THE RATIONAL FOUNDATIONS OF INTERNATIONAL LAW

FRANCISCO SUAREZ AND THE CONCEPT OF JUS GENTIUM

*D. P. O'CONNELL**

INTRODUCTION

In both philosophy and jurisprudence Suarez has remained for three centuries a dominant and highly controversial figure. Interest in him, especially on the Continent, has never been greater than at present, although it is far from apologetic. Criticism derives not only from philosophies alien to his but also from those who share his general structure of belief but deny his conclusions, or detect inconsistency in his logic. In Spain, in particular, jurisprudence divides into Vitoria—versus—Suarez schools and outside of Spain scholars exhibit some impatience with Suarez's eclecticism, his respectful deference to authority, notably the authority of Aquinas, and his consequent efforts to explain away what he cannot agree with in the master, which in many instances becomes, as Dunning says,[1] mere word spinning. Perhaps for this reason a proper evaluation of Suarez in English has yet to come, and in the space available we can do no more than examine his significance as the link between medievalism and modernism in legal thought, and comment upon his systematic treatment of the various divisions of law out of which the essential steps to Grotius were constructed.

Suarez was born in 1548 and died in 1617.[2] Between these two dates the sovereign State and the theory of it both came to maturity. During the same period confessional differences promoted the secularization of Christendom. The birth of the modern States system was the death of a universal order under Empire or Papacy. It is significant that Spain led Europe in this double process, and that Suarez was a Spaniard. His thinking could not but reflect the achievements of Spanish politics and diplomacy during the full century from the reign of Ferdinand to the time when he produced his twelve major works. He must have been acutely conscious of the national character of the Spanish monarchy and its national army which had still a half century of invincibility before it. At the same time, having been sent expressly by Phillip II to bring Spanish scholarship into the Portuguese university of Coimbra he must have been no less conscious of Spain's imperial proportions. Certainly he was influenced by Vitoria's studies of the moral and legal inter-relationship of

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* B.A., LL.M., Ph.D., Reader in Law, University of Adelaide.

[1] *A History of Political Theories from Luther to Montesquieu* (1919) 137, n.1.

[2] Professor at Avila and Segovia 1571-6; Rome 1580-5; Alcalá 1585-92; Salamanca 1592-7; Coimbra 1597-1616. His work *De Legibus, ac Deo Legislatore* is abbreviated *De Leg.* Scott's translation is used in the passage quoted.

Europeans and aborigines in the new Spanish Empire, and he must have been impressed with Spain's struggle to preserve a uniform ideology of Christendom in Europe. As a theologian the problem that these contradictory factors presented to his mind was one of reconciling the co-existence of independently organized and mutually exclusive polities with the moral purposes ordained by God for the whole human race. The solution of this problem demanded a frank recognition of the idea of the modern State, and the ordering of this idea within the traditional framework of Scholastic thought. It was out of this ordering that Suarez laid the foundations of international law.

The modern sovereign State was not just an idea which Suarez took up to demolish the medieval notion of Christendom, as some of his fellow theologians have contended. It was a manifest reality born of the Reformation and the Renaissance and their aftermaths. Vitoria, the Dominican, who died two years before the birth of Suarez, did not fully realize the implications of this development, or at least did not completely accept them.[3] He thus echoes up to a point the ideal of universal Empire partially realized in his own lifetime in the realm of Charles V. To this extent he remained medieval. Suarez, the Jesuit, is of the Counter-Reformation and of an era when the Empire had been divided between Spain and Austria, and the former had been compelled to accord *de facto* recognition of its rebellious subjects in the Netherlands. The two writers thus stand at the extremes of a path linking two distinct historical situations, but a path well defined by Scholastic thought. Suarez completes Vitoria, advances him in some respects, leaves him behind in others, but shares with him an identical view of life and the same intellectual environment. The difference between them is represented by an increasing secularization of the international community.[4]

Vitoria still thought substantially of the *civitas maxima* in institutional and objective terms. He would admit the organization of the human race in a diversity of polities, but such a division would be accidental and could in no way affect the primordial character of the *societas gentium*. It follows that the impact of the human will (of the national sovereign) on the form and characteristics of the international community is minimised, and particularly in the field of the law of war this has certain practical consequences.[5] Suarez, on the other hand, at least by implication, allows more to the wills of individual States in the creation and operation of the pattern of life of the international community. Fundamental to his doctrine is a distinction, never before fully apprehended, between the community of men and the community of nations, a distinction founded on the conception of the human race organized per medium of a plurality of States.[6] The State is the perfect form of community because it recognizes no superior within its order; it is sovereign. To the extent that it participates in the life of the greater human community its own activities, generated by the will of its sovereign, determine the pattern of that life. In this sense the institutions of the *societas gentium* derive from the will of the State and not from the objective human order.

Suarez's realism is in part a product of his theory of the social contract. While admitting that the State arises with moral necessity out of dynamic

[3] *Relectio de Indis.*

[4] Lacambra, "*La Fundamentacion del Derecho de Gentes en Suarez*" in (1948) 1 *Revista Espanola de Derecho Internacional* 28.

[5] Barcia Trelles, *Francisco Suarez* (1934) 98-9; also in (1933) 43 *Recueil de l'Académie de Droit International*; J. B. Scott, *Suarez and the International Community* (1933).

[6] Delos, *La Société internationale et les principes du droit public* (1950) 216ff.; de Visscher, *Théories et réalités en droit international public* (1953) 26; Cavaré, *Le Droit international public positif* (1951) 25.

human nature, and hence is a moral organism, he would say that the concrete form which it takes is contrived by free choice and human initiative. A covenant is a logical and legal necessity, even if it is not an historical fact, to designate the act of transfer from the pre-political to the political state, or the process by which the political order "coalesces."[7] Sovereignty is the attribute of the organism so brought into being,[8] and it derives, ultimately from God, but mediately through the people in the act of tacit or express pact. This, the translation theory, was no novelty. It was already held by, or is at least implicit in, Vitoria, de Soto, Leyva, Bellarmine and Molina,[9] and was based on propositions currently accepted that all men are born free[10] and equal,[11] and that the first society is democratic in form. Power is vested in authority by "translation" from the people.[12] All this was useful ideology in the era of religious wars, and in Suarez's hands was a cogent weapon with which to belabour James I's doctrine of divine right. But in Suarez it had the further consequence of a rejection of the thesis of direct power in temporal affairs of Empire or Papacy, and a ridiculing of the ideal of the *civitas maxima* as utopian.[13] Imperial power is neither derived from God, nor received by human election, nor exercised in fact. Sovereignty follows the facts. The net conclusion is that the international community as a congeries of sovereign States transcends conceptually the notion of Christendom.

So far Suarez can be accommodated to Bodin, Hobbes and Austin, but only so far. To Hobbes or Austin sovereignty is an absolute: to Suarez God is the only absolute. The concept of "perfection" as applied to the State has a certain relativity about it which derives from his careful definition of a sovereign as one who sets up a tribunal in which all legal cases are terminated without appeal to any higher tribunal.[14] In modern terms, sovereignty is but the ultimate competence within a prescribed juridical order. It does not follow that it can be equated with irresponsibility or absence of obligation. While the State is sovereign it cannot be insulated from its fellow States, but must share their life, their common end—the common good of humanity—an end objectively predicated on the nature of man. So says Suarez:

> The human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity. . . . Each one of these States is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these States when standing alone are never so self-sufficient that they do not require some mutual

[7] *De Leg.* III, c.3, n.1, "*ipsa communitas coalescit medio consensu et voluntate singulorum*"; the difference between Suarez and Hobbes, Locke or Rousseau is the difference between a contract of "government" and a contract of "society": Barker, *Essays on Government* (1951) 91.

[8] *De Leg.* III, c.7; *cf.* Bellarmine, *De Supremo Pontifice*, I, 2, c.2.

[9] And much earlier. See the notes to Gierke, *Political Theories of the Middle Ages* (1900) 37ff.

[10] *De Leg.* III, c.3, n.6.

[11] He repudiates the Aristotelian doctrine that some are free and others not: *De Leg.* III, c.2., n.3.

[12] There is an inherent tension between the Aristotelian organic view of society and the individualism of social contract, as Gough points out (*The Social Contract* (1936) 66), but in the late Scholastics it is minimised by the moral obligation to obey the government constituted by consent. Molina explains that man is naturally impelled towards the society, first of the family, then of the polity, but that the latter's authority materialises in form as a result of acts of free choice (*De Justitia et Jure*, Tract II, Disp. XXII, 5. 8.). The proper analogy, as Barker indicates in his introduction to Gierke (*infra*, vol. II, n.60, Note) is from marriage, the institution of which is not explained by or dependent upon the contract. This interaction of free contrivance and natural institution escapes Gierke (n.62).

[13] *De Leg.* III, c.7, n.8; *cf.* Vitoria, *de Indis* II, 1-6; Barcia Trelles, *op. cit.*, 49ff.

[14] *De Caritate*, XIII, II, 4. Also *Def. Fid.*, III, 5, n.3.

> association and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.[15]

When Suarez distinguishes, therefore, between the society of men and the society of nations, he still emphasises the "sociability" of international relationships and asserts the necessity of a law to govern them. Here is the answer to the speculations of Professor Julius Stone, who wonders if the present division of the world into two camps, each culturally insulated from the other, and called respectively the "West" and the "Iron Curtain" has dissolved the international community and substituted for it two communities each with its own law, the product of its own ideology.[16] To Suarez the mere co-existence of the two camps induces society and hence law. As Taparelli put it,[17] "every constant factor which brings any two nations into touch with one another, establishes a positive society," and this society is subject to the universal propositions of justice and charity which direct all nations to the common goal.

So, when Suarez implies that the institutions of the international community derive from its members, he is only enlarging, not departing from, Vitoria's theory of the *societas gentium*.[18] What is novel and modern in his doctrine is the transformation of the *jus gentium* into the *jus inter gentes*. Until this transformation was effected there could be no such thing as international law as we understand it. Naturally the transformation could not long be postponed once the Wars of Religion had changed the European club into a chaotic bear garden, but methodologically it was one difficult to bring about given the contemporary closed system of thought and the Roman and medieval inheritance. It required a mind of unusual flexibility to penetrate the ambiguities underlying the traditional formulations of the "law of nations."

JUS GENTIUM AND *JUS NATURALE*

The term "*jus gentium*" had been used in several senses and at no time had its relationship with *jus naturale* been clearly defined. Gaius and Ulpian had sought to give a philosophical account of the principles of law acknowledged by the praetor peregrinus in cases dealing with aliens or subject peoples. They found these principles common to all nations, and to this extent distinguished them from municipal law. But this *jus gentium* was not, and could not clearly be marked off from *jus naturale* at the one end and positive law at the other. Since the basic principles of the *jus gentium*, life, right to property and its disposition, the concepts of theft, fraud etc., could be regarded as necessary conclusions from the principles of the *jus naturale*, it might be said that *jus gentium* partook of *jus naturale*. But as a comprehensive system of law considered as an adjunct to the *jus civile*, and containing detailed rules about sale and inheritance, (such as the coincidence of *animus* and *factum* in acquisition of a *res nullius*) *jus gentium* was also as much a human invention as the *jus civile* (which, of course, operated between *cives*).[19] In one sense, then, *jus gentium* to the early medieval writers was a term to describe those practical

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[15] *De Leg.* II, c.19, n.9. This notion is again fundamental in Lorimer, I, p. 357. See Jenks, "The Significance Today of Lorimer's Ultimate Problem of International Jurisprudence", in (1940) 26 *Transactions of the Grotius Society*, 35.

[16] *Legal Controls of International Conflict* (1954) 61.

[17] *Essai théorique de droit naturel* (1875) Vol. 3, 40.

[18] Although he seems to depart from him in tending more to a supremacy of the will and a voluntarist conception of law. He defines law as the act of a just and right will by which the superior wills to oblige the inferior. (*De Leg.* I, c.5, n.24). The Thomists had defined it as "an ordinance of reason" (S. T. I-II, q.90, a.1.) Davitt correctly observes that Suarez's efforts to reconcile the two definitions is "a piece of forced exegesis" (*The Nature of Law* (1953) 94, n.22.)

[19] Dabin, *Legal Philosophies of Lask, Radbruch and Dabin* (1950) 430.

TABLE A

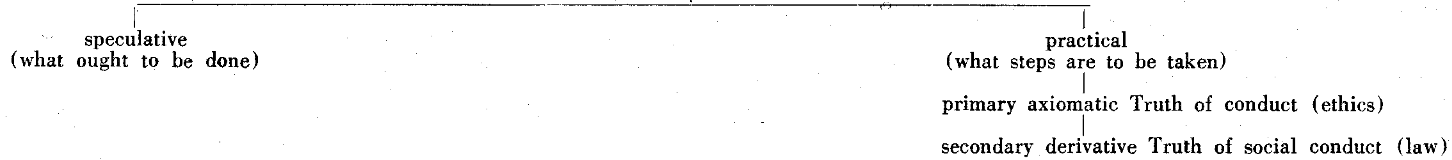

TABLE B

A.	Primary axiomatic truth.	Seek the Good and Avoid Evil	1st principle of natural law.
B.	Secondary derivative truth. (Truth induced from the nature of man).	Seek the social good — Seek the personal good	2nd principle of natural law.
C.	Necessary direct inference.	Do not harm thy neighbour — (ethics)	Precept of natural law.
D.	Contingent general determinations (general concepts). De facto necessity contingent on social facts.	Wilful harm — Duty of care in cases of unintentional harm — Do not defraud (lie) (pacta sunt servanda) — Respect neighbour's property (also original acquisition	JUS GENTIUM.
E.	Applications of determinations generally. (In what circumstances concepts will apply).	Murder, Trespass etc. — Negligence — Contract, Fraud — Theft, Trespass, Restitution	Rules.
F.	Applications of determinations specifically.	Detailed rules — Negligence rules, Donoghue v. Stevenson — Derry v. Peek — Detailed rules	Decisions.

The process of reasoning can be illustrated by Lord Atkin's deductions in Donoghue v. Stevenson from Love thy neighbour (C) to manufacturer's duty (F). The relativity of the judgment made increases with the contingency from stage to stage.

The term JUS GENTIUM in Aquinas seems to bridge C and D.

In Roman Law it refers to E in practice but D in theory.

precepts which are common to diverse bodies of municipal law mediating between the principles of natural law and the rules of municipal law[20] (for which the term "*jus civile*" came to be employed, devoid of its technical associations with citizenship in Roman law). In another sense, it referred to a highly elaborated technical system of positive law.[21]

The emphasis in Aquinas, whose treatise on law in the *Prima secundae* of the *Summa Theologica* was the framework of all later medieval jurisprudence, was on the former aspect of *jus gentium*, but much refinement of his text is necessary before the exact role of *jus gentium* in his doctrine can be detected. (What follows can best be understood by reference to the appended chart which tentatively indicates the steps in the reasoning by which the absolute principle of natural law is applied to relative and contingent circumstances in an English law context. The stage which Aquinas defines as *jus gentium* perhaps becomes clearer on analysis of this chart). Aquinas distinguishes between two faculties of the intellect, the speculative (*cognoscere*) and the practical (*dirigere*);[22] the speculative is concerned with knowledge alone; the practical, which is the intellect plus the will, applies that knowledge to actions. It is obvious that law pertains to the practical intellect since it concerns the actions that direct men to the end which is speculatively apprehended. Aquinas distinguishes several successive acts of the intellect and will which precede every action. The first act of the intellect is the simple grasp of an axiomatic truth ("seek the good and avoid evil"); this is a "primary truth" from which "secondary truths" are syllogistically derived (seek the social good—the minor premise being the social nature of man); from the "secondary truths" other conclusions can be drawn, some of which are "necessary" in that they do not depend upon existing conditions (e.g. "theft" considered in the abstract is always immoral since it arises from the right to property, which is an aspect of man's social nature), and others of which are contingent since they arise out of the state of society at a given time (e.g. whether "theft" is an operative concept will depend upon whether society has based itself upon a division of

[20] It is to be noted, however, that Isidore of Seville included in *jus gentium* much of international law, such as diplomatic immunity, occupation of territory, treaties and prisoners of war (*Encyclopaedia*, V): Bowle, *Western Political Thought* (1949) 152.

[21] On the medieval inheritance from Roman lawyers see generally McIlwain, *The Growth of Political Thought in the West* (1932) 119-131, 326ff.; Carlyle, *A History of Political Theory in the West* (1928), Vol. 5, P.I, cc. 4, 5, 6; II, cc. 1 & 2; Barker's introduction to Gierke, *Natural Law and the Theory of Society* (1934), Vol. I, XXVIIIff.; Vinogradoff, *Roman Law in Medieval Europe* (1909).

[22] It is sometimes supposed that he believed in two intellects. This, however, is not so. He is considering the intellect from two points of view, firstly, considering it in itself, and secondly, considering it in union with the will. The intellect considered in itself is the speculative intellect, which is concerned with knowing things, which it does (a) by apprehending (*synderesis*) (A in Table B of the chart); (b) by judging (B); and (c) by deducing conclusions syllogistically (C and D.) The intellect in union with the will is the practical intellect. By command of the will the intellect applies itself to particular cases. Aquinas' thesis may be illustrated by the following table:

Order of Intention

Acts of intellect	Acts of will
1. Judgment: this end is desirable.	3. Desire (inefficacious).
2. Judgment: this end can and must be obtained.	4. Efficacious intention: I desire this end.
Acts regarding means of attainment:	
A. Order of Choice	
5. Deliberation: these means seem apt for the end.	6. Consent to these means.
7. Practical judgment regarding the best method.	8. Choice of this method.
B. Order of Execution	
9. Command: the means chosen *must** be applied.	10. Active use of the will moving faculties.
11. Attainment of the end desired.	12. Fruition of will, the end being attained.

* This *must* comes from the will, which makes the order of execution the realm of the practical intellect.

property or a community of property: in the one case the rule will be "do not steal from your neighbour": in the other "do not steal from society"). The contingent conclusions must then be applied to more particular circumstances (e.g. rules to make the notion of theft effective), or applied to singular instances *hic et nunc.*[23] At the conclusion level (C), the inferences are logically necessary and direct. At the determination level (D, E, F), the prescribed or prohibited actions are neither just nor unjust intrinsically but become so in virtue of the determination.[24]

Jus naturale, jus gentium and *jus civile* in Aquinas are to be distinguished according to the judgment in which each consists. The first consists of evident conclusions from the first truths of human nature and its end teleologically conceived. The *jus gentium* is said to consist of conclusions drawn from these first principles, and the *jus civile* of determinations of means in a general way by reference to the generality of contingent circumstances (positive or municipal law).[25] Aquinas distinguishing the two modes of derivation from the natural law: "by way of conclusions from the premises," and "by way of determinations of certain generalities,"[26] goes on: *"ad jus gentium pertinent ea quae derivantur ex lege naturae, sicut conclusiones ex principiis: ut justae emptiones, venditiones, et alia hujusmodi: sine quibus homines ad invicem convivere non possunt; quod est de lege naturae."*[27] This, however, does not greatly illuminate the role of *jus gentium.* Is it the equivalent of the secondary or more immediately concluded principles of the natural law (e.g. right to life), or is it the sum total of those jurisprudential concepts which all nations have in common because realizations of these derived principles (e.g. murder, theft, fraud)? The reference to the principles of just sale suggests the second alternative, but the further statement that the precept "thou shalt not kill" is both a moral precept and a proposition of *jus gentium*[28] suggests that the two stages of reasoning are in fact bridged by the one concept.

Much of this difficulty of definition is due to Aquinas' efforts to escape from the confusion between natural law as a notion of moral conduct and natural law as the equivalent of the law of the jungle which Ulpian introduced[29] and Aquinas inherited through Justinian.[30] Ulpian had said that natural law is what nature teaches all animals. But since animals are not rational, this can only refer to animal instinct. The moral law, however, is concerned with choice of conduct, and with what men "ought to do" as distinct from what animals "actually do." When Aquinas[31] distinguishes *jus gentium* as "derived from natural law by way of conclusions that are not very remote from their premises" he is separating it from "that natural law which is common to all animals." It then becomes clear that *jus gentium* is equated

[23] The distinction is usually stated as between the immutable principles of natural law and the fallible but necessary deductions made from them, but this telescopes the problem: McIlwain, *op. cit.*, 326.

[24] For critical investigation of this epistemological basis of natural law see the excellent essay of Mortimer Adler, "A Question about Law" in *Essays in Thomism*, ed. Brennan (1942).

[25] S.T., I, II, q.95, aa. 2, 3, 4.

[26] S.T. I-II, q.95, a.2. *"Sicut conclusiones ex principiis" and "sicut determinationes quaedam aliquorum communium".*

[27] S.T. I-II, q.95, a.4.

[28] S.T. I-II, q.95, aa.2 & 4. For a similar modern ambiguous statement in relation to property see Maclaren, *Private Property and the Natural Law, Aquinas Papers* (1948) 14.

[29] Inst. D.1, 1, 2-3. Generally see D'Entrèves, *Natural Law* (1951) 25ff.

[30] Pandect. I, tit. 1.

[31] S.T. I-II, q.95, a.4, reply to obj. 1. This is clearer in Bartolus: *Comment.* D.1.1.9: *"Jus gentium potest vocari jus naturale secundum verum significatum. Nam cum verbum naturale refertur ad rationem, intelligitur de jure gentium. Nam non est commune animalibus carentibus ratione".*

Aquinas distinguishes generally natural law considered in itself as absolute (*jus*

with the broader principles of the natural law and hence is not contained under human positive law.[32] *Jus gentium* is thus neither international law nor what the Romans understood as an adjunct of their municipal law. It does not proceed from human officials exercising extrinsic authority conjoined with power over the individual, which is the characteristic of positive law,[33] and thus it is prior to the constitution of the State.[34]

This identification of *jus naturale* and *jus gentium*[35] deprived the latter of real juristic autonomy. Aquinas' followers used the word "law" univocally when referring to both the moral law and positive law, simply because he did not say anything to the contrary, whereas these two laws, though not mutually exclusive, differ in mode of derivation and in juridical characteristic.[36] *Jus gentium* was "*jus*" in a sense different from "*jus*" created by human agency. Vitoria, it would seem, understood this clearly enough. In fact he impatiently exclaims that the great dispute arising out of Ulpian's definition is merely one of words.[37] It was not his purpose, however, in treating of the Indians, to enlarge on the point.[38] He was immediately concerned to demonstrate a natural right to cultural and economic intercourse between Spain and America, and to outline the proper conduct of the Spaniards towards the Indians. He does this by explaining that such conduct is governed by principle of *jus naturale, vel derivatur ex jure naturali,* following the definition in the Institutes. The *jus gentium* is still what natural reason has instituted among all nations.[39] A little later he insists that the law of nations completes the manifest power to give law and create obligation,[40] so preserving the moral law character of *jus gentium*. In speaking of the laws established by the greater part of mankind, such as freedom of the seas and diplomatic intercourse, he says these are "sufficiently" derived from natural law. What did he mean by "sufficiently"? Are these rules "conclusions" or "determinations" of natural law, or merely sanctioned by it? In the *de Indis* and the *de Jure Belli* he is not concerned to discuss the question further, but what he really meant, and what perhaps

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naturale secundum primum modum), which is universal and applies to all men and animals (such as the instincts of procreation or self-preservation) and the natural law induced from self-evident principles and specific to man (*jus naturale secundum modum*). Barcia Trelles (*Hague Rec. op. cit.* 431) considers the latter as equivalent in his text to *jus gentium*. As Roland-Gosselin puts it, "*préoccupé de concilier Isidore de Séville et les juristes romains, saint Thomas se rêlache parfois de sa précision quand il trace les frontières de droit naturel et du droit des gens*", quoted by Barcia Trelles.

[32] The ambiguity is heightened by his quotation in I-II, q.94, a.4. of Isidore of Seville (Etym. v.4), who said that natural law is common to all nations. There is the further ambiguity that from natural law two conclusions can be drawn: (a) those which define the means in the sphere of private conduct, and (b) those which define the means in the sphere of public conduct. It is clear that *jus gentium* has reference to the latter only, and is a social concept: Adler, *A Dialectic of Morals*, c.6.

[33] S.T. I-II, q.96, a.5; q.90, a.3, reply to obj. 3; II-II, q.57, a.2., reply to obj. 2.

See the distinction between legal and moral obligation in S.T. I-II, q.99, a.5; Maritain, *Scholasticism and Politics* (1940), 92-3; Farrell, "The Roots of Obligation" in *The Thomist* (1939) vol. 1, 14-30.

[34] This despite the fact that Aquinas elsewhere divides positive law into *jus gentium* and *jus civile*, S.T. I-II, q.95, a.4: Simon, *The Nature and Function of Society* (1940) n.10.

[35] Jones, *Historical Introduction to the Theory of Law* 104. The identification is explicit in Innocent IV, *Apparatus*, C.7x, *quae in eccles.* 1.2: "*id est de jure gentium quod dicitur naturale quia naturali ratione inductum est . . . quod etiam dicitur naturale jus: quia apud omnes generaliter est.*"

D.1.1.5. was frequently invoked to show that both private property and the binding force of contract were sanctioned by *jus gentium*. So property became an institution of *jus naturale*; Gierke, *Political Theories of the Middle Ages* 78-81. The identification is also in St. Germain, to whom the *jus gentium* was the "law of reason secondary-general": McIlwain, *Constitutionalism, Ancient and Modern* (1940) 61-2.

[36] Adler, *loc. cit.* 209.

[37] *De Jure Gentium et Naturali* (*infra*).

[38] Nussbaum, *A Concise History of the Law of Nations* (1947) 59; Lacambra, *loc. cit.* 23ff.

[39] *De Indis*, III, 1, 4.

[40] *Id.*, III, 114.

influenced Suarez, may be discovered in his lectures on the *Secunda Secundae* of the *Summa Theologica* in 1535,[41] where he says that the *jus gentium* has the character of positive law deriving from the common consent of nations. It does not consist in a necessary deduction from natural law but is sanctioned by it.

The way was now prepared for Suarez's description of the law of nations as deriving from the common consensus of sovereigns acting as organs of the peoples who, by use and custom, introduce law.[42] *Jus gentium* now is not natural but human, positive law founded on a concordance of wills manifested in a conjunction of usages, and differing from civil law (municipal law) only in the subjects to which it addresses itself. He establishes this by a series of dialectical steps beginning with a repudiation of Ulpian's definition.[43] Natural law does not dictate for the advantage of natural instinct. This is proved in the case of man by the fact that when natural law does enjoin anything to preserve natural instinct it always involves a rational means. There are many things which natural law prohibits to men but not to brutes, for example, union between mother and son. There is thus no need to use *jus gentium* to describe the moral law; *jus naturale* suffices for this. Nor is it legitimate to regard *jus gentium* as a set of principles deduced as an act of intrinsic necessity from the more fundamental principles of *jus naturale* (as Soto contended[44]), differing from the latter only in being revealed by means of comparatively intricate inferences as opposed to merely simple reflection. So to do would be to confer on the usages of men, contrived by free will, the character of moral absoluteness enjoyed by *jus naturale*. It is true that many of the institutions traditionally described as of the *jus gentium*, such as the proposition *pacta sunt servanda*, follow upon natural law, but they do so only in conjunction with the assumption of the existence of human society and circumstances peculiar to it. For instance, *pacta sunt servanda* presupposes the existence of commercial intercourse and the actual making of a promise, both social acts: The concept of theft presupposes that society has organized itself on a basis of *divisio rerum* and not community of property. The inference, therefore, from the natural law (stages A & B of the table) to the propositions of *jus gentium* (D) is dependent upon the intervention of human free will and of moral expediency

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[41] Published by Beltran de Heredia in 1934 under the title *De Justitia et Fortitudine*, and quoted *in extenso* by Lacambra; it is translated in part under the title *De Jure Gentium et Naturali* in Appendix E to Scott, *Francisco de Vitoria and his Law of Nations* (1934) (Carnegie). "*Dicimus ergo cum Sancto Thoma, quod jus naturale est bonum de se sine ordine ad aliud. Jus vero gentium de se non est bonum, id est jus gentium dicitur quod non habet in se aequitatem ex natura sua, sed ex condicto hominum sancitum est. Et sic ad dubium principale respondeo quod jus gentium potius debet reponit sub jure positivo quam sub jure naturale* (S.T. II-II, q.57, a.3, reply to obj. 2) . . . *Ita de jure gentium dicimus, quod quoddavo factum est ex communis consensu omnium gentium et nationum. Et isto modo legati admissi sunt de jure gentium, et apud omnes nationes sunt inviolabiles; nam jus gentium ita accedit ad jus naturale ut non possit servari jus naturale sine hoc jure gentium. Jus gentium non necessario sequitur ex jure naturali, nec est necessarium simpliciter ad conservationem juris naturalis, quia si necessario sequeretur ex jure naturali jam esset jus naturale. Nihil ominus tamen jus gentium est necessarium ad conservationem juris naturalis. Et non est omnino necessarium, sed fere necessarium, quia male posset conservari jus naturale sine jus gentium. . . . Quando semel ex virtuali consensu totius orbis aliquid statuitur et admittur, oportet quod ad abrogationem talis juris totus orbis conveniat, quod tamen est impossibile, quia impossibile, est quod consensus totius orbis conveniat in abrogatione juris gentium. Secundo dico, quod bene ex parte abrogari jus gentium, licet non omnino; sicut jus gentium est quod captivo in bello justo sint servi; sed Palude dicit quod hoc non tenet inter christianos*". Here in essence is the Suarezian doctrine, and the dependence of Suarez on Vitoria is closer than most commentators have believed.

[42] *De Leg.* II, c.19, n.6. Lord Russell of Killowen, "International Law" (1896) 12 *L.Q.R.* 320; Barcia Trelles in *Hague Rec. loc. cit.* ch.3.

[43] *De Leg.* II, c.17, n.2-3.

[44] *De Justitia et Jure*, II, q.5, a.4.

and is not a matter of logical necessity.[45] And since immutability derives from objective necessity it follows that the *jus gentium* is not immutable.[46] Nor is it necessarily common to all, as is natural law, but *regulariter et fere omnibus*.[47]

THE POSITIVE CHARACTER OF *JUS GENTIUM*

At this point Suarez seems to be fixing *jus gentium* at stage D, and possibly at stage E,[48] of the table, and so clarifying Aquinas by a more precise choice of terms. *Jus gentium* now appears as a stage of reasoning intermediate between natural law and positive law in general. How is it transformed into international law? Suarez says that *jus gentium* has a twofold form: it is a body of laws (this suggests perhaps stage E[49]) which individual States observe within their own borders but which are similar and commonly accepted; it is also the law which various nations ought to observe in their relations with each other.[50] There is no inherent ambiguity in this equivocal use of the term, although there is no doubt considerable inconvenience (Suarez does carefully distinguish the two uses.[51]) The reason is that at this fundamental stage the basic concepts of international and municipal law must be the same. This emerges more clearly in his demonstration that the *jus gentium*, like natural law, may not only enjoin conduct by positive precepts (preceptive law), but also concede and sanction things (concessive law). For example, one is not obliged to take a wife, but if one does the resulting status relationship, though freely produced by consent, is governed by natural law as to indissolubility, support and education of children etc. In the same way, *jus gentium* may concede that nations may do certain things, but the juridical character of the thing done may be independent of the wills of the acting States. So diplomatic immunity is not a necessary derivative of natural law, but the infringement of it would threaten the stability of international relations and derogate from the natural harmony of society.[52] In the case of treaties there is joined to the right to contract an obligation not to violate the bargain.[53] The institutions of *jus gentium* whether they be of international or municipal law are to this extent anchored to the natural law.

The ontological basis, or to put it less philosophically the source of obligation, of a law created by concordance of wills of sovereigns is thus clear. The positivists were later to confront themselves with the questions, why should not the withdrawal of consensus dispel obligation; why, if the law of nations is the consensus of "nearly all" nations should the non-consenting or the recalcitrant be obliged? Suarez's answer to these questions depends on his conception of the international community and the role of natural law in sanction-

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[45] *De Leg.* II, c.17, n.9.

[46] *Ibid.* Also c.19, n.2; c.20, n.1.

[47] *Id.*, c.19, nn. 1-2. Suarez interprets Aquinas' statement that the precepts of *jus gentium* are conclusions drawn from the principles of natural law by saying that they are conclusions not in an absolute sense, and by necessary inference, but in comparison with the specific determinations of civil and private law; II, c.20, n.2; see Copleston, *A History of Philosophy*, vol. 3 (1953) 392. This is reading a good deal into Aquinas.

[48] This certainly appears to be the case from his citation of Isidore's examples of *jus gentium* as including contracts and *postliminium*; *ibid.*, c.19, n.10.

[49] The interaction of intellect and will in Suarez may be examined from the Table. To stage D the process is one of syllogistic deduction; it is judgment, therefore of the intellect. At stage D it is still judgment but in association with contingencies introduced by volition. At stage F the process is one of choice, hence of the will: e.g., *pacta sunt servanda* can be satisfied by either specific performance or restitution. In Suarez the choice is limited by the judgment made, and in this sense the law is not totally will. In Austin the will is un-anchored from the judgment; law becomes totally will. Generally see Delos, *op. cit.* 264ff.

[50] *Id.*, c.19, n.8.

[51] *Id.*, c.20, n.1.

[52] *Id.*, c.19, n.7.

[53] *Id.*, c.18, n.5.

ing the *jus gentium*. Just as man is social, so is he juridical.[54] Custom derives its juridical character from the juridical order predicated on human nature. Although men are divided into various nations they preserve the same moral and quasi-political unity, so that though perfect in themselves States are also members of the human race and dependent to a great degree upon each other.

> Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one State or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation [of the law of nations from natural law] may not be self-evident, that is, not essentially and absolutely required for moral rectitude—it is nevertheless quite in accord with nature, and universally acceptable for its own sake.[55]

Natural law is thus the integrating factor in the international community.[56] Nonetheless Suarez has not worked out his theory of interaction in a completely satisfactory manner, and in the result his doctrine has a pendular character as the argument swings back and forth.[57] For example, the law of war is governed ultimately by natural law, but so is the right to commerce. The one must derogate from the other. Suarez says nations may go to war because peoples can live without commerce, whereas he has already said, following Vitoria, that they cannot co-exist without mutual aid (*caritas*) and communication. This supposed tension, however, is capable of being resolved and the problem is no more than an interpolation in Suarez's stream of thought. Westlake makes the added criticism that Suarez does not distinguish between good and bad customs but allows all custom the force of law.[58] This is a misapprehension of Suarez's Scholastic position and also a misreading of his text.[59] A bad (*injusta*) custom would not be law any more than a *lex injusta*. A more cogent comment is that Suarez does not elaborate the content of his *jus gentium*.[60] It was not his concern to do so. He was writing philosophy, or as he said himself, theology, and he cited only the obvious examples to explain the ontological character of laws between nations; and even this was a very subordinate aspect to a much larger work on law generally.

The real importance of Suarez is thus his clarification of the distinctions between, and the inter-relationship of, natural law and international law. The

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[54] Le Fur, "*Le Droit naturel ou objectif; s'étend-il aux rapports internationaux?*" in (1925) 6 *Revue de droit international et de législation comparée* (3e ser.) 61; also "*La Théorie de droit naturel*" in (1927) 18 *Recueil de l'Académie de droit international* 271.

[55] *De Leg.* II, c. 19, n.9.

[56] On this aspect see Lacambra, *loc. cit.* 29ff. Barcia Trelles (*op. cit.* 137) says "*es caractéristico de Suarez combinar a cada instante, en admirable armonia, la caritad y la justicia*".

[57] Lacambra, *loc. cit.* 31. See generally Nys, *Les Droits de la guerre et les précurseurs de Grotius* (1882).

[58] *Collected Papers* (1914) 28.

[59] *De Leg.* II, c.20, n.3. There is in fact a whole chapter devoted to the question: *Ibid.* VII c.6. Sherwood, "Francisco Suarez" in (1927) 12 *Transactions of the Grotius Society* 19.

[60] Nussbaum, *op. cit.* 67.

distinction was almost immediately obscured again by Grotius, who, while elaborating the content of international law, was weak on ontology. He adopted the proposition of Vasquez, the Spanish Augustinian, that rational nature, irrespective of the positive will of God, is the primary ground of the obligation of natural law,[61] and while admitting[62] that the natural law is enjoined by God, went on to say that it would oblige even if there were no God.[63] So far he and Aquinas are not in radical disagreement, but the emphasis thus placed on the autonomy of the intellect led in his successors in the Age of Reason to an exaggeration of capacity of the intellect to deduce with absolute moral certainty the detailed rules of law. They followed him closely in believing it possible to derive by strict logic a suitable system of rational law containing specific prescriptions covering debts and property, family institutions and inheritance, all sharing the immutability of the first principle of natural law and so having the force of moral obligation.[64] This was a doctrine far removed from that of Suarez who regarded only the general institutions of marriage, property and contract as contained under natural law and would have allowed a considerable relativity to the detailed prescriptions accommodating the institutions to contingent circumstances.

The change thus effected, which Suarez in fact predicted in his famous controversy with Vasquez,[65] is perhaps due to Grotius' stumbling into what was to be Hobbes' fundamental error of confusing what men actually do in a "state of nature" with what they ought to do to realise their moral natures.[66] How else are we to explain his harsh doctrine of the natural law of war, which includes the assassination of enemies, the pollution of their water supply, sack of their cities, massacre of their populations and killing of prisoners of war?[67] The error is rationalised both in the Prolegomenon and in Book I of *De Jure Belli ac Pacis* where Grotius speaks of an *a priori* deduction and an *a posteriori* induction of natural law. He does not mean natural law at all, of course, but the precepts of *jus gentium* which can be deduced from the natural law and induced from diverse bodies of municipal law.[68] The induction proceeds by finding the common principles that underlie the rules of these municipal laws. Suarez's carefully contrived harmony between natural law and *jus gentium* has now vanished and the way is clearly open for Pufendorf again to equate them.[69] From this equation extended the rationalist doctrine of the absoluteness and immutability of the precepts of international law, which was thus forced into a logical straight-jacket. It is not surprising that the positivism into which this same rationalism inevitably turned should repudiate the whole notion of natural law as a manifest absurdity, failing in the process to distinguish between the Suarezian and Pufendorf traditions. Both went, and the 19th century was left with a collection of sovereign States whose whim was law and whose law was whim.

JUS GENTIUM AND THE RIGHT TO WAR

In these circumstances the Suarezian doctrine of just war was obscured, and has in distorted form been restored to international law only in our own

[61] Chroust, "Hugo Grotius and the Scholastic Natural Law Tradition", in (1934) 17 *The New Scholasticissa* 114.

[62] *De Jure Belli ac Pacis,* I, C.1, X.1, 2.

[63] Prolog. to *id.*, 11.

[64] Rommen, *The Natural Law* (1947) chs. 3 & 4.

[65] Copleston, *op. cit.*, vol. 3, 383.

[66] Despite the fact that Grotius, following Suarez and Vitoria, repudiated Ulpian, (1, c.1. x, 1) the error may also be Ulpian's.

[67] *Op. cit.* III, c.IV, XI-XVIII.

[68] Lauterpacht, "The Grotian Tradition in International Law" in (1946) 23 *B.Y.B. Int. L.* 9; Jones, *op. cit.* 105.

[69] *De Jure Naturae et Gentium,* II, c.III, 23, quoting Hobbes, *De Cive*, c.XIV, 4 & 5.

time. It is usual to suggest that it is in this area of speculation that the difference between Vitoria's "institutional" conception of the international community and Suarez's "voluntarist" conception is most marked.[70] Vitoria, it is said,[71] would not admit the primordial right of the State to make war; any right to just war is a delegation from the *societas gentium*. Princes must abstain from injury to aliens, and this in virtue of the *jus gentium* and *auctoritas totius mundi*.[72] Methodologically there may be a difference between this approach and Suarez's based on the view that war is an intrinsic attribute of sovereignty, but the practical relevance of the difference is not completely clear. Vitoria allows the possibility of States dealing with the recalcitrant, and admits the right of defensive war where territory is violated or public good imperilled, and it seems substantially immaterial if the State is acting as an organ of its own interest or of the interest of the international community. Both Vitoria[73] and Suarez[74] are agreed that the sovereign is entitled to go to war only if there is *causa justa*, since the restoration of peace and restitution for injury are the only ends of war. At this point the dependence of international law on the natural law per medium of the concept of the end of the international community, is no less emphasised in Suarez than in Vitoria. Hence war is legitimate only if there is grave violation of the *jus humanae societatis* such as injury to innocents, or continued and unreasonable refusal to afford freedom of commerce and traffic.[75] The last is only one of the grounds of just war which in Suarez is relative to changing economic and political theory. It is at best a controversial thesis and one difficult to apply in practice. Space does not permit elaboration of the conception of just war, but before departing from it we may note that Suarez's view of the content of the law of war tends further than does Grotius' to the humanization of war. The killing of civilians, or the unarmed, for example, is unjust.[76]

An aspect of Suarez's doctrine of just war that has attracted little attention is his treatment of the problem of deciding if in fact the conditions of war are present. The problem is resolved on a formula of "probabiliorism". This was a moral system widely current in the 16th and 17th centuries according to which it is wrong to act on an opinion that favours liberty of action, or absence of law, unless the opinion is more probable than that which favours obligation or the existence of law. The prince, says Suarez, must act as a just judge when there is opinion for and against the justice of a proposed war. If he finds that the opinion favouring war is the more probably true, he may prosecute his own right. If the more probable opinion favours the opposite, he may not. If, after careful and diligent investigation, the probabilities are

[70] Delos, *op. cit.*, 251ff. Vitoria says that divine law is binding because of the Will of the Divine Legislator, but the will of the human legislator does not suffice of itself to render human law binding: *De Potestate Civili*, 16. He thus emphasises the rationality of law, and in the light of this text it is difficult to understand Davitt's note (*op. cit.* 161) on Vitoria's voluntarism. We may agree, however, with his comment (p. 106) that Suarez wavers inconsistently between objectivity and subjectivity. Suarez's voluntarist thesis leads him logically to the view that natural law obliges only because a manifestation of the will of the Divine Lawgiver, which is more emphatic than Vitoria. (*De Leg.*, I, c.5, n.15; III, c.21, nn.6-8). Remove the Lawgiver as Grotius did, and the obligatory character of natural law disappears. The path to Rousseau is then inevitable. It is perhaps at this point that the divergence between Vitoria, with his notion of objective necessity towards the end of the international community, and Suarez with his subjective foundation for obligation is most marked. Delos appears to regard the practical implications of the divergence as important, especially in the law of war, but for qualifications of his view see the conclusions to this paper.

[71] Lacambra, *loc. cit.*

[72] *De Jure Belli* 8-19.

[73] *Id.* 5.

[74] *De Caritate*, XIII, c.4.

[75] *Id.*, XIII, c.4, n.3.

[76] *Id.*, XIII, c.6. nn. 8-11; c.7, nn.3-14. Also de Soto, *De Justitia et de Jure*, I, 5, q.e, a.5.

balanced, or if there is an equal uncertainty in the conclusions of both sides to the debate, then, if the opposing party is in possession he ought to have the preference. If neither party is in possession then either has the right of seizure but must divide the disputed territory or assets equally.[77] The classical objections to probabiliorism, namely, that the less probable opinion may in fact be the true one, and that we are not obliged in intellectual honesty always to adopt the safe course—which thesis would be opposed to practical reality—apply to this analysis so as to deprive it of much real value.

The question would indeed be of little interest to jurisprudence if it did not raise a problem of the interaction of law and ethics. Suarez was not arguing on an exclusively moral plane. The will and freedom of choice, as Lacambra puts it,[78] are in Suarez "integrated in the teleological structure (*estructura finalista*) of the Universe" and through this integration the concept of just war becomes part of the *jus gentium*. Aggressive war, the contrary of just war, is a condition precedent for the operation of certain detailed rules of the conduct of war, including the execution of captured leaders. The question is in essence the one presented in our own time at Nuremberg and hence is by no means remote. A great deal of the debate before the Tribunal was directed to establishing that the accused had not acted as "just princes" in determining if the conditions of war were present. Suarez would insist that, unless war is confirmed on his probabiliorism formula, it is unjust, and so illegal, with all the consequences that its illegality entails, unless some effort at pacific settlement has been made, especially through arbitration. He proposes arbitrators appointed by the contending parties, though each has a right of veto over the other's nominee.[79] As the Nuremberg affair illustrates the line between law and ethics at times wears pretty thin.

It is important, therefore, to ascertain to what extent Suarez would distinguish between the fundamental rules of international law (*jus gentium* properly speaking) which prevail because the practice of nations in fundamentals conforms to natural law, and the morally neutral detailed practices such as territorial waters. The distinction is the same as between the *jus gentium* as the foundation of civil law and the rules and decisions which in a detailed way harmonise society even though they are not necessarily deduced from *jus gentium*. The legal character of such prescriptions derives from the objective order of society as a pre-condition of the fulfilment of man's social nature. Likewise, the practices of nations on territorial waters constitute customary law which oblige no less than the *jus gentium* concept *pacta sunt servanda*, for the reason that to ignore them is to threaten the destruction of the greater human community and thereby derogate from individual human personality. Presumably Suarez, when faced with a practical question concerning the existence or otherwise of some detailed rule of the law of nations, would resolve it in the same way as he resolves the question of just war.

INTERNATIONAL AND MUNICIPAL LAW

What of the inter-relationship of international law and municipal law in the Suarezian system? It would be invidious to treat of this question in the light of the modern doctrines of Kelsen, Verdross and Triepel. The problem as such is not formally discussed by Suarez and his attitude to it can only be gathered from his views on the nature and role of the respective legal orders. It would be surprising if out of such analysis a consistent and comprehensive

[77] *De Caritate*, XIII, c.6, nn.2.3.
[78] *Loc. cit.* 39.
[79] *De Caritate*, XIII, c.6, nn.5, 6.

theory would emerge, since Suarez does not, of course, treat of the matter in the logical-juridical fashion of today, which is an outcome of the Kantian dichotomy of jurisprudence and metaphysics, but in an ethical-juridical. It is therefore possible to find in him arguments that favour both monism and dualism. The key to his general attitude is found in his discussion of the processes by which the *jus gentium* can be changed. He begins by repeating that there are two forms of *jus gentium*, the *jus intra-gentes* and the *jus inter-gentes*. The former is no more than the usages introduced throughout the world by successive acts of mutual imitation because they are expressive of or in harmony with the natural law and so befitting to all nations individually and collectively. The latter is similar to the former in its institutions, for the same reason, but is the produce of imitation by nations considered as entities and not as aggregations.[80] From this distinction it follows that the *jus intra-gentes* is easily changed by any one State since within that State it is no more civil law, although in a fundamental sense. So a State may decree that unjust sales shall be rescinded or its citizens not use certain currency, and it may do this without the consent of other States.[81] Changes in the *jus inter-gentes* are, however, much more difficult, "for this phrase involves law common to all nations and appears to have been introduced by the authority of all, so that it may not be annulled without universal consent. Nevertheless, there would be no inherent obstacle to change, in so far as the subject-matter of such law is concerned, if all nations should agree to the alteration, or if a contrary custom should gradually come into practice and prevail."[82]

It is clear then that if the State contributes to the modification and alteration of any precept of the law of nations tending to introduce new custom, it is acting in this case as a member of the international community. In a sense it is acting as an organ of that community, not repudiating its law. The question is by no means resolved with clarity but there can be little doubt that Suarez is tending here to the primacy of the international order. This theoretical supremacy derives as logical inference from the proximity of international law to the natural law, which is *ex hypothesi* superior to the civil law since more intimately related to the end of man; and the consequent ethical-juridical impossibility that the political community could derogate from what is common to all nations. Man as a citizen is governed by municipal law, but man as man emerges beyond the confines of municipal law and partakes of the wider community of the *societas gentium*. It would follow that the law of nations, as the expression of the being of the international community, must be situated on a plane higher than municipal law.

This, however, is very far from putting Suarez in a modern monistic position. The national order is not a derivation from the international. Suarez had expressly rejected this when repudiating an institutional *civitas maxima*, and it would be a negation of all his thought to treat of the authority of the prince as a delegation from international law. Internal sovereignty is not dependent upon the grace of the world order; the State has integrity and is no mere administrative agency. Therefore, there is a sphere, it would seem, beyond the supremacy of international law, just as international law, deriving its juridical character from a source other than the initiating wills of the sovereigns who formulate it, is beyond the control of municipal law. There is thus in Suarez an initial dualism of sources, although it is not a dualism in the modern sense. Modern dualism regards the sources as mutually exclusive and

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[80] *De Leg.* III, c.20, n.1.
[81] *Id.* II, c.20, n.7.
[82] *Id.* II, c.20, n.8.

opposes them to each other so as to initiate a collision of rights and obligations. The only passage in Suarez suggestive of such a doctrine is one where he argues that the State may ordain that an international law shall not be observed. From his illustration of the rule of the *jus gentium* as to slavery of prisoners of war, which is not observed among Christians,[83] it would seem, however, that he is thinking of concessive international law and not preceptive. A thorough-going dualism, involving a hypothetical collision of international and municipal law would be incompatible with his notions of the naturally harmonious ends of State and *societas gentium.*

A proper interpretation of Suarez's doctrine of the international community would tend to place him midway between the monistic and dualistic schools. In this, as in much else, Suarez is coming into his own. Contemporary theory avoids the extremes of monism and dualism. On the one hand the independence of States in their domestic concerns is preserved in the United Nations Charter; on the other hand, the tendency to substitute the individual for the State as the subject of international law, at least in some areas of discussion, notably the rights of man, genocide conventions etc., imply a corresponding restriction on sovereignty. The logic of this has yet to be worked out, but as Suarez's work constantly emphasises, logic alone is insufficient; the problems of the respective roles of State and international society are at bottom metaphysical.

CONCLUSION

Suarez's work has been the centre of controversy largely because it attempts to grapple in an intelligible manner with the problem of the interaction of law and morality. The question is, of course, central to the philosophy of international law, and if Suarez does not state his position with unimpeachable clarity this is attributable more to the magnitude and the elusiveness of the issue than to any logical or linguistic deficiency in his writings. His critics find that the tension he sets up between sovereignty and the community of men is unresolved, or rather is resolved only by an inconsistent shifting of emphasis in pendular fashion from one concept to the other. These would, in the more extreme instances, banish from the literature of international law either the word "sovereignty" or the conception of the *societas gentium* according to their respective doctrinal starting points. But as Suarez clearly recognized, the abolition of either expression would not solve the problem, which is real and not semantic, of the existence of politically insulated communities in close and constant intercourse with each other. Fundamentally, Suarez's doctrine pivots on the notion that law can be an autonomous discipline, logically disassociated from ethics though evaluated by it. Just as in economics the law of supply and demand can be discussed without being treated as an extension of metaphysics, so there is an area of positive law that can be subjected to its own grammar and analysed on its own postulates.

It is in this that Suarez is modern. The medievalist accepted law as a manifestation of ethics, and constructed a society in which the potential collision of law and morality was minimised. To continue the formal integration once the collision had become actual was to avoid and not facilitate solution. Suarez would not deny the point of intersection of law and morality but he would locate it at only the most fundamental level, leaving a great deal in the actual construction of the content of law to free human will. The basic postulates of any legal system, the law in the widest sense, remain constant

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[83] *Ibid.*

because reflections of the natural law engraven, as Aquinas put it, on the hearts of men, but the deductions made therefrom have a relativity conditioned by various environmental and traditional factors. Where Suarez parts company with the modern sovereignty schools is in his emphasis on conscience, the moral sense of obligation which is a product of the human reason reflecting upon the common good, and which anchors law in its actual operation to metaphysics. In this he has a great many legal historians and sociologists on his side. In the outcome the absence of coercive authority in the international community becomes irrelevant, since sanction is seen as consequential and not conditional. The pattern of life of the community, the product of natural love and mercy as much as of self-interest, can be disciplined and explained within the context of a legal system dependent on moral sense. In this Suarez is much nearer reality than modern writers who found international life on acquisitive and racial principles alone. The nationalism that within the past century or so has added a dynamic to Bodin's sovereignty is probably no more than an ephemeral phenomenon in the history of civilization, and there is evidence that the more basic human instinct to society is reasserting itself as the consequences of the self-interest thesis become more apparent.

A writer such as Suarez who attempts to take up such a position midway between the exclusiveness of the sovereign State and the inclusiveness of the human community cannot fail to be misconceived. On the one hand we have Professor Stone[84] linking him with Vitoria and asserting that "both lacked the more fruitful notion of a consensus of States through State practice". On the other hand we have Delos[85] deducing from Suarez's voluntarism that his whole thesis was in marked opposition to that of Vitoria and totally consensual. In answer to the question why was the doctrinal solidarity of Vitoria dissipated at the very outset of the modern world, why there occurred, "*après la floraison, dans une école brillante et puissante, du droit international à fondement objectif, le brusque et presque immédiat triomphe de l'individualisme et du voluntarisme,*" he proceeds to accuse Suarez:

> *Suarez est l'un des fondateurs du droit international, le plus connu peut-être, et l'un de ceux qui ont le plus influé sur les destinées de la doctrine. Son rôle dans le conflit du Droit à fondement objectif et du Droit subjectif, nous semble avoir été décisif à plus d'un égard. Son oeuvre offre de plus le cas typique que nous cherchions: elle permet de saisir, à un moment donné, et particulièrement important, puisqu'il se place aux origines mêmes du monde moderne, la cause du mal dont souffre la science politique internationale: la substitution du point de vue voluntariste au point de vue du Droit à fondement objectif.*

From this thesis the conclusion is drawn that Suarez founded international law, more or less exclusively, on the consensus of States, and so stepped outside the great stream of tradition which culminated in Vitoria's objective and institutionalist doctrine. The latter, according to Delos, was thus smothered by the divergent teaching of Suarez, and has only recently, and perhaps too late, been restored "*grâce à l'effort personnel de juristes modernes.*" With this Barcia Trelles[86] compares the views of Miaja de la Muela[87] who highlights that feature of Suarez which emphasises that international relations are not established by chance but flow from the exigencies of human nature. In other

[84] *Op. cit.* 10.
[85] *Op. cit.* 232.
[86] *Hague Rec., loc. cit.* 395.
[87] *Internacionalistas espanoles del siglo* XVI (1932).

words, he finds Vitoria and Suarez *ad idem* on the basic thesis of the international community.

A comparison of the texts of Vitoria and Suarez suggests that the issue between them has been considerably exaggerated, and that Suarez, far from repudiating the Scholastic tradition merely enlarged and modernised it. In a sense, as the interesting researches of Barcia Trelles have disclosed, he put Aquinas back on the path outlined with incredible insight a millennium earlier by Isidore of Seville. In the Encyclopaedia Isidore outlines the distinction between divine and human laws, and in the case of the latter emphasises their relativity to national custom. He apprehends distinctly the difference between *jus* and *lex* and goes on to elaborate the institutions that properly fall within the various categories of *jus*. To the *jus naturale* belongs the right of self-defence; union of sexes; appropriation of *res nullius*; liberty. In this he has repudiated Ulpian. *Jus gentium* is not universal, but "as if universal," the expression that is basic to Suarez. It is also a product of human will and the child of convention. Included among its institutions are captivity, slavery, treaties, diplomatic immunity, occupation, war. Civil law by contrast is peculiar to each people and has its origin in custom. In one trained within the unitary Roman system this awareness of the problem of a diversity of legal entities co-ordinated through law is startling, and had the high Middle Ages not obscured the distinction which Isidore drew, the contrast between Aquinas' treatment of *jus gentium* as integral with ethics and Suarez's view of it as an autonomous human discipline would perhaps not be as marked as it is. In any event Vitoria on this point is within the stream that leads from Isidore to Suarez, not outside of it.

Perhaps it is legitimate to draw attention to the theoretical differences between Vitoria's view of the international community as a metaphysical entity and Suarez's definition of it as an association of States each of which is a separate entity but each of which is also a member of a vast "federation", as James Brown Scott interprets it,[88] subjected to the law of nations in place of feudal law. The difference is perhaps that between the organic and the inorganic theses. Since, however, neither of them completely explores the practical consequences in the content of the law of nations of their respective positions, it is difficult to ascertain the practical relevance of the issue, especially since Vitoria admits that *jus gentium* is *sub jure positivo potius quam sub jure naturale*. Suarez would not deny that a real international polity could be contrived. He was, as Catry points out,[89] speaking for his own time and not for the future, and his time was one of "transition between the insufficiency of natural law and the necessity of international law." That transition has been projected into our own time but there is increasingly emergent a notion of international solidarity that is in reality the substratum of the Spanish doctrine of international law.

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[88] *The Spanish Origin of International Law* (1932) 160-9, 250-66; *Suarez and the International Community* (1933) 44-51.

[89] In *Revue générale de droit international public* (1932) 193-218.