible solution from the Christian standpoint, that which conceives colonization as a trust for the welfare of the peoples which have not yet reached cultural and political maturity. This; clear condition formulated by Vitoria will not fail toj surprise many readers. In order to understand it well, and, to give it its proper value, it will be enough to remember| his opinion about the juridical personality of the political non-Christian communities (cf. no. XLIII and the accompany-1 ing note), and his sense of historical responsibility to which) we have already referred. This sense is sharpened here' because there will always be a very wide margin f©r possible abuses. This tutelary idea of colonization was, in aj certain degree, present in the adoption of internationals mandates after World War I, and it seems to be now behind the idea of international trusteeship which the U. N. O.j propounds.

Intervention as a humanitarian requisite.

LXIII. Another possible title is founded either on thej tyranny of those who bear rule among the aborigines of Ame-, rica or on the tyrannical laws which work wrong to innocenti folk there, such as that which allows the sacrifice of innocent! people or the killing in other ways of uncondemned people, for cannibalistic purposes (31). I assert also that without the Pope's authority the Spaniards can stop all such nefarious usage and ritual among the aborigines, being entitled to rescue innocent people from an unjust death.

(De Ind., de tit. leg., 15.)

31) It is known that the problem of the so-called intervention for humanitarian reasons, as, in general, intervention in the domestic affairs of other States, is one of the most difficult problems posed by international law. Its theoretical solution is ultimately conditioned by the concept of sovereignty in use as well as the accepted fundamental rights of the human person and the State. Anyone who has an absolute concept of the free will of sovereignty obviously does not admit any legitimate intervention in the domestic policies of other States, whatever their methods· might me (thus Pradier-Fodéré, Lawrence): in the most serious cases,,; intervention will be imperative because of moral or political reasons, never because of juridical reasons. On the other hand, he who, like Vitoria, conceives sovereignty as limited! by the objective principles of natural law, will be bound to admit a legitimate intervention in the case of a serious violation of these principles by any State, even though it! may result only in injuries inflicted upon its own subject^ (i. e. LÉ Fur). It is apparent, however, that such an intervention (which is nothing but a special case of the application of international sanctions) has been shown, by its own nature, to be of an exceptional character. This is perfectly clear from Vitoria's own examples. Among the unquestionable cases of a lawful application of the principle of intervention for reasons of humanity were the slaughter of Christians in Armenia and other provinces of the Turkish Empire in the latter part of the nineteenth century and the beginning of the twentieth century. But the abuses to which the application of this principle has given rise, and the victims of which have generally been the small nations, give an air of particular modernity to the just solution of the problem suggested by Vitoria:· intervention is only; admissible when a serious violation of the essential rights of humanity has been committed, a violation of rights not! arbitrarily established on grounds of a mere personal on national preference, but based on the very nature of man and society. The fact that Vitoria fixes the limits of this right of intervention is deduced with great clearness from another text, which reads: «Christian princes cannot, even by the authorization of the Pope, restrain the Indians from sins against the law of nature or punish them because of those sins.» *(De Ind.,* de tit. non. leg. 16.) Apart from the hypothesis here considered, intervention in the domestic affairs bf other States cannot possibly be admitted. Though

accepted under the Holy Alliance in the name of the monarchical legitimacy, it has later been repudiated in the name of State sovereingty. This is, however, one of those questions in which theory is far from practice. It is in agreement with the general non-intervention principle in the Atlantic Charter, in point no. 3 of which it is affirmed that the United States and Great Britain respect the right of all peoples to choose the form of government under which they are to live. The Chapultepec Act was made even more poignant on this matter by reaffirming the rejection of intervention of one State in the internal and external affairs of an other, as already proclaimed in 1933 by the Seventh Pan-American Conference and by the Inter-American Conference for the Consolidation of Peace, in 1936. As far as the Three-Power Pact is concerned, it again introduced the opposite principle, but it reserved to Germany and Italy the monopoly of intervention in European affairs and to Japan the monopoly of intervention in the Far-Eastern affairs; the «powers foreign to those areas» were expressly excluded.

Freely accepted protectorate.

LXIV. 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, and herefor the consent of all is not neccessary, but the consent of the majority suffices (32).

(*De Ind.,* de tit. leg., 16.)

32) Here we have the theory of the *plebiscitary cession* of a territory or of a whole nation, which is nothing but! the consequence of the theory of the immanence of power; in the community Itself, brought out by Vitoria in texti no. XXI and those Immediately following. In the interna-

tional sphere this theory implies opposition to a policy of conquest and has become one of the fundamental aspirations of mankind's longing for peace and justice. It was included in point no. 2 of the Atlantic Charter: the United States and Great Britain «do not approve of territorial changes which are not in accordance with the wishes freely expressed by the peoples concerned». In a like manner, the Chapultepec Act. echoing the doctrine of the First Pan-American Conference (1890), condemns «territorial conquest» and establishes the non-recognition of «any acquisition obtained by force».

LXV. [But in order that the election be valid] fear and ignorance, which vitiate every choice, ought to be absent. But they were markedly operative in the cases of choice and acceptance under consideration... (33).

(*De Ind.,* de tit. non leg., 16.)

33) Both colonial and contemporary European history offer numerous examples attesting to the modern character of the problem which Vitoria broaches here in such a straightforward manner.

Solidarity for upholding the law.

LXVI. Another title may be found in the cause of allies and friends. For 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 rewards of victory with them... For there is no doubt, as Cajetan also asserts (*Secunda Secundae,* qu. 4, art. 1), that the cause of allies and friends is a just cause of war, a State being quite properly able, as against foreign wrongdoers, to summon foreigners to punish its enemies (34).

(*De Ind.,* de tit. leg., 17.)

34) Alliances must have a just aim such as, for instance, the safeguard of justice, which would greatly be insured when several States associate themselves against any eventual infringement of the same. Every alliance is, in turn, *a sensu contrario,* unlawful when concerted for the purpose of violating someone else's right. We have already here what later on will be called «collective security».

III

WAR AND ITS LAW

Lawfulness of defensive and offensive war. Need as the only justification for war.

LXVII. Since there can be no doubt that in a defensive war force may be employed to repel force *(Dig.,* 1,1, 3), this is also proved with regard to an offensive war, that is, a war where we are not only defending ourselves or seeking to reposess ourselves of property, but also where we are trying to avenge for some wrong done to us...

... As St. Augustine says *(De verbo Domini* and *Ad Bonifacium),* the end and aim of war is the peace and security of the State. But there can be no security in the State unless enemies are made to desist from wrong by the fear of war, for the situation with regard to war would be glaringly unfair, if all that a State could do when enemies attack it unjustly was to ward off the attack and if they could not follow this up by further steps.

A seventh proof comes from the end and aim and good of the whole world. For there would be no condition of happiness for the world, nay, its condition would be one of utter misery, if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate on them.

(De jure belli, 1.)

LXVIII. Princes have authority not only over their own subjects, but also over foreigners, so far as to prevent them from committing wrongs, and this is by the law of nations and by the authority of the whole world. Nay, it seems to be by natural law also, seeing that otherwise society could not hold together unless there was somewhere a power and authority to deter wrongdoers and prevent them from injuring the good and innocent. Now, everything needed for the government and preservation of society exists by natural law, and in no other way can we show that a State has by natural law authority to inflict pains and penalties on its citizens wo are dangerous to it. But if a State can do this to its own citizens, society at large no doubt can do it to all wicked and dangerous folk, and this can only be through the instrumentality of princes. It is, therefore, certain that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge (35).

(De jure belli, 19.)

35) The doctrine here maintained 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 (if it is to become reality), the world has to make use of States for the j compulsory execution of international law: thus war is! construed as act of vindictive justice in which the just! belligerent acts in the capacity of a judge with powers; delegated to it by the whole world. This is the reason why! the *jus ad bellum* appears as a mere variety of the *jus puniendi* and rests ultimately on the same foundations.

LXIX. In war everything is lawful which the defence of the common weal requires.

(De jure belli, 15.)

Who has the right to resort to war?

LXX. Every State has authority to declare and to make war.

... A State is within its rights not only in defending itself,, but also in avenging itself and its subjects and in redressing wrongs. This is proved by what Aristotle says in the third book of his *Politics,* namely, that a State ought to be sufficient unto itself. But it can not adequately protect the public weal and the position of the State if it can not avenge a wrong and take measures against its enemies. ... It is, therefore, imperative for the due ordering of human affairs that this authority be allowed to States (36).

(De jure belli, 5.)

36) To attribute the *jus ad bellum* exclusively to the State as a perfect society gives to war the nature of a public institution and suppresses so-called private war. The latter, very common in the Middle Ages, was bound to disappear witlT the formation of the modem State, with a unified contrai jurisdiction to which its component parts could always resort. In the ulterior development of international law nothing would hinder the transference of this right to war to a superstate entity with armed forces of its own. Precisely the lack of such an institution is what, in the present state of international life, justifies the resort to war as an *ultima ratio* by the State under attack. One of the great merits of Suarez is to have brought out that war is, rather than an institution belonging to natural law, an institution of the law of nations. *(De legibus,* II, 19, 4.) See also, in the extract LXVIII, both first sentences.

War aims.

LXXI. War is waged: Firstly, in defence of ourselves and what belongs to us; secondly, to recover things taken from

us; thirdly, to avenge a wrong suffered by us; fourthly, to secure peace and security.

(De jure belli, 44.)

Insufficient reasons for a resort to war.

LXXII. Difference of religion is not a cause of just war.

(De jure belli, 10.)

LXXIII. Extension of empire is not a just cause of war.

This is too well known to need proof...

(De jure belli, 11.)

LXXIV. Neither the personal glory of the prince nor any other advantage to him is a just cause of war.

This, too, is notorious. For a prince ought to subordinate both peace and war to the common weal of his State and not spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account.

... The rules relating to war ought to be for the common good of all and not for the private good of the prince.

(De jure belli, 12.)

A serious wrong is the only just cause of war.

LXXV. There is a single and only just cause for commencing a war, namely, a wrong received (37).

(De jure "belli, 13.)

37) In a certain sense, every just war is ultimately ai defensive war inasmuch as it presupposes the existence i of a wrong inflicted by another State, although technically (it may be possible to distinguish between defensive war (that which is waged to repel an actual attack) and offensive war (that which is made to vindicate or punish a wrong already committed). The difficulties arise when coming to determine the concept of «injury», of «wrong», or of «aggression»—to use the more common term in the language of to-day—as everybody knows. Verdross rightly points out that, under the influence of positivism, there has been in modern times a tendency to conceive injury as a violation of *positive* international law, while the classics understood by it an infringement of both *natural law and positive international law consistent, with natural law (Volkerrecht,* Berlin, 1937, p. 192). The question is that, from their standpoint, there is no actual validity in a positive law which is contrary to natural law, though it may have, for opportunist reasons, some historical force (Cf. no. V, IX, XLVIII, LI, LII, and *De Indis,* de tit. leg., 6). There is in this matter an evident analogy between the theory of just war and the theory of just resistance to power.

LXXVI. Not every kind and degree of wrong can suffice for commencing a war.

The proof of this is that not even upon one's own fellow-countrymen is it lawful for every offence to exact atrocious punishments, such as death or banishment or confiscation of property. As, then, the evils inflicted in war are all of a severe arid atrocious character, such as slaughter and fire and devastation, it is not lawful for slight wrongs to pursue the authors of the wrongs with war, seeing that the degree of the punishment ought *to* correspond to the measure of the offence *(Deuteronomy,* ch. 25).

(De jure belli, 14.)

LXXVII. No war is just the conduct of which is manifestly more harmful to the State than it is good and advan-

tageous; and this is-true regardless of any other claims or reasons that may be advanced to make of it a just war.

The proof is: That if the State has no power to make war except for the purpose of defending itself, and protecting itself and its property, it follows that any war will be unjust, whether it be begun by the king or by the State, through which the latter is not rendered greater, but rather is enfeebled and impaired.

(De pot. civ., 13.)

LXXVIII. There is a doubtful point in connection with the justice of a war, whether it be enough for a just war that the prince believes himself to have a just cause. On this point let my first proposition be: This belief is not always enough.

The result would otherwise be that very many wars would be just on both sides, for although it is not a common occurrence for princes to wage war in bad faith, they nearly always think theirs is a just cause.

(De jure belli, 20.)

LXXIX. It is essential for a just war that an exceedingly careful examination be made of the justice and causes of the war and that the reasons of those who on grounds of equity oppose it be listened to.

... This is self-evident. 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.

(De jure belli, 21.)

The justice of war and private conscience.

LXXX. ... Subjects whose conscience is against the justice of a war may not engage in it whether they be right or wrong.

(De jure belli, 23.)

LXXXI. Senators and petty rulers and in general all who are admitted on summons or voluntarily to the public council or the prince's council ought, and are bound, to examine into the cause of an unjust war.

(De jure belli, 24.)

LXXXII. Other lesser folk who have no place or audience in the prince's council or in the public council are under no obligation to examine the causes of a war, but may serve in it in reliance on their betters.

(De jure belli, .25.)

LXXXIII. Nevertheless the proofs and tokens of the injustice of the war may be such that ignorance would be no excuse even to subjects of this sort who serve in it.

(De jure belli, 26.)

LXXXIV. There is no doubt that in a defensive war subjects may, even though the matter be doubtful, follow their prince to the war; nay, that they are bound to follow him, and also in an offensive war. The first proof is in the fact that, as has been said, a prince is not able, and ought not always to render reasons for the war to his subjects, and if subjects can not serve in war except they are first satisfied of its justice, the State would fall into grave peril and the door would be opened to wrongdoing.

Also, in doubtful matters the safer course ought to be adopted. Now, if subjects in a case of doubt do not follow their prince to the war, they expose themselves to the risk of betraying their State to the enemy, and this is a much more serious thing than fighting against the enemy despite a doubt (38).

(*De jure belli,* 31.)

38) The serious problem of the so-called, conscientious objectors, which has originated quite frequently within certain sects which profess a radical pacifism, comes to be resolved here ultimately with a fine sense of proportion and a realistic recognition of the values at stake. The great casuist Vitoria does not fail to see the practical difficulty involved by the fact that the obligation to take part in war depends on the intimate individual conviction of its justice, as a result of insufficient information about the actual causes for it. A delicate intuitive sense of certain requisites peculiar to modern diplomatic action comes clearly to the fore in this text. In short, the subject will have to give his government a wide margin of trust in such a delicate and serious matter.

Doubtful reasons fob war.

LXXXV. What should be done when the justice of the war is doubtful, that is, when there are apparent and probable reasons on both sides?

First proposition: As regards the princes themselves, it seems that if one be in lawful possession, the other may not try to turn him out by war and armed force, so long as the doubt remains...

The proof is that doubtful matters the party in possession has the better position. Therefore it is not lawful to dispossess the possessor in favor of a doubtful cause.

Further, if the matter were being heard by a lawful judge, he would never in case of doubt dispossess the party in possession. Therefore, if we postulate that those princes who are asserting a right are judges in their own cause, they may not lawfully eject a possessor so long as there is any doubt about the title.

(De jure belli, 27.)

LXXXVI. He who is in doubt about his own title is bound, even though he be in peaceable possession, to examine carefully into the cause and give a quiet hearing to the arguments of the other side, if so be he may thus attain certitude either in favor of himself or the other.

This is proved by the fact that a man who is in doubt and neglects to ascertain the truth is not in possession in good faith (39).

(De jure belli, 29.)

39) This obligation to analyze the doubts which might arise about one's own right as the consequence of the allegations of the opposite party is for the moralist a means of withdrawing support from the historical *status quo,* stopping it from becoming the means of an absolute immunity for him who holds to it, since his privileged position rests solely upon good faith. When good faith is lost because of neglect In the elucidation of doubt, this privileged position comes, therefore, to an end. We are not unaware of the fact that we are dealing with a simple moral factor whose effectiveness will depend on the greater or lesser righteousness of the ruler's individual conscience. From the standpoint of law, one of the greatest deficiencies—perhaps

the greatest—of international law is precisely the lack, or the deffectiVe development, of institutions permitting a peaceful change of the historical *status quo* according to criteria of a greater justice. Hence, the territorial readjustments and, in general, the «new arrangements» in the international community have nearly always emerged from wars or war cycles and, therefore, from the exercise of force to a greater or lesser degree. It is enough to think, for instance, of the congresses of Westfalia, Vienna, Versailles. In this sense it would be possible to say, paraphrasing Heraclitus, that war is the mother of positive international law. Within the State, law offers in turn broader legal channels for social and economical readjustments, for social dynamics, although it does not always reach complete success in blocking force as a means for the solution of many of these questions.

LXXXVII. After examination of the case, the lawful possessor is not bound to quit possession so long as the doubt reasonably persists, but may lawfully retain it.

(De jure belli, 30.)

Can a war be just for both sides?

LXXXVHI. The fourth doubt is: Whether a war can be just on both sides.

The following is my answer: First proposition: Apart from ignorance the case clearly can not occur, for if the right and justice of each side be certain, it is unlawful to fight against it, either in offence or in defence.

Second proposition: Assuming a demonstrable ignorance either of fact or of law, it may be that on the side where true justice is the war is just of 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.

Also, on the side of the subjects at any rate, this may often occur; for even if we assume that a prince who is carrying on an unjust war knows about its injustice, still (as has been said) subjects may in good faith follow their prince, and in this way the subjects on both sides may be doing what is lawful when they fight (40).

(De jure belli, 32.)

40) If, from an objetive point of view, war can only be just on one of the sides taking part in it, subjectively speaking it can be just on both sides when either side acts in good faith. (Cf. also *De Indis,* de tit. leg., 6.) Such a possibility, already noted by Vitoria, was later emphasized by Luis de Molina *(De justitia et jure,* II, disp. 102). Rev. Father Yves de la Briere, the most cospicuous restorer of the classical theory of a just war, devotes also minute attention to this. Since Vitoria's time, the possibility that war might be subjectively just on both sides has considerably increased. If the wars which the theologians and jurists of the Middle Ages and the Renaissance had witnessed were merely dynastic wars in which some province was frequently in dispute, or the cause of which was clear enough, thé wars of our own times are far more complex and with much deeper roots. In their origin they are a mixture of political, economical, demographical, ideological, etc. factors, the bnpartial and unmistakable interpretation of which is difficult even for the interested parties. These factors are not the same when examined either from within or without a given country. National traditions, patriotism and so many other questions enter the picture and influence the outlook of the observer. In fact, social psychology—De la Briere observes—shows that each belligerent has widely different opinions about the role and responsibilities of their own State and those of an adversary. As Vitoria very aptly stresses, these reactions are much more frequent in the subjects than in thdir leaders, due to the fact that the latter are in possession of much greater information.

Position of non-combatants in the course of war.

LXXXIX. The deliberate slaughter of the innocent is never lawful in itself.

(De jure belli, 35.)

XC. Sometimes it is right, in virtue of collateral circumstances, to slay the innocent even knowingly, as when a fortress or city is stormed in a just war, although it is known that there are a number of innocent people in it and although cannon and other engines of war can not be discharged or fire applied to buildings without destroying innocent together with guilty.

... Great attention, however, must be paid to the point already taken, namely, the obligation to see that greater evils do not arise out of the war than the war would avert. For if little effect upon the ultimate issue of the war is to be expected from the storming of a fortress or fortified town wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by use of fire or engines of war or other means likely to overwhelm indifferently both innocent and guilty (41).

(De jure belli, 37.)

41) Once more prudence as an intellectual force must fuse the use to be made of abstract right with the requisites of the common good, not only national, but world wide. This problem has been widened in our own times with so-called total war and the consequent lesser differentiation between combatants and non-combatants. World War II has been marked precisely by the great suffering and enormous casualties inflicted on civilians as a result of the aerial bombardment of cities and industrial plants, mass deport-

ations, political, social, racial and religious discriminations, etc. Vitoria dealt also with the lot of non-combatants (and among them, neutrals, see extracts XCIV and XCV) in his *Leet, upon the secunda secundae,* q. 64, a. 6.

XCI. Here a doubt may arise whether the killing of guiltless persons is lawful when they may be expected to cause danger m the fùture... [For instance, the children of the enemies, or the adult male civilans who may be mobilized.]

My answer is that although this killing may possibly be defended, yet I believe that it is in no wise right, seeing that evil is not to be done even in order to avoid greater evil still, and it is intolerable that any one should be killed for a future fault. There are, moreover, other available measures of precaution against their future conduct, namely, captivity, exile, etc...

(De jure belli, 38.)

XCII. It is certainly lawful to despoil the innocent of goods and things which the enemy would use against us, such as arms, ships and engines of war.

(De jure belli, 39.)

XCIII. If a war can be carried on effectively enough without the spoliation of the agricultural population and other innocent folk, they ought not to be despoiled.

(De jure belli, 40.)

Safety of neutral life and goods.

XCIV. ...It is not lawful to slay either foreigners or guests who are sojourning among the enemy, for they are presumed innocent, and in truth they are not enemies.

(De jure belli, 36.)

XCV. The spoliation of foreigners and travellers on enemy soil, unless they are obviously at fault, is in no wise lawful, they not being enemies (42).

(De jure belli, 40.)

42) Vitoria gave us but the embryo of a theory of neutrality. He dealt with this problem only occasionally.

Reprisals.

XCVI. If the enemy refuse to restore things wrongfully seized by them and the injured party can not otherwise properly recoup himself, he may do so wherever satisfaction is obtainable, whether from guilty or from innocent.

For instance, if French brigands made a raid into Spanish territory and the French King would not, though able, compel them to restore their booty, the Spanish might, on the authorization of their sovereign, despoil French merchants or farmers, however innocent these might be. This is because, although the French State or Sovereign might initially be blameless, yet it is a breach of duty, as St. Augustine says, for them to neglect to vindicate the right against the wrongdoing of their subjects, and the injured sovereign can take satisfaction from every member and portion of their State.

(De jure belli, 41.)

A hostage's right.

XCVII. [It is doubtful] whether it is lawful at any rate to kill hostages who have been taken from the enemy, either in

time of truce or on the conclusion of a war, if the enemy break faith and do not abide by their undertakings.

My answer is a single proposition: If the hostages are in other respects among the guilty, as, for instance, because they have borne arms, they may rightfully be killed in that case; if, however, they are innocent, as, for instance, if they be children or women or other innocent folk, it is obvious from what has been said above that they can not be killed.

(De jure belli, 43.)

The fate of the guilty (43).

43) In the three texts quoted below, Vitoria seems to refer .especially to guilt by violation of war laws and usages, whilst in the texts grouped under the word «sanctions» (no. CVII-CXI) he thinks undoubtedly rather of the responsibility of political leaders who had started an unjust war. Thus at least the fact of Vitoria's separating these two groups of texts in such an orderly exposition as is gained by reading *De jure belli,* can be interpreted.

Crimes derived from the violation of war regulations and usages and, generally speaking, of human rights, are no more than a variety of common delinquency. Punishment for them has come to be widely admitted and con. sidered as lawful. It is to-day more than a requirement of natural law, for it is also to be exacted according to positive law (for instance, art 3 of the Fourth Hague Convention of 1907). It must go beyond the scope of crimes committed in the course of carrying out military operations, *and* include unlawful governmental and administrative acts' in military occupied enemy territories. World War II has given rise to a tragic proliferation of this aspect of criml-nality as a result of the length and bitterness of the armed hostilities, the long military occupations of whole countries and the general increase of racial, national and ideological hatred in our times and to which we have already referred (cf. note 28). From a theoretical point of view the main questions are those which affect: a) as far as secondary

agencies are concerned, the limits of due *obedience* io *superior commands;* b) as far as superior, military and political agencies are concerned, the *war methods* which may lawfully be adopted and imposed upon the troops under their command. From a practical point of view the main difficulty lies in securing an effective and just punishement, shunning both the impunity and leniency of national courts and the possible excessive rigorousness of enemy courts. Therefore de la Briere propounds that trials should be carried out by international courts and that *every* crime of which any of the belligerent powers is suspected should be submitted to them (op. cit., p. 170-171). The standpoint of the distinguished French internationalist appears to be based on unquestionably solid arguments.

XCVIII. In the actual heat of battle, either in the storming or in the defence of a city, all who resist may be killed indiscriminately; and, briefly, this is so as long as affairs are in peril.

(De jure belli, 45.)

XCIX. Even when victory has been won and no danger remains, it is lawful to kill the guilty...

... This is permissible against our own wrongdoing citizens. Therefore also against foreigners; for, as said above, a prince when at war has by right of war the same authority over the' enemy as if he were their lawful judge and prince...

(De jure belli, 46.)

C. Merely by way of avenging a wrong it is not always lawful to kill all the guilty.

... We ought, then, to take into account the nature of the wrong done by the enemy and of the damage they have caused and of their other offences, and from that standpoint to move to our revenge and punishment, without any cruelty and inhumanity.

(De jure belli, 47.)

Reparations.

CI. It is permissible to recapt everything that has been lost and any part of the same.

(De jure belli, 16.)

CII. It is lawful to make good out of enemy property the expenses of the war and all damages wrongfully caused by the enemy.

(De jure belli, 17.)

CIII. There is no doubt that everything captured in a just war vests in the seizor up to the amount which provides satisfaction for the things that have been wrongfully seized and which covers expenses also.

This needs no proof, for that is the end and aim of war.

(De jure belli, 50.)

CIV. There is no doubt about the lawfulness of seizing and holding the land and fortresses and towns of the enemy, so far as is necessary to obtain compensation for the damages he has caused.

(De jure belli, 54.)

The problem of security.

CV. A prince may ... in a just war ... do whatever is necessary in order to obtain peace and security from the enemy;

for example, destroy an enemy's fortress and even build one on enemy soil, if this be necessary in order to avert a dangerous attack of the enemy.

This shows that even when victory has been won and redress obtained, the enemy may be made to give hostages, ships, arms, and other things, when this is genuinely necessary for keeping the enemy in his duty and preventing him from becoming dangerous again.

(De jure belli, 18.)

CVI. In order to obtain security and avoid danger from our enemy it is also lawful to seize and hold a fortress or city belonging to him which is necessary for our defence or for taking away from him an opportunity of hurting us.

(De jure belli, 55.)

Sanctions (44).

44) The responsibility of the political leaders who started a war is the result of the very theory of a just war. It is wholly meaningless, for Instance, for those who, like Spinoza, Hegel or Treitschke, see in war something of the nature of God's own judgment, a judgment which inexorably bestows victory on the party which deserves it, and sanctions only in an *a* posteriori fashion those who had the right to come out victorious. On the contrary, those adhering to the Christian tradition conside? war to be an evil which can only be justified on grounds of restoring former violations of the law; it is pbvious, therefore, that, at least in principle, those who have incurred violations of the law and have given rise to armed conflict, incur also the consequent responsibility. Adhering to this theoretical standpoint, which, we repeat, is but the logical consequence of the whole conception of just war, those who at present fall back on this theory (De la Briere, Robert Regout) tend

however, to restrict the adoption of a specific legal sanction against the rulers of the defeated country to criminal terms Of punishment in addition to due reparations for damages. They argue about the difficulty of effectively determining moral guilt as a result of the greater complexity of modern wars (see note 40) and the fact that the *ratione delicti* jurisdiction of the attacked against the attacking State is derogatory as to general principles of public law. The Rev. Father Regout moreover mentions the principle *nullum crimen sine lege* as a reason not to be underrated, though he acknowledges that it does not possess an absolute character. The problem would be quite different were there internationl organizations to determine, declare and apply questions ,of law, for in that case, personal coercitive action against the leaders of the guilty State would no more be, as de la Briere observes, derogatory to the general rules of law.

Similar to the responsibility for initiating war is the responsibility for an abusive continuation of war by either belligerent.. Although Vitoria does not examine this expressly, it is implicit in his whole theory of a just war, according to which war is only justified on grounds of necessity.

CVII. ... Even after victory has been won and redress obtained and peace and safety been secured, it is lawful to avenge the wrong received from the enemy and to take measures against him and exact punishment from him for the wrongs he has done.

(De jure belli, 19.)

CVIIL It is also lawful, in return for a wrong received and by way of punishment, that is, in revenge, to mulct the enemy of a part of his territory in proportion to the character of the wrong, or even on this ground to seize a fortress or town.

This, however, must be done within due limits, as already said, and not as utterly far as our strength and armed force enable us to go in seizing and storming. And 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 caüsed 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...

" *(De jure belli,* 56.)

V CIX. [It is doubtful:] Whether it is lawful to impose a tribute on conquered enemies.

My answer is that it is undoubtedly lawful, not only in order to recoup damages, but also as a punishment and by way of revenge.

(De jure belli, 57.)

CX. [Another doubt is:] Whether it is lawful to depose the princes of the enemy and appoint new ones or keep the princedom for oneself.

First proposition: This is not unqualifiedly permissible, nor for any and every cause of just war, as appears from what has been said. For punishment should not exceed the degree and nature of the offence. Nay, punishments should be awarded restrictively, and rewards extensively. This is not a rule of human law only, but also of natural and divine law. Therefore, even assuming that the enemy's offence is *a* sufficient cause of war, it will not always suffice to justify the overthrow of the enemy's sovereignty and the deposition of lawful and natural princes; for these would be utterly savage and inhumane measures.

(De jure belli, 58.)

CXI. Second proposition: It is undeniable that there may sometimes arise sufficient and lawful causes for effecting a

change of princes or for seizing a sovereignty; and this may be either because of the number and aggravated quality of the damages and wrongs which have been wrought or, especially, when security and peace can not otherwise be had of the enemy and grave danger from them would threaten the State if this were'not done.

This is obvious, for if the seizure of a city is lawful for good cause ... it follows that the removal if its prince is also lawful. And the same holds good of *a* province and the prince of a province, if proportionately graver cause arise.

The excuse

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(De jure belli, 59.)

CXIII. 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,* ch. 12). Moreover, he should reflect that others are his neighbours, 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 defence 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 ought to 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 judge and not as 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 a special reason for this is that in general among Christians all the fault is to be laid at the 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, that *Quidquid de-*

lirant reges, plectantur Achivi (For every folly their kings commit the punishment should fall upon the Greeks).
(De jure belli, 60.)

45) Vitoria, like classical commentators in general, examines the supposition that the just belligerent wins in the end, a hypothesis which has been referred to in the preceding notes. But there are two other cases possible, which escape naturally the conclusions of this doctrine. Firstly, *war can become unjust for both sides* if, for instance, the belligerent starting fighting for a right cause loses the initial good intention which should have guided him and instead of aiming at the restoration of violated principles of law, intends to use the hostilities (already begun) for nationally egoistic ends. There is nothing strange in such a hypothesis; which has much of the plausible in it, bearing in mind the exacerbated nationalism of the last few centuries, which has become so prominent in international relations. Who is, then, to be the judge and who the judged? Secondly, he who does not believe in a pre-establisned harmony between right and might will have to admit *the possibility that precisely the unjust belligerent wins in a just war.* This is a radical shortcoming of the classical theory of a just war, which sets rigorous limits upon its effective value. For war as a legal sanction will be ineffective against a more powerful State than the injured one, unless a sufficiently strong and coherent coalition can be formed against it. This may be the reason why cardinal Cajetan urged the prince, before starting a just war, to have a moral certainty of his victory, for were it not so, he would'run the risk of throwing his people into a greater evil by ending on the losing side; he also maintained that the just aggressor should be stronger than its guilty opponent, for only in this manner would the hoped-for aim of such a war be reached. *(Comment, to the Sum. Theol.,* ad nam-Hne, 0-96, a. 4.) And Suarez himself, who rejected this condition, holding that a certain probability of victory or at least a balance of arguments for or against it, were enough, had to admit, however, that when the hope of victory Is slight an offensive war should not be carried out; defensive war cannot, in fact, be renounced, as is not a matter of free will, but of need *(De bello,* sect. IV, no. 10). This is the

tragical confession of the limited practical scope of the theory of the just. war. This theory will attain true significance only through the establishement of international organizations for determining, declaring and executing questions of law, which would secure for all nations, large or small, respect for their fundamental rights, in which a genuine international spirit should prevail. More than the organization (however necessary it may be), the spirit is what matters, as Pius XII reminded in his Christmas Message 1939 (5th point). Because in the ultimate analysis, institutions are worth no more than the worth of the men themselves. Only experience will show whether the United Nations Organization is capable of attaining such an objective. This is, in any case, the fervent desire of all men of good will.

The duality of powers in the catholic conception.

CXIV. The aim of the State and of secular power is merely temporal — let us say, peaceful conditions, and the community life of the citizens.

(De pot. civ., 15.)

CXV. One power would certainly suffice if the benefits to which man must be directed and the evils from which he must be kept belonged exclusively to present-day social life; but as the life of the faithful is aimed not only at the civil end and state, but also, and more emphatically, at the eternal values, following the advice of the Lord *(Matth.* VI): «Seek first the kingdom of God» ...it follows that to encourage and direct men towards a supernatural end, or to redirect them if they faulted, by means of praise, reward or fear of punishment, another power outside the orbit of the civil is required.

Hugo expresses this argument most elegantly *(De sacram.,* pars 2) when he says: «There is an earthly life and a spiritual life. So that both may preserve justice and bring profit, it was first determined who should provide and distribute profits to them both in an equitable manner. Consequently, if human societies cannot survive without both these lives, spiritual and earthly, two powers are necessary so that justice

be preserved ...one to direct material things and govern life, and another to direct spiritual things and govern spiritual life».

(De pot. Eccl. prior, q. 1.a, 4-5.)

CXVI. Just as it is necessary, for the State, that human works be directed towards a human end and that there shall be some in command and some who obey, so it is that there shall be someone who commands and assumes the leadership of men towards a supernatural end, in order that their works be directed toward this end.,

(De pot. Eccl. pr., q. 3?, p. 2.a, 2.)

CXVII. All spiritual and ecclesiastical power wich now resides in the Church comes, directly or indirectly, from divine positive law.

(De pot. Eccl. pr., q. 3?, p. 1?, 4.)

Priority of the spiritual power founded on superior aims.

CXVIII. It is indubitable that the spiritual (power) is the more excellent, the more eminent, and possessed of the supreme dignity: since different faculties, like different arts and forces, and like all things which serve a purpose, are to be valued according to the purpose which they serve; and since the purpose of spiritual power excels that of temporal power to the same extent that perfect blessedness and ultimate felicity excel human or earthly felicity... Spiritual power, then, is in every way greater and more august than temporal power, and should be accorded a veneration and obedience in like

manner greater than the veneration and obedience accorded to temporal power.

(De pot. Eccl. pr., q. 3.*, p. 3.*, 1.)

Indirect subordination of temporal power to spiritual power (46).

46) The doctrine of «indirect power», which Vitoria develops in the following texts, is the *communis opinio* of Catholic writers and has been officially adopted by the Catholic Church. This doctrine (with the exception of some documents distinguished by excessive verbiage, the origin of which must be sought in thé heat of political struggles) was already upheld by the great medieval Popes—a fact that has not always been acknowledged· This is the case, tor instance, of St. Gregory VII (princes are subject to the Pope *non ratione dominii, sed ratione* peccati);'Innocent III *(«Non intendimus judicare de feudo, cujus ad ipsum* [regem] *spectat judicium... sed decernere de peccato, cujus ad nos pertinet sine dubitatione censura, quam in quemlibet exercere possumus et debemus»;* in another text he recognizes that the king of France has none superior to him in temporal matters); Innocent IV *(«Temporalia et spiritualia diversa sunt et diversos judices habent, nec unus judex habet se intromittere de pertinentibus ad alium, licet se ad invicem, juvare debent»).* We also find it In St. Thomas Aquinas; but its systematic and definitite expression was chiefly due to the jesuits Suarez and St. Robert Bellarmine. In the nineteenth century, it was solemnly reasserted by Leo XIII in his encyclical *Immortale Dei.* It .will be noted that this doctrine is opposed, on one side, to *medieval theocracy* (see note 23), and on the other, to *Caesarian papism* (which aims at subjecting spiritual to temporal power) and to the *absolute separation oi* spiritual and *temporal* power (which reduces religion to a «private matter»). Moreover, let us point out that from the Christian point of view, the question of the relations between Church and State is not a philosophical problem, but a *theological pro-*

blem, for the Church is not an institution of natural law, but of divine positive law (see text CXVII). For non-believers, the determining factor will be the effective importance of the Church as a cultural and social force (cf. J. Leclercq, *Leçons de droit naturel,* t. II, *L'Etat ou la -politique,* 2e éd., Louvain 1934, p. 117 ff.).

CXIX. Temporal power is not' derived from the Pope, as inferior spiritual powers'are — for example, bishoprics,, or curateships, or other spiritual powers.

(De pot. Eccl, pr., q. 3.a, p. 3.*, 2.)

CXX. Civil power is not subject to the temporal power of the Pope.

(De pot. Eccl. pr., q. 3.', p. 3.a, 4.)

CXXI. The Pope possesses no strictly temporal power.

(De pot. Eccl. pr., q. 3?, p. 3.*, 8.)

CXXII. Notwithstanding the truth of thé foregoing statements, civil power is, in a sense, subject to the power of the Pope — not to his temporal, but to his spiritual, power.

The proposition may be proved thus: if the end of a given faculty is subordinate to the end of another faculty, then the first faculty is itself subordinate to the second. ([Aristotle] *Ethics,* 1 [1]). Saint Thomas (IIa-IIae, qu. 40, art. 3 [art. 2, reply to obj. 3]) makes this same comparison. But the end of temporal power is, in a sense, subordinate to the end of spiritual power; and therefore the former power is subordinate to the latter. The proof of this assumption is as follows: human felicity is imperfect, and is subordinate to the perfection of supernatural blessedness; just as the art of manufacturing

weapons is subordinate to that of soldiers and generals, while the art of ship-building is subordinate to that of the seaman, and the art of making ploughshares to that of agriculture, and so on. We should not suppose, then, that civil and spiritual power are like, two distinct and separate States, such as the French and English nations.

(De pot. Eccl. pr., q. 3.*, p. 3.·, 10.)

CXXIII. The Pope has temporal power only so far as it is in subservience to matters spiritual, that is, as far as is necessary for the administration of spiritual affairs... And the proof of it lies in the fact that an art to which a higher end pertains is imperative and preceptive as regards the arts to which lower ends pertain *(Ethics,* bk. I). But the end of spiritual power is ultimate felicity, while the end of civil power is political felicity. Therefore, temporal power is subject to spiritual power.

(De Ind., de tit. non leg., 5.)

Organic unity of the Christian social order, temporal and spiritual.

CXXrV. The whole Church is one body; not two bodies resulting from two States, civil and spiritual, but one only. This fact is made evident in the statement of Saint Paul to which we have already referred. For Christ is the Head of the whole Church, and it would be monstrous if there should exist a body with no head, or if one head were joined to two bodies; on the contrary, that which exists is a single body in which all the members are mutually connected and properly subordinated, the ignoble parts serving those parts which are more noble; so also in the Christian State, all offices, ends, and powers are properly subordinated and connected. And since

it can in no wise be said that the spiritual members serve those which are temporal, one must say that, on the contrary, the temporal members serve those which are spiritual, and are dependent upon them.

(De pot. Eccl. pr., q. 3.a, p. 3.a, 10.)

We omit the general works on international law, and the treatises of history of philosophy and Catholic theology; in almost all of them a more or less developed reference to Vitoria's doctrines will be found.

Far from seeking to establish a complete bibliography—which is an impossible thing here, due to the large number of monographs and articles dealing with Vitoria—we prefer to offer a selection arranged according to the point of view'of the respective works. Such a selection is, on the other hand, more useful than any endless cataloguing of a very extensive bibliography. We omit, naturally, those püblica'tions the character of which is strictly theological.

No special mention is made either of the lectures and articles which appeared in the *Anuario de la Asociaciôn Francisco de Vitoria*. Be it sufficient to indicate that there are among them interesting contributions to our knowledge of Vitoria. The re-appearance of this important publication has been announced.

I. GENERAL CRITICAL PROBLEMS.

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