THE LAW OF WAR IN FRANCISCO SUÁREZ: THE CIVILIZING PROJECT OF SPANISH SCHOLASTICISM

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ABSTRACT

This paper analyzes the law of war in Francisco Suárez. It is not an explanation about a branch of International Law, rather it seeks to investigate the origin of International Law under a very specific point of view. It aims to reproduce the intention of one of the most important authors of the Spanish Scholasticism: that of saving an ancient Christian tradition from its destruction. Though Christian in origin, the doctrine of just war is one of the largest efforts of mankind as a whole to limit the violence of war, even before the existence of that which we call International Law. To maintain the validity of the propositions of the theory of just war – and minimize the effects of war –, Suárez had to change its foundations: from religious doctrine it became a legal one.

RESUMO

O presente texto analisa o direito da guerra em Francisco Suárez. Menos uma explanação sobre um ramo do direito internacional, neste trabalho, busca investigar-se a origem deste direito, sob uma ótica bastante particular. Trata-se de reconstruir o intento de um dos maiores expositores da Escolástica Espanhola para salvar uma tradição cristã muito antiga da sua destruição. A doutrina da guerra justa, embora de origem cristã, corresponde a um dos maiores esforços da humanidade como um todo para limitar a violência da guerra, mesmo antes da existência de um direito internacional. Para manter a validade das proposições da teoria da guerra justa – e minimizar os efeitos da guerra –, Suárez precisou alterar-lhe o fundamento: de doutrina religiosa, ela se tornou jurídica.

INTRODUCTION

Francisco Suárez, one of the greatest Spanish Scholastic writers of all time, was born in Granada, on January 5, 1548 and died in Lisbon, on September 24, 1617. Proclaimed by the Church as *Doctor Eximius et Pius*, he was one of the founders of International Law. The American internationalist James Brown Scott, in an endearing analogy, considered Francisco

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de Vitória to be the founder, Francisco Suárez the philosopher and Hugo Grotius the organizer of International Law.[1]

However, according to Pierre Mesnard – author of an important work on the history of political philosophy –, "we [political philosophers] were often unjust to Suárez."[2]. The thought of Francisco Suárez had an overarching influence on Catholic and Protestant Theology, even though he was relegated by philosophers and jurists. His major juridical-political work, **De Legibus ac Deo Legislatore**, served as a mere dust-collector in libraries. His second greatest text in this area, **Defensio Fidei**, was even prohibited in France and was burned in England for the controversy it caused. This should be a clear indication of the mark of the ideas that the writer defended. Nonetheless, a long period of time had passed before the books of Francisco Suárez were allowed access to the Academia of Law and Philosophy.

It was only in the second half of the nineteenth century, when it came to light that Hugo Grotius was not the sole father of International Law, that Suárez's legal and political texts were reborn. It then became clear that Suárez was not merely an important theologian – one of the greatest of the so-called "Golden Century" in Spain and the most important of the Second Scholasticism –, but also laid out fairly modern legal and political theories such as the social contract, the popular origin of power and the doctrine of tyrannicide. Furthermore, the writer presented a notion of natural rights that were adjusted to historic changes, which spared the Suarezian natural law from one of the most pointed criticisms that positivism levied against modern natural law. The author's thoughts were so original that he developed a sophisticated, original conception of *jus gentium* that went far beyond the universe of Roman culture in which most works on the theme were still steeped.[3]

Any internationalist today would be at terms to recognize the focus of his studies in the texts written by Suárez. Unadvised, he would only find comments on Saint Thomas Aquinas' **Summa Theologica**, and would not find International Law in the writings of any early seventeenth-century author. Authors of this time period were concerned with themes that differ greatly from those in the summaries of contemporary textbooks. They battled with the Doctrine of Just War – the medieval law of war – of which *jus gentium* represents a single source.

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[1] Cf. SCOTT, J. B. **The Catholic Conception of International Law**. Washington D.C.: Georgetown University Press, 1934. pp. 183-184. Luciana Lavôur

[2] "*On a souvent été injuste pour Suarez.*" (MESNARD, Pierre. **L'Essor de la Philosophie Politique au XVIe Siècle**. 3. ed. Paris: J. Vrin, 1977. p. 40).

[3] See BORGES DE MACEDO, Paulo Emílio. **O nascimento do direito internacional**. São Leopoldo: UNISINOS, 2009.

Suárez, however, is worthy of note precisely for his systematic comments on Saint Thomas Aquinas. The study of war in Aquinas happens on a different treaty than the study of Justice (which is also different from that of Law): in the Treaty of Charity. Thus, Suárez had the opportunity to address the Law of Nations in two distinct moments of his life and from two distinct angles: when he wrote his comments on charity and, later, in **De Legibus** (Suárez unified the Treaties of Justice and of Law). This first phase of Suarezian thought concerning the Law of Nations began when he was an instructor at the Roman School (1580-1585). Despite this precocious contact, the study of war corresponds – quite paradoxically – to both the intellectual youth of Suárez and his maturity. The majority of the work was created and written in 1584, but was reviewed and only saw publication in 1621. This time lapse ensured that the message of the work was not dissonant with that of the Treaty of Law.

Therefore, the *jus gentium* laid out by the author in his study of war is not an incomplete, preliminary version of his final thought. Even so, the purpose of Suárez's Treaty of Charity was different from that of the Treaty of Law and, in this, the Law of Nations also plays a very distinct role. Even before the existence of what we today call International Law, jurists and priests sought to minimize the effects of war, limit its reach and establish requirements for its legitimacy. This body of ideas was universal due to its foundation: Christianity, which was accepted as the "Truth" by all European peoples. The Protestant Reformation, however, drastically altered this framework, producing different versions of Christianity. As a result, Catholic theology (including political and legal theology) ceased to be universal.

This was then Suárez's challenge: to prevent the precepts of just war from becoming lost in the midst of this relativism. The jurist from Coimbra was a thinker of the Second Spanish Scholasticism; the significant problems in his life were no longer those faced by Francisco de Vitória (the Age of Discovery, the New World and the rights of the Indians). Suárez was faced with the Reformation; he was the most important theologian of the Counter-Reformation. When King James I called for one more oath of allegiance in England (which would drive off the Pope's power, even in spiritual matters) and began to delve into controversy with Cardenal Bellarmine, Rome sought out to Suárez to elevate the discussion and write a scientific tome of more than eight hundred pages, the **Defensio Fidei Catholicae adversus anglicanae sectae errores**.

If the truths of faith were no longer common ground, what would stop relativism from destroying the Law of War?

THE QUESTION INHERITED BY SUÁREZ

The Just War doctrine is the middle path between complete repudiation of war, often seen among idealists, and unconditional acceptance of violence for the glory of the State, according to certain conceptions of political realism, as if kings and authorities were not subject to morality and the laws of nature. The supporters of Just War recognize that war is an evil, but that there are worse evils: the murder of loved ones and the profaning of cemeteries and sacred places at the hands of invading soldiers. This is a universal tradition, having been developed by Christian theologians and canonists, but also lay jurists.

Most historians credit the origins of this doctrine to *jus fetiale* of the Roman *collegia fetiales*. This *corpus juris* existed from the days of the kings until the end of the Republican era. *Fetiales* were priests, brought together in a form of corporation (*collegia*) and charged with a series of obligations, partly religious and partly legal (*jus sacrum*). Among their many duties, they were charged with certain activities at the beginning of a war. It has come to light that two procedural conditions were indispensable: an official notification to the opponent, insisting on reparations of grievances (damage or offense suffered) by Rome, with a due time for a response, followed by a formal declaration of war. The formal declaration of war took place at a fairly elaborate religious ceremony, marked by the recitation – in an adequately grand tone of voice – of certain legal formulas, ending with the throwing of a blood-covered spear into the boarder of the enemy's territory. Rome could not go to war without prior, explicit approval from the *fetiales*, as the gods only favored *bellum iustum et pium*. Even so, given their subordinate position to political heads, they always sought a justification for hostilities (i.e. violation of a treaty or the immunity of ambassadors; infraction of territorial rights or offenses against allied States).[4]

The influence of Fetial Law on the Doctrine of Just War, however, has come to be so elusive that it is difficult to establish a correlation. Later developments of the doctrine during the Medieval Ages share very little with its Roman origins. The Medieval Law of War lacked formalism and even subservience to political authorities. The only idea to survive from the Roman law of war was the ability to preach the justice or injustice of certain armed conflicts. War was no longer seen as a natural fateful event, but entered the domain of morally relevant action.

[4] Cf. FUSINATO, G. Le droit international de la République Romaine. **RDILC – Revue de droit international et de législation comparée**, pp. 273 e ss., 1885.

Within the Medieval Law of War, other authors[5] have identified influences of the Hebrews of the Old Testament and unquestionable remnants of Hellenic influence. Nonetheless, there is something of a consensus that this doctrine is specifically Christian, beginning with Saint Augustine (354-430). Prior influences are – as they should be – given their due recognition, but have a merely incidental effect on the main issue of this tradition: the legality of a war.

From the merely procedural questions of Antiquity, the Doctrine of Just War began to develop a substantive connotation during the entire Medieval era. War and all resulting violence or destruction are a fairly serious moral problem for Christianity; in addition to Christians' constant conflicts with non-Christians and, to some extent, other Christians, the sacred texts could lead to an error. On one hand, Christ taught peace and "turning the other cheek" to one's enemies, which could be interpreted as radical pacifism that rejects any form of warfare, even defensive war; on the other hand, God reveals Himself as the "Lord of the Armies," which could lend legitimacy to any holy war.

Nonetheless, to Christianity, war is not an evil in and of itself. According to the Spanish *maestros*, the evils that occur during war are accidental in nature, and greater inconveniences could come to pass if war was not permitted.[6] Furthermore, there is no Council that definitively prohibited Christians from participating in a war. There were, without any doubt, certain restrictions: the Council of Nicaea prohibited combat shortly after baptism; in Isaiah, it is forbidden to kill or die on a holy mountain – and, by extension, at holy places. The explication of this concept resulted from the fact that war was not in opposition to peace, but in opposition to evil peace; a peace that reigns to the detriment of justice and law. There is a substantial difference between the concepts of peace and tranquility. The latter is paralysis, while peace is harmony. Harmony assumes balance: the balance of justice. Therefore, "true" peace is based on Law.

The Just war is an eminently Christian tradition, as it was developed and reviewed by European Christian authors. After its origin with Saint Augustine, it was taken up once again by other Fathers of the Church, including Saint Isidore of Seville and Pope Nicholas I. This period was followed by a hiatus during the High Middle Ages, with the Just War falling to the wayside. It was only after the consolidation of theses in **Decreto Gratiano**, in the middle of the twelfth century, that this subject once again gained the interest of thinkers. Writings on war

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[5] Cf. VANDERPOL, Alfred. **La Doctrine Scolastique du Droit de Guerre**. Paris: Pédone, 1919. pp. 160-170.
[6] Cf. SUÁREZ, R. P. Francisci. **Opera Omnia**. *Editio Nova*. *Parisiis*: *Ludovicum Vivès*, 1858. *Tomus* XII. **De Fide, Spe et Charitate**. *Tratactus de Charitate*. *Disputatio* XIII. **De Bello**, 1, 2. Henceforth known as **DB**.

became quite popular in the Low Middle Ages. Canonists and theologians began to examine these theses until they came to acquire the classic formula characterized by Saint Thomas Aquinas. As a result of Aquinian interest, the Just War became a required reference for all Scholars. It was for this very reason that Alfred Vanderpol prefers the denomination "Scholastic Doctrine of the Law of War."[7]

The Church, as an institution, never accepted the thesis of extreme pacifism. Christians never ceased to thicken the ranks of legions, even long before the Edicts of Rome and Milan. It is the extensive presence of Christianity in the army that became the main cause for the last persecutions by the Romans. And, as it had to be, the army was the birthplace for the movement that would culminate in the Edicts of tolerance of Constantine and Licinius of 313, which did not consider military service a sin. Military service was considered compatible with Christianity to such an extent that one of the Fathers of The Church, Saint Athanasius, came to preach that it is permitted, or even glorious, to give one's life in a just war.[8]

It occurs that the first writings on just war were actually concerned with war as a secondary question. The first problem of the Fathers of the Church was not war, but the legitimacy of a public function – military service – in the face of Christian morality. Thus, the affirmations of Saint Augustine are a delayed manifestation of this concern. In the celebrated excerpt from **Contra Faustum manichaeum**, in which he defends Moses' campaign against the attacks of Faustus of Mileve, war was not the central question, but rather, the text focused on the unconditional obedience to incomprehensible – however just –, divine orders: "one

[7] Cf. VANDERPOL, Alfred. *Op. Cit.*, p. 285. Authors of this tradition, in addition to Saint Augustine, include Saint Isidore of Seville (560-636), Pope Nicholas I, with his letter to the Bulgarians, Bishop Rufin, in the **De bono pacis** (1056) treaty, Yves de Chartres (1040-1116) and Abelardo (1079-1142). In the middle of the twelfth century, a decree was issued by the monk Jean de Gratian. They were then followed by Saint Thomas, Raymond de Penyafort (1180-1275), Innocent IV (1243-1254), Hostiensis (Henri de Suse: beginning of thirteenth century -1271), Alexandre de Halès (1170-1245), Henri de Gand (beginning of thirteenth century -1293) and Saint Bonaventure (1221-1274). In the fourteenth and fifteenth centuries, a number of works are written with titles that seem to invoke war: João de Legnano (beginning of fourteenth century -1383) – **De Bello** (1360), Henri de Gorychum – **De Bello Justo** (1420), Saint Antonius of Florence (1389-1459), Alphonse Tostate (1400-1455), Martin de Lodi – **De Bello** (fifteenth century), Gabriel Biel (1425-1495), Sivestre Prierias (1456-1523), Thomas de Vio (Cajetan: 1468-1534), Guilherme Mathiae – **Libellus de Bello Iustitia Iniustitiave** (1533), Josse Clichthove (1472-1543). In sequence, the Age of Discovery led to new names, such as Francisco de Vitória, Francisco Suárez and Balthasar de Ayala – **De Jure et Officiis Bellicis et Disciplina Militari** (1582). This period includes lesser names: A. Guerrero – **Tratactus de Bello Justo et Injusto** (1543), Diego de Covarruvias (1512-1577), Domingos de Soto (1494-1560), F. Martini – **De Bello et Duello** (1589), Gabriel Vasquez (1551-1604), Domingos Bañez (1528-1604), Roberto Berlarmino (1542-1621), Leonardo Lessius (1554-1623), Gregório de Valencia (1561-1603), Luís de Molina (1536-1600), P. Belli – **De re Militari et Bello** (1558), Alberico Gentili – **De Jure Belli** (1598) and Hugo Grotius himself – **De Jure Belli ac Pacis** (1625).

[8] Cf. NYS, Ernest. **Les Origines du Droit International**. Bruxelles, Paris: Alfred Castaigne, Thorin et fils, 1894. p. 45.

should not find it strange or horrifying that Moses went to war, as he did not do so out of cruelty, but out of obedience and respect for divine orders."[9]

In **De civitate Dei**, war becomes the focal point for criticism, as it was one of the main instruments of Roman imperialism. Saint Augustine used war as a warhorse in the greater struggle against the false values of Virgil: the illusory greatness of Rome was rooted in *superbia*, not *pietas*. The poet's celebrated verse can be found in the preface of the same book.[10] In fact, Augustine's criticism was not of war, but the entire system of pagan morals. It is through *pax* and the correlating notion of *ordo naturalis* that the unity of its conception was established. Just as in its Theodicy, which reduces evil to the lack of good, without its own consistency, war is merely the inverse of the positive concepts of *pax* and *ordo*. Human nature is free to submit to *ordo*, via *pietas*, or to oppose *ordo* through *superbia*. *Pietas* leads to *pax ordinata*, in harmony with *ordo naturalis*; *superbia* leads to *pax perversa*, the peace of the diabolic city. To become just, war must raze this type of peace and build a better one, more adequate to *ordo naturalis*, in correspondence with divine will.[11]

In reaction to the feudal propensity for combat, the Church was ready to take a stance against war. However, the Church's hostility towards war was limited to conflicts between the faithful. Furthermore, it sought to reduce the violence and destructive power of war. The clergy was prohibited from spilling blood, while for the companions of William the Conqueror, a Council imposed a penance of one year for each person killed, another forty days for each person wounded and another three for any desire to wound. Even with this, the legitimacy of war was never questioned; only unjust war was considered a true punishment from God.[12]

Historians tend to consider the book XVIII of Saint Isidore of Seville's **Etimologias** a mandatory reference for the High Middle Ages. The author makes a distinction between four types of war: *justum bellum*, *injustum bellum*, *civile bellum* and *plusquam civile bellum* (between generals united by family ties). "Just is war that is declared to retake that which has been subtracted or to repel enemies." In turn, "unjust is war that has its roots in rage and was not undertaken for a legitimate reason."[13] Within this definition there are, therefore, two

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[9] "(...) *nec bella per Moysen gesta miretur aut horreat, quia et in illis divina secutus imperia non saeviens, sed oboediens fuit* (...)" (AGOSTINHO. **Obras de San Agustin**. Translation by Pío de Luis. Bilingual edition. Madrid: BAC, 1993. t. XXXI. *Escritos antimaniqueos*. *Contra Fausto*. p. 604. Livro XXII. 74).

[10] Cf. AGOSTINHO. **Obras de San Agustin**. Translation by José Moran. Bilingual edition. Madrid: BAC, 1958. t. XVI. *La Ciudad de Dios*. p. 62. Book I. *Praefatio*.

[11] Cf. TRUYOL y SERRA, Antonio. **El Derecho y el Estado em San Agustin**. Madrid: Revista de Derecho Privado, 1944. pp. 57-70.

[12] Cf. NYS, Ernest. *Op. Cit.*, p. 46.

[13] "*Justum bellum est quod ex praedicto geritur de rebus repetitis aut propulsandorum hostium causa*." E "*Iniustum bellum est quod de furore, non de legitima ratione inititur*." (ISIDORUS HISPALENSIS EPISCOPUS.

requirements to ensure the legality of a war: a declaration and a just cause. This cause may be to repel an enemy, characterizing a defensive war, or to retake a stolen good, a type of the greater injury.

Despite the importance that this definition would later acquire – most importantly because it would be reproduced in the **Decreto Gratiano** –, the Swiss jurist Peter Haggenmacher points out that this formula was common ground in the Ancient literature and was not quite essential to the tradition of Just War. Mr. Haggenmacher, in his thesis, demonstrates that the Bishop of Seville sought to take back two phrases uttered by Cicero, not Saint Augustine's thoughts on war[14], which would have little to no effect in this period. The same, however, does not apply to the Augustinian notions of *pax* and *iustitia*, which make up the cornerstone of political Augustinianism. Since the end of the Empire, the Christian conception of justice grew roots on the West, as a result of the privileged role a number of Popes played in the political organization of Frankish and Germanic monarchies.

It was only in the twelfth century that the Doctrine of Just War began to be consolidated. In Bologna, in 1140, the monk Graziano wrote the **Concordia discordantium canonum**, marking the beginning of classic Canonic Law. War was the focus of a significant portion of the work, Cause XXIII, and, since then, has been a required theme for future generations of theologians and canonists. The **Decreto Gratiano** has proven to be a work of both Law and Theology, leaving it open to a number of interpretations. The work was a consolidation of a number of different themes – including war – in which Graziano brought together a wide range of references from the Patristic. All of the passages traditionally associated with the Doctrine of Just War can be found in the same place. If Haggenmacher is right – and both Augustine and Isidore had not focused on just war –, then it is the **Decree** that began this tradition. The mere fact of codifying all Christian thought on war is proof of the intent to investigate this theme. Quotes were removed from their original context and became valid in themselves, as a universal rule. This was characterized by a more generic attitude in the face of *auctoritates*, common amongst the period: within this manner of thought, one should always seek out general standards, without giving attention to the greater scenario in which

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Etymologiarum sive Originum Libri XX. ed. W. M. Lindsay. Oxford: Clarendon Press, 1911. XVIII, *De bello et ludis*, I, 2).

[14] One should notice the deep similarity to the phrases of Isidore: "*Illa iniusta bella sunt, quae sunt sine causa suscepta. Nam extra ulciscendi aut propulsandorum hostium causa bellum geri iustum nullum potest.* (...) *Nullum bellum iustum habetur, nisi denuntiatum, nisi dictum, nisi de repetitis rebus.*" (CICERÓN. **De la République – Des Lois**. Translation by Charles Appuhn. Bilingual edition. Paris: Garnier Frères, 1954. p. 164. Book III, 23). See also HAGGENMACHER, Peter. **Grotius et la doctrine de la guerre juste**. Genève, Paris: Heige, Presses Universitaires de France, 1983, p. 23.

they exist. Graziano even unified in to a single item a few excerpts from Patristic texts, the decisions of Councils and Papal decrees: they all correspond to canons.[15]

The cause XXIII of **Decreto Gratiano** is entitled *De re militari et bello* and is divided into eight questions. The first question directly covers, for the first time, the morality of war: *an militare sit peccatum*? ("is waging war a sin?"). Despite invoking a number of precepts of the Gospel that recommend gentle nature and forbid revenge, the author admits that war may be legitimate. Some wars turn out to be necessary, and this necessity provides an excuse for violence.[16]

Even so, necessity is not enough to confer legitimacy to a war. Graziano borrows from the Saint Augustine's book against the Manichaeans, in which he enumerates all of the reprehensible components of a conflict: the desire to destroy, the cruelty of revenge, relentless and violent spirit, savagery in combat, the desire to dominate and all similar excesses. The mere act of going to war is not a sin, but war should not be undertaken with cruelty and avarice, but with the purpose of seeking peace. The decree contains two definitions of just war, the first, offered by Isidore of Seville and already cited, and another borrowed from Saint Augustine: "We tend to call just war any war that seeks to right an injustice, punish a city or country that failed to punish an illegal action committed by one of their own, or to restore that which was unjustly taken."[17] Therefore, just is a war that seeks peace, that rights an injustice and restores a good that was unjustly taken.

More importantly, when Graziano resurrected the definition created by the Bishop of Seville, he introduced a subtle modification. He substituted the expression *ex praedicto*, which implies the necessity for a declaration, with *ex edicto*, which assumes the existence of an authority that orders its forces to war.[18] Thus, in a very inconspicuous manner, he began to create the notion – that would later be developed by Saint Raymond of Penyafort and Saint Thomas Aquinas – that just war requires the approval of a legitimate authority.

Even though the **Decreto Gratiano** analyzed war in itself indeed, Haggenmacher points out that Graziano's purpose does not seem to have been an investigation of the justice in a war. If cause XXIII is taken as a whole, the greater theme comes to light as the legitimacy of the coercive power among Christians, within the dominion of faith. War is characterized as one of the methods of exercising this power. The first three questions that cover war are quite brief,

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[15] Cf. HAGGENMACHER, Peter. *Op. Cit.*, pp. 24-25.
[16] Cf. GRATIANUS. **Decretorum Codex**. *Venetiis*: Nicolai Jenson Sallici, 1477. Causa XXIII, I, 1.
[17] "*Iusta enim bella definiri solent, quae ulciscuntur injurias, si gens vel civitas plectenda est quae, vel vindicare neglexerit quod a suis improbe factum est, vel reddere quod per injurias ablatum est.*" (GRATIANUS. **Decretorum Codex**. Causa XXIII, II, 1).
[18] Cf. NYS, Ernest. *Op. Cit.*, p. 100.

particularly the question that establishes the concept of just war. The two middle questions, for their size, receive more attention, and are devoted to the vindictive power and its ultimate consequence, capital punishment inflicted by a judge. Coercive power, therefore, is the central problem. The first three questions are merely preliminary and rule out a fundamental objection; the two middle questions focus on the subject at hand; and the sixth and seventh cover the immediate consequences of repression; while the eighth covers a specific question, the use of arms by the clergy. This interpretation of cause XXIII is also corroborated by history, as it was adopted by the major issuers of decrees in the twelfth century, in their comments.[19]

Even so, even if cause XXIII does not include a whole doctrine for just war, given the particularities of its composition – covering war and compiling a number of patristic references on the subject – it does represent one of the most decisive factors in the emergence thereof. From Graziano to Saint Thomas Aquinas, the doctrine of just war was organically and continuously developed. If, for the Fathers of the Church, the theme was merely touched on and if, in the **Decreto Gratiano**, it was included as part of a greater theme, among lawyers, canonists and those that issued decrees, it gained autonomy.

It is important to remark the collection of decrees created by the Spanish Dominican Saint Raymond de Penyafort in the first half of the thirteenth century, on orders from Pope Gregory IX. In the collection, the author establishes five requirements for just war (*persona*, *res*, *causa*, *animus* and *auctoritas*), which, later, were condensed by Saint Thomas Aquinas into only three. Shortly thereafter, two authors produced their comments on the Gregorian decrees: Pope Innocent IV, one of the greatest jurists ever to succeed Saint Peter, in **Apparatus in quinque libros decretalium**, and Henry of Segusio, known as *Cardinalis Hostiensis*, in **Summa Áurea**.[20]

Thus, between 1263 and 1269, Saint Thomas Aquinas wrote his **Summa Teologica** and provided the classic formulation for the doctrine of just war. His work influenced theologians, moralists and, while Saint Thomas was not a jurist, it influenced canonists. His investigation on war was condensed in question 40 of the *secunda secundae* of the Treaty of Charity, summarized in four articles. The first espouses on the problem of legality of war; the second questions the legality of the clergy to wage war; the third questions the use of stratagems by combatants and the legality of pursuing a battle on holy days. It is, however, the first article that offers the core of his conception. For a war to become just, three conditions must be met:

[19] Cf. HAGGENMACHER, Peter. *Op. Cit.*, pp. 26-27.
[20] Cf. HAGGENMACHER, Peter. *Op. Cit.*, p. 38.

> First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. (...).
> Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault (...).
> Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil (...).[21]

Given the authority that the thought of Saint Thomas would acquire over time, these three conditions came to characterize the scholastic doctrine of just war.

It is important to note that the interest of lay jurists also turned to the law of war. At the end of the thirteenth century, the question was analyzed by Cino de Pistoia and other French jurists from the Orleans school. At the beginning of the following century, the doctrine was reinforced by the great Medieval jurist Bartolus de Saxoferrato, who incorporated the theses of Innocent IV. In 1360, one of Bartolus' disciples, Johannes de Lignano, wrote the first work to exclusively cover the law of war: **Tratactus de bello, de represaliis et de duello**. Lignano began a tradition which would culminate with Gentili and Grotius. This book gained a practical connotation in its many vulgarizations, including those of Christine de Pisan, William Caxton and the famous work by Honoré Bonnet, **L'Arbre des Batailles**, all written in vulgar languages. Since then until Grotius, a number of works specifically written on the law of war began to appear, including those of Martin de Lodi, Juan Lopes, Pierino Belli, Balthasar Ayala and Heinrich Bocer. This then led to a progressive consolidation of the body of the just war doctrine.[22]

Despite the definitive consolidation of the doctrine of just war in Lignano's book, he did nothing more than compile the conclusions of his predecessors. He introduced a period of stagnation in the area, dominated by a fairly inactive casuistry, with the exception of certain isolated advances – such as those of Lucas de Penna or Raphael Fulgosa. At the beginning of the sixteenth century, despite the fact that general interest on the subject had only increased, it did not befall to jurists to develop the law of war, but rather to theologians. Haggenmacher mentions the contributions of Martin Luther and Erasmus[23], however eccentric they may seem within the tradition of just war. The main writers on this theme during the period were the

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[21] "*Primo quidem, auctoritas principis, cuius mandato bello est gerendum. Non enim pertinet ad personam privatam bellum movere: quia potest ius suum in iudicio superioris prosequi*. (...) *Secundo, requiritur causa iusta: ut scilicet illi qui impugnantur propter aliquam culpam impugnationem mereantur*. (...) *Tertio, requiritur ut sit intentio bellantium recta: qua scillicet intenditur vel ut bonum promoveatur, vel ut malum vitetur*." (AQUINO, Santo Tomás de. **Suma Teologica**. Texto latino de la edición crítica Leonina. Translation by Francisco Barbado Viejo, O.P. 2. ed. Madrid: Biblioteca de Autores Cristianos, 1947. 2-2 q. 40 a.1).
[22] Cf. HAGGENMACHER, Peter. *Op. Cit.*, pp. 39-40.
[23] Cf. HAGGENMACHER, Peter. *Op. Cit.*, p. 42.

Italian Thomas de Vio – vulgarly known as Cajetan – and the Spanish Scholastics. Among the latter, there is not doubt to the outstanding position of Francisco Suárez.

THE PURPOSE OF **DE BELLO**

It is important to note that, while the object of our analysis is the "law" of war – a *jus* –, this study is to be seen within the Treaty of Faith, of Hope and of Charity – particularly, the final of the three. It may seem strange to a modern reader that a book on one of the three theological virtues contains a work on one of the fields of Law; however, for Suárez, this was nothing but normal; only Charity was able to amend the limits of Justice and Law. Although he was seeking to evaluate justice in extreme conditions, war is a reality that surpasses this domain into another.

The fact is that there are juridical questions that Law was unable to answer. In Antiquity, the skeptic Carneades attacked the doctrine of natural law held by the stoics. He gained fame, with his method of demonstrating pros and cons, by ridiculing the notion of Justice. One of his most celebrated arguments was the thought experiment known as the "plank of Carneades." Shipwrecked, two people swim up to a plank to save themselves from drowning, but the plank only holds one. Who, in this case, has the right to the plank? In an extreme case of need and self-preservation, according to the skeptic, the answer would be both and neither. Today, modern legal systems encompass the figure of the "state of necessity" for situations like this, and either of the survivors could take the plank for their own and would still be secure from this exclusionary illegality. But this answer would not satisfy the ancient spirit, given its belief that Justice could only be on one side. Rommen[24] tells us that, only seventeen centuries later, Suárez would provide the correct answer. Law cannot function in situations marked by extreme scarcity or absolute abundance, because it presupposes distribution. In the aforementioned example, the order of Justice and Law ends and the government of Charity begins.

For Saint Thomas, peace is an interior effect resulting from Charity. War, in turn – together with hate, acedia, envy, discord, rivalry, schism, baiting, sedition and scandal –, is a vice opposite to Charity. For a theologian, evaluating justice in war is not concerned so much with determining an injury, but rather because it constitutes a sin against one of the three theological virtues. The investigation of justice or injustice in war is a means to a much more

[24] Cf. ROMMEN, Heinrich. **The Natural Law**. English translation by Thomas Hanley. Indianápolis: Liberty Fund, 1998, p. 18.

important theological end. An unjust war, in addition to harming Law, harms Charity. Francisco Suárez repeats this same order and does not cover the law of war in his treaty on Law and Justice, the **De Legibus**, but rather in the last *disputatio* of the Treaty of Faith, Hope and Charity. That is how a theologian studies Law.

In his concrete, specific dispositions on the law of war, the author does not demonstrate much originality; his text summarizes all of the work of the Second Scholastic on just war. This was his merit and his intent. The work was, most importantly, a Catholic and Spanish conception. Even so, surprising was the fact that, since Francisco de Vitória, the Spanish *maestros* preached a high tolerance for other peoples and religions – particularly the Islam – and reproached the fervor of the Iberian conquest. Suárez, for example, did not hesitate in admitting the possibility of justice in a war waged by a non-Christian sovereign against a Christian prince. And according to Vitória, given that authority does not result from religion, but rather nature, all people, even infidels, are able to hold dominium. The Indians, therefore, also exercise sovereignty and live in a "pacific dominium of public and private property. Thus (excluding any impeding obstacle), they should be considered true owners and, in these circumstances, they cannot be removed from their territory."[25] Therefore, the Spanish Scholastic law of war obstructs the titles of property held by the Spanish in America and takes the monopoly of justice away from Catholic monarchs.

Indeed, at first glance, the "Spanish school of peace" (a term employed by Luciano Pereña) seems hardly Spanish and hardly Catholic. However, "Spanishness" and "Catholicness" represent much more than a mere defense of a state policy or an outdated conception of the world. The grand dilemma of the sixteenth century was the inexorable dissociation between the two cities, the earthly city and the city of God. Suárez employed all his intellectual force to fight Machiavelli on his own terms. The idea of Empire had lost its glimmer in historic years, and there were as many sovereignties as there were States. Spain, for the author, was the key to the crisis and the last hope for the reconstruction of a Christian Europe. The country was to convert itself into an empire at the service of religion, justice and civilization. All Catholic princes, as an imperative of their Faith, could protect the Church. But

[25] "(...) *in pacifica possessione rerum et publice et privatim. Ergo omnino (nisi contrarium constet) habendi sunt pro dominis. Neque in dicta causa possessione deturbandi*" (VITORIA, Francisco de. **Obras de Francisco de Vitória**. *Relecciones Teologicas*. Edited by Teofilo Urdanoz. Madrid: Biblioteca de Autores Cristianos, 1960, *De Indis*, *Relectio* 1, 5. p. 651).

it was only a large and strong state, such as Spain, that could intervene in the schism of Earth and save the Christian civilization[26].

As a truly civilizing mission – an undertaking that had to be both Catholic and Spanish – Suárez conceived the **De Bello**. If this work seemed hardly Catholic and hardly Spanish, it is because it must be read in the light of chapter eighteen of the Treaty of Faith, which Luciano Pereña named the "Treaty of Intervention." The work expounds on the just means of coercion for the conversion of infidels, and its main message can be summed up to the duty of pagans to hear and tolerate the Christian faith.[27] This is not an obligation to convert – which presupposes free adherence – but to support evangelization. The Catholic Religion contained the Truth, and so none could stop its disclosure. In order to guarantee the preaching of religion, the Pope may commission the Catholic princes to intervene and promote war. In the end, the project of the Second Scholastic truly justified the Spanish imperial policy in the conquest of both America and Asia.

Even so, this represented a considerable advancement over the previous conception of "barbarians encircling the Christian and European empire." Sovereignty and titles of domain held by infidels were no less important than those of Christians. The politics of pagan peoples held the same value as those held by peoples that preached the true faith. The lesson of the separation of the two cities was well learned. However, Suárez knew very well that, without the action of Justice (as well as Charity), this dissociation would lead to ethical relativism and a lack of religion. If the defense of Christian Europe could no longer be conducted in the old ways, then neither could civilization – all of the centuries of culture centered on reason and the emancipation of man – keep hold of its home. The law of war and *jus gentium* in general, then, were valuable instruments in the civilization's struggle against the barbarian relativism.

Thus, the **De Bello** was aimed at moralists in an attempt to reach their inteligence. This, therefore, was the motive of the casuistic character of the study and its inclusion in the Treaty of Charity. The tone and audience were a response to Alberico Gentili, to whom the study of war was not a part of the moralist's trade.[28] In another passage, while trampling over all subtleties of the Scholastics, Gentili had said that justice in war has no relation to religion, as if they had espoused such a rudimentary position. Gentili ends this observation with the famous

[26] Cf. PEREÑA, Luciano. *Estudio Preliminar*. In: SUÁREZ, Francisco. **Guerra Intervención Paz Internacional**. Spanish Translation by Luciano Pereña. Madrid: Espasa-Calpe, 1956. p. 10.
[27] Cf. PEREÑA, Luciano. *Estudio Preliminar*. In: SUÁREZ, Francisco. **Guerra Intervención Paz Internacional**. pp. 19 and ss., as well as the whole second part of the work, titled **El Derecho de Intervención**.
[28] Cf. GENTILI, Alberico. **De Iure Belli Libri Tres**. Hannover: G. Antonius, 1612. Available online at <http://gallica.bnf.fr>. Accessed in July, 2012, I, 1, 1.

warning: "Let theologians keep silence about matters outside their province."[29] This, in turn, was a response to the declaration made by Vitória on the gross expansion of the theological trade. There is no doubt that Francisco Suárez would reaffirm the Spanish Scholastic conception in the face of such a rude attack from the Italian jurist from Oxford. The Scholastic law of war was not a mere pamphlet in the defense of Catholicism. It was a sophisticated theoretical corpus abounding with nuance and identified justice in war not with religion, but with civility among peoples. The greatest subtlety, which is difficultly perceived, is the fact that the identifying character of the civilizing project was monotheistic religion and, particularly, Christianity.

This requires an explanation. To regulate the phenomenon of war, one does not rely solely on the principles resulting from nature. Although a fair portion of the law of war was based on natural law, there were some practices that fell outside nature's domain. Cavalry codes and military honor, as well as certain procedures regarding spoils and the capture of nobles – were positive norms and were recognized as binding. Writing on the existence of a legal system with precepts applicable to all peoples is synonymous to accepting the idea of natural law. However, demonstrating the validity of a legal corpus with fairly precise and concrete norms, particularly in a situation so extreme as that of war, meant defending a common positive law. Furthermore, Medieval Roman law could no longer serve this purpose: the decadence of the Roman law and the discovery of non-European peoples – who never knew of the law in question – prevented this.

Although many institutes of the Medieval law of war were part of positive law – and thus its domain surpassed the limits of national law – this did not imply universal validity. In the thirteenth century, four different types of war were identified, each with its own regulations, according to the nature thereof and the enemy in question.[30] With the separation of the two cities and the discovery of American peoples, the law of war was at risk of never becoming universal. At this point, the different types of war could continue to exist, each with its own standards, in accordance with those waging the war. Not all of the precepts of this field were moral; therefore, they were not natural law, which is universal in its excellence. Spanish

[29] "*Silete theologi in munere alieno*!" (GENTILI, Alberico. *Op. Cit.* I, 12, 4).

[30] I.e.: *guerre mortelle*, also known as "Roman war" in which no prisoners were taken and no ransoms were accepted. Generally waged against non-Christians. *Bellum hostile* was waged between Christians and a number of rules of civility were recognized: limits on bad treatment, ransoming of noble prisoners, etc. G*uerre couverte* occurred between two vassals pledged to the same lord. No restrictions on the killing of enemies, but property should be protected. In addition to these three forms, there was also the siege, which by nature, had its own properties. (Cf. STACEY, Robert. The Age of Chivalry. In: HOWARD, Michael; ANDREOPOULOS, George, and SHULMAN, Mark (org.). **The Laws of War**: constraints on warfare in the Western World. New Haven, London: Yale University Press, 1994. pp. 32-39).

theologians were able to make this law universal by finding rational rules that would lead to peace. The law of war in the Second Scholastic could be understood as a justification of both Spanish foreign policy and the expansion of Christianity. Nevertheless, it is possible to understand this issue as an effort to propagate civilization. Given that religion could no longer become universal, then civilization should. It is important here to note that the civilization in question at the time was the fruit of Christian and European values. But this was the only alternative to relativism.

A NEW INTERPRETATION OF SAINT THOMAS

It is clear that the *Eximius* Doctor does not explicitly mention the terms "civilization" or "civility"; however, they correspond to the general meaning of all of his casuistic prescriptions for the law of war. It is the author's choice of a point of view that exceeds the realm of Law and enters into Charity that allowed for the universalization of ideas that were not of moral origin. In order to provide for a better perception of this fact, those precepts must be examined in detail. Suárez begins his work by providing a quite operational concept of war: "the exterior conflict that opposes exterior peace is duly known as war when entered into by two sovereigns and two States."[31] This definition, while very short, reveals certain fundamental ideas for those that study war through the lens of Charity. The fact that war is an **exterior** conflict that opposes **exterior** peace is in clear opposition to the disturbances of the soul, which are internal to the hearts of men. War is a social vice, not an individual one, and this sets it apart from other corruptions of peace. Furthermore, in its characteristic as a struggle between States, war is different from sedition (combat between a sovereign and his people) or from a rift or duel (between individuals).

The first problem Suárez faced was the idea that war could be intrinsically evil, a fact that would put an end to the entire concept of just war. Linked to this question, he had to cope with the obstacle of whether any moral decree would impede a Christian from waging war. Then the Grenadian theologian had to determine if war was contrary first to human nature and second to the Christian religion. Suárez called upon a number of biblical excerpts, already found in the **Decreto Gratiano** to prove that God never prohibited war. As for the passages in

[31] "*Pugna exterior, quae exteriori paci repugnat, tunc proprie bellum dicitur, quando est inter duos principes, vel duas respublicas*" (SUÁREZ, Francisco. **DB**, *Proemium*).

which God seems to condemn the act, Suárez is able to prove that they were critical of other circumstances, not of war itself.[32]

In addition to being permitted, there are situations in which war is mandatory, through the lens of Charity. In defensive wars, any and all who are fit to fight have a duty to defend their homeland. And aggressive war is not evil in and of itself either. This form of war, in Suárez's understanding, is not the same as imperialist expansion. The difference between defensive war and aggressive war is the injury. When war is being waged, the opposing State's actions characterize a defensive war; once conditions have improved, their actions come to characterize an offensive war.[33] Thus, no war, either defensive or aggressive, is an affront to nature or the Gospel.

As it had to be, Suárez called upon the three conditions of justice in war laid out by Saint Thomas: "firstly, legitimate power to wage war. Secondly, a just cause or legal title. Thirdly, that the initiation of hostilities be dignified and fair, as well as the fighting and after the victory.[34] Outside of these requirements, war should be condemned, even though it is not an evil in itself, because it brings evils to bear. Death and destruction caused by all wars must be justified by a greater good. This is not an application of the maxim "the ends justify the means," however, some ends do justify certain means. The purpose of the remainder of his work will be to examine which ends and means may be used as justification. It becomes clear that the author modified, to the slightest degree, Aquinas's last condition of "good intent." Given that war is constituted by external actions, good intent may only be perceived in the behavior of forces during hostilities.

Suárez then went on to analyze the first condition. As natural law authorizes anyone to defend themselfes, legitimate authority is not an issue for defensive wars, only for aggressive wars. Authority, one must note, is held by he who holds sovereignty. If the sovereign fails to act, the decision then rests with the people.[35]

War should be declared by a sovereign, first, because it is his duty to defend the state. Second, because this ability (to declare war) is a power of jurisdiction. The exercising of this ability is tied to vindictive justice, "of the highest need in a republic to punish wrongdoers. Thus, just as a head of State can punish his own subjects when they harm one another, he can

[32] Cf. **DB**. 1, 2.
[33] Cf. **DB**. 1, 3-5.
[34] "*Primum, ut sit a legitima potestate. Secundum, ut justa causa, et titulus. Tertium, ut se vetur debitus modus, et aequalitas in illius initio, prosecutione, et victoria*" (**DB**. 1, 7).
[35] Cf. **DB**. 2, 1.

also take revenge on another sovereign, whose State became subject to the former through an offense."[36]

A sovereign has jurisdiction over his subjects, because they are his people, but this jurisdiction can extend to another state as the result of an offense. This is a penal concept of war, representing a form of criminal sanction. Since that there are no judges with the ability to rule on a dispute between two princes, if the offending party offers no reparations, war becomes the only means possible of delivering justice.

In a primitive judicial system, self-defense seems to be the only manner of ensuring justice. This is indeed a defective, yet possible measure. "What else did the jurists and theologians of the sixteenth century do other than accommodate the immutable and eternal laws of justice and natural law within a historic circumstance?"[37] Natural law grants all individuals with the right to defend themselves, but does not grant the right of jurisdiction. It is for this reason that individuals may defend themselves, but not declare a war. Within Suárez, there is no possible analogy between war and a private raid.

A just cause for a war is always a fairly serious injury, which could not be avenged or repaired in any other way. In principle, self-preservation and the preservation of one's rights may justify combat. However, the offense must be quite serious: the motives that pagans point out (ambition, avarice, conceit and ostentation) cannot be accepted, since any State could invoke these motives, leading to the absurdity of a just war for the both sides involved.[38] There are three classes of serious injuries. The first occurs when a prince takes control of the property of another; second, when the sacred rights of *jus gentium* are denied, such as the right to transit over a public thoroughfare or international exchange; and third, when an injustice is a slight against reputation or honor (moral damages). These injuries constitute cause for war when effected on a sovereign, his people or, furthermore, a third ally. In latter case, in addition to the right, the sovereign must manifest the will to react through war. The reparation of an injury is applicable up to the limit of indemnification for the damage, as well as punishment of the guilty party.[39] For Suárez, punishment is one of the deontic forms of Law and, therefore, can be justly undertaken only by the offended State.

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[36] "(...) *quae maxime necessaria est in republica ad coercendum malefactores; unde sicut supremus princeps potest punire sibi súbditos quando aliis nocent, ita potest se vindicare de alio principe, vel republica, quae ratione delicti ei subditur*" (**DB**. 2, 1).

[37] "*Qué hacían los juristas y teólogos del siglo XVI sino acomodar a una circunstância histórica los principios inmutables y eternos de la justicia y el derecho natural*?" (PEREÑA, Luciano. *Estudio Preliminar*. In: SUÁREZ, Francisco. **Guerra Intervención Paz Internacional**. p. 46).

[38] Cf. **DB**. 4, 1.

[39] Cf. **DB**. 4, 3-4

Since his work expounds on two virtues, an interesting situation could arise: the cause may be just, but, even so, it opposes Charity. Suárez affirms that one should consider, when facing a war, the damage of the State against which war will be undertaken, the damage to the state waging war and the damage that could be done to the Church. In this case, there is a clear dissociation of Charity and Justice. Even though a Christian king may have a just cause, in the establishment of his rights, he may weaken another Christian sovereign that is fighting off the advances of the enemies of faith. In this case, the Pope may use his indirect power of intervention to prevent war. Regarding the first of the three offenses, there is no obligation to restore, given that they were provoked by the (bad) will of the offending State to offer satisfaction. But if after the victory the offended party demands an indemnification that is not required, and that the aggressor cannot meet without great inconvenience, the former has sinned against Charity. In the second case, if the offended sovereign goes to war without considering the damage he may suffer, he is working against both the charity and the justice he owes to his people. He will open up his kingdom to a destruction that far outweighs the offense.[40]

That is a very interesting situation, as it represents a true concession by the doctrine of just war to political realism. A sovereign should not – even when on the side of justice, in principle – undertake foolhardy adventures that could put his reign in danger. Suárez justifies his position by that fact that the prince must protect the common good and, in this case, the medicine could kill the patient. Furthermore, he observes that this condition only applies to aggressive war, because in a defensive war, there is no alternative to combat. Suárez added that this criterion refers to a probability of victory, rather than certainty. And not rarely victory cannot be revealed before the dispute. Often, it is not even in the common good to wait for a degree of absolute certainty. Moreover, if certainty should be required, a weaker sovereign would never declare war against a stronger opponent.[41] Within collective actions, certainty is never the case, but rather probabilities and hope.

In sequence, Suárez analyzed whether Christian princes hold any other right to war, aside from those prescribed by natural law. He sought to discover if professing the true faith grants an advantage that pagans do not have, if war is “more just” for Christians than for other peoples. In principle, Suárez did not find this to be so. To not accept the true religion is not a cause for war, since conversion is an internal adherence and cannot be achieved through force.

[40] Cf. **DB**. 4, 6.
[41] Cf. **DB**. 4, 7-8.

As a result, idolatry is not a legitimate cause for war either. "God did not give all men the power to avenge injuries against Him, because He could easily do so if He so desired.[42]

Nonetheless, if a head of State mandates, by force, his subjects to practice idolatry, this would provide for a just right to intervention by another Christian prince. In this case, the offense is not against God Himself, but against the innocents that desire to profess the true faith. At this moment, Suárez and all of the other Spanish *maestros*, the thoughts of which he summarized, reveal the core of the Spanish School of Peace. This title is not "exclusive to Christians, but is common to all infidels that worship a single God."[43]

This is how the law of war can constitute an ethical minimum. It is monotheism, not the Christian religion, that represent civilization, and it is easy to understand why. The polytheism known to Europeans was ancient paganism and a few scant notices of African religions, all of which contained the idea of human sacrifice and cannibalism, which were already considered as barbarian. Furthermore, both Islam and Judaism, the other two great monotheistic religions, preached mutual love and respect for the other, teachings that Christians could easily relate to. Beyond the revealed religions, civilization was far from certain.

The proof that Suárez's argument is centered on civilization, rather than religion, is the fact that he radicalizes reason. Christian princes, therefore, may intervene in non-Christian states to defend the people from their sovereign's idolatry. They may also intervene in Christian states, if the prince has converted to paganism and has forced the conversion upon his people. Muslim kings may do the same with other Muslim sovereigns that have strayed from the path, as well as even with Christian princes. In the name of monotheism and civilization, Suárez allows non-Christian sovereigns to intervene in Christian states.[44]

Since Vitória, Scholasticism had known that Indians had a just right to property and dominium of their lands. Suárez pondered on the Aristotelian concept of natural slavery, but did not accept a general application of the thesis, because "there are many infidels that are better endowed than many Christians and often more disposed for the political life."[45] Therefore, it is impossible to take away the lands or government of an infidel in a just manner. For this to be possible, it would not be enough that a certain people be less intelligent. It would be necessary that they proved themselves to be so backwards that

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[42] "*Deus enim non dedit omnibus hominibus potestatem vindicandi suas ipsius injurias, quia ipse facile id potest*" (**DB**. 5, 1).
[43] (...) *non proprius Christianorum est, sed communis cum iis infidelibus, qui unum tantum Deum colerent*" (**DB**. 5, 3).
[44] Cf. **DB**. 5, 3.
[45] "(...) *multos esse infideles ingeniosiores fidelibus, et aptiores ad res políticas*" (**DB**. 5, 5).

> they live more like beasts than man (...) [a people lacking any framework of political organization, the members of which live] completely naked, eat human flesh, etc. If this class of man does exist, they may be made subject through a war not to destroy them, but to organize them in a humane manner to allow for their governance with justice. But this right should rarely or never be admitted, except in the death of innocents and other similar crimes. Therefore, this right is best adapted to the idea of defense than that of aggressive war.[46]

Should this right exist, it extends to all kings that seek to defend civilization, not merely the Christian kings.

It is doubtless that there are limits to this religious tolerance. If a non-Christian state wishes to submit itself to the laws of Christ, but the government prevents this act, then Christian sovereigns may defend the innocent. Nevertheless, if the civilization is not in danger, the same right does not assist other monotheistic religions. If this same State wishes to receive the religion of Mohammad and its sovereign forbids this, even if no barbarian practices such as cannibalism or human sacrifice are committed, Turkish sovereigns would have no right to intervene.[47] Civilization is identified with monotheism, but only Christianity holds the Truth. The Truth, in turn, may only be defended by those that know the Truth, and them alone.

Another obstacle in the study of just causes that the creators of the doctrine of the tradition of the right of war had to face was the bilateral nature of justice in a war. If two sovereigns have equal rights to the same good, both would possess a just title. That said, a theologian would be unable to accept this, as it would imply that the will of God is not unequivocal, or that His creations are imperfect. The Spanish *maestros* resolved this problem by appealing to a dimension that Suárez would discover in his **Metaphysical Disputations**: subjectivity. From an objective point of view, Justice would remain united, and only one side would in fact hold the just title; however, if faced with unsurpassable ignorance, an excusable error, then, in a subjective manner, Justice would become bilateral.

In this situation, both parties would be obligated to avoid error to the best of their ability. Suárez, for one, accepted this duty. On each warring side, he contends that there are three classes of persons involved: the prince, the politicians and the military heads (which are responsible for strategy), and the soldiers. It seems logical to suppose that these classes have a decreasing degree of responsibility to diligently investigate the justice of war. The sovereign must always act with the greatest of care. The second echelon should focus to the same degree

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[46] *"(...) potius ferarum more quam hominum vivat*, (...) *nudi prorsus incedunt, carnibus vescuntur humanis, etc. Et si qui tales sunt, debellari poterunt, non ut interficiantur, sed ut humano modo instituantur, et juste regantur. Raro tamen aut nunquam admittendus est talis titulus, nisi ubi intercedunt occisiones hominum innocentum, et símiles injuriae: quare potius titulus hic revocatur ab bellum defensivum, quam aggressivum*" (**DB**. 5, 5).
[47] Cf. **DB**. 5, 7.

if their opinion is requested; if not, they should act along with their soldiers. And the soldiers, for their part, should obey their commanders, unless injustice is unduly manifested.[48] The strict compliance with legal duty serves as an important excuse, but does not absolve them from all moral obligations.

Of these classes, the greatest responsibility falls on the prince. Suárez goes on to provide a number of rules to prevent error. If both sides have the right to the same thing, the sovereign should act as a judge and, thus, rule as to which of the two parties probability favors. Once again, the author compares war to a legal proceeding. If the destruction of war merits a penal sanction, this procedure for investigation and attribution of rights corresponds to an "act of distributive justice through which the most deserving party should be favored."[49] If probability is equal or there is a great deal of uncertainty, the item should remain in the possession of the current owner, in accordance with effective legal standards of the time. If the doubt precedes ownership by either party, the later owner should give the other party satisfaction proportional to the doubt. Only in the hypothesis of equal doubt – and neither party owning the item – does Suárez accept the bilateral nature of justice. This is then unsurpassable ignorance. Even so, the two kings should avoid war, dividing the item or seeking out another procedure for the attribution of the item, such as arbitration. In this situation, there is no risk of injustice; therefore, arbitration is the best means for resolving the issue. Only if one of the two parties refuse any of the solutions shall war be allowed, and it will be just (subjectively) for both parties.[50]

Regarding the final condition – dignified conduct before, during and after hostilities – Suárez also identified different obligations for each varying class of persons involved. Here, the jurist from Coimbra catalogues a number of different hypotheses for *jus in bello*; including a number of separate prescriptions that are difficult to group. He sought to answer the following questions: what are you allowed to do to your enemies?; how should a king behave regarding his soldiers, and vice versa?; how should each class treat those that house them during military expeditions? The author came to very humane conclusions, given the standard of violence prevalent at the time. He discovered that reparations should be accepted, even after war has started, as long as it is not inexorably biased towards one of the two sides. This satisfaction of demands includes the restitution of the item in question, indemnification for damages and the punishment of the guilty, but should be prudent enough so as to not impede future peace. He

[48] Cf. **DB**. 6, 1-7.
[49] "(...) *ille est actus justitiaedistributivae, in qua dignior est praeferendus*" (**DB**. 6, 2).
[50] Cf. **DB**. 6, 2-5.

distinguished between combatants (all of those who are effectively involved in hostilities and those who could become involved) and non-combatants (women, children and the elderly). He also shows that the life of the innocent should be protected. Furthermore, he demonstrated that, after the war, when the victor demands indemnification and punishment of the guilty parties, they may take the goods of the innocent, but never their lives. Yet he always recommended moderation.[51]

In sequence, Suárez went on to cover the so-called "mixed wars" and "private wars," in which one or both parties are not public, and therefore, illegitimate authorities. The first of these, sedition, is not always unjust. When a prince comes to rule without regard for the common good, but with regard to his own good, he becomes a tyrant and a people's war against his government is permitted.[52] Par excellence, private wars are duels, which are identical to the combat between individuals under certain public conditions. But there is another conflict that occurs in the shadows: the fracas. In both, killing another under private authority is deemed unjust.[53]

CONCLUSIONS

The Scholastic Law of War did not reflect the standards for war common at the time. *Los maestros* in Spain chose certain rules that were part of common practice, but recommended others that, while not always floating from natural law, represented precepts that humanized the act of war and made it more difficult an endeavor. They did not seek to end the act of war, given the fact that without a universal judge, wars do serve an important function in distributive justice. However, they sought to make peace the final goal of war. War is not a fact of life, but rather a ruthless realization of Law in the service of international peace.

Even so, the Scholastic Just War represented more than just a right. If it was merely a *jus*, this theoretical construction would be limited to a given continent and time period. Justice, in and of itself, is not enough to serve as a basis for war. Since this field presents a number of positive precepts, justice cannot be made universal. Therefore, the *Eximius* Doctor employed another virtue that, whilst religious in origin, is common to all people that reach a certain level of spiritual progress: Charity. This allowed the law of war to become more than a law from a particular people.

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[51] Cf. **DB**. 7. *in totum*.
[52] Cf. **DB**. 8, 2.
[53] Cf. **DB**. 9, 2.

Whereas Christianity could no longer be made universal as a result of the Reformation, due to the fact that the law of war transcends *jus* and moves into the dominion of Charity, relativism is replaced by an objective order of values. Thus, this order can be foreseen and described beforehand, even if the study did in fact result in a casuistic work. The singular rules of this treaty, while difficult to unite, are not based on religion, but civility.

For this reason, Francisco Suárez was always able to conceive war through the lens of peace. The laws of war include standards that seek to protect peaceful coexistence and a harmonious future among the peoples. In the eleventh disputation of the Treaty of Charity, the author characterized two aspects of peace: the positive, the harmony of wills and unity of criteria, ends and words, and the negative, the renunciation of all acts that could be detrimental to this harmony. Luciano Pereña translates these two elements as justice – that which lends order and meaning to the actions of man and peoples – and the principle of humanity – that which moderates the former to promote deeper ties between men, relations of love and of friendship.[54] Only justice and harmony, together, as Law and Charity, can prescribe universal rules of civility. In the absence of a religion that is valid for all peoples, it is civilization that serves as basis for international law.

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[54] Cf. PEREÑA, Luciano. *Estudio Preliminar*. In: SUÁREZ, Francisco. **Guerra Intervención Paz Internacional**. p. 36.

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