THE LAW OF NATIONS AND THE JURIDICAL EVOLUTION OF HUMANITY IN VITORIA AND SUÁREZ

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INTRODUCTION

According to Francisco Suárez, man, by his rational nature, has a political end that can only be realized in the heart of a peaceful order—an order in which the assembly of States, the mediators of a human life's fulfillment, share in a common destiny that surpasses them and from which, nevertheless, they derive benefit.[1] At the same time, the international society shares in the sphere of the natural law as a condition for the exteriorization of human nature's potentialities. But it makes it equally clear that, with respect to the development of human societies, the law of nations belongs to the sphere of positive law, since this law only becomes effective by being enforced by a human will that makes the universal values of the natural law suitable to historical variations.

Thus, in the historical constitution of the entire human community, custom necessarily leads to recognizing the division of human law into two classes: the written law and the unwritten law.[2] Custom, like the law of nations, is common to all peoples; together they (custom and the law of nations) constitute two leading pieces in the determination of the juridical evolution of the human community. There is one point for Suárez that confirms the historical-political link between custom and the law of nations: the precepts of the law of nations must be distinguished from the precepts of the civil law because they are not constituted by written laws, but by customs, which are not specific to any single country but to the totality or quasi-totality of nations.

Consequently, the critical examination of the law of nations reveals three difficulties: 1) that of its origin, which faces the problem of the distinction between nature and convention, between the universality of the natural law and the historical particularity of

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[1] *See* FRANÇOIS SUÁREZ, DES LOIS ET DU DIEU LÉGISLATEUR [THE LAWS OF GOD AND LEGISLATORS] 180-84 (Jean-Paul Coujou, ed. and trans., 2003).

[2] *Id.* at 624.

positive law; 2) that of its foundation, which requires establishing its link to the natural law and its distinction from it; and 3) that of its finality—opening the way to the constitution of an ethical-juridical development of humanity which respects diversity.

I. *Historicity of custom and the law of nations*

Suárez insists, in De legibus, on the fact that custom and civil law are not any less made aware of their limits when responding to the problem of international relations, since it is not possible to establish an economy consisting of the types of relations to which all nations should conform in order to allow their coexistence and ensure their ongoing existence. It seems that the limited attributions of custom and law prevent them from ensuring the historical unity of the human race.[3] Thus, the power of civil laws has never been historically "one and the same for the universal totality of men."[4] The human community is to be understood, in its foundation and its institution, on the premise that it will be separated into multiple States. The agreement of humanity on the bestowal of universal power to a single leader proves, for Suárez, to be illusory.

Even if such a power were possible, it could not fail to be illegitimate and a source of a tyranny without limits. Thus, "It is not necessary for preservation or natural well-being that all men be gathered into a single political community."[5] The reality of this historical-political division into multiple communities justifies the initiation of a common law, the law of nations, by which the mutual assistance and preservation of peace and justice become effective by the mediation of common consent based on the recognition of common laws (peace treaties, truces, immunity of ambassadors, the law of fortification, captivity, etc., not to mention the Etymologies of Isidore of Seville). Such a law "has been instituted by custom and tradition more than by legal disposition."[6]

For Suárez, in fact, the universal custom of the law of nations (ius gentium) is distinct from particular private custom.[7] The first category includes "the customs of the totality of the whole that constitutes the law of nations."[8] The Aristotelian position—which understands the State as an

[3] *Id.* at 627.

[4] FRANÇOIS SUÁREZ, *De legibus* [ON THE LAWS] *in* OPERA OMNIA vol. 5, bk. III, pt. 2, ¶ 6, at 181 (Ludovicus Vivès ed., Paris, 1856–1861) [hereinafter Vivès].

[5] *Id.* ¶ 5.

[6] *Id.* ¶ 6, at 182.

[7] *Id.* vol. 6, bk. VII, pt. 3, ¶ 7, at 143.

[8] *Id.* at 141.

autocratic community for the purpose of justifying its existence—seems, to Suárez, no longer appropriate for making sense of the State's evolution in history.[9] The State constitutes a totality included within the whole totality of the human race since it is nothing but a partial expression of this universal community. The history of universal relations shows that the State is unable to be an entity having "an absolute autonomy,"[10] existing metaphysically in itself and by itself. This is part of the international logic passed on by Francisco Vitoria, which judges it appropriate to think in terms of an "association and a common exchange,"[11] of a mutual assistance, without which a greater well-being and progress could never be possible in the order of human development. Consequently, nations—without such association—could not provide an economy with the juridical principles needed for rationally structuring the necessity of exchanges and mutual associations, confirming by this likewise a political principle proper to the State; to endure, and a metaphysical principle proper to the exposition of the temporal category: to endure signifies, for every created thing, the preservation of its existence, whether that of an individual, a community, or a State.

This presupposes—for such a prospect to be real—an establishment not only by natural reason but also by the mediation of custom. Historically, an analogy can be established: just as custom reveals itself to be a source of law in the community of the human race, so also the introduction of the law of nations is carried out because of custom. These customs contribute socially to create an agreement with human nature so the principles of the law of nations may become acceptable to all in an easy manner. The law of nations likewise takes the form of an assembly of precepts and ways of life that, without pretending to be understood by the totality of the human race, do not have an international agreement as an immediate end.[12] Its establishment corresponds to an internal jurisdiction of the State in accordance with constitutional procedures. Thus, one could consider rendering worship to God as something of the order of the natural law; nevertheless, the determination of its specific modality belongs to the sphere of divine positive law, and according to the social order it comes back to civil or private law.

Consequently, one may conclude that for Suárez the universal customs constitutive of the law of nations express a true law and oblige in the manner of an authentic law.[13] Such an unwritten law is the result of a creation of the

[9] SUÁREZ, *supra* note 2, at 627.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 628-29.
[13] Vivès, *supra* note 5, vol. 6, bk. VII, pt. 3, ¶ 7, at 143.

whole human race. The law of nations draws the strength of its identification from custom, the human power of interaction within time, without which the origin of this same strength has only the natural law as a foundation. The history of societies, ultimately, can only confirm that the common law of nations at the same time possesses a natural dimension and it serves as a first law without being comparable to a pure defect of the law.

In conformity to these preliminary remarks, it belongs precisely to the ius gentium (identifiable in Roman law with positive law, holding force for all men and elaborated by human reason) to create the conditions of the historical unification of the human race. This is in spite of the rational demands of a calculus of interests and the need a for an effectiveness appropriate to the conditions that come into play in every political reality, which in Suárez's time was shown by the wars of conquest in America and northern Europe. Thus, the divisions of the human race into different peoples and kingdoms does not exclude the persistent existence of "a specific unity of the human race" and of a "political and moral unity."[14]

In order to understand the issue at hand it proves immediately judicious, in spite of the recognition of an affinity between the natural law and the law of nations (namely that they both represent a specific human law[15]), to show the foundation of their difference. This is in order to avoid all confusion between what is given according to an intrinsic and natural necessity and that which—as the effect of the common practice of some peoples—cannot claim the necessity of such universality. Eliminating this confusion is intended precisely to once more spell out the relation between human nature and history. The law of nations is, for Suárez, the bringing together of "a footbridge between the natural law and the human law even though it is closer to the first."[16] In fact, contrary to the natural law, the law of nations does not prescribe by itself anything necessary to practical morality and it does not forbid anything that would be by itself intrinsically evil.[17] Thus, as Fray Luis de Léon remarked, freedom comes from the natural law, yet this principle has been upset with the introduction of slavery by custom and the law of nations.[18]

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[14] SUÁREZ, *supra* note 2, at 627.

[15] *Id.* at 605-06.

[16] *Id.* at 596.

[17] *Id.* at 606.

[18] FRAY LUIS DE LÉON, DE LEGIBUS O TRATADO DE LA LEYES [DE LEGIBUS OR TREATISE ON THE LAWS] 74 (L. Pereña ed., 1963) (1571); *see* JUAN DE LA PEÑA, DE BELLO CONTRA INSULANOS INTERVENCION DE ESPAÑA EN AMERICA [ON THE WAR AGAINST THE ISLANDERS: INTERVENTION OF SPAIN IN AMERICA] 163 (L. Pereña et al. eds., 1982) ("Slavery was introduced by the law of nations, but not by the natural law" [. . . servitus introducta est iure gentium, non autem iure naturali]).

The laws and decrees of men can never change what the natural law prescribes. The natural law, founded on the two attributes of human nature, freedom and reason, remains—in spite of its trans-historical dimension—submissive to its effective fulfillment in the face of the arbitrary quality of human wishes and the relations of historical forces. Institutions likewise reveal that human law grants dispensations in relation to the precepts of the natural law. As Suárez recalls, according to the natural law a community of things exists, yet men have instituted private property, which brings into the State a different manifestation of the natural law.[19] Still, freedom—which is constitutive of man's being according to the natural law—can appear in many States diminished or even abolished by human law.

For Suárez, it is all the more easy to confuse the natural law and the law of nations than it is to legitimately determine the points of convergence between them. They are both, according to their respective modalities, common to all men. Their practical implications and precepts concern the human sphere in a unique way.[20] Finally, they both contain "some prohibitions and some concessions or permissions."[21]

Nevertheless, these similarities cannot hide the moral differences that clearly establish their distinctions.

First, the affirmative precepts proper to the law of nations are not established by their obligatory character because they prescribe or forbid that which is good or bad in itself in the manner of the natural law. These precepts do not derive from their objects the origin of their obligatory character and this implies an inversion: for, contrary to the natural law, the law of nations does not forbid an immoral practice because it is bad, but it is the prohibition that makes such a practice become bad. It does not signify only what constitutes an evil, but it is constitutive of what can be qualified as evil. Its prohibition has the power of making bad whatever it reports as such. Such precepts are extrinsic and dependent on the will and human conventions. According to this orientation, what the natural law prescribes is of natural right, which amounts to setting down that, for natural reason, this prescription appears necessary to moral rectitude.[22] The natural law in the

[19] SUÁREZ, *supra* note 2, at 532.

[20] *Id.* at 602-03.

[21] *Id.* at 618.

[22] The principles of the natural law, as Suárez recalls, are in some way summed up in the *Institutes of Justinian*: "Honeste vivere, alterum non laedere, suum civique reddere" [live honestly, do not injure one another, give to each his own]; *see also* 1 THE DIGEST OF JUSTINIAN bk. 1, pt. 1, ¶ 9 (explaining that law which natural reason has established among all men, and which all nations observe, is referred to as the law of nations).

same way represents the unconditional ontological norm of the legitimacy of the action.

Second, by the same reason of its historicity, the law of nations can never claim an immutability comparable to that of the natural law. The essence of the latter resides in the immutability of its precepts and such immutability operates on the immutability of human nature. On the one hand, the natural law, in the totality of its precepts, defines the legitimate space of human behavior since it is not in contradiction with the natural characteristic of man. On the other hand, the immutability of human nature, with respect to what it refers, represents a universal given that humanity has no power to modify. As a result socio-historical relations must actualize this first immutability, the condition for the development of every axiology. The voice of conscience in each one of us expresses precisely the referential immanence of this corollary immutability of a necessity unfamiliar to the law of nations.[23] On the opposite side, the State has the power to modify the law of nations in its proper territory, precisely because the precepts of the law of nations correspond to a simple civil law when they apply within a State.[24]

This rapprochement allows for a refinement of the difference with respect to the natural law, for, when the law of nations is in force within a State, it can only recall its dependence relative to the authority and the customs of a particular people apart from other nations. Such a law can be modified within the state without investigating its agreement with other nations. Nevertheless, if this law is envisaged from an international perspective, insofar as it is common to the quasi-totality of nations and its advent assumes the authority of the totality of peoples, the pretension of abrogating it in a way independent of general consensus proves to be illusory.

Legitimate exceptions to this principle are, however, observable. As Suárez remarks, the law of nations on the slavery of prisoners obtained by a "just war was abolished by the Church and Christendom, and this rule was not observed in accordance with an ancient ecclesiastical custom."[25] It thus becomes equally possible to note another order of difference regarding the question of mutability: that which exists between the law of nations and the civil law. While the precepts of the civil law can be the object of an abrogation or a complete modification, the rules of the law of nations will only be the object of a partial derogation. The examination of the question of mutability allows for the essential demarcation of the tradition of the law of

[23] SUÁREZ, *supra* note 2, at 625.
[24] *Id.*
[25] *Id.* at 637.

nations as an intermediate form between the natural law and the civil law.[26] From the point of view of universality it agrees with the first (the natural law), but in a limited way, since it is derived from natural principles without being such according to an absolute necessity. This restriction confirms its agreement with the human law.

Finally, it is appropriate to bring out a difference concerning the nature of the universality proper to the law of nations and the law of nature—in spite their apparent agreement (i.e. they reflect upon precepts, prohibitions, and concessions). The universality of the law of nature is characterized by its universality and its absoluteness. In fact, the natural law unites with ontology in its dimension as a universal knowledge understanding the human according to a rule of universality. Natural law conforms to the principle of the constitution of a universal and abstract representation of the human, so it forms a basis for equal dignity among individuals; if it ceases to be observed, that could only result in a perversion with respect to human nature.

With regard to the law of nations, its universality is such that although it is apparent that the quasi-totality of nations observes it,[27] it must at the same time be noted that one cannot assign to this law an absolute intrinsic and natural necessity. "It proves sufficient," according to the heritage of Isidore of Seville, "that almost all nations are suitably organized in making use of it."[28] The cessation of its observation in any space or time does not contradict the principles of human nature as much. This explains that precisely because the law of nations is "quite simply human and positive"[29] and therefore "instituted not by nature but by men,"[30] the term institution, in this case, signifies that habits and customs, not writings, are at the origin of its introduction.

Not only can one not infer from the rootedness of the law of nations in custom that it could be reduced to a purely artificial creation, but it seems not to have this meaning precisely because it has, as its ontological and anthropological foundation, the existence of a natural community among men. Such a community excludes isolation by reason of the common possession of the whole surface of the earth. Humanity cannot have effectiveness and a meaning except in terms of universality, of which one of

[26] *Id.* at 638.

[27] *Id.* at 625 (it is a law common to all the nations and established not by the imposition of the nation alone, but by the usage of nations).

[28] *Id.* at 625.

[29] *Id.* at 619.

[30] *Id.* at 624.

the concrete manifestations is communication and mutual commerce.[31] The reciprocal action between men is made necessary by the spherical form of the earth; this implies that exchanges are initiated between them from one end of the earth to the other. For Suárez, the notion of commerce includes the general fact of the circulation and exchange on one common surface.

In the Suarezian perspective, the assembly of these analyses confirms the legitimacy and necessity of the division of the law into the natural law and the positive and human law.[32] In conformity to the juridical tradition invoked by Suárez, the law of nations is effectively defined by Gaius[33] in the Digest of Justinian as an assembly of rules to which all people conform themselves and which is established by the natural reason of things, namely their natural order.[34] It is a law essentially human in contrast to the natural law, which is common to men and animals. Isidore of Séville had reprised, in precise terms, the tripartite division of Roman law (ius naturale, ius gentium, ius civile) notably by Ulpian, in order to assimilate the ius gentium to institutions in use in the quasi-totality of nations, apart from their conformity or non-conformity to the natural law.[35] It is only after a long theological gestation, juridical and philosophical, led notably by Saint Bonaventure and Alexander of Hales,[36] that the ius gentium will be considered as a natural law properly human.

II. *The law of nations, footbridge between the natural law and the civil law*

Historically, for Suárez, the first one who assigned a specific value to the ius gentium was Thomas Aquinas,[37] who presented a theory of the law of nations as customary law resting on the heritage of the Aristotelian distinctions concerning a primary and secondary natural law. The first reflects an absolute right possessing universal value, namely with regard to the moral virtue of justice found in a disposition to preserve and restore equity in relations with others. This equity is a mathematically determined

[31] *Id.* at 627.

[32] *Id.* at 622-23.

[33] DIGEST OF JUSTINIAN, *supra* note 23, bk. 1, pt. 1, ¶ 9.

[34] THE ETYMOLOGIES OF ISIDORE OF SEVILLE bk. V, pt. iv, ¶ 1, at 117 (Stephen A. Barney et al. eds., 2006) (c. 615-30 A.D.).

[35] SUÁREZ, *supra* note 2, at 618-19.

[36] JEAN-MARIE AUBERT, LE DROIT ROMAIN DANS L'OEUVRE DE SAINT THOMAS [ROMAN LAW IN THE WORK OF SAINT THOMAS] 97 (1955).

[37] THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, Q. 57, a. 3 (A. Raulin ed., A. M. Roguet trans., 4 volumes, 1984-1986).

mean: geometric or proportional in what concerns distributive justice; arithmetic in what concerns commutative justice. The second corresponds to political right, which is part natural and part legal. There is thus recognition of an immanence of nature with regard to political right, leading to the necessity of the determination of the content proper to the distinction between the natural and the legal.

The non-contradictory articulation between the natural law and the law of nations derived its possibility from the Aristotilian thesis. This thesis maintains there is no obstacle in formulating the natural law as changeable without having this mutability lead to the divestiture of its specificity of natural right, all in making intelligible the fact that a natural right cannot be always and in every respect the same. The authentic natural law corresponds to what adjusts to a human nature essentially mutable, which boils down to the inference that the mutability of laws is not comparable to a sign of their artificiality, but that the abstract universality—which requires the identity of laws everywhere—proves itself definitely against nature.

In the strict line of this heritage Suárez maintains the division between the natural and positive law. One will notice in this regard that the laws of the law of nations are not purely natural and, according to the invoked division, they can only be positive and human. In contrast to the natural law derived from natural evidence, the law of nations follows from probable conclusions and from the common appreciation of men.[38] The fact that it is rooted in custom confirms its mutability,[39] and it is precisely in this that it is distinguished from the natural law. For as the historical evolution shows, for the preservation and progress of the human race there has never been any necessity that humanity be comprised of one single political community.[40] The Roman Empire itself never exercised a complete sovereignty on the people over whom it had power.[41] In this sense the law of nations historically confirms that there has never been one sovereign political body in humanity. The constancy of such an absence does not exclude the constitution of a relative universality (distinct from the absolute sovereignty

[38] SUÁREZ, *supra* note 2, at 623.

[39] *Id.* at 635-36 ("The law of nations is changeable because it depends on the consent of men."); *see also id.* at 626-27 ("One thing can be qualified about the law of nations according to two senses: in the first place, because it consists of a law that all peoples and different nations ought to observe in their mutual relations. In the second, because it is a law that each of the States or kingdoms observe within their territory, but it is called the law of nations by reason of its resemblance and its harmony [with other laws].").

[40] Vivès, *supra* note 5, ¶ 5, at 181.

[41] *Id.* pt. 7, ¶ 4, at 195.

of the natural law) corresponding to one communitarian unity in the evolution of the search for the establishment of reciprocal obligations.

Nevertheless, it seems that 1) the principles of the law of nations, in spite of their specific universality, never acquire such an intrinsic necessity; and 2) the law of nations does not possess an intrinsically moral value and it is not possible for it to take, as a reference, conclusions necessarily inferred from moral principles. The precepts that implicate the latter are constitutive of the natural law.[42] In fact, all one can deduce from natural principles by evident reasons is likewise "written into the human heart."[43] The universality found in the natural law is imminent to the human nature completely in reference to a transcendent origin. It, therefore, proves to be absolute.

In contrast, the dominant trait of the origin of the law of nations resides in the fact that men have historically instituted their precepts in the quasi-totality of the human community. This universality, when one takes into consideration the socio-historical evolution of peoples, is relative because it does not rest on a reading of human nature, but on the free will and consent of men. These last two elements proper to its conventional dimension are capable of value for all humanity without assuming an identical justification and foundation. If the content of the precept of the natural law corresponds to what is good or bad in itself, the content of the law of nations concerns that which is evaluated as such as a result of common consent. One can conclude from this: 1) the universality of the natural law is absolute because it defines itself by its unicity and immutability as it transcends the political-historical reality as a constitutive given of the humanity of man; and 2) the universality of the law of nations is relative by reason of a) the artificial character of its existence, and b) its origin by means of the consensus of the greatest number at a given historical moment.

The "quasi political and moral unity"[44] proper to law of nations actually constitutes a necessarily relative unity on account of the historical evolution of humanity, for it remains in part dependent on the sovereignty of each State. Nevertheless, the law of nations historically reinforces the ontological principle of human sociability and the anthropological principle of human

[42] SUÁREZ, *supra* note 2, at 462 ("All these precepts are issued according to a particular necessity of nature and God, as the creator of nature; and they tend toward an identical end which is, without question, the legitimate conservation and natural perfection or happiness of human nature. Consequently, everything among them belongs to the natural law.").

[43] *Id.* at 604-05.

[44] *Id.* at 627.

interaction. Its theorization is based on the concept of universitas[45] from the Middle Ages, a sign of an ontology of totality—of totus orbis—comprising humanity as the synthesis of the entirety of peoples constituted in States. The movement of the multitude of peoples in historical evolution toward an association, organized within limits that respect the sovereignty of States, remains possible and desirable.

This reinforces historically the actuality of a universal human founded on the recognition of a nature common to all individuals, which constitutes them insofar as they are human beings. The Suárezian understanding of the law of nations brings out, in historical practice, the effects of this understanding of the human being at the intersection of the heritage of Stoical anthropology and Christian thought which structures a universal community of the human race expressing a specific entity: that of being-in-common. It aims at promoting a representation of humanity, which only becomes legitimate by being theorized in the universal. This leads to the successful realization of the process of the substitution of universitas for the cosmos of Antiquity in order to advance, starting from reference to the divine order, a dimension of politics proper to the whole, and a global conception of humanity. With the law of nations there emerges the fact that humanity is no longer a part of the whole; it is henceforth on the way toward being identifiable with a whole in becoming what, by its own law, it is in itself.

The law of nations, on the one hand, confirms the relative dimension of the legitimacy of the State's power and, on the other hand, it frees the State from historical isolation and introduces it into a community of law residing in the unity of the human race. Its exact function is understandable from an international political order and it is likewise differentiated on this point from the civil law.

The function of the civil law implies an act proper to the human will, consisting of that by which "men gather themselves into a body politic according to a social bond in order to assist each other in view of a political end."[46] Nevertheless, this "unity by itself"[47] is not historically accomplished; it requires the mediation of the law of nations. The theoretical framework is thus marked out in order to recall that human nature is historically incarnated into a multiplicity of States[48] and its intelligibility cannot be dissociated from

[45] *See generally* PIERRE MICHAUD-QUANTIN, UNIVERSITAS: EXPRESSIONS DU MOUVEMENT COMMUNAUTAIRE DANS LE MOYEN-AGE LATIN [UNIVERSITAS: EXPRESSIONS OF THE COMMUNITARIAN MOVEMENT IN THE LATIN MIDDLE-AGES] (1970).

[46] SUÁREZ, *supra* note 2, at 643.

[47] Vivès, *supra* note 5, ¶ 4, at 181.

[48] *Id.* ¶ 6 ("The totality of men has not reached integration into a single political body but it is rather divided into several States.").

its incarnation in the historical evolution. In conformity with the preceding anthro-theological deductions, it thus becomes necessary to invoke a law, which, by the character of its relative universality, distinguishes itself from all other laws. In this way, it is the expression of freedom and reason in history and not the product of a logical deduction from human nature, but it does not remain in this less historically advantageous to the affirmation of this same nature.

This relation to history allows for a refinement of the difference between the natural law and the law of nations. The object of the natural law is not comparable to the humanity historically comprised as a unity divided into States, but rather to the humanity ontologically grasped as a unity composed by the whole assembly of men; every man considered individually does not remain any less by himself a manifestation of his natural law. If one refers to the object of the law of nations, it is comparable to nations as members of humanity, its function being regulated in the historical evolution of international relations. It confirms the same aspect in its public dimension of striving to guarantee peace and justice in the inter-communitarian realm.

Historically, it seems that the precepts of the law of nations take on a character more general than those of the civil law. This is precisely because "the interest of the whole of humanity and conformity to the first and universal principles of nature"[49] are taken into account. Nevertheless, the necessity of such conformity would never overlook the mutability of the law of nations since "it depends on the consent of men."[50] Its prohibitions and positive precepts are in the same way affected as soon as it is stipulated that its rules cannot be derived from natural principles "by way of necessary and evident deductions."[51] Also, the foundation of its obligation does not follow from pure reason but implies reference to a human obligation resting on custom.

If humanity encounters in itself the particularity with respect to the law of nations, how does it attain universality? How does it submit its decision to the truth of the natural law? An antinomy seems to appear between the diversity of the ways of being and human destiny; between the contingency of the given and the immutability of the first universal principles of nature. The understanding of the law of nations as an intermediary between the natural law and the civil law allows for a response. The distinction in the historical evolution within the law of nations leads to an agreement between diverse nations and universal law "by means of international customs and

[49] SUÁREZ, *supra* note 2, at 632.
[50] *Id.* at 635.
[51] *Id.*

habits insofar as peoples in their mutual relations maintain a form of association and exchange." [52] This opens the way to overcoming the aforementioned antinomy notably by reference to a political and moral unity of the human race.[53]

The first law remains dependent on the particularity and customs of each people considered in an autonomous way. A State operates in this way by outlawing prostitution within its own territory.[54] With regard to the second, common to the whole of nations, it establishes the possibility of the universal in the very heart of the recognition of the particularity in the first law, confirmed by the impossibility of its total abrogation since it has as its origin "the authority of all the nations." [55] Thus follows the immunity of ambassadors, the respect for treaties and truces.

For Suárez, not only does history confirm that the well-being and preservation of humanity has never required the integration of men into a single political community,[56] but the power of instituting human laws has never been one and the same for all humanity.[57] History, since the fracturing of humanity into multiple communities, presents itself as a succession of events and a series of existences. Is it thus possible to grasp the totality of history in adopting a synthetic point of view on the multiplicity of its communities? What type of understanding could attain such a comprehension of history? The problem of the law of nations sketches the framework of a philosophy of history by showing from the start that there is no incompatibility between its nature and the fact of the history of societies, which have come to operate without a single political body, a single sovereign, and the temporal and spatial diversification of State structure.

This philosophy of history maintains that human history cannot be reduced to a pure juxtaposition of a multiplicity of States, on interests and divergent institutions; it must lead to the determination of a totality moving toward a better life in common, capable of assigning a meaning to the whole. This meaning is a search, in the function and the finality of the law of nations: to create the conditions of mutual assistance among nations in view of the conservation of peace and justice by means of common consensus and common laws[58] not reducible to the spheres of the natural law or positive

[52] *Id.* at 636.
[53] *Id.* at 627.
[54] *Id.* at 637.
[55] *Id.*
[56] Vivès, *supra* note 5, ¶ 5, at 181.
[57] *Id.* ¶ 6.
[58] *Id.*

law. Thus, in this contractual logic, the form of the agreement constitutes the matter of civil law, the ethical requirement of observing this law reflects the natural law, and the freedom of passing such an agreement belongs to the sphere of the law of nations.

By way of these remarks, it is likewise fitting always to keep in mind the distinction between the intra-communitarian law of nations—comparable to a private and positive international law—and the inter-communitarian law of nations—comparable to a customary public law capable of establishing the meaning of the historical totality in a theological logic of salvation. Finally, one must emphasize that the natural law remains omnipresent in international relations since nations can only claim a limited and relative sovereignty with respect to moral persons.

For Suárez, as soon as one maintains that from the international perspective nations define themselves by their independence and their natural equality, the sole conceivable origin for a common law resides in the natural law. The distinction between the natural law and the law of nations does not lead to their separation; it leads to recognizing again the unavoidable character of the axiological priority of the first. Consequentially, the ethic that grounds the finality of the law of nations on the adequacy of the natural law ascribes ultimate value to it and guarantees the legitimacy of its integration into the universal teleological order. In return, the theological-political sphere confirms the existence of a link in the human world between the natural right, which the natural law determines in its immanent obligation, and the conventional agreements that human institutions establish. From another perspective, the law of nations reveals the complementarity between nature and convention for conceiving in a new way the extension of the ethico-political domain in history.

III. *The foundational heritage of Vitoria*

The source of such a historical-political construction of the law of nations is to be sought in the influence of Vitoria's theses. The analysis that he proposes of the law of nations first implies a reexamination of the definition of the jurist Gaius:[59] "One calls the law of nations that which natural reason has established among all peoples."[60] Now, for the term "man" present in the definition of Gaius, Vitoria substitutes that of

[59] JUSTINIAN, *Institutes*, *in* CORPUS IURIS CIVILIS bk. I, tit. I, ¶ 1 (Krueger ed., Lawbook Exchange, 7th ed. 2010) (1872).

[60] FRANCISCO DE VITORIA, LEÇON SUR LES INDIENS ET SUR LE DROIT DE GUERRE [LESSON ON THE INDIANS AND ON THE RIGHT OF WAR] 82 (Maurice Barbier trans., 1966).

"peoples," carrying out in the same way a transition from the law of individuals or the law of private persons to the international law among different States or the law of public persons. This redefinition of the Roman concept of the law of nations lays out the theoretical conditions for the establishment of a regulating principle of the historical relations between nations. The redefinition assigns it a historical-political meaning, which sets the law apart by its identification—original to the whole of the juridical natural law—in order to open it to a cosmopolitical demand, the Communitas totius Orbis, understood as the universal community of peoples. And it integrates into this title both the relations of citizens to other nations as well as the duty of hospitality and the recognition of the fundamental human rights for individuals and for peoples.

Such a shift in Vitoria is connected to the process of deconstruction of the theocratic medieval order that it initiates by a separation of the spiritual ecclesiastical power and the temporal political power, not excluding their respective autonomy. The temporal power in its essence does not depend on pontifical delegation; in fact, it finds its basis in the natural law and the law of nations. The latter is defined by the scope of anthropology and history. On one side, this confirms the substitution of the medieval Orbis Christianus by the Communitas totius Orbis, and on the other side, reveals that the juridical meaning of the cosmo-political is inseparable from its cultural and moral realization. The progressive organization of citizens, as a historico-political system, has precisely as its bond a society of the assembly of nations or universal community. The principles of such a structuring are found in the natural law and the law of nations. For these complement one another in their universal and internationalist finality with respect to the imperatives of civil society, distinctive and founded on the dignity of the human person as the image of God and endowed with inalienable rights such as political and religious liberty.

The foundation of the law of nations in the natural law does not exclude allowing Vitoria to remove its origin from assent and agreement. As a result, one part of its juridical precepts belongs to the realm of the positive law. It is possible in this sense to invoke without contradiction a natural law of nations and a law of nations issued by an institutional will. A double semantic acceptance, formally considered, follows: the law of nations represents one of the subdivisions of law and constitutes a norm of reference in the invocation of the opposition of the natural law to the positive law. Considered from the point of view of content, it expresses a restricted domain of the juridical order—that of international law—and, as such, it encompasses the precepts of both the natural law and consensual positive

law. The way is thus opened for a natural right theory of international law. The latter involves a joint existence of a law of nations founded on private consent and a law of nations founded on the common consent of peoples and nations. Both oblige morally in conscience since they guarantee, according to their respective modality, the preservation of the natural law. The historical-political force of the law of nations comes from human agreement and consensus. The human race, insofar as it constitutes a republic in its own way, affirms its power to give just laws to all. It exists in the community of peoples, as it confirms—within the history of societies—a legislative ordering function of States living together.

Vitoria likewise invokes, as an extension of this perspective, a law of natural sociability and of free communication among all citizens and nations of the world. This allows for the origin of a distinct internationalist doctrine whose foundation resides, insofar as it has been determined, in the natural law and the law of nations. The universal community of the assembly of men constitutes an organic whole; a self-sufficient community capable of promoting the existence and progress of its members. The world in its entirety, which has been created by God and placed at the disposition of the human race, is the original site of all men. The universality of this natural condition signifies that all men, insofar as they reside in the world, possess by the same fact of being a law over all parts of the earth. Such a law cannot be abrogated by historical-political partitions instituted by human positive law. Thus, the partition of lands whether on the private or national level cannot pretend to abolish this natural law at the foundation of the relation between each man and the totality of the world.

Spatiality is actually promoted as a constitutive element of the world. It is precisely in reference to it that one can take hold of the human value of the world. The structure of the latter is rooted in human existence; that which implicates the Communitas Orbis is the same historical expression of the ontological and ethical character of the human. It is this that makes possible such an unlimited opening to every manifestation of the human. Whether one refers to the natural law or the law of nations, the fact of coming together and being near represents constitutive characteristics of being in the world. They manifest a more unexpected aspect of the spatiality of human existence in providing it the possibility of moving about in a universal juridical space.

Thus, the idea of the sociability of the totality of men is articulated by a series of rights and duties that must be universally respected: the right to the freedom of travel by land and by sea; the right to free communication between nations; the right to free commerce between peoples; and the right of citizenship, of emigration, and of living in common. Likewise, the

elements of nature—such as the air, water, forests, flowers, and sea—are common to the whole of humanity according to the natural law and the law of nations. Historically, this communication, a significant expression of international solidarity, takes on, in equal ways, the form of commercial exchanges between nations, most notably according to the principle of the freedom of the high sea.61 This liberty springs directly from the common possession of the entirety of the earth's surface. It responds in a practical way to the use that can be carried out by the right to what is given as the common possession of the human race. One such use for Vitoria is found in commerce, which brings about the reciprocal action between men made necessary by the spherical and limited space of the earth. This assumes that exchanges are established between them and they share in a peaceful reconciliation of nations. The international solidarity that is manifested by this is inseparable from a process of juridical generalization of exchanges, sharing in the historical construction of the international human society. The relations between States—with equal claim as the relations between individuals because they seek equilibrium in the conflict of interests—must be subjected to the regulating power of the law, without which the peace becomes precarious. After having contributed to the formation of each political community by access to self-sufficiency, communication contributes by extension to the genesis of a community of republics. For it synthesizes, by its actualization, the need for distributive justice and social justice in interstate relations.

Now the arrival of a higher political unity requires a harmony of wills which have their origin in the sovereign decision of each State. The thesis of the Communitas Orbis allows for precision on this point: neither papal power, nor the power of an emperor, whatever it may be, can pretend to possess the power to impose the unity of such a republic, for it exceeds the scope of their jurisdiction. The higher unity of such a Communitas must in fact rest on the recognition of a universal authority of the law of nations as the principle for the recognition of reciprocity and the factor of agreement.

In this sense, the principle of the equality of States appears as the extension of the equality of men and their right of self-determination. This presupposes the permanent reference to the common condition of men, implying a power proper to the whole group for appropriating the adequate means that permit the achievement of the objectives pursued by political association: namely the fulfillment of the highest possibilities of man,

[61] *See id.* at 59, 83-84.

precisely by peace and justice.[62] It involves invoking the common nature of men to promote a foundation of the temporal order (the political power being the natural law and not divine positive law, as with ecclesiastical power) on which the law of nations can rest without contradiction. And if Vitoria invokes a higher unity, it is because it is centered on the principle of the common universal good as the guiding norm of a peaceful world order indicating that the common good of a people must be subjected to the common international good.

Two historical higher forms designed for the integration of the political community can be brought forth; human coexistence could present a unity that establishes the totality both at once and in succession. The first form for Vitoria corresponds to the federation of Christian republics resting on their respective autonomy. The second refers to the community of human nature resting on the universal and effective authority of the law of nations, conceived as a conventional historical manifestation of the commandments derived from the natural law and integrating religious diversity and necessary cultural plurality.

CONCLUSION

To conclude, I hope I have underscored the importance of the interpretation adopted by Suárez according to which—following the heritage of Vitoria—international positive law rests on a double support: the natural law for the ethical legitimacy of its principles, and the law of nations for the possibility of the historical actualization of these principles. In this sense, the law of nations is to international positive law what the natural law is to civil law. In this perspective developed by the second scholasticism it belongs logically to the law, insofar as it is appropriate, to contribute to the actualization of the juridical evolution of humanity in the international order. As a consequence, Suárez confirms—following his illustrious predecessor, Francisco de Vitoria—that it is for our contemporary world to serve as the pioneer of such a theorization.

Translated from French by Robert L. Fastiggi

[62] FRANCISCO DE VITORIA, LEÇON SUR LE POUVOIR POLITIQUE [LESSON ON POLITICAL POWER] 73-74 (Maurice Barbier trans., 1980) ("For the entire world, which forms, in a certain manner, one political community, has the power to make good and just laws for all, such as those found in the law of nations.").