From the just war doctrine to the international law of civilized nations: modernity and ambiguity in Las Casas and Sepúlveda

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The “Valladolid dispute” is probably the best-known episode in the debate on the legitimacy of the Spanish conquest of the Americas. The scientific literature that has been dedicated to the Quaestio de Indiis is very extensive, and has focused from different points of view on the theoretical divergences of its two main protagonists: Bartolomè de Las Casas and Juan Ginés de Sepúlveda.

The themes on which the majority of the critics focused are very broad: the question of the “servitude by nature” of the natives and the problem of the Indians’ ability to be “true owners” of the lands conquered by the Spanish. The

objective of this contribution is rather to attempt a comparison between Las Casas and Sepúlveda with reference to a specific theme: the conception of war. This is, as I will try to show, an interesting problem from the perspective of the theory and history of law, and the philosophy of international law in particular. The thesis that I will support is that the positions of Las Casas and Sepúlveda configure two different developments in modern “law of nations”. They constitute two opposing models - but perhaps it would be more appropriate to understand them as “complementary” - that we can find in the historical development of international law. In order to avoid possible misunderstandings, I think a few premises are appropriate.

At a preliminary level, it should be clarified what can be understood by the term “international law” (or “law of nations”)\(^2\). International law is commonly defined as “the set of rules governing relations between States”. This definition expresses the “classical” concept of international law, modelled on the so-called “Westphalian model” of international relations. It does not therefore make it possible to fully grasp the historical development of international law, provided that its existence is not limited to modernity itself.

In order to analyze stages and times in the international legal system from a broader diachronic perspective, it therefore seems necessary to leave behind the classical definition (international law as the “law of States”), based on a subject - the State - inextricably linked to modernity. A definition based on the object of international law rather than on its subjects seems to be more effective from a historiographical point of view. In this direction, the interpretative key

\(^2\) The expression “international law” is modern. It first appeared in its English form - international law - in a work by Jeremy Bentham in 1789 (cf. J. Bentham, An Introduction to the Principles of Morals and Legislation, London, T. Payne and Son, 1789). From a purely philological point of view, to refer to ancient and medieval experience, the expression “law of nations”, taken from the Latin jus gentium and still widespread today in German (Völkerrecht) and French (droit de gens), would be more appropriate. In the course of this work the expressions “international law” and “law of nations” are used as synonyms.
according to which international law is the particular legal system whose object is the regulation of the use of force on a large scale, or, in other words, the limitation of war, is particularly fruitful. Again, this is a reductive, simplifying, not completely satisfactory definition. However, it offers the possibility of seizing the historical development of international law, understood mainly, though not exclusively, as jus belli ac pacis. By not linking the concept of international law to a particular form of its addressees, the interpretative proposal just outlined makes it possible to consider modern ‘international society’ - whose subjects are sovereign states - as only one of the possible configurations of the international legal order. Based on the distinction between different models of the discipline of war, the approach proposed here also makes it possible to distinguish coherently between “ancient international law” (marked by the proceduralisation of the prodromal phases of conflicts), “medieval international law” (dominated for about a thousand years by Christian reflection on “just war”) and “modern international law” (characterized by the attribution of a *jus ad bellum* to each subject of international law and the definition of rules on the conduct of hostilities).

In the perspective just outlined, the dispute between Las Casas and Sepúlveda, which took place in Valladolid between 1550 and 1551, is situated at a very interesting juncture in the history of international law, which since the middle of the 16th century has undergone a phase of profound transformation.

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gradually moving from the medieval paradigm to modern models, the most famous of which is the so-called *jus publicum europaeum*.

The medieval paradigm was characterized by the prevalence of *jus ad bellum* (the rules of recourse to war violence) over *jus in bello* (the rules of conduct of war). In other words, in the medieval paradigm the question of the “justice” of a war was inextricably linked to the existence of a *justa causa belli*. There were, of course, rules of conduct of war, but these rules could be derogated from in the presence of a “just cause”, albeit in ways that changed radically from one author to another. On the contrary, in the model of *jus publicum europaeum, jus in bello* prevailed over *jus ad bellum*. The justice of war rested on respect for the rules of *jus in bello*. People continued to speak of “just cause”, but the theme of *jus ad bellum* was now “neutralized” on the basis of the theoretical mechanism that attributed to each State as such the “subjective right” to wage war: an absolute right, the exercise of which was the prerogative of the individual State, which could decide autonomously on the existence or otherwise of a “just cause” of war. In this sense, all states could claim a *justa causa belli* (as Erasmus would have said: “Cui non videtur causa sua justa?”). Corollary to the principle that each state decided independently on the existence of its own just cause and therefore on the possibility of recourse to war, was the possibility that war was “just” on both sides. The enemy, therefore, was no longer, automatically, an “unjust enemy” (as was the enemy of the medieval “just war”), but a *justus hostis*, an enemy who had the same moral and juridical status as his opponent, and

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5 The fortune of this expression is mainly linked to the work of C. Schmitt, *Der Nomos der Erde im Völkerrecht des jus publicum Europaeum*, Köln, Greven Verlag, 1950.
6 About the distinction between *jus ad bellum* and *jus in bello*, let me refer to S. Pietropaoli, *Jus ad bellum e jus in bello. Genealogia di una grande dicotomia del diritto internazionale*, «Quaderni fiorentini per la storia del pensiero giuridico moderno», 38 (2009), pp. 1169-1213.
who could also “be right”. Consequence of this approach to the problem was the possibility of an effective limitation of war conflict.

As already noted, it is precisely in the phase of transition from the medieval paradigm to modern models that the dispute between Las Casas and Sepúlveda must be placed. Neither of the two authors is traditionally mentioned in the list of the “fathers of modern international law”, and it is certainly not the case to further enlarge an already well-nourished group, which goes from Vitoria to Grotius, passing through Ayala, Gentili, Suárez, Zouch and others. However, the analysis of the views of Sepúlveda and Las Casas on the justice of war is particularly useful in understanding some aspects of the formation of modern international law.

The visions of Las Casas and Sepúlveda are united by a conception of war that in some ways is still deeply immersed in the medieval perspective. Neither for Sepúlveda nor for Las Casas is the justice of war independent from 

\textit{jus ad bellum}. In both authors, the persistence of the medieval logic of the “just cause” is identifiable: the justice of war depends on the respect of the \textit{jus ad bellum}, in other words on the conformity of the war attack to a legitimizing scheme of ethical character. In this sense, and unlike, for example, Vitoria, neither Las Casas nor Sepúlveda conceive the possibility (not even on a purely theoretical level) of a “just war” ex utraque parte. For both, therefore, only one of the contenders fights a “just war”: the Crown of Spain, according to Sepúlveda, the Indians, according to Las Casas. If the theoretical starting point is common, and of medieval imprint, however, it is possible to identify significant divergences between the vision of Las Casas and that of Sepúlveda.

Sepúlveda, in contrast both with the irenicic positions within the Roman Church and with humanist pacifism, strongly defends the concept of “just
war”. To this end he recovers most of the Augustinian arguments. In Democrats secundus, the work in which Sepúlveda better expresses his reflections on war, Augustine’s influence is evident. Taking up a famous passage from Contra Faustum, Sepúlveda argues that “the great slaughters and killings of men”, which a war inevitably entails, are the “just punishment” of those who obstruct justice. To be against war because it involves the death of people “who one day will have to die”, is precisely that of the fearful, not of pious souls (“timidorum est, non religiosorum”). War is nothing but a sentence (“ipsa belli

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indictio est pro declaratione iudiciaria”, with which the just punishment is inflicted on the offender. It is for this reason that it makes no sense for Sepúlveda to think that war can be just for both sides: “What, in fact, is more established among sane men - Sepúlveda writes - than the fact that two entirely opposite causes of war cannot be just, just as two contrary statements cannot be true at the same time?” In full conformity with the medieval doctrine of bellum justum, Sepúlveda believes that the justice of war rests exclusively on the presence of a *justa causa belli*, and therefore on the existence of a *jus ad bellum*. According to Sepúlveda, the rules of conduct of war must be observed. However, the violation of these rules by those with a *justa causa belli* does not make the war itself less “just”. In other words, the violation of *jus in bello* does not affect the “justice” of war.

In relation to the conquest of the Americas, Sepúlveda admits that there may have been “rapacious, cruel and infamous” acts by “bad and unjust” men. But such events “do not make the cause of the prince and the good worse” Those who perform ungodly and shameful acts must be punished, but their conduct does not corrupt the ‘justice’ of war. If the war has been moved for just causes and regularly declared to the enemies, even if it has been conducted “with an unseemly soul and aimed more at the prey than at justice, that vice of the soul would not oblige the soldier to return the prey, in other respects rightly taken away from a public enemy”. In a perspective that we could define as “realistic”, Sepúlveda maintains that no war is conducted “without great damage or loss, without any wrong or harm”. But the crimes, morally

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10 *Ivi*, p. 138.
12 P. 45.
13 P. 49.
14 P. 117.
reprehensible, of those who violate the *jus in bello*, are not attributable to the prince, nor do they “make unjust or condemnable a war undertaken for a just cause” ("nec ex causa justa iniustam faciunt sive damnandam" 15). For Sepúlveda, in conclusion, the quaestio de Indiis, and therefore the question of Spain’s “just war” against the Native Americans, concerns only the legitimacy of the cause of the war, and not the way it is conducted. “We - writes Sepúlveda - do not now dispute over moderation or the crimes of the soldiers and superiors, but over the nature of this war in relation to the just Prince of Spain 16.

Unlike in Sepúlveda, in Las Casas it is possible to perceive an already fully modern declination of the medieval dogma of the indissolubility of the link between “justice” of war and *justa causa belli*17. It is true that respect for the rules of conduct of war, in Las Casas’ reflection, is not sufficient to believe that a war is “just”, and therefore one of the fundamental traits of the doctrine of *jus publicum europaeum* is still missing. And yet reading some passages of the Apologia authorizes one to believe that for Las Casas the “justice” of war depends not only on *jus ad bellum*, but also on respect for *jus in bello*. In this sense, the existence of a *justa causa belli* is a necessary but not sufficient condition for a war to be considered “just”.

As we have seen, Sepúlveda believes that the crimes committed by soldiers during a war are not attributable to the prince. In Sepúlveda’s argumentative scheme, the violation of the rules of conduct of war does not erase the justice of the *belli causa*, to the point that the plundering of the enemy’s property, even if carried out by unjust means, remains in itself just. The

16 Ibidem.  
17 The literature on the work of Las Casas is now vast. Here, one can only refer to the recent bibliographical review edited by Giuseppe Tosi in Bartolomé de Las Casas (Seville 1484 - Madrid 1566), “Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale”, V (2009), 1, <http://www.juragentium.org/topics/rights/profiles/it/lascasas.htm>.
dynamic of this approach is absolutely “vertical”: from the justice of the cause of the prince descends the intrinsic justice of the acts carried out by his subjects, even if they are vicious and sinful. On the contrary, from the guilt of the enemy prince descends the guilt of the entire adversary people.

In Las Casas the perspective is radically different. At the beginning of chapter XXX of the Apología, Las Casas maintains that the argument that all the inhabitants of a country against which a just war is fought are enemies is false: “Ad argumentum, scilicet, quod, damn justo bello civitate, omnes eius incolae praesumuntur hostes, falsum est”\(^{18}\). Even admitting that the war is just (because it is legitimated by a just cause), those who lead it cannot indiscriminately deprive the inhabitants of the enemy country of their property. This is because even among them there are innocent people - feminae, pueri, senes -, who have no guilt and do not deserve, therefore, any punishment. In invoking the authority of the Decretals of Innocent IV, Las Casas maintains that the innocent must be “ab omni vi bellica [...] immunes”, and for this reason “si a militibus spolientur, milites tenentur ad restitutionem et peccant mortaliter”\(^{19}\). Las Casas arrives therefore at an antithetical solution compared to that proposed by Sepúlveda. The just cause of war has no “purifying” effect on the illicit conduct of the milites.

Las Casas, as already mentioned, is not an irenist. On the contrary, he is a strict supporter of the concept of “just war”. However, he repeatedly emphasizes that war is “ peste y atroz calamidad para el género humano”\(^{20}\). In itself, war is an impious work, which can only be justified by extreme necessity (“la circunstancia que convertiría a la guerra en guerra justa, esto es, la


\(^{19}\) Ibidem.

\(^{20}\) P. 387.
necesidad\textsuperscript{21}). And it is in this sense that the war of the Indians is just: it is a “just war” because the Indians are forced into it\textsuperscript{22}. If this reconstruction is plausible, then Las Casas’ reflection on war can be read as a theory of transition between the medieval paradigm and the modern model of \textit{jus publicum europaeum}. Las Casas is still “medieval” to the extent that it considers the presence of a just cause to be necessary as the foundation of the moral as well as the legal legitimacy of a war. But it is already “modern” when it considers that this legitimacy is conditioned by the effective observance also of the rules of conduct of war.

From what has been said so far, one could deduce that while Las Casas’ reflection on war is characterized by the juxtaposition of medieval positions with openings that reveal its modernity, Sepúlveda’s approach, on the other hand, is inexorably declined in a perspective that is still all medieval and not at all modern. But this is not the case. To clarify the possible misunderstanding, some observations may be useful.

So far reference has been made several times to the “models” of modern international law. One should not, in fact, forget that the so-called \textit{jus publicum europaeum}, celebrated by Carl Schmitt in \textit{Der Nomos der Erde}, is only a part of modern international law. It is therefore wrong to consider “modern” only theoretical attempts that go in the direction of limiting war violence, neutralizing the medieval concept of \textit{justa causa} in favour of a vision of the justice of war linked to respect for the rules of conduct of hostilities. As Schmitt himself points out, “European public law”, which for about three centuries had as its main objective the mitigation of the bloodiest aspects of warfare, has

\textsuperscript{21} P. 389.

\textsuperscript{22} On this point we refer to the remarks by D. ZOLO, \textit{Il multiculturalismo pacifista di Las Casas}, in \textit{BARTOLOMÉ DE LAS CASAS, De Regia Proteestate}, Roma-Bari, Laterza, 2007, pp. V-XIII.
gained real relevance only in wars fought between European states on European soil. It, in fact, did not regulate either the maritime war, or the clashes between European states on non-European territories, or the hostilities between European states and non-European political communities. Ultimately, while modern international law, on the one hand, provided for a series of instruments aimed at limiting the wars fought between “civil states” on European soil, on the other hand it established that there was no limitation of conflicts that did not affect the “free zone” of “civil” Europe. On the other hand, as already stated, the mechanism of limitation of war conflict provided by *jus publicum europaeum* was based on the mutual recognition by the belligerents of an equal status (the quality of “State”). In other words, the temperament belli of modern international law only functioned within an “international community” which, as is easy to note, was based on the concept of “civilization”. Suffice it to think, to confirm this, that the greatest work dedicated in the nineteenth century to *jus in bello* is entitled *The Modern Law of War of Civilized States*.

This clarifies the “dark side” of modern international law, which uncompromisingly justified European colonialism: if war between civilized states was limitable, between civilized states and non-civilized peoples no rules had to be respected. In this sense, even in modern international law we can find a manifestation of the logic of “just war”. Civilization - and therefore colonization - is a just cause, which justifies any conduct of war against the non-civilized. And it is no coincidence that as soon as the idea of a “community of European civilized states” was put into crisis by the First World War (think of the depiction of the Kaiser’s Germany as a denial of European civilization in

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English and French propaganda), the concept of “just war” was evoked and taken up again by a large group of internationalists.

In the perspective that has been tried to delineate, it is therefore possible to see in Juan Ginés de Sepúlveda absolutely “modern” aspects. As anticipated, Sepúlveda takes up the Augustinian doctrine of the “just war”, and adopts its fundamental concepts and assumptions: the justice of war depends on the presence of justae causae, on the regular indictio by the prince, on the recta ratio that animates it and guides it. So far the sepulvedian theoretical construction appears as yet another version of the medieval doctrine of bellum justum. But if one examines the list of justae causae proposed by Sepúlveda, one can catch a fundamental novelty.

In setting out the just causes that must exist for a “just war” to be waged, Sepúlveda takes up “traditional” arguments, which refer to three principles partly elaborated by Roman law and later developed by the Christian doctrines of “just war”: vim vi repellere licet24, rerum repetitio25, and iniuriarum ulterior26. These three justae causae, which Sepúlveda illustrates by invoking the authority of Isidore and the ecclesiastical decrees, are not, however, the only possible causes of “just war”. “Sunt et aliae justi belli causae - Sepúlveda writes - quae minus quidam late patent minusque saepe accidunt; justissime tamen habentur nitunturque jure naturali et divino”27. Beyond the traditional just causes of war, Sepúlveda identifies others, “less clear and less frequent”, but nevertheless rigorous. Among these - and it is here that the novelty is perceived, that is, the

24 Cfr. SEPÚLVEDA, Democritus secundus, cit., p. 26: «Sed justae causae subesse debent ut iuste bellum suscipiatur, quarum illa gravissima est et maxime naturalis, ut vi, cum non licet aliter, vis illata repellatur».
25 Cfr. ibidem: «Secunda causa justi belli est ut res ablatae repetantur».
26 Cfr. ivi, p. 28: «Tertia, ut qui iniuriam intulerunt, ab his poenae repetantur, nisi fuerint a sua civitate, quae maleficia negligat, puniti, ut tum ipsi et qui consentiendo facti sunt iniuriarum socii, iustis poenis affecti de cetero fiant ad maleficia tardiores, tum ceteri ipsorum exemplo deterreantur».
27 P. 31.
“modernity” of Sepúlveda’s reflection - there is one that “maxime convenit in istos barbaros, Indos vulgo dictos”: the condition of “natural servitude” of the Native Americans.

With reference to the conquest of the Americas, therefore, Sepúlveda’s reflection on the war, while starting from a theoretical structure firmly based on medieval tradition, introduces an element of strong discontinuity. The traditional just causes that he recalls cannot justify the conquest. Nevertheless, it is possible to identify a new justifiable cause belli. To achieve this result, Sepúlveda did not resort to the authority of Augustine, but to that of Aristotle (of which - it is worth remembering - he was a profound connoisseur, as demonstrated by the task entrusted to him in 1534 by Clement VII to translate the Aristotelian Ethics). And it is with reference to Aristotle’s Politics that Sepúlveda maintains that, by law of nature, it is a “just war” that of those who subjugate those whose natural condition is to obey others.

The “natural servitude” of the Indians - barbaric, inculturated and inhuman - is a just cause of war at the very moment when they refuse the dominion of the Spanish. Opposing the conquest, according to Sepúlveda, means disturbing the natural order, for which “matter must obey to form, body to soul, appetite to reason, brute animals to men, inferior things to the perfect ones”. This is how Sepúlveda engaged Aristotelian arguments in the Augustinian and Thomist tradition. Not subjecting the natural servants of the Americas means allowing them to commit crimes against human nature and against God. In other words, the Spanish have a duty to prevent anthropophagy and recourse to human sacrifice, and to protect the Christian religion, granting the possibility for preachers to proclaim the Gospel, and for natives to embrace the true faith without danger.
Sepúlveda thus builds a doctrine of war as “lesser evil”. He recognizes that every war involves bloodshed, and also innocent bloodshed. Nevertheless, he is firmly convinced that “minus malum pro bono habetur”. In this perspective, it is clear that the concept of war elaborated by Sepúlveda refers to the medieval tradition of bellum justum. But the theoretical framework in which it is inserted by Sepúlveda is no longer medieval. Notwithstanding his respect for the cultural tradition of the Middle Ages, Sepúlveda is aware of the radical upheavals that inexorably mark the end of an era.

Even if in Sepúlveda’s work it is not possible to identify a theorization of sovereignty as a fundamental attribute of the State and therefore as a presupposition of a “family of European States”, the panorama in which his reflection is declined is no longer that of the *respublica christiana*. In this direction, in Sepúlveda the identification of a “just cause” of war is no longer the exclusive prerogative of the Roman Pontiff and theologians, but is now beginning to be a prerogative of the prince. And it is in this perspective that one can sustain that Sepúlveda’s reflection on war reveals a rate of secularization that is a clear sign of modernity. As a humanist, and not as a theologian, Sepúlveda shifts the axis of his arguments from the religious level to the “cultural” level. The fruit - even if it is a sour fruit - of this theoretical operation is the theory of the cultural superiority of civilized peoples over barbarian peoples, and therefore the justification of war no longer (or not only) in the name of God, but in the name of civilization. And this theory, as the tragic events of European colonialism will testify, cannot be denied being dramatically modern.