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CHRONICLE

THE ORIGINS OF HUMANITARIAN LAW¹

II

CHRISTIANITY

The Christian Church, which had saved civilisation at the time of the barbarian invasions, succeeded after centuries of effort in softening the manners of the barbarians.

The Church preserved the ideas of humanity which, proclaimed in the fifth century by St. Augustine and developed in the thirteenth century by St. Thomas Aquinas, were systematised in the sixteenth century by Victoria. They were the inspiration of a code of morality and a law of war, of which it is proposed in the present Chapter II to summarise the principal stages of development during the period of a thousand years from the fall of the Roman Empire to the end of the Middle Ages, the period which saw the blossoming of the Christian ideal.

I. ST. AUGUSTINE AND THE ROMAN TRADITION

Rome was captured by the barbarians in the lifetime of St. Augustine; but he knew the blessings of the *pax Romana* in the province of Africa where he lived, for the latter was not conquered by the Vandals until five years after his death.

A student of the classic philosophers, and an admirer of the virtues of the ancient Romans², the Bishop of Hippo has transmitted to us in his sermons and his letters the legacy of Roman wisdom, as reconceived in the light of the Christian idea, and so strengthened and ennobled by the conception of universality.

¹ See *Supplement*, August 1952, page 222.

² *Jus bonumque apud eos non legibus magis quam natura valebat* (Livy, I.11, quoted by St. Augustine in the *De Civitate Dei*, II. XVIII).

Peace according to St. Augustine is the supreme Good ; but it is only peace with justice that deserves to be called peace. It is no longer, as in the early days of Rome, the interest of the mother-country which constitutes the criterion of the justice of a cause, but a general and absolute conception of a moral character, the principle of which is a function of God.

The idea of "just war".

It follows that war is admissible, if "just" ; and the difference between this kind of just war and the "bellum justum" of the ancient Roman Fœdial Law, which merely meant the declaration of war in accordance with the traditional rites, is at once apparent. To obtain reparation for damages, to repel violence, to avenge an injury, to recover what one has been unjustly deprived of—such are the possible motives of a just war. But any warlike enterprise not based on justice is to be proscribed absolutely. "To make war on one's neighbours, or to go further and conquer and subject unoffending peoples from sheer lust of domination—how can such things be called anything else than large-scale brigandage?"¹ It is also noteworthy that, according to St. Augustine, it is only the Prince, i.e. the Sovereign, who has the right to declare war. Private wars are prohibited.

But, if war is lawful on condition that it is just, it is to be waged in such a way as to admit as far as possible of the application of the principles of Christian charity. St. Augustine's recommendations on the point to Bonifacius, the official in charge of the defence of the Province of Africa, are particularly interesting in view of the fact that the aggressors against the Roman rule were native tribes, who ranked under the classical conceptions of law as being without legal rights of any kind. "If the enemy who fights against you is to die," so writes St. Augustine, "let his death be by necessity of battle, and not by your will. Rebellion and resistance call for the use of violence ; but the conquered and the captives have a claim to compassion, especially where the exercise of clemency does not conflict

¹ *De Civitate Dei*, IV. VI.

with the interests of peace,"¹ and he adds: "Even in war, if you find yourself once again at war, aim at peace!"

That in a few lines was the doctrine of war and peace, so steeped in solicitude for the rights of the individual, and so full of enlightenment for the age in which it took shape. It need hardly be said, it went far beyond the conceptions of the barbarians, whose power was then in the ascendant.²

Role of the Church

But the barbarians, while they wrecked the Roman Empire, respected the Church. The Bishops in the defeat of the civic authorities appeared as the only champions of the common people; and it was to them that the clemency of the conquerors was extended. Attila himself respected Troyes on the prayer of St. Lupus, and further spared Rome at the instance of St. Leo.

It was then that the Bishop of Rome, as Protector of the Eternal City, conceived the exalted mission of himself as arbiter of the Christian peace. "O Rome," said St. Leo, "the domain which was made subject to you by force of arms is less vast than that other domain, over which the Christian peace has set you to reign". The *pax Christiana* thus succeeded in ambitious anticipation to the *pax Romana*; and in this spirit the Church fostered the establishment of barbarian kingdoms, and by such restoration of State authority brought back some elements of order into the chaos following on the collapse of the Roman Empire.

At the beginning of the sixth century St. Benedict of Nursia founded the first religious Order, setting thereby an example of a peaceful, laborious community, governed paternally and concerned with the interest of all in accordance with the highest principles. The Benedictine monks, whose numbers spread rapidly in all the countries of Western Europe, formed little

¹ *Epistulae*, 189.6, quoted by Goyau, *L'Eglise catholique et le Droit des Gens* in the *Recueil des cours de l'Académie de Droit international*, 6, 1925, I.

² Nevertheless Alaric in the sack of Rome allowed the major basilicas to serve as inviolable places of refuge; and all who sought asylum there had their lives spared.

islands of civilisation wherever they came. Required by their Rule to do seven hours of manual work in the day, they restored the dignity of labour, which had till then been accounted servile. They had stables and mills. They reclaimed land, and brought it under cultivation. It was to Benedictine convents that one-third of the towns and villages of France owed their origin. Everywhere respected, they preached the gospel to the British Isles and the Teuton lands, their "clerks regular" supporting the action of the Bishops who, with the weapon of excommunication in their hands, were contriving to check the ferocity of the barbarians.

Violent habits and customs of the barbarians.

The task before them was a heavy one. The extent of it may be judged from the record of the violence with which St. Gregory of Tours had to contend.

The chronicles relate the shameful action of Ebroin, Mayor of the Palace of Neustria, who had the eyes of St. Leger, Bishop of Autun, put out. They record the cruelty of Frigidonde, who had Siegbert assassinated with poisoned daggers, and tortured Brunehaut by the horrible method of dragging her alive attached to a horse's tail. The conversion of these barbarians, and even the abandonment by them of their language for that of the Gallo-Romans with whom they had intermingled, had not yet made them forget their brutal ancestral institutions. Under the Salic Law "Whoso cuts off the hand, foot, nose or ear of a man shall pay a hundred gold sols. For the big toe he shall pay forty-five gold sols, for the second finger" (used in shooting arrows) "thirty-five sols" etc.¹ The "ordeals" consisted in burning persons presumed guilty by red-hot iron or boiling oil. If they survived, they were considered innocent.

Right of asylum.

The first effort of the Church was to secure respect for the right of asylum in churches and chapels. Persons who took

¹ This blood-price (*Wehrgeld*) is a high one, for the gold sol would be the equivalent of several hundred present-day Swiss francs.

refuge in these could not be brought out and massacred. The right of asylum was stoutly asserted by the Church, and remained in force throughout the Middle Ages. It did not begin to fall into disuse until the modern States came to be formed, and there was a public authority capable of enforcing law and order.¹

Serfage.

The Church also intervened to protect slaves, and to encourage their enfranchisement, recalling to slave-owners the words of St. Paul: "Masters, give unto your servants that which is just and equal, knowing that ye also have a Master in heaven."² It was not long before serfage took the place of slavery. The serf was better off than the slave. He had the right to have a family and even a certain patrimony of his own. *Adscriptus glebae* (that is to say, without the right to leave the soil on which he worked), he could not at any rate be separated from his family or sold like an animal.

The Pope.

The universal character of the Church under the direction of its Head, the Bishop of Rome, fostered the spread of such social developments. At the end of the fourth century the authority of Pope St. Gregory very greatly increased the prestige of the Holy See. Born in Rome of a rich patrician family, the gens Anicia, Gregory was Prefect of the City before becoming a Benedictine monk, and later being appointed Papal Legate to the Emperor at Constantinople. He thus combined in his person all the grandeurs of ancient Rome. Though of extreme personal humility, calling himself "servus servorum Dei" ("servant of the servants of God"), he exacted strict obedience from all hierarchic subordinates, beginning with the Patriarch of Constantinople. He treated Princes on a footing of equality, and pleaded with them the cause of the oppressed. "My ministry," he wrote, "compels me to hasten wherever justice

¹ For the right of asylum see the *Revue internationale de la Croix-Rouge*, December 1950, pages 909-917.

² St. Paul, *Epistole to the Colossians*, 4.1

demands.“ This gave him the title of “ Consul Dei ”.¹ His contemporary, St. Leander, Bishop of Seville, speaking at the Third Council of Toledo, exclaimed : “ Rejoice, Holy Church of God, in the knowledge that sweet is charity, and delectable is unity. Thy only preaching is the alliance of nations : thy only longing is the unity of peoples. It is in accordance with the order of nature that all the nations, issue as they are of one and the same man, should be united in mutual love.”

The universal ideal of the Christian Church is affirmed in these words. But events were to restrain the scope of these tendencies. A rival theocracy, itself proclaiming universal aspirations, was to make its appearance in the person of Islam, to limit the development of the far-reaching programme of Christianity.

Islam.

Not that Islam, the religion which took its birth from the preaching of Mahomet at the beginning of the seventh century, was devoid of generous elements. In many respects it is akin to Christianity, and the Prophet considered himself a “ continuer ” of the message of Christ. But Mahomet’s teaching was more restricted than that of Jesus : for he did not say that “ all men ”, but only that “ all believers ”, were brothers. In virtue of this precept every man is entitled under the Koran to make what use he wishes of himself and of the things of this world as he pleases. ² “ He who has killed a man shall be deemed to be the murderer of all the human race, and he who has given back to a man his life shall be deemed to have given back life to all the human race ” (Koran, Sura V, verse 35). The Islamic laws of war are summarised in the instructions of Abu Bekr, first successor of Mahomet, to the Generals entrusted with the conquest of Syria. “ Bear in mind ”, he said, “ that you are always in God’s eyes, and on the eve of death, and that you will render account at the Last Day. When you fight for the glory of God, fight like men, never turning your backs to the enemy ;

¹ Words engraved on his tomb.

² Ahmed RECHID, *L’Islam et le Droit des Gens* in the *Recueil des Cours de l’Académie de Droit international*, 60, II, 1937, pages 390-399.

but let not the blood of women or children or the old tarnish your victory. Do not destroy the date-palms! Do not burn houses or fields of corn! Do not cut down fruit-trees, or destroy cattle, unless you are compelled to do so for food! When you conclude a treaty with an enemy, or accept his surrender, observe sedulously the clauses of the agreement. In the course of your advance you will come upon religious, who live in monasteries and serve God in their retirement: "Leave them alone, and do not destroy their monasteries!"

It is none the less true that the obligation of the Mahometan to proselyte authorises "Holy War"; and it may well be imagined that in the great conflagration of conquest, which burst suddenly over Asia, Africa and Spain, the victories of the Arabs were not always gentle. The account of the learned Mahometan writer, from whom we have just quoted, is sufficiently instructive. "Before Mahomet," he writes¹, "with the exception of certain Jewish or Christian tribes, the mass of the Arab nation were grossly idolatrous, and had been attached from time immemorial to savage and barbarous customs. The sacrifice of one sex to the other was universal, as were also the practice of poor fathers burning their daughters alive for fear of having their name dishonoured, and the enslavement of women. The thirst for vengeance was inextinguishable with all its horrible and excessive consequences. The warlike and implacable women indulged on the battlefields in unheard of atrocities. The *lex talionis* was binding on all, and rapine and brigandage were the justified sequel to victory." Presumably these wild and untamed peoples, for all their conversion to Islam, did not at once become obsequious adepts of humanitarian principles.

The Arab conquests created a common defensive front in the Christian world.

The Arabs had overflowed into Gaul, when they were held up by the "mur de glace" of the Frankish warriors. The victory of Charles-Martel at Poitiers placed the Carolingian dynasty at the head of Europe; and the Pope was so clearly convinced

¹ Ahmed RECHID, *op. cit.*, page 399.

of the necessity of a secular arm to defend the *pax Christiana* that he himself put the imperial crown on the head of Charles the Great (Charlemagne). But the *pax Christiana* was thenceforth limited to the borders of Christendom.

The great Emperor of the West was an assiduous reader of the *De Civitate Dei*, and dreamt of imitating the Emperor Constantine, whose revered authority was cited in example by St. Augustine. He had however plenty to do in pacifying and christianising his empire. He had to reckon with the ferocity of his adversaries, and he did not hesitate to combat them with their own arms. In his wars against the Saxons he brutally avenged the missionaries and the soldiers who had been massacred. On one day at Verdun he put to death 4500 hostages. In order to disarm obstinate and continually recurring resistance, he deported whole tribes to Gaul. But these stern measures should not make us forget the civilising work that he did.

Charles was for peace with Islam. Harun al Rashid sent him ambassadors, whom he received with honour, and replied by accepting a sort of Protectorate of the Holy Places in Palestine, the Patriarch of Jerusalem having sent him the keys of the Holy Sepulchre.

But these presages of equilibrium as between Islam and Christianity, which seemed to foreshadow peaceful relations between the two, were misleading.

The era of invasion was not closed.

In the West after Charles' death new barbarian hordes, Hungarians and Normans, began to imperil the civilisation which had with such difficulty been reestablished; and in the South the Saracens threatened to overwhelm Italy as they had overwhelmed Spain. Landing at Ostia, they made their way up the Tiber, and got as far as Rome, where they sacked the Basilicas of St. Peter and St. Paul.

The Feudal System.

In presence of these dangers, and in the impotence of the States to cope with the menace of the new barbarians, the feudal system came into being.

The Pope having asked for protection against the Saracens, Charles the Bald by the Capitulary of Quierzy-sur-Oise conferred the right on all who were prepared to follow him in Italy to hold, and to transmit to their heirs, the public charges then devolving on them. Thirty years before he had already recommended each of them to choose a *seigneur*¹ to organize locally the resistance to the Norman invasions. A serious step this, since it meant the break-up of the authority established by the Roman tradition. The idea of the "State" gave way to the splintering of powers; and a new world began to take shape with its own law and its own customs. Once again the Church, in the abeyance of the royal power, was to endeavour to establish the reign of Christian charity, as far as the prevailing brutality of manners and morality made it possible to do so. For, in spite of the sanguinary struggles in which it engaged, feudal Europe still respected the fraternal principles of the beliefs in which it was united. At no time had religious faith been more ardent: at no time had it led to greater enterprises conceived in common. The perils arising from the Mahometan conquests and the new inroads of the barbarians imbued Europe with the feudal conception of common interest, in which Christianity was exalted, and was inspired to an aggressive initiative of its own, once it began to feel sure of itself. Hence the Crusades, in which Christianity attacked Islam, a "Holy War" in reply to a "Holy War", the inevitable consequence of a world divided into Dar ul Islam (House of Islam) and Dar ul Harb (House of War).

2. FEUDAL LAW. — ST. THOMAS AQUINAS

The feudal system, which was established in Europe at the end of the ninth century and lasted until the modern States came to their full strength, was not an isolated phenomenon in the world. Feudalism is a political form, which is the natural outcome of certain situations where absence of security coexists with the existence of a moral ideal and a patriarchal conception of life.

"*Nulle terre sans seigneur.*" Such was the principle of the new regime. Every cultivator, in order to cultivate his land in

¹ *Capitulary of Mersen (847).*

peace, was compelled to resort to the protection of someone more powerful than himself. In case of an alarm the peasants and their beasts took shelter in the castle of their *seigneur*, and were thus enabled to resist brigandage. The brigands themselves, when they had the better of it, transformed themselves into feudal lords. Stage by stage a whole hierarchy was organised from the lowest vassal to the highest lord right up to the King, the supreme *seigneur* of the whole of his territory. But at the same time the authority of the sovereign, as it became more remote, was weakened. Each feudal lord became in practice the master of his own territory ; and feudalism came to mean the parcelling of sovereignty. The feudal lords usurped the attributes of the State. They exercised the powers of justice “ high and low ”, which meant that they could not only act as judges of minor offences, but could even condemn to death. They coined money, and they claimed the right to make private wars.

Private wars.

It is easy to see the possible abuses of such a system. These private wars were a constant source of alarms and devastation. From being a protector of the weak, many a *seigneur* now became an oppressor ; and often they made war only to take prisoners and hold them for ransom.

The Chronicle of Suger, the historian of Louis VI, paints a picture of some of these brigand *seigneur*, for instance of the youthful Hugo, “ a bad man, abounding in perversity and in the perversity of his ancestors ”. On coming into possession of the fief of Puiset, “ he did not cease, unworthy scion of an unworthy sire, to imitate his father’s example... But those, whom his father used to chastise with whips, he now with even greater cruelty put to death with the venom of scorpions ”.

Even before the Royal power began to call a stop to this internal brigandage, the Church had called its moral weapons into play to limit the effects of the law of private war.

The Peace of God.

In 989 at the Council of Charroux the Archbishop of Bordeaux had proclaimed the “ Peace of God ”. Under this announcement

an anathema was pronounced on all who in process of a private war attacked churches or monasteries, stole the property of the poor, or ill-treated clerics. The Councils of Narbonne (990), Anse (994) and Limoges (997) extended this immunity to cover merchants, pilgrims, cultivators and their families, as well as labouring beasts and mills.

The Council of Verdun on the Doubs (1016) created a "Peace Association" in the dioceses of Lyons, Besançon, Auxerre and Soissons, the members of which swore to respect churches and persons consecrated to God, and undertook, also under oath, not "to take cattle, to capture peasants or merchants, to burn houses, to uproot vines, to destroy mills, or to attack persons carrying the produce of their vintages". The penalty for breaches of this undertaking was excommunication, the most terrible penalty known to the Middle Ages. An excommunicated person was literally cut off from all social life as if he were a victim of the plague.

The form of this oath is particularly interesting, because it already embodies the distinction between "combatants" and "non-combatants", which is the primary conception of humanitarian law.

In 1038 the Council of Bourges decided to make the "Peace Association" obligatory. Archbishop Aimon was responsible for making all the faithful under 15 years in all the dioceses of his metropolitan province (Aquitaine) take the oath of peace, and join the diocesan military organisations charged to punish breaches of the oath. The clergy themselves were at the head of these organisations. This Association remained in force in Berry down to the reign of St. Louis under the name of "Peace Commune".

The Truce of God.

The "Peace of God" was followed by the "Truce of God", first instituted by the Council of Elne in 1027. Under this new institution it was forbidden for anyone to attack his enemy between 3 o'clock in the afternoon of Saturday and 6 o'clock in the morning of Monday, "so as to enable all men to pay their dues to God on Sundays". The Truce of God was later extended

to Advent and Lent, including Christmas and Easter, that is to say, to five consecutive weeks twice a year.

St. Odilon, Abbot of Cluny, wrote in 1041 to the Bishops of Italy, advocating the general extension of the Truce of God "to all Christians, whether friends or enemies, neighbours or strangers" from Wednesday evening to Monday morning in each week. "We have dedicated to God", he explained, "Thursday for Christ's Ascension, Friday for His Passion, Saturday for His Burial, and Sunday for His Resurrection, so that on all these days there should be no hostile expeditions, nor any have to fear his enemy".

The Crusades.

At the Council of Clermont (1095) Pope Urban II solemnly proclaimed the Truce of God at the same time as he preached the First Crusade.

The pacification of the Christian world was thus associated with the war against the "Infidels".

That was no doubt a set-back as compared with the dream of *pax Christiana* which, as conceived by St. Gregory at the end of the fifth century, had extended to all mankind. But at least these expeditions on the part of Christendom had the effect of putting an end to the private wars within the Christian kingdoms. It must also be admitted that the capture by the Seljuk Turks of the Holy Places had deprived the Christian pilgrims of the facilities they had till then enjoyed of repairing to the Tomb of Christ, and had thus afforded a pretext for the warlike spirit and the spirit of adventure of the Crusades. The sufferings and the hardships they had undergone during the long journey to the East in the First Crusade, and their apprehensions in a distant and hostile country, and finally their fanaticism and their ignorance explain, though they cannot excuse, the atrocious massacres, which accompanied the capture of Jerusalem in 1099¹.

¹ Ahmed RECHID, *op. cit.*, page 458, quotes G. le Bon, *La civilisation des Arabes*, Chapter VIII, page 337, in which the latter records the horrible account of an eye-witness, Raymond d'Agiles, Canon of Puy: "So much blood there was, spread over the ancient Temple of Solomon" (the Mosque of Omar, in which 10,000 Mahometans had taken refuge) "that the dead bodies floated here and there in the Court of the Temple, and severed hands and arms drifted about".

The Turks for their part raided the Christian countries for children to be brought up to form the Corps of Janissaries, who became the élite of their troops.

Chivalry.

Nevertheless efforts were made on both sides to mitigate the consequences of " Holy Wars ". Honour, loyalty and good faith are sacred principles, on which relations came to be established during the feudal period between man and man, between vassal and suzerain, and often even between enemy and enemy.

In his victory over Alfonso VI, King of Castile, the Mahomedan Jakub took 20,000 prisoners, but chivalrously set them all free (1195). Exchanges of prisoners were frequent, as were also redemptions by ransom. Torture and mutilations were in principle prohibited.

The *Viqayet*, written about 1280, is a regular codification of the laws of war, dating from the height of the prosperity of the Saracen rule in Spain.¹ It forbids the killing of women, " even of those who by their cries excite the warriors ". It also protects children, old people, the insane and disabled, together with bearers of flags of truce and persons under safe-conduct. It prohibits mutilations, actions in bad faith, and the poisoning of fountains or springs.

On the Christian side the combatant monks of the Orders of Chivalry had the charge of defending the Holy Sepulchre. In the intervals of fighting they nursed the sick and wounded. In time of peace they maintained hospitals, in which the sick were " treated with respect like *seigneurs*, so far as the resources of the hospital permitted ", in accordance with the Rule of the Knights of St. John of Jerusalem.

The ceremony by which young nobles were dubbed knights and assumed the armour of knighthood had originally had nothing clerical about it. But it was now transformed by association with religious rites, which included prayer and a vigil of arms in a church, together with an oath to be " the living

¹ See Ch. A. WALKER, *History of the Law of Nations*, pages 75 ff., 126 ff.

protection of all weakness". Jean de Beuil¹ writes: "The most noble and most excellent Order of Chivalry has been ordained in order to preserve, defend and keep the people in peace, untrammelled by the adversities of war."

The Pontifical Supremacy.

At the same time the Papacy, asserting its authority within the framework of the feudal system, assumed the uncontested lead of Christendom.

The Liber Censuum (Book of Dues) of the Roman Church, drawn up in 1192, enumerates the various Kingdoms under the suzerainty of the Holy See—namely, Poland, the Two Sicilies, Castile, Leon, Denmark, Bohemia, England, Kiew, Croatia and Dalmatia, Aragon and Portugal. All these Kingdoms paid tribute to the Pope, and their Princes were recognised as his vassals.

Innocent III, who was Pope from 1198 to 1216, made a reality for a time of the Pontifical Supremacy. We find him (1) receiving the homage of Sicily, and assuming the guardianship of the young King Frederick II of Naples, (2) giving the Crown of Germany to his protégé Otto IV, and then taking it away again to give it to Frederick II, (3) deposing John "Lackland", King of England, and restoring his Crown on his taking an oath as his vassal, and (4) placing France under an interdict in order to compel King Philippe-Auguste to take back his lawful wife. Combining a profound knowledge of law with unwearying activity, this great Pontiff has left us nearly 6,000 letters. "The name of Innocent III," writes Gonzague de Reynold, "calls to mind the one brief moment when Europe in its diversity was one, and civilisation reached its culminating point".

The Schoolmen.

It was at this time that the Schoolmen proceeded to draw what may be called the consequences of this Papal pre-eminence. Going back faithfully to the teaching of St. Augustine, they formulated their theory of the law of war, which gave Christendom rules suitable for making a veritable *Civitas Dei* on earth.

¹ Edition Leicester, I. page 14, Paris 1887 (Société de l'Histoire de France).

The sixteen great Universities, which then came into being in Europe after the model of the University of Paris, originated, like the latter, in the episcopal schools ¹, and like it were dependent solely on the Holy See. They imparted a genuinely international form of teaching, the teachers being chosen without consideration of nationality.

The teaching in these Universities was drawn very faithfully from St. Augustine. At Bologna the monk Gratianus compiled the famous repertory of Canon Law, which under the name of the "Decree of Gratian" constituted a law of war discussed in every learned centre in Europe. It was however at Paris that Scholasticism reached its fullest and finest development under St. Thomas Aquinas, the "Angelic Doctor".

The *Summa* of St. Thomas develops afresh the theory of "just war". It lays down in precise form the three rules, which must be observed to justify a war. In the first place, the war must be declared by an authority knowing no suzerain—which definitively eliminates the conception of private wars. Only sovereign Princes are to be entitled to declare war. Secondly, the cause of the war must be a just cause—namely legitimate defence or the necessity to obtain justice. Thirdly, the war must be waged with just intention—so that, even in a just war, abuses are forbidden, and victory must be exploited with moderation.²

The doctrine of "just war" is defined as follows: "*Causa justa, ut scilicet illi qui oppugnantur propter aliquam culpam impugnationem mereantur*" ("By a just cause is meant that those attacked for a fault committed have thereby merited war"³).

St. Thomas goes on to ask: "Is it lawful to capture the belongings of the enemy?" He answers: "Yes, because in a

¹ It may be noted incidentally that these schools were accessible to all, even to the poor and even to serfs. (Suger, Abbot of St. Denis, and Minister of Louis VI and Louis VII, was the son of a serf. He had been a fellow-pupil of Louis VI as a child.)

In the fourteenth century the University of Paris had 30,000 students.

² See LE FUR, *La Théorie du Droit naturel*, in the *Recueil des Cours de l'Académie de Droit international*, 18.III.1927, page 289.

³ See VANDERPOL, *La Guerre devant le Christianisme*, page 69.

just war the enemy is a guilty party, so that the booty is not robbery, but punishment". The position would be different, if the war were unjust : in that case the booty ought to be restored.

In the age of St. Thomas such doctrine was not merely academic, as in the time of St. Augustine. It was endorsed by Popes and accepted by Princes. St. Louis, King of France, of his own initiative consulted St. Thomas, and modelled his actions on the principles of the *Summa*. This justice-loving Prince, who abolished such cruel customs as "justice by duel", saying that "combat was not a form of law", was celebrated for his arbitrations and for his moderation in the hour of victory. Having retaken from the King of England in virtue of feudal law the provinces of France, whose allegiance to the French Crown the English King contested, he gave them back to the latter against recognition of the feudal claim. St. Louis was described by an English Chronicler as "rex regum" or "king of kings" because of his prestige amongst his contemporary sovereigns. In his testament he does not hesitate to write that in relation to Rome he preferred to "waive his claims rather than to dispute them"—a remarkable instance of a political attitude in keeping with the discipline of medieval Christendom.

It seemed at the beginning of the fourteenth century as if, animated by these sentiments, a Federation of European States was on the point of coming into being. The jurist Pierre Dubois dreamt of a General Council with its seat in France, representing the federated European States, and of an international tribunal. He proposed to leave it to the Pope to call the Council, to make proposals to it and to act as an instance of appeal in the case of international differences.¹ But the formation of the modern States was to raise new problems, and to create a new field for the scholastic doctrine of war.

3. FORMATION OF THE MODERN STATES. VICTORIA

By re-establishing the supreme authority of the King's justice St. Louis had dealt a decisive blow to feudalism. His

¹ TER MEULEN, *Der Gedanke der internationalen Organisation*, pages 82-87 and 101-123, quoted by Goyau, *op. cit.*, page 199.

prestige was such that the Royal power remained from that time onwards uncontested, and again assumed the charges and prerogatives of sovereignty.

Conception of the State.

The conception of the State was definitely restored by the labours of the jurists of the period, basing themselves on the definitions of Roman Law, and gradually bringing back into force the work of Justinian.

The process necessarily made a break with the harmonious hierarchy of Kingdoms under the leadership of the Holy See, which had seemed to afford a means of maintaining international order in Christendom. For nearly a century the emigré Popes at Avignon had still to reckon with the authority of Kings ; but, once back in Rome after the restoration of peace between the parties, they never recovered the primacy they had enjoyed in the reign of Innocent III.

Enfranchisement of the Serfs.

As a result the social functions assumed by the Church in the Middle Ages were limited. Henceforward it was the King who put a stop to private quarrels, and who took the initiative in great social reforms. In 1315 an Ordinance of Louis X enfranchised by a stroke of the pen all serfs of the Royal domains. From 1350 onwards serfdom in France was no more than a memory.

The Civil Power and the humanitarian ideas of the fourteenth and fifteenth centuries.

In the field of International Law the era of Conventions between States and declarations on the laws of war now began.

One of the first of these Agreements one can cite is the Covenant of Sempach (1393), in which the Cantons of Schwyz, Uri, Unterwald, Glarus, Zug, Zürich, Berne, Lucerne and Solothurn embodied certain clauses concerning observance of the plighted word, pillage and respect for women and for the wounded. The Covenant has also been called the "Frauenbrief"

(" Women's Charter "), because it says that women should be kept apart from war. Of the wounded it says: " They will therefore be left intact, their persons and their property." This Agreement may indeed be described as the ancestor of the Geneva Convention—an interesting example on the part of the Swiss people who, after fighting tenaciously in defence of their independence at Murten ¹, were destined for centuries to provide soldiers for all the armies of Europe.

For, though the era of private wars was ended, the peoples were still to be exposed to just as great an extent to the miseries of foreign wars.

At the end of the fourteenth century we find in the Benedictine monk Honoré Bonet, the author of *L'Arbre des batailles*, and in Christine de Pisan, who is an enthusiastic admirer and imitator of Honoré Bonet, whole series of chapters on the law of war. " In truth ", writes Bonet, " I have great pain at heart to see and hear the martyrdom they inflict without pity or mercy on poor labourers and other poor people, who say no ill and think no ill, and do nothing but work for their betters, and from whose handiwork the Pope, the Kings and all the *seigneurs* in the world have under God all that they eat and drink and all the raiment that they wear, yet none cares for the labourers who make these things." ² The " Ecorcheurs " in Paris, and the " Grandes Compagnies " in the country, sowed desolation, and gave birth to peasant revolts such as the Jacquerie, which Charles the Bad stifled in blood, putting 20,000 revolted peasants to death.

Amongst such horrors it is a relief to read in the Chronicles of the generous attitude displayed by warrior chieftains like Duguesclin and Joan of Arc. " Wherever you wage war, remember always that clergy, women, children and peasants are not your enemies ", said the Constable of Charles V, while of the Maid we read that, as those testified who knew her, she showed herself " full of kindness to her enemies, and pity for the wounded English, shedding tears at the large number of

¹ " Cruel comme à Morat " (" cruel as at Murten ") became a proverb.

² H. BONET, *L'Arbre des Batailles*, édition Wys, IV. 47. page 140, quoted by Goyau, *op. cit.*, page 159.

dead there were in their camp".¹ At her trial she was asked : " Which liked you best, Jeanne, your banner or your sword ? " She answered : " My banner many times, aye ! forty times, more than my sword. I carried my banner myself, when I was attacking the enemy, so as not to kill anyone. I have never killed anyone." ²

Evolution of the doctrine after the discovery of the New World.

Thus in these troubled centuries the moral traditions of the great Canonists from time to time asserted themselves.

Then came suddenly the discovery of the New World, affording a new opportunity for the collection of these traditions in a work summarising the scholastic doctrine on the laws of war, insisting on the universal character of the principles by which that doctrine is inspired, and extending it deliberately beyond the limits of Christendom.

Such was the work of the Spanish monk Francisco de Victoria, Professor of Theology at the University of Salamanca from 1526 to 1546.

The exploitation of the vast Empire, which had been opened up by the discoveries of Columbus, raised great labour problems for Spain ; and there were plenty of colonists, who urged that slavery should be imposed on the inhabitants of the Caribbean. In a discussion between theologians, which took place in 1519, Bartolomé de Las Casas ³ said : " Our religion is the religion of equality. It is adapted to all Governments, and to all nations. It deprives no one of their liberty or of their leaders, in order to reduce them to slavery on the pretext that Nature made them for that condition."

In spite of this expression of opinion, in spite even of intervention by Rome, the abuses overseas continued. Pope Paul III had written in 1537 on the subject of the natives of America : " Though they do not know the faith of Jesus Christ, they are

¹ See DEFOURNY, *Jeanne et le Droit des Gens*, Paris (*Société bibliographique*) 1887, quoted by Goyau, *op. cit.*, page 160.

² QUICHERAT, *Procès de la Condamnation de Jeanne d'Arc*, tome 1, pages 52-70.

³ A Spanish prelate of the Order of St. Dominic.

not for that reason to be deprived of their freedom or of their property, or to be reduced to slavery. No one has the right to trouble or disturb them in their possession of what they have received from the liberal hand of God, the Lord and Father of all men.¹ “

In his teaching at Salamanca Francisco de Victoria developed the theory of this noble doctrine. Like St. Thomas Aquinas at the Court of St. Louis, Victoria had ready access to the Emperor Charles V, who welcomed his counsel on questions relating to the Indies.

Victoria's treatise on the laws of war begins, like the work of his predecessor, with the conception of just war.

The third part of the treatise, which is headed “Diverse questions concerning things permitted in a just war” is of quite exceptional interest.

Victoria deals in succession with the three following points: is it allowable to kill innocent people, to despoil innocent people or to capture or enslave them, to kill hostages or any guilty parties, whether they have been taken prisoners or have surrendered? Is everything taken from the enemy the property of those who have taken it? Is it lawful to impose tributes? May enemy Princes be deposed? To all these questions Victoria replies in the same sense as present-day International Law.

His moderation is exemplary. “One has”, he writes, “to take into account the harm done by the enemy, the damage he has caused, and all his other wrongful acts, and to let these considerations determine the penalty and the punishment, putting out of account all inhuman or cruel feelings.” He continues, quoting Cicero: “Penalisation of the guilty must not exceed the limits of equity and humanity.” He goes further, and adds: “The disaster and the misfortune of the guilty State must be limited as much as possible, particularly as the guilt in most cases in Christian countries comes from the Princes.”

The last comment has an essentially modern note. But all this doctrine is based on the interdependence of States in the light of the welfare of their peoples.

¹ Nys, *Etudes de Droit international*, I. page 223.

Victoria, as will be seen, as the last great Scholastic, already anticipates by the light of his genius the times that were to come. G. Goyau in the work already more than once cited says that it is in Victoria's work that we have the first appearance of "*jus inter gentes*" in the modern sense of International Law. Justinian's Institutes defined the *Jus gentium*, that is to say, the body of rules which natural reason has established amongst all men ("quod naturalis ratio inter omnes homines constituit"). Victoria on the other hand wrote: "the body of rules which natural reason has established amongst *nations*", substituting the word "nations" for the word "men", and thereby becoming the godfather of modern International Law.

We thus conclude this brief review of the ideas, which went in the Middle Ages and in the early days of modern times to contribute to the formation of humanitarian law. Brief as it is, this summary will have served to show the extraordinary moral richness of an age, which on the other side of the medal was so arid and frequently so sanguinary.

We have seen the continuity of doctrine in the splendid effort of Christian theology "to reconcile with the spirit of peace, charity, mercy, meekness (as the Gospel teaches it)," to quote once more Goyau, "the patent necessity of particular groups of human beings being compelled to fight for their rights, conceived not as selfish claims, but as applications of that universal justice, which at no point in the world ought to be injured or violated".

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