

Justice, Peace and Dominicans 1216–1999

IV — Francisco Vitoria: The Rights of Enemies and Strangers

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Under the heading 'Vitoria, Founder of International Law' *Blackfriars* of October 1946 devoted a whole issue to the Spanish Dominican who had died 400 years earlier. The timing could not have been more appropriate: what one might call the 'legal audit' of the Second World War was in full swing. Uppermost in the minds of the contributors were the Nuremberg Trials (verdicts delivered that month). Article 6 of the Tribunal Charter defined crimes against 'humanity' (the contemporary, secularized version of natural law) in terms that would have been recognizable to Vitoria, and indeed—via 400 years of development—owed much to his original concept of the law of nations.¹ Then there were the atomic bombs used the previous year. The end of the world war had left a legacy of guilt about the practice of destroying whole cities by strategic bombing, culminating at Hiroshima and Nagasaki. This put the principle of non-combatant immunity—fully integrated with just war theory for the first time by Vitoria—at the centre of the arguments for and against the new weapons. Further, the revival of international law in the first half of the twentieth century had issued the previous October in the United Nations Charter and would lead in 1948 (just 50 years ago last month) to the signing of the Declaration of Human Rights and the Genocide Convention; and three years later, in 1949, there was to be the first of the Geneva Conventions on the limitation of warfare.

In the studies of the origins of international law that had preceded all this postwar legislative activity—largely the work of secular American and Jewish scholars—it was Vitoria the Spanish Catholic theologian who had been identified as the 'founding father', the one who had first established basic principles for the coexistence of independent sovereign states in the global community of the modern world.² Perhaps rather too much was claimed by way of Vitoria's modernity—he was after all a scholastic, lecturing on medieval texts; he had some medieval attitudes, notably towards Saracens and heretics, and Christendom was still a reality for him. But his timely birth and the momentous events taking place during the period of his mature work—together with his special genius for

bringing universal principles into relation with the big political events of the day in a clear and intelligible manner, and his undoubted respect for the human dignity of non-Europeans—made all the difference to his future relevance.

One article every 50 years on a Dominican theologian of such contemporary importance is not a lot, and it suggests the need for a little biographical detail.³

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Francisco de Vitoria was born in 1483, probably in Burgos to a family from the Basque town of Gasteiz/Vitoria. He was 9 years old when Columbus, back from his first voyage, was received by Ferdinand and Isabella in Burgos, then the Spanish capital. The revolution in European consciousness that began with that discovery was the background of Vitoria's early years and it is clear that he followed reports of that astonishing conflict with great attention. At the same time the Protestant Reformation was tearing Christendom into irreconcilable fragments and a new era of 'holy wars' was about to begin.

In Spain it was also a time when religious orders—including the Dominicans—were experiencing regeneration through a return to their sources. The young Francisco soon followed his elder brother Diego into the priory of Burgos and was professed in 1506. The following year he was sent to Paris where he became a master and teacher of theology, returning to Spain in 1523 to teach at Valladolid. There he lectured on grace, sin, human society and the two areas of law, ecclesiastical and civil. Then in 1526, when he was 43, by popular choice of the students of the University of Salamanca he was elected to the leading theological post in Spain—that of Prima Professor. The title referred not to his rank but to the time of his lecture: 6 a.m., immediately after the Office of Prime, and presumably before breakfast (and about 100 years before coffee). This was the *lectio* or 'reading'—though unlike some other teachers, Vitoria did not just read the text. Moreover, he broke with the age-old custom of lecturing on the *Sentences* of Peter Lombard, and took the *Summa Theologiae* of Aquinas as the standard text and thus the foundation of theological teaching—a change already initiated in Paris by his teacher, Peter Crockaert. It represented a resourcing of scholasticism after generations of baroque decline and subsequent retreat in the face of the new humanism. It was to become the basis of the so-called 'Renaissance Scholasticism' of sixteenth-century Salamanca, led first by Vitoria and then by the Jesuit, Francisco Suarez. But they were less concerned with looking back to the past than with the problems of their own epoch,

notably the laws of war, colonialism, slavery, and resistance to unjust governments.

Eye-witnesses tell us that Vitoria's lectures were meticulously prepared—giving him little time to do anything else in his career — delivered with great clarity and wit, and always relevant to contemporary events. He usually answered questions, even during the lecture, which, given that he could be speaking to up to 900 students, tells us something about the attention he commanded. None of the lectures survive except in the form of students' notes. He never gave the same lecture twice, rewriting his course for every one of his 26 years at Salamanca, and would tell his students it was no use their using last year's notes since he was constantly rethinking his theology.

More important for posterity is the special annual lecture, called *relectio*, or rereading, in which Vitoria would formally discuss some important topic of the day in the light of the theological principles they had been studying through the year. Since the *relectio* was governed by a time limit of two hours, the material was presented with sharp focus on the main point. The university published these and we have a fair number of them. There is an immense amount of learning behind them, worn very lightly. The most important and influential for European thought are undoubtedly the two he wrote on the treatment of the inhabitants of the New World, *De Indis Noviter Inventis* (On the Indians Lately Discovered) and *De Jure Belli* (On the Law of War made by the Spaniards on the Barbarians). It is their brevity and clarity which makes these texts so accessible—something that has done a lot for their continued influence.

A modern reader finds it difficult to decide whether Vitoria is a theologian, a political moralist or a lawyer. But none of these over-defined categories can contain his writings.⁴ He was employed as a theologian, choosing as his text the *Summa* of Aquinas, behind which, of course, lay the Scriptures. But the theology he inherited from this source covered everything governed by divine or natural law. It was jurisprudence in the most comprehensive sense. He deliberately narrowed the scope of his public utterances, however, and was so much the more effective for that.⁵ He specialized in what we would call 'political theology'. The topics he chose to engage with were the most contested ones of his day: the powers of the pope; the nature of civil power; the wars between Christian powers—France and Spain; the marriage and divorce of monarchs (Henry VIII and Catherine of Aragon, daughter of Ferdinand and Isabella); the rights of newly discovered peoples to possess their land and govern themselves; the right and wrong methods of spreading the Christian faith to pagans; how to deal with people whose religion requires human sacrifice; whether they can be forcibly baptized. Vitoria never sidesteps

conclusions which might be politically unwelcome to the powers—notably the King of Spain and the Papacy. At a time when political theology really mattered, as never before, or perhaps since, Vitoria's was the voice which carried most weight, but it was an independent voice, never that of a 'court theologian'.

For the first time ever in theology, Vitoria addressed the problem of Christian states confronting organized, peaceful non-Christian communities with their own political authority, with their own laws. Previously there had been barbarian raiders—and Saracens. But unlike these 'enemies of Christendom', the newly discovered peoples were assumed not to be hostile to Christianity. They may have been 'barbarians', but it was the Christians who were the raiders.

His two treatises amount to a code of ethics for first contact: what can be assumed on behalf of the humanity and—to use a modern term—the human rights—of these non-Christians when confronted by the claims of their European 'discoverers'. The basic concept was the Roman Law category of *jus gentium*, which until then had been understood to be the 'common law' of the Roman/Christian world, governing contact between different jurisdictions and subject nations, but under the same notional authority. The discovery of quite new areas of the globe which owed nothing to Roman order or to Christianity but which consisted rather of independent, autonomous peoples, each with their own governments, required a rethinking of this concept. By a deployment of the Thomist category of natural law, Vitoria was able to think through to something like a *jus inter gentes*, an order of law binding peoples together in virtue of their common human need for government, freedom of ownership, and pursuit of their lives in communities unhindered by attacks from outside. Such needs were there by 'nature', irrespective of any agreement or contract between rulers, or religious allegiance:

The law (*jus*) of nations does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth (*res publica*), has the power to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes . . . No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.⁶

On a day (12 December 1998) which has seen the appearance of a retired Latin American dictator in the dock of a British magistrates' court on charges of murder and torture in his own country, this passage has a particular resonance. In the *relectio On Civil Power* just quoted, Vitoria

may have been speaking primarily of Christian nations, but the ground is well prepared for a real intellectual revolution: the globalization of the common good realized in the two *relectios* on the war against the Indians.

As a young Dominican Vitoria may have read the reports of Las Casas on the treatment of the Indians of the new World, and his stance in maturity was essentially the same as that of Las Casas, even though he never went to the Indies to find out for himself. On hearing of the destruction of the Inca Atahualpa by Pizarro and his men in July 1533, he wrote to his Dominican superiors in the following year that 'After a lifetime of studies and long experience, no business shocks me or embarrasses me more than the corrupt profits and affairs of the Indies. Their very mention makes my blood run cold.' The returning conquistadors were attempting to legalize their robberies by 'compounding'—paying the royal treasury a lump sum—and some of them were doing the rounds, trying to elicit the agreement of the theologians that this was a legitimate practice. Vitoria would have nothing to do with them: 'Sooner my tongue and hand wither than say or write a thing so inhuman, so alien to all Christian feeling! On their heads be it, and let them leave us in peace. There will be no lack of men, even within the Dominican order, to salve their consciences, and even to praise their deeds and butchery and pillage.' As for the war itself: '. . . the justice of this war passes my understanding'; 'there was no other cause for this war than sheer robbery . . . Even if the emperor has just titles to conquer them, the Indians do not and cannot know this. They are most certainly innocents in this war.'

Although he stood at the threshold of European colonialism and had no idea what was to come in the centuries ahead, in these two brief treatises the entire course of that colonialism—not just of Spaniards, but of Portuguese, French, British for the following four centuries—has the moral ground pulled from under it once for all. European assumptions of right to rule (though not of cultural or religious superiority) were questioned at their root. Thus he openly proclaimed the limits of the powers of the Pope and the European monarchs over other, non-Christian peoples. This involved confronting the claim often made by the conquistadors and kings that the Pope had the power to grant them the lands of the heathen. Vitoria denied this at length in two *relectios*.⁸ No surprise then that in 1539 Charles I of Spain and V of the Holy Roman Empire tried to get him silenced by his religious superiors. Unfortunately for the Emperor, the prior in Salamanca was Dominic de Soto, the *Vespera* Professor, who agreed with everything Vitoria said, and did nothing. So Charles had to put up with it, and later on even consulted Vitoria on the revision of the Laws of the Indies (1542), which became

the most elaborate and humane (even if unenforceable) body of European colonial law. But Vitoria's writings—stating, as they did the limits of papal authority—deeply offended Pope Sixtus V and just escaped being put on the index of forbidden books by the Pope's death.

On the American Indians

The basic issue behind this *relectio* and the one on just war which followed it is the circumstances of the conversion of the inhabitants of the Indies. From the outset, Isabella had declared the sole justification of the Spanish presence there to be that of bringing the gospel to the heathen. So, by starting his investigation with the great commission at the close of Matthew's Gospel, Vitoria establishes the evangelical framework for everything that follows. The question is: What right have the Spaniards to conquer the Indians, take their land and goods, depose their rulers, and make subjects of them? Is it a necessary consequence of making Christians of them, or something quite alien to this?

Vitoria takes some time establishing the theologian's (and therefore the Church's) right to decide a matter which might seem to be the business of secular rulers and lawyers only. Behind the text one can detect some hostility between the theologians and the secular jurists, acting for people with other objectives, for whom converting the Indians was a means to an end rather than the end itself. He asserts the primacy of a *theological* framework for the judgement of the legality of the wars against the Indians:

Since these barbarians we speak of are not subjects [of the Spanish Crown] by human law, as I shall show in a moment, their affairs cannot be judged by human statutes, but only by divine ones, in which jurists are not sufficiently versed to form an opinion of their own.

It is a deliberate challenge. Then, with some irony, he establishes that there is sufficient doubt about the legality of what has happened for a fresh judgement:

At first sight, it is true, we may readily suppose that, since the affair is in the hands of men both learned and good, everything has been conducted with rectitude and justice. But when we hear subsequently of bloody massacres and of innocent individuals pillaged of their possessions and dominions, there are grounds for doubting the justice of what has been done. . . .⁹

If all this appropriation and killing is going on in the name of the Christian King, perhaps it is because—as Vitoria's opponents asserted—the Indians, being already natural slaves in the Aristotelian sense, are not true legal

owners of their goods and their land, and the Spaniards are simply exercising their rights over them. There was no shortage of theologians to provide the desired arguments on behalf of the conquest —some of them Dominicans. These are some of the arguments designed to show that relieving the Indians of their goods was perfectly right and proper:

1. They are all in mortal sin, so they can have no dominion over anything.
2. They are unbelievers and heretics and so have forfeited any title they might have in law.
3. They are irrational creatures, like children, and no one without the use of reason can have a capacity for ownership.
4. They are all mad. (One senses the incomprehension of the Spanish soldier confronted by the strange and terrified Incas.)

These could all be legal grounds for arguing against ownership in domestic law and Vitoria has no great trouble in disposing of them in a few pages of perfectly clear and irrefutable arguments. Then he says:

The conclusions of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters. It would be harsh to deny to them, who have never done us any wrong, the rights we concede to Saracens and Jews, who have been continual enemies of the Christian religion. Yet we do not deny the right of ownership of the latter, unless it be in the case of Christian lands which they have conquered.

It will be repeatedly argued by Vitoria throughout both treatises that what Christians are not permitted to do to Jews and Muslims (i.e., forcibly baptize them, arbitrarily confiscate their property, war against them without just cause) they are not permitted to do to 'barbarians' either — and that what a Christian ruler is not permitted to do to his own subjects he is not permitted to do to foreigners. In any case, writes Vitoria in a bit of creative exegesis, when Aristotle made his fateful remark about natural slaves, he did not mean that anyone had the right to 'seize the goods and lands, and enslave and sell the person, of those who are by nature less intelligent'—even if that were the case.¹⁰ It was intended as an assertion of the best political outcome, not of the rights of the strong over the weak.

Very well, an opponent would reply, perhaps the Indians are true owners of their goods and land, but the Spaniards have legally come into possession of them. These are the arguments put forward to prove this:

1. The Holy Roman Emperor Charles V is lord of the whole world and whom therefore of these barbarians too. He owns everything and can give to whom he chooses. Claims had been made in the past that a Christian emperor obtains his power as a temporal 'vicar of Christ', being endowed with the Lord's plenitude of power over creation spoken of in the New Testament epistles.
2. The Pope has full jurisdiction in temporal matters and consequently he can make the Kings of Spain sovereign over the Indians, and so he has. Several weighty medieval authorities had made such a claim about the Pope's authority before the discovery of the Americas, including the great Dominican bishop of Florence, St Antoninus.
3. The lands belong to the Spaniards by right of discovery. The law of nations allows that deserted lands become the property of the first occupant.
4. Since the natives refuse to accept Christianity, when it was clearly set before them and they were warned that it is a matter of their eternal salvation, it is right to make war against them because they are sinners and the Christian King exercises the authority from God that Paul speaks of in Romans ¹³.

Again, Vitoria demolishes these arguments one by one. The Emperor is not the lord of the whole earth. The power of Christ is not the summit of a feudal pyramid, but, in accordance with John 18.37, is 'not of this world'. And there is no mention in Scripture of any handing over of such power. In any case, political power is not a natural given, but a construction of law and there is no such law in existence, nor could there be. Even granted that the Emperor were the lord of the world, still that would not entitle him to seize the provinces of the Indians and erect new lords there and put down the former ones or take taxes. He still does not have the right to convert provinces to his own use or give land away at his own pleasure. He too is subject to the laws. This, then, shows that the Spaniards cannot justify on this ground their seizure of the provinces in question.

As for the Pope, he 'has no temporal power over the Indians or over other unbelievers'. It was the Lord himself who said, 'you know that the princes of the Gentiles exercise lordship over them . . . But it shall not be so among you.' Christ had no temporal power, and so neither can his representative on earth. 'It is utterly absurd' . . . 'utterly sophistical . . .' 'What has been said demonstrates that at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population'.

As for right of discovery, this is the weakest of all—the Indians were already in possession. It is nonsense to talk about uninhabited lands. It provides no support for possession of these lands, 'any more than it would

if they had discovered us': a neat way of forcing the opposition to look at the implications of their own arguments. And the fourth claim—that the Indians wilfully refused to accept the salvation offered to them in Christ—has many arguments against it. The most powerful appears to have some sarcasm and anger behind it:

It is not sufficiently clear to me that the Christian faith has up to now been announced and set before the barbarians in such a way as to oblige them to believe it under pain of fresh sin. By this I mean that they are not bound to believe unless the faith has been set before them with persuasive probability. But I have not heard of any miracles or signs, nor of any exemplary saintliness of life sufficient to convert them. On the contrary, I hear only of provocations, savage crimes, and multitudes of unholy acts. From this, it does not appear that the Christian religion has been preached to them in a sufficiently pious way to oblige their acquiescence; even though it is clear that a number of friars and other churchmen have striven industriously by their preaching, and this would have been enough, had they not been thwarted by those with different things on their mind.¹¹

And this is the crux of the matter: is the Spanish presence in the New World to be governed by the truth of the gospel, or is it to be managed solely for the purposes of illicit plunder? Who decides what is *right*? Is it to be the adventurer with his so-called right of conquest or is it to be the theologian, with his right deriving from natural law? Even though the Christian faith may have been announced to the Indians with adequate demonstration and they have refused to receive it, yet this is not a reason which justifies making war on them and depriving them of their property. St Thomas had shown that you cannot compel unbelievers, such as the Jews, to receive the faith. Belief is an assent of the will and the will cannot act properly out of fear—conversion would be a sacrilege unless done freely. And this is the point where Vitoria comes up with one of his most memorable statements: 'War is no argument for the truth of the Christian faith.' This undermined all notions of holy war, then undergoing a revival.

It remains to be considered what rights the Spaniards *do* have in the New World. Contact has been made and hostilities commenced, after all. It is here, in his answer to this third question, that one sees what a different kind of presence the Europeans might have made.

There are, first of all, purely natural rights of travel and trade, which anyone should enjoy in a foreign country. The Spaniards have a right not to be molested while doing this, so long as they do no harm to the natives and observe the laws of the land. The laws of hospitality demand this. The Indians can no more keep off the Spaniards from trade than Christians can keep off other Christians. 'Nature has established a bond of relationship

between all human beings . . .’ (There is a global community, as the far-sighted such as Vitoria were beginning to perceive. The extension of natural law to cover the interactions within this community would be the basis for the subsequent development of international law.) Consequently, if the Indians, misunderstanding the Europeans’ purposes (did they?) and being so fearful of the Spaniards, attack them, then the Spaniards have a right to defend themselves

within the bounds of blameless self-defence; but once victory has been won and safety secured, they may not exercise the other rights of war against the barbarians such as putting them to death or looting and occupying their communities, since in this case what we may suppose were understandable fears made them innocent. So the Spaniards must take care of their own safety, but do so with as little harm to the barbarians as possible since this is a merely defensive war.¹²

Secondly, Christians have a right to preach and announce the Gospel in the lands of the barbarians. Moreover, if the barbarians permit the Spaniards to preach the Gospel freely and without hindrance, then ‘whether or not they accept the faith, it will not be lawful to attempt to impose anything on them by war, or otherwise conquer their land’. The basic principle is that ‘no war can be just when not preceded by some wrong, as St Thomas says (*ST* II-II. 40.1)’.

However, such a wrong would be done in the event of the Indians’ obstructing the preaching of the Gospel and attacking the preachers and their converts. This looks fair enough, but it is well to remember that Vitoria—in common with everyone of his time—assumed the cultural superiority of Christian society over any pagan society it was likely to encounter, though he may not have been quite clear about the critical superiority of the Europeans’ weaponry. With the hindsight of 400 years of colonialism, one may see just how attacks on missionaries by people wielding spears and arrows might provide the pretext for their pacification and even Christianization at gun-point.

On the Law of War

The conclusion of the first *relectio* then, is that if the Spanish forces are to occupy the lands of the Indians, this can only be justified, if at all, by the laws of war. Hence the second *relectio*, *De Jure Belli*, delivered a few months later, in June 1539, and designed to be read along with the first. Often nowadays read on its own, without reference to its context, the treatise on just war is in no way an abstract thesis, but a continuation of the argument about the legality of the conquest (‘the case of the Indians, which is now before us’). However, it is Vitoria’s foundation of just war

on natural law, applying to all human beings, Christian or otherwise, which makes it more than a political tract for the times. What he has to say about the causes of just war (*jus ad bellum*) and about the just conduct of war (*jus in bello*) made this *relectio* highly influential among the jurists of the following century (most notably Grotius) and has continued to make it a reference point for contemporary discussions of just war.¹³

After a traditional preamble establishing the legitimacy of Christians going to war at all, and the need for legitimate authority, it proceeds to a denial of certain commonly held grounds for just war, the first of which is perhaps the most important, both for him and for us:

My first proposition is: *Difference of religion cannot be the cause of just war*. This proposition was amply proved in the previous *relectio*, where I refuted the fourth title offered to justify the enslavement of the barbarians, namely, 'that they refuse to receive the Christian faith'. This is the opinion of St Thomas (*ST* II-II, Q. 66, art. 8 ad 2.) and of all the other doctors: I know of no one who thinks the contrary.

It requires considerable ingenuity to get the teaching from the cited passage of St Thomas, which allows Christian princes to despoil unbelievers of their goods when they have done something 'illegal'. Vitoria is relying on a creative interpretation of this by the great Dominican Thomist commentator, Cajetan (see *De Indis* 2.2). However, what St Thomas says about the illegitimacy of forcing baptism on Jews and anyone who has never accepted Christianity may be sufficient. What seems clear is that Vitoria was the first theologian—and in flat contradiction of many others of his period—to state unambiguously that 'holy' war is not just war.

Illustrating the contradiction, the American just-war theorist, James Turner Johnson¹⁴ quotes some of the holy-war enthusiasts, among them Cardinal Allen, the enemy of Queen Elizabeth I: 'There is no war so just and honourable . . . as that which is waged for religion, we say for the true ancient, Catholic, Roman religion.' It was a common opinion of the time, among both Catholics and Protestants, that the best possible warrant for going to war was a command of God, which could only come through an interpretation of certain Old Testament passages in one's favour. Against such a shallow and self-serving theology, Vitoria understood that a firm grasp of *law* and *justice* was itself, at root, deeply theological. Real theology is done, not by a proof (force of arms) of one's privileged position in the eyes of the Creator over against everyone else, but by a regard for the unity of the human race under the one divine law governing the treatment of anyone, whether belonging to one's own religion or not. It is for this reason that Vitoria, when doing his theology, often appears to

us to be doing something else—morals, jurisprudence or whatever. It was perhaps only his elevated and totally confident understanding of what theology is that enabled him to do this with authority and without a hint of the embarrassment that would afflict us, after centuries of demoting theology to the category of ‘special interest’. If theology had taken the direction indicated by him and his successors at Salamanca, instead of suffering self-destruction at the hands of the holy-war mongers during the era of European wars of religion, it might now be more able to do its rightful job.

Vitoria’s conclusion is that ‘there is a single and only just cause for commencing a war, namely, a wrong received’. It is a matter of right, rather than righteousness. A ruler has no more authority over foreigners than he does over his own subjects. They too have share in human dignity and if they have done no wrong he is forbidden to attack them.¹⁵ However, Vitoria is quick to add that ‘Not every or any injury gives sufficient grounds for waging war’.

There are many, strict precautions to be taken against assuming that any given war will have a just cause. Among them,

if a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person. But in the case before us the enemy are innocent.. Therefore they may not be killed.

As for councillors of state:

If such men can by examining the cause of hostility with their advice and authority advert a war which is perhaps unjust, then they are obliged to do so . . . if a man can prevent something which he ought to prevent, and fails to do so, the blame rests with him.

Affinity with the Nuremberg principles is clear.

Vitoria is also noted for being the first to recognize that in some sense it may be possible to fight justly on both sides. Although it cannot in fact be true that the same war is just on both sides, ignorance of the facts or of the law can result in ordinary soldiers on both sides being justified in fighting. This tends to strengthen the affinity between the combatants and focus the moral question for the soldier not so much on the justice of the war as such, as on the methods by which it is being fought—the *jus in bello*. They are up against men who may also be fighting in good faith. They may not treat them as if they were not fellow human beings.

Vitoria is most remembered, however, for his principled yet realistic approach to non-combatant immunity, which he systematized from medieval antecedents such as the code of chivalry and the writings of the

canonists. In spite of the biblical record of Joshua's campaigns against the Canaanites¹⁶—much invoked by the contemporary enthusiasts for holy war—Vitoria flatly states that 'it is never lawful in itself intentionally to kill innocent persons'.¹⁷ His examples of who may not be killed—women and children of the Saracens (even), *bona fide* travellers caught up in the fighting, clergy and monks (so long as they are not caught fighting), and 'harmless agricultural folk'—make it appear that he is working with a notion of innocence familiar to us. But this is not entirely so. Although there is a strong moral element in it—to be fighting an unjust war is, after all, morally wrong and anything but innocent—it is not entirely a moral category in our sense. The functional element is also strong, and would become stronger as just war theory developed. It is the function of the soldier that is crucial to his status rather than his moral position. He may be morally quite innocent, but nevertheless engaged in some violent harm to the common good, which needs to be prevented. Conversely, the noncombatant may be guilty of hatred, but nevertheless not actively engaged in doing harm, and therefore may not be directly attacked. Sharpening the distinction between moral and functional definitions of innocence—something undertaken by Vitoria's successors—enabled a clearer distinction to be made between those guilty of war crimes and those merely guilty of fighting on the wrong side. It also made easier a denial of the malignant doctrine of collective guilt, already weakened by Vitoria's refusal of religion as a just cause.

But in a passage that causes some trouble to modern commentators, Vitoria allows that one may kill the innocent while attacking 'military' targets,

for example, during the justified storming of a fortress or city, where one knows there are many innocent people, but where it is impossible to fire artillery and other projectiles or set fire to buildings without crushing or burning the innocent along with the combatants. This is proven, since it would otherwise be impossible to wage war against the guilty, thereby preventing the just side from fighting. Nevertheless, we must remember . . . that care must be taken to ensure that the evil effects of the war do not outweigh the possible benefits sought by waging it.

He was speaking about fairly primitive cannons, but the fantastically increased power of modern weapons to cause indiscriminate damage has made this a dangerous admission. Vitoria's allowance for what is nowadays called 'collateral damage' needs to be seen realistically in the context of modern methods of war. But what he certainly would not allow is any attempt to win a war by deliberately targeting non-combatants as the most effective method of breaking down resistance.

Although the material conditions of modern war are utterly different

from the Conquistadors' campaigns against the American Indians, the moral reality is not so very different, and Vitoria's strict rules of engagement, based on the common human dignity of people on both sides, and their rights to their own lives, property and social order, still have a great deal to say to us. To take a contemporary example: with the stated aim of dislodging the ruler of a sovereign state, the Western nations, since 1992, have aimed severe economic sanctions and sometimes bombs at a large and populous Middle Eastern country. This has resulted in immense hardship, child mortality, hunger and disease, the impoverishment and collapse of ordinary life and sometimes sudden death for wholly innocent people. As usual, it is the 'soft target' of the general population that is hit rather than the rulers. We need to ask Vitoria's questions: whether the innocent are being intentionally targeted (if not by the bombs, then by the sanctions) and whether the evil effects of the war—the damage to the human community itself—do not outweigh the possible benefits sought by waging it.

Postscript

Often quoted is a passage from Boswell's *Life of Johnson*:

'I love the University of Salamanca; for when the Spaniards were in doubt as to the lawfulness of their conquering America, the University of Salamanca gave it as their opinion that it was not lawful.' He spoke this with great emotion . . .

This was a simplification of history no doubt, and it is always a temptation for the British to point the finger at the Spanish for what they did to the people of the New World. But one is entitled to ask where is the Vitoria of British, French, or Dutch colonialism? Where were the royal consultations, the regard for a law transcending the power of the State, the moral debates, the university opposition, the treatises in political theology demonstrating the illegality of the division of Africa, or the genocide of the North American Indians and Australian aborigines? I am unaware of anything approaching the care that was taken over such matters in sixteenth-century Spain.

- 1 'Crimes against Humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all

acts performed by any persons in execution of such plan.' See Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 1982), p. 155.

The point is that in the natural law tradition, to which both Vitoria and the Nuremberg Tribunal belong (despite the 400 years and a change of vocabulary), it is individuals—not only States—whose rights are to be protected in law, and individuals who must be held responsible when these are violated.

- 2 International law has several such 'founding fathers' who took it new directions, most notably the Spanish Jesuit, Francisco Suarez (1548–1617), and the Dutch Calvinist, Hugo Grotius (1583–1645), both of whom acknowledged a debt to Vitoria.
- 3 A lot more attention has been paid to Vitoria and other great figures of the Salamanca school in other European countries, Spain in particular, and of course in Latin America, with critical editions of his works, institutes of human rights named after him, international congresses on his thought, etc. It is a pity that, apart from the excellent translations of Pagden and Lawrance (see below), not much of this activity is finding its way into English.
- 4 Vitoria himself was well aware of the difficulties: 'The office and calling of a theologian is so wide, that no argument or controversy on any subject can be considered foreign to his profession. . . . perhaps this is the reason why there are now, to put it no more strongly, so few really good and solid theologians.' (*On the Civil Power*, Prologue, Anthony Pagden and Jeremy Lawrance, *Francisco Vitoria Political Writings* (Cambridge: Cambridge University Press, 1991), p. 3.)
- 5 'In this broad and mighty field of universal theology, whose acres are infinite, I have chosen for myself a single little corner. . . . My subject is the commonwealth (*res publica*)' (Ibid.).
- 6 *On Civil Power* 3.4, Pagden and Lawrance, p. 40.
- 7 Letter to Miguel de Arcos OP. Salamanca, 8 Nov. 1534, in Pagden and Lawrance, pp. 331–2.
- 8 I and II *On the Power of the Church* (1532 and 1533), texts in Pagden and Lawrance.
- 9 *On the American Indians*, Introduction, Pagden and Lawrance, pp. 237–8.
- 10 Ibid., 1.6, p. 251.
- 11 Ibid., 2.4, p. 271.
- 12 Ibid., 3.1, p. 282.
- 13 See, for example, James Turner Johnson, *Ideology, Reason and the Limitation of War*, and *Just War Tradition and the Restraint of War* (Princeton, NJ: Princeton University Press, 1975 and 1981).
- 14 *Just War Tradition*, p. 96.
- 15 *On the Law of War* 1.3.4, Pagden and Lawrance, p. 303.
- 16 He does not have the space for a proper examination of biblical texts, but simply opposes the Joshua texts with one from Exodus 23.7: 'the innocent and righteous slay thou not'. This may look like a piece of proof-texting, but in its context it simply demonstrates that the case for holy war is thrown into doubt by its own single resource, the Old Testament, whereas the more theological argument of Vitoria, which opposes holy war, does not need to put all its eggs in one basket.
- 17 *On the Law of War* 3.1, Pagden and Lawrance, p. 314.