The Catholic Lawyer

Volume 5
Number 3 *Volume 5, Summer 1959, Number 3*

Article 5

Natural Law and the International Community

D. P. O'Connell

NATURAL LAW AND THE INTERNATIONAL COMMUNITY†

D. P. O'CONNELL*

IN MODERN TERMS, sovereignty is but the ultimate competence within a prescribed juridical order. It does not follow that it can be equated with irresponsibility or absence of obligation. While the State is sovereign it cannot be insulated from its fellow States, but must share their life, their common end – the common good of humanity – an end objectively predicated on the nature of man. According to Suarez:

> The human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity. . . . Each one of these States is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these States when standing alone are never so self-sufficient that they do not require some mutual association and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.[1]

When Suarez distinguishes, therefore, between the society of men and the society of nations, he still emphasizes the "sociability" of international relationships and asserts the necessity of a law to govern them. Here is the answer to the speculations of Professor Julius Stone, who wonders if the present division of the world into two camps, each culturally insulated from the other, and called respectively the "West" and the "Iron Curtain" has dissolved the international community and substituted for it two communities each with its own law, the product of its own ideology.[2] To Suarez the mere co-existence of the two camps induces society and hence law. What is novel and modern in his doctrine is the transformation of the *jus gentium* into the *jus inter gentes*. Until this transformation was effected there could be no such thing as international law as we understand it.

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† Based on an article by the same author entitled *Rational Foundations of International Law*, 2 SYDNEY L. REV. 253 (1957).

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

[1] *De Leg.* II, c19, n.9. This notion is again fundamental in Lorimer, I, p. 357. See Jenks, "The Significance Today of Lorimer's Ultimate Problem of International Jurisprudence," in (1950) 26 *Transactions of the Grotius Society*, 35.

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

Jus Gentium and *Jus Naturale*

The term *"jus gentium"* in Roman law was used in several senses but at no time was its relationship with *jus naturale* clearly defined. Gaius and Ulpian sought to give a philosophical account of the principles of law acknowledged by the praetor peregrinus in cases dealing with aliens or subject peoples. They found these principles common to all nations, and to this extent distinguished them from municipal law. But this *jus gentium* was not, and could not clearly be marked off from *jus naturale* at the one end and positive law at the other. Since the basic principles of the *jus gentium,* life, right to property and its disposition, the concepts of theft, fraud etc., could be regarded as necessary conclusions from the principles of the *jus naturale,* it might be said that *jus gentium* partook of *jus naturale.* But as a comprehensive system of law considered as an adjunct to the *jus civile,* and containing detailed rules about sale and inheritance, (such as the coincidence of *animus* and *factum* in acquisition of a *res nullius*) *jus gentium* was also as much a human invention as the *jus civile* (which, of course, operated between *cives*).[3] In one sense, then, *jus gentium* to the early medieval writers was a term to describe those practical precepts which are common to diverse bodies of municipal law mediating between the principles of natural law and the rules of municipal law[4] (for which the term *"jus civile"* came to be employed, devoid of its technical associations with citizenship in Roman law). In another sense, it referred to a highly elaborated technical system of positive law.[5]

The emphasis in Aquinas, whose treatise on law in the *Prima Secundae* of the *Summa Theologica* was the framework of all later medieval jurisprudence, was on the former aspect of *jus gentium,* but much refinement of his text is necessary before the exact role of *jus gentium* in his doctrine can be detected. (What follows can best be understood by reference to the appended chart which tentatively indicates the steps in the reasoning by which the absolute principle of natural law is applied to relative and contingent circumstances in an English law context. The stage which Aquinas defines as *jus gentium* perhaps becomes clearer on analysis of this chart). Aquinas distinguishes between two faculties of the intellect, the speculative (*cognoscere*) and the practical (*dirigere*);[6] the speculative is concerned with knowledge alone; the practical, which is the intellect plus the will, applies that knowledge to actions. It is obvious that law pertains to the practical intellect since it concerns the actions that direct men to the end which is speculatively apprehended.

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[3] Dabin, *Legal Philosophies of Lask, Radbruch and Dabin* (1940) 430.

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

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

[6] It is sometimes supposed that he believed in two intellects. This, however, is not so. He is considering the intellect from two points of view, firstly, considering it in itself, and secondly, considering it in union with the will. The intellect considered in itself is the speculative intellect, which is concerned with knowing things, which it does (a) by apprehending (*synderesis*) (A in

TABLE A

INTELLECT — WILL

- speculative (what ought to be done)
- practical (what steps are to be taken)
  - primary axiomatic Truth of conduct (ethics)
    - secondary derivative Truth of social conduct (law)

TABLE B

A.	Primary axiomatic truth.	Seek the Good and Avoid Evil	1st principle of natural law.
B.	Secondary derivative truth. (Truth induced from the nature of man).	Seek the social good / Seek the personal good	2nd principle of natural law.
C.	Necessary direct inference.	Do not harm thy neighbour / (ethics)	Precept of natural law.
D.	Contingent general determinations (general concepts). De facto necessity contingent on social facts.	Wilful harm; Duty of care in cases of unintentional harm; Do not defraud (lie) (pacta sunt servanda); Respect neighbour's property (also original acquisition)	JUS GENTIUM.
E.	Applications of determinations generally. (In what circumstances concepts will apply).	Murder; Trespass etc.; Negligence; Contract; Fraud; Theft; Trespass; Restitution	Rules.
F.	Applications of determinations specifically.	Detailed rules; Negligence rules; Donoghue v. Stevenson, [1932] A.C. 562; Derry v. Peek, [1889] 14 A.C. 337; Detailed rules	Decisions.

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

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

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

Aquinas distinguishes several successive acts of the intellect and will which precede every action. The first act of the intellect is the simple grasp of an axiomatic truth ("seek the good and avoid evil"); this is a "primary truth" from which "secondary truths" are syllogistically derived (seek the social good – the minor premise being the social nature of man); from the "secondary truths" other conclusions can be drawn, some of which are "necessary" in that they do not depend upon existing conditions (e.g., "theft" considered in the abstract is always immoral since it arises from the right to property, which is an aspect of man's social nature), and others of which are contingent since they arise out of the state of society at a given time (e.g., whether "theft" is an operative concept will depend upon whether society has based itself upon a division of property or a community of property: in the one case the rule will be "do not steal from your neighbour": in the other "do not steal from society"). The contingent conclusions must be then applied to more particular circumstances (e.g., rules to make the notion of theft effective), or applied to singular instances *hic et nunc*.[7] At the conclusion level (C), the inferences are logically necessary and direct. At the determination level (D, E, F), the prescribed or prohibited actions are neither just nor unjust intrinsically but become so in virtue of the determination.[8]

Jus naturale, jus gentium and *jus civile* in Aquinas are to be distinguished according to the judgment in which each consists. The first consists of evident conclusions from the first truths of human nature and its end teleologically conceived. The *jus gentium* is said to consist of conclusions drawn from these first principles, and the *jus civile* of determinations of means in a general way by reference to the generality of contingent circumstances (positive or municipal law).[9] Aquinas distinguishes the two modes of derivation from the natural law: "by way of conclusions from the premises," and "by way of determinations of certain generalities."[10] This, however, does not greatly illuminate the role of *jus gentium*. Is it the equivalent of the secondary or more immediately concluded principles

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Table B of the chart); (b) by judging (B); and (c) by deducing conclusions syllogistically (C and D.) The intellect in union with the will is the practical intellect. By command of the will the intellect applies itself to particular cases. Aquinas' thesis may be illustrated by the following table:

Order of Intention

Acts of intellect

1. Judgment: this end is desirable.
2. Judgment: this end can and must be obtained.

Acts of will

3. Desire (inefficacious).
4. Efficacious intention: I desire this end.

Acts regarding means of attainment:

A. Order of Choice

5. Deliberation: these means seem apt for the end.
6. Consent to these means.
7. Practical judgment regarding the best method.
8. Choice of this method.

B. Order of Execution

9. Command: the means chosen *must** be applied.
10. Active use of the will moving faculties.
11. Attainment of the end desired.
12. Fruition of will, the end being attained.

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

[7] The distinction is usually stated as between the immutable principles of natural law and the fallible but necessary deductions made from them, but this telescopes the problem.

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

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

[10] S.T. I-II, q.95, a.2.

of the natural law (e.g., right to life), or is it the sum total of those jurisprudential concepts which all nations have in common because realizations of these derived principles (e.g., murder, theft, fraud)? The reference to the principles of just sale suggests the second alternative, but the further statement that the precept "thou shalt not kill" is both a moral precept and a proposition of *jus gentium*[11] suggests that the two stages of reasoning are in fact bridged by the one concept.

Much of this difficulty of definition is due to Aquinas' efforts to escape from the confusion between natural law as a notion of moral conduct and natural law as the equivalent of the law of the jungle which Ulpian introduced[12] and Aquinas inherited through Justinian.[13] Ulpian had said that natural law is what nature teaches all animals. But since animals are not rational, this can only refer to animal instinct. The moral law, however, is concerned with choice of conduct, and with what men "ought to do" as distinct from what animals "actually do." When Aquinas[14] distinguishes *jus gentium* as "derived from natural law by way of conclusions that are not very remote from their premises" he is separating it from "that natural law which is common to all animals." It then becomes clear that *jus gentium* is equated with the broader principles of the natural law and hence is not contained under human positive law.[15] *Jus gentium* is thus neither international law nor what the Romans understood as an adjunct of their municipal law. It does not proceed from human officials exercising extrinsic authority conjoined with power over the individual, which is the characteristic of positive law,[16] and thus it is prior to the constitution of the State.[17]

The way was now prepared for Suarez's description of the law of nations as deriving from the common consensus of sovereigns acting as organs of the peoples who, by use and custom, introduce law.[18] *Jus gentium* now is not natural but human, positive law founded on a concordance of wills manifested in a conjunction of usages, and differing from civil law (municipal law) only in

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

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

[13] Pandect. I, tit. 1.

[14] S.T. I-II, q.95, a.4, reply to obj. 1.

Aquinas distinguishes generally natural law considered in itself as absolute *(jus naturale secundum primum modum)*, which is universal and applies to all men and animals (such as the instincts of procreation or self-preservation) and the natural law induced from self-evident principles and specific to man *(jus naturale secundum modum)*. Barcia Trelles considers the latter as equivalent in his text to *jus gentium*.

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

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

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

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

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

the subjects to which it addresses itself. He establishes this by a series of dialectical steps beginning with a repudiation of Ulpian's definition.[19] Natural law does not dictate for the advantage of natural instinct. This is proved in the case of man by the fact that when natural law does enjoin anything to preserve natural instinct it always involves a rational means. There are many things which natural law prohibits to men but not to brutes, for example, union between mother and son. There is thus no need to use *jus gentium* to describe the moral law; *jus naturale* suffices for this. Nor is it legitimate to regard *jus gentium* as a set of principles deduced as an act of intrinsic necessity from the more fundamental principles of *jus naturale,* differing from the latter only in being revealed by means of comparatively intricate inferences as opposed to merely simple reflection. So to do would be to confer on the usages of men, contrived by free will, the character of moral absoluteness enjoyed by *jus naturale.* It is true that many of the institutions traditionally described as of the *jus gentium,* such as the proposition *pacta sunt servanda,* follow upon natural law, but they do so only in conjunction with the assumption of the existence of human society and circumstances peculiar to it. For instance, *pacta sunt servanda* presupposes the existence of commercial intercourse and the actual making of a promise, both social acts: The concept of theft presupposes that society has organized itself on a basis of *divisio rerum* and not community of property. The inference, therefore, from the natural law (stages A & B of the table) to the propositions of *jus gentium* (D) is dependent upon the intervention of human free will and of moral expediency and is not a matter of logical necessity.[20] And since immutability derives from objective necessity it follows that the *jus gentium* is not immutable.[21] Nor is it necessarily common to all, as is natural law, but *regulariter et fere omnibus.*[22]

The Positive Character of *Jus Gentium*

At this point Suarez seems to be fixing *jus gentium* at stage D, and possibly at stage E,[23] of the table, and so clarifying Aquinas by a more precise choice of terms. *Jus gentium* now appears as a stage of reasoning intermediate between natural law and positive law in general. How is it transformed into international law? Suarez says that *jus gentium* has a twofold form: it is a body of laws (this suggests perhaps stage E[24]) which individual States observe within their own borders but which are similar and commonly accepted; it is also the law which

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

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

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

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

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

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

various nations ought to observe in their relations with each other.[25] There is no inherent ambiguity in this equivocal use of the term, although there is no doubt considerable inconvenience (Suarez does carefully distinguish the two uses[26]). The reason is that at this fundamental stage the basic concepts of international and municipal law must be the same. This emerges more clearly in his demonstration that the *jus gentium,* like natural law, may not only enjoin conduct by positive precepts (preceptive law), but also concede and sanction things (concessive law). For example, one is not obliged to take a wife, but if one does the resulting status relationship, though freely produced by consent, is governed by natural law as to indissolubility, support and education of children, etc. In the same way, *jus gentium* may concede that nations may do certain things, but the juridical character of the thing done may be independent of the wills of the acting States. So diplomatic immunity is not a necessary derivative of natural law, but the infringement of it would threaten the stability of international relations and derogate from the natural harmony of society.[27] In the case of treaties there is joined to the right to contract an obligation not to violate the bargain.[28] The institutions of *jus gentium* whether they be of international or municipal law are to this extent anchored to the natural law.

The ontological basis, or to put it less philosophically the source of obligation, of a law created by concordance of wills of sovereigns is thus clear. The positivists were later to confront themselves with the questions, why should not the withdrawal of consensus dispel obligation; why, if the law of nations is the consensus of "nearly all" nations should the non-consenting or the recalcitrant be obliged? Suarez's answer to these questions depends on his conception of the international community and the role of natural law in sanctioning the *jus gentium.* Just as man is social, so is he juridical.[29] Although men are divided into various nations they preserve the same moral and quasi-political unity, so that though perfect in themselves States are also members of the human race and dependent to a great degree upon each other.

> Consequently such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one State or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation [of the law of nations from natural law] may not be self-evident, that is, not essentially and absolutely required for moral rectitude – it is nevertheless quite in accord with nature, and universally acceptable for its own sake.[30]

[25] *Id.*, c.19, n.8.
[26] *Id.*, c.20, n.1.
[27] *Id.*, c.19, n.7.
[28] *Id.*, c.18, n.5.

[29] Le Fur, *"Le Droit naturel ou objectif; s'étend-il aux rapports internationaux?"* in (1925) 6 *Revue de droit international et de législation comparée* (3e ser.) 61; also *"La Théorie de droit naturel"* in (1927) 18 *Recueil de l'Académie de droit international* 271.
[30] *De Leg.* II, c. 19. n.9.

Natural law is thus the integrating factor in the international community. Nonetheless Suarez has not worked out his theory of interaction in a completely satisfactory manner, and in the result his doctrine has a pendular character as the argument swings back and forth.[31] For example, the law of war is governed ultimately by natural law, but so is the right to commerce. The one must derogate from the other. Suarez says nations may go to war because peoples can live without commerce, whereas he has already said, following Vitoria, that they cannot co-exist without mutual aid (*caritas*) and communication. This supposed tension, however, is capable of being resolved and the problem is no more than an interpolation in Suarez's stream of thought. Westlake makes the added criticism that Suarez does not distinguish between good and bad customs but allows all custom the force of law.[32] This is a misapprehension of Suarez's Scholastic position and also a misreading of his text.[33] A bad (*injusta*) custom would not be law any more than a *lex injusta.* A more cogent comment is that Suarez does not elaborate the content of his *jus gentium.*[34] It was not his concern to do so. He was writing philosophy, or as he said himself, theology, and he cited only the obvious examples to explain the ontological character of laws between nations; and even this was a very subordinate aspect to a much larger work on law generally.

The real importance of Suarez is thus his clarification of the distinctions between, and the inter-relationship of, natural law and international law. The distinction was almost immediately obscured again by Grotius, who, while elaborating the content of international law, was weak on ontology. He adopted the proposition of Vasquez, the Spanish Augustinian, that rational nature, irrespective of the positive will of God, is the primary ground of the obligation of natural law,[35] and while admitting[36] that the natural law is enjoined by God, went on to say that it would oblige even if there were no God.[37] So far he and Aquinas are not in radical disagreement, but the emphasis thus placed on the autonomy of the intellect led in his successors in the Age of Reason to an exaggeration of the capacity of the intellect to deduce with absolute moral certainty the detailed rules of law. They followed him closely in believing it possible to derive by strict logic a suitable system of rational law containing specific prescriptions covering debts and property, family institutions and inheritance, all sharing the immutability of the first principle of natural law and so having the force of moral obligation.[38] This was a doctrine far removed from that of Suarez who regarded only the general institutions of marriage, property and contract as contained under natural law and would have allowed a considerable relativity to the detailed prescriptions accommodating the institutions to contingent circumstances.

International and Municipal Law

What of the inter-relationship of international law and municipal law in the Suarezian system? It would be invidious to

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

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

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

[34] Nussbaum, *A Concise History of the Law of Nations* (1947) 67.

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

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

treat of this question in the light of the modern doctrines of Kelsen, Verdross and Triepel. The problem as such is not formally discussed by Suarez and his attitude to it can only be gathered from his views on the nature and role of the respective legal orders. It would be surprising if out of such analysis a consistent and comprehensive theory would emerge, since Suarez does not, of course, treat of the matter in the logical-juridical fashion of today, which is an outcome of the Kantian dichotomy of jurisprudence and metaphysics, but in an ethical-juridical fashion. It is therefore possible to find in him arguments that favour both monism and dualism. The key to his general attitude is found in his discussion of the processes by which the *jus gentium* can be changed. He begins by repeating that there are two forms of *jus gentium,* the *jus intra-gentes* and the *jus inter-gentes.* The former is no more than the usages introduced throughout the world by successive acts of mutual imitation because they are expressive of or in harmony with the natural law and so befitting to all nations individually and collectively. The latter is similar to the former in its institutions, for the same reason, but is the produce of imitation by nations considered as entities and not as aggregations.[39] From this distinction it follows that the *jus intra-gentes* is easily changed by any one State since within that State it is no more than civil law, although in a fundamental sense. So a State may decree that unjust sales shall be rescinded or its citizens not use certain currency, and it may do this without the consent of other States.[40] Changes in the *jus inter-gentes* are, however, much more difficult, "for this phrase involves law common to all nations and appears to have been introduced by the authority of all, so that it may not be annulled without universal consent. Nevertheless, there would be no inherent obstacle to change, in so far as the subject-matter of such law is concerned, if all nations should agree to the alteration, or if a contrary custom should gradually come into practice and prevail."[41]

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

This, however, is very far from putting Suarez in a modern monistic position. The national order is not a derivation from the international. Suarez had expressly rejected

[37] Prolog. to *id.,* 11.
[38] Rommen, *The Natural Law* (1947) chs. 3 & 4.
[39] *De Leg.* III, c.20, n.1.
[40] *Id.* II, c.20, n.7.
[41] *Id.* II, c.20, n.8.

this when repudiating an institutional *civitas maxima,* and it would be a negation of all his thought to treat of the authority of the prince as a delegation from international law. Internal sovereignty is not dependent upon the grace of the world order; the State has integrity and is no mere administrative agency. Therefore, there is a sphere, it would seem, beyond the supremacy of international law, just as international law, deriving its juridical character from a source other than the initiating wills of the sovereigns who formulate it, is beyond the control of municipal law. There is thus in Suarez an initial dualism of sources, although it is not a dualism in the modern sense. Modern dualism regards the sources as mutually exclusive and opposes them to each other so as to initiate a collision of rights and obligations. The only passage in Suarez suggestive of such a doctrine is one where he argues that the State may ordain that an international law shall not be observed. From his illustration of the rule of the *jus gentium* as to slavery of prisoners of war, which is not observed among Christians,[42] it would seem, however, that he is thinking of concessive international law and not preceptive. A thorough-going dualism, involving a hypothetical collision of international and municipal law would be incompatible with his notions of the naturally harmonious ends of State and *societas gentium.*

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

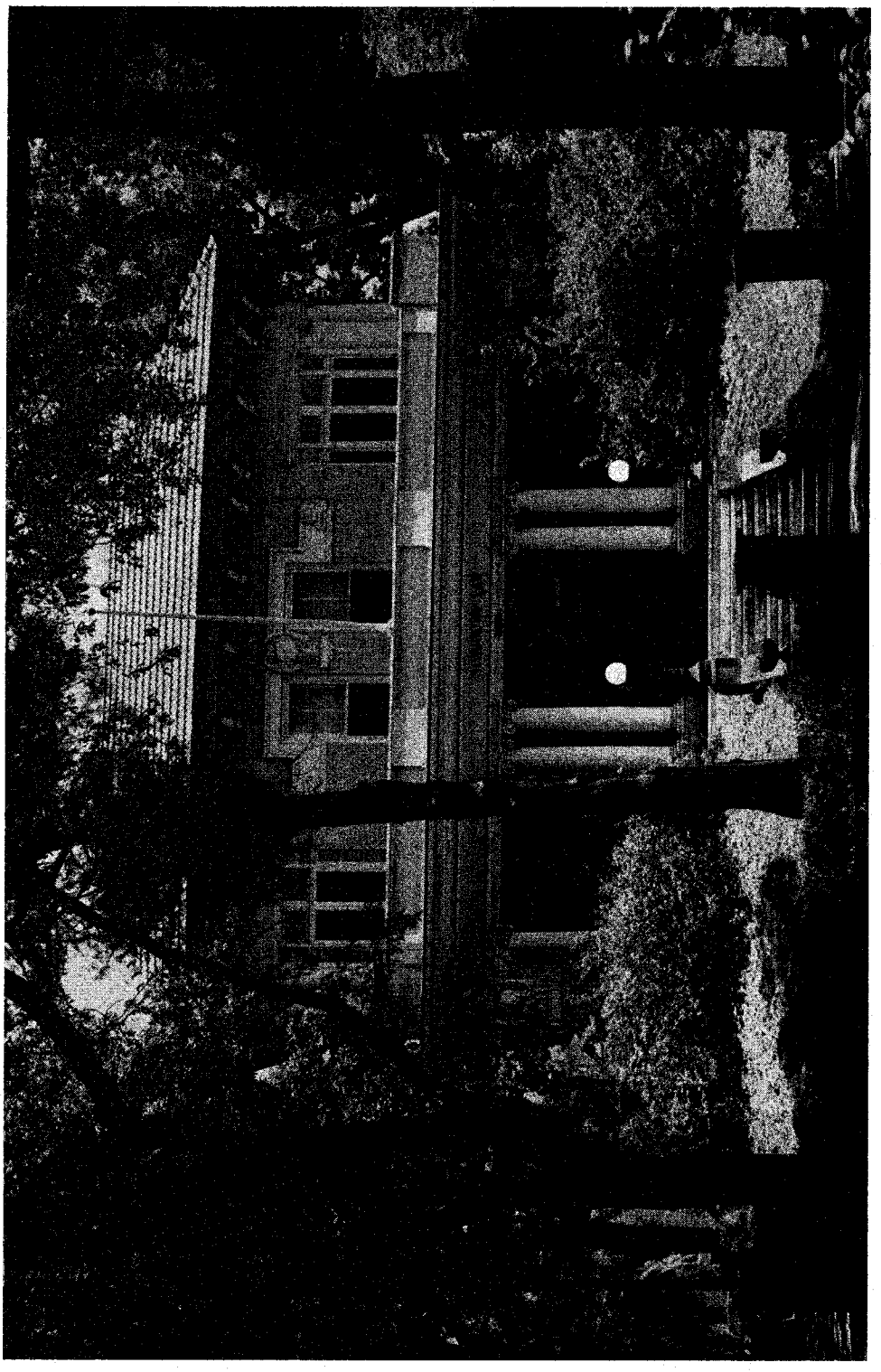
Conclusion

Suarez's work has been the centre of controversy largely because it attempts to grapple in an intelligible manner with the problem of the interaction of law and morality. The question is, of course, central to the philosophy of international law, and if Suarez does not state his position with unimpeachable clarity this is attributable more to the magnitude and the elusiveness of the issue than to any logical or linguistic deficiency in his writings. His critics find that the tension he sets up between sovereignty and the community of men is unresolved, or rather is resolved only by an inconsistent shifting of emphasis in pendular fashion from one concept to the other. These would, in the more extreme instances, banish from the literature of international law either the word "sovereignty" or the conception of the *societas gentium* according to their respective doctrinal starting points. But as Suarez clearly recognized, the abolition of either expression would not solve the problem, which is real and not semantic, of the existence of politically insulated communities in close and constant intercourse with each other. Fundamentally,

[42] *Ibid.*

Suarez's doctrine pivots on the notion that law can be an autonomous discipline, logically disassociated from ethics though evaluated by it. Just as in economics the law of supply and demand can be discussed without being treated as an extension of metaphysics, so there is an area of positive law that can be subjected to its own grammar and analysed on its own postulates.

It is in this that Suarez is modern. The medievalist accepted law as a manifestation of ethics, and constructed a society in which the potential collision of law and morality was minimised. To continue the formal integration once the collision had become actual was to avoid and not facilitate solution. Suarez would not deny the point of intersection of law and morality but he would locate it at only the most fundamental level, leaving a great deal in the actual construction of the content of law to free human will. The basic postulates of any legal system, the law in the widest sense, remain constant because reflections of the natural law engraven, as Aquinas put it, on the hearts of men, but the deductions made therefrom have a relativity conditioned by various environmental and traditional factors. Where Suarez parts company with the modern sovereignty schools is in his emphasis on conscience, the moral sense of obligation which is a product of the human reason reflecting upon the common good, and which anchors law in its actual operation to metaphysics. In this he has a great many legal historians and sociologists on his side. In the outcome the absence of coercive authority in the international community becomes irrelevant, since sanction is seen as consequential and not conditional. The pattern of life of the community, the product of natural love and mercy as much as of self-interest, can be disciplined and explained within the context of a legal system dependent on moral sense. In this Suarez is much nearer reality than modern writers who found international life on acquisitive and racial principles alone. The nationalism that within the past century or so has added a dynamic to Bodin's sovereignty is probably no more than an ephemeral phenomenon in the history of civilization, and there is evidence that the more basic human instinct to society is reasserting itself as the consequences of the self-interest thesis become more apparent.



St. Thomas More Hall — The Law School of Loyola University