

JUST WAR: THE CATHOLIC CONTRIBUTION TO INTERNATIONAL LAW

James Gaffney
Professor Emeritus
Department of Religious Studies
Loyola University New Orleans

King Henry: By my troth, I will speak my conscience to the king: I think he would not wish himself anywhere but where he is.

Bates: Then I would he were here alone; so should he be sure to be ransomed, and a many poor men's lives saved.

King Henry: I dare say you love him not so ill to wish him here alone, howsoever you speak this; to feel other men's minds: methinks I could not die anywhere so contented as in the king's company, his cause being just and his quarrel honourable.

William: That's more than we know.

Bates:...Ay, or more than we should seek after; for we know enough if we know we are the king's subjects: if his cause be wrong, our obedience to the king wipes the crime of it out of us.

William: But if the cause be not good, the king himself hath a heavy reckoning to make when all those legs and arms and heads chopped off in a battle shall join together at the later day and cry all, "We died at such a place, some swearing; some crying for a surgeon, some upon their wives left poor behind them, some upon the debts they owe; some upon their children rawly left. I am afeared these are few die well that die in a battle; for how can they charitably dispose of anything when blood is their argument?"

Shakespeare. King Henry V, iv.i

Fatuous as it may be to assign fatherhood to great movements in human thought, international law has been regularly assigned either of two paternities. The more widely known is the 17th century Dutch Calvinist scholar, jurist and diplomat, Hugo Grotius. The other candidate is the 16th century Spanish Catholic philosopher and theologian, Francisco de Vitoria. By a winsome irony there exists at the Hague a plaque dedicated to the

"Founder of International Law." The plaque was erected by the Grotius Society. The person it honors is Vitoria!

My only interest in this amiable paternity question is the symbolic focus it provides for my belief that, between the 16th and 17th centuries a progressive though erratic Catholic doctrinal development reached a maturity after which it shed its ecclesiastical particularities and entered upon a new phase, secular and juridical. Finally, after two world wars, theory embarked on practice through two international organizations, the League of Nations and, since 1947, the United Nations.

What I hope to do in this presentation is indicate, by selective attention to a few representative historical figures, how just war theory, as a moral doctrine remotely originated, and how it was modified by presuppositions of authoritative thinkers and refined in controversy generated by unforeseen events. I shall stop at the time period commonly called the Renaissance and Reformation when just war theory, in essence nearly complete, ceased to be part of Catholic intellectual history, and became part of the new jurisprudence of international law. After that time, within the Catholic Church just war theory participated in the general stagnation of post-Reformation Catholic moral and political thought. At the same time, until the past century, Protestant religious thinkers gave it little attention beyond insisting, against Protestant pacifists, that wars certainly could be just and, at least if conducted by Protestant rulers, were best presumed so.¹

The relative poverty of early Protestant thought about just war is partly due to the fact that Protestantism was still young when the whole topic was subsumed in the secular discipline of international law. Exclusive reliance on the Bible required ingenious justifications of wars divinely enjoined as wanton massacres in the Old Testament, as well as ingenious interpretations of opposite teachings by Jesus that seemed to favor pacifism. Both of these tasks had been addressed by Protestantism's favorite theologian, St. Augustine, and his answers were widely adopted. Catholic moral tradition, relying more confidently on natural law, encouraged both freer reasoning about these matters, and freer use of pre-Christian moralists. It may have made a difference that Catholic experience did include a kind of

supranational law in papal claims to jurisdiction over monarchs, whereas the history of Protestantism largely coincided with a history of rival sovereignties and fractious nationalisms. Finally, Catholicism's moralizing about war had to come to terms with its own conscience in two great programs of Catholic aggression, first against Muslims and then against native Americans of newly discovered lands.

Pre-Christian and Early Christian Writers

The pre-Christian writers most relied upon by Christians in matters of political morality were, from the 4th century on, Cicero and, from the 13th century on, Aristotle. Aristotle himself remarked that the legal enforcement of justice which secured civilization within states failed to span frontiers, so that conduct which would be treated as criminal if perpetrated by one citizen on another, was tolerated and even advocated when done by one state to another. The rueful observation is accompanied by no suggested remedy. It should not be inferred that Athenians were indifferent to international morality. A century before Aristotle, Thucydides recounted the military decision to ignore a treaty guaranteeing neutrality to the island state of Melos and to punish its non-cooperation by devastation and enslavement.² This episode became a focus of intense moral and political debate. The historian reconstructs a dialogue between the assailants' cynical reliance on might and their victims' conscientious appeal to right, which would become a paradigm of the debate between "moralists" and self-styled "realists" over international behavior.

Aristotle's few comments on justice in warfare enter obliquely into his discussion of slavery in the *Politics*.³ He distinguishes between "natural slaves" whose supposed incapacity for self-government necessitates control by a master, and "legal slaves" who acquired servile status as war prisoners. Evidently aware that such enslavement is sometimes not merely a consequence but the very purpose of war, he insists that "wars may be unjust in their origin." In a later context, criticizing the militarism and imperialism that he thinks are ruining Sparta, Aristotle contends that the only legitimate objectives in legislating about war are leisure (the term Athenians typically use where we might expect "freedom") and peace.⁴ It may be justified to

avoid enslavement, to gain leadership for the sake of those who are led, but not to oppress them, and to dominate those who deserve servitude – presumably his so called "natural" slaves. It can be no surprise that these words would later be cited in support of Christian world powers seeking colonial dominion over native peoples and in defense of the practice of slavery. And it is appropriate to recall that Aristotle had been tutor to the future Alexander the Great. Nevertheless, Aristotle strongly opposed militarism, as eroding the best qualities of civilization and hastening the demise of a state, and he warned of how conducive warfare is to tyranny. Clearly, for Aristotle, the distinction between just and unjust war was important and meaningful. It was an ethical distinction, not a legal one, founded in a definite philosophy of political life. In developing the distinction it is evident that Aristotle uncritically accepted some conventional assumptions, especially about slavery.

Early Western Christianity received its Greek philosophy mostly at second hand in paraphrase or translation. Aristotle was little known. There was great interest in Plato but not as a political or moral philosopher. Stoic writers, some of whom were esteemed as moralists, anticipated later thought in their conception of natural law and of a world citizenship transcending nationality. The two concepts are closely related, in that natural law depended not on nationality but on rationality, the exercise of dispassionate right reason in moral matters. Also related to and supportive of this stoic philosophy of law were legal developments that had begun a century earlier. At that time, the diversity of the city's population led to the appointment of a special praetor to handle cases of those who were not Roman citizens. Given the diversity of these people's local laws and customs, it was judged necessary to adjudicate on the basis of common ideas of what constituted fair dealing. Collectively, these broad areas of agreement were called, *ius gentium*, the law of peoples. It was natural to unite the concepts of *ius gentium* and *ius naturale* and insist that the former might exceed but must not contradict the latter.

In the realm of political and legal morality, Cicero greatly influenced Christian writers. Indeed the first Western Christian textbook on morality was an adapted version of his treatise *De Officiis*.⁵ Equally important on the

subject of justice in war was Cicero's philosophical dialogue *De Republica*, of which no complete manuscript exists, so that it must be reconstructed from fragmentary quotations in ancient authors.⁶ Significantly, the best ancient source for the section on war, and the even more influential section on natural law, is St. Augustine. Cicero enumerated two stable criteria for a just war. First, "no war can be justly waged except for the purpose of redressing an injury or driving out an invader." And second, "no war is held to be lawful unless it is officially announced, unless it is declared, and unless a formal claim for satisfaction has been made." Augustine cites from memory of this same work a "discussion of the proposition that no war is undertaken by a well conducted state, except in defense of its honor or for its security." Another reconstructed portion of the text calls "lawful war" that "which is formally declared and which is waged either to secure restitution of property for which a claim has been made, or to repel an invader." "Unlawful war" is less helpfully described as one "begun from a mad impulse and without a legitimate cause." Cicero does favor expansionism, which he sees as a function of natural superiority and as benefiting those who are weaker, but he does not explicitly approve military aggression to enlarge empire.

In his treatise *De Officiis*, Cicero begins a discussion of "laws of warfare" by noting that "there are two ways of settling disputes: by reasonable discussion, or by force."⁷ Reasoning is the properly human way, and force can be only a last resort. War's only proper goal is being able "to live in peace without wrongdoing." After victory he recommends gentle treatment of former foes who were not cruel or barbarous, anticipating the modern distinction between mere combatants and war criminals. He insists on a settlement that advances peace without concealing any snare, meaning, apparently, any hidden incentive to resume hostilities. He warns against the evils of false promises, even by prisoners of war. Cicero's concern about terms of peace is farsighted and often overlooked by later writers. He tells us moreover that Roman fetial law contains detailed prescriptions. This tantalizing reference is to a priestly state institution overseeing procedural justice in international agreements, about which, most regrettably, we lack further information.

In reading Cicero on this subject one finds his philosophic habits of mind blended with his juridical outlook. In the kind of war he mainly envisions, the battlefield resembles a court of last appeal in a kind of international civil (as distinct from criminal) litigation. To settle a dispute outside that kind of court is always preferable. Failing that, due process becomes all important. Once the trial ends and judgment is reached, emphasis should be on compensatory damages, while punitive damages should be minimized. More comparable to a criminal trial is the case of a war to repel actual invasion: Cicero is aware of another kind of war, waged for "glory and supremacy." Such wars he neither explicitly condemns nor attempts to justify, but they are clearly irreconcilable with his criteria of justice.

Augustine

Since much of what we know about Cicero on the subject of just war comes to us from St. Augustine, since Augustine admired both Cicero's thought and his style, and since Augustine would be for many centuries Western Christianity's main authority on the ethics of war, one might expect Christian just war doctrine to be harmoniously built on Cicero's impressively humane foundations. That this is not true results from Augustine's preoccupation with theological issues that had no place in Cicero's world, in particular the biblical assessment of war, and the coercive repression of heresy.

Among the Manichean doctrines Augustine had to confront was rejection of the Jewish Bible. As evidence of its evil inspiration, Manicheans pointed to immoral directives attributed to God, including military campaigns of ruthless extermination. (It might be noted in passing that the Manicheans themselves must have possessed at least enough just war doctrine to support their indictment of these wars.) Augustine's theological commitment to the divine inspiration of the aggressive Old Testament moved him to defend these wars. That task, difficult in itself, was further complicated by the Gospels' account of Jesus' seemingly pacifist teaching, especially in the Sermon on the Mount, and by a strong tradition in the early Church of refusing military service on religious grounds.

The Roman Empire had been a Christian empire only twenty-five years when Augustine was born. Previously, Christian writings were typically anti-military and Christian soldiers were uncommon. Accordingly, Augustine's comments in justification of war laid part of the groundwork for a new order. In Western Christian churches and traditionally Christian nations, Augustine's acceptance of justifiable war generally prevailed. But strong objections have persisted in pacifist church traditions, since the Radical Reformation and, more recently, in some main line Protestant and Roman Catholic minority movements.

Augustine's defense of Old Testament wars had the twofold effect of establishing "holy war" as a Christian concept and effectively disallowing what we have come to call "conscientious objection." The basic argument is simple.⁸ "When war is undertaken in obedience to God, who would rebuke, or humble or crush the pride of man, it must be allowed to be a righteous war." Augustine does not mean that, where God is concerned, might is right. He means that moral standards, all deriving from God as imperfect reflections of his perfect wisdom and goodness, cannot be turned against their author. It is the argument that would, centuries later, be compressed into a papal slogan to justify the Crusades, "*Deus lo veult* - God wills it.

But Augustine's argument takes an additional turn that would have serious consequences. He introduces an *a fortiori* argument. "Since a righteous man, serving it may be under an ungodly king, may do the duty belonging to his position in the State by fighting by the order of his sovereign, - for in some cases it is plainly the will of God that he should fight, and in others where this is not so plain, it may be an unrighteous command on the part of the king, while the soldier is innocent because his position makes obedience, a duty, - how much more must the man be blameless who carries on war on the authority of God who can never require what is wrong." Thus, Augustine does not argue, but merely takes for granted, that the justice of war is a moral question for sovereigns but not for subjects. The morality of the divine sovereign is beyond question. Thus, the morality of subjects engaged in war is determined in the first place by their obedience to legitimate authority. But it does have another determinant. What that is, Augustine demonstrates in dealing with the seeming pacifism of Jesus Christ.

Augustine's adversaries pointed to Jesus' seemingly anti-military injunction to "turn the other cheek" and "resist not evil" and other sayings to similar effect. Augustine replies by citing Gospel passages in which soldiering seems to be accepted as a legitimate occupation. But then, what does Jesus mean by those sayings? "The answer is," says Augustine, "that what is here required is not a bodily action, but an inward disposition. The sacred seat of virtue is the heart." In the same vein, Augustine asks: "What is the evil in war? Is it the death of some who will soon die in any case, that others may live in peaceful subjection? The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power and such like, and it is generally to punish these things when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars." On this basis, it might seem that just war is essentially a matter of good people chastising bad attitudes.

One can see in this a feature of Augustine's thought that would greatly influence Western Christianity. It derives from Augustine's stress on the interiority of moral values. With its shift of emphasis from visible actions and palpable consequences to invisible passions, Augustine's thought departs widely from Cicero's perspective, and from the realm of enforceable legislation. At risk of oversimplifying, let me relate this feature to Augustine's well known founding of Christian morality on well-ordered love. To behave morally is to behave in ways that express the love of God and of the neighbor for God's sake. By this standard all claims to virtue are assessed. But it is this wholesome doctrine that underlies most of what is found especially disquieting in Augustine's justifications of coercive force. For Augustine, force is applied morally when it is applied lovingly by appropriate persons. And one could scarcely do anything more loving for sinners than correct their sinfulness, gently if possible, but forcibly if necessary. That action taken on this basis should appear at times self-righteous and overbearing paternalism is hardly surprising.

Thus, for Augustine, the persecution of heresy, deemed both sin and crime, is justified as a kind of moral surgery, to excise an infection that resists less invasive treatment. There may be fanaticism but there is no hypocrisy in

Augustine's response to Donatist heretics whom he caused to be imprisoned that "it is fitting that you should be drawn forcibly away from a pernicious error, in which you are enemies to your own souls, and brought to acquaint yourselves with the truth."⁹ To the Donatists' objections, Augustine replies that "the aim towards which a good will compassionately devotes its efforts is to secure that a bad will be rightly directed." But in this struggle of good wills to rectify bad ones, the possessor of the good will must act from love uncorrupted by malevolent passions. A magistrate may be morally constrained to inflict torture but, Augustine concedes, he may appropriately shed tears in doing so.

It is from the point of view I have just described that one can best appreciate the shift in Augustine's thought about just war from defensive to punitive considerations, and from a violent dispute over conflicting ambitions to a purgative vindication of good against evil. War against malicious adversaries, if lovingly carried out, not only guards or repairs national interests, but inflicts wholesome punishment to vindicate justice and morally rehabilitate the wicked. To carry out such warfare is to have one's violence not only justified by legitimate self-interest, but ennobled by altruism. For, as Augustine explains, "many things have to be done with a certain kind of benign asperity to those who must, however unwillingly, be punished. And indeed one is happily vanquished from whom there is removed a freedom to do wrong."¹⁰ Phrases like "benign asperity" and "happily vanquished" capture a distinctively Augustinian flavor of paradox.

Augustine does venture a definition of just wars which he says is the usual one.¹¹ They are "wars that avenge wrongs, when a people or state must be chastised for neglecting to punish wrongdoings of their own citizens, or to restore something that has been wrongfully taken away." Here we see Augustine's habitual view of war as vindictive and punitive, loosely supplemented by a practical objective of repossessing lost goods. Taken up in the *Decretum* of Gratian, this flimsy and flexible definition would occupy pride of place in Christian law for many ensuing centuries.¹²

However unwittingly, Augustine's statements about war are the remote ancestors of that sanctimonious militancy we continue to hear in Christian

political rhetoric. They discourage the very thought that there might be both justice and injustice on both sides. Nor does their emphasis on punitive moral cleansing encourage tolerance or compromise. Augustine's enormous prestige caused his moral theology of war to go largely unquestioned. Christian jurists typically combined it, not very smoothly, with secular norms drawn from Roman law. Papal decrees, using that combination opportunistically, became themselves components of the law.

Thomas Aquinas

In a scholastic writer like Thomas Aquinas, all these elements may be detected, disposed in variety of contexts. But whereas Augustine discussed war unsystematically, and incidentally to other and greater concerns, Thomas treated it as one topic within an organized and comprehensive ethical treatise. As a result, although his explicit treatment of warfare is scanty, he provides general principles that are highly relevant to the moral assessment of warfare, thereby furnishing resources for more complete ethical analyses by some of his followers.

The main features of Augustine's thought about justice in warfare reappear in the writings of Thomas Aquinas, but systematically distributed and detached from any current polemic. Thomas' principal explicit discussion of the subject is in his *Summa Theologica*, second part of the second part, as one of four "vices" opposed to peace, namely schism, brawling, sedition, and warfare.¹³ Evidently it is not for Thomas a big issue. Part of the reason may be that Peter Lombard's *Sententiae*, the collection of texts that constituted a syllabus for medieval theologians, does not deal explicitly with war. Thomas' own treatment comprises four headings, two of which I shall ignore as having only ecclesiastical relevance: 1) Whether warring is always sinful. 2) Whether fighting is licit for bishops and clergy. 3) Whether deceptions may be used in war. And 4) Whether warring is permissible on holy days.¹⁴ It is the first of these articles that embraces but significantly modifies the main opinions of Augustine, concisely arranged in what would later be transmitted as a kind of compact three-part formula.

Thomas disposes of Christian pacifist interpretations of Jesus' teaching by citing Augustine on the Gospels' seeming contrary sayings implying approval of the military. But Thomas does not in this context embrace Augustine's view that the Sermon on the Mount pertains only to interior dispositions rather than external actions. Perhaps partly for that reason, Thomas does not adopt Augustine's interpretation of just warfare as doing the enemy a spiritual service by correcting their moral delinquency.

Having thus disposed of the main theological objection to admitting the very possibility of a just war, Thomas sets down three requirements, first, right authority, second, just cause, and third, right intention. Authority to command the waging of war belongs to the ruler, or, "prince," and to no private person. The reason for this already expresses what Thomas understands to be war's legitimate purpose. For the "prince" is committed to protect the commonwealth by force of arms, both from domestic malefactors and from foreign enemies. Clearly, therefore, Thomas understands just war as self defense by a political community, a quite different idea from Augustine's salutary chastising of the bad by the good. Yet, when he deals explicitly with the second requirement, just cause, Thomas defers to Augustine's so called "usual definition" of just war. Those who are warred against must deserve it for "some guilt," and the war finds its just cause in "avenging wrongs" or restoring misappropriated goods. Yet, in a passing reference to just war in discussing the virtue of courage, Thomas again defines such a war as one that "defends the common good." Finally, Thomas explains that what he means by a "right intention" is one that intends to promote good or avert evil. He then exemplifies bad intentions by quoting verbatim Augustine's list of those evil dispositions of which Augustine sees war as the corrective punishment.

Thomas disposes briefly of the question concerning the legitimacy of deception in warfare. Here again he cites Augustine, who, recalling that God in the Old Testament ordered an ambush, argues that once a war is just it makes no moral difference whether the fighting is carried out openly or by deceit. Thomas, however, insists on a distinction. Secrecy about military preparations is justifiable in a just war. But outright lying and breaking of agreements is wrong even between belligerents.

Thomas' article on sedition argues, not surprisingly, that sedition is sinful, but he also argues, more surprisingly, that to revolt against tyranny is not seditious, because it defends the common good, whereas it is the tyrant who is really seditious, for he is the enemy of the common good.¹⁵

It should be clear from even this brief summary that in the teaching of Thomas Aquinas two quite different notions of a just war coexist without ever being explicitly contrasted. One is Augustine's notion, guaranteed its place by the prestige of its author and its regular inclusion in ecclesiastical documents over the course of eight centuries. It is a notion that makes war an exercise of virtue in the chastisement and, ideally, the eradication of vice, an affliction of bodies for the improvement of souls, moved from start to finish, by love, and by love alone. It supposes that warriors know both that their own motives are good and that those of their foes are bad. The other notion brings us much closer to the pre-Christian thought of moralists like Aristotle and Cicero. War is the last resort of self defense by a political community, seeking to regain its violated security, and to do so in such a way that future conditions will favor lasting peace. Here there is no attribution of vicious motives nor any claim that sufferings inflicted in battle are medicines lovingly bestowed on ailing souls. Love is certainly involved but it is not notably altruistic. It is innocent, ordinary, readily understood, collective self love, the love of an endangered common good. Since what matters are the foe's outward actions, rather than their inward dispositions, it should be apparent when the goal has been achieved and it is time to stop. Perhaps enough has already been said about these contrasting approaches to suggest which of them could alone be effectively adopted as a basis for international law.

Thomas' approach to just war has the additional advantage of bringing certain neglected aspects of the problem onto familiar moral ground, where they can be subjected to familiar ethical arguments. For if just war is self defense writ large, familiar norms of both law and morality regarding self defense become applicable. It has often been pointed out that the great omission in most medieval discussions of just war is the morality, not of going to war, but of how the war is waged. When the Augustinian tradition

insisted on moderation, it was only the moderation of a just warrior's internal feelings, who must remain loving, and saddened by any injury he is compelled to inflict. Moderation of the injury itself, its extent, intensity, and duration, seldom came into the picture. But ordinary ethics had long since set rational limits to the use of force in self defense, limits, for the most part, of proportionality between what was being defended and what was being damaged in the process of defending it.

Thomas Aquinas did not provide us with a fully articulated just war doctrine. He transmitted confusedly two different and barely articulated just war doctrines. But he also provided many ethical resources for developing one of those doctrines, and in a way that could furnish guidelines for public law. Thomas was not unique in this respect, but he was uniquely important because it would be his followers who pursued that development and did so in urgent practical circumstances, hardly amenable to the Augustinian approach. These developments took place two and a half centuries after Thomas' death and two centuries after his canonization confirmed his authority. It was a very different time, with Europe politically and religiously fractured, culture transformed by Renaissance art and learning, and a world map that showed vast new continents ripe for commerce and empire. It was also a time when Catholic ecclesiastical scholarship exhibited an impressive renaissance of its own, especially in Spain and Portugal. It is to one of the celebrities of that renaissance that I wish to turn after a brief parenthesis.

The Renaissance: Erasmus and Vitoria

An account of just war theory does not include pacifist teachings because they reject the possibility of just war. While that remains true, there is a kind of "almost pacifist" who arrives at that position by applying just war theory to the real world, only to find that real wars hardly ever make the grade. Regarding the chances of satisfying the demands of justice in any war as negligibly small, such thinkers assume what amounts to a virtual pacifism. For them, war is expected to be unjust, regarded as guilty until proved innocent, which seldom happens. This school of thought had one of its greatest representatives in the Dutch Renaissance humanist Erasmus,

admired as a scholar and enjoyed as a satirist. One of his satires, *Querela pacis*, personifies peace as a butt of cynicism, trying futilely to find a place in the world, but always repulsed by the self interests of the powerful.¹⁶ Erasmus, who despised Scholastic philosophy and theology and sympathized with certain views of the Reformers, was distrusted by many fellow Catholics. But the popularity of his work, especially among liberal scholars and university students, and notably in Spain, helped to break down moral apathy about war.

It was in this Spain whose traditions of proud militancy were threatened by a new wave of critical pacifism, that consciences were further assailed by news of recurrent atrocities perpetrated by Spanish traders and settlers, soldiers and officials, against native peoples in the lands first made known by Columbus. Reports of torture, enslavement, and slaughter reached Spain mainly from missionaries. The earliest missionaries were Dominicans and the earliest reports were examined by the Dominicans' illustrious faculty at the University of Salamanca. There, as at other universities, protests were generated among students, while scholars took sides for and against Spain's conduct and policies in the New World. Debates over the matter were encouraged and at times organized by the crown and subsequently by the emperor.

One of the most reluctant participants in these debates was the illustrious Dominican scholar, Francisco de Vitoria, a man whose natural environment was lecture halls and libraries, and who shunned political activism. There is real pathos in the letter he wrote to his superior, acknowledging that what he had learned of Spanish treachery and cruelty no longer allowed him in good conscience refrain from the controversy.¹⁷ So he entered the debate on his familiar ground, with lectures to his students, immediately circulated as notes, and later published. The lectures followed time honored scholastic form, enunciating theses, citing and answering objections, reviewing traditional authorities, and arguing to an affirmation or rejection of each thesis. In reviewing this material I must confine myself largely to the conclusions.

The first question for Vitoria is what entitles Spaniards to take control of lands occupied by people called Indians.¹⁸ His answers, which may seem to us obvious, were at the time revolutionary. On grounds drawn from accepted traditions in law and morality, he concludes that the Spaniards had no right to invade and no right to rule. He refutes the claims that popes can give away continents that do not belong to them, that "discovery" of occupied lands, or the natives' rejection of Christianity, or their questionable personal morality, or the exigencies of imperial expansion give any legitimate moral claim to them. He notes other traditional grounds considered to justify defensive war, but finds that none of them apply to the Indians. He notes that no free elections have been held resulting in an Indian majority opting for Spanish rule or a mutual defense treaty with Spain. And he points out that reports offer no support to the claim that Indians are an inferior race of mental defectives, incapable of civilization and eligible for natural enslavement. He even addresses the sub-moral claim that Spain's status as a major power simply demands economic enlargement by riches imported from the New World. Perhaps so, says Vitoria, but if so why not just encourage commercial trade with the Indians and tax imports, slyly remarking that that is how the Portuguese do it and it seems to work for them. In short, Vitoria vindicates the sovereignty of non-Christian peoples and even their religious freedom to reject Christianity.

Throughout these arguments, Vitoria contends that Indians and Spaniards are equally subject to the law of nations and the law of nature. He observes that "there are certainly many things which are clearly to be settled on the basis of the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights. But even on the occasions when it is not derived from natural law, the consent of the greater part of the world is enough to make it binding, especially when it is for the common good of all men."¹⁹ Here, in a sense, is the beginning of international law.

Approaching the topic from a different angle, Vitoria points out that the Indians obviously do not want to be ruled by the Spaniards, and accordingly do their pitiful best to resist that rule. Hence there is no way the Spaniards can rule them except coercively, by that application of force on one

sovereign people by another that goes by the name of war. The question then arises, could such a war be just?²⁰

Vitoria agrees with his predecessors that war is sometimes justifiable. In cases of urgent self defense, he concedes that even private citizens may take military action. As for the authority of the ruler, he holds it only as chosen representative of the commonwealth. Clearly a more republican view is here replacing the monarchical assumptions of Augustine and Thomas. A just war can never be based on religious differences, imperial expansionism, or a ruler's self-glorification, nor can it be undertaken unless all non-violent alternatives are exhausted. There can be no just cause unless harm has been wrongfully inflicted, but not any wrongful harm will suffice. The response must not be disproportionate to the injury, for, as he says "all the effects of war are cruel and horrible." Given adequate cause and reasonable proportionality, what may be done in war? Basically, one may do what is necessary to defend and protect the commonwealth. One may reclaim what has been misappropriated and claim indemnity for the costs of war. One may prevent the resumption of hostilities by destroying offensive fortifications and establishing surveillance. And one may, and sometimes must, as in judicial sentence for a crime, impose punishment.

Although Vitoria's account of a just cause, *ius ad bellum*, offers no grounds for warring justly against the Indians, he goes on to discuss how a war which did have a just cause must be justly waged, *ius in bello*. In doing so he takes up the moral questions about war most commonly overlooked by his predecessors. For example, Vitoria pays considerable attention to non-combatant civilians, their lives, property, and personal freedom. Intentional killing of the innocent is never admissible, and military actions that foreseeably threaten their lives are lawful only in a just war that would otherwise be hopeless. Even then, foreseen but unintended injuries must not be disproportionate to the advantages gained.

A biblical precedent had often been alleged for killing male children, inasmuch as they would mature into enemy soldiers. Vitoria objects that it is intolerable to kill someone for a sin he is yet to commit, probably the first statement against preemption. Plundering the innocent is unacceptable

unless the war's progress necessitates it. Enslaving prisoners and holding them hostage is allowable only if indispensable, but Vitoria adds that "it seems to be accepted in the law of nations that Christians cannot enslave one another." In dealing with questions concerning hurtful actions outside of actual combat, Vitoria's arguments are generally based on considerations of fair indemnification and preservation of peace. While allowing that punishment may be in order, he repeatedly insists that punishments must not exceed crimes and urges that punitive measures be diminished out of mercy. He is opposed to a just victor's deposing an enemy ruler unless future security would otherwise be impossible.

We have already seen that for Vitoria rulers are conceived, at least ideally, as responsible representatives of their people. That notion is consistent with his rejecting the idea, derived from Augustine, that war is a moral question for rulers alone, whom their subjects must simply obey. For Vitoria, "if the war seems patently unjust to the subject he must not fight even if he is ordered to do so by the prince." If there are doubts that only detailed study could hope to resolve, subjects may trust their superiors. But senators and ministers are obliged to undertake the whole requisite study, and "war should not be declared on the sole dictates of the prince, nor even on the opinion of the few, but on the opinion of the many and of the wise and reliable."

As conventional claims to war justly against the Indians diminished in plausibility, a new and quite special justification was alleged that called for special treatment. Vitoria produced two treatises, one *De Indis*, defending the natives' claim to sovereignty in their own lands, and a second, *De jure belli*, refuting Spanish claims to war justly against them. The third bears the initially perplexing and possibly whimsical title, *De usu ciborum*, on dietary practices.²¹ There was evidence that Indians practiced and consumed human sacrifice, although the extent of the practice was disputed. Vitoria concedes that cannibalism is considered a sin against nature, but he insists that no such sins, including sexual ones, committed by citizens of one nation, fall under the jurisdiction of another. But the case of human sacrifice was admittedly different. Here there were victims. Harm was certainly done by Indians. And although the harm was not to Spaniards, it could be argued that Spaniards

might justly intervene militarily to protect Indian victims, just as it might be morally commendable for an individual to forcibly repel an attack on a private person. Here we have what modern usage might call a war of intervention to curb human rights violations. Vitoria does not reject such warfare in principle. But knowing that in this case it is a pretext, he merely points out that such a war would have to cease as soon as the victims were rescued, and could furnish no justification for seizure of property or land. Rescue missions, if they adhere to their legitimate purpose, are never profitable and often costly. They are, however, the only kind of war by Spaniards against Indians for which Vitoria offers even the slimmest hope of a just cause.

The writings of Vitoria that I have attempted to summarize represent an impressive advance. Their modernity reflects the cultural transformations of his day. The historic crisis that prompted them gives them realistic complexity and moral urgency. What gave them persuasiveness was not only Vitoria's care in ethical argument, but his persistent effort to draw his principles from respected traditions, to treat adversaries with courtesy and thoroughness, and to refrain always from tendentious or abusive rhetoric.

It is the set of principles and arguments that Vitoria brought to this vast and complex moral case that I have ventured to call the Catholic contribution to international law. His moral principles lead to practical conclusions readily translatable into public law, that readily bridges religious and cultural differences. His arguments dispense with all claims to divine prerogatives whether of papal authority or of evangelistic urgency. They discard the entire Augustinian concept of waging war to make the enemy as right minded as oneself. They understand just war as exclusively defensive and as subject to the same moral restraints as all self-defense. They recognize politically organized resident communities, however exotic, as having equal claims to sovereignty with the greatest nations of Europe, undiminished by racial and social differences.²²

It is natural to ask if the intellectual achievements of Vitoria and others like him did any real good. The answer must be yes and no. The no is the sad admission that the Indians were not rescued from foreign domination and

exploitation. The yes is the gratifying recognition that the arguments were not ignored by king and emperor but actually made the basis of impressive legal reforms. But these efforts, grudging on the part of the king but conscientious on the part of the Emperor, admirable as they are in some respects, came too late to restrain traders, settlers, and adventurers from continuing their ruthless practices far beyond the reach of legal enforcement. It would be in the development of international law that the moral wisdom brought to bear on the tragedy of the Indians would find its future opportunities.

We live at a time when international law exists and functions, though it remains harder to enforce than to evade. It is a time when most nations have freely joined a world organization and assumed its obligations, though they often neglect them. It is a time when alleged offences of one nation against another can be judged by a more diverse and impartial jury than that of the plaintiff. It is a time when nations can be systematically protected by neighbor nations, acknowledging a common interest that overrides national expedience. Such circumstances offer unprecedented opportunities for restraining war and assessing its justice. But we also live in a nation whose positivistic traditions of legal education are inimical to the very concepts of natural law and a law of nations, and whose official preoccupation with its own unrivalled power discourages belief in any common good that excels and exceeds national ambition. We live under the shadow of a war waged in our name. Augustine might have comforted us with assurance that only heads of state need trouble their consciences over war. Vitoria denies us such comfort, permitting no surrogate for personal conscience. And by his own painfully reluctant participation in political controversy he acknowledged the duty of scholars to discharge their own small moral ministry, confronting unconscionable ignorance with unwelcome knowledge.

An Epilogue on Augustine's Position

In much of the previous discussion it has been argued or intimated that Augustine's typical approach to the question of justice in warfare was not only unhelpful to the establishment of practical moral criteria that might

guide the formation of international law, but also dangerous as fostering self righteous religious or ideological persecution. However much or little Augustine can be blamed for it, sanctimonious claims to be waging war as a pure instrument of goodness and godliness have persisted throughout Christian history and continue to thrive in our own country.

Nevertheless, Augustine did focus upon a moral concern that should not be overlooked. For his main preoccupation was not the physical damage that war causes to human beings and their environments, but the moral damage it so often induces. Augustine's remedy for this, his injunction to wage war lovingly, like a just magistrate sadly imposing a painful sentence, has often impressed readers, with an irony verging on sick humor. C. S. Lewis labeled it the "mournful magistrate" theory. And one British cartoonist who heard the doctrine preached in an Anglican church in the Second World War depicted firebombs falling on Dresden civilians inscribed with the words, "this hurts me more than it does you."

But the fact remains that war foments and feeds on hatred, and that the hatred is often deliberately intensified by deceit. I am old enough to remember patriotic posters showing Japanese as monkeys with bared fangs, and a contrived vocabulary that translated killing Vietnamese people into "wasting gooks." Combat training has always valued and fostered the volatility of rage against a foe. Post-war psychological studies find, again and again, strains of violence and anti-social attitudes traceable to wartime experience.

Augustine's fear is well grounded. War damages not only bodies but souls. But to take this into account is not to adopt Augustine's impossible agenda of tormenting people because we love them. It is rather to add this terrible personal and moral harm to the weight of other evils that the objectives of a just war are obliged to overbear. The sanitary concept of "collateral damage" must extend beyond shortened lives, broken bodies, ruined families, and shattered lands, to include hardened hearts, despairing spirits, and embittered minds. Such consequences are hard to measure, but impossible to overlook, and perilous to ignore.

About the Author

James Gaffney, professor emeritus of Ethics at Loyola University in New Orleans, is the author of ten books, nearly a hundred articles, and chapters in several collective volumes. He has taught at universities in Europe, Africa, and Latin America, as well as various parts of the U.S. He holds a doctorate in Ethics and master's degrees in Psychology and in African Studies. His most recent writing analyzes religious and moral objections to meat eating in Eastern religions. He just returned from volunteer service in providing water facilities to rural Nicaraguan villagers. A former N.Y. Jesuit, married to theologian Kathleen Gaffney, he is the father of two and grandfather of five. He presented this paper on March 30, 2003, as the Yamauchi Lecture in Religion at Loyola University, New Orleans.

Endnotes

1 Typically, and. classically, Calvin, *Institutes*, IV, xx, 11 John Calvin, *Institutes of the Christian Religion* (Grand Rapids: Eerdmans, 1972) II,661f.

2 Thucydides, *History of the Peloponnesian War*, III, 36-49.

3 Aristotle, *Politics*, I, ii.

4 Aristotle, *Politics*, VII, xiii.

5 Ambrose of Milan, *De officiis ministrorum*.

6 Cicero, *De republica*, III, xxiii. See Augustine, *De civitate dei*, 22.6.

7 Cicero, *De officiis*, I, xxxiv xl.

8 Augustine, *Contra Faustum*, XXII, 74 79.

9 Augustine, *Epistola* CLXXIII.

10 Augustine, *Epistola* CXXXVIII.

11 Augustine, *Quaest In Heptateuch*, in *losue* 9.10.

12 *Decretum c.*, 23, qu. 1, c. 6.

13 Thomas Aquinas, S. T., IIaIIae, qq 39 42.

14 *ibid.*, 40, 1 4.

15 *ibid.*, 42.

16 Desiderius Erasmus, "The Complaint of Peace," in *The Essential Erasmus*, J. P. Dolan, ed. (NY: New American Library, 1964), 174-205.

17 Francisco de Vitoria, *Francisco de Vitoria, Political Writings*, edited by Anthony Pagden (Cambridge: Cambridge U. Press, 1991), 331-333.

18 *ibid.*, 233-291.

19 *ibid.*, 280-281.

20 *ibid.*, 293-327.

21 *ibid.*, 205-230.

22 *Las leyes de Burgos* of 1512, under King Ferdinand after the death of Queen Isabella, were the first legislation to alleviate the plight of the native peoples. *Las leyes nuevas* of 1542-1543, under Emperor Charles V, were much more thoroughgoing and humane.