DePaul Law Review

Volume 4
Issue 2 *Spring-Summer 1955*

Article 1

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DE PAUL LAW REVIEW

Volume IV SPRING-SUMMER 1955 *Number 2*

REVISION OF THE U.N. CHARTER: A NATURAL LAW APPROACH

FRANCIS J. SEITER

TEN years ago, on June 26, 1945, delegates of fifty nations signed at San Francisco the Charter of the United Nations. The Charter came into force on October 24, 1945, by which date China, France, the Soviet Union, the United Kingdom and the United States of America and a majority of the signatory nations had deposited their ratifications with the government of the United States. In these ten years the attitude and aims of the U.S.S.R. in its international relations have become increasingly clear. It is not that these aims have particularly changed; there is simply less attempt to disguise or conceal them. The Charter was based upon the hope, at least, of reasonable cooperation in good faith by the major world powers. The Soviet Union has demonstrated its true attitude in its behavior in the United Nations, and that organization as a forum has served at least to give the other nations of the world a remarkably candid view of the official Soviet mentality and tactics.

No changes in the original Charter have been made as yet, but Article 109 makes it mandatory that a proposal for a conference to review the present Charter be placed on the agenda of the tenth annual session of the General Assembly—the next session. Thus the need for revision of the Charter and the proper approach to the revision itself are topics which will increasingly attract attention and interest as we near the tenth annual session of the General Assembly in the Fall of 1955.[1]

[1] See 296 Annals of the American Academy of Political Science (November, 1954). This entire November issue is entitled "The Future of the United Nations. Issues of

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The United States has been preparing for this revision officially by studies conducted by the Department of State and by the activity of a Subcommittee of the Committee on Foreign Relations which has been holding public hearings on the matter of charter amendment. No definite position has been taken on any particular proposal for amendment, but the major areas for discussion at the conference appear to be: admission of members; the security council and the unanimity rule in voting; economic and social issues, "colonial" problems and intervention in domestic affairs; regulation of armaments, particularly control of atomic weapons; strengthening international law.

Before embarking on suggestions about an attitude in changing the Charter it may be useful to review some of the points of major interest in the background of the formation of the United Nations.

The League of Nations, which had proved ineffective to stop Japanese aggression against China in 1931, Italian aggression against Ethiopia in 1935, or German rearmament and conquest, practically expired after it voted to expel Soviet Russia in 1939 for its attack on Finland. Although it was dormant and defunct throughout World War II, the League did not formally disband until 1946 when it turned over certain technical services to the new United Nations Organization. It was very clear that the conspicuously unsuccessful League in which the United States had never participated and to which the Soviet Union had been admitted for only five years and had then been expelled would hardly be a feasible vehicle for an effective international organization after World War II.

The germ of the present United Nations is found in expressions of the war-time coalition of powers against the Rome-Berlin-Tokyo axis. It is in this fact—that the unity of these powers was founded on their common opposition to a combination of hostile military powers, a common opposition in the case of Russia, at least, based on military expedience rather than on a unity of philosophy or political principles —that one of the fundamental weaknesses of the present United Nations is found. War, even more than politics, makes strange bedfellows. The comradeship of shared danger with its mutual respect for gallantry and courage and fighting ability, which is real and true while the fighting rages, may cool or vanish when the common foe is beaten and the common danger is overcome.

Charter Revision." See particularly Key, United States Planning for Charter Review, 296 Annals 151–155 (1954), and Wiley, The Senate and the Review of the United Nations Charter, 296 Annals 156–162 (1954).

For much the same reason it may be that it was premature that a world wide organization to promote peace should have been attempted while our troops were still actively engaged in war in the Pacific. In retrospect, of course, it is easy to make these observations.

The steps leading to the San Francisco Conference may be traced in the following documents and events: The London Declaration, The Atlantic Charter, The United Nations Declaration, The Moscow Declaration, The Teheran Declaration, and The Dumbarton Oaks Proposals.

On June 12, 1941, representatives of Britain, Canada, Australia, New Zealand and South Africa, of the exiled governments of Belgium, Czechoslovakia, Greece, Luxembourg, Netherlands, Norway, Poland, Yugoslavia and General de Gaulle of France declared against separate peace and stated:

> The only true basis of enduring peace is the willing cooperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security.
>
> It is our intention to work together, and with other free peoples, both in war and peace, to this end.[2]

The Atlantic Charter signed on August 12, 1941 by Roosevelt and Churchill stated in part:

> After the final destruction of nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.[3]

And:

> They believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.[4]

To the "common program of purposes and principles" represented in the Atlantic Charter twenty-six belligerent countries subscribed on January 1, 1942 at Washington, D.C., in a pact known as the

[2] Everyman's United Nations 4 (2d ed.; New York: United Nations, Department of Public Information, 1950).

[3] Ibid.

[4] Ibid., at 5.

United Nations Declaration. These were the United States, United Kingdom, the Soviet Union, China, Australia, Belgium, Canada, El Salvador, Guatemala, Honduras, Luxembourg, New Zealand, Norway, Poland, Yugoslavia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Greece, Haiti, India, Netherlands, Nicaragua, Panama and South Africa. The Declaration provided that it could be "adhered to by other nations which are, or may be, rendering material assistance and contribution in the struggle for victory over Hitlerism." This was done by Mexico, Colombia, Iraq, Iran, Liberia, Paraguay, Chile, Uruguay, Egypt, Syria, Lebanon, France, Philippines, Brazil, Bolivia, Ethiopia, Ecuador, Peru, Venezuela, Turkey and Saudi Arabia.

In addition to the Atlantic Charter principles The United Nations Declaration preamble stated with reference to international protection of human rights that complete victory was necessary "to defend life, liberty, independence, and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands. . . ."[5]

On November 1, 1943 a Moscow meeting of foreign ministers of the United States, the United Kingdom and the Soviet Union (Cordell Hull, Anthony Eden, and V. Molotov) and the Chinese Ambassador to the Soviet Union (Foo Ping Shen) resulted in a Declaration of Four Nations on General Security which in part stated:

> That they (the foreign ministers) recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.[6]

This Declaration in turn led to the Dumbarton Oaks conversations which were held in the early fall of 1944 between the United States, United Kingdom and the Soviet Union and then separately between the United States, United Kingdom and China. An organizational plan for the United Nations was formulated which was substantially that adopted at the San Francisco conference. No agreement was reached as to voting procedure in the Security Council. This fateful matter was agreed upon at the Crimean Conference (Yalta) in February, 1945.

The Dumbarton Oaks proposals outlined an international organization, the functions of which would be vested in these major organs:

[5] Ibid.

[6] Ibid., at 6.

A Security Council, the General Assembly, an Economic and Social Council, a Trusteeship Council, a permanent Secretariat and an International Court of Justice. The Security Council was to have primary responsibility for the maintenance of peace and security while the role of the General Assembly in those areas was merely discussion and, to some extent, recommendation.

The Chinese Government in its phase of the Dumbarton Oaks conversations put forth certain suggestions which were subsequently agreed to by the U.S.S.R.:

> These suggestions were concerned with (1) a clear expression in the Charter of the principle that, in discharging its responsibilities for the pacific settlement of disputes, the Organization should act with due regard for justice and international law and not merely in furtherance of what may seem politically expedient; (2) the inclusion among the responsibilities of the Assembly of the development and codification of international law; and (3) the extension of the activities of the Economic and Social Council to the field of educational and other forms of cultural co-operation.[7]

The most significant addition to the Dumbarton Oaks proposals at the San Francisco Conference which produced the Charter was the voting formula for the Security Council. This formula, which provides for "an affirmative vote of seven members including the concurring votes of the permanent members" to determine anything other than procedural points for the eleven member Security Council, based the hope of effective action by the Security Council on the continued cooperation of the five permanent members (United States, United Kingdom, Soviet Union, France and China). Although the Security Council has interpreted this Charter provision as meaning that an absence or an abstention from voting does not constitute a negative vote, nevertheless the Soviet Union has not been reluctant to veto proposals when it chose, and only its absence from the Security Council meeting in June 1950 permitted the United Nations action with respect to the defense of the Republic of Korea. It is doubtful that the United States would have agreed to membership in an organization in which it could be bound against its will, and the provision, although overworked by the Russians, was added as much at our instance as theirs.

In its original conception the General Assembly, which consists of

[7] Bentwich and Martin, A Commentary on the Charter of the United Nations, XVIII (New York: Macmillan, 1950). See this work generally on the background to the San Francisco Conference at IX-XXVIII. See also Chase, The United Nations in Action, 17–30 (New York: McGraw-Hill, 1950).

all the member nations, was simply a discussing and recommending body; all *action* was centered in the Security Council.

Pertinent Charter provisions are:

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council, and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.[8]

Thus, with respect to the most vital function of the United Nations—that is, maintaining peace—the General Assembly had little power. On the other hand the Security Council was to have broad powers. As to it, the Charter provided in part:

[8] Charter of the United Nations and Statute of the International Court of Justice, 6–8 (Lake Success, N.Y.): United Nations. Department of Public Information (1948).

Article 23

1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution....

Article 24

1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this resposibility the Security Council acts on their behalf. . . .

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.[9]

The Security Council was to be responsible for formulating a system to regulate armaments, was to function continuously and hold periodic meetings. It was to arrange for armed forces from the member nations for the purpose of maintaining international peace and security. These things have not been done.

The General Assembly was designed to be a much less powerful organ. It was scheduled to meet in regular annual sessions. It was to have no armed forces at its disposal. It could not make decisions—only recommendations. Its main weapon was discussion and debate.

As the Security Council has fallen into disuse, largely because of dissension among the great powers, the General Assembly has become a stronger and more vigorous organ. By various devices, including the creation in 1947 of the Interim Committee, or the so-called "Little Assembly," ways and means have been found to keep the General Assembly in virtually continuous session. Moreover, the "Uniting for Peace" resolution, which was approved in 1950 after the attack on Korea, geared the General Assembly to take quick action against an aggressor in the event the Security Council failed to exercise its responsibility for the maintenance of peace.

Today, the General Assembly may be convened in emergency session in twenty-four hours. It may make up appropriate recommendations to the members for collective measures, including the use of armed forces. It has created two important subsidiary organs: (1) a Collective Measures Committee to report on the methods which might be used to strengthen international peace and security; and (2) a Peace Observation Commission to observe and report on any situation which might endanger international peace and security. Finally, Member States have been asked to earmark certain of their armed forces

[9] Ibid., at 11–13.

so organized, trained, and equipped that they could be made available promptly for service as United Nations units.[10]

The Charter of the United Nations stands in need of change. The position of the Secretary of State, John Foster Dulles, with his reasons why the Charter should be changed, was set out by him in a speech before the American Bar Association in Boston on August 26, 1953. There Dulles said:

> The UN Charter now reflects serious inadequacies. One inadequacy sprang from ignorance. When we were in San Francisco in the spring of 1945, none of us knew of the atomic bomb which was to fall on Hiroshima on August 6, 1945. The Charter is thus a pre-atomic-age charter. In this sense it was obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that, if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.
>
> A second inadequacy sprang from the fact that the three leaders who planned the United Nations were President Roosevelt, Prime Minister Churchill, and Generalissimo Stalin, precisely the three who led the wartime victory coalition against Hitlerite Germany. Inevitably, they looked upon the United Nations as a kind of peacetime prolongation of the wartime triumvirate. Consequently, the proposals initially put forward by the United States, United Kingdom, and Soviet Russia placed primary authority in the Security Council and stipulated that the Great Powers permanently represented on that Council must be in agreement.
>
> At San Francisco this concept was to some extent altered and greater scope was given to the General Assembly. However the "veto" remained in the Security Council and the General Assembly was permitted only to "recommend." Indeed, the Assembly voting procedure, with one vote per nation, precludes its decisions having more than advisory weight.
>
> Now we see the inadequacy of an organization whose effective functioning depends upon cooperation with a nation which is dominated by an international party seeking world domination.
>
> A third inadequacy came out of disregard for the fact that the world order, in the long run, depends not on men but upon law—law which embodies eternal principles of justice and morality. When the Charter was drafted at Dumbarton Oaks, it contained no mention of the word "justice" or of the word "law." That defect was to some extent remedied at San Francisco. At several points in the Charter, references to "justice" were introduced. Also the General Assembly was required to promote "the progressive development of international law and its codification." However, in the eight years of its existence, the General Assembly has made but little progress in this respect.[11]

[10] Wilcox, How the United Nations Charter has Developed, 296 Annals 1, 8 (1954).

[11] Dulles, U.S. Constitution and U.N. Charter: An Appraisal, 29 U.S. Department of State Bulletin 309–310 (1953).

The weaknesses of the United Nations organization have caused some people to doubt the very existence of any fundamental principles of international law. Such persons doubt that there are any natural underlying concepts governing the relations of one state with another, or that there is any validity to the notion that there is a moral law which applies to international relations irrespective of the wishes of those who think that nothing matters except the will of the stronger.

As Professor Clyde Eagleton of New York University has observed:

> International law, of course, is weak and inadequate; there are some, indeed, who say that it is not law. Lawyers, I regret to say, frequently say this; they, like others, seem to think that international law should grow all by itself. Lawyers believe in law; they know what a struggle it is to get a new rule of domestic law into being, and they may be willing to work hard to help; but it does not seem to occur to them that international law must have similar support. People say that they want law between nations, but do nothing to build it up; when it is unable to meet needs, they jeer at it. Nevertheless, and doubtless because it is indispensable, there is an international law; at any rate, there is a set of rules governing the conduct of nations. Governments base their claims against other governments upon the basis of this law, use legal procedures in the argument, refer cases to tribunals, accept and obey the decisions given and pay indemnity where ordered. No state ever denies the existence or the binding force of these rules. It is difficult to deny the name law to such rules.
>
> The trouble is that this law does not reach out to cover those matters which peoples would most like to see covered—vital questions such as economic relationships, the prevention of the use of force, the rights of individual human beings, et cetera. Furthermore, this law does not have behind it the procedures found in domestic law, by which a nation can be brought to court even when it does not want to go, nor does it have means of enforcing the law when it is clearly applicable. The reason for this is that those very persons who criticize it for these defects are unwilling to have such requirements applied to their own nation, or, at the least, make no effort to have their own nation develop the law and submit to it. This is not surprising; nations have for centuries been accustomed to being sovereign, to defend their rights by themselves, to depend upon themselves. Along with this, they claim the right of free decisions upon all matters with no limitation from any outside authority.
>
> With such habits of thought reaching back for centuries, it is not easy for people to think of submitting their nation's disputes to, and relying for protection upon, the community of nations. The state was created for the purpose of protecting and advancing the interests of its individual members, and it is difficult for these members to accept the idea that their interests can no longer be adequately protected by the state, and can be better protected in some respects by the organized community of nations. In the interdependent state of the world today, and with the weapons and methods of modern war,

no state can even fight a war with its own unaided efforts; it must have help from the outside.[12]

There is very little international law as such in the United Nations:

The makers of the Charter did not evidence much interest in international law. The Dumbarton Oaks proposals contained only one reference to it, and this was taken out at San Francisco. Originally, as in the Covenant of the League of Nations, the provision was that the decision whether or not a matter was a domestic question was to be made in accordance with international law. At San Francisco, when the clause was moved back under "Principles," the reference to international law disappeared. Many states, however, noted this complete exclusion of law, and their efforts resulted in two inclusions: one in Article 1, paragraph 1, where it was said that a dispute would be settled "in conformity with principles of justice and international law"; and the other in Article 13 where, in weak words, the General Assembly was instructed to make recommendations for the purpose of promoting political co-operation and encouraging the development of international law. Compulsory jurisdiction of the Court over members for legal disputes was of course rejected; and the only vestige of law as regards the functions of the Security Council was that it should take into consideration (Art. 36, par. 3) that legal disputes should as a general rule be referred to the International Court of Justice. . . .[13]

The record shows easily that the members of the United Nations have little interest in law as a means of adjusting differences between themselves, and as little in the constitutional system which the Charter was intended to provide. This is not surprising. The majority of members are small and many of them new states, which wish to develop; the Soviet bloc in a parallel sense wishes to develop its ideology and controls. International law is for either of them a set of rules of the past, which stand in their way; they are looking to the future and wish no restraints. A constitution has as one of its primary purposes to restrain the government and protect its subjects and one might expect the weaker states to rely upon the Charter; in fact, it works the other way, for they constitute a majority and do not want the Charter restrictions to prevent them from moving as they want to move. It is the older and stronger states, having vested interests, who support international law and wish to rely on the constitutional protections given by the Charter. Of course, a smaller state may itself occasionally be the object of attack, in which case it hastily scampers back under the shelter of the Charter; and a large state has more than once been willing to stretch its interpretation of some Charter restriction to gain votes in the cold war or for other purpose.

Professor Eagleton continues:

But one should not mistake a factual situation for political or moral principles. It does not follow from a circumstantial situation in which political methods are preferred to law that it is logical and desirable that the United Nations should be a political order. The struggle for political power goes on always and everywhere, but unless it is brought under control in the sense of rules within which it is to be carried on, the inevitable end, the final solution, is physical conflict.[14]

[12] Eagleton, The Yardstick of International Law, 296 Annals 68, 69 (1954).
[13] Ibid., at 70–71. [14] Ibid., at 75.

Although in many circles it is considered rather naïve to speak of natural law, it is the purpose of this article to suggest that the natural law approach to problems of international relations is one which had no emphasis in the setting up of the United Nations organization but which ought to be employed in any attempt to revise the United Nations Charter. Bringing this attitude to consideration of the problems of the nations would have the virtue of forcing discussion of these principles and compelling the Soviet Union and such satellites as are in the U.N. either to speak out as a foe of the natural rights of nations or at least indicate the cynicism of the Soviet position.

One of the best known proponents of a natural law approach in international relations was the Spanish Dominican, Franciscus de Victoria, who lived in the early part of the sixteenth century. Having studied at the University of Paris and the Sorbonne, Victoria took the primary chair of theology at the University of Salamanca on September 7, 1526, which he occupied until his death in 1546.

Victoria's major work is, as a matter of fact, not written by him but consists of notes taken by his students from his formal lectures and printed after his death.[15] These lectures were delivered in 1532 and are a complete examination of the titles the Spanish might put forward in order to justify their domination in the New World. In the *Relectiones de Indis* and *De Jure Belli Hispanorum in Barbaros*, Victoria repudiates all theories attempting to justify the conquest of the Indians, which were based on the alleged superiority of the Christians, or on their right to punish idolatry, or on the mission which might have been given them to propagate the true religion.

In speaking of Victoria, Professor Quincy Wright recently dismissed him rather lightly as a sort of apologist for Spanish conquest:

> Francisco de Victoria, in his *Relectiones de Indis et de Jure Belli* of 1532 . . . asserted that denial of the natural rights of trade and missionary activity to the Spaniards by the Aztecs was sufficient grounds for the conquest of Mexico by Cortes.[16]

Victoria is not so easily tossed aside. An analysis of the *Relectiones* shows clearly that Victoria was using reason and the natural law to

[15] The best translation of these lectures is found in Victoria, *De Indis et de Jure Belli Relectiones*, in the series: Classics of International Law published by the Carnegie Institution of Washington, 1917. This volume contains the Latin text, a photographic reproduction of the 1696 Edition of the lectures, and an English translation. The translation indicates in the margin the pagination of the original work, and the citations herein are to such marginal page numbers.

[16] Wright, Human Rights and Charter Revision, 296 Annals 46 (1954).

seek a solution to problems—not merely to justify Spanish actions already completed.

In *Relectio de Indis* Victoria inquires by what right the Indians came under the power of the Spaniards. If the matter were entirely clear, Victoria points out there would be no need of an inquiry, but in the matter of the Indians:

> . . . we see that it is not in itself so evidently unjust that no question about its justice can arise, nor again so evidently just that no doubt is possible about its injustice, but that it has a look of both according to the standpoint. For, at first sight, when we see that the whole of the business has been carried on by men who are alike well-informed and upright, we may believe that everything has been done properly and justly. But then, when we hear of so many massacres, so many plunderings of otherwise innocent men, so many princes evicted from their possessions and stripped of their rule, there is certainly ground for doubting whether this is rightly or wrongly done. And in this way the discussion in question does not seem at all superfluous and so we get a clear answer to the objection.[17]

Victoria then proceeds to the question as to whether the aborigines were "true owners in both private and public law before the arrival of the Spaniards." Noticing that the Indians were in peaceable possession of their goods, both publicly and privately, Victoria declares that they must be treated as owners and not be disturbed in their possession unless cause be shown. He then examines the question of whether they may be dispossessed because they are sinners, or unbelievers, or witless or irrational. Victoria comes to the conclusion that "in the same way that God makes His sun to rise on the good and on the bad and sends His rain on the just and the unjust, so also He has given temporal goods alike to good and to bad."

The attempted justification of Spanish domination because the Indians were unbelievers is rejected by Victoria:

> Hence it is manifest that it is not justifiable to take anything that they possess from either Saracens or Jews or other unbelievers as such, that is, because they are unbelievers; but the act would be theft or robbery no less than if it were done to Christians.[18]

Further the argument that the Indians are savages and have not sufficient mentality to own property is rejected by Victoria:

> . . . they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have politics which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all

[17] Victoria, op. cit. supra n. 15 at 313.

[18] Ibid., at 323.

of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason. Also, God and nature are not wanting in the supply of what is necessary in great measure for the race.[19]

Accordingly I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing, for even among ourselves we find many peasants who differ little from brutes.[20]

To the argument that the Indians were slaves, Victoria says:

It remains to reply to the argument of the opposite side to the effect that the aborigines in question seem to be slaves by nature because of their incapability of self-government. My answer to this is that Aristotle certainly did not mean to say that such as are not over-strong mentally are by nature subject to another's power and incapable of dominion alike over themselves and other things; for this is civil and legal slavery, wherein none are slaves by nature. Nor does the Philosopher mean that, if any by nature are of weak mind, it is permissible to seize their patrimony and enslave them and put them up for sale; but what he means is that by defect of their nature they need to be ruled and governed by others and that it is good for them to be subject to others, just as sons need to be subject to their parents until of full age, and a wife to her husband. And that this is the Philosopher's intent is clear from his corresponding remark that some are by nature masters, those, namely, who are of strong intelligence. Now, it is clear that he does not mean hereby that such persons can arrogate to themselves a sway over others in virtue of their superior wisdom, but that nature has given them capacity for rule and government. Accordingly, even if we admit that the aborigines in question are as inept and stupid as is alleged, still dominion can not be denied to them, nor are they to be classed with the slaves of civil law.[21]

Having established the Indians as true owners, Victoria continues his inquiry into the justifications for Spanish domination. In turn he analyzes and rejects various arguments: 1) that the Emperor is the lord of the whole world; 2) that the Pope is temporal monarch of the whole world and could make the Kings of Spain sovereign over the aborigines; 3) that the Spanish had rights by discovery; 4) that the Indians refused to accept the Christian faith although it was set before them and they had been "adjured and advised to accept it"; 5) that the Indians were sinners committing both ordinary sins and sins against nature, such as sodomy, incest and cannibalism; 6) that the Indians came under Spanish domination by voluntary choice; and 7) that the Indians are subject to the Spanish by special grant from God.

In disposing of these arguments Victoria applies his reasoning

[19] Ibid., at 333.

[20] Ibid., at 334.

[21] Ibid., at 335–336.

power and shows a keenness of insight and an objectivity which set him quite apart from an ordinary apologist for his nation's imperialistic conquests.

As to the first argument, Victoria states:

> Now, in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or, if there were, it would be void of effect, inasmuch as law presupposes jurisdiction. If, then, the Emperor had no jurisdiction over the world before the law, the law could not bind one who was not previously subject to it. Nor, on the other hand, had the Emperor this position by lawful succession or by gift or by exchange or by purchase or by just war or by election or by any other legal title, as is admitted. Therefore the Emperor never was the lord of the whole world.
>
> Second conclusion: Granted that the Emperor were the lord of the world, still that would not entitle him to seize the provinces of the Indian aborigines and erect new lords there and put down the former ones or take taxes. The proof is herein, namely, that even those who attribute lordship over the world to the Emperor do not claim that he is lord in ownership, but only in jurisdiction, and this latter right does not go so far as to warrant him in converting provinces to his own use or in giving towns or even estates away at his pleasure. This, then, shows that the Spaniards can not justify on this ground their seizure of the provinces in question.[22]

As to rights by discovery:

> Accordingly, there is another title which can be set up, namely, by right of discovery; and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be an adequate title because those regions which are deserted become, by the law of nations and the natural law, the property of the first occupant (Inst., 2, I, 12). Therefore, as the Spaniards were the first to discover and occupy the provinces in question, they are in lawful possession thereof, just as if they had discovered some lonely and thitherto uninhabited region.
>
> Not much, however, need be said about this third title of ours, because, as proved above, the barbarians were true owners, both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the aforementioned passage of the Institutes. And so, as the object in question was not without an owner, it does not fall under the title which we are discussing. Although, then, this title, when conjoined with another, can produce some effect here (as will be said below), yet in and by itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.[23]

As to the Indians' refusal to embrace Christianity:

> Before the barbarians heard anything about Christianity, they did not commit the sin of unbelief by not believing in Christ. . . .

[22] Ibid., at 348.

[23] Ibid., at 359–360.

The Indians in question are not bound, directly the Christian faith is announced to them, to believe it, in such a way that they commit mortal sin by not believing it, merely because it has been declared and announced to them that Christianity is the true religion and that Christ is the Saviour and Redeemer of the world, without miracle or any other proof or persuasion.[24]

And this is confirmed by what St. Thomas says (Secunda Secundas, qu. I, art. 4, on obj. 2, and art. 5, on obj. I), namely, that matters of faith are seen and become evident by reason of their credibility. For a believer would not believe unless he saw that the things were worthy of belief either because of the evidence of signs or for some other reason of this kind. Therefore, where there are no such signs nor anything else of persuasive force, the aborigines are not bound to believe. And this is confirmed by the consideration that if the Saracens were at the same time to set their creed before them in the same way and without anything more, like the Christians, they would not be bound to believe them, as is certain. Therefore they are not bound to believe the Christians either, when without any moving or persuasive accompaniments they set the faith before them, for they are unable, and are not bound, to guess which of the two is the truer religion, unless a greater weight of probability be apparent on one side.[25]

It is not sufficiently clear to me that the Christian faith has yet been so put before the aborigines and announced to them that they are bound to believe it or commit fresh sin. I say this because (as appears from my second proposition) they are not bound to believe unless the faith be put before them with persuasive demonstration. Now, I hear of no miracles or signs or religious patterns of life; nay, on the other hand, I hear of many scandals and cruel crimes and acts of impiety. Hence it does not appear that the Christian religion has been preached to them with such sufficient propriety and piety that they are bound to acquiesce in it, although many religious and other ecclesiastics seem both by their lives and example and their diligent preaching to have bestowed sufficient pains and industry in this business, had they not been hindered therein by others who had other matters in their charge.[26]

Of the fifth argument—that of the sins of the Indians, Victoria says:

For it alleged that, though their unbelief or their rejection of the Christian faith is not a good reason for making war on them, yet they may be attacked for other mortal sins which (so it is said) they have in numbers, and those very heinous. A distinction is here drawn with regard to mortal sins, it being asserted that there are some sins, which are not against the law of nature, but only against positive divine law, and for these the aborigines can not be attacked in war, while there are other sins against nature, such as cannibalism, and promiscuous intercourse with mother or sisters and with males, and for these they can be attacked in war and so compelled to desist therefrom. The principle in each case is that, in the case of sins which are against positive law, it can not be clearly shown to the Indians that they are doing wrong, whereas in the case of the sins which are against the law of nature, it can be shown to them that they are offending God, and they may consequently be prevented

[24] Ibid., at 368.

[25] Ibid., at 369.

[26] Ibid., at 372.

from continuing to offend Him. Further they can be compelled to keep the law which they themselves profess.[27]

I, however, assert the following proposition: Christian princes can not, even by the authorization of the Pope, restrain the Indians from sins against the law of nature or punish them because of those sins. My first proof is that the writers in question build on a false hypothesis, namely, that the Pope has jurisdiction over the Indian aborigines, as said above. My second proof is as follows: They mean to justify such coercion either universally for sins against the law of nature, such as theft, fornication, and adultery, or particularly for sins against nature, such as those which St. Thomas deals with (Secunda Secundae, qu. 154, arts. II, 12), the phrase "sin against nature" being employed not only of what is contrary to the law of nature, but also of what is against the natural order and is called uncleanness in II Corinthians, ch. 12, according to the commentators, such as intercourse with boys and with animals or intercourse of woman with woman, whereon see Romans, ch. 1. Now, if they limit themselves to the second meaning, they are open to the argument that homicide is just as grave a sin, and even a graver sin, and, therefore, it is clear that, if it is lawful in the case of the sins of the kind named, therefore it is lawful also in the case of homicide. Similarly, blasphemy is a sin as grave and so the same is clear; therefore. If, however, they are to be understood in the first sense, that is, as speaking of all sin against the law of nature, the argument against them is that the coercion in question is not lawful for fornication; therefore not for the other sins which are contrary to the law of nature. The antecedent is clear from I Corinthians, ch. 5: "I wrote to you in an epistle not to company with fornicators," and besides "If any brother among you is called a fornicator or an idolator," etc.; and lower down: "For what have I to do to judge them also that are without?" Whereon St. Thomas says: "The prelates have received power over those only who have submitted themselves to the faith." Hence it clearly appears that St. Paul declares it not his business to pronounce judgment on unbelievers and fornicators and idolators. So also it is not every sin against the law of nature that can be clearly shown to be such, at any rate to every one. Further, this is as much as to say that the aborigines may be warred into subjection because of their unbelief, for they are all idolators. Further, the Pope can not make war on Christians on the ground of their being fornicators or thieves or, indeed, because they are sodomites; nor can he on that ground confiscate their land and give it to other princes; were that so, there would be daily changes of kingdoms, seeing that there are many sinners in every realm. And this is confirmed by the consideration that these sins are more heinous in Christians, who are aware that they are sins, than in barbarians, who have not that knowledge. Further, it would be a strange thing that the Pope, who can not make laws for unbelievers, can yet sit in judgment and visit punishment upon them.

A further and convincing proof is the following: The aborigines in question are either bound to submit to the punishment awarded to the sins in question or they are not. If they are not bound, then the Pope can not award such punishment. If they are bound, then they are bound to recognize the Pope as lord and lawgiver. Therefore, if they refuse such recognition, this in itself furnishes a ground for making war on them, which, however, the writers in question deny, as said above. And it would indeed be strange that the barbarians could with impunity deny the authority and jurisdiction of the Pope,

[27] Ibid., at 374–375.

and yet that they should be bound to submit to his award. Further, they who are not Christians can not be subjected to the judgment of the Pope, for the Pope has no other right to condemn or punish them than as vicar of Christ. But, the writers in question admit–both Innocent and Augustinus of Ancona, and the Archbishop and Sylvester, too–that they can not be punished because they do not receive Christ. Therefore not because they do not receive the judgment of the Pope, for the latter presupposes the former.[28]

Of the Indians' submission "voluntarily" to Spanish domination Victoria states that fear and ignorance, which vitiate every choice, ought to be absent.

But they were markedly operative in the cases of choice and acceptance under consideration, for the Indians did not know what they were doing; nay, they may not have understood what the Spaniards were seeking. Further, we find the Spaniards seeking it in armed array from an unwarlike and timid crowd.[29]

From his resolute rejection of all these arguments and his consideration of the aborigines as men having certain natural rights simply because they are men, Victoria is seen as a champion of right against mere force and power and against specious justifications proposed for colonial expansion.

Victoria then proceeds to a discussion of the lawful grounds under which the aborigines could have come under the power of Spain. The first proposition is that the Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them.

Proof of this may in the first place be derived from the law of nations (jus gentium), which either is natural law or is derived from natural law (Inst., I, 2, I): "What natural reason has established among all nations is called the jus gentium." For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.[30]

Victoria argues further that the Spaniards may carry on trade with the Indians as a matter of *jus gentium* and should have any rights enjoyed by other foreigners to the Indians. On this point he says:

. . . inasmuch as things that belong to nobody are acquired by the first occupant according to the law of nations (Inst., 2, I, 12), it follows that if there be in the earth gold or in the sea pearls or in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as

[28] Ibid., at 375–378.

[29] Ibid., at 379–380.

[30] Ibid., at 386.

the fish in the sea do. And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all. For if after the early days of the creation of the world or its recovery from the flood the majority of mankind decided that ambassadors should everywhere be reckoned inviolable and that the sea should be common and that prisoners of war should be made slaves, and if this, namely, that strangers should not be driven out, were deemed a desirable principle, it would certainly have the force of law, even though the rest of mankind objected thereto.[31]

He further indicates that children born to Spanish parents domiciled in the lands of the Indians could not be excluded from citizenship and such privileges as citizenship might entail:

The proof of this is furnished by the rule of the law of nations, that he is to be called and is a citizen who is born within the state (Cod., 7, 62, 11). And the confirmation lies in the fact that, as man is a civil animal, whoever, is born in any one state is not a citizen of another state. Therefore, if he were not a citizen of the state referred to, he would not be a citizen of any state, to the prejudice of his rights under both natural law and the law of nations. Aye, and if there be any persons who wish to acquire a domicile in some state of the Indians, as by marriage or in virtue of any other fact whereby other foreigners are wont to become citizens, they can not be impeded any more than others, and consequently they enjoy the privileges of citizens just as others do, provided they also submit to the burdens to which others submit. And the passages wherein hospitality is commended are to the same effect (I St. Peter, ch. 4): "Use hospitality one to another"; and (I Timothy, ch. 3, about a bishop): "A bishop must be given to hospitality." Hence, on the other hand, refusal to receive strangers and foreigners is wrong in itself.[32]

In the face of opposition by the Indians to the Spaniard's exercise of these natural rights, the Spaniards might finally resort to force to protect them. But Victoria sees it as a last resort:

The Spaniards ought in the first place to use reason and persuasion in order to remove scandal and ought to show in all possible methods that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm; and they ought to show this not only by word, but also by reason, according to the saying, "It behoveth the prudent to make trial of everthing by words first." But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. And not only so, but, if safety can not otherwise be had, they may build fortresses and defensive works, and, if they have sustained a wrong, they may follow it up with war on the authorization of their sovereign and may avail themselves of the other rights of war. The

[31] Ibid., at 391.

[32] Ibid., at 392.

proof hereof lies in the fact that warding-off and avenging a wrong make a good cause of war, as said above, following St. Thomas (Secunda Secundae, qu. 40). But when the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so.

It is, however, to be noted that the natives being timid by nature and in other respects dull and stupid, however much the Spaniards may desire to remove their fears and reassure them with regard to peaceful dealings with each other, they may very excusably continue afraid at the sight of men strange in garb and armed and much more powerful than themselves. And therefore, if, under the influence of these fears, they unite their efforts to drive out the Spaniards or even to slay them, the Spaniards might, indeed, defend themselves but within the limits of permissible self-protection, and it would not be right for them to enforce against the natives any of the other rights of war (as, for instance, after winning the victory and obtaining safety, to slay them or despoil them of their goods or seize their cities), because on our hypothesis the natives are innocent and are justified in feeling afraid. Accordingly, the Spaniards ought to defend themselves, but so far as possible with the least damage to the natives, the war being a purely defensive one.[33]

At the extreme Victoria would permit subjection of the Indian's cities and full scale war, but this is based on a denial of rights not merely on Spanish whim.

In the *Relectio de Jure Belli* (on the law of war) we find again Victoria's rational approach to international problems. Here is no cynical, pragmatic attitude basing the justification for war and conquest simply on the existence of, or lack of, resources and armed power. The answers to problems and disputes among nations are not satisfactory (nor, indeed, long lasting) when based only on military power, as the problems engendered in the breaking up of colonial empires today so clearly point up.

Here Victoria considers these questions: (1) May Christians engage in war at all? (2) Where lies authority to make war? (3) What may and ought to furnish causes for a just war? (4) What and how extensive measures may be taken in a just war?

The question as to whether Christians can serve under arms at all had bothered the early Christians but had been resolved by the time of St. Augustine in the affirmative.

As to authority to make war:

Every State has authority to declare and to make war. In course of proof of this be it noted that the difference herein between a private person and a State is that a private person is entitled, as said above, to defend himself and what belongs to him, but has no right to avenge a wrong done to him, nay, not even to recapt property that has been seized from him if time has been al-

[33] Ibid., at 392–393.

lowed to go by since the seizure. But defense can only be resorted to at the very moment of the danger, or, as the jurists say, *in continenti*, and so when the necessity of defense has passed there is a end to the lawfulness of war. In my view, however, one who has been contumeliously assaulted can immediately strike back, even if the assaulter was not proposing to make a further attack, for in the avoidance of shame and disgrace one who (for example) has had his ears boxed might immediately use his sword, not for the purpose of vengeance, but, as has been said, in order to avoid infamy and disgrace. But a State is within its rights not only in defending itself, but also in avenging itself and its subjects and in redressing wrongs. This is proved by what Aristotle says in the third book of his Politics, namely, that a State ought to be sufficient unto itself. But it can not adequately protect the public weal and the position of the State if it can not avenge a wrong and take measures against its enemies, for wrongdoers would become readier and bolder for wrongdoing, if they could do wrong with impunity. It is, therefore, imperative for the due ordering of human affairs that this authority be allowed to States.

Third proposition: A prince has the same authority in this respect as the State has. This is the opinion of St. Augustine (Contra Faustum): "The natural order, best adapted to secure the peace of mankind, requires that the authority to make war and the advisability of it should be in the hands of the sovereign prince." Reason supports this, for the prince only holds his position by the election of the State. Therefore he is its representative and wields its authority; aye, and where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace.

Now, the whole difficulty is in the questions: What is a State, and who can properly be called a sovereign prince? I will briefly reply to them by saying that a State is properly called a perfect community. But the essence of the difficulty is in saying what a perfect community is. By way of solution be it noted that a thing is called perfect when it is a completed whole, for that is imperfect in which there is something wanting, and, on the other hand, that is perfect from which nothing is wanting. A perfect State or community, therefore, is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and other the like. For there is no obstacle to many principalities and perfect States being under one prince. Such a State, then, or the prince thereof, has authority to declare war, and no one else.[84]

What is a just cause of war? Victoria as in the other *Relectio* goes to the common justifications for war and shows which are *not* just causes. Neither difference of religion, nor extension of empire nor the personal glory of the prince nor any other advantage to him is a just cause of war.

For a prince ought to subordinate both peace and war to the common weal of his State and not spend public revenues in quest of his own glory or gain, much less expose his subjects to danger on that account. Herein, indeed, is the difference between a lawful king and a tyrant, that the latter directs his

[84] Ibid., at 424–426.

government towards his individual profit and advantage, but a king to the public welfare, as Aristotle says (Politics, bk. 4, ch. 10). Also, the prince derives his authority from the State. Therefore, he ought to use it for the good of the State. Also, laws ought "not to be enacted for the private good of any individual, but in the common interest of all the citizens," as is ruled in can. 2, Dist. 4, a citation from Isadore. Therefore the rules relating to war ought to be for the common good of all and not for the private good of the prince. Again, this is the difference between freemen and slaves, as Aristotle says (Politics, bk. I, ch. 3 and 4) that masters exploit slaves for their own good and not for the good of the slaves, while freemen do not exist in the interest of others, but in their own interest. And so, were a prince to misuse his subjects by compelling them to go soldiering and to contribute money for his campaigns, not for the public good, but for his own private gain, this would be to make slaves of them.[35]

The only just cause for war is a wrong received, and this cannot be a slight wrong or a fancied wrong.

In the first place, there is a doubtful point in connection with the justice of a war, whether it be enough for a just war that the prince believes himself to have a just cause. On this point let my first proposition be: This belief is not always enough. And for proof I rely, first, on the fact that in some matters of less moment it is not enough either for a prince or for private persons to believe that they are acting justly. This is notorious, for their error may be vincible and deliberate, and the opinion of the individual is not enough to render an act good, but it must come up to the standard of a wise man's judgment, as appears from Ethics, bk. 2. Also the result would otherwise be that very many wars would be just on both sides, for although it is not a common occurrence for princes to wage war in bad faith, they nearly always think theirs is a just cause. In this way all belligerents would be innocent and it would not be lawful to kill them. Also, were it otherwise, even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service.

Second proposition: It is essential for a just war that an exceedingly careful examination be made of the justice and causes of the war and that the reasons of those who on grounds of equity oppose it to be listened to. For (as the comic poet says) "A wise man must make trial of everything by words before resorting to force," and he ought to consult the good and wise and those who speak with freedom and without anger or bitterness or greed, seeing that (as Sallust says) "where these vices hold sway, truth is not easily distinguished." This is self-evident. For truth and justice in moral questions are hard of attainment and so any careless treatment of them easily leads to error, an error which will be inexcusable, especially in a concern of great moment, involving danger and calamity to many, and they our neighbors, too, whom we are bound to love as ourselves.[36]

Victoria then discusses the question as to whether subjects of the State must examine the cause for the war. "If a subject is convinced

[35] Ibid., at 428.

[36] Ibid., at 434–435.

of the injustice of a war, he ought not to serve in it, even upon the command of prince . . . soldiers also are not excused when they fight in bad faith."[37]

As to advisers to the prince and the ordinary citizenry Victoria says:

Senators and petty rulers and in general all who are admitted on summons or voluntarily to the public council or the prince's council ought, and are bound, to examine into the cause of an unjust war. This is clear; for whoever can save his neighbor from danger and harm is bound to do so, especially when the danger is that of death and greater ills, as is the case in war. But the persons referred to can avert the war, supposing it to be unjust, if they lend their wisdom and weight to an examination into its causes. Therefore they are bound so to do. Again, if by their neglect an unjust war be entered on, they are consenting parties thereto, for that which a man could and ought to prevent is imputed to him, if he does not prevent it. Again, a king is not by himself capable of examining into the causes of a war and the possibility of a mistake on his part is not unlikely and such a mistake would bring great evil and ruin to multitudes. Therefore war ought not to be made on the sole judgment of the king, nor, indeed, on the judgment of a few, but on that of many, and they wise and upright men.

Third proposition: Other lesser folk who have no place or audience in the prince's council or in the public council are under no obligation to examine the causes of a war, but may serve in it in reliance on their betters. This is proved, first, by the fact that it is impossible and inexpedient to give reasons for all acts of state to every member of the commonalty. Also by the fact that men of the lower orders, even if they perceived the injustice of a war, could not stop it, and their voice would not be heeded. Therefore, any examination by them of the causes of a war would be futile. Also by the fact that for men of this sort it is enough proof of the justice of war (unless the contrary be quite certain) that it is being waged after public counsel and by public authority. Therefore no further examination on their part is needed.[38]

And for doubtful causes:

What should be done when the justice of the war is doubtful, that is, when there are apparent and probable reasons on both sides. First proposition: As regards to princes themselves, it seems that if one be in lawful possession, the other may not try to turn him out by war and armed force, so long as the doubt remains. For example: Suppose the King of France to be in lawful possession of Burgundy and that it be doubtful whether he has or has not right thereto. The Emperor may not try to oust him by arms; nor on the other hand may the French King seize Naples or Milan, if there be doubt who is entitled to it. The proof is that in doubtful matters the party in possession has the better position. Therefore it is not lawful to dispossess the possessor in favor of a doubtful cause. Further, if the matter were being heard by a lawful judge, he would never in case of doubt dispossess the party in possession. Therefore, if we postulate that those princes who are asserting a

[37] Ibid., at 436.

[38] Ibid., at 436–437.

right are judges in their own cause, they may not lawfully eject a possessor so long as there is any doubt about the title. Further, in the suits and causes of private persons it is never permissible in a doubtful matter to dispossess a lawful possessor. Therefore not in the causes of princes; for the laws are the princes' laws. Therefore, if by human law it is not permissible in a doubtful matter to dispossess a lawful possessor, it can quite validly be objected to princes, "Obey the law thyself hast made, seeing that a man ought to adopt the same law for himself which he has enjoined on others." Also, were it otherwise, a war could be just on both sides and would never be settled. For if in a doubtful matter it were lawful for one side to assert his claim by force, the other might make armed defense, and after the one had obtained what he claimed, the other might afterwards claim it back, and so there would be war without end, to the ruin and tribulation of peoples.[39]

He who is in doubt about his own title is bound, even though he be in peaceable possession, to examine carefully into the cause and give a quiet hearing to the arguments of the other side, if so be he may thus attain certitude either in favor of himself or the other. This is proved by the fact that a man who is in doubt and neglects to ascertain the truth is not in possession in good faith. . . . Also, princes are judges in their own cases, inasmuch as they have no superior. But it is certain that, if any one raises any objection to a lawful possessor, the judge is bound to examine the case. Therefore in a doubtful matter princes are bound to examine their own case.[40]

Victoria then brings up a point that we of the thermonuclear weapons age may very well ponder:

Now, much attention must be paid to the admitted fact that a war may be just and lawful in itself and yet owing to some collateral circumstance may be unlawful. For it is admitted that one may be entitled to recapture a city or a province and yet that, because of some scandal, this may become quite unlawful. For inasmuch as (according to what has been said before) wars ought to be waged for the common good, if some one city can not be recaptured without greater evils befalling the State, such as the devastation of many cities, great slaughter of human beings, provocation of princes, occasions for new wars to the destruction of the Church (in that an opportunity is given to pagans to invade and seize the lands of Christians), it is indubitable that the prince is bound rather to give up his own rights and abstain from war. For it is clear that if the King of France, for example, had a right to retake Milan, but by the war both the Kingdom of France and the Duchy of Milan would suffer intolerable ills and heavy woes, it would not be right for him to retake it. This is because that war ought to take place either for the good of France or for the good of Milan. Therefore, when, on the contrary, great ills would befall each side by the war, it could not be a just war.[41]

On the question of killing innocent people such as children, another problem raised more pointedly in our age than in any other, Victoria states:

With regard to this doubt, let my first proposition be: The deliberate slaughter of the innocent is never lawful in itself. This is proved, firstly, by

[39] Ibid., at 438. [40] Ibid., at 440. [41] Ibid., at 445–446.

Exodus, ch. 23: "The innocent and righteous slay thou not." Secondly, the basis of a just war is a wrong done, as has been shown above. But wrong is not done by an innocent person. Therefore war may not be employed against him. Thirdly, it is not lawful within a State to punish the innocent for the wrongdoing of the guilty. Therefore this is not lawful among enemies. Fourthly, were this not so, a war would be just on both sides, although there was no ignorance, a thing which, as has been shown, is impossible. And the consequence is manifest, because it is certain that innocent folk may defend themselves against any who try to kill them. And all this is confirmed by Deuteronomy, ch. 20, where the Sons of Israel were ordered to take a certain city by force and to slay every one except women and little ones.

Hence it follows that even in war with the Turks it is not allowable to kill children. This is clear, because they are innocent. Aye, and the same holds with regard to the women of unbelievers. This is clear, because so far as the war is concerned, they are presumed innocent; but it does not hold in the case of any individual woman who is certainly guilty. Aye, and this same pronouncement must be made among Christians with regard to harmless agricultural folk, and also with regard to the rest of the peaceable civilian population, for all these are presumed innocent until the contrary is shown. On this principle it follows that it is not lawful to slay either foreigners or guests who are sojourning among the enemy, for they are presumed innocent, and in truth they are not enemies. The same principle applies to clerics and members of a religious order, for they in war are presumed innocent unless the contrary be shown, as when they engage in actual fighting.

Second proposition: Sometimes it is right, in virtue of collateral circumstances, to slay the innocent even knowingly, as when a fortress or city is stormed in a just war, although it is known that there are a number of innocent people in it and although cannon and other engines of war can not be discharged or fire applied to buildings without destroying innocent together with guilty. The proof is that war could not otherwise be waged against even the guilty and the justice of belligerents would be balked. In the same way, conversely, if a town be wrongfully besieged and rightfully defended, it is lawful to fire cannon-shot and other missiles on the besiegers and into the hostile camp, even though we assume that there are some children and innocent people there.

Great attention, however, must be paid to the point already taken, namely, the obligation to see that greater evils do not arise out of the war than the war would avert. For if little effect upon the ultimate issue of the war is to be expected from the storming of a fortress or fortified town wherein are many innocent folk, it would not be right, for the purpose of assailing a few guilty, to slay the many innocent by use of fire or engines of war or other means likely to overwhelm indifferently both innocent and guilty. In sum, it is never right to slay the guiltless, even as an indirect and unintended result, except when there is no other means of carrying on the operations of a just war, according to the passage (St. Matthew, ch. 13) "Let the tares grow, lest while ye gather up the tares ye root up also the wheat with them."[42]

The balance of the lecture is devoted to what a victorious State may do to the vanquished enemy. Victoria sums up his views on war as follows:

[42] Ibid., at 447–449.

All this can be summarized in a few canons or rules of warfare. First canon: Assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should, if possible, live in peace with all men, as St. Paul enjoins on us (Romans, ch. 12). Moreover, he should reflect that others are his neighbors, whom we are bound to love as ourselves, and that we all have one common Lord, before whose tribunal we shall have to render our account. For it is the extreme of savagery to seek for and rejoice in grounds for killing and destroying men whom God has created and for whom Christ died. But only under compulsion and reluctantly should he come to the necessity of war.

Second canon: When war for a just cause has broken out, it must not be waged so as to ruin the people against whom it is directed, but only so as to obtain one's rights and the defense of one's country and in order that from that war peace and security may in time result.

Third canon: When victory has been won and the war is over, the victory should be utilized with moderation and Christian humility, and the victor ought to deem that he is sitting as judge between two States, the one which has been wronged and the one which has done the wrong, so that it will be as judge and not as accuser that he will deliver the judgment whereby the injured state can obtain satisfaction, and this, so far as possible should involve the offending state in the least degree of calamity and misfortune, the offending individuals being chastised within lawful limits; and an especial reason for this is that in general among Christians all the fault is to be laid at the door of their princes, for subjects when fighting for their princes act in good faith and it is thoroughly unjust, in the words of the poet, that—

Quidquid delirant reges, plectantur Achivi.

(For every folly their Kings commit the punishment should fall upon the Greeks.)[43]

A good deal of the language of Franciscus de Victoria has been presented here so as to communicate the flavor and the structure of his thinking. His approach to problems of peace and war and international relations is from the point of view that all men are children of God, and thus brothers, and that their relationship one to another should be based upon reason and charity. One who thinks that God is always on the side of the heaviest ordnance may feel that thinkers like Victoria are of little effect in the destinies of the world—that power politics alone spells out the course of man's fate.

It is difficult to diagnose clearly the ills of the United Nations and obviously prognosis is even more difficult. In the months to come we shall find the United States' position crystallizing as we draw closer to the Tenth General Assembly.

There is in this country strong support for the United Nations. There is also some disillusionment. There are those who feel that the failure of the United Nations to fulfill all their hopes arises from the fact that it does not go far enough, and they advocate its transformation from a voluntary organi-

[43] Ibid., at 466–467.

zation of sovereign states into some sort of superstate. At the other extreme are those who are basically skeptical of all world-wide efforts toward international co-operation, and they would like to see the United States withdraw from the organization. Still others would like to see the U.S.S.R. and its satellites expelled, and the United Nations turned into a closely knit military alliance. Some Americans have in mind specific amendments of a less far-reaching nature which they believe would enable the Organization to function more effectively, while others are averse even to considering changes in the Charter for fear that in the present world situation the end result will be a loss of ground.

In the view of the Department of State, proposals along the lines of the first three do not fall within the proper scope of Charter review, since the purpose of such review is to strengthen the existing Organization—not to destroy it or to change completely its character. To try to write a completely new Charter would, in the words of Secretary Dulles, be to "open a Pandora's box," and the chances of bringing together in a new organization anything approaching the present membership of the United Nations would not be good.

It is therefore with the thinking of the fourth group mentioned above that the Department of State is primarily concerned in its studies preparatory to Charter review, since it does not support the view that it is too dangerous even to consider amending the Charter.[44]

The sincerity of concern of Pope Pius XII for peace in the world is challenged, so far as I know, nowhere but among hard-bitten Marxists. As Cardinal Pacelli he served as Vatican Secretary of State and worked diligently to prevent the outbreak of World War II in Europe. He has visited the United States of America and is not unaware of this county and its position in world affairs.

Pope Pius has expressed deep concern with the prospect of what man can do to his fellow man because of his scientific and technological progress.

This view is shared by many world leaders. Dr. Eelco Nicolaas van Kleffens, President of the Ninth General Assembly of the United Nations, speaking at the opening of the session on Sepember 21, 1954, urged those assembled to the greatest goodwill, the utmost of prudence and a maximum of restraint in speech and action, for he pointed out:

> Many have a sense of living under a lowering sky. A dark and somber threat is hanging over us. Man has been successful in wresting from nature some of its most closely guarded secrets—to the point where the utter destruction of our own kind is now a possibility.[45]

In his annual Christmas messages since 1939 Pope Pius has urged peace upon the nations of the world and international harmony in ac-

[44] Key, United States Planning for Charter Review, 296 Annals, 151, 153 (1954).

[45] 1 United Nations Review 2 (1954).

cordance with principles of Divine and natural law.[46] Pope Pius has felt that his particular mission has been "to lead mankind back to the paths of peace."

Deploring the cold peace as "the mere co-existence of various peoples based on fear of each other and on mutual disillusionment," Pius XII in his Christmas message of 1954, which was delayed because of his health, stated:

> It is a common impression, derived from the simple observation of facts, that the principal foundation on which the present state of relative calm rests, is fear. Each of the groups, into which the human family is divided, tolerates the existence of the other, because it does not wish itself to perish. By thus avoiding a fatal risk, the two groups do not live together, they co-exist.
>
> It is not a state of war, but neither is it peace; it is a cold calm. Each of the two groups smarts under the fear of the other's military and economic power. In both of them there is a grave apprehension of the catastrophic effect of the latest weapons.
>
> Each follows with anxious attention the technical development of the other's armaments and the productive capacity of its economy, while it entrusts to its own propaganda the task of turning the other's fear to its advantage by strengthening and extending its meaning.
>
> It seems that in the field of concrete politics reliance is no longer placed on other rational or moral principles, for these, after so many delusions, have been swept away by an extreme collapse into skepticism.
>
> The most obvious absurdity of the situation resultant from such a wretched state of affairs is this: current political practice, while dreading war as the greatest of catastrophes, at the same time puts all its trust in war, as if it were the only expedient for subsistence and the only means of regulating international relations. This is, in a certain sense, placing trust in that which is loathed above all other things.[47]

The Pope points out that war is not simply an acceptable form of political action:

> On the other hand, the above-mentioned political practice has led many, even of those responsible for government, to revise the entire problem of peace and war, and has induced them to ask themselves sincerely if deliverance from war and the ensuring of peace ought not to be sought on higher and more humane levels than on that dominated exclusively by terror.
>
> Thus it is that there has been an increase in the numbers of those who rebel against the idea of having to be satisfied with mere co-existence, of renouncing relationships of a more vital nature with the other group, and against being forced to live all the days of their lives in an atmosphere of enervating fear.

[46] See Principles for Peace (Washington: National Catholic Welfare Conference, 1943), a volume of selections from papal documents prepared for The Bishops' Committee on the Pope's Peace Points of the National Catholic Welfare Conference. Chairman of that committee is Samuel Cardinal Stritch, Archbishop of Chicago. Another work to be consulted is Gonella, A World to Reconstruct: Pius XII on Peace and Reconstruction (Milwaukee: Bruce, 1944).

[47] The New World, January 7, 1955, p. 8.

Hence they have come back to consider the problem of peace and war as a fact involving a higher and Christian responsibility before God and the moral law.

Undoubtedly in this changed manner of approach to the problem there is an element of "fear" as a restraint against war and a stimulus to peace; but here the fear is that salutary fear of God—Guarantor and Vindicator of the moral law—and, therefore, as the psalmist teaches (Ps. 110, 10), it is the beginning of wisdom.

Once the problem is elevated to this higher plane, which alone is worthy of rational creatures, there again clearly appears the absurdity of that doctrine which held sway in the political schools of the last few decades, namely, that war is one of many admissible forms of political action, the necessary, and as it were the natural, outcome of irreconcilable disputes between two countries; and that war, therefore, is a fact bearing no relation to any kind of moral responsibility.

It is likewise apparent how absurd and inadmissible is the principle—also so long accepted—according to which a ruler, who declares war, would only be guilty of having made a political error, should the war be lost. But he could in no case be accused of moral guilt and of crime for not having, when he was able to, preserved peace.

It was precisely this absurd and immoral concept of war which rendered vain, in the fatal weeks of 1939, our efforts to uphold in both parties the will to continue negotiations. War was then thought of as a die, to be cast with greater or less caution and skill, and not as a moral fact involving obligation in conscience and higher responsibilities.

It required tombs and ruins without number to reveal the true nature of war: namely, that it was not a luckier or less lucky gamble between conflicting interests but a tragedy, spiritual more than material, for millions of men; that it was not a risking of some possessions, but a loss of all; a fact of enormous gravity.[48]

In speaking of the division of the world into two camps in the "cold war" the Pope continues to stress the necessity of a natural law foundation for any unity among men and nations:

Now a bridge cannot be built in truth between these two separate worlds unless it be founded on the human beings living in one and the other of these worlds, and not on their governmental or social systems.

This is so because, while one of the two parties still strives in large measure, whether consciously or unconsciously, to preserve the natural law, the system prevailing in the other has completely abandoned this basis.

A one sided supernaturalism might refuse entirely to take such an attitude into consideration, alleging the reason that we live in a redeemed world and are therefore withdrawn from the natural order; or some might say that the collectivist character of that system ought to be recognized as a "historical truth," in the sense that it too corresponds to the will of God—but these are errors to which a Catholic can by no means submit. The right road is quite different.

In both camps, there are millions in whom the imprint of Christ is pre-

[48] Ibid.

served in a more or less active degree: they too, no less than faithful and fervent believers, should be called upon to collaborate towards a renewed basis of unity for the human race.

It is true that, in one of the two camps, the voice of those who stand resolutely for truth, for love and for the spirit, is forcibly suffocated by the public authorities, while in the other people suffer from excessive timidity in proclaiming aloud their worthy desires.

It is, however, the duty of a policy of unification to encourage the former and to make heard the sentiments of the latter.

Particularly in that camp where it is not a crime to oppose error, statesmen should have greater confidence in themselves: they should give proof to others of a more firm courage in foiling the maneuvers of the obscure forces which are still trying to establish power hegemonies, and they should also show more active wisdom in preserving and swelling the ranks of men of good will, especially of believers in God, who everywhere adhere in great numbers to the cause of peace.[49]

Secretary-General Dag Hammarskjold's remarks at the Second Assembly of the World Council of Churches in Evanston, Illinois, in the Summer of 1955, point out the limitations of the United Nations but stress the part which can be done by churches and by all men of good will.

When we go beyond the great social and economic trends to the underlying ideological tensions, the contribution that the United Nations can make is more limited. Faithful to its ideals, impartial in the clashes of interest, and with patience and perseverance, it can be one of the focal points for the hopes of all those who honestly work for peace. It can help to justify their patience. It can give encouragement to their own will to impartiality and to their respect for justice. But the very nature of the Organization makes it inadequate as a means of influencing those basic attitudes which are decisive in the battle for the hearts of men. The impact of its actions and attitudes can only be a very general one, and will always remain uncertain unless properly explained.

A war to be fought in the hearts of men can be waged only by those speaking directly to men. It is here that I see the great, the overwhelming task of the Churches and of all men of good will of every creed in the work for peace. Their vital contribution to this work is to fight for an ever wider recognition of their own ideals of justice and truth.

However, they also have the power to show men the strength—so necessary in our world of today—that follows from the courage to meet others with trust. We have seen how out of present day conflicts and the underlying tensions has grown a widespread state of fear and frustration, of distrust and desperation. This is, as we all know, in itself a source of evil. It maintains an atmosphere in which unbalanced reactions may suddenly release the explosive power of the forces which we have to master. In the face of this development, we have reason to remember the truth that he who fears God will no longer fear men.[50]

[49] Ibid., at 10.

[50] 1 United Nations Review 22, 25 (1954).

Secretary-General Hammarskjold continued:

> For the Christian faith "The Cross is that place at the centre of the world's history . . . where all men and all nations without exception stand revealed as enemies of God . . . and yet where all men stand revealed as beloved of God, precious in God's sight." So understood, the Cross, although it is the unique fact on which the Christian Churches base their hope, should not separate those of Christian faith from others but should instead be that element in their lives which enables them to stretch out their hands to peoples of other creeds in the feeling of universal brotherhood which we hope one day to see reflected in a world of nations truly united.[51]

Whether the conference will produce large changes or no changes in the structure or operations of the United Nations remains to be seen. This article has, of course, suggested no specific changes. It simply points to the fact that a forum is opening for a useful discussion of international organization and that many points of view will be represented. It suggests an attitude and commends the essential validity of the approach to all intelligent men. It is true that the natural law has nothing to say about many specific legal and political problems, for example, what tax rates shall be or what is a good traffic control law. But in the very basic things of life—such as war and peace and our relations with men and women throughout the world whom we have never seen and of whom we know very little (except that they, too, are human beings) it has a compelling appeal that a simply pragmatic approach based on considerations of economic power, military expediency or global geo-politik has not.

[51] Ibid.