LA NATURALEZA, CARACTERÍSTICAS E INSTITUCIONES DEL *IUS GENTIUM* SEGÚN FRANCISCO SUÁREZ

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Resumen: Francisco Suárez es ampliamente considerado como uno de los fundadores del derecho internacional, junto a otros escolásticos españoles. En su obra, así como en la de Vitoria, se diferencia por primera vez de modo claro la idea de un sistema de reglas consuetudinarias positivas que regulan las relaciones internacionales. Aunque se ha escrito mucho sobre el tema, en este artículo presentamos una contribución original

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a la bibliografía sobre el *ius gentium* en Suárez en cuanto exponemos de modo claro y analítico las características del *ius gentium* según Suárez, su lugar dentro de la jerarquía de sistemas jurídicos, y explicamos las razones que llevaron a Suárez a asignarle un rol subsidiario en la regulación de los asuntos internacionales, razones que tienen su fundamento en los principios de su filosofía política. Se muestra, asimismo, cómo su noción de *ius gentium* no coincide enteramente con la actual de derecho internacional, aunque se asemeja a ella.

Palabras clave: Francisco Suárez; *Ius gentium*; Derecho natural; Derecho internacional; Soberanía nacional.

The nature, features, and institutions of ius gentium according to Francisco Suárez

Abstract: Francisco Suárez is widely considered to be one of the founders of International Law, among other fellow Spanish Scholastics. In his work, as in that of Vitoria, the notion of a system of positive legal customary rules regulating international affairs was for the first time clearly differentiated. Although much has been written on that matter, in this paper we present a novel contribution to the literature on Suárez's views on *ius gentium* in the sense that we carefully and analytically expose the features of *ius gentium*, its place among the legal hierarchy of legal systems, and explain the reasons that led to Suárez to assign to *ius gentium* a subsidiary role in regulating international affairs, reasons which are rooted in the basic tenets of his political philosophy. We also show how his notion of *ius gentium* does not exactly correspond to, although it resembles, our notion of International Law.

Keywords: *Francisco Suárez*; Ius gentium; *Natural law*; *International law*; *National sovereignty*.

Natura, caratteristiche e istituti del ius gentium secondo Francisco Suárez

Sommario: Francisco Suárez è ampiamente considerato uno dei fondatori del diritto internazionale, insieme ad altri scolastici spagnoli. Nella sua opera, così come in quella di Vitoria, viene per la prima volta chiaramente differenziata l'idea di un sistema di norme consuetudinarie positive che regolano le relazioni internazionali. Sebbene molto sia stato scritto sull'argomento, in questo articolo presentiamo un contributo originale alla bibliografia sullo *ius gentium* in Suárez in quanto esponiamo in modo chiaro e analitico le caratteristiche dello stesso secondo Suárez, la sua collocazione all'interno della gerarchia degli ordinamenti giuridici, e spieghiamo le ragioni che hanno portato Suárez ad assegnargli un ruolo sussidiario nella regolazione degli affari internazionali, ragioni che si fondano sui principi della sua filosofia politica. Si mostra anche come la sua nozione di *ius gentium* non coincide del tutto con quella attuale del diritto internazionale, pur essendo ad essa simile.

Parole chiave: Francisco Suárez; *Ius gentium*; Diritto naturale; Diritto internazionale; Sovranità nazionale.

1. Introduction

Francisco Suárez is considered one of the pivotal thinkers between the Middle Ages and Modernity. Ever since the publication of Quentin Skinner's *The Foundations of Modern Political Thought*, it has been expounded how he, among other fellow Spanish Scholastics, deployed some theoretical concepts associated with Modernity, such as those of "state of nature", "social contract", and the "consent of the people" in his political works well before Hobbes and Locke[2].

In legal theory, it has been recognized that he modified previous legal thought by giving a new emphasis to the notion of subjective rights which, in his account, became the central case of *ius*. Similarly, among other fellow Spanish Scholastics, he is considered by some scholars to be one of the founders of the theoretical notion of International Law because of his new account of the old notion of *ius gentium*.

Nowadays, the phrase "ius gentium" is associated with the idea of International Law. But this association came after that phrase underwent a change of meaning in the XVIth and XVIIth centuries in the work of Spanish Scholastics who, while discussing the old issue of *ius gentium*, differentiated the idea of a system of positive legal rules that had the states as its subjects.

The phrase "ius gentium", found already in Roman Law[3], had previously meant different things to different authors but, generalizing, one could say that, for the Romans, it meant the ensemble of positive legal rules that one finds among all the nations, and regulating institutions as diverse as contracts, the inviolability of diplomats, the rules of war, and so on[4]. Medieval philosophers added that these rules were very close to natural law since their derivation from natural law required little reasoning or no reasoning at all[5]. But all of them considered that these rules regulated the internal affairs of states, being called "of the peoples" insofar as one can find them among all the peoples. One can say that, for these authors, this ensem-

2 See Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2 (New York: Cambridge University Press, 1978), 135-187.

3 According to Rafael Domingo, the first author to use the phrase "ius gentium" was Cicero: see Rafael Domingo, *Elementos de Derecho Romano* (Pamplona: Aranzadi, 2010), 28.

4 See, especially, Justinian's *Digest* I, I, 1; I, I, 4; I, I, 5; I, I, 9.

5 For instance, see Aquinas's *Summa Theologiae* II-II, q. 57, a.3.

ble of rules constituted what contemporary legal philosopher H.L.A. Hart called "the minimal content of natural law", namely, the ensemble of rules that constitute the minimal necessary content of every municipal legal system because of being required for the very survival of the community[6].

As was said, the Spanish Scholastics, for the first time, theoretically differentiated the idea of a positive legal system that had the states as its subjects. This idea was clearly differentiated for the first time by Francisco de Vitoria, although he said little about the content of this legal positive order or its institutions[7].

Again, one key figure in this differentiation is Francisco Suárez who, while discussing the centuries-old issue of whether *ius gentium* was part of natural or positive law, answered that it was part of positive law and that two independent concepts were expressed by the ancients' use of the phrase "ius gentium": the ensemble of positive rules that obtain in every municipal legal system and, crucially, the ensemble of positive legal rules that regulate the conduct of states between each other.

2. Two kinds of ius gentium

Suárez is well aware of what kind of institutions belong to *ius gentium* according to the "jurists" (he means specially Roman jurists): it includes rules of natural morality such as to worship God, honor parents and reject force and iniquity, and legal institutions such as manumission and slavery, wars, the division of the Earth into distinct political communities and that of goods too, private law contracts like that of buying and selling, and so on[8].

6 See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997), 193-200.

7 Of course, the normative system we call "international law" itself is as old as man lives in diverse political communities, ever since having been concluded treaties among them. The novelty in the work of Vitoria was the theoretical differentiation of the concept that describes the practice. I take this distinction between having –and using– a normative system, and having the concept of it, from Joseph Raz, "On the Nature of Law", in id, *Between Authority and Interpretation. On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009), 91-124. Kindle Edition.

On Vitoria and International Law, see Ramón Hernández O.P., *Francisco de Vitoria. Vida y pensamiento internacionalista* (Madrid: Biblioteca de Autores Cristianos, 1995).

8 See *De Legibus*, II, XVII, 3; vol. IV, 103.

When quoting Suárez's *Tractatus de Legibus, ac Deo Legislatore* (hereafter, *De Legibus*), I quote, as it is usual, the book, chapter and paragraph (here, II, XVII, 3), followed by the volume and page of the edition of the CSIC (Madrid: Consejo Superior de Investigaciones Científicas, vols. I-IV, 1971-1973) (here, vol. IV, 103), which is widely regarded the best one, so that the reader may easily find the quotation in this edition.

Only when quoting *infra* book VII of *De Legibus*, I quote using the edition of the *Opera*

He is also well aware that the content that traditionally has been included in *ius gentium* includes rules and institutions of very different sorts. So, when treating of the opinion of those that included *ius gentium* in natural law, he says that "that cannot be made compatible with all that is attributed to ius gentium"[9].

Therefore, in an effort of conceptual clarification, he makes a crucial distinction between two kinds of *ius gentium*:

"I also add, to better clarify the issue, that of two ways something is said to be of ius gentium (in so far as I understand from Isidore and other legal texts and authors): in one way, because it is a law that all peoples and different nations have to respect among themselves; in another way, because it is a law which single cities or kingdoms keep within themselves, but it is called by resemblance and convenience ius gentium"[10].

And he adds, crucially, that he thinks that the first kind of *ius gentium* is the "proper" *ius gentium*, namely, the one that properly is called such. To this *ius gentium* belong diplomats and commercial relations, the law of war, and slavery as a mode of punishment for those taking part in an unjust war. And, crucially, he says that the signing of treaties belongs to this *ius gentium*, even though the obligation to keep them is of natural law. It is worth quoting the whole passage:

"Peace treaties and truces may be located under this chapter; not in that they should be kept after they are made (because that belongs more to natural law), but in that they have to be accepted and not refused, when they are asked for in the proper way and reasonably. Even though that seems very concordant with natural reason, it seems by custom and ius gentium to be firmer and under a stronger obligation"[11].

To the second kind of ius gentium, the "local" ius gentium, belong institutions like the most common types of private law contracts, for instance,

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Omnia of Charles Berton (Paris: Ludovico Vivés, 1856), since, as it is known, the CSIC edition of Suárez's *De Legibus* has not reached book VII yet. Book VII of *De Legibus* is included in vol. VI of that *Opera Omnia*.

9 "Hoc autem ad omnia quae de iure gentium adducuntur, accomodari non potest": *De Legibus* II, XVII, 7; vol. IV, 107.

10 "Addo vero ad maiorem declarationem duobus modis (quantum ex Isidoro et aliis iuribus et auctoribus colligo) dici aliquid de iure gentium: uno modo, quia est ius quod omnes populi et gentes variae inter se servare debent; alio modo, quia est ius quod singulae civitates vel regna intra se observant, per similitudinem autem et convenientiam ius gentium appellatur": *De Legibus* II, XIX, 8; vol. IV, 134.

11 "Item foedera pacis et induciarum possunt sub hoc capite collocari; non quatenus servanda sunt, postquam sunt facta (hoc enim potius pertinent ad ius naturale), sed quatenus admittenda sunt et non neganda quando debito modo et rationabiliter petuntur. Hoc enim licet sit valde consentaneum rationi naturali, tamen usu ipso et iure gentium videtur magis firmatum et sub maiori esse obligatione": *De Legibus*, II, XIX, 8; vol. IV, 135.

buying and selling[12], or the rule stating that no one should be expropriated of one's goods by the public authority without compensation[13]. In the same vein, he says that the right to occupy fields, to build in them, to fortify them is a natural right[14], but that their "use" pertains to the "local" *ius gentium*. It seems to me that here he says that *ius gentium*, determines how these natural subjective rights are exercised.

3. The international ius gentium, or *ius gentium* proper

As has been seen, the proper *ius gentium* is the international one. Its first feature is that of being a normative system of rules unified by a common end, namely, the common good of mankind. When Suárez discusses *ius gentium*, he, following the Scholastic tradition, acknowledges that the very word "ius" is equivocal. However, as it is also known, he states, for the first time in the history of that tradition, that the focal sense of *ius* is what we now call a "subjective right". But, before treating specifically on *ius gentium*, he says that he will understand in this exposition the word "ius" as meaning "lex". Therefore, notwithstanding his affirmation that the focal sense of "ius" is that of a subjective right, "ius gentium", when it is the subject of Suárez's expounding, has to be understood as an ensemble of rules forming a system. Now, Suárez also says elsewhere that what unifies an ensemble of rules into one system is their common end, namely, the common good. So, speaking about the natural law, he says that, even though it comprises many precepts, it has a "unity of collection": "So, natural law is called one and has many precepts, but in a very different way. For in natural law there is a unity of collection"[15]. And this "unity of collection" arises from the common end of the diverse precepts: "For the law, as providence, looks at the common good as its end, and therefore all the precepts which are ordered to the end of the same nature are considered as being one legal system and one

12 See, "Sic etiam multa ex exemplis Isidori videntur dici de iure gentium, ut sedium occupatio, aedificio, munitio, usus pecuniae. Contractus etiam multi particulares possunt, hoc modo, dici de iure gentium, ut emptio et venditio et similia, quibus nationes singulares intra se utuntur": *De Legibus*, II, XIX, 10; vol. IV, 137.

13 See: "[...] de iure gentium est ut nullus privetur possessione sua, etiam ad publicam utilitatem, nisi soluto pretio": *Additiones Suarecii*, 10, in Suárez, Francisco, *De Legibus (II 13-20). De Iure Gentium*. Ed. L. Pereña, V. Abril and P. Suñer (Madrid: Consejo Superior de Investigaciones Científicas, 1973), vol. IV, 163.

14 See *De Legibus* II, XVIII, 7; vol. IV, 120.

15 "Nam lex naturalis una dicitur et plura continet praecepta, licet modo longe diverso. Nam in lege naturali est unitas collectionis": *De Legibus* II, III, 16; vol. III, 45.

law"[16]. Similarly, when speaking about natural law, he says that, although it comprises many precepts, it is just one "ius", namely, a normative system: "It has to be said that in every man there are many natural precepts, although from all of them is constituted one natural law"[17]. Therefore, *ius gentium* is an ensemble of rules unified into a system by their relation to a common end, namely, the common good of mankind. It is the nature of this ensemble of rules which has been traditionally named "ius gentium", and which Suárez acknowledges that "it has a great affinity with natural law"[18], that Suárez tries to explain. He also says that, like natural law, *ius gentium* is common to all mankind[19].

The features of *ius gentium* proper are:

3.1. It is positive law, but close to natural law

Regarding its nature, when dealing with the old question of whether this ensemble of rules belongs to natural or positive law, Suárez answers that *ius gentium* clearly belongs to positive law because its rules do not have any moral necessity, since they are neither first moral principles, nor conclusions necessarily derived from them[20]. It is, therefore, quite clear to

16 "Lex autem sicut et providentia respicit bonum commune in finem, et ideo omnia praecepta quae ordinantur ad finem eiusdem rationis, censentur unum ius et unam legem constituere": *De Legibus* II, III, 16; vol. III, 45.

17 "[…] dicendum est in unoquoque homine plura esse naturalia praecepta; ex omnibus vero componi unum ius naturale": *De Legibus* II, VIII, 2; vol. III, 126.

18 "[…] magnam habet cum iure naturali affinitatem": *De Legibus* II, XVII, 1; vol. IV, 100.

19 See *De Legibus* II, XIX, 1; vol. IV, 125.

20 "[…] multa dicuntur esse de iure gentium quae non habent illam intrinsecam necessitatem, ut divisio rerum, servitus et alia quae infra videbimus. Secundo ac praecipue, quia ius gentium, nec circa prima principia moralia, nec circa conclusiones quae ex illis necessario inferuntur, versari potest": *De Legibus* II, XVII, 8; vol. IV, 108.

For Scholastic philosophers, the main problem was that not only the Roman sources, but also Aquinas, one of the main authorities on the issue, had not been clear on whether *ius gentium* belonged to natural or positive law. In *Summa Theologiae* II-II q. 57, a3. resp, he seems to say, commenting on Ulpian's doctrine, that *ius gentium* was a part of *natural* law, namely, that part that is proper only to man and that is not shared by other animals. Here, the whole idea of a natural law (*ius* naturae) common to man and other animals seems only to be a concession to Ulpian's authority, since Aquinas is quite clear that irrational beings are no subjects of moral laws, unless this idea is understood as referring to that part of moral natural law that refers to inclinations that man has in common with other animals, like the inclination to reproduction, of which he speaks in I-II q. 94 a. 2.

In I-II q. 95 a. 4, resp, on the other hand, he had said that *ius gentium* was that part of *positive* law that could be derived with little or no reasoning from natural law as conclusions from principles.

Suárez that *ius gentium* has been established by man[21]. and, consequently, belongs to positive law[22]. Therefore, it is not as immutable as natural law[23].

On the other side, despite being positive law, its rules have a great degree of universality because of having an *almost* necessary moral nature: namely, although they do not prescribe or forbid what is in itself intrinsically right or wrong, its institutions seem so clearly beneficial for the advancement of the common good of humanity[24], that it is almost impossible to attain that common good without *ius gentium*.

3.2. It is customary law

However, how has it been established, since there is no world legislative authority? Suárez answers that it has been established by the tacit consent of nations in their mutual interactions and, therefore, it has a customary nature. *Ius gentium* is consuetudinary law, not written law[25], introduced by the nations gradually and continually, not in a single moment[26].

3.3. Its subjects are states in their reciprocal relations

He says that the reason that explains the existence of such a legal system is that, although the world is divided into different peoples and kingdoms, mankind "always has a certain unity, not only of species, but also as

21 "[…] praecepta iuris gentium ab hominibus introducta sunt per arbitrium et consensum illorum, sive in tota hominum communitate, sive in maiori parte": *De Legibus* II, XVII, 8; vol. IV, 108-109.

22 "Unde tandem concludi videtur ius gentium simpliciter esse humanum ac positivum": *De Legibus* II, XIX, 3; vol. IV, p. 127.

23 See *De Legibus* II, XIX, 2; vol. IV, 126.

24 "Est enim hoc ius tam propinquum naturae et tam conveniens omnibus nationibus et societati earum, ut fere naturaliter propagatum fuerit cum humano genere": *De Legibus* II, XX, 1; vol. IV, 140.

25 "Praecepta iuris gentium in hoc differunt a praeceptis iuris civilis quia non scripto sed moribus, non unius vel alterius civitatis aut provinciae sed omnium vel fere omnium nationum constant. Ius enim humanum duplex est, scilicet, scriptum et non scriptum [...] Constat autem ius gentium scriptum non esse; et ita in hoc differre ab omni iure civili scripto, etiam imperiali et communi": *De Legibus* II, XIX, 6; vol. IV, 131.

26 "Nam si sermo sit de proprio iure gentium priori modo declarato, facile constat potuisse, ipso usu et traditione, in universo introduci paulatim et per successionem, propagationem et imitationem mutuam populorum, sine speciali conventu vel consensu omnium populorum, uno tempore facto": *De Legibus* II, XX, 1; vol. IV, 140.

if political and moral, which is shown by the precept commanding mutual love and mercy, which extends to all, even strangers and of any nation"[27].

Therefore, even if political communities are perfect polities, they need some system of rules to regulate their interactions. This system of rules is partly natural and partly positive. The system of positive rules that regulates this interaction is *ius gentium* proper. He even says that the matters of this *ius gentium* are few and very close to the natural law[28].

3.4. It is not entirely coincident with our contemporary notion of public international law

As can be seen, Suárez notion of *ius gentium* does not correspond exactly to what we nowadays call "Public International Law" (since it consists only of customary rules and, therefore, does not include written sources), and it does not exhaust the rules that regulate the interactions between states (because some of their interactions are regulated by the rules of natural law, which includes the crucial rule "pacta sunt servanda"[29]). Therefore, although somewhat similar, *ius gentium* in Suárez is not exactly our contemporary international law (even though this last one also includes rules of customary nature among its sources).

3.5. International treaties are not its sources

As was said, *ius gentium* is a system of customary rules, not of written sources. That is particularly interesting since, even though not including written sources among its rules, Suárez clearly knows the existence of in-

27 "[…] humanum genus, quantumvis in varios populos et regna divisum, semper habet aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale praeceptum mutui amoris et misericordiae quod ad omnes extenditur, etiam extraneos et cuiuscumque nationis": *De Legibus*, II, XIX, 9; vol. IV, 135.

28 See, "Hac ergo ratione indigent aliquo iure quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia; ideoque aliqua specialia iura potuerunt usu earundem gentium introduci. Nam sicut in una civitate vel provincia consuetudo introducit ius, ita in universo humano genere potuerunt iura gentium moribus introduci. Eo vel maxime quod ea quae ad hoc ius pertinent, et pauca sunt, et iuri naturali valde propinqua": *De Legibus*, II, XIX, 9; vol. IV, 136.

29 Suárez also says that some of the precepts of natural law regulate warfare, that is, they are part of what is today called the law of armed conflicts. See, *De Legibus* II, VIII, 9; vol. III, 135: "[…] etiam in statu naturae corruptae aliud est tempus pacis, aliud belli, in quibus diversa praecepta [of natural law] servanda sunt".

ternational treaties and somewhat relates them both to natural law as to *ius gentium* when he says that the obligation to keep treaties is of natural law[30], and that they should be accepted, when demanded, is of *ius gentium*[31].

What may strike a modern reader is the absence of international treaties as sources of *ius gentium*. We tend to consider international law as stemming mainly from international treaties. However, on Suárez's account, the system of rules stemming from international treaties does not fit very well into any of the normative systems Suárez recognizes: neither into natural law (although it also partly regulates international behavior of states with rules such as "pacta sunt servanda"[32]), neither into *ius gentium* (a system of unwritten rules), neither into municipal law (a system that regulates only affairs internal to states).

30 Suárez says also that the rule "pacta sunt servanda" pertains to natural law, and he connects it explicitly with international treaties: "Idemque cum proportione dicendum est in octavo, nono et decimo exemplis de pace, induciis et legatis. Nam illa omnia fundantur in pacto aliquo humano; in quo tam facultas contrahendi quam obligationes fidelitatis et iustitiae, quae ex foedere seu conventione nascuntur, ad ius naturae spectant. Solus usus potest dici de iure gentium propter convenientiam omnium gentium in usu talium rerum in genere. Veruntamen hic etiam usus est effectus iuris, non ipsum ius, quia hoc ius non ex usu, sed usus ex iure est": *De Legibus*, II, XVIII, 7; vol. IV, 121.

31 "Item foedera pacis et induciarum possunt sub hoc capite collocari; non quatenus servanda sunt, postquam sunt facta (hoc enim potius pertinent ad ius naturale), sed quatenus admittenda sunt et non neganda quando debito modo et rationabiliter petuntur. Hoc enim licet sit valde consentaneum rationi naturali, tamen usu ipso et iure gentium videtur magis firmatum et sub maiori esse obligatione": *De Legibus*, II, XIX, 8; vol. IV, 135.

For Suárez, ultimately, every kind of obligation, of every kind of normative system, depends, at least remotely, from natural law: "Aliquando vero habet lex humana alios effectus circa res ipsas in quibus actus virtutum versantur, et tunc saepe fieri potest ut licet aliqua mutatio in rebus facta sit per legem humanam aut per ius gentium aut etiam per voluntatem privatam, obligatio postea sic vel aliter operandi immediate nascatur ex lege naturali¨: DL II, IX, 12; vol. III, 145. Suárez says that this is the case even of divine positive law: see *De Legibus* II, IX, 12-13; vol. III, 144-146.

32 A fact noted by Borges de Macedo: "This does not mean that only the Law of Nations regulates relations between peoples. Natural Law also does. The *pacta sunt servanda*, the mutual obligation of the communities to respect their possessions reciprocally, as well as to repair the damage they may cause, and perhaps other provisions, are natural principles that rule the life of states": Paulo Emílio Vauthier Borges de Macedo, *Catholic and Reformed Traditions in International Law. A Comparison Between the Suarezian and the Grotian Concept of Ius Gentium* (Cham: Springer, 2017), 203.

Similarly, Tobias Schaffner says that "For Suárez, positive *jus gentium* is only one part of the law governing the relationship between nations. In addition to positive *jus gentium*, these relationships, e. g. war, are subject to rules belonging to natural law, (positive) divine law and, in the dealings between Christians, to canon law": Tobias Schaffner, "Francisco Suárez S.J. on the End of Peaceful Order among States and Systematic Doctrinal Scholarship", in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*. Ed. Stefan Kalenbach et al. (New York: Oxford University Press, 2017), 71.

Why is this so? Borges de Macedo explains this Suarezian omission in the following way:

"The *jus gentium* stems from a sort of tacit pact. It is not a formal or explicit consent. Thus, the simple repetition of the practice allows almost all the peoples to agree on certain behaviors and institutes.

In Suárez, the customary manifestation of the *jus gentium* does not exclude the possibility of two peoples entering into a treaty. He expressly states that trade agreements, peace treaties and truces are permissions within the Law of Nations. But the author does not elevate the treaty to a source of the *jus gentium*, probably because he was not familiar with the idea of a multilateral treaty. In Suárez's time, treaties were bilateral and not different from contracts. In his eyes, the only possible way to bind all (or nearly all) peoples was by customs"[33].

Borges de Macedo seems to show the right direction. Recall that, when Suárez clarified what he understood by "ius gentium", he said that it had to be understood as a system of rules. What we now call a legal system. However, an international treaty is no system of rules; it is simply an agreement between two states. As such, it can't pretend to regulate affairs of states that are no contracting parties. And, Suárez thinks, it is not possible to create a legal system with sources that are only individual rules. Consider the case of private law: it is not made only of private law contracts but also, especially, of the general legal rules that regulate the formation of these contracts (for instance, the Civil Code in countries that have one). No private law system arises only from individual contracts, which, as such, only obligate the contracting parties. Even in communities where no written rules regulate the formation of these contracts, as was the case in Ancient Rome, some general customary rules did that job. Suárez is quite clear that individual agreements *suppose* some general statute or institution on which they are founded[34].

That is why international treaties are not, in themselves, sources of international law. As such, they obligate only the contracting parties and

33 Paulo Emílio Vauthier Borges de Macedo, *Catholic and Reformed Traditions...*, 205.

However, it has to be clarified that, contrary to what Borges de Macedo says, it is not simply the repetition of a practice that introduces customary law according to Suárez. Suárez makes clear that the practice has to be repeated with the intention to introduce a customary rule. Mere repetition of an action does not create a rule. See, on this, Jesús Castro Prieto, "El derecho consuetudinario en Suárez. Su doctrina e influjo. Estudio histórico-jurídico comparativo", *Revista Española de Derecho Canónico*, 4, 10 (1949), 116-117.

34 "[…] pactum vel promissio non inducitur sola consuetudine, nisi intercedat praescriptio vel supponatur aliqua lex vel institutio in qua talis consensus in obligationem pacti fundetur": *Additiones Suarecii*, 6; vol. IV, 159. This phrase is repeated *verbatim* in *De Legibus* VII, IV, 9; *Opera Omnia*, Ed, Vivés, vol. VI, 144.

have no power to obligate the whole world, as *ius gentium* does. And, Suárez makes clear, *ius gentium* is a kind of *law*: it is a general rule[35]. In the absence of a universal legislator, the only explanation of the binding nature of this ensemble of positive rules is that they are customary. Mutual agreements between states can't create legislation with worldwide territorial scope, just as you can't make a statute within a state by signing multiple private law contracts[36].

3.6. It comprises very few institutions

The obvious question that arises here is that of which institutions, according to Suárez, belong to the so-conceived *ius gentium*? Suárez is very concise, and somewhat relates to it, apart from the disposition to accept peace treaties, institutions like the immunity of diplomats, the factual division of the world into distinct polities[37], and the derogation among Christian polities of the right to enslave prisoners captured in a just war. On the other hand, he says that the immunity of diplomats and the *pacta sunt servanda* are rules of natural law[38].

There is an important passage clarifying his conception of the relation of *ius gentium* with the immunity of diplomats and natural law:

"The custom of receiving diplomats under the law of immunity and security, considered in itself, doesn't have the necessity of natural law; because a certain community of men might not have had diplomats from another, nor wished to receive them; now, however, to receive them is of ius gentium, and to expel them would be a sign of enmity and a violation of ius gentium, even though it weren't an injustice against natural reason. Therefore, supposed the admission of diplomats under an implicit pact, it would be against natural law not to respect that immunity, because that is against

35 Book VII of *De Legibus* is entitled "De Lege non Scripta quae consetudo appelatur": custom is a kind of *law.*

36 Notice that this same conception seems to have also been that of Vitoria, who says that *ius gentium* does not stem only from human pacts, because it has the "force of law", whose legislator is, then, the whole world: "[…] *ius gentium non solum habet vim ex pacto et condicto inter homines, sed habet vim legis. Habet enim totus orbis, qui aliquo modo est una respublica,* potestam ferendi leges aequas et convenientes omnibus, quales sunt in iure gentium": Francisco de Vitoria, *Relectio de Potestate Civili*, 21, in id. *Relectio de Potestate Civili. Estudios sobre su Filosofía Política.* Ed. Jesús Cordero Pando (Madrid: Consejo Superior de Investigaciones Científicas, 2008), 62.

37 "[…] ipsamet gentium discretio et regnorum divisio est de iure gentium": *De Legibus* II, XVIII, 3; vol. IV, 117.

38 See *De Legibus* II, XIX, 1; vol. IV, 125.

justice and due fidelity, however, that supposition and that pact were introduced, under those conditions, by ius gentium"[39].

Similarly, he says that something similar happens with private law contracts: the particular mode of contracting is determined by civil law; the obligation to fulfill the contract pertains to natural law; and the "liberty of doing business with other people" is of *ius gentium*, since a republic could also have decided not to do business with any other republic: "But by ius gentium it has been established that transactions should be free, and it would be a violation of ius gentium if they were prohibited without reasonable cause"[40].

3.7. It is hard to change

One of the features of the ius gentium proper, namely, international law, that Suárez stresses is its nonwritten character, having been gradually introduced by custom[41]. This feature also explains why, even not being part of natural law, the customary rules of this *ius gentium* are very hard to change. Theoretically mutable, *ius gentium* has become, in fact, almost immutable due to the difficulty of achieving among nations the necessary accord to change it[42].

39 "Nam consuetudo recipiendi legatos sub lege immunitatis et securitatis, absolute spectata, non est de necessitate iuris naturalis; quia potuisset unaquaeque communitas hominum non habere apud se legatos alterius, nec velle illos admittere; nunc tamen admittere est de iure gentium, et illos repudiare esset signum inimicitiae et esset violatio iuris gentium, esto non esset iniustitia contra rationem naturalem. Quocirca licet, supposita admissione legatorum sub pacto subintellecto, contra ius naturale sit non servare illis immunitatem, quia est contra iustitiam et debitam fidelitatem, tamen illa suppositio et pactum illud sub tali conditione iure gentium est introductum": *De Legibus*, II, XIX, 7; vol. IV, 133.

40 "Iure autem gentium introductum est ut commercia sint libera, violareterque ius gentium si absque causa rationabili prohiberentur": *De Legibus* II, XIX, 7; vol. IV, 134-135.

41 See, "Nam si sermo sit de proprio iure gentium priori modo declarato, facile constat potuisse, ipso usu et traditione, in universo introduci paulatim et per successionem, propagationem et imitationem mutuam populorum, sine speciali conventu vel consensu omnium populorum, uno tempore facto. Est enim hoc ius tam propinquum naturae et tam conveniens omnibus nationibus et societati earum, ut fere naturaliter propagatum fuerit cum humano genere; et ideo scriptum non est, quia a nullo legislatore est dictatum, sed usu convaluit": *De Legibus*, II, XX, 1; vol. IV, 140.

42 See, "In alio autem iure gentium longe difficilior est mutatio, quia respicit ius commune omnium nationum et omnium auctoritate videtur introductum, et ideo non sine omnium consensu tolli potest. Nihilominus tamen non repugnat mutatio ex vi materiae, si nationes omnes consentirent vel si paulatim introduceretur consuetudo contraria et praevaleret. Sed hoc licet cogitari possit ut non repugnans, moraliter non videtur possibile": *De Legibus*, II, XX, 8; vol. IV, 147.

3.8. It does not prevail over national law

In an interesting passage, Suárez says that a prince may abolish some rule of ius gentium in his domains. After saying that *ius gentium* is very hard to change, he adds that "In another way, some community may command that among its parts and members this ius gentium be not observed; and in this way, it is moral and possible"[43].

As Tierney says, "in modern language, he was discussing the problem of the relation between international law and national sovereignty"[44]. He also comments:

"There is a certain uneasiness in the argument that Suarez presented. He wrote that 'the ius gentium is truly law and binds as true law', but also that individual nations were not always obliged by the law. As we saw, the reason was that acts contrary to the ius gentium were not necessarily intrinsically evil or violations of the law of nature. But the binding force of the ius gentium did not derive from the fact that its precepts were intrinsically good. (That was just what Suarez denied.) The authority of the law of nations –like that of customary law in general– came from the fact that it was instituted by the will and consent of all or the greater part of a community, in this case a community of nations. It did not follow that a particular member of the community could choose to depart from the law because its chosen course of action would not violate the natural law"[45].

Well, it is true that from the fact that the chosen course of action would not violate natural law, it does not follow that the particular member of the community may depart from *ius gentium* (or international law). But, even if it does not follow, neither does it follow, from the fact that international rules contradict national rules, that the first should prevail, unless further argument be given. And this argument can't appeal to *ius gentium* or international law, on pain of being circular reasoning.

43 "Alio vero modo potest aliqua communitas praecipere ut inter partes et membra sua tale ius gentium non servetur; et hic modus est possibilis et moralis": *De Legibus*, II, XX, 8; vol. IV, 147. See, similarly, "dico quod principem fortasse posse ferre legem contra ius gentium, derogando illi quoad aliquid quod in suo regno et respectu suorum subditorum expedit non servari; ut v.g. quod in tali regno homines non sint servi, sed omnis sint liberi vel quid simile": *Additiones Suarecii*, 12, vol. IV, p. 165. Similarly, *De Legibus* VII, IV, 6; *Opera Omnia*, vol. VI, 146: "Quapropter dicendum censeo absolute non repugnare aliquid de jure gentium per consuetudinem abrogari; ratio est, quia illud quod tantum est contra jus gentium proprium non est intrinsece malum, cum oppositum non sit de intrinseca obligatione legis naturae".

44 Brian Tierney, "Vitoria and Suárez on *ius gentium*, natural law, and custom", in *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2007), 122.

45 Tierney, "Vitoria and Suárez...", 124.

Let us explain the point: sometimes it is fallaciously asserted that, in case of contradiction between international and national law, the former should prevail because Article 27 of the Vienna Convention on the Law of Treaties (1969) states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". To an attentive reader, it will be clear that from that provision it does not follow that, in case of contradiction between international and national law, the first should prevail, *unless you were, previously, supposing that international law should prevail*. If you say that international law should prevail because international law so says, then your reasoning is clearly circular. After all, national law also claims to prevail over any other normative system.

Suárez was clearly aware of that: that a positive legal system of rules says from itself that it prevails over others does not resolve the issue. Both national law and international law claim to prevail. Therefore, you can't appeal to any of them to resolve the issue. In the case of contradiction between *natural* law and national law, it is quite clear that the former prevails since it commands what is intrinsically just and prohibits what is intrinsically unjust. Therefore, there are some actions, even in international relations, that states should never do, like not respecting diplomats.

But when we speak about a conflict between *ius gentium*, which is *positive* law, and municipal law, which is also *positive* law, then it is not so clear at all, even from a logical point of view, which one should prevail. The preference Suárez gives to national sovereignty, contrary to what Tierney says, is quite congenial with the overall tone of his political philosophy: the central case of political community is, as Aristotle already said, a national community. The central case of a positive legal system, as nearly all legal theorists acknowledge, is the municipal legal system, not the international[46]. Moreover, the authority to legislate, according to Suárez, stems from the consent of the people, and this consent is more present, because of being more immediate, in the case of the national community than in the case of the international community. In this last case, it is even hard to speak of a universal people at all, and if it were argued that there is a common humanity, Suárez could very well answer that the rules that stem from this common humanity and regulate international relations among states belong to *natural* law, not to positive law. *Ius gentium* is a system of positive legal rules, and therefore, it is based not on moral necessities but on consent. And,

46 Alf Ross, for instance, who also wrote on many issues of International Law, even denies that the term "law", when applied to international law, has the same meaning as when it is applied to municipal law. See Alf Ross, 2004 [1959], *On Law and Justice* (Clark, New Jersey: The Lawbook Exchange, 2004 [1959]), 59-64.

whatever the consent of nations may mean, it is not the consent of a people, that does not exist at an international level.

It would be tempting to retort with a "geographical" argument: just as, in the case of a national state, if there is a contradiction between a legal rule of a particular unit of that state, for instance, a region or a member state in the case of federal states, and a rule of the whole polity (the "larger community"), for instance, the national constitution, this last one prevails, so, in the case of contradiction between a rule of a national state and one instituted by the whole world ("the larger community"), the second one should prevail. The legislation of the state of Florida has to conform to the United States Constitution, and not the other way around. Should not the same happen in the case of contradiction between the legislation of one national state and that of the whole world?

However, this geographical objection is invalid since the relation between a particular unit of a national state and that state, on the one hand, and a national state and the international community, on the other hand, are not similar. A particular unit of a national state *derives* its normative powers from the national constitution so that the validity of a statute enacted by the state of Florida depends, ultimately, on the United States Constitution. However, national states do not derive their normative powers from the international community. They are sovereign. Quite the contrary: it is the international community that depends, for its existence, on the relations between states. This fact is so clear that international tribunals have jurisdiction only over states that voluntarily recognize their authority, whereas national tribunals have immediate jurisdiction over all of the persons inhabiting a certain territory, with or without any explicit act of individual recognition of their authority.

For all of these reasons, *pace* Tierney, Suárez's answer to the problem of contradiction between national law and international positive law, namely, that national law prevails, is not so strange at all[47], and it is quite congenial with his political philosophy in general.

47 Notice that this does not mean that a state may be free not to comply with a bilateral treaty with another state. The rule "pacta sunt servanda" is a rule of natural law. We are speaking here of possible contradictions between the *customary* international rules and national legal rules.

However, let us add a further point: for the international treaty to obligate the state, it has to be compatible with the state's constitution. The reason is clear: otherwise, it would be from the very beginning void since, Suárez says, when the lawgiver establishes a statute outside of its legislative powers, the statute is void: "Ad iustitiam autem ex parte agentis seu commutativam pertinent omnia quae capite octavo diximus, et inde etiam satis constat legem sine iurisdictione latam esse nulam": *De Legibus* I, IX, 15; vol. II, 20. He follows here Aquinas who, among the causes of possible injustice of a statute, mentions the lack of powers of the law-

Consider, on the other side, what Francesca Iurlaro says:

"In Suárez's evocative words, the fact that 'not everybody can agree on everything' is as true as the fact that many peoples can agree on something. The possibility of opting out of specific customary rules, therefore, is conceived as a unilateral act. This turns the custom into a more ductile legal instrument - one that is not based on general consent, but on the individual (rather than collective) expression of sovereign wills. This allows *ius gentium* to become an instrument of change, as different customary provisions can be rejected by sovereign in different contexts, while its general moral foundation remains unchallenged"[48].

It is true that Suárez recognizes the possibility of opting out of specific rules of *ius gentium*. However, it is misleading to say that *ius gentium* is not based on general consent. Indeed, Suárez says explicitly that it arises from the customs of the whole world[49]. The reason why, in case of contradiction between national and international law, the former prevails, according to Suárez, is that the sovereign always can derogate previous customs and that there should be no exception regarding *ius gentium* because of its wider universality. Having a wider territorial scope does not mean being higher in the hierarchy of legal rules[50].

But, someone may ask: what is the point of having a legal system with universal territorial scope, if states can unilaterally derogate its rules? Suárez's answer, it seems to me, would be the following: this legal system

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giver. "Quod vero haec iniustitia sufficiat ad nullitatem legis affirmat expresse divus Thomas": DL I, IX, 16; vol. II, 21.

Since, in contemporary polities, a written constitution normally sets the limits of legislation, every act of an authority of that polity, including the signing of international treaties, be they unilateral or multilateral, that contradicts that constitution would be clearly, according to Suárez, void, and would not oblige that state.

Let us give an example: as it is widely known, the US Constitution recognizes a right to keep and bear arms. In the –highly unlikely– scenario that the US President signed an international treaty promoting civilian disarmament, that treaty would not oblige the United States.

48 Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca. 1550-1750* (New York: Oxford University Press, 2022), 73-74.

49 When commenting on the division of custom in universal, common, and particular, he says that "Ego vero sub primo membro praecipue pono illas consuetudines totius orbis, quae jus gentium constituunt, l. 2 diximus: nam illud revera est jus, et in suo ordine tamquam vera lex obligat, ut ibi probavi. Est etiam jus non scriptum, ut etiam est manifestum: ergo usu introductum, et moribus non unius vel alterius gentis, sed totius orbis": *De Legibus*, VII, III, 7; *Opera Omnia,* vol. VI, 143.

50 See, "Unde, sicut rex potest statuere contra aliam consuetudinem, ita etiam contra hanc quoad illam partem quae suum regnum concernit, quia propter solam universalitatem ibi non est fortior vel immutabilior respectu suorum subditorum, sed solum respectu aliarum nationum": *De Legibus*, VII, IV, 8; *Opera Omnia* vol. VI, 147.

works as a subsidiary legal system in relation to municipal law. That means that, if some municipal system lacks any concrete rule *regarding international relations,* and if natural law does not provide that rule, then we can resort to *ius gentium* proper[51]. We can also say: the sources of international relations, for each state are, according to Suárez: first, natural law; second, its own written internal rules concerning international relations; third, as a subsidiary source, *ius gentium*. International treaties also obligate the states, but they are not sources of true universal territorial scope.

4. Conclusion

As can be seen, Suárez makes an important conceptual clarification when treating the old issue of *ius gentium* that helped to differentiate the notion of international law. Even though he claims that his conception of *ius gentium* is that of Justinian, Isidore of Seville and Aquinas[52], it is quite clear that he transformed the notion of ius gentium and prepared the complete differentiation of the notion of international law in later modern authors.

Finally, let us present a problem that may serve as an incentive for further research: How can his conception of *ius gentium* be related to his overall conception of law as a command? Suárez thinks that a law is, essentially, an act of the will of the legislator (though presupposing acts of practical reason), since it does not consist in an act of knowledge, but of commanding. Law, says Suárez, moves to action, which is properly the work of the volitive faculty[53]; only the will can obligate since only it can create necessity where previously there was none[54]. When confronted with the problem of how customary rules conform to that definition, he seems to say that they can be considered tacit commands of the legislator, since every custom needs the consent of the legislator[55]. But, does this general conception of

51 Notice that the other *ius gentium*, the "local" one, also has subsidiary force in relation to national rules, but concerning internal affairs of the state, for instance, private law matters.

52 See, *De Legibus* II, XIX, 6; vol. IV, 132.

53 "Prima est movere et applicare subditum ad exercendam actionem, sub actione semper omissionem intelligendo. Principium enim movens et applicans ad exercitium actionis est voluntas": *De Legibus* I, V, 15; vol. I, 91.

54 "Secunda est habere vim obligandi, quae proprie est in voluntate et non in intellectu; nam intellectus solum potest ostendere necessitatem, quae est in ipso obiecto; quod si illo non sit, non potest ipse eam tribuere; voluntas autem confert necessitatem, quae in obiecto non erat": *De Legibus* I, V, 15; vol. I, 91.

55 See, "Est ergo tertia et vera sententia, quae imprimis statuit generatim, principis consensum ad vim consuetudinis esse necessarium": *De Legibus,* VII, XIII, 6; *Opera Omnia*, vol.

custom as a tacit command apply also to *ius gentium*? Whose tacit command would it be? In the case of the customary rules that pertain to a municipal

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VI, 186. He speaks sometimes of a "tacit" consent of the prince: see *De Legibus,* VII, IX, 7; *Opera Omnia*, vol. VI, 172.

As it is widely known, the theory of custom as a tacit command of the sovereign, as espoused by John Austin, was devastatingly criticized by H.L.A. Hart. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997), 46-49. Hart asserted that it is illicit to conclude, from the inaction of a superior, that he necessarily approves, and therefore tacitly commands, the actions of state's officials, as judges are. This superior may ignore what the official does, or even knowing his actions, may not intervene for reasons other than mere approval.

However, it is not clear whether this criticism is valid concerning Suárez's theory of custom as a tacit command, since he expressly recognizes a kind of "legal consent" of the sovereign, which is different from the "personal consent" of the prince, and which is given by law itself.

"Est ergo tertia et vera sententia, quae imprimis statuit generatim, principis consensum ad vim consuetudinis esse necessarium [...] Deinde vero addit haec opinio, hunc consensum duobus modis posse intelligi: unum voco personalem, quia datur a persona principis, vel expresse consentientis, vel antecedenter dando licentiam ad introducendam consuetudinem, vel consequenter, aut concomitanter approbando illam, aut expresse, aut videndo et non impediendo. Alium vocare possumus consensum legalem, seu juridicum, quia non datur personaliter a principe, sed per ipsum ius. Quia si princeps statuit legem, ut consuetudo habens illas vel illas conditiones valeat, ex tunc consentit, et in particulari applicatur ille consensus ad similes consuetudines, quando introducuntur in virtute illius legis": *De Legibus*, VII, XIII, 6; *Opera Omnia,* vol. VI, 186.

The key point here is whether this legal consent requires a previous statute by the prince stating which features should have the custom to be valid. If, as Suárez seems to say, this legal consent, "given by law", requires such a previous statute, then Suárez's theory can't withstand Hart's criticism of the theory of custom as a tacit command, since Suárez would still be unable to explain the legal nature of customs not expressly and personally approved by the prince in those countries which lack such a previous statute. Suárez is quite clear that, in some communities, customary law precedes historically written law: "[…] nunc constat consuetudinem saepe esse antiquorem jure scripto, et saepe noviorem, et aliunde scriptum esse praecipuum": *De Legibus,* VII, proemium; *Opera Omnia,* vol. VI, 135. He mentions here the examples of Sparta and Athens.

However, according to Carlos Larrainzar, Suárez thinks that this "legal consent" is given by law every time a certain custom has certain features, especially its justice and reasonability, and therefore has to be presumed wherever a customary rule has these features: See Carlos Larrainzar, "La naturaleza del 'derecho consuetudinario' según Francisco Suárez", *Ius Canonicum*, 22, 44 (1982), 781-782. If that were the case, Suárez's theory would be immune to Hart's criticism.

Notice, on the other hand, that Suárez is fully aware of some of the bases of Hart's criticism of Austin, namely, that mere inaction of a superior does not necessarily show approval: "[…] tolerantia sola, supposita scientia, non indicat sufficienter consensum, quia multa per patientiam toleratur, quae non approbantur": *De Legibus*, VII, XIII, 12; *Opera Omnia*, vol. VI, 187, and that a prince can't know all the customs being applied in his kigndom: "[…] moraliter impossibile est consuetudines omnes ad principis notitiam pervernire": *De Legibus,* VII, XIII, 8; *Opera Omnia,* vol. VI, 186.

system, one can perhaps say that they are tacit commands of the legislator because in these communities, there is a legislator who could abolish them, if he wishes. But what happens in the case of the international community? Does it make sense to speak of a universal lawgiver whose name we do not even in principle may know? It is the case, maybe, that the absence of such a universal legislator may also explain the doctrine that Tierney found so strange, namely, that national law prevails over *ius gentium*?

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