Unpuzzling Customary International Law (CIL): The Invention of Customary Law of Nations from Francisco de Vitoria to Emer de Vattel

Francesca Iurlaro

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Abstract

This thesis seeks to trace an intellectual history of the concept of customary international law (CIL) within the natural law and *ius gentium* tradition. Across a timespan of two centuries, in the present work I will make the claim that a strong, foundational relationship exists between the normative content of natural law and the emergence of customary law of nations as a distinctive concept of the international legal discourse.

The work is divided in two parts. The first deals with the emergence of the concept of customary law of nations in the early modern 16th century legal tradition, by juxtaposing and contrasting two different natural law doctrines, the theological one of the School of Salamanca (through the eyes of Francisco de Vitoria and Francisco Suárez) and the rhetorical theory of *ius gentium* by Alberico Gentili. The second part takes into account the modern legal tradition from Hugo Grotius, *via* Samuel Pufendorf and Christian Wolff, to Emer de Vattel, by showing the relationship between custom and the systematization of natural law into a body of rational law which constitutes a leitmotif of the 17th-18th century.

The aim of this work is to assess the argumentative strategies that led to the formation of the concept of customary international law. In other words, the overarching thesis of this project is that the natural law and *ius gentium* tradition have provided normative content to CIL in ways that are still recognizable today. An intellectual-historical analysis is useful to qualify such content, to show the conceptual development of CIL over time, and ultimately, to answer the question of why CIL is so important to the Western legal tradition of international law.

Table of contents

Acknowledgments **7**

General methodological introduction – Do we still need customary international law? An intellectual history of CIL between natural law and the invention of the past **9**

Why do we need CIL? Main problems of, and stakes in the contemporary debate on CIL **9**

"The past won't rest": modern natural law and the "invention" of customary law of nations **18**

Methodology: customary law of nations, intellectual history and international legal thought **23**

Customary law of nations through the history of human sciences **27**

Part 1. Global law, multiculturalism and the boundaries of humanity: why was customary law of nations "born" in the 16th century? **33**

Chapter 1. "Like beginners in Arabic." The double-face of custom in Francisco de Vitoria's doctrine of *ius gentium* **41**

1.1 A law supreme: Vitoria's controversial account of the relationship between *lex naturalis, ius naturae* and *ius gentium* **43**

1.2 If law is an act of intellect, what is *ius gentium* like? The consensual nature of the law of nations in Vitoria **45**

1.3 *Lex* and *imperium*: the analogy between reason and *lex naturalis*. Vitoria's Commentary on Aquinas' ST IaIIae (Ms Ott. Lat. 1000) **51**

1.4 Vitoria's supposed theoretical inconsistency in the *Relectiones*. The paradox of an "immutable positive law" **61**

1.4.1 The universal commonwealth and the victory of public law on private agreement: *ius gentium* as *lex* in the relection *On Civil Power*. 61

1.4.2 The creation of a political *orbis*. Majority vs. minority, and reason as the ultimate criterion of consensus 64

1.4.3 A real customary *ius gentium*? 69

Chapter 2. *Ratio probabilis, consensio omnium* and the impact of *humanitas* on Alberico Gentili's theory of customary international law **71**

2. 1 Imitation of nature. Reason between human variability and repetition of customs **73**

2.1.1 A question of science. Gentili's humanism as a method for *ius gentium* and the legal bound of the *tacit vinculum*. 79

2.2 Is *ius gentium* the same as *ius naturae*? *Consensio omnium* as an in-between concept **84**

2.3 Gentili's method of identification of custom: some examples **89**

Chapter 3. Obligation through agreement, agreement on obligation: customary *ius gentium* as expression of will in Francisco Suárez **95**

3.1 Suárez on natural law, natural reason, and *ius gentium* **98**

3.2 Is the international community imperfect? Suárez on the customary law of nations and the source of its obligation 101
3.2.1 The naturalism of *habitus* and the self-legitimizing role of will 107
Part 2. From *consuetudo* to "*das Herkommen*": customary law of nations in Grotius, Pufendorf and the influence of the 18th century German legal tradition on Vattel 115
Chapter 4. Grotius and the methodological "bifurcation" of customary international law 123
4. 1 *Etiamsi Deus (non) daretur*? An introduction on divine will and natural law 123
4.2 Rhetorical method and Grotius' distinction between natural law and the law of nations 126
4.3 Grotius, Dio Chrysostom and the "invention" of custom 134
4.3.1 Natural custom 140
4.3.2 Voluntary customary *ius gentium* and the use of conjectural method 144
Chapter 5. Custom in concentric circles: Samuel Pufendorf's customary *ius gentium* between glory and state interests 151
5.1 Natural law as the science of morality: the fundamental innovations of Pufendorf 154
5.2 Custom and *consensio*: method and the problem of custom within a natural law framework 158
5.3 Law of nations in times of peace: international agreements and reason of state 167
5.3.1 Duties of humanity 175
The constitutive relationship between self-interest and *socialitas* is described by Pufendorf through a verse of the Roman poet Ennius, saying that he who lights a candle can benefit others without expense to himself. Pufendorf claims that "from this one example we may sufficiently apprehend, that whatsoever we can part with to another, without any damage to ourselves, this it is our duty to give, though to a stranger". 175
5.3.2 Presumption of tacit consensus 177
5. 4 Law of nations in times of war: customary *ius gentium* between glory and state interest178
Chapter 6. Christian Wolff and his *ius gentium consuetudinarium* 185
6.1 Wolff's system: the psychological foundations of natural law 190
6.1.1 *Consensus* 194
6.1.2. *Perfectio* 195
6.1.3. *Concursus* 197
6.2 Laws of nature, natural law and *ius gentium*: the perfection of *civitas maxima* 199
6.3 *Ius gentium consuetudinarium:* between philosophy and history. 204
Chapter 7. International law is a winning game: Vattel's customary law of nations between principles and state practice 209
7.1 Application of natural law, *perfectio* and *civitas maxima*: Vattel vs. Wolff 212
7.1.1 Vattel's method: an enlightened history of state practice 222
7.2. Formation of customary law of nations, compliance with natural law and rules for its identification 225
7.2.1 Facts with meaning: customs originating in an overlapping of practice and principles 228
7.3 Indifferent Customs: three criteria to identify customary law of nations 234
7.4 Is the violation of custom enforceable? 238
7.5 Customs *de lege ferenda*: "this should be turned into a conventional law" 240
Conclusion 243
The "fiction" of custom. 243
The "Pufendorf-paradox" 245
"Unilateral" custom vs. universal custom? 248

Bibliography **253**
List of original texts consulted **253**
Manuscripts 253
Printed editions 253
Contemporary editions and translations taken into account **257**
Secondary literature **260**

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General methodological introduction – Do we still need customary international law? An intellectual history of CIL between natural law and the invention of the past

Why do we need CIL? Main problems of, and stakes in the contemporary debate on CIL

International law is living a time of self-doubt. Scholars have started questioning the very assumptions of their discipline, either acknowledging its self-referentiality or its pretentious and indeed fictitious internationalism.[1] The alleged "universalism" of international law seems more and more scattered into a prism of different conceptions, approaches and disrupted narratives. We are not just talking of a fragmentation of international law into different and at times incompatible legal regimes,[2] but of a profound conceptual turning point for the discipline, which begins to perceive itself, *via* its scholars, as a non-unitary legal phenomenon, despite the universalistic rhetoric of fundamental concepts like *jus cogens* or *human rights*. These profound existential concerns of the international legal discipline transcend the widely acknowledged claim that international law is a product of centuries of Western culture and, more specifically, of international law professionals creating their own language and set of institutions.[3] They go even further in claiming that these aspects are just the tip of the iceberg, and that conceptual difficulties are constitutive of international legal discourse itself. One possible way to problematize such universalism might be to engage in rigorous self-criticism or, as critical legal studies say, to psychoanalyze international law itself.[4] However, as has recently been pointed out, critical studies of international law might have even contributed to leaving the whole belief-system behind international law unquestioned.[5] In other

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[1] These provocative claims have recently been vindicated by A. Roberts, *Is International Law International*?, Oxford University Press, Oxford 2017; J. D'Aspremont, *International Law as Belief System*, Cambridge University Press, Cambridge-New York 2017.

[2] As pointed out in the well known Reports by the International Law Commission on the "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006. Comparative approaches towards international law also insist on the difference between fragmentation as a phenomenon of diversification of legal regimes and the theoretical problems concerning international law's supposed universality. See A. Roberts, P. B. Stephan, P. H. Verdier & M. Versteeg, 'Comparative International Law: Framing the Field', *American Journal of International Law*, 109 (2015), p. 469; A. Roberts, P. B. Stephan, P. H. Verdier & M. Versteeg (Eds.), *Comparative International Law*, Oxford University Press, New York 2018.

[3] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge-New York 2001; L. Nuzzo, *Origini di una scienza: Diritto internazionale e colonialism nel XIX secolo*, Vittorio Klostermann Verlag, Frankfurt am Main 2012.

[4] M. Nicholson, 'Psychoanalyzing International Law(yers)', *German Law Journal*, 18/3 (2017), pp. 441-510.

[5] J. D'Aspremont, *International Law as a Belief System*, p. 14.

words, international law relies on a series of unquestioned principles, the importance of which centuries of scholarly activity have contributed to overlooking. This has been achieved by attributing to those principles a self-legislating power that international law provided herself with, like a last instance world legislator providing himself with Kantian principles in order to avoid the dangers of international anarchy.[6] In other words, doubts have arisen as to whether the self-legislative character of international law is itself sufficient to guarantee the legitimate validity of international law as a science and practice. As a result, the rise of Third World States as primary actors of the international arena has contributed to seriously challenging those assumptions, to the point that some scholars are hoping for the birth of a "comparative" international law"[7] that would do justice to the complexities of the contemporary world.

In times of indeterminacy and conceptual difficulty, the question of how to make sense of international legal phenomena arises. Internationalists have often turned to history to seek answers. This "turn to history"[8] has been interpreted in various ways, either as a symptom or as a cause of the conceptual confusion international law is facing. In other words, it might be symptomatic of a necessity to look to the past in search of legitimating arguments from European legal history, justifying this or that concept or practice. In this respect, some TWAIL (Third World Approaches to International Law) scholars have claimed that historical approaches towards international law might hide claims of imperialism, either cultural or political, i.e. it is precisely because of its historical development that international law became that universal law that we all know of. By downplaying the cultural and political importance of

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[6] M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', *Theoretical Inquiries in the Law*, 9 (2007), p. 25; A. von Bogdandy, & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification', *European Journal of International Law*, 23/1 (2012), pp. 7-41.

[7] See the already quoted A. Roberts, P. B. Stephan, P. H. Verdier & M. Versteeg, 'Comparative International Law: Framing the Field', pp. 467-474.

[8]See R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, Stanford University Press, Stanford 2002; M. Koskenniemi, 'Why History of International Law Today?', *Rechtsgeschichte*, 4 (2004), pp. 61-66; G. R. B. Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law', *European Journal of International Law*, 16 (2005), pp. 539–59; A Kemmerer, 'The Turning Aside: On International Law and its History', in J. Beneyto & D. Kennedy (Eds.), *New Approaches to International Law*, TMC Asser Press, The Hague 2012, pp. 99–122; T. Skouteris, 'Engaging History in International Law', in J. Beneyto & D. Kennedy (Eds.), *New Approaches to International Law*, TMC Asser Press, The Hague 2012, pp. 99–122, at 103; M. Koskenniemi, 'A History of International Law Histories', in B. Fassbender & A. Peters, *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford 2012; J. Guidi & D. Armitage (Eds.), *The History Manifesto*, Cambridge University Press, Cambridge 2014; D. Armitage, 'Modern International Thought: Problems and Prospects', *History of European Ideas*, 41/1 (2015), pp. 116-130; M. Craven, 'Theorizing the Turn to History in International Law', in A. Orford & F. Hoffmann, *The Oxford Handbook of Theory of International Law,* Oxford University Press, Oxford 2016

such pervasive imperialism in the historical development of international law, international lawyers are said to justify the status quo.[9]

Others have claimed that historical analysis does not necessarily have an apologetic approach towards the past, but rather seeks to unravel and critically analyze past concepts and discourses for the sake of raising awareness among international legal scholars.[10] From this critical perspective, another possible reason historical analysis could be beneficial to international law is that, as has been argued, the history of *ius gentium* (the grandfather of contemporary international law) coincides, to some extent, with international law itself.[11] In other words, investigating the historical past of international law does not merely seek to ascertain the genealogy of concepts, institutions and practices. Rather, it provides contemporary international law with a normative content that, although not officially included in the institutional *corpus* of contemporary international law that emerged after the creation of the United Nations, is still relevant in so far as it informs our preconceptions and understandings of contemporary phenomena.[12] As has been powerfully argued, "the past... may be a source of present obligations. Similarly, legal concepts and practices that were developed in the age of formal empire may continue to shape international law in the post-colonial era".[13] In other

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[9] Mostly, following A. Anghie's critical appraisal of international law in his classical *Imperialism, Sovereignty, and the Making of international law*, Cambridge University Press, Cambridge 2005; see also M. Toufayan, E. Tourme-Jouannet, H. Ruiz Fabri (eds.), *Droit international et nouvelles approches sur le tiers-monde: entre répétition et renouveau / International Law and New Approaches to the Third World: between repetition and renewal*, Société de legislation comparée, Paris 2013.

[10] See S. Kadelbach, T. Kleinlein & D. Roth-Isigkeit, *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, Oxford 2017, pp. 5-7.

[11] As argued by M. Craven, 'Theorizing the Turn to History in International Law': "It is, then, in the history of Europe (and of the states of which it is composed) during the last centuries, that we must look for the existing law of nations. Immediately, this was to focus attention on the customs and practices of European states, upon the 'positive' or 'voluntary' law of nations as exemplified in treaties and diplomatic exchanges, rather than upon the rationalist discourse of the natural law. But it was also to reshape the way in which the literary tradition of natural law itself was to be received. The figures of Grotius, Pufendorf, Vattel, and so on would acquire a new vital resonance: no longer would they simply be the most prominent, or wise, advocates of a universal metaphysics (and represent, in that sense, a textual, literary tradition of judgement and opinion), but they would become representatives of a definitively historical tradition of thought and practice located in both time and place. As figures, they would begin to appear from behind the veil of their work—as advisors, philosophers, teachers, advocates—engaged in specified diplomatic, legal, and political activity, arguing with greater or lesser distinction as to the nature or content of the law of nations. Their work, furthermore, would no longer be valued merely in terms of its precision, rigour, or exhaustive character, but by the extent to which it spoke to a contemporary moral or political consciousness that was aware of its own historical place. The historicist alignment of judgement and social context that informed this was to add a new evaluative element to all the standard themes: the enslavement of enemies, claims to territory by way of papal grant, or the pursuit of 'just wars' were questions that could no longer be answered simply in terms of ideas of abstract justice, but in terms that recognized both the historical relativity of ethical judgement and the changing character of the social and political field within which they were to operate" (p. 29).

[12] In a similar vein, Koskenniemi has also defined *ius gentium* as "historical law" (M. Koskenniemi, 'A History of International Law Histories', p. 946).

[13] A. Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', *History and Theory of International Law Series*, *IILJ Working Paper* 2012/2, p. 2.

words, the European natural law and *ius gentium* traditions are for us informative of arguments and practices that used to be part of international law itself – and that provide us with an important source of information about where the normative content of many of the concepts that internationalists still use today derives from.[14]

An important chapter of the history of international law concerns the concept of customary international law. This thesis is devoted to re-tracing an intellectual history of this concept, precisely by looking at how it was framed by the most influential authors of the natural law and *ius gentium* tradition. When did custom start to be conceptualized as a source of legal obligation among sovereigns? What intellectual sources and traditions have influenced the emergence of this concept in the history of international legal thought?

Customary international law (CIL) is one of the most controversial sources of contemporary international law, precisely because of its theoretical difficulty. According to article 38.1(b) of the Statute of the International Court of Justice, CIL is one of the sources of international law, and it consists of "evidence of general practice accepted as law". This definition of CIL conceals endless theoretical problems, to the point that some have even suggested getting rid of this problematic and obsolete source of international law.[15] In spite of these provocative proposals, contributions from scholars and jurists seeking to disentangle the conceptual difficulties of CIL are abundant in current literature.[16] What these contributions

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[14] On the Foucaldian origin of the term "genealogy", see M. Foucault, 'Nietzsche, Genealogy, History', in P. Rabinow (Ed.), *The Foucalt Reader*, Panteon Books, New York 1984, pp. 76-100. On the problems concerning the use of "genealogy" in the history of international law see M. Craven, M. Fitzmaurice & M. Vogiatzi (Eds.), *Time, History and International Law*, Martinus Nijhoff Publishers, Leiden-Boston 2007 (especially the *Introduction* and contributions from R. Lesaffer and A. Carty); A. Rasulov, 'New Approaches to International Law: Images of Genealogy', in J. M. Beneyto & D. Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences*, TMC Asser Springer, 2012, pp. 151-191; K. Purcell, 'Faltering at the Critical Turn to History: Juridical Thinking in International Law and Genealogy as History, Critique and Therapy', *Jean Monnet Working Paper* no. 2/15; A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, Oxford 2017.

[15] J. P. Kelly, 'The Twilight of Customary International Law', *Virginia Journal of International Law*, 40/2 (2000), pp. 449-544.

[16] Some 'classical' texts facing the conceptual ambiguities of custom under international law are: A. D'Amato, *The Concept of Custom in International Law*, Cornell University Press, Ithaca NY-London 1971; F. Kirgis, 'Custom on a Sliding Scale', *American Journal of International Law* 81/1 (1987), pp. 146-151; M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*, Finnish Lawyers' Pub. Co., Helsinki 1989; K. Wolfke, *Custom in Present International Law*, M. Nijhoff, Dordrecht-Boston, 1993; M. Byers, *Custom, Power and the Power of Rules*, Cambridge University Press, Cambridge-New York 1999; A. Roberts, 'Traditional and Modern Approaches to Customary International Law: a Reconciliation', *American Journal of International Law* 95/4 (2001), pp. 757-791; A. Perreau Saussine & J. B. Murphy (eds.), *The Nature of Customary Law: Legal Historical and Philosophical Perspectives*, Cambridge University Press, Cambridge-New York, 2007; D. J. Bederman, *Custom as a Source of Law*, Cambridge Unviersity Press, Cambridge-New York, 2010; B. Lepard, *Customary International Law: a New Theory with Practical Applications*, Cambridge University Press, Cambridge-New York, 2010; M. Scharf, 'Customary International Law in Fundamental Times of Change: Recognizing Grotian Moments', *King's Law Journal* 25/2 (2014), pp. 313-317; H. W. A. Thirlway, *The Sources*

point out is that there are three major problems concerning the legitimacy of CIL as a source of legal obligation, i.e. political concerns; cultural prejudices; and methodological inconsistencies.

As for the first set of concerns, custom is accused of being a politically biased source of law. Indeed, because it traditionally relies on tacit consensus it can represent the hegemonic expression of the will of the most powerful states, which over time had the power and influence to impose respect for a customary rule of their choice and to turn it into an established and generally accepted practice.[17] In this respect, less influential states (mostly, non-European states) would find themselves in the position of having to accept and observe a customary rule, the formation of which had not involved their contribution or explicit consent.[18] In a similar manner, the "volatility" of CIL (in contrast to positive, written law) can be a powerful rhetorical device in the hands of more influential states that make use of it to pursue their own interests or political agendas. To solve this problem, recent international law has seen an increased sense of the importance of treaty law, and therefore of expressed rather than tacit consensus, precisely with the purpose of ameliorating the "democratic deficit" of CIL.[19]

These political concerns are a consequence of the widely-perceived cultural insufficiency of CIL as a source of legal obligation in facing the pluralist challenges of a global world. In other words, CIL might not only be the result of Western states politically imposing their own agendas on the world, but also of their own cultural mindset and legal tradition.[20]

Why, then, do we need CIL? This question is far from answered, but internationalists seem reluctant to abandon one of their most problematic, yet important sources of law.[21] From this perspective, starting from 2011, the International Law Commission proposed a long-term Programme of Work on "Formation and Evidence of Customary International Law". This title was eventually changed to "Identification of Customary International Law". The ILC produced

of International Law, Oxford University Press, Oxford 2014; J. B. Murphy, *The Philosophy of Customary Law*, Oxford University Press, Oxford 2014. Even more recent contributions include C. A. Bradley (ed.), *Custom's Future: International Law in a Changing World*, Cambridge University Press, Cambridge-New York, 2016; B. D. Lepard, *Reexamining Customary International Law*, Cambridge University Press, Cambridge-New York 2017.

[17] As pointed out by M. Byers, *Custom, Power and the Power of Rules*, pp. 3-20.

[18] On this aspect, see G. R. B. Galindo, 'Customary International Law and the Third World: Do not Step on the Grass,' *Chinese Journal of International Law*, 16/2 (2017), pp. 251-270.

[19] See J. O' McGinnis, 'The Comparative Disadvantage of Customary International Law', *Harvard Journal of Law and Public Policy,* 30/1 (2006), p. 7-14.

[20] Again, G. R. B. Galindo, 'Customary International Law and The Third World', pp. 8-9; however, A. Roberts sees this phenomenon in a comparative perspective and claims that customary equilibria are only a matter of balance of power and that the rise of TWAIL is actually helping the emergence of new, non-European, customary rules via "unlike minded approaches" (A. Roberts, *Is International Law International?,* p. 279).

[21] According to a famous statement by I. Brownlie, CIL is not just a part of international law but, rather, is international law itself (I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, The Hague Academy of International Law, M. Nijhoff, The Hague 1998, p.18).

five reports and draft articles on this topic (amendments to such articles have been recently issued),[22] the purpose of which was to clarify the controversial aspects of CIL. They constitute an important and authoritative source of information in understanding the stakes of the contemporary debate on this issue.

The ILC Reports consider the "approach of states" as the main source of information about CIL.[23] Furthermore, it states that the most important methodological aspect of contemporary CIL consists in the "widespread acceptance of the two-elements doctrine".[24] This doctrine, originating in the 19th century European legal tradition,[25] is a perfect example of what I have identified as the cultural fallacy of CIL. This expression means that CIL should be considered as constituted of two fundamental elements: *opinio iuris sive necessitatis*, namely the sense of legal obligation and necessity annexed to a given customary rule; and *state practice*, i.e. the practice of states as evidence of acceptance of such a norm.[26] As is often stated, whereas *opinio iuris* constitutes the psychological element of obligation, state practice is the material acceptance of a customary norm through the behavior of states. How do these two elements of tacit acceptance become visible so that the jurist is able to deduce or infer shared acceptance of CIL? Does mere *usus* suffice to determine the existence of practice or, vice versa, can the presence of a clearly defined *opinio iuris* justify the absence of relevant and consistent practice?[27] What kind of act of states (or more generally, international actors) count as expressions of *opinio iuris*?[28] Furthermore, the two elements doctrine is problematic as far as the formation of CIL is concerned: according to the so-called "chronological paradox of *opinio iuris*", how can states create a new customary rule that they do not already perceive as binding due to a sense of legal obligation? This paradox excludes the possibility that mere state practice can create CIL (since it lacks the psychological element of *opinio iuris*), but at the same time, it also questions the idea that a sense of obligation can arise out of nowhere.[29] If that is not the case, the suspicion might arise that states are inclined to perceive a sense of obligation towards

[22] M. Wood, *Fifth Report on the Identification of Customary International Law*, International Law Commission, Geneva 2018, A/CN.4/717.
[23] M. Wood, *Second Report on the Identification of Customary International Law*, International Law Commission, Geneva 2014, A/CN.4/672, p. 2.
[24] M. Wood, *Second Report*, p. 7.
[25] See next paragraph, p. 13.
[26] As famously stated by the ICJ in the *North Sea Continental Shelf*, ICJ Reports 1969, p. 3, at p. 44, para. 77.
[27] This possibility is foreshadowed in the 'sliding-scale' doctrine of custom (F. Kirgis, 'Custom in a Sliding Scale').
[28] For example, the question of whether UNGA resolutions amount to expressions of *opinio iuris* is still debated (M. Byers, *Custom, Power and the Power of Rules*, pp. 40-43).
[29] The famous doctrine of 'instant custom' includes the possibility that custom can arise spontaneously and 'out of the blue', as a consequence of the emergence of new situations or phenomena that the law has to deal with, as it happened for example with the law of the outer space in the 60s (B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', *Indian Journal of International Law* 5 (1965), pp. 23-112.

moral values that are already perceived as important to the international community, although they have not yet turned into existing legal obligations. In this sense, the existence of undeclared universal moral standards[30] might further support the charges of cultural deficiencies and hegemonic fallacies directed at CIL.

Furthermore, something all these concerns about the ambiguity of CIL have in common is that it is a conceptually biased and insufficient source of law, both because the process leading to the formation of a new customary rule is not clear enough, and because once it comes into existence it is particularly hard to identify as it is problematic to understand what kind of tacit behaviors imply a sense of legal obligation. Additionally, the possibility of change is called into question: can the object of a customary norm be changed? Or rather, would the only admitted change to a custom be, paradoxically, a violation?[31]

One could wonder what room there could be for historical analysis in such an already complex picture. Interestingly enough, CIL potentially shares the same accusations of imperialism that historical approaches towards international law are often charged with. The reason for such concerns is that both custom and history deal with the question: *what use should we make of the past*? Are they both incapable of grasping the reality of the global world in its relationship with a controversial past? If the past is law, and custom is certainly one important part of it, how can we look at that past by contextualizing, and yet giving meaning to it without being charged of anachronism? What kind of historical method should we use to reconstruct the genealogy of international customs? In other words, the equation between custom and history might seem more misleading than clarifying. First of all, because it might lead to the conclusion that if the development of CIL coincides with the historical past of international law, then CIL is inevitably as biased as the history of international law is. Secondly, due to its inherent nature custom is the result and repetition of past practices carrying legal meaning. However, as has been argued by anthropologists and ethnographers, custom mostly consists in the invention of the past through different rhetorical strategies.[32] This means that, on the one

[30] The question of the relationship between 'universal moral standards' and international law has been addressed by political philosophers, especially with regards to legal regimes such as *jus cogens* and human rights. See on this, and more specifically on the question of custom, J. Tasioulas, 'Custom, *Jus Cogens*, and Human Rights', in C. A. Bradley (ed.), *Custom's Future*, pp. 95-116.

[31] As famously stated by the ICJ in *Nicaragua Merits*, ICJ Reports, 1983. Although referring to a "virtually uniform practice" and "constant practice", (which is however difficult to ascertain, M. Wood, *Second Report*, p. 17), the ILC states that "some inconsistency is not fatal". Inconsistencies are, generally speaking, breaches of CIL rather than instances of contrary practice, but the ILC's clarifications aim to specify that no "universal practice" is required for a customary rule to be valid.

[32] As claimed by E. Kadens, 'Custom's Past', in C. A. Bradley (ed.), *Custom's Future*, p. 17; on this see also A. Dundes Renteln & A. Dundes (eds.), *Folk Law: Essays in the Theory and Practice of* Lex non Scripta, University

hand, it is a dynamic source of law expressing the changing values of a community, but on the other it calls into question the issue of legitimacy: how can custom be a reliable source of law if it is constantly adapting to situations and changes? How can we be sure that it does not become instrumentalized by political actors? Why do we not simply replace custom with positive law, which guarantees stability, clarity and efficiency? Or, rather, should international lawyers include historical analysis in their attempts to identify customary norms?

Looking to the past for precedential instances of customary norms is surely a marginal approach within the contemporary doctrine of positive international law (and not one void of methodological problems, especially as far as recourse to a so-called 'doctrine of precedent' is concerned).[33] In other words, judicial precedents cannot be taken as evidence of CIL (rather, they are "subsidiary means"[34]), because international courts cannot apply precedents of CIL to states taking part in a dispute, since those states might not have explicitly consented to that customary rule and cannot be bound by a previous judgment.[35] A compelling doctrine of consent, in other words, seems to be the answer to the legitimacy problems of CIL. Nor are historical occurrences commonly used as evidence of such consensus, since the question remains of selecting historical precedents and according to what criterion.[36]

Consistent with this approach, the ILC Reports do not mention any importance history might play in the ascertainment of CIL except an antiquarian one – only quoting Francisco Suárez and Hugo Grotius as the first instances of the conceptualization of custom in international legal thought.[37] However, what is historically relevant to the ILC Reports, but of course falls out of the scope of their purpose and application, is their insistence on the *value* of CIL as a source of law. The idea seems to emerge, ironically, that there is *opinio iuris* on *opinio iuris*, namely a sense of shared acceptance of the importance of custom as a source of international law, but why such an important value is conceded to it is still obscure. This dissertation will try to unravel this conceptual puzzle precisely by undertaking an historical

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of Wisconsin Press, Madison WI, 1994.

[33] On the use of historical precedent for judicial decisions, although in the context of international criminal trials, see R. A. Wilson, *Writing History in International Criminal Trials*, Cambridge University Press, Cambridge-New York, 2011.

[34] M. Wood, *Third Report on identification of customary international law*, International Law Commission, Geneva 2015, A/CN.4/682, Draft conclusion 14.

[35] On this aspect, see P. Palchetti, 'La rilevanza dell'atteggiamento degli stati parti nell'accertamento del diritto internazionale generale da parte della Corte internazionale di giustizia', *Rivista di diritto internazionale* (1999), pp. 647-679; C. A. Bradley, 'Customary International Law Adjudication as Common Law Adjudication', in C. A Bradley (ed.), *Custom's Future*, pp. 34-61.

[36] See next section, "*Custom through the history of human sciences*".

[37] M. Wood, *First Report on Formation and Evidence of Customary International Law,* International Law Commission, Geneva 2013, A/CN.4/663, p. 45.

overview of the concept of CIL as it started to emerge in the European legal tradition as one important and valuable feature of *ius gentium*. This operation will allow us, first of all, to ascertain the intellectual genealogy of such a pervasive concept of the Western legal tradition, and to see whether it has always been an exclusively intra-European source of law, or instead a relativistic, pluralist and dynamic legal concept that authors of the past have made use of to make sense of cultural differences between international actors.

The second sense in which a history of the concept of CIL might shed new light on the conceptual ambiguities of contemporary CIL is that (recalling the idea that the history of *ius gentium* is to some extent that of international law) through the intellectual history of CIL we are able to assess the argumentative strategies that led to the formation of the concept of CIL. In other words, the overarching thesis of this project is that the natural law and *ius gentium* tradition have provided normative content to CIL. An intellectual-historical analysis is useful to qualify such content, to show the conceptual development of CIL over time, and ultimately, to answer the question of why CIL is so important to the Western legal tradition of international law. This will be done by focusing on two main key-concepts of the early modern and modern tradition. I.e., the *conceptualization of human agency,* and the *use of the past*.

Firstly, the question of custom will be analyzed by investigating the anthropological assumptions each jurist implies in his legal doctrine. For instance, whether they rely on a voluntaristic or rationalistic doctrine of human morality, or rather on a general criterion of sociability, etc. By the expression '*conceptualizing human agency*'[38] I mean the doctrines (theological, philosophical, etc.) that lie at the foundation of natural law and serve the purpose of generalizing and legitimating human behaviors, by providing them with criteria of deliberation and action. This aspect is particularly important as far as the conceptualization of custom in the early modern period is concerned, as sovereigns starts to be conceived of as individuals, and consequently, as subject to the dictates of natural law. This means that, in general, the same rules that are valid for individuals can easily be applied to sovereigns in their mutual relationships, and that they are endowed with a set of natural rights and duties directly deducible from natural law.

[38] On "human agency", see T. Pfau, *Minding the Modern: Human Agency, Intellectual Traditions, and Responsible Knowledge*, University of Notre Dame Press, Notre Dame IN, 2013; E. Mayr, *Understanding human agency,* Oxford University Press, Oxford 2011.

Secondly, this work will focus on how authors of the past make use of *their own past*[39] to "invent custom". As I will discuss in more in detail in the methodological section, modern jurists are constantly engaging in a dialogue with intellectual sources from their past. The choice of such sources and of the method to read them all in a consistent matter, as a means of reframing past doctrines or creating fictional consensus among sources from antiquity, will be a fundamental factor in the development of CIL, as I will explain in the next paragraph. The historical past provides jurists with a conceptual reserve of argumentations and narratives, through which they can invent[40] customary rules applicable to their present situation. To retrace the history of the concept of the customary law of nations according to these criteria means then, to narratively re-create the story of the imaginative, creative process with which its formation is associated.

For the sake of clarification, it is worth specifying here that the purpose of this dissertation is not to undertake an analysis of European customs, which would constitute the ideal counterpart to this more theoretically-focused work. I will explain the reasons for this choice in the next paragraph, where the very notion of "state practice" will be challenged.

"The past won't rest": modern natural law and the "invention" of customary law of nations

Having explained the main conceptual problems of CIL, several claims that acted as guiding principles of my analysis are here discussed. The first of these claims is that, although the contemporary concept of CIL (as based on the two-elements doctrine described above) was born at the end of the 19th century, international custom was conceptualized long before that. Furthermore, whereas *opinio iuris* was not a criterion that modern jurists relied upon, they definitely had a concept of state practice that was, however, different from ours. I will presently explain to what extent.

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[39] As pointed out by F. Oakely, *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought,* Brill, Leiden 1999 (quoted by Orford, 'The Past as Law or History', p. 6, fn. 28); see also next section on *Methodology*.

[40] The "invention" of *ius gentium*, conceived of as a rhetorical activity of *inventio* of arguments, ties in with what has been defined by C. Warren as "the problematic of the made" (C. N. Warren, *Literature and the Law of Nations 1580-1680*, Oxford University Press, Oxford, 2015). In other words, dialogue with the past is for modern jurists functional to the creation of a science and practice of *ius gentium*, which is emerging in the modern age as a distinct legal regime. This applies particularly to custom, as will be argued in this thesis. Additionally, and interestingly enough, D'Aspremont refers to contemporary CIL as the "invention of an imaginary genealogy" (J. D'Aspremont, *International Law as a Belief System*, p. 87)

Indeed, the notion of *opinio iuris* was introduced by 19th century German (and French) legal scholarship, through the works and professional commitments of jurists like Franz von Liszt and François Geny.[41] In this respect, it has been argued by Carty that only a notion of *consensus* can be found in the work of authors like Hugo Grotius or Samuel Pufendorf, and that it is therefore inappropriate to speak of customary international law with respect to the classical authors of the natural law tradition. What I will try to show in this dissertation is that, on the contrary, although in ways that are different from our contemporary concept of CIL, the natural law and *ius gentium* tradition provided several conceptualizations of custom as a source of obligation among sovereigns. I will refer to these conceptualizations as "customary law of nations" in order to avoid anachronism and confusion with the contemporary definition of CIL. Across a timespan of two centuries, between Francisco Vitoria and Emer de Vattel, I will show different strategies adopted by several authors that all have in common the fact that natural law provides custom with a legitimizing principle of obligation. To put it radically, natural law was to modern jurists what *opinio iuris* is to contemporary international lawyers. The question then, is what kind of natural law doctrine lies in the background and legitimizes the customary law of nations.

This second claim, that a strong, co-constitutive relationship exists between natural law and customary *ius gentium*, also impacts the methodological approach of the present work. Consequently, the analysis will focus on the main characteristics of various natural law doctrines (and their respective impact in terms of the conceptualization of custom) in the more abstract and philosophical sense, rather than on a historical assessment of what customs were present in Europe at a given time or place. This choice is due to the fact that, as briefly mentioned above, in the modern age state practice is a controversial concept. First of all, the very concept of state practice lacked theorization because it was mostly deemed to conflict with natural law principles.[42] To modern jurists, custom could not be the illegitimate reiteration of a

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[41] Crawford attributes the first appearance of the expression "*opinio iuris sive necessitatis*" to Franz von Liszt (J. R. Crawford, *Brownlie's Principles of public international law*, 8th edition, Oxford University Press, 2012. For a more specific account see also *Chance, Order, Change, Collected course of the Hague Academy of International Law*, Martinus Nijhoff, Leiden 2014). Franz von Liszt was a late 19th century German jurist and author of *Das Völkerrecht systematisch dargestellt* (1898) in which he claims that "customary law – non-positive law- is the effective practice as manifestation of legal conscience". An alternative genealogy is provided by E. Kadens, who claims that *opinio iuris* was conceptualized by the French Jurist François Geny ('Custom's Past', p. 12). A. Carty has also insisted on the importance of the German Pandectist School for the emergence of such concept as an expression of *Volksgeist*, but attributes its importation in international legal discourse to A. Rivier and F. von Kaltenborn (A. Carty, 'Doctrine versus State Practice', in B. Fassbender, A. Peters (Eds.), *The Oxford Handbook of the History of International Law*, p. 978).

[42] J. P. Kelly holds a similar position in J. P. Kelly, 'Customary International Law in Historical Context: The Exercise of Power without General Acceptance', in B. D. Lepard, *Reexamining Customary International Law,* p. 47.

behavior carrying legal meaning; it had to be a legitimate source of obligation for sovereigns – that is why these authors seek to legitimize its normative content through natural law. This does not mean that state practice did not exist (namely, that custom was not a reality of the international relations, as it was practically used by jurists like Gentili or Bynkershoek in their legal profession), but merely that in the story of how customary law of nations was conceptualized over these two centuries state practice was considered potentially dangerous. Every time we find references to what happens in their contemporary state practice in authors like Gentili or Grotius, these references always have a pejorative nuance. What everybody does, or what is being reiterated as the result of years of injustice is not always what the law says it should be,[43] as custom is often, so to speak, the continuation of politics by other means. For this reason, *ius gentium* has the purpose of emending such errors by proposing a theory of custom that allows *gentes* to interact according to natural law, and yet to foresee a space of legal change according to the variability of human behaviors over time and space. From this perspective, there are two possibilities. Either reference to the practice of states is absent, as in the most abstract theorizations of customary law of nations (see, for example, those of Vitoria and Suárez), since natural law itself provides custom with all that it requires to be considered a valid source of legal obligation. Or, practice of customary norms is sought in the historical record, possibly as crystallized by classical history, rather than in the often illegitimate behaviors of sovereigns. I will come back to this point in the next section concerning methodology.

Another claim I make in this thesis, resulting from the previous one, is that I do not conceive of customary law of nations by analogy with custom under private law. Indeed, in Roman law, custom applies in the absence of written law, and *ius gentium* is not defined as customary but rather as *naturalis ratio* applied to human beings.[44] Rather, the main point of the early modern doctrines on *ius gentium*, engaging in an interpretation of these famous passages of the Justinian *Corpus*, was to establish the value and meaning of natural reason.[45] Recently, Kadens has rightly argued that 12th century commentator jurists are responsible for a pervasive misplacement of the analysis of the customary phenomenon, since they insisted on finding a definition of custom by analogy with written law: “the modern publicists’ problems with custom grow out of the efforts of the medieval jurists to fit custom into the hierarchy of law. […] This sort of lawyerly bias has its origin in the 12th century, when the European tradition of

[43] See, for example, Chapter 2.
[44] On the question of *naturalis ratio*, see *Institutiones*, I, 2; *Digestum,* 1.1.1.4.
[45] On this, see A. S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law,* Princeton University Press, Princeton-Oxford 2011.

formal legal study began. But custom had a prelegal existence, and in this natural state it did not fit the mold of enacted law".[46] Additionally, "natural custom was fluid, uncertain, equitable, and communitarian –features of a system of social regulation that lawyers no longer equate with law. Instead, for nearly 900 years, jurists and judges have been trying to force custom to look like what they have been trained to believe law is, and for nearly 900 years they have failed. Natural custom might, in certain circumstances, have functioned as law, but it did not function like law".[47]

My claim is that this challenge starts to be taken in the early modern period, when modern jurists start making a normative claim about the foundational role of natural law with regards to custom. In this respect, what is peculiar with the modern age is that jurists engage precisely in an interpretation of natural reason as a conceptual basis of *ius gentium*, in order to found the possibility of its universal application on generalized cognitive and moral capacities with which the whole of humankind is endowed. Therefore, as a result of such an analysis, the idea starts to emerge in the works of 16th century jurists that custom plays a fundamental role in qualifying the role and purposes of natural reason; either because custom is the virtual substratum of international relations even when written laws or treaties exist; or because it is conceptually impossible to conceive of *ius gentium* but as a customary legal regime; or because custom is equated to natural law, more aptly translated as the "unwritten rules of conscience" famously referred to in classical antiquity by Antigone.[48]

The pre-legal existence of custom also points to another problem of customary law of nations, namely that of political authority. Unlike private law, where custom only has a residual role in comparison with written law, and where such a "vacuum" can easily be filled by a legislator, *ius gentium* constitutively lacks such possibility. Consequently, custom can only count on the authority and the binding force that natural law provides it with, but this self-regulating capacity is itself insufficient to deal with the establishment of a political consensus among sovereigns. Ultimately, the question of sovereignty and of its role and function within the international society is at stake. Additionally, such a close relationship between natural law and custom calls into question the role of voluntary, positive *ius gentium*. How do we create a

[46] E. Kadens, 'Custom's Past', p. 11.
[47] *Ivi*.
[48] On this see, C. Humfress 'Law & Custom under Rome', pp. 23-47, in A. Rio (ed.), *Custom in the Middle Ages*, Hellenic Studies Institute, London 2012; A. Schiller, 'Custom in Classical Roman Law', *Virginia Law Review*, 2/3 (1938), pp. 268-282; see also G. Dilcher, *Gewohnheitsrecht in Mittelalter,* Duncker & Humblot, Berlin 1992. I refer to these works for further bibliography on the topic.

political community for *ius gentium*? Is custom positive law? How can custom become a valid source of mutual obligation for this community without letting particular sovereign interests emerge, at the expense of the universal human society? Who, ultimately, belongs to this community and who does not – and, if so, why?

This particular focus on the natural law foundations of the customary law of nations explains the choice to let the analysis begin with Francisco de Vitoria, father of the School of Salamanca, who started to reflect on how it was possible to create a consensual law of nations after the discovery of the New World. In other words, it can be argued that the history of customary law of nations begins precisely as a reaction to the intercultural demands of the global world, and calls into question the relationship between natural law and religion.[49]

In a similar manner, it ends with Emer de Vattel, who was one of the last influential jurists of the natural law tradition to conceive of a coherent doctrine of customary law of nations (comprising state practice, as I will explain) and inspiring later generations of professional international lawyers.[50] In this respect, Vattel marks the end of an era, but his intellectual formation is profoundly indebted to the previous generation of natural law scholars, like Grotius, Pufendorf and Wolff. Therefore, this project will not provide a narrative of the later 19th century concept of *opinio iuris*. Rather, it will seek to unravel the natural law foundations of customary law of nations, before it became CIL *stricto sensu*. As has been noted, this methodological choice has a declaredly normative purpose. Additionally, this work provides an overview of the main argumentative strategies of "invention" of customs that are still considered customary legal regimes today, despite having been recently crystallized into treaties (customs of war, laws of embassy, laws of the sea).

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[49] See, among others, M. Koskenniemi, M. García Salmones Rovira & P. Amorosa (eds.), *International Law and Religion*: *Historical and Contemporary Perspectives*, Oxford University Press, Oxford, 2017.

[50] As claimed by E. Fiocchi Malaspina, *L'eterno ritorno del Droit des Gens di Emer de Vattel (secc. XVIII-XIX): L'impatto sulla cultura giuridica in prospettiva globale*, Max Planck Institute for European Legal History, Frankfurt 2017

Methodology: customary law of nations, intellectual history and international legal thought

Recent scholarship has pointed out that the "turn to history" that has characterized international law not only has conceptual biases (which have been briefly described above) but is also problematic from a methodological point of view. One set of problems regards the legitimacy and the ideological purposes of this emerging interdisciplinary field, which is far from a unitary phenomenon. As a matter of fact, while there is a plurality of approaches generating different *histories* of international law,[51] the question still remains of whether and how it is possible to make sense of present problems by looking at the past. In other words, anachronism is the worst enemy of any historical approach towards international law, as the necessities of contextual historical analysis seem to conflict with the genealogical desires of contemporary international law. Even when such desires are not apologetically attempting to explain current problems with historical precedents, it has been pointed out that international lawyers might have a functional approach towards historical investigation.[52] They might, in other words, be interested in nothing but finding answers to their problems, irrespective of conducting a rigorous historical analysis based on the specific context in which authors lived and wrote their texts.

Furthermore, with regards to this last point, these concerns highlight that there is an unresolved tension between texts and context.[53] On the one hand, texts are vectors of meaning beyond the times in which they are written. On the other, each author is situated in a specific time and place which informs his preconceptions and understanding of the world. The analysis of the "classical authors of international law" is, in this respect, biased by the fact that we look at those authors with an eye to the influence that their contribution produced on our contemporary world. At the same time, such an approach instills the presumption of retracing historical past by assuming that history works as a series of necessary causal connections. Others have stressed rather that when looking at the past, we should be careful not to

[51] M. Koskenniemi, 'A History of of International Law Histories', in B. Fassbender, A. Peters (Eds.), *The Oxford Handbook of the History of International Law*, pp. 943-971.
[52] A. Orford, 'The Past as Law or History?', p. 6; R. Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in M. Craven, M. Fitzmaurice & M. Vogiatzi (eds.), *Time History and international Law*, p. 27.
[53] As famously claimed by the Cambridge 'contextualist' school of intellectual history: Q. Skinner, 'Meaning and Understanding in the History of Ideas', *History and Theory* 8 (1969), pp. 3-53; Q. Skinner, *The Foundations of Modern Political Thought*, 2 vols, Cambridge University Press, Cambridge 1987; see also A. Brett, J. Tully & H. Hamilton-Bleakley (Eds.), *Rethinking the Foundations of Modern Political Thought*, Cambridge University Press, Cambridge 2006; D. La Capra, *Rethinking Intellectual History: Texts, Contexts, Language*, Cornell University Press, Ithaca-London 1983.

overemphasize claims of authenticity and originality by indulging in arguments like "that is the first manifestation ever of this concept… this is the first expression of that practice".[54]

In this dissertation, I have tried to face and be aware of these problems without the arrogance of solving them in any definitive manner. Such a larger theoretical enterprise would fall outside of the scope of this work. However, I have tried to reconcile the normative claim that "the past is a source of contemporary obligations" with a number of strategies that allowed me to narrow my analysis of custom to three specific aspects. The first, namely the analysis of natural law in relation to customary law of nations, I have already discussed above. Such analysis has been undertaken with an approach that has recently been defined as "international legal thought", namely a history of concepts based on a moderate anachronism that consists of walking the line,

> […] between the inner structure of the argument, contextual research and a perspective carefully guided by today's international law. This involves thinking about questions like the author's intended audience, possible constraints, and the extent to which the theory responds to a given political context. To make sense of a use of the argument today, however, it is also important to take the theory out of its original context and reflect upon it in the light of current problems, and to ask whether its transformative value is dependent on the historical situation. This could mean, e.g., to ask to what extent Vitoria's and Suárez' arguments are not only explained through colonialism, but also dependent on it […]. The ambition of international legal thought thus understood obviously reaches further than confining international law to an assemblage of concrete treaties or customary obligations. On the other hand, it cannot be reduced to natural-law thinking. It evokes a specific *form* of normativity that touches upon many of the received accounts.[55]

In other words, the tension between *texts*, *context* and *reception* would allow us to read authors on different levels of interpretation, by both placing their texts within the context of their own mentality and, at the same time, by comparing *our* reception of them with *their reception* of their own past. This latter comparative activity is particularly interesting as it bears witness to the fact that our misconceptions (of authors writing on *ius gentium*) are often a consequence of a lack of appreciation of *their* reception of the past. Addressing the question of past lawyers talking to their own past is also a contextual activity. From this perspective, the

[54] However, in this respect, Fassbender has claimed that "genealogy does not mean identity" (B. Fassbender, 'Introduction: Towards a Global History of International Law', in *The Oxford Handbook of the History of International Law*, p. 7).
[55] S. Kadelbach, T. Kleinlein & D. Roth-Isigkeit, 'Introduction', in S. Kadelbach, T. Kleinlein & D. Roth-Isigkeit (Eds.), *System, Order and International law*, p. 4.

author's dialogue with selected sources from the past also becomes a source of information about the context in which they live in, about the intellectual debates they were involved in, and the polemical adversaries they have. An example of this strategy of "double contextualization" (with regards to texts and context) will be provided in the chapter on Grotius, who conceptualizes natural custom by relying on a revival of Dio Chrysostom as a witness of the naturalness of the customary phenomenon. Through Grotius' reading of this and other sources, we are able to identify a crucial passage in the history of the concept of customary *ius gentium*, consisting of a clean break up with the scholastic moral theory.[56] Classical reception studies[57] have, in this respect, helped the present analysis insofar as they allow contemporary readers to distinguish between different layers of receptions. Additionally, ultimately what the history of the reception of classical antiquity into the international legal discourse shows, is that recourse to the classical tradition to make legal arguments reinforces the idea that custom is a cultural product of European civilization. We owe this intuition to Pufendorf, who first thought that custom was not only the result of the political and diplomatic interaction of European nations, but also an effect of their cultural proximity, as it enshrined a number of values (like those, for example, of moderation expressed in the customs of war) that the international community[58] conceive of as important and, therefore, binding. Such values are best expressed in the most authoritative classical authors of Western culture (Cicero, Seneca, poets like Virgil, historians like Tacitus or Livy, etc.).

The history of reception is also closely interconnected with the history of those disciplines that provide authors with categories to read those texts. Without the help of what is generally referred to as "history of disciplines" most of the importance of the modern jurists' activity as interpreters of the past would be lost. By combining approaches taken from the history of disciplines and history of philosophy, [59] I have tried to contextualize the intellectual

[56] See chapter 4.

[57] L. Hardwick, *Reception Studies*, Oxford Unviersity Press, Oxford 2003; L. Hardwick & C. Stray (Eds.), *A Companion to Classical Reception*, Blackwell Publishing, Malden MT 2008; C. Kallendorf, W. W. Briggs, J. H. Gaisser, C. Martindale (Eds.), *A Companion to the Classical Tradition*, Blackwell Publishing, Malden MT 2007; W. Brockliss, P. Chaudhuri, A. H. Lushkov & K. Wasdin (Eds.), *Reception and the Classics: an Interdisciplinary Approach towards Classical Tradition*, Cambridge University Press, New York 2011.

[58] Or, in the words of Pufendorf: "system of states". See chapter 5.

[59] On the history of disciplines, see for example D. R. Kelley (Ed.), *History and the Disciplines. The Reclassification of Knowledge in Early Modern Europe,* University of Rochester Press, Rochester NY 1997; L. Graham & W. Lepenies (Eds.), *Functions and Uses of Disciplinary Histories*, Springer, Dordrecht 1983; E. Messer-Davidow, D. R. Shumway, & D. J. Sylvan (Eds.), *Knowledges: Historical and Critical Studies in Disciplinarity*, University Press of Virginia, Charlottesville 1993. More specifically on the relationship between history and philosophy, see, among others: R. Rorty, J. B. Schneewind, Q. Skinner & C. Taylor (Eds.), *Philosophy in History*: *Essays on the Historiography of Philosophy*, Cambridge University Press, Cambridge 1984; A. J. Holland (Ed.), *Philosophy: its History and Historiography*, Reidel, Dordrecht 1985; J. E. Gracia, *Philosophy and*

traditions that the authors taken into account considered themselves indebted to. Such a methodological choice, in a way close to the approach called by Hochstrasser "histories of morality",[60] is useful in at least two respects. First of all, it substantiates and categorizes the content of the natural law doctrines that modern jurists rely upon (something that was previously referred to as "conceptualizing human agency"). For example, theology and philosophy play fundamental roles in providing natural law with systematic and universalistic principles, which are also reflected in the theorization of custom. Disciplines such as rhetoric and historiography helped the jurists in the activity of inventing custom through an invention of the intellectual past.

Secondly, following the conceptual development of the customary law of nations across the history of these disciplines also seeks to provide a reaction to the accusation of functionalism that histories of international law are often charged with. In other words, the history of human sciences not only helps us to understand the evolution of customary law of nations, it also gives us information regarding the evolution of the history of human sciences in general. This is made possible by the fact that in the modern age, the study and practice of law had not yet been subject to the professionalization that would come later in the 19th century. In this respect, jurists are often intellectuals, historians, philosophers and political theorists, and it is impossible to grasp their legal argumentation without having a sense of the totality of their intellectual interests, which often considerably impacts on their legal analysis. In the next section, I will show how these different levels of analysis are intermingled in the interpretation of the authors that I have taken into account.

Inevitably, the choice of authors is just one of many possible choices that one could make, if he/she is interested in the interrelation between natural law and customary law of nations. However, I have tried to group them according to the historical-disciplinary model described so far, and in order to show the evolution and discontinuities of the concept of custom. To this end, I tried to systematically account for their reciprocal relationship as readers and interpreters of each other's thought.

The work is so divided into two parts: the first deals with the emergence of the concept of customary law of nations in the early modern 16th century legal tradition, by juxtaposing and

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its History: Issues in Philosophical Historiography, State University of New York Press, Albany 1992. G. Santinello, *Storia delle storie generali della filosofia*, La Scuola, Brescia 1979.

[60] T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment*, Cambridge University Press, Cambridge-New York 2000.

contrasting two different natural law doctrines, the theological one of the School of Salamanca (through the eyes of Vitoria and Suárez) and the rhetorical theory of *ius gentium* by Gentili. The second part takes into account the modern legal tradition from Grotius, *via* Pufendorf and Wolff, to Vattel, by showing the relationship between custom and the systematization of natural law into a body of rational law which constitutes a leitmotif of the 17th-18th century.

Customary law of nations through the history of human sciences

Through such an analysis of the most influential jurists of the modern legal tradition, it is possible to detect two fundamental strategies concerning the "invention" of customary law of nations. Either the normative content of custom is invented by reference to universally applicable (preferably theological) principles, or the invention of custom coincides with an appeal to the European literary-historical past in order to extract principles compliant with the dictates of right reason. The "invention" of customary law of nations will be analyzed through the lens of five major disciplines (and their respective development between the 16th and 18th century) which significantly contributed to its emergence as a concept: theology, rhetoric, *historia literaria*, philosophy and official historiography.

As has been pointed out, for modern jurists, custom as a source of obligation among sovereigns was problematic for both epistemic and political reasons. In other words, the two main concerns of jurists of the natural law tradition are how to create a valid method to identify custom, and what political entity is needed to implement it. Consequently, the concept of customary international law emerged out of a significant interaction between the following two factors: the origin of the obligation of natural law, and on the other hand the epistemic certainty through which this obligation can be understood rationally. The more authoritative and certain the source of obligation, the clearer the cognitive process through which we can acknowledge such obligation. Theology, rhetoric, historiography and philosophy tell us a story of this interaction between the epistemic discourse and the political aspects of custom.

Such interaction is particularly evident in authors from the Second Scholastic, who rely on a strongly theological framework to build their theories of natural law and *ius gentium*. As a result, the certainty of their metaphysical tenets is reflected both in the existence of a stable

order among principles of knowledge and in the faith of a superior political order.[61] In other words, an almost unchanged reliance on Aristotelian epistemology together with faith in God's superior authority (of which the Church is a manifestation) guarantee that customary law of nations is rationally deducible, understandable and therefore applicable to diverse and even distant *gentes*. Francisco de Vitoria and Francisco Suárez, both representative figures of the School of Salamanca, analyzed in Chapters 1 and 3 respectively, offer a valid example of this claim, although they make distinct arguments. International custom allows us to pursue universal common good, as theology plays a fundamental role in setting the moral agenda of international relations.[62]

Another valid strategy to conceptualize customary *ius gentium* in the 16th century is to resort to the authority of the classical past. Scholars have insisted on the wider cultural and intellectual impact of humanism and *studia humanitatis* on legal disciplines.[63] Indeed, dialogue with the past can be equated with calling a "mute witness" to the bar. The "muteness" of history, in this respect, can be equated to the tacitness of the consensus required by custom. Both cannot be contradicted, therefore utmost attention to the selection of sources is needed, and the trustworthiness of documents, authors and sources becomes of great relevance. However, turning back to the European historical past seems a better alternative than to search for legal validation in a present defined as barbarous and vulgar.[64] Concerning rhetorical *inventio*, the Italian jurist Alberico Gentili provides us with a first example of rhetorical method applied to the identification of customary law of nations (Chapter 2). Such a method, also applied by Hugo Grotius (Chapter 4) but with significant amendments, consists in providing likely argumentations (*rationes probabiles*), drawing from classical historiography, philosophy and even poetry, in order to prove the shared acceptance among scholars of the past of a given customary rule. Rhetorical method is quite important because it introduces in international legal thought, and more precisely, in the development of the concept of customary law of nations, a primitive criterion of *opinio iuris*. The more widespread acceptance a customary rule has, the more it is valid, not because it is accepted by a larger number of people, but because such an acceptance is a sign that it represents a manifestation of natural law principles. Additionally,

[61] M. Scattola, 'Before and after Natural Law: Models of Natural Law in Ancient and Modern Times', in T. Hochstrasser, P. Schröder, *Early Modern Natural Law Theories. Contexts and Strategies in the Early Modern Enlightenment*, Springer, Dordrecht 2003, p. 5

[62] Although H. Höpfl argues that it is unappropriate to speak about *respublica christiana* with regards to Suárez. See H. Höpfl, *Jesuit Political Thought: The Society of Jesus and the State, 1540-1630*, Cambridge Unviersity Press, New York 2004, p. 359.

[63] See chapter 2 and related bibliography on the legal impact of humanism.

[64] See chapter on Gentili, *infra* at p. 76.

rhetorical method provided customary *ius gentium* with an inductive method of identification, rather than with a deduction of universal principles as the theologian's model did. In this respect, the relationship of customary law of nations with these epistemic questions concerning the validity of human knowledge is also informative for us since it connects the story of CIL with the debates concerning deductive and inductive methods of ascertaining custom.

But after Grotius the question of method starts to be designated as an urgent philosophical problem, as consequence of reflection on the nature of legal obligation. Rhetorical method starts to be considered too arbitrary to provide a legitimate foundation to natural law. These concerns result in Samuel Pufendorf's more "geometrical" rationalism (Chapter 5), whose main concern is to turn historical analysis into a deductive system of knowledge. *Historia literaria*, considered as the unanimous consensus of antiquity, seems to be a valid alternative to rhetoric, as it consists of portraying classical sources in an eclectic but exhaustive manner, which the "arbitrary" choice of rhetorical *topoi* did not allow. While in the 16th century (and beginning of the 17th) rhetorical argumentation aimed to contrast the universalistic scholastic line of reasoning by promoting a view of the human condition as fundamentally uncertain and unstable and constructing a secularized space of peace against the turmoil and cruelness of European wars of religion, the eclecticism of the *historia literaria* sought to fight the extremism and dogmatism of the 17th century German academic environment. Such demands of philosophical certainty would become more and more urgent for Christian Wolff (Chapter 6), a follower of G. W. Leibniz, who rejects the utility of *historia literaria* as a method for both philosophy and his legal doctrine. By contrast, for the first time he elaborates a "philosophical theory" of customary law of nations based on the deduction of the fundamental principles of natural law and human psychology. From this perspective, custom becomes an abstract theoretical device providing jurists with a criterion of compliance with natural law, and consequently with the pursuit of universal common good.

One might think that after such a process of abstraction nothing is left for a concrete, pragmatic assessment of customary law of nations. Quite the contrary. Post-Westphalian Europe has seen the rise of official historiography intended to be the study of contemporary history as opposed to literary history, through which court historians narrate enlightened stories of national interests and *raison d'etat*. In this respect, official historiography constitutes a fundamental turning point of our narrative, as it contributes to a rehabilitation of the role played by state practice in the conceptual development of custom. As pointed out above, until Grotius, looking at contemporary practice of states was not deemed a legitimate method to detect

customary practices, as it was of primary importance to establish the normative, natural law core of custom. However, as sovereignty emerges as a founding principle of both political thought and international relations after the peace of Westphalia, contemporary history starts to play a legitimate role in the history of customary law of nations, as it provides it with a genealogy of each state's characteristics, policies and self-interests. Whereas Pufendorf is the instigator of this fundamental methodological change, by combining the analysis of literary occurrences from the past with contemporary history, the Swiss jurist Emer de Vattel (Chapter 7) brings this method to a more mature completion. Vattel provides us with a coherent doctrine of customary law of nations precisely by reconciling his attention towards the diplomatic practices of states with the natural law principles he both inherited from, and reframed in contrast with his predecessors (Grotius, Pufendorf and Wolff).

As is commonly known, Vattel's account of the law of nations will be particularly influential for the 19th century jurists, but he does not provide an explicit doctrine of state practice and *opinio iuris*. Quite the contrary, to hint at further developments of the category of custom beyond the scope of this dissertation, the concept will first be analyzed by authors like Johann Jakob Moser (1701-1785). Moser claims that *ius gentium* is a question of *praxis,* and not what academics write in their books (and he quite ironically wrote a book himself to prove it, his *Grundsätze des jetzt üblichen Europäischen Völcker-Rechts in Friedens-Zeiten*, 1750). However, the influence of Kantian critical philosophy challenged the category of custom by informing legal theory in the light of the formalism of reason. Two significant texts witness this transformation: that of Karl Gottlob Günther, *Europäischer Völkerrecht in Friedenszeiten nach Vernunft* (1787), and G. F. von Martens' (1756-1821) *Précis du droit des gens* (1789). Is there a place for custom in Kant's *Perpetual Peace* (1795)? Apparently, his transcendental method rules out the possibility of a customary law of nations, which is replaced by a completely new idea of international legal order. Is it the death of international custom, which is nothing but the product of "sorry comforters of international law"?

It has been argued by several scholars that the first occurrence of the expression '*opinio iuris'* is to be found in the works of authors of the 'Historical School of Law' (or 'Pandectist School'), which developed in Germany at the beginning of the 19th century with figures like K. F. Savigny and G. F. Puchta. Arguably, although these figures have played an important role in the history of custom, they did not consider custom and *opinio iuris* as applicable to interstate relations. These authors reflected on the question of *Rechtsüberzeugung*, i.e. the legal conviction of obligation perceived by a certain *Volk* towards the unwritten norm of his land.

Custom, just like language, develops spontaneously out of the *Volksgeist* (notably, J. G. Herder was one important source for Puchta). Consequently, due to its nationalist character, this theory of *opinio iuris* is inapplicable to the society of nations. Therefore, for a proper concept of *opinio iuris* as one constitutive element of customary international law to emerge, we have to wait for the second half of the 19th century, when the idea of a community of European civilized nations becomes a foundational category of international discourse[65].

To conclude, some reflections on the conceptual and political biases of custom will be provided. Are such biases constitutive of the concept of custom? What is, ultimately, the value of customary international law in the light of historical analysis of the concept in the natural law tradition? Is the normative, moral character of custom still present in contemporary debates concerning, for example, CIL and *jus cogens*?

[65] M. Koskenniemi, *The gentle civilizer*; L. Nuzzo, *Origini di una scienza*.

Part 1. Global law, multiculturalism and the boundaries of humanity: why was customary law of nations "born" in the 16th century?

For those addressing the issue of CIL, the legal tradition of the 16th century constitutes a fundamental turning point. Although customary international law was already present in international relations before the 16th century[66], this does not imply that it was explicitly conceptualized as a source of law. Instead, it is only in the works of the so-called 'fathers of international law' that we may begin to find assistance as to a proper reflection on custom as a fundamental source of obligation among nations. In this part of my thesis, I will provide insight into the works of Francisco de Vitoria (1486-1546), Alberico Gentili (1552-1608), and Francisco Suárez (1548-1617). All these figures play a decisive role in this investigation into the concept of custom, as they all try to conceptualize it as a source of international obligation using different strategies.

Why start this narrative precisely in the 16th century? Traditionally, it has been argued that in the 16th century the reflection on *ius gentium* and natural law becomes crucial, after the intellectual foundations of Europe have been shaken by the discovery of the New World.[67] Indeed, in this period traditional European political language has to face the question of cultural communication (or, as it has been even more radically referred to, *commensurability*[68]) with the newly discovered people. From this perspective, what kind of relations exist between particular human societies and human society as a whole? This is one of the crucial questions addressed by all the authors in this period, in order both to justify the extension of the boundaries of humanity, and to prove that, beyond all apparent differences, human beings belong to the same global community (*orbis*)[69] by virtue of their inherent rationality. *Ratio* acts a universalistic principle because it is, on the one hand, philosophically resistant, and on the other, legally binding. With regards to the first philosophical aspect, humans cannot lack reason, otherwise God must have deceived them. Brett argues that in this respect,

[66] See W. Grewe*, The Epochs of International Law*, W. De Gruyter, Berlin-New York 2000, p. 88-91.

[67] M. Koskenniemi, 'Colonization of the Indies: The Origin of International Law', in Y. G. Chopo (ed.), *La idea de América en el pensamiento jus internacionalista del siglo xxi*, Institución 'Fernando el Católico y Universidad de Zaragoza, Zaragoza 2010, pp. 43-63.

[68] A. Pagden, *European Encounters with the New World: From Renaissance to Romanticism*, Yale University Press, New Haven 1994.

[69] On Vitoria's concept of *orbis*, see K. Bunge, 'Francisco de Vitoria: a Redesign of Global Order on the Threshold of the Middle Ages to Modern Times', in *System, Order, International Law*, pp. 38-55.

> the construction of human being as free being coincides with the construction of the subject of law. Government by law is not the application of external force (violence), nor is it the harnessing or engendering of passion or appetite (natural inclination) […]. Rather, it works by commanding choice, and it demands a subject capable of choice […]. That choice is not simply between material objects or courses of action, but between those things understood as in some way good or bad. The concomitant of a natural capacity to choose in this sense is some kind of natural principle or principles of choice, which is provided for our authors by the notion of a natural law.[70]

Consequently, the crucial question for Vitoria and others contemporary to him was to assess whether these newly discovered people were capable of *dominium,* although they seem "very little different from brute animals who are incapable of ruling themselves"[71]. This would make them subjects of law under all respects - and also prove that the Spanish conquest was illegitimate. As a matter of fact, the American Indians "did, in fact, have 'a certain rational order in their affairs'. They lived in cities, had a recognized form of marriage, magistrates, rulers, laws, industry and commerce, 'all of which', as Vitoria observed, 'require the use of reason'."[72] In other words, the theoretical challenge for these authors is to include these categories of para-humans within the boundaries of humanity in order to,

> create a political philosophy which could be fully accountable in terms of a set of rationally conceived, and thus universally acceptable, first principles. The application of these principles was, however, consensual. Knowledge was, in Francisco de Vitoria's blunt phrase, 'that thing on which all men are in agreement', and it could, as Grotius and Pufendorf were to argue, be made identical with men's interests on the same understanding: that this is, self-evidently, what God must have intended for man. Human societies were, therefore, sources of knowledge.[73]

This inclusive effort, which has been referred to as the "rhetorical invention of

[70] A. S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*, Princeton University Press, Princeton/Oxford 2011, p. 62.
[71] F. Vitoria, *On the American Indians*, in *Political Writings*, ed. by A. Pagden and J. Lawrance, Cambridge University Press, 1991, p. 239.
[72] A. Pagden, 'Dispossessing the Barbarian: the Language of Spanish Thomism and the Debate over the Property Rights of the American Indians', in A. Pagden (Ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge University Press, Cambridge 1987, pp. 82-85.
[73] A. Pagden, 'Introduction', in *The Languages of Political Theory*, p. 4.

otherness"[74] is what motivates the choice of Vitoria, Gentili and Suárez as the object of a preliminary assessment of how can custom be conceptualized as a source of obligation for nations. Despite their respective differences as intellectuals, they are all engaged into a communal effort to turn natural law into a *"*a consensual and historical *ius gentium".*[75] The driving force behind this attempt is the urge to construct a new global law which is as universally applicable as possible, even to newly-discovered peoples. However, the intellectual milieu and sources of a 16th century jurist cannot but subordinate any reflection on *ius gentium* to that of *ius naturae*, with the result that the concept of nature is so overwhelmingly self-evident as to leave the contemporary reader at an impasse. In accepting this as a matter of fact, Gentili and Suárez are particularly modern. They seek to emphasize the human (opposed to the natural) derivation of the legal phenomenon, in order to make it subject to the changes and variability inherent in human nature. However, as I will show, this would constitute a danger in the eyes of Vitoria, who preferred to rely on the indisputably true and universal foundations of human reason as a solid basis on which to found his legal doctrine. It is in this scenario that the reflection on custom becomes particularly interesting. How is it possible to make the application of those rational and universal principles "consensual"? How do these authors think of custom as a law of humankind? What sort of intellectual devices are developed in order to make reason customary? What is the relation between custom, *ius naturae* and *ius gentium*? My hypothesis is that before becoming a source of the law of nations, custom is understood as a typically human practice. The way in which it is conceptualized depends on the theological and philosophical sources taken into account by each author. Three different strands were identified in this part, as I will show in the three chapters that follow: custom as coincident with human reason (Vitoria); custom as evidence of generally accepted human behaviors (Gentili); custom as the result of reiterated acts of will (Suárez).

After the discovery of the New World, we seem to assist in a collapse of the idea of human nature (which the 17th century rationalism will try to reassemble). That which seemed predictable, unchangeable by virtue of its similitude to the Creator, becomes all of a sudden subject to cultural and geographical variability. Human behaviors have never been so unpredictable: and all the efforts to normalize them into a universal rational model are nothing but proof of this acknowledgment. To put it radically, the question of radical human uncertainty

[74] G. Gliozzi, *Adamo e il nuovo mondo: la nascita dell'antropologia come ideologia coloniale: dalle genealogie bibliche alle teorie razziali (1500-1700)*, La Nuova Italia, Firenze 1976.
[75] M. Koskenniemi, 'International Law and *raison d'état*: Rethinking the Prehistory of International Law', in *The Roman Foundations of the Law of Nations*, p. 303.

ties in with the creation of an interconfessional consensus that guarantees Europe with a space of peace and security, notwithstanding religious conflicts and hegemonic pretensions over the New World.

Perhaps that is why, and this is the second claim of this first part of this dissertation, custom starts to be designed in this period as a *reflection* of natural law. In fact, custom does not lack normativity; but does it also feature immutability? If yes, is it a divine immutability, like the one granted by *ius naturae*? This is a fundamental point. In other words, the concept of customary law of nations strives to emerge between two opposite poles, namely the immutability of *ius naturae* and the variability inherent in human positive law. From this perspective, the choice of these three authors could not be more paradigmatic. For all of them, investigation into the nature of *ius gentium* becomes the crucial point of the analysis: *ius gentium* has been considered by them as either the same as natural law or as a form of positive law dependent upon natural law (in terms of moral content). Each of these *divisiones iuris*, both derived from the corresponding famous passages in Justinian's *Corpus*,[76] delimits a sphere of possibilities for the concept of custom to emerge. More specifically, if the law of nations is considered the same as natural law, we expect that both legal realms will share immutability as a common feature. In such a scenario, custom will be valid only insofar as it reflects natural law. This makes the constant repetition of an act a legally binding norm. On the other hand, there is more space for the emergence of a flexible concept like custom if *ius gentium* more closely resembles positive law (although being a specific kind of natural law applied to *gentes*). Such an equation with positive law allows *ius gentium* to change, but only partially – changes and modifications are admitted only insofar as they do not violate natural law. Therefore, whether *ius gentium* is identical with, or derived from natural law, in both scenarios the concept of customary law of nations seems to be a mere intellectual surrogate, neither binding enough to be natural law, nor effective enough to be positive law. How to solve this paradox? First, Francisco de Vitoria considers law, and so too *ius gentium*, to derive from reason. As will be shown below, it is *reason* that provides him with a counterfactual argument based on the existence of a universal and non-derogable consensus. Vitoria argues that since law is derived directly from reason, it is therefore unchangeable; even in the unlikely event of a universal assembly, no one would abrogate such law, as this would imply giving up the use of human reason as well. It is on this strong analogy, between law and reason, that Vitoria founds his

[76] Inst. I. 2.1; Dig.1.1.1.4 (*Codex Iustinianus*, ed. by P. Kruger, Weidmann, Berlin 1900).

theory of a consensual *ius gentium*. Alberico Gentili's solution, however, could not be more distant from that of Vitoria. Gentili conceives of human reason as *probabilis*, as the result of a constant practice of imitation and repetition of acts worthy of social approbation. Therefore, Gentili argues that by taking a closer look at human conduct, it is possible to identify, *empirically*, a number of norms on which there is a shared consensus. Additionally, the 'humanist' Gentili also constructed a primitive category of *opinio iuris* by borrowing from the humanists the method of taking into account the works of authoritative scholars as evidence of consensus. Lastly, Francisco Suárez considers law to be the expression of the will and consent: through the crucial notion of *habitus*, as a repetitive act of will regarded *as* natural, he addresses the issue of custom more systematically as a source of obligation among sovereigns. He concedes to customary law of nations a substantive conceptual primacy, by introducing into *ius gentium* a Scotist voluntarist theory of the law. This allows custom to be the expression of the will of sovereigns, and not a mere conceptual surrogate of an immutable universal reason like in Vitoria.

Another element deserves our attention. A tension exists between custom as norms of conduct between private individuals, and as a source of legal obligation among sovereigns. This is another typical feature of the 16th century historical context, i.e. the gradual emergence of states as subjects of *ius gentium*. This gradual emergence is particularly evident in Vitoria's thought, where a "public *ius gentium*" problematically coexists with a "private *ius gentium*", while disappearing with Suárez, who writes more than half a century after him. In other words, if it is true that *ius gentium* applies to all human beings in the world, how can it also be applied to sovereigns, who are, by definition, *legibus soluti*? How can custom become a source of legal obligation for them – and not a mere philosophical construct useful in explaining recurrences and constants in human behaviors? In such a scenario, two possibilities are foreshadowed. On the one hand, custom could be conceptualized in a way that made it transposable from the domestic level to the international one. Provided that states are considered *as* individuals, the same set of rules are (at least conceptually) applicable to both of them. As a direct consequence, one possibility for custom to become customary international law was to consider the factual existence of states and their qualification as legal *personae*. This transposition was made possible by the fact that both individuals and states were deemed to comply with the dictates of natural law, which constituted the highest normative peak both of private law and, even more particularly, of *ius gentium*. However, provided that through the so-called "domestic analogy" *ius gentium* would apply to sovereigns (as 'public' projections of individuals), the question still

remains of making this new scenario fit into the old categories of natural law and *ius gentium*. One thing is to say that natural law and natural reason are essentially customary, in the two senses explained above; a further step is to claim that custom, a source of private law, is also a source of *ius gentium*. The complete transposition of the concept from one realm to another is due to the efforts of Suárez.

Another strategy, happily pursued by Vitoria and, to some extent, by Gentili,[77] is to consider *ius gentium* not as international law but rather as an inter*personal* law – as defined by A. S. Brett.[78] In such a scenario, the existence of public entities is not a necessary requirement, because every kind of legal obligation derives directly from membership of *humanitas*, for which *ius gentium* is precisely designed, and from the inherent rationality of its members. According to this cosmopolitan ideal *ante-litteram*, derived from an interaction of the model of the *respublica christiana* and from the humanistic reprisal of the Roman Stoic tradition,[79] in every community, human behaviors, if not totally understandable, are at least interpretable to a certain extent. One could argue that custom does not need such a criterion, as the constant repetition of an act over time itself amounts to a legally binding behavior. This is precisely the point, and herein resides the novelty of the 16th century legal tradition. In order to construct custom, an external criterion has to be identified according to which each action can be explained and considered applicable to a (recently expanded) global community; the more general this criterion is, the more it deserves universal application, as we will see in Vitoria.

Finally, all these theoretical questions have a considerable impact on the method which is deemed most appropriate to identify custom. In this first part, we will see the contrast between two models, theological deduction vs. rhetorical induction of custom. The first method, adopted by Vitoria and Suárez, is a consequence of the epistemic and political overlap between reason (as a human faculty of understanding) and political *orbis*, of which each rational being is part by virtue of the mere fact of being endowed with reason. From this perspective, custom will be a simple, intuitive deduction of general behavior starting from natural law principles, whose universal applicability is guaranteed by both reason and divine will. With Gentili, instead, we

[77] Gentili acknowledges that *ius gentium* applies to sovereigns (DIB I, III). However, he is also skeptical about the possibility of sovereigns enforcing *ius gentium*: see *infra*, Chapter 2. *Humanitas* is, in other words, the subject for which Gentili's *ius gentium* is specifically designed.
[78] A. S. Brett, *Changes of State*, *Nature and the Limits of the City in Early Modern Natural Law*, Princeton University Press, Princeton/Oxford 2011 p. 12-13.
[79] See L. Scuccimarra, '*Societas hominum*. Cosmopolitismo stoico e diritto delle genti', in L. Lacché (Ed.), *Alberico Gentili e gli orizzonti della modernità: ius gentium ius comunicationis ius belli*, *Atti del Convegno di Macerata in occasione delle celebrazioni del quarto centenario della morte di Alberico Gentili (1552-1608), Macerata 6-7 dicembre 2007*, Giuffrè Editore, Milano 2009, pp. 29-50.

assist in the introduction of a rhetorical method, in proper humanist fashion, in order to make sense of the customary phenomenon. Custom is itself a rhetorical construct, instances of which can only be collected by induction, namely by inferring probable behaviors according to a logic of double approbation from both human conscience and from authoritative scholars from the past. The interaction between inductive and deductive methods of analysis of custom is particularly informative of a tension (between the universalism of reason and the occurrences of particular human facts), which will be also a feature of later developments of custom within the natural law tradition.

Chapter 1. “Like beginners in Arabic.” The double-face of custom in Francisco de Vitoria’s doctrine of *ius gentium*

The importance of Francisco de Vitoria for the birth of international law has been widely acknowledged. His doctrine of *ius gentium* contributed to the creation of a universal legal argument that was pervasive in Western legal thought not only at the threshold of modernity,[80] but whose centrality was also genealogically recalled in the 19th and 20th centuries (most famously, by international lawyers as James Brown Scott and Camillo Barcia Trelles) as foundational of international legal science.[81] Vitoria, one of the first theologians of the School of Salamanca, was definitely one of the most important figures reacting to the discovery of the New World by engaging in a dialogue with sources of the past (most notably, Thomas Aquinas’ *Summa Theologiae*), providing theology and law with new frameworks of enquiry. The close connection between theology and law was one of the main motifs of the School of Salamanca, of which Vitoria was one of the first, and the most representative figure. It has been argued that in this respect, the central feature of this School (whose method is often referred to as ‘scholasticism’) is derived, first of all, from the style of argumentation of theologians, who had a *schola* as addressee and made use of *quaestiones* to present problems (*quaestiones* could also be presented in the form of *lectiones* or *relectiones*). The medieval model of the *quaestio* allowed theologians to dialectically provide different contrasting solutions to a given problem, which was eventually solved in the light of the divine scriptures and theological authorities. Thus, in a second sense, scholasticism implies a precise attitude of respect towards the main authority, namely Thomas Aquinas[82]. Scholasticism, therefore, although comprising a wide variety of doctrines and of authors, can be described as a unitary phenomenon, at least as far as its ideological motives are concerned. For the sake of clarification, it is possible to identify at

[80] Beneyto, J. M., & Corti Varela, J. (Eds.), *At the Origins of Modernity: Francesco de Vitoria and the Discovery of International Law*, Springer, Cham 2017.
[81] Regarding the fortune of Vitoria and his 19th century rehabilitation as “father of international law”, Belda Plans identifies three decisive moments: the work of Erneste de Nys (*Le droit de la guerre et le précurseurs de Grotius*, 1882) first contributed to the valorization of Vitoria’s figure; then, James Brown Scott’s masterpiece *The Spanish origin of International Law* (1928) and Camilo Barcia Trelles’s lectures at the Hague Academy of International Law (1933). Finally, he mentions the creation of the “Associacion Francisco de Vitoria” (1927, in Valladolid) and of the Francisco de Vitoria chair in the Faculty of Law of the University of Salamanca (J. Belda Plans, *La escuela de Salamanca*, Biblioteca de Autores Cristianos, Madrid 2000, p. 923).
[82] Merio Scattola, in ‘Domingo de Soto e la fondazione della Scuola di Salamanca’, *Veritas*, 54/3 (2009), pp. 55-56.

least three of them, as argued by Belda Plans: 1) all the representative figures shares the teaching of Vitoria as a direct or indirect influence on their thought; 2) they also share "*ideales y objectivos communes*", namely they seek to adapt theology to their times and to engage in reflection on contemporary issues;[83] 3) it is possible to identify a "*tradicion doctrinal comun*" in the school, namely the adoption of, and the close commenting on the *Summa Theologia* as a guide text: "*esto da lugar a un legado doctrinal manuscrito de comentarios a la Suma que se trasmeite de unos a otros y que se va enriqueciendo progresivamente*".[84] This does not mean that scholasticism was impermeable to external influences, and Plans argues that humanism was one of these influences. Plans argues that the main innovation of humanists was to have drawn attention to ancient sources, in order to investigate critically any given issue by making use of *ratio* instead of relying on *auctoritas*. What is interesting to see here is that, although not being totally closed towards humanism, theologians never accepted it entirely.[85] They were skeptical about the extensive use of philological and historical methods, which they deemed too superficial to deal with important theological truths and incapable of understanding "*el misterio de la Iglesia in quanto tal*". However, Plans acknowledges that one aspect of humanistic culture has certainly influenced scholasticism, and Vitoria in particular, namely "*el aprecio por el hombre y los valores humanos*".[86] Such an attention towards human nature and, more in general, *humanitas*, will be central in the construction of a universal community of humankind, to which *ius gentium* seems to refer. Dialogue with the past, therefore, allowed theology to be at the service of international affairs, as we will see with Vitoria.

In this chapter I will try to address the issue of custom in Vitoria's complicated doctrine of natural law and *ius gentium* by showing its close connection with Vitoria's doctrine of

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[83] J. Belda Plans, *La escuela de Salamanca*, p. 157. In this respect, see also A. Pagden, 'Dispossessing the Barbarian': "Vitoria and his pupils, and the pupils of his pupils down to the generation of the Jesuits Luis de Molina (1535-1600) and Francisco Suárez (1548-1617), have come to be called 'The School of Salamanca', although the Italian term 'seconda scolastica' is a better description. Their project was to create a moral philosophy based upon an Aristotelian and Thomist interpretation of the law of nature. Central to that project was an understanding of what we refer to loosely as 'property', but which, in the language of natural jurisprudence, was called *dominium* or more exactly in this case *dominium rerum.* By the terms of the social contract, men had renounced their primitive freedom in exchange for the security and the possibility of moral understanding which only civil society could provide; but they retained certain natural and hence inalienable rights of which *dominium* is the most fundamental." (p. 80). On the relevance of the School of Salamanca within contemporary scholarship on the history of natural law, see contributions from D. Simmermacher, K. Bunge, M. J. Fuchs, & A. Spindler (Eds.), *The Concept of Law* (lex) *in the Moral and Political Thought of the School of Salamanca*, Brill, Leiden 2016; J. L. Fuertes Herreros, 'Presentación: Una mirada retrospectiva de la *Escuela de Salamanca* desde el presente', *Azafea, Revista de Filosofía*, 18 (2016), pp. 17-26, as well as contributions from this issue.
[84] J. Belda Plans, *La Escuela de Salamanca*, p. 157.
[85] *Ibid*., pp. 76-77: "En general, los teólogos no reáccionaron tan désfavorablemente en contra del Humanismo como parecìa en un principio. Tan solo unos pocos lo rechazaron en su totalidad; del mismo modo, solo algunos pasaron a estar del todo a su favor".
[86] *Ibid*., p. 257.

consensus and moral agency. First, I will try to analyze Vitoria's account of law, by explaining the interdependence between reason and law. Reason is such an important and constitutive element of the law that Vitoria compares those who refuse to accept this view, i.e. voluntarists, as "beginners in Arabic". With this evocative expression, Vitoria means to say that to replace the primacy of reason with will as a foundation of the legal phenomenon, is equivalent to being a beginner learner of Arabic, who will inevitably write from left to right out of habit and, by so doing, pervert the right order of things. Secondly, I will explain the doctrinal architecture of Vitoria, by analyzing his multi-faceted concepts of natural law and *ius gentium*. To conclude, I will address the question of whether there exists a proper concept of custom (as a source of obligation among nations) in Vitoria.

1.1 A law supreme: Vitoria's controversial account of the relationship between *lex naturalis, ius naturae* and *ius gentium*

"A major task for early modern jurists was to determine whether the law of nations was derived from natural law or positive human law and, if the latter, what kind of human law was involved. Vitoria referred to these issues at various points in his works but without producing any coherent doctrine or, apparently, even attempting to do so. [...] In various contexts, Vitoria wrote that the *ius gentium* derived its authority from natural law, from custom, from an initial consent at the beginning of the human race, or from a continuing virtual consent of all nations or a majority of them. Perhaps Vitoria regarded the problem as a juridical one, not of primary importance for a theologian".[87] This is Brian Tierney's justification for Francisco de Vitoria's elusive account of the nature of the law of nations. Such an affirmation conflicts with the importance of his contribution as a founder of the modern science of international law, for which he is most famously known.

In this chapter I will try to shed light, where possible, on the controversial nature of *ius gentium* by looking at Vitoria's texts. In this respect, a preliminary clarification is needed. Difficulties regarding Vitoria's thought are, first of all, due to a philological problem. Vitoria did not write anything in his lifetime. All we have are the recordings of his *lectiones* and *relectiones* that were made by his students.[88] For a long time these have been interpreted with

[87] B. Tierney, 'Vitoria and Suárez on custom', in A. Perreau-Saussine, J. B. Murphy (Eds.), *The nature of customary law*, Cambridge University Press, Cambridge-New York 2007, p. 110.
[88] A classical work on Vitoria's texts is V. Beltrán de Heredia, *Los manuscritos del Maestro Fray Francisco de Vitoria, O.P.: Estudio critico de introducción a sus Lecturas y Relecciones*. Biblioteca de Tomistas Españoles IV, Santo Domingo el Real, Madrid-Valencia, 1928; for a more recent account, see also the above-mentioned work by

skepticism by scholars, given that the (much corrupted) manuscripts of the *reportata* may be full of typographic and conceptual errors, and therefore share little with Vitoria's original thought.[89] However, recent philological studies have downplayed these suspicions.[90] Indeed, when *prima professor* at the University of Salamanca, Vitoria introduced the practice of *dictado*: he used to read his lectures at a very slow pace to allow his students to take notes. This practice implied that the professor did not improvise but rather had to prepare a text in advance to read in the class, of which the students' notes will be an almost exact reproduction. This fact, together with his refusal to write even a proper textbook (if not a treatise), might suggest that Vitoria gave high consideration to these *reportata* as a means of delivering his thought. A further distinction must be made in this regard. Whereas *relectiones* were delivered on solemn occasions, and the university selected a single official copyist to record the lecture, everyday scholarly lectures on particular arguments were dictated by Vitoria to all the students present in the class. Therefore, whereas there are some variants in the different manuscripts of the *Relectiones,*[91] they are substantially homogeneous compared to the lectures, of which there are a higher number of recorded manuscripts. This makes it difficult to retrace a cohesive account of Vitoria's thought. Langella argues that this might be one of the reasons Vitoria's lectures on Aquinas *Summa Theologiae* have been studied less than the *Relectiones.*[92]

Despite this lack of attention, the commentaries on Aquinas are an incredible source of information about Vitoria's ideas on law and natural law. Langella also argues that these lectures have a preparatory function in relation to the *relectiones.*[93] Besides, contrary to the practice of the University of Salamanca, where professors used to comment on Peter Lombard's *Sententiae*, it was Vitoria's idea to introduce, together with the novelty of *dictado*, the reading of, and close commenting on Aquinas' *Summa Theologiae.*[94] Moreover, even if we do not accept the "preparatory" hypothesis suggested by Langella, nowhere else in Vitoria's texts do we find a very detailed definition of the questions of law, its division into natural and positive

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Langella.

[89] However, it has been claimed that the *Commentaries* should not be taken into account because they were discovered later in the 19th century. See M. Geuna, 'Le relazioni fra gli Stati e il problema della guerra: alcuni modelli teorici da Vitoria a Hume', in A. Loche (Ed.), *Guerra giusta e filosofie della pace, Atti del Seminario su La pace e le guerre (Cagliari, 29 novembre, 9 e 16 dicembre 2004)*, Cooperativa Universitaria Editrice Cagliaritana, Cagliari 2005, pp. 45-130.

[90] S. Langella, 'Estudio introductorio', in F. de Vitoria, *De legibus*, Universidad de Salamanca Edicciones, Salamanca, 2010.

[91] See the Pagden and Lawrance in their 'Critical note on texts and translation' (F. de Vitoria, *Political Writings*, p. xxxiii-xxxviii; in addition, see footnote 95.

[92] S. Langella, *Teologia e Legge naturale*, p. 57; following V. Beltran de Heredia, *Los Manuscritos*, p. 90.

[93] Langella, *Teologia e Legge naturale*, p. 59.

[94] For a complete account of Vitoria's intellectual milieu, see A. Brett, *Liberty, right and nature. Individual rights in later scholastic thought*, Cambridge University Press, Cambridge-New York 1997, chapter 3-4.

law, and the role of *ius gentium,* as in the commentaries. Therefore, I will integrate the reading of Vitoria's commentaries into that of *relectiones,* where the possibility of a *consensus totius orbis* is more explicitly articulated. In this respect, my second aim is to see whether a proper formulation of a concept of customary international law can be attributed to Vitoria. In order to do this, I will compare Vitoria's *Commentaries* on Aquinas with the *Relectiones*, where I argue that he gives a normative account of the law of nations, and not a "mere" re-reading of Aquinas.[95] This does not mean that Vitoria's works on Aquinas are sterile, quite on the contrary: my hypothesis is that Aquinas' theory of moral agency is primarily involved in the creation of a multi-level customary *ius gentium*.

1.2 If law is an act of intellect, what is *ius gentium* like? The consensual nature of the law of nations in Vitoria

It can be argued that there is no proper doctrine of customary law of nations in the work of Vitoria. However, his figure plays a fundamental role in this genealogy of custom, because he thinks of *ius gentium* as a consensual law, the existence of which can be derived from a hypothetical argument which seeks to answer the question – what would people (x) do in a situation (y) *at any given time*? This sort of mental experiment, which has been referred to as a

[95] As far as the commentaries are concerned, I will analyze the *Codex Ottobonianus Latinus* 1000 from the Vatican Library, which contains the lectures delivered by Vitoria on Aquinas' *Summa Theologiae* (hereafter: ST), and IaIIae in the year 1533-34. I compared several available editions of the same commentary, from which it emerged that other manuscripts of the commentary are available - for example, Ms Vat. Lat. 4630 (1533-34) and the Ms P.III.28 at the Biblioteca el Escorial, from the academic year 1541-42. The *Codex Latinus* 4630 of the Vatican Library also contains the first commentary from the academic year 1533-34, yet Ott. Lat. 1000 is given preference "because it is the one that hands down an 'academic' text in the strict sense and thus transmits Vitoria's thought more accurately" (A. Sarmiento, 'Summary', in F. de Vitoria, *Sobre los actos humanos*, p. xi). Besides, q. 90 of the same manuscript might have been written when Vitoria was substituted due to health problems, as Langella convincingly demonstrates (see her 'Estudio Introductorio', in F. de Vitoria*, De Legibus*, p. 32); therefore, Ms Ott. Lat. 1000 has to be given precedence again. Ms Escorial P.III.28 is instead the object of the German edition, together with Ott. Lat. 1000, despite the fact that the Spanish manuscript would be very useful in order to see the evolution of Vitoria's teaching over the years. Unfortunately, it is interrupted at q. 16 as Vitoria seems to have been substituted again at question 17. The annotation in q. 17. a.1 says "lectio magister Johanes Gil quia recedit magister Vitoria." As a result, it seemed reasonable to take into account only Ms Ott. Lat. 1000. With regards to the other commentary, the one on ST IIaIIae (1535), I follow the Frommann-Holzboog edition, where two manuscripts are taken into account, Codex n. 43 of the University of Salamanca and the Vatican Library Ms Ottob. Lat. 1015. The Frommann edition follows the work of Beltrán de Heredia and compares both manuscripts. In relation to the *Relectiones*, I take the English edition of Pagden-Lawrance. All the relections derive from one original manuscript, by "Vitoria's own hand or one that circulated on his authority" (A. Pagden & J. Lawrence, 'Critical note on text and translation', in F. de Vitoria, *Political Writings*, p. xxxiv), the existence of which is attested by the Ms Palentinus 13 (P), which is constantly confronted with Ms Valentinus (V) and Ms Granatensis (G). The first printed edition was published in Lyon in 1557 (referred to by the editors as L) and uses Ms G. The critical apparatus provides all the variants in the relevant passages, which I will explain case by case. In cases where they coincide, I will take the L printed edition as the original text in Latin, while following Pagden-Lawrance's translation into English.

"counterfactual claim",[96] goes as follows:

> […] there are certainly many things which are clearly to be settled on the basis on the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights (*vim habet ad dandum ius et obligandum*). But even on the occasions when it is not derived from natural law, the consent of the greater part of the world (*consensus maioris partis totius orbis*) is enough to make it binding, especially when it is for the common good of all men. If after the dawn of the creation or after the refashioning of the world following the Flood, the majority of men decided that the safety of ambassadors should everywhere be inviolable, that the sea should be common property, that prisoners of war should be enslaved, and likewise that it would be inexpedient to drive strangers out of one's land, then all these things certainly have the force of law, even if a minority disagree.[97]

In the above-mentioned passage, Vitoria seems uninterested in clarifying the nature of *ius gentium*, which "either is or is derived from natural law".[98] Does it pertain to natural law or to positive law?

Natural law, as we already know, is necessary. Vitoria conceives of three different degrees of necessity, which also affect the way in which we get to know natural law: 1) *ius* can be known *per se*, namely it is known and just according to right reason (do not steal, do not kill); 2) *ius* is inferred and deduced through a good consequential reasoning and from precepts known *per se* ("*in bona consequentiam ex praeceptiis per se notis*"), like the rules of the Decalogue, on which everybody agree;[99] 3) *ius* might be known from a manifest consequence ("*ex consequentia apparenti*"): even if we ignore that fornication is illicit, and we cannot infer it from already known precepts, as in the second degree of natural law, we can nonetheless grasp the content of natural law by thinking of what would happen if everybody fornicated freely. Paternity would be uncertain, and fathers would be unable to take proper care of children: therefore, fornication is illicit "*per consequens*". This third kind of natural law resembles the counterfactual argument Vitoria will make later on, as I will show.

But what if we ignore even the precepts underlying the "*bona consequentia*", namely if were not able to understand those self-evident precepts through reasoning? This might be the

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[96] A. Pagden, *The Burdens of Empire*, p. 67.

[97] F. De Vitoria, *On the American Indians*, in *Political Writings*, p. 281.

[98] *Ibid*., p. 278.

[99] Again, a reference to a general consensus; on this aspect, see K. Bunge, 'Francisco de Vitoria: a Redesign of Global Order on the Threshold of the Middle Ages to Modern Times', in *System, Order, International Law*, pp. 42-45; C. Noreña, *Studies in Spanish Renaissance Thought*, Nijhoff, The Hague 1975, p. 142-3.

case for non-Christian people, for example. Vitoria holds that it is through syllogism that we "get to know the unknown from the knowledge of what is already known". This process is called by Vitoria "*consequentia probativa*", which proves once for all that natural law cannot but be known by man.[100]

Having made these distinctions, what about *ius gentium*? Is it positive or natural law? Vitoria surprises us by maintaining that, "the dispute concerns the name more than the thing".[101] He uses this expression on many occasions, generally not to manifest disinterest but to avoid silly disputations on words, as "there are more things than names".[102] Besides, Vitoria denounces a profound difference between the way in which jurists and theologians conceive of *ius gentium.* The former extend it to all animal beings.[103] Elsewhere, he seems more inclined to argue that *ius gentium* is a kind of positive law.[104] However, he later adds that, to a certain extent, *ius gentium* approaches natural law.[105] What does Vitoria have in mind? According to him, *ius gentium* can be both "fixed in reason by human agreement" [106] or "established by promulgation".[107] Following Vitoria's argument, there seems to be two kinds of *ius gentium*. The one "fixed in reason by human agreement" seems to derive its cogency from the role of reason as a legislative faculty, both because it is capable of *imperium* and because it allows human beings to agree by means of the homogeneity of their minds. Therefore, Vitoria calls this "private" *ius gentium* ("*ex privato pacto*"),[108] in the sense that it applies to individuals vis-à-vis each other (i.e. the already mentioned 'inter*personal* law'). Vitoria argues that "when someday from a virtual assembly of all the world something is established and admitted, it is necessary that all the world gather together in order to abrogate that *ius*, which is impossible, because it is impossible that the consensus of all the world is reached for the abrogation of the

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[100] "nihil est de iure naturali nisi quod naturaliter non potest sciri ab hominibus." (F. De Vitoria, *De iustitia / Über die Gerechtigkeit*, p. 30). On the term "*probare*", see Chapter 2 on Gentili; we could argue against Vitoria that it is questionable that non-Western peoples recognize syllogism as a valid method of reasoning, either… but to address such a criticism to Vitoria would be historically and theoretically illegitimate.
[101] F. de Vitoria, *De iustitia / Über die Gerechtigkeit*, p. 34.
[102] *Ibid.,* p. 12.
[103] On the relationship between natural law and animal rights, see F. Iurlaro, 'In guerra e in amore non tutto è permesso: *bestialitas*, diritto naturale e *ius gentium* nel pensiero di Francisco de Vitoria e Francisco Suárez', in L. Bombardieri, T. Braccini, S. Romani, & L. Silvano (Eds.), *Parafrodite: illeciti erotici, tabù e amori irregolari dal mondo antico alle soglie della modernità*, Edizioni dell'Orso, Alessandria, pp. 337-354; Brett, A., 'Rights of and over Animals in the *Ius Naturae et Gentium* (Sixteenth and Seventeenth Centuries)', *AJIL Unbound*, 111 (2017), pp. 257-261.
[104] F. De Vitoria, *De iustitia / Über die Gerechtigkeit*, ed. by T. Duve, Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit, Reihe I: Texte, Band 3, Frommann-Holzboog, Stuttgart-Bad Cannstatt 2014, p. 34.
[105] *Ibid.,* p. 36.
[106] *Ibid.,* p. 32.
[107] *Ibid*., p. 34.
[108] *Ibid*., p. 36.

law of nations".[109] From this perspective, the first type of *ius gentium* cannot be abrogated, as it stems from human reason, *lex naturalis,* and therefore, consensus. It cannot be abrogated because humanity would, in such a very unlikely event, agree to abrogate human reason itself, which is impossible. This would be particularly self-destructive for Vitoria: it could be argued that his aim is to save law (and in particular *ius gentium*) from the danger of becoming the mere expression of an act of will, which would make it completely void of moral content and so changeable at any time. This ideological motive of Vitoria is particularly relevant in the construction of a global law, intended as applicable to humans of different latitudes and culture.[110]

In this respect, the idea of reason as a natural endowment of mankind makes *ius gentium* universally applicable and immutable. This natural endowment, referred to by Vitoria as *lex naturalis,* is given by God to humankind as a whole, making natural law obligatory despite any possible ignorance of it. On the one hand, this is proved by the general consensus of men. He who violates the law, law being a proper function of reason, must have done it on grounds of ignorance: "everyone says of such a man that he must be ignorant; but if he was not bound by that law, he would not be pardoned on the grounds of ignorance. Ignorance, then, is when a man thinks he is not bound by a law, but is".[111] On the other hand, if ignorance is the only conceivable violation of the *lex naturalis*, it follows as a consequence that no dispensation or repeal of natural law is possible. There is no need to promulgate natural law, as it is already present in our intellect as the intellect itself, and already binding in the court of conscience. A world without *lex naturalis* is, for Vitoria, a world without reason. This move is quite important, because it foreshadows a double nuance of the notion of *lex naturalis* as something that can be both proved by general consensus and presented as evidence before the tribunal of conscience. The more it is approved by the general *consensus*, the more *lex naturalis* can be proved, so to speak, *in interiore homine,* and vice versa.[112]

The second kind of *ius gentium* is less problematic for Vitoria, as it stems from the reciprocal obligations of sovereigns vis-à-vis each other (he calls it "public" *ius gentium*). The disrespect of this *ius gentium* would not only, indirectly, violate natural law, but also create a situation of public inequality among sovereigns. Of this second kind of *ius gentium*, Vitoria provides an example: "If the French respect our ambassadors as inviolable, it is necessary that

[109] *Ibid*., p. 40.
[110] See A. Pagden, *The Burdens of Empire*, p. 67; A. S Brett, *Changes of State*, p. 62.
[111] F. De Vitoria, *De actibus humanis / Sobre los actos humanos*, p. 160.
[112] Gentili further develops this intuition, see Chapter 2.

we respect theirs as well. Whence, if ambassadors are sent from one party to negotiate peace and their person is not violated, if ambassadors are sent from the other party and violated, it follows that there is inequality and injustice".[113]

However, Vitoria is still concerned about the moral question of whether it is a sin, then, to violate positive *ius gentium*? If it has been specifically promulgated as positive law, then it must be a sin, as every law is binding before the courts of conscience. But Vitoria wonders whether it is also a sin to violate that…

> […] *ius gentium* which has not yet been approved by some peoples, namely the doubt regards the law of nations which has not been written yet, or it is written, but it does not bind all men who are in the world, as it is evident with the killing of ambassadors, which is against *ius gentium*. Not everybody has to abide by the law of nations, as it is not natural law, as we *suppose*. […] To this we answer with the *supposition* that *ius gentium* has a double nature, like positive law has, as we said in art.2. A certain positive law comes from private agreement and consensus, another from public statute. Likewise, *ius gentium* is made up of the common consensus of all the peoples and nations. In this way, ambassadors are admitted according to the law of nations and are inviolable in every nation. In effect, *ius gentium* approaches natural law, as natural law cannot be preserved unless with *this ius gentium*.[114]

Vitoria's great moral doubt, therefore, is concerned with unwritten *ius gentium*, which we may cautiously call *customary,* as it springs out of "common consensus". This doubt may apply to written *ius gentium* as well, but this does not change Vitoria's moral quandary. As far as custom is concerned therefore, it lies between *lex naturalis* and promulgation, between *ius naturale* and *positivum*. It helps natural law to be preserved, as tangible evidence of the existence of the precepts of natural law.

But can the second type of *ius gentium* eventually become as binding as *lex naturalis* and as effective as positive law? In q.3 a. 4 of the *Relectio de Potestate Civili*, Vitoria holds that…

> […] the law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment. The whole world, which is in a sense a commonwealth, has the power

[113] *Ibid*., p. 38.
[114] *Ibid*., p. 36. [emphases added]

to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes, at any rate in the case of the graver transgressions such as violating the immunity of ambassadors. No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[115]

Here Vitoria hints, again, at the double nature of *ius gentium,* but he seems dissatisfied with the first kind of "private" law of nations. The analogy he has made by considering the whole world *as* a commonwealth, allows a shift from the realm of private inter*personal* law to that of positive "international" law. As Vitoria says, here we are not speaking of human beings, nor about their hypothetical meeting, but of a proper commonwealth.[116] However, Vitoria's complex picture is made even more problematic by an asymmetry existing, in his thought, between reason and consensus. Reason makes *ius gentium* immutable, but consensus cannot be established; it can only be fictionally presupposed. How then, can it be effectively binding? For according to Vitoria's intellectual theory of agency, consensus does not amount to a proper act of *imperium*. *Imperium* is a power of reason and produces an act of will, both by expressing a command in words and by putting it into being. Consensus lacks the last, decisive, passage of producing an act; because it lacks imperium and is not a linguistic faculty. That is why, if we apply this scheme to *ius gentium*, Vitoria always seeks to adjust consensus through *imperium* and vice versa. He needs *imperium* to found the universality and rationality of *ius gentium*, but at the same time he is aware that he cannot expect its promulgation as in civil law *stricto sensu*. However, consensus relies upon natural law, from which it derives its bindingness and rationality - but what about its necessity and effectivity? This remains a problematic aspect of Vitoria's understanding of consensus as a basis of *ius gentium*. However, here Vitoria perfectly (although unconsciously) foreshadows the ambiguity typical of the concept of custom, as something between natural and positive law.

[115] *Ibid*.
[116] On this, see A. Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth', *Oxford Journal of Legal Studies* 31/3 (2011), p. 5.

1.3 *Lex* and *imperium*: the analogy between reason and *lex naturalis*. Vitoria's Commentary on Aquinas' ST IaIIae (Ms Ott. Lat. 1000)

When Vitoria studied in Paris between 1511 and 1523 "he knew and admired the work of Conrad Summenhart, who generally preferred the teaching of Duns Scotus. But his own master was Pierre Crockaert, a Dominican Thomist".[117] As noted above, Vitoria deliberately substituted Lombard with Aquinas as the subject of his course on theology. Although the question of Vitoria's adherence to the Thomist model has been the subject of much debate among scholars,[118] what interests us here is the aim of understanding the impact of such theological premises on his theory of the law and the use he makes of them in order to create a modern *ius gentium*. Such premises are to be found, undoubtedly, in Aquinas' intellectualist theory of moral agency. In other words, conceiving of law as a rational model is, for Vitoria, a question of life or death for the *ius gentium* of his day. Only if reason is the essence of the law can it be universally applicable *inter omnes homines* – as Vitoria deliberately paraphrases Ulpian's definition of *ius gentium* as the law between *omnes gentes*.

In Vitoria there seems to be an almost complete identification between the principles of moral agency and those of natural law, which is a direct consequence of Vitoria's reading of Aquinas. Besides this, a more ideological motive orients, in my view, Vitoria's effort to grasp the nature of his contemporary *ius gentium* through the lens of Aquinas. The latter provides Vitoria with a solid intellectualist theoretical and moral framework with which to address such a complicated issue. In his *Commentary* to Aquinas' IaIIae, a series of lectures he delivered in Salamanca in the academic year 1533-34, Vitoria claims that "law is a function of reason because giving commands issues from reason, and law is a kind of rule or measure of human activity, the word *lex* being derived from the verb *ligare* 'to bind, to oblige' [...]".[119] Why is it reason and not will? How can law measure human acts?

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[117] B. Tierney, *The idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1635*, Emory University Studies in Law and Religion, Paperback edition, W. B. Eerdmans Publishing Co., Grand Rapids, Michigan / Cambridge, UK, 2001, p. 256; see also C. Noreña, *Studies in Spanish Renaissance Thought*, pp. 38-50.

[118] B. Tierney, *The idea of Natural Rights,* p. 256. Here Tierney refers to subjective rights; about this, see also A. S. Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought*, Cambridge University Press, Cambridge 1997.

[119] F. De Vitoria, *On Law*, in *Political Writings*, p. 155. This is a distinctive feature of Aquinas' theory of the law as well: "St. Thomas views law as a rule and measure of distinctively human acts. As we see still more clearly later on, this makes it something right for humans to follow, something that 'binds in conscience'. If we ask what conditions an enactment would have to satisfy in order to be such a thing, he replies that it must be an ordinance of reason, for the common good, made by those who have care for the community, and promulgated. To paraphrase, it must be something the mind can recognize as right, it must be good for community as such rather than just

Vitoria answers these two questions by confronting contemporary theologians and advocating against them for a more legitimate reading of Aquinas and Aristotle. With regards to the first question, the faculty of *imperare*, that is to say to command, is deemed to be the distinctive feature of law. But does *imperium* pertain to reason or to the will? Vitoria deals with this issue in *quaestio* 17 of his *Commentary*. In the preceding *quaestiones* he has described the nature of human acts, namely how every action derives from an *actus intellectivus*, to which the will *only subsequently* gives its consent according to the following (typically Thomistic) process. As the intellect *knows* the moral good, it deliberates according to it (*deliberatio*), then it pronounces a moral judgment (*sententia*) to which it gives its consent (*consensus*), and finally it puts the action into being through a proper choice (*electio*).[120] *Deliberatio* is a power of the intellect, whereas *sententia*, *consensus* and *electio* are powers of the will. Vitoria asks whether *imperium* pertains to one or the other faculty. He complains about a general misunderstanding of Aquinas' *Summa* among his contemporary theologians: more specifically, they consider *imperium* an act of will, like an act through which the will commands an act of another power. But this is unnecessary: in the intellect there are only judgments and apprehensions, and *imperium* is none of these.[121]

In the following passage, which is worth quoting in its entirety, Vitoria identifies his polemic target among the "*moderni theologi*:"

> We started above by discussing of which power [*imperium*] is an act. And, if it pertains to reason, what kind of act is it. Jacques Almain says in his *Moralia*, a. 2 *On Prudence*, that imperium is a proper function of the will, as to command belongs to the will, which is like a queen; whereas intellect looks more like a servant. Secondly, he proves that by saying that this is because a certain act which amounts to imperium cannot be assigned to the intellect, but only to apprehension and judgment. This is the common opinion of the moderns.

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serving a special interest, it must be made by public authority rather than private individuals, and it must be made known – a secret or hopelessly obscure law is not a law at all". (J. Budziszewski, *Commentary on Aquinas' Treatise on Law*, Cambridge University Press, 2014, p. 1; see also N. Kretzmann & E. Stump (Eds.), *The Cambridge Companion to Aquinas*, Cambridge University Press, Cambridge New-York 1993; B. Davies & E. Stump (Eds.), *The Oxford Handbook on Aquinas*, Oxford University Press 2014.

[120] F. de Vitoria, *De actibus humanis / Sobre los actos humanos*, q. 15-16, p. 140-150.

[121] "*Omnes moderni adversantur Sanctum Thomam hic. Dicunt enim quod hic actus: volo scribere est imperium, scilicet actus quo voluntas imperat actum alterius potentiae. Probatur quod non est necessarius: nullus actus est in intellectu nisi iudicativa sive apprehensiva notitia. Sed neutra est talis actus. Ergo. Patet minor, quia apprehensio non est imperium, cum ille qui non sitit aequaliter apprehendat aquam. Ergo. Quod autem iudicium non sit imperium Sanctus Thomas dicit, nam post iudicium sequitur electio, et postea imperium. Arguitur sic: iudicium est ante electionem, imperium post electionem. Ergo iudicium non est imperium*" (*Ibid*., p. 150).

Of the contrary opinion there is Aristotle, in *Nichomachean Ethics* VI, 10, which says: *sagacitas* and *prudentia* are not the same thing. *Prudentia* can give rules, *sagacitas* can only express judgments[122]. Furthermore, prudence does not produce any other act but that of commanding. Therefore, to give commands is not an act of will, but of the intellect. Buridan, jurists, Faber and <…>[123] hold this view, because they cannot say anything else unless they want to contradict Aristotle. The same does Averroes.

But what should we say to Almain, who did not read Aristotle while writing his *Moralia*, nor thereafter, by merely acknowledging that all the jurists agree that the will is the queen? Aristotle in *Politics*, I, 3 says that reason is the queen among the powers of the soul. Therefore, *imperium* pertains to the intellect, not to the will. But these moderns, like beginners in Arabic, conceive that will is the queen […]. To command is a proper function of the most perfect power. Seneca maintains the same everywhere[124], that reason is like a queen to which we must obey.[125]

Vitoria has no mercy for Almain's perversion of the teachings of both Aristotle and Aquinas.[126] He compares Almain to a consensus of scholars who hold the view that *imperium* is an act of the intellect, with the result of a tragicomic emphasis on the fact that he "did not read Aristotle neither while writing his *Moralia*, nor thereafter". Vitoria even more polemically argues that such a divergence from the Thomistic doctrine of *imperium* makes these modern theologians look "like beginners in Arabic:" who, out of habit, read from left to right instead of right to left, completely distorting what they are reading[127].

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[122] Whereas *prudentia* mostly famously translates *phronesis*, *sagacitas* stands for the Greek *synderesis*: Vitoria himself is unhappy of such a translation (*Ivi*). For the role of *sagacitas*, see later pp. 53-54.

[123] This part of the text is missing.

[124] The footnote of the Frommann-Holzboog edition says "*referentia non inventa*". Vitoria might refer to Seneca, *Epistulae Morales*, 66, 28, "*ratio divina est*", or to 66, 35, "*ratio est arbitra bonorum malorum*" (Seneca, *Ad Lucilium Epistulae Morales*, ed. by L. Reynolds, Oxford University Press, New York 1965).

[125] "*Incepimus disputando superius cuius potentiae sit actus. Et si rationis, quis actus est. Dicit Almainus in Moralium a. 2 De prudentia, quod imperare spectat ad voluntatem, quae est tamquam regina; intellectus autem, ut servus. Secundo probat quia non potest assignari in intellectu aliquis actus qui sit imperium; sed solum est apprehensio et iudicium. Est communis sententia modernorum. In contrarium est Aristoteles VI Ethicorum c. 10 cuius verba sunt: non est autem idem sagacitas et prudentia (*phronesis*); prudentia namque praeceptiva est, sagacitas autem iudicativa est solum. Inmo non ponit aliud actum prudentia nisi praecipere. Ergo praecipere non est actus voluntatis, sed intellectus. Buridanus tenet, et iuristi et Faber et., quia non possunt aliud dicere nisi velint negare Aristotelem. Idem Averroes. Sed quid dicemus ad Almainum, qui non vidit Aristotelem cum scripsit Moralia, inmo nec postea, sed si omnes iuristas vidisset diceret quod voluntas est regina? Aristoteles I Politicorum c. 3 dicit quod ratio est regina inter potentias animae. Ergo imperium pertinent ad intellectum, non ad voluntatem. Sed isti moderni, sicut incipientes arabici, imbibunt quod voluntas est regina […] Imperare ad perfectiorem potentiam spectat. Idem clamat Seneca ubique, quod est regina cui oboediendum est*" (F. De Vitoria, *De actibus humanis / Sobre los actos humanos,* p. 152).

[126] Almain followed the Gersonian nominalist stream. This might justify Vitoria's polemical attitude; see A. S. Brett, *Liberty, Right and Nature*, p. 116-22.

[127] Vitoria's text says "*incipientes Arabici*", without further explaining the meaning of such an expression. However, this seems to me quite intuitive: following Vitoria's argument about the relationship between reason and will, reason has the primacy over will. He who disagrees, literally, reads from right to left (eventually holding that will has the primacy over reason).

Therefore, after having assessed the primacy of reason over the will, Vitoria can take a further step, particularly relevant for our purposes:

> Thus, law lies in reason, and so does *imperium*. The conclusion is known, as law is of the precepts [less literally: law deals with precepts]. From the antecedent proposition it is clear that natural law, that is to say, natural enlightenment, is in the intellect: "it is sealed upon us." But it pertains to the law to command, *ergo* [the conclusion follows].
>
> In the like manner, it is argued that the will has to adequate to reason, and not the other way around, although the same [modern theologians] admit this. To direct is a proper function of reason,[128] therefore it is reason that commands. [129]

But if it is in the intellect and is not a *iudicium* or an *apprehensio*, then what kind of act is *imperium*? Vitoria provides two possible answers to this question. First, *imperium* can be a *practica apprehensio* (opposed to the *speculativa*): for example, when we say, "do this" we are both expressing a sentence with our speculative faculty and commanding with our practical faculty (as we are ordering someone to do something). The second and better understanding of the act of *imperium* is that it is "only an apprehensive cognition, but presupposing an act of will through which cognition wants to move to do something".[130] Here there seems to be a dangerous contradiction: if *imperium* is in reason, but reason expressly *presupposes* will, how can it be a true act of reason if we have excluded that will in any case precedes reason? First of all, the translation from Latin into English might be misleading: in Vitoria's (as well as Aquinas') original text we find the expression "*apprehensiva notitia, sed presupposito actu voluntatis*". This means that the act is not presupposed *by* the apprehensive cognition but, grammatically and conceptually, stands for itself with no relation of subordination with the main clause.

[128] Note also that Aquinas distinguishes between *ratio* and *intellectus*: (ST I, 79 a. 8: "*intellectus comparatur ad rationem sive aeternitas ad tempus*"). In other words, *intellectus* is reason, so to speak, "*sub specie aeternitatis*". See T. Aquinas, *Opera omnia iussu impensaque Leonis XIII P. M. edita, t. 6-7: Prima secundae Summae theologiae*, Ex Typographia Polyglotta S. C. de Propaganda Fide, Romae, 1891-1892; all the translations into English are taken from from T. Aquinas, *Summa theologiae,* trans. by Gilby, et al., 60 vols. London: Eyre and Spottiswoode, and New York: McGraw–Hill, 1964–73 (referred to as The "Blackfriars edition," Latin and English).

[129] "Item: lex est in ratione. Ergo et imperium. Conclusio est nota, quia lex est praeceptorum. Antecedens patet qui lex naturalis, hoc est, lumen naturale, est in intellectu: "*signatum est super nos". Sed ad legem spectat imperare. Ergo. Item arguitur: voluntas tenet se confirmare rationi et non e contra, quod etiam ipsi concedunt. Ergo ad rationem spectat dirigere. Ratio ergo est quae imperat*" (F. De Vitoria, *De actibus humanis / Sobre los actos humanos*, p. 154).

[130] *"[…] solum notitia apprehensiva, sed presupposito actu voluntatis quo vult movere ad aliquid agendum*" (*Ibid*., p. 156).

Furthermore, Aquinas' corresponding passage in the *Summa* further develops (and confirms) this point:

> Command is an act of the reason presupposing, however, an act of the will. In proof of this, we must take note that, since the acts of the reason and of the will can be brought to bear on one another, in so far as the reason reasons about willing, and the will wills to reason, the result is that the act of the reason precedes the act of the will, and conversely. And since the power of the preceding act continues in the act that follows, it happens sometimes that there is an act of the will in so far as it retains in itself something of an act of the reason, as we have stated in reference to use and choice; and conversely, that there is an act of the reason in so far as it retains in itself something of an act of the will.[131]

Does not this resemble the "beginners in Arabic" Vitoria was criticizing? Aquinas would argue that will does not *ontologically* precede reason, but their respective acts reflect each other (once they are put into being) as "the power of the preceding act continues in the act that follows".[132] But what about Vitoria? He accepts this view from Aquinas, and he seems to put the emphasis on what we would today call a linguistic understanding of the law. In his words, "thus I say that to give commands is to speak within one's own self or expressly, an act of will being presupposed, that through those words I want that something is moved to action. […] Not only I want you to do something, but I ask you to do it".[133] Later on in q. 90 a.1, Vitoria confirms such a linguistic approach by saying that "to give commands belongs likewise to the

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[131] "*Respondeo dicendum quod imperare est actus rationis, praesupposito tamen actu voluntatis. Ad cuius evidentiam, considerandum est quod, quia actus voluntatis et rationis supra se invicem possunt ferri, prout scilicet ratio ratiocinatur de volendo, et voluntas vult ratiocinari; contingit actum voluntatis praeveniri ab actu rationis, et e converso. Et quia virtus prioris actus remanet in actu sequenti, contingit quandoque quod est aliquis actus voluntatis, secundum quod manet virtute in ipso aliquid de actu rationis, ut dictum est de usu et de electione; et e converso aliquis est actus rationis, secundum quod virtute manet in ipso aliquid de actu voluntatis*." (T. Aquinas, ST Iª-IIae q. 17 a. 1 co).

[132] In his relection *De eo ad quod homo tenetur dum primum venit as usum rationi* (which belong to the lectures delivered by Vitoria between 1535-40, as the *Relectio de Indiis*), Vitoria confirms the validity of such a theoretical model: "omnis actus voluntatis praesupponit actus intellectus et econtrario" (L edition, p. 345). For a detailed discussion on this text, see A. S. Brett, *Changes of State*, p. 39-41: in this relection Vitoria that with "that on which man is obliged, when it comes to the use of reason". Brett argues that "the moral self-direction of rational, that is, free, that is, human agency is necessairily in the direction of God, otherwise it is mortal sin. Vitoria's two-pronged discussion centres around two sets of human beings who appear to throw Aquinas' understanding of human agency into doubt", namely children, insane people and dreamers on the one hand, barbarians on the other. In order to solve this problem, Vitoria "opened a gap between the bare use of reason and the moral use involved in free will. Secondly, he opened another gap, this time between freedom and free will. Children, madmen and people in their dreams are capable of free acts of the will that are distinct from animal appetites, even though none of them can be said to have the moral use of reason that makes for free will. […] There can be a will that is free, *libera voluntas*, without free will, *liberum arbitrium*" (p. 40-41).

[133] "*Ita dico quod imperare est loqui interius sive exterius presupposito actu voluntatis, quod per illa verba volo, movetur aliquid ad agendum. […] non solum volo quod facias, sed rogo te ut facias. Ita de imperio: non est volo quod facias, sed fac. Hoc est clarum*" (F. De Vitoria, *De actibus humanis / Sobre los actos humanos*, p. 156)

intellect, not to the will, as proved above, since 'to prescribe' is 'to pronounce' or put into into words, and speech is an act of reason, not of will".[134]

This leads us to another question we are left with, i.e. how can law measure human acts? By being both binding in conscience, therefore approved by the general consensus of men, and the object of an effective human enactment (promulgation). With regards to the first point, we have already pointed out that *lex naturalis* is a natural enlightenment of our intellect. This makes natural law obligatory despite any possible ignorance of it. On the one hand, this is proved by the general consensus of men. He who violates the law, and law being a proper function of reason, must have done so on grounds of ignorance: "everyone says of such a man that he must be ignorant; but if he was not bound by that law, he would not be pardoned on the grounds of ignorance. Ignorance, then, is when a man thinks he is not bound by a law, but is".[135] On the other hand, if ignorance is the only conceivable ground of violation of the *lex naturalis*, it follows as a consequence that no dispensation or repeal of natural law is possible. There is no need to promulgate natural law, as it is already present in our intellect as the intellect itself and already binding in the court of conscience. A world without *lex naturalis* is, for Vitoria, a world without reason. This passage is quite important, because it foreshadows a double nuance of the notion of *lex naturalis* as something which can be both proved by general consensus and presented as evidence before the tribunal of conscience. The more it is approved by the general consensus, the more *lex naturalis* can be proved, so to speak, *in interiore homine,* and vice versa. Gentili further develops this intuition, although not expressly quoting Vitoria (though presumably having read him).[136]

However, promulgation plays an essential role in Vitoria's understanding of the law. But does this not make natural law less necessary, if it still needs promulgation to be effectively binding? As for the intellect, which both thinks and expresses an act of *imperium*, but has to state it to make it effective, the same applies to the law, which is an act of *imperium*. This constant analogy between *lex* and reason is a crucial point, which I will address later when dealing with consensus.

Thus, the legislator must promulgate the law to make it effective (i.e. positive), notwithstanding the self-evident nature of the natural law precepts upon which it rests. This dialectic between inner consciousness and necessity of promulgation (which is the precise

[134] Again, see q. 90. a.1, F. De Vitoria, *On law*, in *Political writings*, p. 156.
[135] *Ibid*. p. 160.
[136] See paragraph 2.1 on Gentili's *probabilis ratio*.

mould of the rational deliberative process we have previously described, as *lex* and reason are analogous) hints at a further meaning Vitoria gives to natural law. In q. 94 a.1 he asks whether natural law is a disposition, a "*habitus*".[137] The suspicion might arise, following Vitoria, that natural law is not innate and can be learned through experience, which would allow the "ignorant" to know the moral good and behave accordingly. Vitoria, like Aquinas, excludes the possibility that natural law is a habitus because habitus is not constituted by reason, but by practice. This point is quite relevant for our intellectual reconstruction of the concept of customary law of nations. In other words, Vitoria seems to foreshadow a dialectic between an abstract "general consensus of men" as proof of natural law, which derives its validity from the fact of being a proof given by reason, and a more concrete concept of habitus, where it is practice that turns the constant repetition of an act into a permanent disposition. In the first model, the "ignorant" has to be convinced through reason, in the second he simply imitates what he judges good according to his natural inclination. Vitoria resolves the difficulty by claiming that natural law is a habitus only in a *derivative* sense, "as when an action is called a disposition or custom simply because it is habitually repeated (*in habitu*). […] Therefore natural law is not so called because it exists within us by nature: children have neither natural law nor the disposition for it. It is so called because we judge what is right by natural inclination, not because of some naturally implanted quality (*qualitas*)".[138] It is our natural inclination towards good to make respect for natural law habitual: this leaves room for children, insane people or barbarians to get to *know* natural law, neither because they learn it through experience, nor because they have an innate notion of natural law, but because their natural disposition to the good (which is, of course, given by God) makes respect for natural law a habitual behavior. This is made possible by *synderesis*: Aquinas argues that "the first practical principles, bestowed on us by nature, do not belong to a special power, but to a special natural habit, which we call *synderesis*. Whence *synderesis* is said to incite to good, and to murmur at evil, inasmuch as through first principles we proceed to discover, and judge of what we have discovered. It is therefore clear that "synderesis" is not a power, but a natural habit".[139] This point is crucial, because *synderesis* seems to lead the "discovery" of the natural praecepts, and the consequent action of judgment upon them. What does this imply?

Vitoria has mentioned that *ius gentium* has a double nature, precisely as positive law stems out of private or public agreement: he has underlined this aspect by saying that natural

[137] F. de Vitoria, *On Law*, in *Political Writings*, p. 169.
[138] *Ibid*, p. 169.
[139] T. Aquinas, ST I, q.79 a. 12.

law cannot be preserved without *this ius gentium*, clearly hinting at the existence of *another* kind of *ius gentium*. It seems that the first kind of *ius gentium* approaches natural law, as an agreement and consensus between private people. Therefore, the bindingness of this first kind of *ius gentium* is drawn from the cogency of the natural law precepts it rests upon, as evidently there is no international legislator. Such an interpretation is also confirmed by the fact that, as some scholars have suggested, Vitoria's understanding of the law of nations is more similar to an inter*personal* law rather than to a proper inter*national law*. In the words of Niemelä, "to talk about a new and secular international law maintained by sovereigns rather than God would be an utter heresy for Vitoria. His jurisprudence is based on only one authoritative source that precedes and dictates all. Secular and spiritual authorities are only middlemen between God and humanity with no authentic autonomy".[140] This has also been referred to as a kind of cosmopolitanism stemming from a "mid-century Dominican meditation".[141]

To sum up, in the first sense, when Vitoria speaks of a "private agreement" and "consensus", he seems to refer to compliance with *ius naturae* as a form of *lex naturalis*; when, in the second sense he says "public agreement", he seems to have in mind justice as a prerogative of *ius*, which implies the principles of reciprocity and equality (*ad alterum*, as said in q. 57 a. 1). This brings this second type of *ius gentium* closer to the second degree of natural law, where what is just is not immediately deduced by self-evident precepts of reason but needs to be "discovered" through syllogism. Moreover, to disrespect this second *ius gentium* would not only indirectly violate natural law, but also create a situation of public inequality among sovereigns. Of this second kind of *ius gentium* Vitoria provides an example: "if the French respect our ambassadors as inviolable, it is necessary that we respect theirs as well. Whence, if ambassadors are sent from one party to negotiate peace and their person is not violated, if ambassadors are sent from the other party and violated, it follows that there is inequality and injustice".[142]

Vitoria concludes this article by explaining that *ius gentium* follows from natural law "*ex bona consequentia*", namely it is the second degree of natural law, of which Vitoria quoted

[140] P. Niemela, *A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations*, in A. von Bogdandy & R. Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law*, Volume 12 (2008), Brill/M. Nijhoff, Leiden 2008, p. 325.

[141] A. S. Brett, *Changes of State*, p. 12-13; see also I. Trujillo Perez, *Francisco de Vitoria. Il diritto alla comunicazione e i confini della socialità umana,* Giappichelli, Torino 2003, where the author provides a philosophical account of Vitoria's communitarian tendency.

[142] "*si Galli habent inviolatos legatos nostros, oportet, quod nos etiam habeamus suos. Unde si legati ex una parte mittuntur ad componendam pacem et non violantur, si ex alia parte mittentur et violentur, sequitur quod est inequalitas et inustitia*" (F. de Vitoria, *De iustitia / Über die Gerechtigkeit*, p. 38).

the Decalogue as an example. It cannot be a natural law properly speaking; otherwise it would be necessary and therefore identical with natural law. This seems to contradict the idea of consensus as an expression of *lex naturalis*. Consequently, Vitoria raises this difficulty: if *ius gentium* is not necessary, can it be abrogated? He answers in the negative: this is what Pagden has described as Vitoria's counterfactual claim,[143] which we also find expressed in his *Relectiones*. Vitoria argues that "when someday from a virtual assembly of all the world something is established and admitted, it is necessary that all the world gather together in order to abrogate that *ius*, which is impossible, because it impossible that the consensus of all the world is reached for the abrogation of the law of nations".[144] From this perspective, the first type of *ius gentium* cannot be abrogated, as it stems from human reason, *lex naturalis,* and therefore consensus. It cannot be abrogated because humanity would, in such a very unlikely event, agree to abrogate human reason itself; which is impossible, as well as particularly self-destructive, and would, therefore, foreshadow the most impossible of the impossible things, i.e. the death of God. In other words, reason keeps a part of *ius gentium* immutable. This is guaranteed by the fact that Vitoria is not a "beginner in Arabic," meaning he rightly allocates imperium to reason and not vice versa. Vitoria's reasoning resembles that "manifest consequence" through which *ius naturae* can be discovered: what would happen if such a particular law, like the one prohibiting fornication, did not exist? From this "mental experiment" Vitoria deduces the necessity of such a rule, although it is not immediately self-evident as in the first kind of *ius naturae*. This distinction between necessity and self-evidence is a crucial point, on which I will come back at the end of this section.

On the contrary, the second kind of *ius gentium* can "partially be abrogated, of course not completely – like it is a rule of *ius gentium* that prisoners in a just war are slaves, but Petrus de Palude says that this does not hold true among Christians. If during a war the Spanish captured some French people, the French are prisoners, not slaves, as they can appear before a court and do other similar things, which would not be allowed if they were slaves. Likewise,

[143] "Vitoria offered a compelling account of the nexus between the natural law and the law of nations, which made of the latter a hypothetically positive version of the former. If the human community is governed by a law to which all its members have access, then the law which applies between nations, however remote they might be from one another, must be that to which they all would have agreed on had they been consulted about it beforehand. What the Salamanca theologians had created was, in effect, a heavily ontologized moral argument based on a counterfactual claim which could plausibly allow any people, from Finns to Fuegians, to recognize a properly binding law when they saw one". (A. Pagden, *The Burdens of Empire*, p. 67).

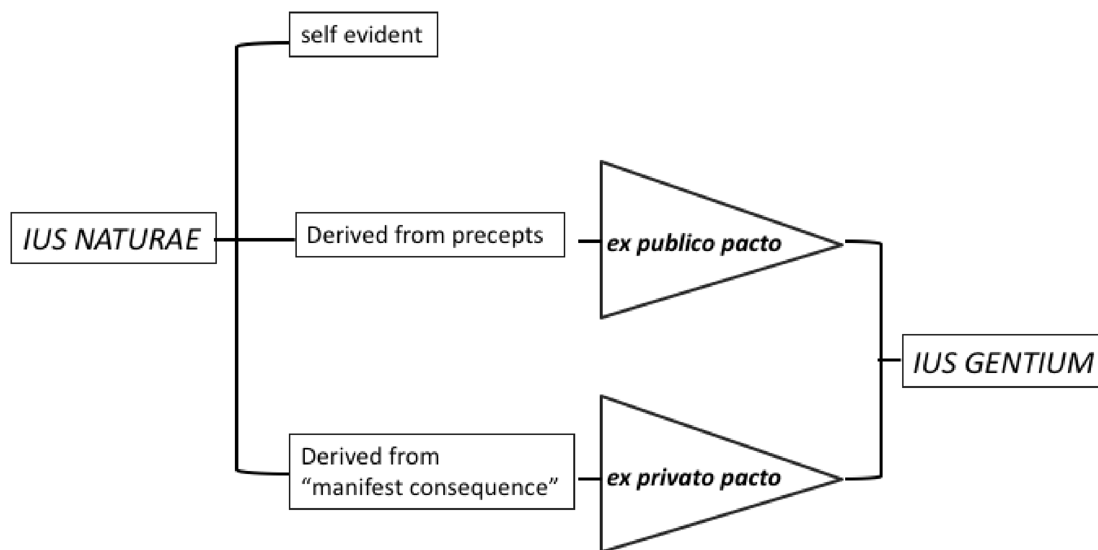
[144] "*quando semel ex virtuali consensu totius orbis aliquid statuitur et admittitur, oportet, quod ad abrogationem talis iuris totus orbis conveniat, quod tamen est impossibile, quia impossibile est, quod consensus totius orbis conveniat in abrogatione iuris gentium*" (F. De Vitoria, *De iustitia / Über die Gerechtigkeit*, p. 40).

the acts of a Frenchman are valid, and a Christian cannot sell him at all".[145] It is no wonder that Vitoria takes as an example a norm of *ius gentium* which is intended to apply differently to Christians and non-Christians: the latter cannot rightly infer the precepts of natural law "*ex bona consequentia*" because they do not rely on the Decalogue as a normative source.

In my view, Vitoria's puzzling account is due to a misinterpretation of the concept of necessity applied to *ius gentium*. Vitoria, as a true Thomist, refused to consider *ius gentium* as identical with natural law. Nevertheless, he acknowledges that some relationship must exist between the two. The way in which he solves the dispute is to split the concept of necessity into two. On the one hand, he considers *ius gentium* as "formally necessary", based on a fictional consensus capable of preserving *ius naturae*. In this respect although prima facie *ius gentium* may lack the absolute self-evidence of *ius naturae*, nonetheless we can consider it necessary by recurring to the following counterfactual proof: *what if ius gentium did not exist?* This is impossible, both because this would lead to the destruction of *ius naturae* and because it is impossible that men agree to abolish a consensus that directly springs out of their reason. We may call this "counterfactual necessity", which makes the first kind of *ius gentium* similar to the third degree of natural law. On the other hand, we might argue that Vitoria distinguishes necessity from self-evidence. As a consequence of the "counterfactual" mental experiment, we are unable to imagine a world without *ius gentium*, although *prima facie* it lacks the absolute degree of necessity required by *ius naturae* (which does not need counterfactual proofs at all!). Then, what substantially distinguishes *ius naturae* from *ius gentium* is their respective degree of self-evidence. In this respect, it can be argued that "interpersonal" *ius gentium is,* in a way, natural law.

Applying the same criterion to "public" *ius gentium*, it can also be rightly inferred that *ius gentium* is derived from natural law. Indeed, it corresponds, in term of self-evidence, to *ius naturae* "*ex bona consequentia*":

[145] *"…ex parte abrogari ius gentium, licet non omnino – sicut ius gentium est, quod captivi in bello iusto sint servi, sed Palude dicit, quod hoc non tenet inter Christianos. Si enim in bello Hispani capiant Gallos, Galli sunt captivi, sed non servi, quia possunt comparere in iudicio et alia huiusmodi, quae tamen non licerent, si essent servi. Item facta, Galli tenerent, et Christianus non posset illum omnino vendere. Ecce hic ex parte violatur ius gentium. Nam de iure gentium captivi in bello iusto sunt servi*" (F. De Vitoria, *De iustitia / Über die Gerechtigkeit*, p. 40).



This scheme, in my view, allows a better interpretation of Vitoria’s puzzling assertion that *ius gentium* “either is or is derived by natural law”: *ius gentium is* natural law in terms of “counterfactual” necessity (it cannot be abrogated), *it is derived by it* as far as its degree of self-evidence is concerned (it is derived by “precepts known per se”). [146]

1.4 Vitoria’s supposed theoretical inconsistency in the *Relectiones*. The paradox of an “immutable positive law”

1.4.1 The universal commonwealth and the victory of public law on private agreement: *ius gentium* as *lex* in the relection *On Civil Power*.

In the preceding paragraphs, I pointed out that the double-face of *ius gentium* stems from a further dialectic between private and public agreement. Private agreement seems to lie at the origin of the *consensio omnium*, which produces an inter*personal* law of nations, a law

[146] This scheme preserves, formally and consistently with Vitoria’s intent, the allocation of *ius gentium* to the realm of positive law (as nowhere Vitoria says *ius gentium* is *as necessary* and *as self-evident* as the first kind of *ius naturae*).

of the *orbis*; whereas *ius gentium* derived by "public agreement" resembles more the actual positive law-making of nations, as Vitoria's examples also demonstrate.

In this last respect, it is useful to read Vitoria's *Relectio de Potestate civili*, delivered in 1528 (therefore, it precedes the commentaries on Aquinas), where he discusses the nature of power. Having divided it into public and private, he provides an Aristotelian reading of public power according to material, efficient, and final causes.[147] Vitoria concludes that the existence of societies is necessary to humankind, therefore they cannot exist "without some overseeing power or governing force", namely God as a universal creator. In such a way, "public power rests upon natural law, and if natural law (*ius naturae*) *acknowledges* God as its only author, then it is evident that public power is from God, and cannot be overridden by conditions imposed by men or by any positive law".[148] This may have an impact on our discourse, as Vitoria subsequently equates the "domestic" commonwealth to the universal one. Interestingly, here Vitoria also foreshadows the possibility of *ius naturae* being "acknowledged," as it consists of different degrees of evidence. He does not do the same with *lex naturalis*, to which he gives an absolute meaning. But can the second type of *ius gentium* eventually become as binding as *lex naturalis* and as effective as positive law? In q.3 a. 4 Vitoria asks whether civil laws are binding on the legislators, calling into question the thorny question of *princeps legibus solutus*. On this point, "some authorities argue that they are not, since rulers are set over the commonwealth, and obligations can only be imposed by a superior".[149] Vitoria replies to this proposition with an interesting and, at this point, familiar argument. On the one hand, although it is for the legislator to promulgate laws, they have effect to all the commonwealth, to which the legislator also belongs. His privilege consists in having the power and will to promulgate the laws he wishes, but he is nonetheless bound by them once they are put into effect. Vitoria compares this case to a treaty (*pactum*): "anyone may choose whether or not to sign a treaty, but once made he is not free to choose whether he will be bound by its terms".[150] We do not know whether Vitoria refers here to an international treaty or to a civil law contract, nonetheless the ambiguity nicely fits into the "interpersonal law" model we have described. However,

[…] the law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment. The whole world, which is in a sense a commonwealth, has the power

[147] F. de Vitoria, *On Civil Power*, in *Political Writings*, p. 4-12.
[148] *Ibid*., p. 10.
[149] *Ibid*., p. 40.
[150] *Ivi*.

to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes, at any rate in the case of the graver transgressions such as violating the immunity of ambassadors. No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[151]

Here there seems to be a tension in Vitoria's argument, especially when compared with the *Commentaries*. He claims that *ius gentium* derives its effectiveness not only "*ex pacto et conducto hominum*",[152] namely from what we have referred to as the "private agreement" of interpersonal law, but also has the "*vim legis*", the force of a positive enactment. Here Vitoria hints, again, at the double nature of *ius gentium;* but he seems dissatisfied with the first kind of "private" law of nations. The analogy he has made by considering the whole world *as* a commonwealth, allows a shift from the realm of private interpersonal law to that of positive 'international' law. As Vitoria says, here we are not speaking of human beings, nor about their hypothetical meeting, but of a proper commonwealth. Of course, if this is the case the law of nations cannot lack the effectiveness of promulgation. Therefore, Vitoria seems to refer here to the second kind of *ius gentium*, claiming it is as effective as a positive law enactment. However, he seems to again confuse the two levels of argumentation, by making a sort of "immutable positive" *ius gentium*, which resembles a positive enforcement of *lex naturalis,* the violation of which certainly results in the sanction of the whole world. Such sanction relies on the unchanging consensus of humanity on matters of *ius gentium.* What is the style of Vitoria's argumentation here? Is he describing a matter of fact or normatively assessing how the law *ought* to be? The latter might be the case, bearing in mind that this is a *relection* and not a common lecture, nor a comment on Aquinas. In other words, Vitoria's primary aim here might be the expression of his thought rather than teaching. Secondly, and consequently, Wagner rightly holds that "Vitoria seems to suggest that, while the global commonwealth *de iure* has *potestas ferendi leges*, there is no concrete institution that could enact this *de facto* and thus there is no statutory law – *lex* – at this level. However, there are unwritten norms – *ius* – and whatever their origin is, they gain normative validity via the global commonwealth's *auctoritas*. In this manner, their obligatory force on the one hand corresponds to the universal and public character of the global commonwealth, and on the other hand it is perfectly consistent with them not being necessary or natural law".[153] Such consistency is related to the fact that, as we

[151] *Ivi.*
[152] L edition, §21, p. 207
[153] A. Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*,

previously said, *ius gentium* is only counterfactually necessary and derivatively self-evident. Moreover, if we compare this passage with Vitoria's concerns about unwritten *ius gentium* in q. 57 a. 3, we may derive a similar impression of an urge for "codification," clarity and publicity that Vitoria seems to advocate for his contemporary customary[154] law of nations.

1.4.2 The creation of a political *orbis*. Majority vs. minority, and reason as the ultimate criterion of consensus

Custom may obtain the force of law, argues Vitoria, echoing Aquinas.[155] Can we conclude that the same applies to international customs, given our assessment of the global commonwealth as akin to a domestic one? Let us take a step back to the *Commentary* on ST, IaIIae, where Vitoria argues that:

> […] no custom (*consuetudo*) can be binding, either in the court of conscience or in the court of law, except by the express authority of the superior power. From this follows a corollary: however widespread a custom may be, if some origin for it cannot be established in the will of the legislator, as it is not binding, assuming this provokes no disorder. A third proposition: custom may be the sign of the intention and will of the legislator, and consequently have the force of law. But it is not a sufficient sign […]. A sufficient sign is when experts judge it is obligatory.[156]

The critical note, which appears in the English edition reports that Ms Ott. Lat. 1000 says "quod non obligat", which seems to completely turn the argument upside down. The sentence would then sound like: "experts judge that it is *not* obligatory," namely experts would provide a significant sign of the inexistence of a custom, rather than of its existence; but would

Oxford Journal of Legal Studies 31/3 (2011), p. 5.

[154] "[…] one other type of norms that are not *leges* can acquire *vis legis*: customs. Prima facie customs do not possess that force, but can acquire it when they can be interpreted as 'signs' for a corresponding intention of the legislator. Yet the pure facticity of a social or princely custom is not a sufficient ground for such an interpretation; it has to be supplemented by either the verdict of sapientes or by customary authoritative punishment of transgressors. In the case of *ius gentium* then, where a legislating institution is absent, the legislator whose intention is to be inferred is the global commonwealth as a whole (whose existence must be presupposed for reasons described above). As with the multi-level legal environment of the *res publica totius orbis*, Vitoria can connect this argument with the majority principle of taking convergent municipal laws, which imply punishment of transgressors and explicit adoption by multiple particular commonwealths, as signs for the intention of the global legal community. The normative authority of particular commonwealths – or even of their governments – on the municipal level is transformed into an epistemic authority on the international level and cannot decide on, but effectively contribute to, the recognition of rules of *ius gentium*" (*Ibid*, p. 8-9).

[155] F. de Vitoria, *On Law*, in *Political Writings*, p. 185.

[156] *Ivi*

such a proof would be of any use? Yes, because the text continues by saying that "in doubtful cases, it is always to be assumed that custom is *not* binding". However, in the passage quoted above, Vitoria says that a custom does not have the force of law "no matter how widespread it might be". If consensus does not derive from reason's counterfactual argument, it does not have force of law (and it is also very unlikely that it can base such force on the opinion of experts, as they do not have the power to promulgate).

This passage allows us to understand Vitoria's worries about unwritten *ius gentium*, both because it shares the same fate of custom, that is to say of being a kind of "deficient" law, and because the only paradoxical way to ascertain the existence of it is "when its transgressors are punished," as he continues in the same q. 97 a.3.[157]

However, elsewhere Vitoria seems to admit the validity of a dialectic between majority and minority. Although expressly accepting that possibility in the (national) commonwealth,[158] he seems rather skeptical when it comes to applying the same criterion to *ius gentium,* for the reasons stated above. However, *Relectio de Indiis* (1539) addresses this issue in at least two passages, one of which has already been mentioned many times. In question 3 Vitoria famously deals with the just titles of the Spanish conquest of the Indies. The first title he mentions is that of the natural partnership of humankind and the *ius communicationis* deriving from it. The first proof of it derives from:

> […] the law of nations, which either is or derives from natural law, as defined by the jurist: "What natural reason has established among all nations is called the law of nations (Institutions, I. 2.1). Amongst all nations it is considered inhuman to treat strangers and travellers badly without some special cause, human and dutiful to behave hospitably to strangers.[159]

Every human enactment (*lex*) prohibiting this right would be, the reasoning follows, "unreasonable" ("*nec esset rationabilis*")[160]. Again, Vitoria emphasizes the close relationship between *lex* and reason. But he is more explicit in q. 4 a.1, §4, when he wants to prove that

[157] *Ibid*, p. 186.
[158] F. de Vitoria, *On Civil Power*, in *Political Writings*, P. 30.
[159] F. de Vitoria, *On the American Indians*, in *Political Writings*, p. 278.
[160] *Ibid*., p. 280; L edition, p. 355. On *rationabilitas* is a criterion of canon law custom, see footnote 254.

according to *ius gentium*, as a corollary of the right of travelling and of trading, a *res nullius* belongs to its first taker. Like this provision,

> […] there are certainly many things which are clearly to be settled on the basis of the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights (*vim habet ad dandum ius et obligandum*). But even on the occasions when it is not derived from natural law, the consent of the greater part of the world (*consensus maioris partis totius orbis*) is enough to make it binding, especially when it is for the common good of all men. If after the dawn of the creation or after the refashioning of the world following the Flood, the majority of men decided that the safety of ambassadors should everywhere be inviolable, that the sea should be common property, that prisoners of war should be enslaved, and likewise that would be inexpedient to drive strangers out of one's land, then all these things certainly have the force of law, even if a minority disagree.[161]

This passage summarizes all the questions we have been dealing with until now. First of all, *ius gentium* is either derived by natural law or not. Whatever the nature of this doubt (as long as it is not a *moral* one), it can be settled through the fictional device of the *consensus maioris partis orbis*. Such consensus, as a direct effect of reason, makes *ius gentium* a sort of "immutable" positive law: immutable because it is derived from human natural inclination towards good (and, as a consequence, common good), positive because such immutability is the effect of a non-derogable consensus based on reason. However, Vitoria introduces a novelty in this passage, in comparison with q.57 a.3 of the *Commentary* on ST, IIaIIae, where he spoke of a "*consensio omnium gentium and nationum*". Here Vitoria refers to the consent of the *greater* part of the world, for the first time introducing a majority criterion for which he previously did not seem to have sympathy. *Ius gentium* has become, consistent with *Relectio de Potestate Civili*, like a domestic commonwealth, therefore it can be subject to rules analogous to those of the political society. A very general consensus among men, if turned into a consensus of the majority of them, amounts to the act of promulgation Vitoria was expecting from *ius gentium*. This "political" move made by Vitoria has not, however, solved the inner ambiguity of *ius gentium,* but it makes it an argumentative device, "*rationabilis*", through the plausibility of which it is possible to convince, eventually, even a minority. When *orbis* is conceived of as a proper political entity, *ius gentium* becomes entirely positive. And if such an argumentative practice does not work (but it *must* work, as it rests upon reason), this does not

[161] F. de Vitoria, *On the American Indians*, in *Political Writings*, p. 281.

make *ius gentium* less valid: reason will always provide a counterfactual proof, "even if a minority disagree".

The role played by *consensus* in Vitoria's doctrinal architecture has been questioned by several authors. Deckers, for example, argues that it is a distinctive feature of Vitoria's theory of *ius gentium*. In his view, "*seine Theorie der Genese der* ius gentium *entwickelt er im Rückgriff auf die in seiner Theorie der Eigentumsentstehung grundlegende Denkfigur consensus*". Such a "figure", which Vitoria seems to borrow from Conrad Summenhart[162] and from the context of the original division of property after the Fall, allows *ius gentium* to be grounded in *ius civile*. However, this is in contradiction with the fact, noticed by Deckers himself, that consensus is just *virtualis*, not *formalis*.[163] In fact, Deckers reads Vitoria's *Relectio de Indiis* through the lens of the doctrine of *divisio rerum*, arguing that virtual consensus has become formal, we would say, through the introduction of a majority principle. In Deckers' "systematic" account however, this makes *ius gentium* entirely positive. In my view however, the ambiguity remains. It seems that in the *Relectiones* Vitoria wants to merge both kinds of *ius gentium* into one single effective positive law. This does not change the fact that originally there are two kinds of *ius gentium*, as there are two kinds of civil law. Deckers claims that Vitoria creates an historical *ius gentium*, where customs can be traced back, *à rebours*, by looking at historical examples.[164] I do not think this is what Vitoria means. He neither mentions nor needs history, as every time reason provides proof of the existence of an unchangeable consensus. All his examples are rather "a-historical": he always refers to the original Fall, to Adam or to a hypothetical assembly which would always agree on any given issue (because its members are endowed with reason).

Cruz Cruz also calls for a "systematic" reading of Vitoria through a "*internationalisticher Ansatz*". He argues that it is easy for Vitoria both to assimilate *ius gentium* at the same time as natural law, on the grounds of its universality and necessity (I have

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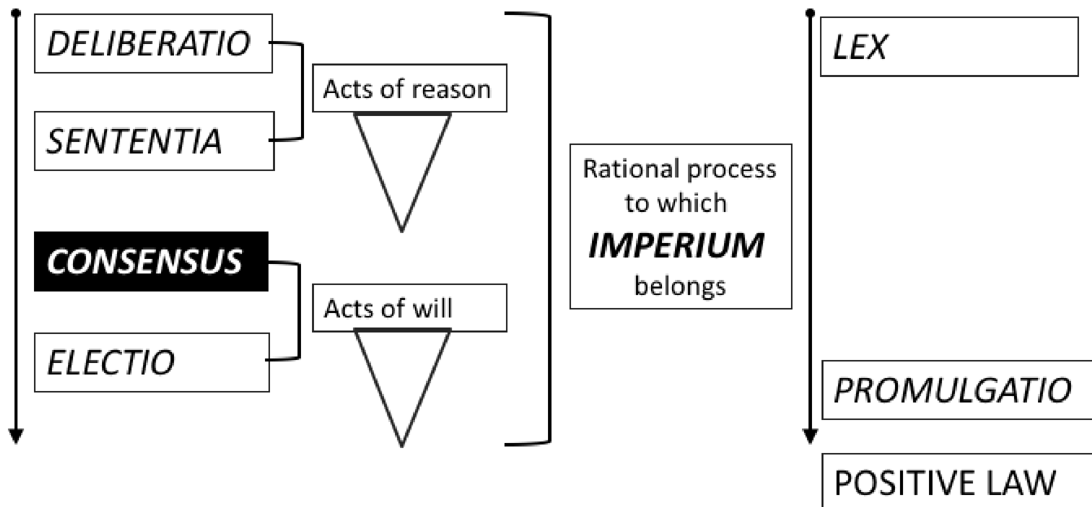
[162] D. Deckers, *Gerechtigkeit und Recht*, *Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483-1546)*, Studien zur theologischen Ethik, Universitätsverlag Freiburg i. Ue., Verlag Herder Freiburg i. Br., Freiburg 1991, p. 166, 369.

[163] In the words of Vitoria, "*vel etiam possumus dicere quod potuit fieri divisio ex consensu virtuali et interpretative occupando unusquisque suum locum, dimittendo loca aliorum. Et forte sic facta fuit, non consenso certo et formali, sed quodam consensu interpretativo, ita quod incoeperint aliqui colere certas terras et alius alias; [...] Et hoc non aliquo consensu formali, sed virtuali. Quia videbat unus alium habere illas terras, non curabat ire ad illas, sed capiebat alias. Et iste consensus sufficit ad ius gentium, quod ius gentium certe ad plurimum constat solo isto consensu, scilicet virtuali. Quia nunquam homines convenerunt inter se quod legati essent inviolabiles et securi, ut nunc fit, sed expresserunt consensum illum potius factis quam verbis; et aliqui incoeperunt facere, et servati sunt legati, los embajadores, inviolavile ab aliis, et ita postea perseveraverunt in illo usus*" (*Ibid*, p. 348. Deckers is quoting Vitoria's *Commentary* on Aquinas ST IIaIIae q. 62 a. 1 n. 23).

[164] *Ibid*., p. 372.

already challenged the meaning of "necessity" in this respect), and to positive law, because "*es ein konstituiertes Recht ist, nicht von der einen oder anderen Nation, sondern von allen Nationen der Welt. Im eigentlichen Sinn bezeichnet Zivilrecht dasjenige, das einer Nation eigen ist und das nicht gleichzeitig von der Gemeinschaft der Menschen als universelles Gesetz auferlegt ist*".[165] *Ius gentium* therefore, lies between the universality of natural law and the claim of effectiveness made by human will, where consensus plays a decisive role. Cruz Cruz claims the "necessity" of consensus *once* it is established[166]. This is, in my view, the crucial point where ambiguity lies: consensus cannot be established, both because it is fictional and because it does not amount to a proper act of imperium. Either men agree tacitly (therefore, without speaking) or they act "more with facts than with words". This however, does not change the urge for legitimacy perceived by Vitoria. In both cases, promulgation and the counterfactual argument are the only possibilities. The former *speaks* the law, the latter is a mental experiment that proves facts are legitimate as they are in accordance with reason. Both possibilities however, do not change the ambiguous nature of *ius gentium*. I think that a possible way to address such ambiguity is through a clarification of the relationship between consensus and imperium. We have said that consensus is a power of the will, although comprised in the deliberative process of reason. This means that it does not "presuppose an act of will", as *imperium* does, but rather contributes to its creation. Remember that consensus is just one step before *electio*. Imperium, on the other hand, is a power of reason and produces an act of will, both by expressing a command in words and by putting it into being. Consensus lacks the last, decisive, passage of producing an act (see the scheme below) because it lacks imperium and it is not a linguistic faculty. Only a rational faculty can do this, as we have previously explained. That is why, if we apply this scheme to *ius gentium*, Vitoria always seeks to adjust consensus through imperium and vice versa. He needs imperium to found the universality and rationality of *ius gentium*, but at the same time he is aware that he cannot expect promulgation from it as in civil law *stricto sensu*. Therefore, consensus plays a decisive role: it is a power of will, but "crystallized" into a rational process, and consequently constitutionally incapable of producing a proper act. Consensus, in fact, is not imperium. However, consensus relies upon natural law, from which it derives its bindingness and rationality - but what about its necessity and effectivity?

[165] J. Cruz Cruz, '*Ius gentium* bei Vitoria: ein eindeutig internationalistischer Ansatz', in A. Fidora, M. Lutz-Bachmann, & A. Wagner (Eds.), Lex *und* Ius*, Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, Reihe II: Untersuchungen, Band 1, Frommann-Holzboog, Stuttgart-Bad Cannstatt 2010, p. 331.
[166] *Ibid*., p. 328.



1.4.3 A real customary *ius gentium*?

In the preceding paragraphs, I have tried to unpack Vitoria's complicated doctrinal reasoning. From such an operation, it is possible to draw a couple of conclusions.

In my view, Vitoria's account of *ius gentium* as an "immutable positive law" perfectly describes the ambiguous nature of customary international law. Although he does not explicitly say that *ius gentium* is custom, because this would lead him to a negation of Aquinas, he manages to make it unrecognizable from the original model described in ST and more similar to a customary law of nations. In this respect, in his *Relectio De iure belli* (1539), when dealing with the question of prisoners of war, Vitoria argues that "as many practices in war are based on the law of nations, it appears to be established by custom that prisoners taken after a victory,

when the danger is past, should not be killed unless they turn out to be deserters and fugitives. This law of nations should be respected, as it is by all good men".[167]

In fact, as reason is always directed towards good (and, therefore, *lex* as well), the inner reasonableness of *ius gentium* (either as recognized immediately by reason or discovered by it) makes it understandable, universal and unchangeable. As we have seen, the criterion of the "common good," deduced by reason, is one of the distinctive features of Vitoria's *ius gentium* precisely in those cases in which it is impossible to derive it from natural law.

However, the patent impotence of the law of nations in relation to its positive law status remains, and the possible moral consequences of this particular situation seem to concern Vitoria. This drives him to excogitate an alternative solution. We have said that when he speaks of *consensus omnium gentium et nationum*, Vitoria has in mind a sort of interpersonal law governed by reason, which also provides the counterfactual proof of the existence of such law. However, when in his *Relectiones*, starting from the one *On Civil Power*, he starts to conceive of the *orbis* as a proper *civitas*, namely a commonwealth, the perspective changes completely. Consensus becomes not only a hypothetical device but assumes a legislative force, which is granted, to use an oxymoron, by the *promulgation of reason*. This makes custom effective, because when the international commonwealth follows the same rules of the domestic *civitas*, then a majority criterion can rightly be introduced. But we have said that even a widespread majority for Vitoria would be insufficient to promulgate a law. In this case, however, the law in question is the law of nations, which is "firmly established in reason". Therefore, once again reason acts as a driving force, which has the power to convince everyone of the rightness of its precepts. No such possibility would exist in the domestic commonwealth, where the sovereign has the power to legislate. What if there is no sovereign, as at the international level? In such circumstances for us, being advanced learners of Arabic, "reason is like a queen".

[167] "*videtur receptum* consuetudine…*et servandum est ius gentium eo modo, quo inter bonos viros* consuetum *est*". A further stress on the customary nature of *ius gentium* is given by the verb "*consuetum est*", which shares the same etymological origin of *consuetudo*. F. De Vitoria, *On war*, in *Political Writings*, p. 321-322, L edition, p. 417; Furthermore, that of the "*omnium hominum bonorum*" is a famous Ciceronian theme, see Cicero, *Pro Sestio*, XXII, LXVIII (Cicero, *Speech on Behalf of P. Sestius*, ed. by R. Kaster, Clarendon Press, Oxford 2006).

Chapter 2. *Ratio probabilis, consensio omnium* and the impact of *humanitas* on Alberico Gentili's theory of customary international law

The Italian jurist Alberico Gentili (1552-1608) has been the subject of much debate in the last decades.[168] To what extent did he contribute to the creation of modern international law? What did he mean by *ius gentium?* Of what does his modernity consist? This chapter takes as a starting point the assumption that the philological method proves particularly valid if one wants to weave the architecture of sources underlying specific legal issues. Jurists like Gentili, even when dealing with extremely technical legal questions, used to rely upon a wider body of knowledge (comprising literature, poetry, historiography, etc.) in order to prove their assumptions. All their texts are full of marginal quotations which constituted the skeleton of the argument, but were sometimes left unexplained by their authors, because they believed that the source quoted was well-known (i.e. Cicero, Augustin, and so on) to their intellectually literate audience.[169] As a result, such an erudite style of argumentation may sound inconclusive to a contemporary jurist, trained in an epoch of positivism and of disciplinary hyper-specialization. However, reading this web of (marginal) texts under the (main) text is a very helpful operation in terms of conceptual clarification. It seems to me that this applies especially to Gentili.

The main thesis of this chapter is that Gentili's use of classical sources significantly influences the way he conceives of the role of custom in the law of nations. In this respect, he provides an interesting example of the difference between scholastic and humanistic methods of inquiry into the law of nations. What the so-called "great debate" among scholastics and humanists reveals is not a clear-cut opposition of two factions, but the epistemic differences of their respective political and intellectual agendas.[170] In other words, whereas the two methods

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[168] For a biographical sketch of Gentili, see J. van de Molen, *Alberico Gentili and the development of international law: his life work and times*, Sijthoff, Leiden 1968.

[169] D. Quaglioni, 'Introduzione', in A. Gentili, *Il diritto di guerra*, trans. by P. Nencini, ed. by G. Marchetto e C. Zendri, Giuffrè Editore, Milano 2008; see also C. Zendri, 'Alberico Gentili e il *De iure belli*. Metodo e fonti', *Laboratoire Italien* [Online], 10 (2010), URL: http://laboratoireitalien.revues.org/534).

[170] See D. Panizza, 'Political Theory and Jurisprudence in Gentili's *De Iure Belli*. The great debate between 'theological' and 'humanist' perspectives from Vitoria to Grotius', *IILJ Working Paper 2005/15, History and Theory of International Law Series*; R. Tuck*, The rights of war and peace: political thought and international order from Grotius to Kant*, Oxford University Press, 1999, p. 16; R. Tuck, *Philosophy and government*, Cambridge University Press 1993. Further contributions on Gentili's humanism, against the background of Carl Schmitt's famous praise of Gentili's *silete theologi in munere alieno*! (C. Schmitt, *The Nomos of the Earth*, Telos Press, New York 2003) include: D. Panizza, *Alberico Gentili giurista ideologo dell'Inghilterra elisabettiana*, La Garangola, Padova 1981; D. Panizza (Ed.), *Alberico Gentili. Politica e religione nell'età delle guerre di religione*, *Atti del convegno della seconda Giornata Gentiliana, (17 maggio 1987),* Giuffrè Editore, Milano 2002; M. Ferronato, & L. Bianchin (Eds.) *Silete theologi in munere alieno. Alberico Gentili e la seconda scolastica, Atti del Convegno Internazionale, 20-22 novembre 2008*, CEDAM, Padova 2011; G. Minnucci, *Silete theologi in munere*

of inquiry were mutually permeable to their respective influences, what their comparison ultimately shows is a totally different perspective on human nature and political order. For humanists like Gentili, human reason is fundamentally uncertain, as compared to the claims of epistemic firmness of a perfect and universally deducible reason like that of Vitoria. This conceptual assumption has profound implications for the construction of *ius gentium*, which is not conceived of as a universally deducible system of principles, but rather as the changing expression over time of natural law principles that can only be inferred by observing human behavior. The question is then one of providing *ius gentium* with a normative framework that legitimizes such behavior.

Custom plays a fundamental role in Gentili's conceptual transformation. In his *De iure belli*, after identifying *ius gentium* with natural law, he explicitly defines *ius gentium* as *consuetudo*. In order to explain such an explicit equation, in the first part of my contribution, I will start by deconstructing the concept of *naturalis ratio*. Gentili refutes the assumption of jurists like Hugue Doneau that natural reason is immediately deducible from human nature and vindicates, on the contrary, a notion of *ratio probabilis*, which is to be inferred and not geometrically derived from the behaviors and customs of *gentes*. The uniformity and repetition of such acts is granted by the fact that their authors all belong to a universal *societas hominum*. However, as said before, according to Gentili, *ius gentium* is natural law. Natural law being, by definition, immutable, how can this uniform recurrence of customary practices itself be a sufficient guarantee of immutability? In the second part, I will try to clarify this point by looking at the relationship between Gentili and the Stoic tradition of Cicero. Furthermore, by referring to the category of *humanitas*, I argue that it is possible to see how this notion of a universal society of humankind allows the concept of custom to be consistently applied to the realm of *ius gentium*, providing it with a totally new theoretical framework from which a specific concept of legal obligation derives.

Thirdly, I will read the notion of *consensio* through the lenses of *naturalis ratio* and *humanitas*. In fact, as a further and radical step, Gentili deprives natural law of its content. Natural law, he argues, cannot be proved "unless you want to make it obscure". However, although it is impossible to demonstrate (the Latin verb he uses is *probare*) due to its patent self-evidence, we can nevertheless provide proof of its existence (*allegare*) by equating it with

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alieno. Alberico Gentili fra diritto, teologia e religione, Monduzzi, Milano 2016; P. J. du Plessis & J. W. Cairns (Eds.), *Reassessing Legal humanism and its claim:* Petere Fontes?, Edinburgh University Press, Edinburgh 2016; C. N. Warren, 'Gentili, the Poets and the Laws of War', in *The Roman Foundations of the Law of Nations*, pp. 148-9.

ius gentium. The only thing that we are able to prove is *naturalis ratio*, which acts as a criterion for natural law for the precise reason that it is considered *probabilis*, i.e. it can provide actual evidence of natural law in human conduct. The question is, at this point of the argument, what is this evidence? How can the jurist collect it and according to what criterion? Is natural reason a normative-based concept?[171] Is repetition itself enough to qualify a legally binding behavior? I will interpret some excerpts of Gentili's texts where he strives to identify customs. My hypothesis is that the concept of *humanitas* is relevant in defining the content of natural reason, as well as in providing *ius gentium* with a formal method of identification of customs (as evidence of natural reason). More precisely, I will discuss how Gentili's method of *studia humanitatis* (consisting in relying upon the common opinion of scholars as a further evidence of agreement on any given issue) contributed to the creation of a primitive concept of *opinio iuris*.

2. 1 Imitation of nature. Reason between human variability and repetition of customs

In order to elucidate Gentili's understanding of *naturalis ratio*, which is at the basis of the doctrine of *ius gentium*, I will start by deconstructing his thought and analyzing what he means by nature and reason. These two concepts are crucial in the construction of a jurisprudence which understands itself as a science of humanity, as Gentili argues in the first pages of his *De iure belli* (from hereafter: DIB). Here the author vindicates a new space of inquiry for his philosophy of war, which falls, according to him, under the jurisdiction of *ius gentium*. Philosophers never ventured outside the boundaries of the *civitas*, nor did Justinian stray beyond those of empire; and as for those who deal with military questions "I could not read them all without annoyance"[172], complains Gentili. The weakness of these contributions lies in the fact that their authors do not assign the laws of war to the right compartment of the law, namely the law of nations, and that they do not consider nature but *opinion* as a source of law. What exactly does Gentili mean by *nature* and, more precisely, by human nature? Gentili clarifies this point when he deals with the idea of war as trial. We as humans are constitutionally incapable of knowing the truth behind conflicts. Nevertheless, we are deceived by the naïve persuasion that we can indeed have access to that truth, and consequently be able to assess the

[171] See B. Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgement', *American Journal of International Law*, 92/4 (1998), pp. 713-723.
[172]DIB, I, I, p. 3.

rightness of our position as belligerents.[173] This misleading thought is a consequence of an inappropriate identification of the concept of nature, meaning what happens in the physical world and is subject to rules of necessity; with that of human nature, which remains inscrutable and as a result can only be the object of reasonable estimation. Therefore, the role of war has the same ascertaining nature of a judicial trial, since it tests where the truth lies and grants justice accordingly. Further on in the *De iure belli* Gentili provides a valid counterexample of this reasoning, taking as a negative model the Ancient Greeks and their relationship towards barbarians. The reason there can be no peace but only perpetual hostility between the two lies in the fact that, according to Gentili, the Greeks used to identify their nation with reason itself: "but when you hear 'Greeks' you do not have to intend the name of that *nation*, but that of *reason* itself".[174] Such a synonymy implies the dangerous consequence that, if Greeks are the only ones endowed with rationality, then barbarians cannot but be considered as animals; therefore, war is justified by necessity of their *natural* inferiority.[175] Gentili seeks to de-construct this absolute account of "natural" reason and necessity in order to make this concept more suitable as a basis for the science of *ius gentium,* i.e. of humankind.

Another account he gives of reason comes from *De armis Romanis*, where Gentili qualifies reason as *probabilis* in order to present his historical method. This method consists of considering historical events and occurrences more as debatable proofs than as indisputable facts from which there is no escape, nor a possible future discussion. This approach is once again linked to the idea that war is similar to a judicial trial in ascertaining the truth, as there is no international tribunal among nations. Furthermore, through historical analysis it is possible to reconstruct the legitimacy of that truth after it has been crystallized (with *exempla* counting as markers of it). Gentili's *De armis Romanis* is a typically humanistic treaty in the form of a debate on the legitimacy of the Roman Empire between an *Accusator* and a *Defensor* (Gentili seems to support the views of the latter). In this text, historical method is qualified through a specific conception of reason: "the *Accusator*, undeterred by the hard task of subverting the received common opinion about the legitimacy and greatness of the Roman empire, underlines that in the ultimate analysis reason alone, more than a thousand witnesses, is the measure of historical truth: *ratio est vera regula*. On the other hand, the *Defensor* starts his argument by stressing the principle that established consent is the test of truth and to this effect he quotes

[173]DIB, I, VI, p. 48-49.

[174] DIB, I, XII, p. 86.
[175] *Ivi*.

Cicero's sentence: *ut, de quo omnium definitio* consentit [my emphasis], *id verum esse, necesse est*".[176]

The rationale behind the refusal to take *ratio* as an exclusive criterion, according to Gentili, is that, as already said, it goes too far and beyond human capacities of understanding[177]. This does not lead Gentili, however, to a radical skepticism. Instead, what he suggests is to leave aside philosophical investigations on the merits (what is reason, what is its content) and to take reason as evidence of a shared consensus. In this sense, reason is *probabilis* not because it is probable (its certainty and reliability as a source are not under discussion) but because it literally "can be proven".[178]

This has an interesting relationship with the idea that, according to Gentili, natural law itself is inscrutable and indemonstrable; therefore, we are left with a *ratio probabilis* and with an *improbabile ius naturae*. How to connect these two? Once again, we have to dig a bit deeper into the concepts of 'reason' and 'nature'. In the last pages of DIB, I, 1 Gentili clarifies the relationship between the two in terms of *imitation*. More specifically, having said that *ius gentium* is a set of innate laws given to us by God, Gentili refuses to answer the question of which of these are natural laws. In fact, he says that "*rationem naturalem per se patere"*, namely that natural reason is evident *per se,* and every further attempt at determining its content has the fate of making it obscure *("si probare tentes, obscures"*). The only thing we can do is to *allegare* natural law, that is to say to provide evidence of it (*allegare* is the Latin verb for the presentation of evidences in a trial: again, a reference to the judicial process).[179] Here Gentili provides two *allegationes* of natural law, developing two sets of arguments. About the first one, Gentili says that "*satis probatum est, ius esse naturale, quod si quid facias adversus illud, tu vel pudore correptus factum suppressum velis: aut si eo processeris impudentiae, ut fatearis,*

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[176] D. Panizza, 'Gentili's *De armis Romanis'*, in *The Roman foundations of the law of nations*, p. 58-59. The quotation from Cicero is taken by *De armis Romanis*, II, I, p. 90: "that, on the subject on which the definition of everybody agree, it is necessary that that is true".

[177] This echoes Seneca's *Epistulae Morales ad Lucilium*, 66, 12. The divine origin of reason does not make it less mutable, as subject to the variations of human fortune: "*mortalia minuuntur cadunt, deteruntur crescunt, exhauriuntur implentur; itaque illis in tam incerta sorte inaequalitas est: divinorum una natura est. Ratio autem nihil aliud est quam in corpus humanum pars divini spiritus mersa; si ratio divina est, nullum autem bonum sine ratione est, bonum omne divinum est*".

[178] In order to avoid misunderstanding, I will not deliberately translate the Latin *probabilis* into English. I do not want to hint at the misleading suggestion that *ratio probabilis* is something probable, therefore uncertain. Gentili does not address the philosophical issue of the value of reason as *episteme*; he takes it for granted, and refuses any investigation about the nature of reason, leaving it unsolved in the realm of natural law.

[179] See Dig. 50.17.42; Dig. 48.1.13; the term passed through the Italian vulgar mantaining the same meaning as in B. Latini, *La Rettorica* (1260-61): "Ma perciò che in questo consolamento non ha lite, perciò che 'l consolato non si difende né non allega ragioni contra il consolatore, non puote essere ragione di questa arte" (ed. by F. Maggini, Firenze, Le Monnier 1968).

defendasque, sentias tamen idem, quod traditur de his sententiis, quae axiomata nominantur, defendi factum non posse"[180]. This argument proves, *ex contrario*, the moral existence of natural law. Through a mental experiment, Gentili excludes any possibility of defense of a violation of natural law, both because it would be manifestly against conscience and because it would lack any sort of moral approbation by others. This derives automatically from natural law's self-evidence and it is confirmed by other passages of DIB. For example, when talking about betrayers in DIB, II, IX, if "law is justly said to be what everybody praises", then to behave justly is to follow what is approved by everybody's consensus; the feeling of moral repugnance is a clear indication of the absence of *ius*.

There is an important point here, which provides a new insight into the theme of human reason we have been investigating. The unanimity of consensus comes not only from the fact of some behavior being the object of widespread social approbation (Gentili himself is aware that societies, usages and culture are subject to changes), but more profoundly from that behavior being in agreement with one's own conscience. In other words, not only is human reason at the very core of the idea of justice, but it also becomes a distinctive criterion of its identification. In fact, "in this way natural reasons manifest themselves, by being in agreement with conscience", namely with the individual moral feeling of approbation (given to what "must be done") and repugnance (against what is a reason for the conscience to feel shame). This also proves that *ius gentium* has moral content. The question of approbation is more evident in the second argument he makes, hinting at a second meaning of the term *probabilis*. We also find evidence of this inner and patent bindingness of natural law in the sentences of the "*magni auctores*", namely the *auctoritates* that Gentili will take into consideration in his treaty. The witnesses of these *auctores* further legitimize natural law as they speak "*secundum naturam*", namely, according to nature:

Et sic exempla eorum huc venient, qui *probi*, et *probati* habentur. nam et isti egisse secundum naturam videntur. Quanquam enim nec sit exemplis iudicandum: et aurea ea dicitur lustiniani lex. Ab exemplis tamen duci *probabilem* coniecturam, certum est, et in dubio iudicandum imo est exemplis: et cum itum in consuetudinem est. Neque enim mutare decet, quae certam observantiam semper habuerunt, et firmius iudicium creditur, quod plurimum sententiis confirmatur. Quid de gestis summorum dico, et bonorum virorum? Ea imitanda sunt semper:

[180] DIB, I, I, p. 14-15, "*it is enough proved that natural law exists: if you do something in violation of it, you would either be ashamed and want your action to be forgotten, or, should you go so far with your impudence to defend it, you would be answered the same thing that it is said of those maxims which are called axioms, i.e.: that such an action cannot be defended*".

socordiae enim, et proditionis est, nolle eos imitari, qui tanti fuerint: ut idem scribit Iustinianus. 'Quod mundus *probat*, non audeo *improbare*:' Baldus respondit. Etiam argumenta, et rationes facient hic: quemadmodum alibi facere animaduertimus. Quid ni? 'Ratio est naturae imitatio'. Et neque ego tibi dico demonstrationes, quas petes a Mathematico; sed quales ista tractatio patitur, suasorias *[all italics are mine]*[181].

This very dense passage has at least three key-points worthy of discussion. First, Gentili draws a parallel between the *probabilitas* of reason, namely its capacity of being proved through exempla, and the approbation that these examples receive from the community of *auctoritates*. More explicitly, Gentili here plays on the double meaning of the Latin verb *probare*, which means both 'to prove, to try', and 'to approbate'. This further nuance in the term *probare* considerably strengthens the concept of *ratio probabilis*, which is now based on evidence which counts as proof of natural law as long as it is approved, and is approved as long as it is evidence of natural law. This vicious cycle, although bringing the argument to a dead end, grants the certainty of *ratio probabilis* - Gentili insists on this point in the passage quoted above: "certum *est*", "certam *observantiam*", "firmius *iudicium*", "*sententiis* confirmatur".[182] Moreover, this certainty rests upon the fact that reason is always *secundum naturam*, according to nature. More precisely, it consists in its imitation. Here Gentili quotes Seneca: as we imitate nature with our reason, pursuing virtue and rejecting evil,[183] on a second level of imitation we also emulate those who behaved according to reason, may they be historical figures or our neighbors. Reason is, in other words, a multilevel imitative practice peculiar to human beings.[184]

[181] *Ibid.*, p. 15-16: "Therefore, examples taken from those who are honorable and of approved goodness prove useful to this end, for these men seem to have acted according to nature. Although we do not have to judge according to examples, and golden is that rule of Justinian, it is however true that from examples we can draw conjectures worthy of approbation. In reality, in dubious cases, we have to judge through examples, also in order to assess when a certain behavior became custom. It is unseemly to change what has been always and faithfully respected, and the more accepted an opinion is, the more stable it is. What should I say of the deeds of the most noble and good men? They are always to be imitated by us: indeed, not doing so would amount to indolence and betrayal, as Justinian says. 'I do not dare to blame what the world approves', replies Baldus. Arguments and reasons will be useful here and elsewhere, as I have already said. Besides, 'reason is the imitation of nature'. And I do not provide you with demonstrations, which you will ask the mathematician, but rather with persuasive arguments appropriate to this treatise".

[182] Elsewhere, Gentili recurs to the same formula of the *ratio probabilis*: very often he uses expressions like "id rationes probant", "intellectus naturalis probat" (*De legationibus libri tres*, II, II). This suggests a substantial homogeneity of this thought through all his most important texts.

[183] Seneca, *Epistula 66.*

[184] In his *Lectionis Virgilianae Variae Liber* (Hanau 1603), a legal-philological commentary on Vergil's *Eclogues*, Gentili addresses the issue of the humanity of the shepherds. He considers them human because they invented poetry through the imitation of the bird song (*Lectionis Virgilianae variae Liber*, XIII, p. 120; XX, p. 188-189). On the importance of poetry for Gentili, see J. W. Binns, *Intellectual culture in Elizabethan and Jacobean England,* Francis Cairns Publications Ltd, Leeds 1990; J. W. Binns, 'Alberico Gentili in Defence of Poetry', *Studies in the Renaissance* 19 (1972), pp. 224-271; C. N. Warren, 'Gentili, the Poets and the Laws of War', in *The Roman Foundations of the Law of Nations*, pp. 146-162; C. N. Warren, *Literature and the Law of Nations*, pp. 31-61; F. Iurlaro, 'Il testo poetico della giustizia. Alberico e Scipione Gentili leggono la *Repubblica* di Platone'. *Pegé* 2

The fact that reason does not coincide with nature but is an imitation of it makes it an artificial construct, a painting from which we cannot deduce but infer the features of the original model. Forms and methods of imitation may change - turning again to the artistic metaphor, painters may have personal inclinations, tastes, live in different epochs, belong to different cultures. What does not change is that they are artists, and always will be, by virtue of the very fact that they imitate.[185] Leaving aside this metaphor, the same applies to humankind: imitation is quintessential of human nature. I will come back on to this point in the section dedicated to the notion of *humanitas*, in the light of which we can further conceptualize the imitative nature of reason. Last, having said that *probabilis* does not mean 'uncertain' - quite the contrary - Gentili can conclude his argument by vindicating its persuasive nature versus a mathematical model of deduction, which he rejects as inappropriate to his analysis. This sheds further light on Gentili's method: why does he refuse to proceed *more geometrico*? His reading of Seneca is crucial here: Gentili does not want to rule out the epistemic validity of *ratio*, but he does want to submit it to the variability of human nature, due to the changes, contingencies, misfortunes and fortunes to which it is subject. Moreover, "*ratio naturalis secundum hominum captum quandoque variat: et multi non tam ratione illa, quam phantasia aguntur. Leges autem latae a sapientissimis viris, et iudicio omnis seculi adprobatae, certe eam rationem tenent, quae Alciatus sapientissimus*".[186] This variability does not make human behavior less understandable; rather, it provides a basis for the immutability of their conduct "*secundum naturam*". Gentili argues that what never changes is "*etenim qui omnia faciunt, homines iidem sunt*".[187] Therefore, it is possible to find recurrences (in the form of "*leges latae*") in this variability, which are *certae* and *adbprobatae* as long as they passed the test of truth, i.e. they are according to nature (and conscience), and therefore repeatedly approbated over centuries. This is a criterion, as Gentili said before ('in dubious cases it must be judged according to examples, even when a certain behavior became custom'), for identifying *consuetudo*. This theoretical move will prove crucial in Gentili's conception of *ius gentium*, as I will show in section 3.

To conclude this section, which has served as a glossary of the most important concepts in Gentili's account of the law of nations, it is easy to notice how the architecture of sources

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[185] This metaphor is not present in Gentili, however that art imitates nature famously amounts to a classical *topos* in the Greek and Roman world. What we could wonder is that, being for Gentili law the *ars boni et aequi*, the same rules of imitation may apply to it. In this view, the metaphor would sound less exotic.

[186] DIB, I, I, p. 16.

[187] A. Gentili, *De legationibus libri tres*, III, VIII, p. 107.

has radically changed. Natural law is no longer an object of investigation, whereas *ius gentium* still is, because the *naturalis ratio* on which it is based has radically transformed its physiognomy. This is because Gentili is interested in no nature except for human nature. It needs to be ascertained, therefore, what precisely he means by *human*.

2.1.1 A question of science. Gentili's humanism as a method for *ius gentium* and the legal bound of the *tacit vinculum*.

We have already said that Diego Panizza and Richard Tuck addressed the issue of Gentilian humanism, qualifying it in terms of a stark intellectual debate with the Scholastic tradition. However, what interests us is here is to emphasize the humanistic nuance of Gentili's thought, in order to clarify the meaning he gives to the notion of *humanitas*, so relevant in his re-reading of natural reason, and ultimately of natural law. Both conceptualizations, as has been mentioned, have important consequences in his theorization of *ius gentium*. This significance is also clear from the first book of the *De iure belli*, which systematically expresses Gentili's intentions and methods. He writes that jurisprudence is *vera philosophia* because it is the only science applicable to humanity as a whole. Neither moral philosophy nor Justinian's Corpus could extend their validity to such a level of universality: "*haec de bello Philosophia reipublicae est magnae, universi terrarum orbis, et generis hominum universi*".[188] Gentili vindicates this new kind of legal study on the laws of war with an equally new legal methodology,[189] which ensures history is preserved and looked back on in the form of *exempla* instead of providing an almost a-critical "*recitatio historiarum*".[190] Therefore, his historical method consists in considering historical events and occurrences more as proofs to be debated than as indisputable facts from which there is no escape, nor a possible future discussion, as has been shown with the analysis of the concept of *ratio probabilis*. History does not have the last word, as other humanists thought,[191] although it can have an important role in retracing the

[188]DIB, I, I, p. 2: "this philosophy of war concerns the great commonwealth, the universe and the whole of humankind".

[189]See L. Scuccimarra, '*Societas hominum*. Cosmopolitismo stoico e diritto delle genti', in L. Lacché (Ed.), *Alberico Gentili e gli orizzonti della modernità: ius gentium ius comunicationis ius belli, Atti del Convegno di Macerata in occasione delle celebrazioni del quarto centenario della morte di Alberico Gentili (1552-1608), Macerata 6-7 dicembre 2007*, Giuffrè Editore, Milano 2009, p.43.

[190] A. Gentili, *De iuris interpretibus*, I, I, p. 4: "recitation of history".

[191] On this aspect, see D. Kelley: *Foundations of modern historical scholarship: language, law and history in the French Renaissance,* Columbia University Press, 1970; *Renaissance Humanism*, Twayne Publishers, Boston 1991; *Vera Philosophia. The philosophical significance of Renaissance Jurisprudence*, Journal of the History of Philosophy, 14/3 (1976), pp. 267-279.

existence of customs. However, in Gentili's *arbor scientiarum* jurisprudence is the masterscience that identifies finalities and methods of inquiry. The role of history is made clear in Gentili's *De legationibus libri tres*, where he shows a general tendency to take into account historical examples in order to prove the sanctity of the figure of the ambassador.[192] Historical analysis is preferable in this context because present events are banal ("*vulgaria sunt, inque omnium oculis collocata*"). Therefore, looking at the past does not contradict, but rather legitimizes the present for four main reasons: 1) because the questions Gentili is investigating were, are, and will be the same for ancient, present and future times ("*et vero eorum multa, quae scripsimus, non antiquorum solum, sed et nostrorum sunt, et omnium temporum erunt*"[193]); 2) because the immutability of *ius gentium* cannot be questioned ("*iura gentium immutabilia mutari, tollique a nemine possunt*[194]); 3) because it is wiser to judge according to settled practice, than to consider how the law should be ("*itaque qui sapit non ex eo, quod fieri debet sed ex eo, quod fit, magis rem aestimabit*"[195]); 4) and finally, because it is always men who do everything ("*qui omnia faciunt, homines iidem sunt*"[196]; therefore the ambassador must be very well learned in history and philosophy).

Therefore, history proves rather than contradicts the immutability of *ius gentium*. How does Gentili manage to reconcile probable reason with *ius gentium*? Gentili's starting point is to recognize the importance of the Stoic ideal of the *universi generis humani societas*: *ius gentium* can be natural law because it is a science of that universal society to which all human beings belong, as stated by Cicero in his *De Officis*. According to him, all humans participate in such a universal society because of reason and language, the two elements that unequivocally distinguish men from animals.[197] From such a natural endowment, man derives a series of

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[192] R. Langhorne, 'Alberico Gentili on Diplomacy', *The Hague Journal of Diplomacy* 4/3 (2009), pp. 307-318.
[193] A. Gentili, *De legationibus*, II, I, p. 39-40.
[194] DL, II, V, p. 48: "in reality, many of the things we have written are valid not only in ancient times, but also in ours".
[195] DL, II, XIX, p. 81: "thus, he who is wise will take into greater consideration what happens than what ought to be".
[196] DL, III, VIII, p. 107.
[197] Cic., *De Officiis*, I, 50: "*Optime autem societas hominum coniunctioque servabitur, si, ut quisque erit coniunctissimus, ita in eum benignitatis plurimum conferetur. Sed quae naturae principia sint communitatis et societatis humanae, repetendum videtur altius. Est enim primum quod cernitur in universi generis humani societate. Eius autem vinculum est ratio et oratio, quae docendo, discendo, communicando, disceptando, iudicando conciliat inter se homines coniungitque naturali quadam societate, neque ulla re longius absumus a natura ferarum, in quibus inesse fortitudinem saepe dicimus, ut in equis, in leonibus, iustitiam, aequitatem, bonitatem non dicimus; sunt enim rationis et orationis expertes*"; Ibid., III, 69: "*hoc quamquam video propter depravationem consuetudinis neque more turpe haberi neque aut lege sanciri aut iure civili, tamen naturae lege sanctum est. Societas est enim (quod etsi saepe dictum est, dicendum est tamen saepius), latissime quidem quae pateat, omnium inter omnes, interior eorum, qui eiusdem gentis sint, propior eorum, qui eiusdem civitatis. Itaque maiores aliud ius gentium, aliud ius civile esse voluerunt, quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet. Sed nos veri iuris germanaeque iustitiae solidam et expressam effigiem nullam tenemus, umbra et imaginibus utimur. Eas ipsas utinam sequeremur! feruntur enim ex optimis naturae et veritatis*

precepts of natural justice, namely that he has the moral duty (as well as a legal one, Gentili would add) to respect not only his fellow citizens, but also humankind as a whole.[198] Gentili makes this point clearly in DIB I, XV ("*De honesta defensione*"). He vindicates the unity of humankind: nature has constituted among men the ties of love and benevolence on which *ius gentium* is based. Men are like limbs that constitute the human body: different in kind, but all part of the same organism. The question at stake here is whether this universal bound of friendship legitimizes an armed intervention in favor of other peoples. The answer Gentili gives to this problem is quite famous: what is relevant here is to understand the legal nature of the bound within the *humana societas*. In other words, is this bond so strong that it can override membership in particular societies? Gentili answers affirmatively, mainly using two sets of (contradictory) arguments. The first point he makes is that we should transpose what happens at the private level to the universal one. We should provide help to other peoples who are victims of aggression exactly as we would help our neighbors. We should also take into consideration the fact that there is no superior authority among princes. Only the prince himself can remedy injuries, but he generally refuses to do so pre-emptively.[199] However, one might suspect that this "humanitarian" intervention hides non-humanitarian interests. This point was raised by Guicciardini, which Gentili quotes as evidence of dissent on the issue. This allows him to move to the second argument, which incorporates Guicciardini's criticisms. There is no problem, he argues, if the people we want to defend are our friends or our neighbors. This is the famous *propinquitas* argument already deployed by Cicero: "we were born in such a way that among all of us exists a certain social vinculum, which gets stronger the closer we get one another; therefore, citizens are preferable to strangers, neighbors to distant peoples".[200] Therefore, the

exemplis" (Cicero, *De Officiis*, ed. by M. Winterbottom, Oxford Classical Texts, Oxford University Press, New York 1994).

[198] Again, L. Scuccimarra, '*Societas hominum'*, p. 45-46: "Lo sviluppo stesso del discorso di Gentili offre, peraltro, una precoce testimonianza del decisivo slittamento di piano in atto all'interno della rielaborazione giusnaturalistica del paradigma cosmopolitico classico. Inseriti nel contesto costruttivo del nascente *ius naturae et gentium*, quegli stessi principi che in Cicerone si ponevano alla base di un'etica universale della solidarietà intersoggettiva divengono, infatti, ora il fondamento di una cornice giusnaturalistica specificamente destinata a disciplinare le relazioni tra le persone pubbliche del diritto di guerra – 'principi sovrani' e 'popoli liberi'. A spingere in questa direzione è, a ben vedere, la stessa concezione para-giudiziaria della guerra – anch'essa di ispirazione ciceroniana – che domina l'intera intelaiatura sistematica del *De iure belli*. Se il dovere di difendere gli altri, chiunque essi siano è, infatti, vincolante per i privati cittadini che vivono nell'ordinato contesto di una *respublica*, a maggior ragione esso dovrà valere nei rapporti fra le diverse comunità politiche, dove non c'è alcuna autorità sovraordinata che possa rimediare alle offese subite e la difesa del diritto dipende solo dall'intervento individuale".

[199] DIB, I, XV, p. 114: "*atque si vera in privatis sunt, quanto magis in principibus vera erunt? […] Tanto magis in principibus vera erunt, quanto, si privatus privatum non defendit, superest magistratus, qui ulcisci privatorum iniurias, et emendare damna potest: at, qui iniurias, et damna principim faciat, nullus est, nisi is idem princeps, qui post malit malo medicinam ferre, quam a principio prohibere, fieri malum*".

[200] Cicero, *De Officiis*, III, 69; *Laelius de amicitia*, V, 19: "*ita nati sumus, ut inter omnes sit societas quaedam; maior autem, ut quisque proxime accedit, cives potiores peregrinis, propinqui alienis*" (Cicero, *De Re Publica, De Legibus, Cato Maior de Senectute, Laelius de Amicitia*, ed. by J. G. F. Powell, Oxford Classical Texts, Oxford

universalism implied by the concept of *humanitas* is toned down by the criterion of propinquity, which also introduces a tension noticed by Gentili himself. More specifically, he is aware that in this way reason appears more utilitarian than natural ("*sic utilis ratio latens*"), but in his view this does not contradict the validity of the vinculum itself. In addition, in cases when neighboring peoples are in danger we are more than authorized to intervene in their favor, as the injuries they suffer can involve us as well for reasons of proximity. Here *utilis ratio* no longer seems latent. This is a very problematic aspect and calls into question the idea of justice, which Gentili has to face to solve the dichotomy between a *ratio probabilis* and an *improbabile ius naturae.*

What happens, for example, if men are reluctant to observe the precepts of *humanitas*? Gentili answers that in the construction of a science of the law of nations "these are not to be taken into account more than we would consider beasts". Here Gentili seems to propose the dichotomy between rationality and bestiality which he will later use to contest the Ancient Greeks. On the contrary, Gentili continues that it is difficult but not impossible to convince men with justice, with which "the favor of the divinity has endowed everybody's senses, so that even those who do not know the laws recognize notwithstanding the *ratio veritatis*, the reason of the truth".[201] This capability of having an inner understanding of the laws rests upon the natural endowment of reason, which is "*secundum naturam*" as already explained. In other words, by arguing that reason always follows nature, Gentili grounds the bindingness of *ius gentium*, so to speak, *in foro conscientiae*, strengthening the moral and legal ties between individuals and the *humani generis societas* (in this sense, he perfectly acknowledges the Stoic tradition). However, whereas the Stoic model builds a direct relationship between the individual and the universal, there is no such precise correspondence between particular societies, contexts and cultures, and *ius gentium*. Ideally, every individual is subject to *ius gentium*, but practically the intermediation of the particular society or *respublica* in which he lives seems to divide humanity, despite the existence of the *humani generis societas. Ius gentium* itself rests on the following paradox: after the Tower of Babel, humankind dispersed into many languages and cultures. Consequently, the existence of a universal *naturalis ratio* has been presumed by jurists in order to make communication between *gentes* possible. However, Gentili faces the difficulty arising from the fact that reason is to be inferred from human behavior (and not presumed). Therefore, he qualifies, deploying again Stoic sources, *humanitas* as a tacit vinculum, membership to which is granted in principle to everyone (as everyone can imitate human

University Press, Oxford-New York 2006).

[201] DIB, I, I, p. 8.

behavior "*secundum naturam*"), unless they behave contrary to the idea of humanity itself. By so doing, Gentili founds a primitive category of tacit consent, which on the one hand goes beyond differences in languages and customs, and on the other determines the boundaries of the human society based on an evaluation of the behaviors of its members. In other words, Gentili considers violations of the tacit consent as breaches of the idea of humanity itself. This, read together with Gentili's account on nature, explains why he includes Turks and barbarians in general in the universal human society (unless they do not behave accordingly; and that is always the case with Turks, argues Gentili in a rhetorical impetus, although he does not consider them inferior by nature)[202], whereas he categorically excludes pirates and cannibals.[203] In DIB, I, IV he argues that "*hoc est ius, et de iure disputare, id est, de vinculo, quo obstringimur: et hoc vinculo non obstringimur istis*", as pirates declare themselves to be outside humanity (which is a legal vinculum: "*hoc est ius*").[204] The concept of human nature guarantees that the boundaries of humanity remain flexible, according to an opt in/opt out logic, and seeks to reconcile the immutability of *ius naturae et gentium* with the variability typical of human events. Furthermore, those who do not respect the laws of humankind may be punished and forced to respect it. However, if this attempt fails or is not feasible (as with pirates, since we cannot declare war on them; this would automatically include them as subjects of law), this also implies that the rights granted to humanity by *ius gentium* are not guaranteed to those who declare themselves outside humanity. Here Gentili seems to shift from the category of natural enemy to that of enemy of humankind, with the same results in terms of exclusion, but at least considerably enlarging the number of potential actors in the international arena (with the reservation that they respect the rules of humanity).

By using the category of *humanitas* instead of the almost metaphysical category of *ius naturae*, Gentili is also able to give *ius gentium* a more concrete connotation. As there are many practices that we are able to observe, the question remains; which acts demonstrate proof of the existence of custom?

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[202] DIB, I, XII, p. 92. See N. Malcolm, 'Alberico Gentili and the Ottomans', in *The Roman Foundations of the Law of Nations*, pp. 127-145.

[203] On pirates and *ius gentium*, see L. Benton, 'Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism', *Comparative Studies in Society and History* 44/4 (2005), pp. 700-724; L. Benton, *A Search for Sovereignty. Law and Geography in European Empires, 1400-1900*, Cambridge University Press, Cambridge-New York 2009; L. Benton, 'Legalities of the Sea in Gentili's *Hispanica Advocatio*', in *The Roman Foundations of the law of nations*, pp. 269-283; F. Iurlaro, 'Pirati, barbari e pastori: figure al limite dell'*humanitas* nel pensiero di Alberico Gentili (1552-1608)', *Historia et Ius* 10 (2016), paper 8. URL: http://www.historiaetius.eu/uploads/5/9/4/8/5948821/iurlaro_10.pdf

[204] DIB, I, IV, p. 36: "this is the law, and to speak properly about the law, which is precisely the bond that keeps us together: and we surely do not share that vinculum with them".

2.2 Is *ius gentium* the same as *ius naturae*? *Consensio omnium* as an in-between concept

Having identified natural law and *ius gentium*, Gentili here provides a second definition of *ius gentium*, which says a bit more about this relationship. "They say (D. 1.1.1.6) that *ius gentium* is the law that peoples use, which natural reason constituted among all human beings and among all of them is uniformly observed. This is *ius naturae*: in fact, the consent of all the peoples *ought* (my italics) to be considered natural law".[205] However, this sentence must not be understood as if the whole of humankind effectively gathered together in order to constitute their laws of nations, nor as Hugo Doneau understands it in his *Commentarius de iure civili*. Doneau argues that, given the impossibility of such a universal assembly existing, because of the differences in languages and usages between all the peoples of the world, *ius gentium* can be deduced by *naturalis ratio*. There is no need to prove what is inherent in the essence of human beings and therefore distinguishes them from brutes and animals. Gentili's fierce reply to this point is crucial to our discussion. By warning his reader not to trust Doneau's account, the author refutes the idea that *naturalis ratio* and *ius gentium* are identical, suggesting a more original position. He argues that *omnes* is to be considered as,

> what *everybody* seemed to like repeatedly, that is considered to be the whole world's decree and council. […] In fact unwritten law, like this one, as well as *consuetudo*, cannot be introduced otherwise […] Our jurists could collect this law from almost all the peoples, because if the Romans, the Greeks, the Jews, the barbarians, and all those who are known, ultimately use that law, human beings are considered to use the same law. We know the unknown from what is known. Like the government and the legislation of the *civitas* is in the power of the majority, so is the government of the world in the hand of the assembly of the major part of the world.[206]

[205] DIB, I, I, p. 10: "*aiunt autem, ius esse gentium, quo gentes humanae utuntur: quod naturalis ratio inter omnes homines constituit, et apud omnes peraeque custoditur. Hoc ius naturae est:* in re consensio omnium gentium lex naturae putanda est". It is worth noticing that in this very last passage of the Latin text Gentili says *lex* naturae, not *ius* naturae. Why does this distinction mean? Is it just a terminological oscillation? In Cicero's *De Legibus lex* means both *recta ratio* and "positive" law, whereas *ius* seems a more general, almost moral, concept of justice (*De Legibus*, I, §18-23). If we read this passage through the lens of Cicero's text, Gentili seems to propose two conceptual pairings: *ius gentium/ius naturae* vs *consensio/lex naturae*. According to such a distinction, the theory of the equation between *ius gentium* and *ius naturae* may lose significance, being the one between *consensio* and *lex naturae* operative and concrete. On the other hand, if we consider the use of *ius* and *lex* equivalent, as just a terminological oscillation, because they both rely on *ratio*, then this is just a philological side remark. However, we should consider such ambiguity to be a methodological *caveat*.

[206] DIB, I, 1, p. 13: "*quod* successive [my emphasis] *placere omnibus visum est, id totius orbis decretum, et concilium fuisse existimetur, […] Et vero ius non scriptum, ut hoc est, item ut consuetudo, aliter non inducitur* (p. 6) […] *Potuerunt nostri Iurisconsulti et de omnibus omnino gentibus colligere ius istud, quod si Romani, Graeci, Iudaei, barbari, omnes denique noti iure aliquo usi sunt, eodem homines usi existimentur. Incognita per cognita cognoscimus. Imo ut rectio civitatis et legis latio est penes civitatis partem maiorem: ita orbis rectio est penes congregationem maioris partis orbis*".

This is a very dense passage, in which Gentili develops his intuitions.[207] First of all, the Latin word *successive* (here translated as "repeatedly") deserves some attention, since it implies a twofold meaning. The first hints at the repetition of the same act during time, the second one stresses the *ex post* nature of the identification of such an act. In other words, *naturalis ratio* is a customary construct, which is only identifiable *after* a consistent repetition of acts with juridical value. This means that this consensus between *omnes* is neither deduced by what will later be called universal reason, nor presupposed *ex ante* as a counterfactual argument, as Francisco de Vitoria did in his *Relectio de Indiis*. According to Vitoria, such a connection between natural law and *ius gentium* exists, that "even on the occasions when it is not derived from natural law, the consent of the greater part of the world is enough to make it binding, especially when it is for the common good of all".[208]

Gentili argues quite the opposite. Since there is neither a geometrical reason from which natural law can be derived, nor is there a chance to prove its existence, *consensio* therefore *ought* to be considered universally binding as natural law - not in terms of a hypothetical universal assembly, but of actual historical legitimation given to that law. In other words, whereas for Vitoria *consensio omnium* answers the question "what would people *x* do at any given time in a *y* situation", for Gentili *consensio* can only be empirically inferred *after* it has been uniformly repeated, because it is coincident with natural reason, which is *probabilis* in the twofold meaning I have highlighted. However, according to Anthony Pagden,

> the theologians' conception of the law of nations, and Vitoria's in particular, because they held it to be a species of positive law, was consensual and thus changeable. Gentili's understanding of the *ius gentium/ius naturale* is, in effect, the precise opposite. By making the law of nations into the content of the natural law, he had dispensed with any need for 'moral discernment'. By making that content in all significant respects identical to the Roman law, he had also eliminated any need for further development. As far as its basic principles were concerned, it could only remain where 'our jurists' had left it: unchanged and unchanging for all time.[209]

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[207] Scipio Gentili, brother of Alberico and pupil of Donellus confirms this interpretation. Scipio edited Donellus' *Commentarius in iure civili* in 1595: in an illuminating footnote (of the same passage here quoted polemically by Alberico) Scipio argues: "*Sed Albericus Gentilis in DIB I,1 respondet, non eam mentem esse Imperatoris, et Ulpiani, nec nos ita capere debemus verbum, omnes, de omnibus gentibus, numero innumeris, regionibus disiunctis, et c. sed ut quod* successive *(!) placere omnibus visum est, id totius orbis decretum fuisse existimetur* (H. Doneau, *Commentarius*, I,VI,4)

[208] F. de Vitoria, *On the American Indians*, in *Political Writings*, p. 281.

[209] A. Pagden, 'Gentili, Vitoria, and the Fabrication of a Natural law of nations', in *The Roman foundations of the*

I have already demonstrated that *ius gentium* does indeed have moral content. As far as Roman law is concerned, it seems to me that Pagden's criticism is not fully convincing in this regard either. If Gentili considered Roman law to be such a universal model, he would have stopped his enterprise at the first page of the *De iure belli*. As has already been said, instead he starts his analysis by assessing the insufficiency of Roman law in matters regarding the laws of war.[210] Rather, as a product of the Empire, Roman law is itself subject to the dynamics of imperial conquest. In my view, Roman law itself is not a model, but it becomes one as soon as the Romans impose their dominion by conducting a series of legitimate and just wars. Moreover, 'our jurists' actually collected a number of practices observed in their interaction with other *gentes* (therefore, Roman law has an inherently comparative nature), and they succeeded in this operation because all the people of the world have laws exactly in the same way all of them have deities to worship.[211] Alternatively, going beyond what Gentili says, can we argue that those *gentes*, in the very same moment that they accepted, by being defeated, to be ruled by the Romans, also did not object to the imposition of Roman legal instruments but rather accepted them as a form of acculturation, and indeed imitated them as they recognized their *ratio veritatis*? Moreover, perhaps Pagden's account does not do justice to the theoretical model Gentili had in mind, as I demonstrated by describing his concept of *ratio probabilis* and its dynamic nature, and as the quotation from Cicero shows. He says that *consensio* ought to be

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Law of Nations, p. 360-61. Pagden himself seems less rigid than this elsewhere; "Modern law derives ultimately from Roman law, and Roman law was created, in large part, to serve the needs of a multiethnic empire. The very vocabulary of citizenship itself carried with it the idea of a society which was always ready to accept outsiders". (A. Pagden, *The Burden of Empire*, p. 4)

[210] In DIB, I, III Gentili further specifies that, on the one hand, jurists are not bound to consider the books of Justinian as the sole sources of the law (as physicians should not limit themselves to the teachings of Galenus, and philosophers to those of Aristotle). On the other, Roman law has a universal value, as it comprises precepts of natural law and which *can* be applied to gentes ("*aptatum sic est ad naturam universum*"). Gentili seems to suggest, quoting again Hugue Doneau (*Commentarii de iure civili*, I, XVI, §7), that the *Corpus Iuris Civilis* was *adjusted* to the demands of the law of nations. This clearly implies that there is no exact identification between the two, in fact: "sed ut quod civile est, non idem continuo est gentium: quod tamen gentium est, idem et ciuile esse debet. est quidem ius ciuile, quod non servit naturali, et gentium iuri per omnia: at neque in totum a naturali recedit, vel gentium" (DIB, I, III, p. 27).

[211] DIB, I, 1, p. 11. However here Gentili manipulates the source he is quoting (Cic. *De natura deorum*, I 62) to his own tastes and argumentative needs. In the very same passage mentioned, Cicero expresses doubt and suspicion about the fact that all the peoples of the world have deities: "*quod enim omnium gentium generumque hominibus ita videretur, id satis magnum argumentum esse dixisti, cur esse deos confiteremur. Quod cum leve per se, tum etiam falsum est. Primum enim unde tibi notae sunt opiniones nationum? Equidem arbitror multas esse gentes sic inmanitate efferatas, ut apud eas nulla suspicio deorum sit". Instead, Gentili writes: "Et vero ius non scriptum, ut hoc est, item ut consuetudo, aliter non inducitur. Isthaec autem adprobatio nec cognosci non potest: quemadmodum quod omnium gentium, generumque hominibus videretur, Deum esse. Potuerunt nostri Iurisconsulti de omnibus gentibus dicere: cum Romanorum, Alexandri, et Parthorum imperia detegere de his potuerint, et detexerint*" (Cicero, *De natura deorum; Academics*, ed. by H. Rackham, Harvard University Press, The Loeb Classical Library, Cambridge MA 1979).

considered ("*putanda est*") *lex naturae*, which is slightly - but significantly - different from saying that *consensio* is natural law. These are hints as to the direction of a consent that has to be proved natural law, not abstractly considered so. If *consensio* were natural law, what would be the use of it, if natural law itself cannot be proved? Therefore, *naturalis ratio* is shaped as custom, and is expressly called *consuetudo*.[212]

A similar reading of Gentili's account is also articulated by Jeremy Waldron, who defends Gentili's equation of the law of nations and the law of nature precisely for the reason that the "empirical turn" implied by the equation allows *ius gentium* to become a positive kind of law.[213] However, the fact that Waldron gives a contemporary meaning to the term "positivism", of course exogenous to Gentili's context, has the shortcoming of exacerbating the dichotomy *ius gentium/ius naturae* instead of proving their exact identification. In fact, in his contemporary reading of Gentili, Waldron argues that he reconciles positive law with natural law by including natural law theorizing in the domain of positive law. Here the category of positivism, which Waldron borrows from authors of the 20th century, is misleading. *Ius gentium* is not positive law. Gentili expressly considers it *consuetudo* precisely for the reason that it is unwritten law. He does not have in mind a universal civil law system, but rather a law of nations with the features that I described. Moreover, Gentili strongly affirms that *ius gentium* is *ius naturae* (and this is the thesis that Waldron also wants to defend). If the equation holds true, *ius naturae* is already included in *ius gentium*.

Therefore, in my view Gentili's aim is to develop *ius naturae* into a consensual source of law (which is not positive insofar as it is still natural law). Having this in mind, Gentili refers to ancient authors "in order to find principles of natural law", as stated by Waldron, who defines this method, again anachronistically, as *opinio iuris.* In my view, consistent with his intention of making *naturalis ratio* consensual, Gentili more precisely infers consensus (rather than *ius naturae,* about which we are unable to say anything) as *evidence* of principles of natural law.[214]

[212] From this perspective, there is a parallel between reason being an imitation of nature and custom intended as "second nature": on this, see D. Kelley, '*Second Nature*: The Idea of Custom in European Law, Society, and Culture'', in A. Grafton & A. Blair, *The Transmission of Culture in Early Modern Europe*, University of Pennsylvania Press, Philadelphia 1990, pp. 131-172.

[213]J. Waldron, 'A Defence of Gentili's Equation of the Law of Nations and the Law of Nature', in *The Roman Foundations*, p. 285.

[214] The same applies to the other source of *opinio iuris* that Gentili takes into account, namely human practice; Waldron argues that Gentili quotes "human practice not because of the positive law that it constitutes and not because it is authoritative, […], but rather because it is indicative of what the natural law requires" (human practice, as evidence of ratio probabilis, is not a requirement of natural law – which, being such an "obscure" legal source, can never be implemented or complied with - but rather the expression of it), *ibid*., p. 289.

It appears that only by giving precedence to this consensual element, and bearing in mind the dichotomy *probare/allegare*, the equation between *ius gentium* and *ius naturae* makes sense. From this perspective, consensus acts as an in-between concept, which implies some sort of "positive" law-making (only in the sense that it is the result of human agency and agreement), but still as an expression of *ius naturae*. The fact that consensus is so closely related to natural law makes the concept more efficient, according to Gentili: the more evidence we are able to collect, the more *consensio* approximates natural law, and as a result, natural law approximates *ius gentium*. Otherwise, considering *ius gentium* positive law makes explaining how it fits with natural law very problematic. Violations of natural law would also be conceptually impossible. On the contrary, violations of *naturalis ratio* are in principle admitted - and observable in practice - since the concept relies upon a consensual basis (automatic but voluntary membership to the *societas humani generis* through imitation). However, the violators face the consequence of their breach.

Waldron rightly identifies two markers of the existence of custom, or as he expresses it, of natural law (we have already challenged his interpretation). One is practice; the other is the *opinio iuris* of scholars as a source of "epistemic authority".[215] Regarding the first marker, Gentili looks at the practice contemporaneous to him (applying a majority rule and humanity as a criterion of validity, as already mentioned) and to historical *exempla*. Examples from the past are not valid for the sole reason of having occurred, but because they show the *ratio* behind custom. This does not make them less valid in terms of natural law, assuming that the term has the anthropological nuance we explained before. I will provide examples of this method in the next paragraph.

Most importantly, and in the second "epistemic" sense, it seems that Gentili draws a parallel between an imaginary *respublica* of eminent authors and the actual practices of peoples, as a result of his assimilation of *consensio* into natural law. The authors (or better, *auctoritates*) taken into account are an expression of a huge body of knowledge (which comprises literature, poetry, historiography, theology, and so on) from which it is possible to derive consensus. Waldron provides an example of Gentili's technique when describing his chapter on 'Declaring War'. Gentili quotes and sums up passages taken from Augustine, Cicero and Alciatus, arguing that "there is no doubt that war ought to be declared, if the agreement of so many peoples is of any effect in establishing the law of nations, and if such unanimity on the part of the learned

[215] *Ivi.*

men for so many centuries may be called the very voice of nature and truth. This is the voice of God. This is natural reason". Here consensus constitutes the law of nations, because natural reason is *probabilis* in the second sense we described above. To this effect, quotations from scholars are not a mere embellishment but a proper source of identification of consensus, as they *approbate,* or not, a particular custom. However, this method introduces a significant tension between *auctoritas* and *consensio*. Is it the authority of the source that creates the *ratio,* or instead the greatest possible number of scholars who consent to it? Is a majority sufficient to determine what is just? In addition, in the abovementioned passage, Gentili only talks about a "*doctissimorum auctorum conspiratio*", namely a convergence of the opinions of the scholars. What happens if they diverge? Should the jurist then exercise his discretion? Is something like a persistent objection conceivable in Gentili's thought? The answer would be no, as he identifies the category of tacit consensus with that of *humanitas*: objectors to the established consensus would be objectors to the very idea of humanity. Does this make *ius gentium* immutable? Yes, but one could admit that change is only permitted within the boundaries of humanity.

2.3 Gentili's method of identification of custom: some examples

I will present here three examples (in terms of method and content), taken from three works by Gentili: *De legationibus libri tres* (1585), the above-mentioned *De iure belli* (1598), and the posthumous *Hispanicae advocationis liber* (1613). The choice of these texts allows the demonstration of different argumentative techniques deployed by Gentili according to the intentions he wants to pursue in each work. In fact, it is possible to find oscillations in Gentili's method depending on the role he is playing: lawyer (as in the first and third text mentioned); or law professor (which is the case with *De iure belli*). These differences of intention do not impair the theoretical structure we have delineated in the previous paragraphs. On the contrary, there is a substantial homogeneity in the argumentative process: *rationes* are always presented as proofs of something Gentili wants to demonstrate. What changes is the type of evidence presented. From this perspective, the choice of these three texts is emblematic. In the first one Gentili uses almost exclusively historical examples to prove the sanctity of the embassies, in the *Hispanicae Advocationes* there is only reference to state practice contemporary to Gentili, whereas in *De iure belli* there is a balanced combination of historical occurrences and present cases. Another constant element is the apparatus of authoritative source quoted as evidence of approbation of a specific custom.

Concerning *De legationibus libri tres,* Gentili wrote this book in 1585 after having been counsellor for England in the *Mendoza* case, a Spanish ambassador accused of conspiracy towards Queen Elizabeth. This experience, alongside Machiavelli's influence, might have contributed to shaping *De legationibus* as a *speculum principis*, as the dedication to Philip Sidney and the style of the third book shows. The legitimizing role of history, due to the fact that through *exempla* we are able to observe human nature in action, is made very clear by Gentili in DL II, 18. This chapter is dedicated to the Mendoza case, where Gentili recalls the advisory opinion he was asked to give. We have, therefore, a very important witness to a controversial contemporary case. The question was whether to grant criminal immunity to Ambassador Mendoza for having plotted against Elizabeth I. This principle was not unanimously accepted, and those who agreed to grant the ambassador a general personal inviolability were quite reluctant to concede immunity from criminal jurisdiction for acts committed in the exercise of his functions.[216] Therefore, Gentili here has to address the emergence of what he believes to be a new custom (connected with the recent birth of permanent embassies), and to prove its existence. In this chapter, he adopts a double strategy. First, he opposes the view that the ambassador should be judged according to civil law. Second, he recalls an example from Cicero, decisive for his argument: when Verres was sent by the Romans as a *legatus* to Lampsacus and raped the daughter of one of the locals, they refused to kill him because "they would have made a smaller mistake in sparing an evil man than in killing an ambassador".[217] This is a clear proof of an "invincible *ratio*"; the ambassador has the task of regulating the relationship between two public entities, not between public and private individuals. Therefore, he enjoys immunity and must not be killed as a private individual. In this sense, the historical example illuminates a truth which is deemed invincible, as its denial would impair the existence of *ius gentium* itself.

In the *De iure belli* the argument is more fully articulated. Gentili plays on a different level of analysis. I will illustrate this with a very famous example, the previously mentioned chapter on the *honesta defensio*.[218] As I have already described the content of this chapter in order to explain how Gentili articulates the concept of *humanitas*, I will concentrate here solely on his argumentative method. In the first section of the chapter, he quotes all the literary precedents where the idea of a universal society of mankind is approbated. After providing the

[216] I. Birocchi, 'Il *De Iure Belli* e l'"invenzione" del diritto internazionale', in *Ius gentium, ius communicationis, ius belli,* p. 101-138.
[217] DL, II, XVIII, p. 78: "levis eorum peccatum fore, si homini scelerato perpecissent, quam si legato non perpecissent".
[218] DIB, I, XV

reader with an incredible carousel of quotations from Cicero, Seneca, Gellius, Horatius, Varro, Lactantius, Plato, Augustinus, etc., Gentili argues that there is a widespread consensus among the scholars on this issue ("*quantum consensum sapientum?*"). This is linked to the fact that membership of *humanitas* is a corollary of our being political animals. By so doing, he demonstrates through the twofold meaning of the concept of *ratio probabilis* that the existence of a universal society is both suggested by compliance with natural law and by consensus among scholars. Furthermore, Gentili continues his argument by criticizing the opinions of jurists on the issue of the *honesta defensio*. First, he argues that there is unanimity of consensus (to defend others is always right), then that there is no duty to defend others, as it is licit to receive money in exchange for having saved someone. This proves, according to the unconvincing ("*non satis firmo*") argument of these jurists, that there is no obligation to provide help to others, otherwise it would have been illegal to be paid as a reward. This, argues Gentili, has to do with gratefulness, which is never dishonest; therefore, the argument is poorly reasoned. In fact, some actions "can be done without glory and omitted without guilt".[219]

A second level of the argumentation regards the risk posed by utilitarian interests behind the right to defend. Here Gentili's main targets are Guicciardini (from which he quotes an almost contemporary example, the defense of Pisa) and Bodin. The first argues that political power can never be moved by consideration of humanity, rather intervention is always animated by greed. However, Gentili opposes this view with the idea that the jurist must not be interested in anything but justice. In the present case he argues, quoting Ambrose, that "full is the justice that defends the weak; and this is the justice I am looking for".[220] He does not explain what this justice consists of, because it is evident *per se* as a natural reason and it is a corollary of the fact that we all belong to the same human society (the existence of which Gentili has already proved). According to Bodin, instead, in cases in which we want to defend our allies, there must be a specific clause in the treaty of alliance authorizing the intervention. Here the argument is strictly legal, but Gentili opposes Bodin's view by first quoting historical examples (from Ancient Greek and Roman history), then literary occurrences of the criterion of *propinquitas*. This criterion is both a corollary of *humanitas* (love your neighbors first; again, he quotes literary examples of this) and a useful means of preventing possible dangers we may suffer. In fact, being very close to the source of the injury we want to vindicate, we may be contaminated by it.

[219] *Ivi*.
[220] *Ivi*.

The last example is a chapter of the *Hispanicae Advocationis libri duo* (HA), published in 1613 by Scipio Gentili after his brother Alberico's death. This text is a collection of cases that Gentili dealt with during his work as a lawyer before the Admiralty Court. In each chapter the author recalls the arguments in his pleadings before the Court. This is particularly interesting both as evidence of his intellectual method and of its applicability to current legal practice. For example, in HA I, XX, he analyzes the case of an English ship approaching Constantinople with a cargo of gunpowder (*pulvis tormentarius*), which was seized and confiscated by the Maltese and the Sardinians. There are several points through which Gentili contests the right of confiscation, here I will take into account the one that most emblematically stresses Gentili's method as I have tried to describe it. More specifically, having said all the opponent's arguments seem to run against the English position, he argues that

> …the opposing arguments mentioned above do not present any difficulty, for they do not really present a difficulty, I reply that in my opinion the English have the right in their favor, and that the Sardinians and Maltese are wronging them. Further, with reference to the other merchandise, which constitutes far the largest part of the property concerned, the merchandise outside of the contraband mentioned above, I think that the English are undoubtedly right. When lawful and unlawful merchandise belong not to the same but to different persons, the lawful is not confiscated on account of the unlawful, nor is the lawful confiscated even if both go with the same skipper. This is the view which Cynus, Baldus, and Salycetus prefer. "This is the truth," says Baldus. "It is the truth," Bartolus says also, and Alexander makes the same remark in commenting on Bartolus, and later Felynus and others express the same opinion. This is undoubtedly the common opinion in the case where owners of lawful goods have not known about the unlawful goods […]. These lines of reasoning are general and approved everywhere [*sunt hae rationes generales, ac ubique* probatae]. Therefore, the view would be established also by common usage [*et itaque* probata *sit opinio per communem quoque* consuetudinem], and on this point there is a passage in Clarus[221] (my italics).

As is evident in this excerpt, there is no reference to historical examples. Gentili conducts the reasoning exclusively on a legal basis, but he recurs to the same method of finding the *ratio probabilis* in the laws he wants to prove to be valid in the case at stake. He quotes other jurists as sources of common opinion, but does not address the question of the agreement of these *rationes generales* with natural law. This might be due to the concrete situation of the trial, where legal argumentation naturally takes precedence over theoretical analysis. However,

[221] HA, I, XX, p. 74-75, English translation by F. F. Abbott, in J. B. Scott (Ed.), *The Classics of International Law*, vol. 9, Oxford University Press, New York 1921.

elsewhere Gentili brings up the issue concerning the role of authoritative sources in determining the existence of a custom: "there has been a vigorous dispute on the point whether we ought to trust a doctor who testifies concerning a usage, indeed whether we ought to trust several who unite in testifying about it. Their opinions do not serve to establish the usage beyond their own time and their own district".[222] This prudence seems to contradict the method he has used in *De legationibus* and *De iure belli*, where there is no such restrictive approach in the selection of sources. Again, this does not contradict the general validity of the method, as shown in the example of the English ship carrying gunpowder, where Gentili relies on the common opinion of scholars. Perhaps Gentili's prudence on the issue is due to his opposition to the common law system. Later on, he calls for the application of civil law rather than common law in the Admiralty Court and distances himself from the common-law doctrine of precedent, which "these pettifoggers of common law" may be tempted to apply to foreigners simply because they deal with English citizens, interests or commercial transactions.[223]

The three examples mentioned above illustrate Gentili's tendency to use different and overlapping levels of argumentations, of which I have tried to unpack the underlining reasoning. In order to do this, I provided a glossary of Gentili's intellectual universe. I first presented his notion of *naturalis ratio.* I argued that a deconstruction of this concept leads straightforwardly to its reconceptualization into the notion of *ratio probabilis*. Gentili gives the concept a double meaning, insisting both on the fact that *ratio* has to be proved (compliant with natural law, as the only evidence of it) and approved by the community of scholars, jurists, intellectuals and by historical examples. This calls into question the relationship between *ius gentium* and natural law, both of which he re-conceptualizes through the idea of *humanitas.* By considering humanity both as a source of legal obligation, and consequently as a tacit *vinculum*, Gentili pursues his goal of founding *ius gentium* as a consensual science of humankind: *probabilis ratio* becomes a criterion both of compliance with natural law and of evidence of *ius gentium*. The humanistic nuance of this argumentation is evident in the fact that humanism becomes for Gentili a method of identifying customs in the law of nations. From a formal point of view, he borrows the method of presenting *auctoritates* as evidence of consensus from humanists; from a substantial standpoint, he considers compliance to the laws of *humanitas* a proof of existence of that consensus through centuries.

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[222] HA, I, IV, p. 15.
[223] HA, I, XXI, p. 89.

Chapter 3. Obligation through agreement, agreement on obligation: customary *ius gentium* as expression of will in Francisco Suárez

Francisco Suárez (1548-1617) was one of the most eminent philosophers and theologians of his time, rightly deserving the title of *Doctor Eximius* for the importance of his contributions. He was also one of last great representative figures of the School of Salamanca, to which his affiliation to the Society of Jesus significantly contributed in terms of theological renovation.[224] While his fortune in the field of the history of philosophy has oscillated,[225] notwithstanding the undeniable novelty of his thought,[226] the merit of his reflections on international matters has been widely recognized, starting with J. B. Scott.[227] Such merits undoubtedly consist in the idea, successfully articulated by Suárez, to conceive of *ius gentium* as a totally positive law, by trying to overcome the theoretical difficulties faced by Vitoria and by treasuring the dynamism of Gentili's customary *ius gentium*. Therefore, his contribution constitutes an interesting synthesis of the problems we have been dealing with until now through the works of Vitoria and Gentili. As a matter of fact, in many ways Suárez relies on Vitoria's main intuition that *ius gentium* is a positive law constituted by human consensus. However, the way in which Suárez gives shape to such an intuition creates a completely different picture. Such a positive *ius gentium* is conceptually closer to 'international law'. This might partially explain the success of his contribution to international law in the following centuries – together with its direct influence on Grotius, who was an enthusiastic reader of Suárez.[228]

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[224] F. Ehrle argued, a bit too emphatically but "no carente de cierta verdad histórica" (as Belda Plans comments, *La Escuela de Salamanca*, p. 853), that "quien mas contribuyo a su propagacion, perfeccionamento y estabilidad fue la entonces naciente Compañia de Jesus; ésta no solo tomo de la Escuela Salmantina su régimen de estudios sino también sus primerso Maestros. Francisco de Toledo transplanto la reforma salmantina al Colegio Romano, la gran Escuela central de la nueva Orden" (F. Ehrle, *Los Manuscritos Vaticanos de los Téologos Salmantinos del Siglo XVI,* in F. Ehrle, *Estudios Eclesiasticos*, Madrid 1930).

[225] This is not the place to engage in the merits of his philosophical excellence; yet as a reminder, he has been deemed to have strongly influenced Descartes with his doctrine of the *ens reale*. On this, see R. Fastiggi, V. Salas (Eds.), *A Companion to Francisco Suárez*, Brill, Leiden 2015.

[226] Among others (Leibniz, Wolff, etc), see I. Kant: "[T]he greatest among all dogmatic philosophers, ...[who] gave us the first example (an example by which he became the author of a spirit of well-groundedness in Germany that is still not extinguished) of the way in which the secure course of a science is to be taken, through the regular ascertainment of the principles, the clear determination of concepts, the attempt at strictness of proof and the prevention of audacious leaps in inference..." (*Critique of Pure Reason*, trans. by P Guyer & A. Wood, Cambridge University press, Cambridge 1998, pp. xxxvi–xxxvii).

[227] About the fortune of Suárez as a father of international law, see the detailed reconstruction made by C. Barcia Trelles, *Francisco Suárez (1548-1617),* Recueil des Cours de l'Acadèmie de Droit International, 43 (1933), pp. 385-551.

[228] Se Grotius' letter to Canon John Cordesius, October 15, 1633, in H. Grotius, *Epistolae quotquot reperiri*

But there are certainly other reasons for such success. First of all, Suárez's philosophical inclinations and urges towards systematization might have contributed to the clearer expression of his thought. Secondly, and consequently in contrast with Vitoria, he produced an impressive body of written works, which make approaching the totality of his thought easier (and less philologically uneven).[229] Moreover, clarity of expression is the result of a pedagogical urge on the part of Suárez. In fact, after having studied in Salamanca, he complained of a profound dissatisfaction with the teaching methods of that university. He then spent a period in Valladolid, lecturing on Aquinas as his predecessors did, where he realized he "disliked being bound by the order, organization and content of the *Summa*", which instead he intended to treat "as a living philosophy".[230] In other words, he started to consider the study of Aquinas, as it was carried out in the University of Salamanca, too confusing and difficult for the students to master. The practice of closely commenting on the texts did not allow students to engage in any critical exercise, and the amount of material was so wide that they could not recognize in it any conceptual order. Because of such pedagogical interests, Suárez was called to Rome by the *Collegio Romano* to work as an advisor for the writing of the *Ratio Studiorum*, the famous Jesuit code of education.[231]

A second element, particularly important for our reconstruction of customary *ius gentium* in Suárez, has still more to do with his affiliation to the Society of Jesus. Suárez grounds international consensus not on an immutable reason, but on a voluntaristic theory of human agency that he derives from the medieval philosopher Duns Scotus (1265-1308). In this respect, we have to bear in mind that the opposition between the intellectual legacy of Aquinas and that of Scotus was the *leitmotiv* of the theological debates of the 16th century. One of the crucial questions at stake was precisely whether law was derived from reason or from an act of will. When Vitoria studied in Paris between 1511 and 1523 "he knew and admired the work of Conrad Summenhart, who generally preferred the teaching of Duns Scotus. But his own master was Pierre Crockaert, a Dominican Thomist".[232] We have already said how these theoretical tenets influence the way in which these authors conceive of *ius gentium*. Indeed, Suárez, a Jesuit

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potuerant (Amsterdam, 1687), p. 118: "...in philosophia tantae subtilitatis, ut vix quemquam habeat parem."

[229] I will here take into account the monumental Vivés Edition in Latin, *Opera omnia*, in 28 vols., ed. by C. Berton, Vivés, Paris 1856-61; just as a reminder, the *princeps* edition of *Tractatus De legibus ac de Deo Legislatore* appeared in Coimbra in 1612.

[230] B. Hill, 'Introduction', in B. Hill & H. Lagerlund (Eds.), *The Philosophy of Francisco Suárez*, Oxford University Press, New York 2012, pp. 16-17

[231] *Ibid*.

[232] B. Tierney, *The idea of Natural Rights*, p. 256.

and not a Dominican, and therefore less ideologically bound to perpetuate the intellectual legacy of Aquinas, derives from Scotus the idea that law is the expression and the result of an act of will. The crucial concept of Scotus' understanding of the law is *praxis*, which "is an act that naturally follows an act of intellection".[233] This does not mean that will is not in agreement with reason, but only that will has an ontological primacy over reason (like the beginners in Arabic that Vitoria was opposing). Law therefore, is "a common precept, just and stable, sufficiently promulgated" which implies "a command expressing the will of a superior. […] No command can be addressed to non-rational creatures, because they cannot understand or obey commands as expressions of the reason and will of a superior".[234] Furthermore, in the words of J. Finnis, "Suárez (and it seems Vazquez) maintained that obligation is essentially the effect of an act of will by a superior, directed to moving the will of an inferior… (We can call this thesis 'voluntarist'.) Aquinas, on the other hand, treats obligation as the rational necessity of some means to (or way of realizing) an end or objective (i.e.: good) of a particular sort".[235]

This 'voluntarist thesis' has a profound impact on Suárez's understanding of *ius gentium* as customary. In order to demonstrate its influence, I will proceed in three steps. First, I will introduce Suárez's doctrine of law, and more specifically, of *ius gentium* as customary, in order to clarify from the very beginning the stakes of the question. After that, I will engage in a conceptual clarification of what is custom according to Suárez's moral philosophy. In this part, I will read two philosophical works of Suárez, the famous *Disputationes Metaphysicae* and the treatise *De voluntario ac involuntario*, in order to explain the fundamental concepts underlying his doctrine of custom. He distinguishes a factual and a psychological element in custom. On the one hand, the faculty of will is capable, according to Suárez, of producing *habitus*, namely a series of repetitive acts which amount to the factual element constitutive of custom. To this material element, which makes custom a mere *consuetudo facti*, he adds a psychological one, to which he expressly refers in Chapter VII of his *De Legibus*. This is the feeling of obligation perceived towards a certain custom. This makes custom a proper *consuetudo iuris*. In order to find this psychological element, Suárez refers expressly to his moral philosophy. Finally, I will explain the controversial relation between *consensus*, obligation and *consuetudo*, by arguing that *ius gentium* provides further proof of the fact, contested in scholarly debates, that consensus arises from obligation and vice versa.

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[233] *De Legibus*, II, XIX, p. 127.
[234] See T. H. Irwin, *Obligation, Rightness, and Natural Law: Suárez and Some Critics*, in *Interpreting Suárez: Critical Essays, ed. by D. Schwartz*, Cambridge University Press, 2012, p. 143.
[235] J. M. Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford 1980, p. 46.

3.1 Suárez on natural law, natural reason, and *ius gentium*

In order to understand the original contribution of Suárez to the issue we are tackling, it is worth analyzing his account of the foundation of law in general, and of natural law in particular. This will help us to understand Suárez's attempt to distinguish *ius gentium* from its natural law origins. To this effect, the long section of chapter 1 dedicated to the origin of law in Aquinas will serve as a conceptual basis for Suárez's reflections on the very same topic.

To begin with, it has rightly been argued that with Suárez we face a transitional moment in the history of philosophy and of legal thought, where a more precise distinction between the realm of nature and that of morality is vindicated. As we have seen, this distinction was one of the fundamental tenets of Gentili's account of the law of nations, and substantially contributed to a reconfiguration of the concept of *naturalis ratio*. This applies also to Suárez. According to A. S. Brett,

> Law, then, belongs to a moral, not a physical universe and the Jesuits used this sharp distinction – with which, as we saw in the last chapter, they replace Aquinas' distinction between the animal and the human – to break Aquinas' sequence between eternal and natural law. It follows that they also either relegated or outright rejected Aquinas' account of the relationship between our necessary, natural inclinations, and the precepts of natural law. The intimate connection between the two in Aquinas cuts across the clear divide they wanted to make between the moral and the natural. So what then does give the content of natural law? The content of natural law lies in the necessary goodness or badness of certain actions in relation to human nature, a relation that can be found out by reason even if – as for the voluntarist Suárez – natural reason without any positive or arbitrary law should be called natural, *whether it commands things that are in accordance with natural inclination, or not*. Suárez was not so direct in his rejection of the inclinations as a basis for the commands of natural law. Nevertheless, he made it plain that Aquinas' categorisation of the precepts of natural law is only one among several, and he put it last with the qualification that we are not to think of these inclinations as "purely natural" but as "determined and elevated" by reason.[236]

Nature and *reason* start to be conceived, therefore, as two different realms of inquiry. In this respect, Suárez foreshadows a question which will be crucial for 17th century philosophy. In this period, reason starts to be shaped as a distinctive human, artificial and even geometrical

[236] A. S. Brett, *Changes of State*, pp. 74-75.

phenomenon, governed by rules and principles which are to be discovered independently from natural inclinations, but instead, and self-reflectively, *within* and by reason itself.[237]

Brett also points out that Suárez does not sharply oppose Aquinas' tradition. As a matter of fact, concerning the nature of the legal phenomenon, he does not object that law is a command of reason. However, he shows more elements of originality, especially as compared with Vitoria's reading of *Summa*. These elements are a result of Suárez's sympathy towards the Nominalist and Scotist philosophical traditions, which he seeks to integrate with the Thomistic one. More specifically, by expressly refuting the positions of his contemporary fellow Jesuit Gabriel Vazquez, he argued that law could be an act of will while still being an ordinance of reason. In this respect, as Paul Pace puts it:

> Vázquez held that law is *actus intellectus supposito actu voluntatis*, a definition he applies to all classes of law except the natural law; the natural law, in contrast, indicates of itself what is intrinsically good or intrinsically bad. Accordingly, an action is good if it conforms to human rational nature. Since Vázquez held that he could identify the natural law with human rational nature, he saw no need for any particular legislative act on God's part. In fact, he argued, the expression 'natural law' is inexact, for one cannot in all rigour speak of it as a 'law', but rather as human rational nature. Suárez, who had adamantly claimed that essentially all law is an *actus voluntatis*, and who had excluded no law from this definition, could never agree with Vázquez, and this difference provided him with the opportunity of putting forward his own theory.[238]

If we briefly recall Vitoria's understanding of the same issue, he did not exclude, as Vázquez did, natural law from the general rule that law is an act of intellect presupposing an act of will. Quite on the contrary, he based his doctrine of *imperium* precisely on the analogy between reason and law. In this respect, Suárez is closer to Vitoria (and consequently, to Aquinas) than Vázquez is. There are however, two significant differences that Suárez introduces, opposing Vitoria and Vázquez respectively. On the one hand, as we could rephrase the sentence, law is no longer an act of intellect but an "*actus voluntatis supposito actu intellectus*". This is an intuition that Suárez concedes to Scotus, as we have said, namely by arguing that the foundational element of legal obligation lies in God's will. God is not only the

[237] Think of the line of thought which stretches from Descartes to Kant: all these philosophers were interested in findind the principles of reason *within* reason itself. This is a real revolution in the history of philosophy, which will culminate with Kant's idea of reason as a tribunal, that has to establish its own principles through a proper judicial trial conducted *by* itself.
[238] P. Pace, *Suárez and the Natural Law*, in *A Companion to Francisco Suárez*, p. 280.

Creator but also, as the title of the *De legibus* suggests, the Legislator of humankind. However, he also challenges this too-radical interpretation by suggesting that a middle way exists between Vázquez and Vitoria and vindicating that a space exists for human will to express itself. This interpretation consists in considering the realm of natural law as *foundationally* distinct from that of human reason. In the words of Suárez, therefore, the error of Vázquez was precisely to have confused "natural law with its foundation: not everything that is the ground of a certain prohibition or order can be called law".[239]

In this respect, Suárez introduces a significant distinction between human reason itself and "a certain capacity" of human reason to discern right from wrong. Human reason is morally consistent with itself before actually becoming natural law. Indeed, it is human reason that provides the *fundamentum* for natural law by judging what is morally suitable according to its own nature. Natural reason, instead, is a secondary construct, relying upon human reason and instigating human will to act according to natural law.[240] This argument implies a strong faith in the human capability for moral self-discipline, even in the hypothetical absence of prescriptive laws. According to Irwin, "Suárez argues that moral badness follows from contrariety to reason, apart from any divine command. This moral badness makes it blame-worthy to perform the action".[241] But it can be objected that such a strongly reason-based approach to law can hardly be considered voluntarist. Suárez tries to solve this controversial issue by arguing that the source of obligation perceived by our own reason lies in God's will itself. Natural law, in other words, is the result of divine will, from which obligation stems. Otherwise, Suárez argues, natural law would be merely indicative and not prescriptive. As he pointed out in the above-mentioned passage, reason has no commanding power. Reason can only act in conformity with itself; but such a conformity does not suffice to create an obligation. Obligation instead derives from God, who endowed us with free will.

To sum up, therefore, "it is not just a mere indication but a law that creates a true obligation as a result of an act of the divine will, though this very act does not constitute the whole ground of the goodness or malice of what is required or prohibited. It presupposes an intrinsic honesty or malice in the acts themselves, to which it adds a special obligation of the divine law".[242] This means that, despite the apparent contradictions, Suárez is actually

[239] *Ibid*. p. 281

[240] DL 2.5.9, p. 102

[241] T. H. Irwin, *Obligation, rightness, and natural law*, in *Interpreting Suárez. Critical Essays*, Cambridge University Press, Cambridge 2012, p. 149.

[242] P. Pace, *Suárez and the Natural Law*, p. 282.

consistent in arguing that, at a foundational level, reason judges right from wrong according to its own nature (as it is a *vis directiva*).[243] However, it is only the additional element of will that gives specific legal content to those (otherwise moral) provisions. Natural law therefore relies upon the inherent morality of human nature, *but not vice versa*. This would have been the case for Vitoria. Suárez instead argues that in order to turn the moral into legal, a specific act of will is necessary. Such act can be discovered by reason, in the case of natural law, or even amount to a proper act of promulgation in the case of positive law, as we will see.

From what we have said until now it is possible to draw a number of conclusions, relevant to our purposes. First of all, the fact that moral agency does not coincide with natural law explains why *ius gentium* can be independent from natural law while still remaining morally qualified. In fact, as Suárez will argue, morality also provides *ius gentium* with a solid basis and preserves it from any possible abrogation ("*moraliter,* ius gentium *non potest totaliter tolli*").[244] Apart from being an interesting way of re-shaping Vitoria's counterfactual argument, this conceptualization on the part of Suárez also leaves effective room for human will and consent to exercise freely.

3.2 Is the international community imperfect? Suárez on the customary law of nations and the source of its obligation

It is according to the philosophical background described above that Suárez argues that *ius gentium* differs from natural law. First, this is because *ius gentium* does not prohibit evil as morally wrong in itself, it is rather by prohibiting something that it is made evil. Natural law, as it is a divine command that we discover through our *naturalis ratio*, instead directs human reason to act according to moral good. Second, and consequently, *ius gentium* is not as immutable, nor as necessary, as natural law. Third, Suárez famously distinguishes between *ius inter gentes* and *ius intra gentes*: whereas the first one is the law that "various *gentes* have to observe between them", the second definition refers to the law that each political community respects *within* itself. This distinction is a particularly modern innovation on the part of Suárez, both with regards to the preceding tradition (think, for example, of Vitoria), and also because it

[243] T. Pink, *Action and Freedom in Suárez's Ethics*, in *Interpreting Suárez*, p. 128; later on Pink calls it "the force of demand" (p. 131).
[244] DL, VII, IV, 7

vindicates the existence of a new normative framework, namely a proper 'international' domain of legal interaction.[245]

As a consequence, Suárez adds that *ius gentium* is *almost* regularly observed by *almost* all the peoples, but it can also be violated "without error", that is intentionally and by means of non-acceptance.[246]

Custom plays a fundamental role in such a scenario, as it is qualified as a repetition of moral (therefore voluntary) acts.[247] In fact, Suárez argues that *ius gentium* was introduced by "will and human opinion", and "in those matters depending on human opinion and judgment there rarely is an agreement".[248] Plus, *ius gentium* differs from civil law, due to the fact that it is unwritten, and therefore customary.[249] In his view, *consuetudo* is the main source of *ius gentium* (he provides the law of the immunity of ambassadors and the freedom of commerce as examples). However, unlike Vitoria, Suárez holds that nature *per se* does not force us to respect these rules, as *ius gentium* derives its validity from customs, not from nature (or from natural law). Therefore, we can deduce that, and Suárez will explicitly confirm this interpretation, *ius gentium* depends on the capability of human beings to agree with each other. Indeed, as we will see in the following section on *habitus*, it is his theory of moral agency that provides us with a criterion for the identification of human customs, which would be mere repetitions of similar acts, but with no legal value. The importance played by the voluntary source of agreements *iure gentium* clearly recalls what we have previously said about Suárez's theory of law: it is *will* that plays a fundamental role in providing custom with a legitimate source of obligation.

Besides, Suárez holds that the agreement of human wills can be the object of empirical estimation. Therefore, *ius gentium* was introduced

> […] gradually, by acts following other acts, propagation, and mutual *imitation* of peoples *without a specific assembly*, nor through their consent reached in one single moment; this law is so close to nature, and so

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[245] DL, II, XIX, 10; on this, see, among others, F. Todescan, '*Jus gentium medium est intra jus naturale et jus civile*: la double face du droit des gens dans la scolastique espagnole du 16ème siècle', in P. M. Dupuy & V. Chetail (Eds.), *The Roots of International Law / Les fondements du droit international*, Brill, Boston 2013, p. 171.
[246] DL, II, XIX, p. 126-127.
[247] DL, VII, I, p. 135.
[248] DL, II, XIX, p. 128.
[249] *Ivi*: "*non naturae, sed moribus innituntur*". On this point, see B. Tierney, 'Vitoria and Suárez on custom', in *The nature of customary law*, p. 110.

suitable for all nations and their respective societies, that it has been spread among humankind *almost* naturally, and therefore it is unwritten, as it is promulgated by no legislator, but derived its validity from custom.[250]

This passage is quite significant if read in comparison with Francisco de Vitoria and Alberico Gentili. Whereas Gentili maintains a position similar to that of Suárez, by arguing that custom is necessarily an imitative practice, Vitoria seems to be Suárez's polemical target in the above-mentioned passage. Against Vitoria's "counterfactual claim", Suárez holds that the universal consensus of men is a mere *supposition* of the agreement of their opinions and wills.[251] It is by the constant repetition of an act of will that we tacitly confirm our intention and acceptance of the law.[252]

It is, therefore, no novelty that the law of nations is considered as a customary phenomenon. However, Suárez has the merit of expressly relating *consuetudo* to *ius gentium:* he not only says that *ius gentium* is customary, but that it cannot be but customary. We infer this by analysis of book III of chapter VII of *De legibus*, where Suárez argues that there are different kinds of *consuetudines*, depending on the breadth of their possible application. Such a distinction follows the traditional canon law tripartition into *generalissima*, *generalis* and *particularis consuetudo*. While general custom is the customary law operating within a commonwealth, particular custom is just the outcome of a private, individual usage which becomes customary. *Generalissima consuetudo* is, instead, according to Baldus, Henricus Hostiensis and Rochus Curtius (the main sources for Suárez),[253] the custom applying to Christian peoples.[254] Suárez deliberately turns *generalissima consuetudo* into *communissima*

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[250] DL, II, XX, p. 130. [emphasis added].
[251] DL, II, XIX, p. 127: Suárez refers to it as "*illa suppositio*".
[252] DL, VII, X, p. 535.
[253] While Baldus and Hostiensis are famous Medieval lawyers, the (less known) Italian jurist Rochus Curtius was almost a contemporary of Suárez. He wrote the *Enarrationes in celeberrimum Iuris cap. cum tanto tit. De consuetudine*, Apud Haeredes Iacobi Giuntae, Lugduni 1550. For a detailed analysis of Curtius' theoretical elaboration of *consuetudo*, see R. Garré, Consuetudo. *Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten* ius commune *in Italien (16.-18. Jahrhundert*), V. Klostermann, Frankfurt am Main 2005.
[254] DL, VII, III, 7, p. 143. On *communissima consuetudo*, see R. Schnepf, 'Suárez über das Gewohnheitsrecht (DL VII)', in O. Bach, N. Brieskorn, G. Stiening (Eds.), Auctoritas Omnium Legum: *Francisco Suárez De Legibus between theology, philosophy and jurisprudence*, Frommann-holzboog Verlag, Baden Baden 2103. On custom and canon law, see D. Bauer, 'Custom in Canon Law and the Expansion of Legal Reality', in in P. Anderson & M. Münster-Swendsen (Eds.), *Custom: The Development and Use of a Legal Concept in the Middle Ages*, DJØF Publishing, Copenhagen 2009, pp. 107-122; Bauer claims that there are two main characteristics of canon law custom, first custom is in some sort of dialectic (either positive or negative) with law; second, custom need to be rational, i.e. the criterion of *rationabilitas*; also, insistence on custom's rational voluntarism as a factor of development; see also E. Kadens, 'Custom's Past', in *Custom's Future*, p. 11-33; see J. P. MacIntyre, *Customary Law in the* Corpus Iuris Canonici, Mellen Research University Press, San Francisco 1990.

consuetudo. The latter comprises "the customs of the whole world, which constitute *ius gentium*… [*Ius gentium*] is also, therefore, as it is evident, introduced through the practice [*usus*] and habits [*mores*] of not just this or that nation, but of the whole world".[255] Another important source quoted by Suárez in support of his thesis is Isidore de Seville. Suárez suggests interpreting Isidore's definition of custom as applied to *ius gentium*. The identification between custom and *ius gentium* is a particularly original move on the part of Suárez, made even more astonishing by the fact that Isidore's text does not authorize it explicitly.[256] Isidore says that custom applies where law is missing: according to Suárez this constitutes further proof of his point, because *ius gentium* was not created by men in the absence of any law, but it was necessarily created as we know it now. Such necessity consists in the fact that *ius gentium* could not have been introduced other than by customary practice.[257]

This is a completely original move by Suárez, as has been argued by R. Schnepf and R. Garrè.[258] It is probably in order to differentiate *ius gentium* from the law applied to Christianity that Suárez refers to *communissima* rather than to *generalissima consuetudo*. However, he argues that *generalissimae consuetudines* can still be comprised within *ius gentium*. This aspect is problematic and seems to hint at the fact that the international community still has the flavor of a *respublica Christiana*, intended as the "visible body of Christians united by their common faith and the common headship of the Vicar of Christ".[259] In this respect, the choice of the Latin term *communissima* is also symptomatic, as it hints at the existence of a *communitas* to which such custom is applied. This aspect introduces a further tension in Suárez's argument: how can a *communissima consuetudo* be effective if it is produced by a community with no superior authority like the international society? There might be two interpretations of this problem. First, Suárez's doctrine of *ius inter gentes* might suggest that, although lacking a superior authority, authority is "horizontally" distributed among *gentes* through custom. This would

[255] DL VII, III, 7 p. 143.
[256] This is Isidore's definition of *consuetudo*: "*consuetudo autem est ius quoddam moribus institututm, quod pro lege suscipitur, cum deficit lex: nec differt scriptura an ratione consistat, quando et legem ratio commendet. Porro si ratione lex constat, lex erit omne iam quod ration consisterit, dumtaxat quod religioni congruat, quod disciplinae conveniat, quod saluti proficiat. Vocata autem consuetudo, quia in communi est usu*" (I. de Seville, Ethymologiae, V, III). Quite interestingly, Crawford takes Isidore as one of the first authors conceptualizing CIL (J.R. Crawford, *Brownlie's Principles of public international law*, 8th edition, Oxford University Press, Oxford 2012, p. 26)
[257] DL VII, III, 7, p. 144.
[258] R. Schnepf, 'Suárez über das Gewohnheitsrecht (DL VII)', p. 323-324.
[259] H. Höpfl, *Jesuit Political Thought: The Society of Jesus and the State, 1540-1630*, Cambridge Unviersity Press, New York 2004, p. 359. Also, this calls into question the relationship between natural law and the Decalogue, an issue that was already faced by Vitoria (see A. Spindler, 'Law, Natural Law, and the Foundation of Morality in Francisco de Vitoria and Francisco Suárez', in D. Simmermacher, K. Bunge, M. J. Fuchs, & A. Spindler (Eds.), *The Concept of Law* (lex) *in the Moral and Political Thought of the School of Salamanca*, Brill, Leiden 2016, pp. 172-197).

make *ius gentium* a perfectly self-sufficient legal regime, where custom has the precise role of regulating the mutual affairs of sovereigns.[260]

A second interpretation, in apparent contrast with the first one, insists on the normative and political value of Suárez's idea of *communitas perfecta*. Suárez's concept of custom is profoundly rooted in his notion of *communitas perfecta*,[261] which is at the core of his political theory. Family and individual forms of association are but imperfect societies, where no one is invested with authority through a formal voluntary act. As M. Brito Vieira claims, "the congregation of wills to come together as one society for one political end activates a power of self-government, which is to be exercised by the commonwealth over itself and individual members".[262] In addition to this, man has a natural ability to constitute such a perfect political society, which produces legitimate political power by its own nature.[263] In other words, as Brito Vieira argues, Suárez's political body consists of both "a horizontal agreement, relying on the will expressed by the social contractors, and of a vertical, superior power that directly exercises authority. Any political body consisting of just the horizontal legitimation is not a proper *corpus politicum*."[264] This might be the case with the international community, which lacks this last "vertical" movement legitimizing political power.

Such insistence on the voluntarist, authoritative nature of political power creates several theoretical problems concerning the validity of *communissima consuetudo* as a horizontal source of obligation *inter gentes*. As the international society has no superior authority, it might seem that it is not a perfect community. J.B. Murphy seems to agree with such an interpretation, by arguing that it is problematic to claim that custom can also be applied to *ius gentium*.[265] Murphy claims that it is "odd" to describe customs as the command of the legislator", and that

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[260] J.B. Schneewind, *The Invention of Autonomy: a History of Modern Moral Philosophy*, Cambridge University, New York 1998, pp. 58-65; A similar point has been made by J. P. Coujou, 'Suárez, d'un droit avant le droit au devenir juridique de l'humanité', in *Proceedings of the International Conference 'The Legal and Political Thought of Francisco Suárez',* KU Leuven, Bruges 24-25 November 2017, *forthcoming*.

[261] M. Brito Vieira, 'Francisco Suárez and the *Principatus Politicus*', *History of Political Thought*, 29/2 (2008), p. 284.

[262] *Ibid.,* p. 286.

[263] DL I, VI, 21.

[264] M. Brito Vieira, 'Francisco Suárez and the *Principatus Politicus*', p. 284.

[265] J. B. Murphy, *The Philosophy of Customary law*, Oxford University Press, Oxford 2014, p. 40: "Although it is at least prima facie plausible to regard legislation as the will and command of the supreme political authority, Suárez seeks to prove that custom is equally the will and command of the supreme political authority. Since statutes are deliberately made while customs arise, not from design, but as a by-product of human social conduct, it seems odd to describe customs as the command of the legislator. As we shall see, Suárez's attempt to do so both reveals and obscures the nature of custom. Commentary on Suárez's view of the law of nations typically says little about his theory of custom; and commentary on his theory of custom typically says little about this view of the law of nations. Indeed, although Suárez himself claims that the law of nations is customary, he rarely attempts to relate what he says about the law of nations".

this at the same time "reveals and obscure the nature of custom".[266] As a flipside, Murphy claims that it is precisely where there is no legislator – in the realm of *ius gentium* – that the consequences of Suárez's voluntarist claim become more evident. However, Suárez clarifies that "*generalissima consuetudo*" applies among sovereigns and, for the fact of not having been promulgated, it more closely resembles natural law than proper positive law.[267] What is the use, then, of *ius gentium*, if it so closely resembles natural law? From such a perspective, is there any room left for Suárez to claim that *ius gentium* cannot but be customary?

In order to clarify these complexities inherent in Suárez's thought, it might be useful to take a look at Suárez's concept of political obligation, which he considers as deriving from *ius gentium.* It is by thinking of an overarching, hierarchical international society that he grounds the legitimacy of sovereign power, and he does so amid the background of the Medieval tradition of *generalissima consuetudo*, which applies universally to the *respublica Christiana*. Coujou rightly argues that, according to Suárez,

> The diversification of the human race into peoples and states cannot obscure the 'political and moral unity' required by the natural law of charity and by mutual love. [...] Historically but also ontologically, each state is a part of this whole in developing what represents the human race. In this sense, a universal society of states imposes a moral necessity upon constituted states. This implies the necessity of mutual assistance and of a universal common good. In conformity with this perspective, it will be legitimate to evoke a society of nations and an international law. Such a society is ruled by the law of nations, a positive law with an essentially customary origin that governs relations among nations in a sovereign manner.[268]

Therefore, membership of the human race constitutes the ontological foundation of sovereignty. Moreover, the idea of "universal common good" provides *ius gentium* with a teleological orientation, which acts as a criterion in the absence of a legislator, as we will see in a while.

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[266] *Ivi*.
[267] DL II, XIX, 6, p. 168.
[268] J. P. Coujou, 'Political thought and legal theory in Suárez', in *A Companion to Francisco Suárez*, p. 63.

3.2.1 The naturalism of *habitus* and the self-legitimizing role of will

Suárez gives us some hints as to the nature of custom, how it is formed, how it relates to *ius gentium*. Most relevantly, Suárez claims that the place where the jurist has to look for evidence of acceptance is in the conscience. In the words of Suárez, "the law of custom is always depending on the *animus* of the people as a whole".[269] How can this *opinio iuris* be detected? Suárez recognizes that this is a problematic point: "I say that it is not easy to judge about an obligation of a rule derived by custom".[270] As nobody can be presumed to have an obligation, it is better to make other moral reasons[271] prevail, like honesty, devotion, virtue, etc. The rationale behind this Suárezian argument is that it is better to face uncertainty than "to multiply rules which are morally uncertain".[272] Therefore, Suárez provides us with four criteria to identify an uncertain custom: 1) If the customary rule at stake has been respected for a long time, deals with a "grave and difficult question" and has been accepted by the major part of the people, as "people do not tend to agree to produce similar acts, except in those cases in which these acts stem out of obligation". This is a great hint as to the fact that there is a sense of obligation (Suárez terms this feeling "*cogitatio obligationis*"[273]); 2) If learned men judge badly those who do not comply with a custom, and people in general are also scandalized; 3) If priests or politicians judge non-compliance badly and; 4) When the custom in question deals with the utility of the commonwealth, then the obligation is deemed to be designed to the common good of all.[274] In other words, paraphrasing Suárez, the sense of obligation, social approbation, the opinion of learned men, and considerations of public utility, may all help the jurist when identifying custom. What is crucial, however, is that it is through obligation that we infer acceptance, because men tend to agree in their behavior when they perceive a sense of obligation upon them. This, in my view, is Suárez's most important contribution to the conceptualization of a customary law of nations.

In fact, on the other hand, acceptance of custom as law can also be revoked. Again, the sense of *obligation* is the criterion involved here. For example, one nation can refuse to comply with a custom without obliging others to opt-out as well; if violation is not an error, then a lack of compliance can be tolerated. This leads Suárez to the articulation of what we would

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[269] DL, VII, XV, 11, p. 193: "animus totius populi"
[270] *Ivi*.
[271] Again, a reference to morality as a guiding criterion for the identification of customary rules.
[272] *Ivi*.
[273] J. B. Murphy, *The Philosophy of Customary Law*, p. 49
[274] DL, VII, XV, 13, p. 194.

nowadays call the doctrine of the *persistent objector*.[275] As it is common experience that not everybody agrees on everything, "from this it follows that a custom contrary to *ius gentium* can be approbated and tolerated in a certain country, provided that it does not cause prejudice or injury to another country".[276] A sovereign can always opt-out from a customary rule, as it is the very essence of *ius gentium* to be grounded on will. However, Suárez argues that, as a flipside of the impossibility of a universal agreement, it is also impossible for *all* sovereigns to opt-out from the very same customary rule. This is an empirical claim that Suárez makes, derived from the observation of human behaviors: 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 therefore, is conceived as a unilateral act, whereas agreement can only be reached through a sense of obligation, and obligation through agreement. Suárez's doctrinal efforts suggest making a number of clarifications regarding the changing nature of the law of nations. He seems either to hint at the fact that there is a core of *ius gentium* which can never be changed, although Suárez does not tell us what it consists of, or he merely wants to tell us that it is just the sense of obligation that makes a custom valid, no matter its content. In other words, when he says that *ius gentium* can 'partially' be changed, Suárez might be suggesting, going beyond Vitoria, that modifications are permitted as long as they do not impair the moral content of *ius gentium*. In fact, as Suárez makes clear, "*morally speaking*, *ius gentium* cannot be totally abrogated".[277]

In such a picture, *ius gentium* can be changed in some of its parts (without prejudice to the others), as the reiterated expression of a sense of obligation makes *ius gentium*, as a whole, *generally* accepted by everyone. In fact, consensus becomes a more flexible concept if it depends on human will rather than on universal, unchangeable principles of natural law. This does not mean, however, that there is no relation at all between those principles and *ius gentium*. The latter, in fact, has been *almost naturally* spreading amongst humanity.[278] This seems to hint at a particular feature of custom. As it is almost natural, in a sense it has a self-correcting capacity, which allows "bad" customs to automatically turn into accepted ones. How is this

[275] See C. Focarelli, 'Customary Foundations of *Ius Gentium* in Francisco Suárez's Thought and the Concept of International Community in Contemporary International Law', 41 *Italian Yearbook of International Law* (2006), pp. 41-56.
[276] DL, II, XX, 7, p. 172.
[277] DL, II, XX, 7, p. 172. [emphasis added].
[278] "Ce qui est un produit de là convention ne peut être modifié que par la convention, mais il n'est pas nécessaire que ce consentement s'exprime d'une façon plurilaterale et contemporaine; chaque nation peut remplacer une coutume internationale par une autre, et c'est ainsi que la nouvelle pratique, en s'étendant peu à peu, peut finir par éliminer un usage et mettre un autre à sa place, ou tout simplement l'abolir sans le remplacer. Cette possibilité n'existerait pas si le droit *inter gentes* se réalisait dans une forme écrite, contractuelle, mais comme il a une nature consuétudinaire, c'est de là que vient la possibilité de sa mutation, au moyen d'actions iso- lées, de désuétudes et remplacements de quelques coutumes par d'autres" (C. Barcia Trelles, *Francisco Suárez*, p. 471).

possible? The answer is to be found in Suárez's treatment, in the context of his moral philosophy, of the concept of *habitus*, which Suárez describes as the factual element of custom.

Suárez says that *habitus* is "something physical",[279] which is different from "something moral" which derives from that faculty which is the source of obligation, i.e. the will. Before analyzing the role of will in Suárez's account of custom, I will briefly concentrate on the "physical" element of *habitus*. Suárez complains that the term *habitus* is inappropriately confused with custom by the jurists.[280] In his view, it refers instead to an inherent feature of custom itself. Moreover, Suárez relies on another feature inherent in the thomistic concept of *habitus*. According to Aquinas, we can infer the existence of a permanent disposition only from its effective manifestations ("*habitus per actus cognoscuntur*").[281] Indeed, it is possible that an existing *habitus* does not produce any effect if it is not exercised. To provide an example, having the habit of virtue is nothing without the effective exercise of it.

Suárez employs such a concept of *habitus* by emphasizing its connotation as a quasi-natural phenomenon. If in *De Legibus* he considers "physical" the human disposition to reproduce the same act over time, in his most famous *Disputationes Metaphysicae* he even more radically argues that "*habitus sunt in rerum natura*".[282] *Habitus* therefore produces a sort of easiness ("*facilitas*") in our actions, which we are then inclined to repeat. Such easiness remains with us even after the action is concluded, assuming a permanent and real form. In addition, Suárez claims, at this point unsurprisingly, that will is the power capable of producing *habitus*.[283]

Consequently, will is then identified with the moral element of custom which provides its source of obligation. Also, will helps to identify a threefold criterion for *legitimizing*, *correcting* and *identifying* custom. Regarding the first element, will legitimizes custom insofar as it allows the mere repetition of acts to become a proper intentional acceptance of a natural *habitus*. This is due to the fact that the object of the will is good, and as we have seen, reason as a *vis directiva* persuades will to good. But then it is only will that moves the *appetitus*, by giving *advice* to it through reason, as it "*non movet autem necessitando: est ergo motio et*

[279] DL, VII, I, 4, p. 136-137.
[280] *Ivi*.
[281] T. Aquinas, *Summa Theologiae*, I, q. 87 art. 2.
[282] F. Suárez, *Disputationes Metaphysicae*, 1597, vol. 26 Vivès edition, (from hereafter: DM), § 44, sectio I, 2 (p. 663).
[283] DM, § 44, sectio II, 11 (p. 666).

oboedientia politica, non despotica”.[284] In other words, will is a marker of human freedom, which is not despotically subject to reason but engages in a sort of (using Suárez’s very nice metaphor) *political* negotiation with the will. Here we can see how reason and will actually cooperate in Suárez’s theory of law. Furthermore, we already mentioned that obligation derives from will; another element of Suárez’s theory of obligation that deserves further attention is the fact that, in such a model,

> a standard that is morally obligatory is a standard breach of what is not foolish, or merely inept, but blameworthy. […] The advantage of appealing to blame is that it does seem to pick out what is so special about moral obligation – namely its demanding nature. Moral obligations demand our compliance and do not merely advise it, so to speak, in that breach of the obligation is not merely foolish, but blameworthy. Blame is a distinctively condemnatory criticism.[285]

Moral blame, therefore, is one of the main criteria involved. As it is evidence of the feeling of obligation, moral approbation can hint as to the existence of a custom precisely because moral blame clearly indicates a breach of an obligation. This aspect is particularly interesting, if compared with Vitoria and Gentili. Not only is moral approbation to be found *in foro conscientiae* (Vitoria), but it must also be the object of probable estimation (Gentili). What Suárez’s theory of obligation adds to this argument, nicely combining the views of his predecessors, is that obligation itself is evidence of compliance or non-compliance. This is a consequence of the fact that, as suggested by Pink, violating moral obligation is not stupid or inept. On the contrary, it causes blame because obligation *demands* obligation. Such a demand can only be satisfied by appropriate moral compliance, which can be the object of empirical observation because moral approbation implies *social* approbation. This explains why there is not a universal agreement on any given issue, although it is very likely one would find people engaging in some form of mutual agreement, if one looks at their moral behavior as the source of obligation. Indeed, moral action is always voluntary – therefore, it provides evidence of consensus. In this respect, comparing Suárez’s account with that of Gentili, obligation acts as an opt-in/opt-out criterion precisely as compliance with the idea of *humanitas* was for Gentili.

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[284] *Ivi*.

[285] T. Pink, ‘Action and Freedom in Suárez’s Ethics’, in D. Schwartz (Ed.), *Interpreting Suárez. Critical Essays*, Cambridge University Press, New York 2012, p. 127.

As a consequence of the fact that will is always directed towards the good, Suárez acknowledges that custom exhibits a sort of self-correcting nature. He argues that there cannot be morally bad habit. Suárez says that the single acts repeated that, in due time, amount to custom, must be similar and not contrast with each other. This is primarily because there is no *habitus* – nor reiteration of the same acts – if these actions have different ends. It is not possible to have a permanent disposition if not by reiterating the *same* moral act in an almost natural way. This does not happen when actions are morally bad. Vices normally deal with temporal pleasures, which are by definition inconsistent and unstable, therefore cannot be the object of custom and of its permanent nature. [286]

To sum up, Suárez's account of the customary phenomenon relies both on problematic conception of sovereign power as *communitas perfecta* and upon a moral argument about the nature of *habitus*. In this respect, we may agree with Murphy that customary *ius gentium* is a problematic concept in Suárez, especially at a foundational level. It seems that, although being an act of will, molded on the model of Suárez's moral philosophy, by its own essence it lacks the fact of being the command of a legislator (which is required for a proper act of will to turn into law). The claim might be made, however, that international custom does not need such a legislator. In the words of J. B. Murphy,

> Suárez sees the prima facie inconsistency between his assertion that *ius gentium* is valid human law. But he says that there is no contradiction because, even though mankind is not unified into a perfect community, the many polities need to aid each other and to cooperate in establishing justice and peace. Respecting common laws is necessary for achieving these rational goals of international society. […] Suárez's attempt to understand all human law on the model of civil law in a perfect community undermines the generality of his account of custom. [287]

Therefore, be the international society a perfect community or not, the question remains of the relationship between its communitarian afflatus and the role of Catholic faith. This problematic relationship becomes particularly relevant in the analysis of *ius gentium* as a customary phenomenon, as Suárez constructs his notion of *communissima consuetudo* against the background of canon law. As Coujou holds, "the conception of the political society as a perfect and autonomous republic, and the conception of the Church as a supra-national society encompassing the whole of Christian nations, should be accompanied by the inauguration of an

[286] F. Suárez, *De Actibus Qui Vocantur Passiones Tum Etiam de Habitibus*, II, 9, vol.4 Vivès edition, p. 511.
[287] J. B. Murphy, *The Philosophy of Customary Law*, pp. 46-7.

international society comprising the human race".[288] Coujou also rightly maintains that Suárez's deep study of canon law testifies to the importance he devotes to the unifying power of religion, which is effective in gathering the conscience of the citizens.[289] This reference to conscience is particularly relevant to our reconstruction of international custom, which is heavily relying on the sense of obligation perceived by human conscience. It is *conscience* that provides moral praiseworthiness as a criterion to identify custom.

Furthermore, Suárez seems to suggest a *teleological* idea of consent. As there is no "contractual" moment which founds the universal community (as there is no beginning of *habitus*, it is *almost* natural), it is rather the fulfilment of the same goal (common good) that pulls the community together. Such an intuition calls into question the role of political consensus. Is there really the need for sovereigns to express their consent, if they are already obliged to comply with the moral standards of the universal society? Among the scholars, the question of the relationship between obligation and consent in Suárez's political thought has been the object of a great debate.[290] Such attention is due to the fact that Suárez is frequently classed among the social contract theorists. The main assumption of the scholars engaging in this debate is that consent is incapable of producing political obligation, as political power is independent from the way in which it is produced, as if it "naturally" resulted from its own coming to existence and not from the totality of individual wills involved in its creation. Schwartz provides an insightful reading of Suárez by challenging this interpretation. In his view, firstly, such an understanding of Suárez does not do justice to the author's emphasis on human free will.[291] We could also add that will itself, as we have said, exercises its function not as a tyrant but rather involving reason in a political negotiation. Therefore, it seems that Suárez indeed insists on the political. Secondly, again following Schwartz, will also generates a moral union between men, who assume "duties and obligations that make political life possible. This is done through an express or tacit pact between the would-be citizens to help each other, together with their consent to subordinate themselves to a superior. Without this pact, the social conglomerate cannot become a moral unity".[292] Consequently, once the political unity is made, they are indeed bound by the consent they expressed. Schwartz proposes here an interesting parallel between Suárez's political theory and his treatment of promissory oaths. In his *De*

[288] J. P. Coujou, 'Political thought and legal theory in Suárez', in *A Companion to Francisco Suárez*, p. 69.
[289] *Ibid.*, p. 35.
[290] D. Schwartz describes the stakes of such debates in D. Schwartz, 'Francisco Suárez on Consent and Political Obligation', *Vivarium* 46 (2008), pp. 59-81.
[291] *Ibid.,* p. 66.
[292] *Ivi*.

iuramento, Suárez clearly states that "while it is up to a man's will to make or not make an oath, it is not in his power not to oblige himself by the oath made".[293]

In conclusion, three elements are crucial for Suárez's theory of *ius gentium* as customary. Firstly, the distinction between natural law and natural reason provides the law of nations with a solid moral foundation that takes into account human contingencies and variability. Secondly, will, expressed through consensus, legitimizes, self-corrects and identifies custom by inferring obligation from it. Lastly, sovereignty and compliance with the law of nations do not contradict each other. Quite on the contrary, sovereignty is enhanced by membership of a universal society that orients it teleologically (i.e. towards the common good of humankind) by virtue of its inherent morality. From this perspective, custom also helps us to explain the complex dynamic between *ius inter gentes*, as a self-sufficient legal regime, and *communitas perfecta*. To put it a bit radically, the latter guarantees custom with the authority of a communitarian orientation towards good that makes it a perfectly effective source of law (without being positive law and maintaining the normative orientation of natural law).

[293] F. Suárez, *De iuramento*, vol 14, Vivés Edition, II.VII,12.

Part 2. From *consuetudo* to "*das Herkommen*": customary law of nations in Grotius, Pufendorf and the influence of the 18th century German legal tradition on Vattel

In the previous chapters, it has been shown that the concept of customary international law emerged out of a significant interaction of the following two factors: on the one hand, the origin of the obligation of natural law; and on the other hand, the epistemic certainty through which this obligation can be understood rationally. The more authoritative and certain the source of obligation, the clearer the cognitive process through which we can acknowledge such obligation. This aspect is particularly true of authors from the Second Scholastic, who rely on a strongly theological framework to build their theories of natural law and *ius gentium*. As a result, the certainty of their metaphysical tenets is reflected both in the existence of a stable order among principles of knowledge, and in faith in a superior political order.[294] In other words, an almost unchanged reliance on Aristotelian epistemology together with faith in God's superior authority (of which the Church is a manifestation) make the concept of customary law of nations a peculiar overlap of consensus and obligation.

Vitoria offers a valid example of this overlap. We have seen that the concept of natural law is developed according to the source of its obligation (God, and consequently right reason). This aspect impacts significantly and substantially on customary law of nations. We have seen how the insistence on God as the ultimate legislator results in a concept of custom similar to the idea of an international and unchangeable moral consensus. The question for human actors is only then, that of *agreeing* to that consensus – without properly "creating" any custom but merely acknowledging its presupposed existence. In contemporary terms, we would say that there is no difference between the process of formation of custom and its subsequent identification by the jurist. No diachronic argument is provided to justify the legitimacy of customary *ius gentium*. Rather, the "counterfactual" claim is made by Vitoria, that without custom, *ius gentium* would not even exist. Moreover, it is moral theology that provides it with the ultimate criterion of truth: universal common good has to be pursued through international

[294] M. Scattola, 'Before and after Natural Law: Models of Natural Law in Ancient and Modern Times', in T. Hochstrasser, P. Schröder (Eds.), *Early Modern Natural Law Theories. Contexts and Strategies in the Early Modern Enlightenment*, Springer, Dordrecht 2003, p. 5.

custom. We find ourselves in a political framework in which religion plays a fundamental role in setting the moral agenda of international relations.

Contrary to this, Gentili's more secularized account of natural law leaves more room for human action and voluntary agreements to be performed. With Gentili, we have seen how it is precisely the concept of *humanitas* which shapes that of customary law of nations. Although the equation between *ius gentium* and natural law makes the question of the changeability of custom particularly problematic, and a notion of justice seems to lie in the background, *ius gentium* starts to be seen as an inherently customary dynamic. It is a collection of *habitus* that are produced and approved by humankind over time, and it is by actually reproducing them that we tacitly approve them. Through such constant repetition, Gentili claims, *habitus* becomes a sort of "second nature". In this respect, we have also highlighted the importance of the concept of *probabilitas* in Gentili's theorization of customary law of nations. It has been argued that his insistence on the "likelihood" of custom amounts to the adoption of a proper rhetorical method for two main reasons. As far as the first is concerned, *probabilitas* entails the moral content of a given behavior, which is approved as worthy by the individual's conscience, and also inter-subjectively, by others. But the "approbation of conscience" was already present in Vitoria's account of custom.

What changes considerably in Gentili's account is that the process of formation and the subsequent identification of customary law of nations start to be distinguished from each other, although still being co-dependent. This aspect allows for the proper qualification of *ius gentium* as a "rhetorical" construct. In fact, *auctoritates* from the past provide the jurist with a repertoire of arguments that are used as trustworthy evidence of custom (which is itself approved by conscience, but receives further validation from the fact of having been the object of praise of "highly qualified scholars"). From this point of view, rhetorical *inventio* goes hand in hand with the actual "invention" of legal arguments. This is particularly evident in the scarce use of contemporary state practice, which to Gentili does not seem as relevant or as paradigmatic as historical examples. Rhetorical arguments are instead absent from Vitoria's account of customary law of nations precisely for the reason described above: there is no need to prove what is already crystal-clear to human mind. According to Suárez, the notion of *habitus* as the repetition of the same act over time guarantees that such a process is solidly grounded in a moral anthropology where the individual is naturally oriented by God towards good. From this perspective therefore, there can be no "wrong" custom, as Suárez showed us. Besides, customary law of nations is shaped as a *communissima consuetudo*, a concept drawn from

canon law that identifies the law applicable to the *communitas* of Christian states – again, a reference to religious principles which guarantees the moral orientation of customary *ius gentium*. Suárez did not seem to make use of a rhetorical method to identify customs, although within the Society of Jesus he was mainly responsible for the adoption of rhetorical methods for the evaluation of controversial moral cases. The application of this method, which is commonly referred to as "moral probabilism",[295] seems marginal in Suárez's account of custom in his *De Legibus*, which tends to be rather normative and void of references to the "facts".[296] It is probably the goal of Suárez's distinction between law and fact to secure his account of *ius gentium* from the accusation of casuistry – as we have argued, custom has for Suárez a universal value and applicability. However, interestingly enough, it is precisely the Jesuits' moral probabilism that constitutes one of the major polemical targets of Immanuel Kant, when he will re-shape the international legal order through his perpetual (and critically tested) idea of peace.

As for rhetorical *inventio*, the comparison of arguments drawn from the literature shows an important feature of the historical development of the concept of customary law of nations: secularization turns the question of obligation of custom into a question of *method*. If natural law exists even with no superior authority or legislator, then the certainty of such law lies exclusively in its epistemic reliability. That is precisely why Grotius seeks to reduce natural law to a "system": to grant the certainty of its epistemic status within the limits of natural law itself. As a matter of fact, Grotius' main preoccupation is to understand human nature in order to derive necessary or plausible propositions on which to build an international legal order based on an interplay between natural law and *ius gentium*. From this perspective, custom plays a fundamental role. Grotius thinks of it as a source of evidence for human nature, both *a priori* and *a posteriori.* From this perspective, the place of custom in Grotius' legal doctrine is ambiguous. It provides evidence of human nature, as natural law does, but at the same time it is the result of reciprocal voluntary agreements among sovereigns. Both features identify, respectively, two kinds of customs: a "natural custom"; and a "voluntary customary *ius gentium*". Both are investigated by Grotius by adopting different rhetorical strategies that aim to prove the naturalness of the first and the voluntary nature of the second kind of custom. Concerning the first, Grotius thinks of natural custom as that custom that, in the words of his inspiring source Dio Chrysostom, is the invention of "life and time", as Grotius contends by

[295] On moral probabilism, see R.A. Maryks, *Saint Cicero and The Jesuits. The Influence of Liberal Arts on the Adoption of Moral Probabilism*, Ashgate, Aldershot 2008; S. Tutino, *Uncertainty in Post-Reformation Catholicism: a History of Probabilism,* Oxford University Press, New York 2017, pp. 61-77, especially p. 74 on the distinction between opinion *de facto* and *de iure.*
[296] R.A. Maryks, *Saint Cicero and The Jesuits.,* p. 124.

depersonalizing the Scholastic concept of *habitus*. Indeed, natural custom is not the result of an intentional, voluntary human action. Rather, it arose spontaneously, as it has always been there. For reasons of its naturalness, natural custom is as necessary as natural law. Traces of such custom can be found in literary works from the past, which epitomize those customary human behaviors as natural, i.e. useful for human preservation and flourishing. Ultimately, *sociabilitas* constitutes a fundamental criterion for deducing natural custom. On the other hand, Grotius conceives of voluntary customary *ius gentium* as the product of contingent agreements among nations. It is here that Grotius makes use of a method which he describes as 'conjectural'. A probable estimation of diverse sources leads the jurist to an understanding of the relevance and applicability of these voluntary customary agreements, which can however change over time.

As a result of those influences, Pufendorf profoundly condemns the agreement of nations of positive *ius gentium* (in a Hobbesian fashion). Voluntary becomes synonymous with moral, and therefore legitimately included in the rational.[297] Through the science of *morales personae*, Pufendorf insists on the value of *consensio omnium* as opposed to *consensio gentium*. In other words, he refutes the existence of voluntary *ius gentium* (*consensio gentium*) by replacing it entirely with the widespread consensus of scholars (*consensio omnium*). At the same time, he seems to acknowledge the existence of a proper customary law of nations, emerging from the custom of the "most civilized nations". I will try to explain how the multi-faceted nature of custom in Pufendorf can be faced through different levels of analysis. I will also address the following questions: what role does historical method play in the establishment of natural consensus?[298] What do the concepts of "observance of natural law" and "tacit consensus" mean and how are they developed? Is there room for a real customary law of nations based on voluntary agreements among sovereigns? My claim is that, quite ironically, as a result of the process of naturalization of *ius gentium*, Pufendorf leaves a tiny space for a proper concept of international custom to develop.

However, Pufendorf's pupil Christian Thomasius (1655-1728) seems to emphasize even further the rationalist approach to the law of nations, and consequently to leave even less space within which anything like a customary law of nations might exist. Quite interestingly, Thomasius speaks of *historia literaria* as a method for *iurisprudentia,* taking a step beyond

[297] On the relationship between history and law in the thought of Pufendorf, see L. Krieger, 'History and Law in the Seventeenth Century: Pufendorf', *Journal of The History of Ideas* 21/2 (1960), pp. 198-210.
[298] As for the development of *historia literaria* in the 17th century, see T. Hochstrasser, *Natural Law Theories*, p. 53; F. Grunert, Historia Literaria. *Neuordnungen des Wissens im 17. und 18. Jahrhundert*, Akademie Verlag, Berlin 2014.

Grotius' intuition that natural law can be better described through literary examples.[299] However, although Thomasius also insists on *observantia* as a fundamental feature of *consuetudo*, he simply refuses the existence of custom as a source of *ius gentium*, either natural or voluntary.[300] Therefore, the importance of this concept seems to diminish, and the evidentiary role of custom seems to be completely replaced by a universal, self-sufficient doctrine of natural law.

However, Locke's (1632-1704) insistence on experience and, consequently, Leibniz's (1646-1716) philosophical innovations shed light on the relation between reason and experience. This affected legal studies as well, and it is by the second half of the 18th century that we find a more positivist approach to the law in jurists like Christian Wolff (1679-1754), in his famous *Jus Gentium Methodo Scientifica Pertractata* (1740-1748).

Wolff, a follower of Leibniz, marks a fundamental turning point in our narrative: philosophy, and no longer history, is the science in charge of providing law with a systematic method (as he claims at the end of his *Prolegomena*).[301] How does this epistemic shift affect the theorization of customary law of nations? Philosophy provides natural law with a solid rationalistic foundation. In this respect, Wolff says that "system was an unknown term back in Grotius' times".[302] In this declaredly philosophical perspective, one could be tempted to argue that custom faces dire straits. It seems that it does not deserve any special place in any philosophy (unless it is Hume's empiricism[303]), because it is a problematic, unsystematic conceptual category. How can we rely on custom as a source of knowledge if it is pure reason that can show us the true principles of knowledge? To quote a later Humean problem, how can I be sure that the sun will rise tomorrow? Hume would say that it is the force of habit to convince us so. However, one could object that custom might show us regularities, but will never provide us with a systematic account on whatever issue (be it the rising of sun or international relations).

If we turn to the legal questions, Wolff faces precisely the issue of the legitimacy of *ius gentium consuetudinarium*, as he expressly calls it. First of all, he restores the Grotian *divisio iuris* between natural law and *ius gentium*. Additionally, he divides voluntary *ius gentium* into three parts: the proper voluntary law of nations (*ius gentium volontarium*), treaty law (*ius*

[299] C. Thomasius, *Delineatio Historiae Iuris Romani et Germanici*, Praefatio, 1750.
[300] See C. Thomasius, *Dissertatio de Jure Consuetudinis*, §21-22 (1722); *Tractatio Juridica de Jure Asylii Legatorum*, §25 (1737)
[301] C. Wolff, *Jus Gentium Methodo Scientifica Pertractata,* Prolegomena.
[302] *Ibid*., *Praefatio*.
[303] See H. E. Allison, *Custom and Reason in Hume: a Kantian reading of the first book of the Treatise*, Oxford University Press, Oxford 2008.

gentium pactitium) and customary law of nations (*ius gentium consuetudinarium*).[304] The first kind of *ius gentium* is an overarching system of voluntary rules deriving from Wolff's concept of *civitas maxima*, to which all nations belong by natural inclination. *Civitas maxima* is governed by voluntary but universal principles, most importantly that of sovereign equality, and is ruled by a majority principle: the explicit consensus of the majority of nations (notably, the most civilized ones) implies the existence of a universal consensus among all of them.[305]

Ius gentium consuetudinarium is defined as the law deriving from tacit consensus or from a tacit pact. Although tacit, custom still amounts to a pact: therefore, it is assimilated to *ius gentium pactitium*. This very technical formulation of custom as just "one" of the sources of *ius gentium* constitutes a fundamental break in the narrative that we have sketched until now. Wolff claims that Grotius' mistake lies precisely in the fact of having equated customary *ius gentium* with the whole voluntary *ius gentium*. Consequently, by so doing, he could not distinguish good from bad customs.[306] In this respect, Wolff distinguishes from the universal consensus of the *civitas maxima*, which identifies a number of general laws of conduct, and tacit consensus, which is a proper feature of custom. It is interesting to note, for the mere sake of comparison, that such a distinction was inconceivable to Vitoria and Suárez (for obvious historical reasons). Quite to the contrary, they thought that from the tacit consensus of nations a presumption could be derived that *ius gentium* could not be abrogated. Instead, Wolff's idea of *civitas maxima* is hierarchically superior to customary law of nations, and provides it with the necessary normative foundation.

In addition to this, we owe to Wolff another fundamental innovation. He introduces the German word "*das Herkommen*" as a translation of the Latin *consuetudo*. This is a significant semantic shift. Although in German *das Herkommen* means "usage", etymologically the verb *herkommen* simply means "to come from, to derive". Although Wolff is not particularly interested in custom, his terminological innovation will be crucial for the later development of the concept. This semantic shift might suggest that from now on custom has either to be deduced genealogically or derived through a proper doctrine of precedents. By "genealogical deduction" I mean a method of deriving tacit consensus grounded in Wolff's psychology, which I claim is

[304] *Ibid.*, *Prolegomena,* §4, §22.
[305] *Ibid.*, *Prolegomena*, §20.
[306] *Ibid.*, *Praefatio*.

decisive in understanding the conceptual specificity of custom (and the proper method to detect it).[307]

Finally, the last chapter will deal with Emer de Vattel (1714-1767), whose book on the law of nations was incredibly widely read and discussed by jurists.[308] Such success is probably due to the explicit aim of Vattel's book – to popularize Wolff's account of the law of nations, which one could not understand without delving into thousands of pages about metaphysics.[309] Vattel's debt towards Wolff is also evident in his distinction between universal consensus and *ius gentium consuetudinarium*, which he considers of limited applicability. Although Vattel rejects Wolff's idea of *civitas maxima*, he replaces it with the "presumption of universal principles" on which there is consensus among nations. Once again, Grotius constitutes the starting point of Vattel's discussion on *ius gentium*. Vattel claims that Grotian natural law was tailor-made for individuals, and therefore made problematic the issue of relations among sovereigns, who are not like individuals and have no superior state above them. Therefore, Vattel's claim is that natural law has to be made *enforceable* while still being universal. Vattel thought that the presumption of "sovereign wills and agreement" was the way in which this was made possible.[310] As far as the proper, "technical" concept of customary law of nations is concerned, I will demonstrate some concrete examples of customary practice among nations in Vattel's text, and also compare it with Wolff's relevant passages on the same issues.

[307] On tacit consensus and Wolff's pshychology, see his *Philosophia Practica Universalis*, I, VI, §664-665, §669 (1738); and relevant references to his *Psychologia Empirica* (1732). Wolff also wrote a *Psychologia Rationalis* (1734), and thought of it as intertwined with the empirical one.
[308] E. de Vattel, *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758).
[309] *Ibid*., *Praeface*, pp. 7-8.
[310] See C. Covell, *The Law of Nations in Political Thought. A Critical Survey from Vitoria to Hegel*, Palgrave MacMillian, Basingstoke, 2009, p. 105. Contrary to Vattel, Wolff thinks of *praesumptio* as an alternative and conjectural (*probabilis*) method of deducing tacit consent, and it applies to a "singular case" (see his *Institutiones Juris naturae et gentium,* §27): it consists in holding something as true until it is proved false, §31.

Chapter 4. Grotius and the methodological "bifurcation" of customary international law

4. 1 *Etiamsi Deus (non) daretur*? An introduction on divine will and natural law

In order to understand why Grotius turns the question of obligation into a question of method, a short clarification on the relationship between scholasticism and Grotius will prove useful.

The relationship between scholasticism and Grotius has been the subject of a vivid debate. There are several reasons justifying such an interest. Critical appraisals have moved between two opposite poles: the novelty of Grotius and his alleged originality, *versus* the Scholastic tradition and his intellectual debt towards it. No wonder then, that some have traced a Suárezian influence in Grotius' famous claim that natural law would exist "*etiamsi Deus non daretur*".[311] In fact, the similarity between Suárez's and Grotius' texts is striking.[312] However, whereas it is hard to imagine that for Suárez such a fortunate expression had but a hyperbolic function, for Grotius it is traditionally considered to be the basis of the process known as the secularization of natural law.[313] Others have argued, instead, that Grotius might have taken from Suárez the semantic distinction between *ius* and *lex*.[314]

But what is, essentially, the difference between the Scholastic and Grotius' natural law theory? Straumann has recently argued that Grotius, in terms of his methodological choices, is definitely a humanist.[315] But what is meant by Grotius' humanism? Recent contributions have shown that humanism is a complex phenomenon and that it does not exclude the use, although

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[311] See the famous contribution from J. St. Leger, *The Etiamsi daremus of Hugo Grotius: a study in the origins of international law*, Typis Pontificiae Universitatis Gregorianae, Romae 1962.

[312] G. Ambrosetti, *I presupposti teologici e speculativi delle concezioni giuridiche di Grozio*, Zanichelli, Bologna 1955; G. Del Vecchio, *Grozio e la fondazione del diritto internazionale*, Giuffrè, Milano 1960; K. Haankonssen, *Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenmen*t, Cambridge University Press, New York 1996; S. Ertz, 'Hugo Grotius's Hermeneutics of Natural and Divine Law', 37/1 *Grotiana* (2016), pp. 61-94;

[313] M. W. Janis, C. M. Evans (eds.), *Religion and International law*, Nijhoff, Leiden, 1999; R. Jeffery, *Hugo Grotius in International thought*, Palgrave MacMillan, New York, 2006, p.36; M. Somos, 'Secularization in *De iure praedae'*, *Grotiana* 26/1 (2007), pp. 147-191.

[314] *Ius* in considered in the sense of subjective right, namely of a faculty, whereas the term *lex* is taken in a more objective sense. See B. Tierney, *The Idea of Natural Rights*, p. 51.

[315] B. Straumann, *Roman law in the state of nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge University Press, Cambridge 2015, pp. 21, 45.

critical, of theological sources.[316] Does it even make sense then, to speak about the phenomenon of secularization of the law?

Grotius faces the question of the source of obligation of natural law: does its binding force lie in its "conformity with right reason or rather from the will of God"?[317] When it comes to definition, Tierney argues, we find in Grotius that same impasse of Suárez: namely, that of defining natural law as rational but still characterizing it with some voluntarist elements – in order to ground its bindingness, so to speak, in its effectiveness. However, it has been argued that Grotius, although recognizing his debt to the Scholastics, intends to oppose them as polemically as he wishes to criticize skepticism.[318] In fact, Grotius makes use of what has been defined as a "mathematical method"[319] in order to "repudiate the Scholastic a priori system of knowledge, based on a natural reason whose creator is God".[320] From this perspective, Tuck argues that with the famous formula *etiamsi Deus non daretur*, Grotius would claim that "the obligatory aspect of the law of nature arises independently of God's will", whereas "the

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[316] *Ibid*., p. 133. On the relationship between humanism and theology, see *infra* at p. 67-68.

[317] See B. Tierney, *The idea of natural rights*, p. 327. About the theology of Grotius, see also C. A. Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations*, De Gruyter, Berlin-New York 2006; J. S. Geddert, *Hugo Grotius and the Modern Theology of Freedom: Transcending Natural Rights*, Routledge, New York 2017. Grotius shift of position between *De iure praedae* and *De iure belli* has been variously interpreted: st. Leger argues that it is an effect of Grotius' Arminianism (J. St. Leger, *The Etiamsi Non Daremus*, p. 137). Straumann has recently claimed that, rather, Grotius' refusal of voluntarism is an outcome of his sympathy towards Stoic doctrines (B. Straumann, *Roman Law in the State of Nature*, p. 36). For a general reconstruction of the problem, see M. Villey, *La formazione del pensiero giuridico moderno*, Jaca Book, Milano 1986, p. 522.

[318] On this, see R. Tuck, 'Grotius, Carneades and Hobbes', *Grotiana* 4 (1983), p. 58. See also, from the same author, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant*, Oxford University Press, Oxford 1999.

[319] In the current debate on Grotius, this "mathematical hypothesis" has been dismissed as inconsistent. However, to grasp the stakes of such debate, see A. Dufour, 'L'Influence de la méthodologie des sciences physiques et mathématiques sur les Fondateurs de l'École du Droit Naturel Moderne (Grotius, Hobbes Pufendorf)', *Grotiana* 1 (1933), pp- 33-52; B. Vermeulen, 'Simon Stevin and Geometrical Method in De Jure Predae', *Grotiana* 4/1 (1983), pp. 63-66 ; E. Wilson, *Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within Eary Modern World System (c.1600-1619),* Martin Nijhoff, Leiden 2008, pp. 340-341. This mathematical hypothesis finds a couple of textual references in Grotius' works: "just as the mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for the first time, with the purpose of laying a foundation upon which our other conclusions may safely rest"; In his *De iure belli ac pacis* he also seems to refer to such a scientific method when he states that he intends to link his *probationes* of natural law to a maximum degree of certainty: "my examination of what belongs to the law of nature on ideas which are so certain that nobody can deny them without doing violence to their fundamental being". Also: "For I profess truly, that as Mathematicians consider Figures abstracted from Bodies, so I, in treating of Right, have withdrawn my Mind from all particular Facts". Another reference to mathematics occurs when Grotius distinguishes between arithmetic and geometric justice. All these occurrences, although bearing witness to a certain *Zeitgeist*, informed by scientific discoveries and new methods of inquiry, constitute insufficient evidence to prove that Grotius thought of mathematical method as something more than a metaphor.

[320] R. Tuck, 'Grotius, Carneades, and Hobbes', p. 58.

scholastic point was that human beings have the ability to understand what is good and bad even without invoking God but have no obligation proper to act accordingly without God's command".[321]

It has rightly been argued that Grotius opposes these philosophical models by recurring to Stoicism. But what Stoicism? And *why* Stoicism? As is commonly known, with the word Stoicism we combine a number of heterogeneous doctrines coming from the Greek and Roman Hellenistic period.[322] However, it has recently been ascertained that Grotius' main sources were Stobaeus, Cicero and Seneca.[323] It is by relying on these authors that Grotius elaborates his famous concept of *appetitus societatis* in the background of that of *oikeioisis*. In turn, *oikeiosis* constitutes Grotius' starting point – if not the fundamental principle – of his doctrine of natural law and right. According to this famously Stoic doctrine, the implication of which I will describe presently, humans have a feeling of self-appreciation that leads them both to self-preservation, and at the same time to the "appreciation of the human species as being akin to the individual human being".[324] Notably, in his account the two meanings of *oikeiosis* merge together. The instinct of preservation already contains the germs of *sociabilitas*, and *vice versa*.[325]

Therefore, Grotius replaces the old Carneadean argument about the law being just a matter of profit with a new doctrine of natural justice where the legal phenomenon is both a natural, immediate product of reason, and a means of agreement between human beings.

The first kind, namely natural law, can be deduced from the main principle of *oikeiosis*. Natural laws are to be searched for *in abstracto* using their compliance with *oikeiosis* as a

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[321] *Ivi*. Also, B. Straumann, *Roman Law in the State of Nature*, p. 86.

[322] See A. A. Long, *The Hellenistic Philosophy: Stoics, Epicureans, Sceptics*, University of California Press, Berkeley and Los Angeles 1986. In the recent years, an increasing attention drawn by scholars on the relationship between Grotius and the *Stoa*, clarified which Stoic sources Grotius referred to. Although he did not have at his disposal our *Stoicorum Veterum Fragmentarum* (but managed to edit a collection of fragments of his own). Grotius wrote a *Philosophorum sententia de fato* (published posthumously in 1648), a collection of Stoic materials on the question of fate. He translated all the Greek sources into Latin himself, as he declares in *Praefatio*.

[323] In 2001 a whole volume of the *Grotiana* series has been devoted to the relationship between Grotius and Stoic thought. In addition, see, J. Miller, 'Grotius and Stobaeus', *Grotiana* 26-28 (2005-2007), pp. 104-126. M. Van Ittersum, 'The Wise Man is Never Merely a Private Citizen: The Roman Stoa in Grotius' *De Jure Praedae*' (1604-1608), *History of European Ideas* 36 (2010), pp. 1-18. L. Winkel, 'Les Origines Antiques de l'Appetitus Societatis de Grotius', *Tijdschrift voor Rechtsgeschiedenis* 68/3 (2000), pp. 393-403; H. Blom, L. Winkel, 'Grotius and the Stoa: Introduction', *Grotiana* 22/1 (2001), pp. 3-20. On the concept of *oikeiosis*, see R. Radice, "Oikeiosis*": ricerche sul fondamento del pensiero stoico e sulla sua genesi,* Vita e Pensiero, Milano 2000.

[324] H. Blom, L. Winkel, 'Grotius and the Stoa: Introduction', p. 9.

[325] As Grotius claims in his *De iure belli ac pacis* (Paris 1625, *Prolegomena* XVII). Further references from this text will be taken from the English translation (Grotius, H., *The Rights of War and Peace*, ed. by R. Tuck from the edition by J. Barbeyrac, Liberty Fund, Indianapolis 2005, fromhereafter: *IBP*, pp. 93-94) and compared, if necessary, with the Grotius' amended editions of 1631 and 1632.

criterion. Only if such compliance is necessary do we find ourselves before genuine natural law. The latter voluntary aspect of law is introduced by civil law, through which individuals enter into agreement with each other in order to pursue their interests, derived from their ontological indigence and in need of mutual help from other fellow human beings. This implies an epistemological claim about the law: that it is natural, self-evident to the human mind, and yet can be the object of agreement among humans.[326]

This leads us to a second relevant aspect of Grotius' reflection: how can we get to know the law, in order to establish its principles and rules? If it is natural, should we simply deduce it from human nature? The answer is not as clear cut as Grotius would have desired. In fact, as Tuck warns us, this need for a more demonstrative argument did not transcend *in toto* the claims of the skeptics. For example, the empirical-geographical claim that the existence of an infinite variety of human customs all over the world seems to contradict our urge to consider human nature as universal and unitary. But that is the challenge that Grotius takes on: "to use empirical evidence drawn from his enormous knowledge of world history to show that all kinds of surprising practices were compatible with social life"[327]. However, what is the point of using empirical evidence to find widespread consensus of something that can be deduced - i.e. it is already self-evident and axiomatic?[328] This aspect is made more problematic by the fact that Grotius changes his *divisio iuris* between the law of nature and *ius gentium* over time, as we will see in the next section.

4.2 Rhetorical method and Grotius' distinction between natural law and the law of nations

Grotius' famous contribution to the systematization of the law of nations, as expressed in his *De iure belli ac pacis* (1625), is today still considered a milestone of international legal thought. However, the way in which Grotius conceives of demonstrative science is extremely controversial. Attempting to face this very problem, Grotius himself complains that his predecessors failed to build a valid legal *ars*, precisely because they did not,

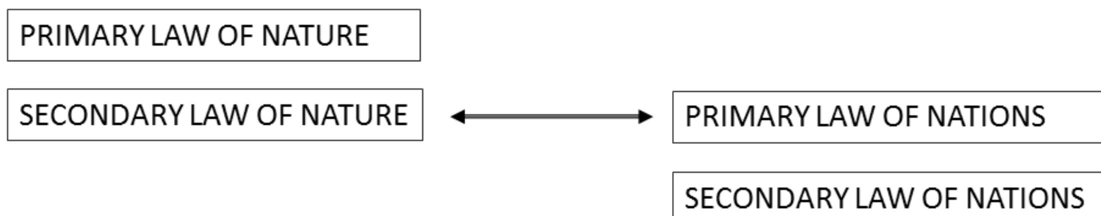
[326] IBP, p. 112.
[327] R. Tuck, 'Grotius, Carneades and Hobbes', p. 54.
[328] This point is made by D. Obbink, 'What all men believe – must be true: Common concetions *and consensio omnium* in Aristotle and Hellenistic philosophy', in J. Annas (Ed.), *Oxford Studies in Ancient Philosophy* 10, Clarendon Press, Oxford 1992, pp. 193-231.

> […] distinguish those things (which have not been yet sufficiently taken Care of) that are established by the Will of Men, […] from those which are founded on Nature. For the Laws of Nature being always the same, may be easily collected into an Art; but those which proceed from Human Institution being often changed and different in different Places, are no more susceptible of a methodical System [*extra Artem posita sunt*], than other Ideas of particular Things are.[329]

In other words, paraphrasing Grotius, there are some things of human life – namely, voluntary acts – that cannot be reduced to a "systematic" analysis. As a matter of fact, Grotius openly criticizes Scholasticism (according to which we can simply deduce human nature from God-given *naturalis ratio*) as well as skepticism (whose fundamental claim goes: if we are not able to reduce into a system the whole body of ethics, then we should simply give up striving for any kind of systematic attempt whatsoever).[330]

This intent to divide things which are founded on nature and things which originate from human will is further complicated by Grotius' *divisio iuris*, which changes over time. Notably, in both his *De iure praedae commentarius* (1604-5) and his *Mare Liberum* (1609), Grotius distinguishes between primary and secondary laws of nature, following the Spanish jurist Fernando Vázquez de Menchaca.[331] Whereas primary natural law is the direct effect of God's will, the secondary law of nature is that which can be derived from universal human reason, i.e. through *recta ratio*.[332] The rationality of these secondary precepts is evident from the consent that they have generally deserved, and to this effect, "what the common consent of all mankind has shown to be the will of all, that is law".[333] It is on the basis of such universal consent that the secondary law of nature coincides with what Grotius calls the primary law of nations,[334] from which we distinguish the secondary law of nations – a law which result from the obligation expressed by the will of sovereigns:

[329] *Système methodique* is a translation of Barbeyrac: Grotius did not wish to construct a legal system but to reduce necessary legal proposition into an "*ars*".
[330] For example, the works of Pierre Charron. On this, see R. Tuck, 'Grotius, Carneades, and Hobbes', p. 44.
[331] See A. S. Brett, *Liberty Right and Nature,* p. 165.
[332] H. Grotius, *De iure praedae commentarius* (1604-1606). Reference from this text are taken from the English translation (H. Grotius, *Commentary on the Law of Prize and Booty*, ed. by M. J. van Ittersum, Liberty Fund, Indianapolis 2006, p. 25, fromhereafter: IPC) and compared with the original manuscript of the *De iure praedae* held in and digitalized by the Leiden University Library (Ms. BPL 917).
[333] *Ivi*.
[334] On this debated question, see the essays in H. Blom (Ed.), *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De iure praedae. Concepts and Contexts,* Brill, Boston 2009; especially contributions from F. Todescan, M. Scattola and L. Winkel. Also, see P. Haggenmacher, *Grotius et la doctrine de la guerre juste*, PUF, Paris 1983. Of course the literature is wider than this but I refer to these specialist contributions for further bibliography.



And, similarly, in *De iure praedae*, Grotius' claim was that there exists a secondary law of nations which arises from the will of states. More precisely, "whatever all states have indicated to be their will, that is law in regard to all of them".[335] Through this declaredly voluntarist position, Grotius seems to here make a claim about the nature of sovereignty, which is derived from the Spanish jurist F. Vázquez Menchaca.[336] Brett has rightly pointed out that Vázquez Menchaca associates sovereign power with *potentia*, sheer might, rather than with *potestas*, "which is the power conceded by citizens to the prince, which is specifically a power, limited by law, to look after their good. […] Power in the sense of *potentia* puts a person in possession of prelacy: but possession belongs to the world of fact rather than right and is subject to all the instability and mutability of that sphere", or as Vázquez Menchaca himself puts it, "even if that state of affairs [prelacy over other princes] had once obtained, or we conceded freely that it had obtained, still it would not constitute an objection, because right in things of this sort every day arises, and every day comes to an end".[337] Following this intuition, Grotius

[335] IPC, p. 45.
[336] In his *Controversiae Illustres aliaeque usu frequentes,* 1564.
[337] A. S. Brett, *Liberty, right and nature*, p. 169

argues that sovereigns are free to rule themselves as they like, both internally and with regard to external relations with other nations.[338]

In *De iure belli ac pacis*, the distinction between primary and secondary law of nature/primary and secondary law of nations seems to blur. As a matter of fact, Grotius only distinguishes between natural law and *ius gentium*, by arguing that everything which is not natural is contingent, and therefore is the result of the will and consent of men:

> For natural principles, being always the same, are easily put into a systematic form, whereas conventional principles, which often change and which vary from place to place, like other collections of particulars cannot be handled systematically. So if the experts [*sacerdotes*] on true justice were to undertake to deal with the different parts of natural and perpetual jurisprudence, they should first set to one side everything which derives from the free will.[339]

We can now understand Grotius' claim that we need to use a deductive *a priori* method to provide natural law with solid principles. He distinguishes immutable rational principles from voluntary agreements, which are therefore subject to change.[340]

Grotius seems to suggest that for natural law both *a priori* and *a posteriori* proof is possible: "the former Way of Reasoning is more subtle and abstracted; the latter more popular. The Proof by the former is by shewing the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature".[341] In the *a priori* and *a posteriori* argument about natural law Grotius seems to merge the old distinction, in *De iure praedae,* between primary and secondary law of nature.[342] In this respect, he contends:

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[338] IBP, p. 262: "quod si qui verae iustitiae sacerdotes naturalis et perpetuae iurisprudentiae partes tractandas susciperent, semotis iis quae ex voluntate libera ortum habent, alius quidem de legibus, alius de tributis, alius de iudicum officio, alius de volutatum conjectura". On *voluntatis conjectura* see next section.

[339] IBP, p. 1754.

[340] Compare with H. Grotius, *Mare liberum*, 1609 (fromhereafter: ML). References from this text are taken from the English edition (H. Grotius, *The Free Sea*, ed. by D. Armitage, p. 43) and compared with the original edition (H. Grotius, *Mare liberum, sive De iure quot Batavis competit ad Indicana commercia dissertatio*, Elzevir, Leiden 1609).

[341] Quoted in B. Straumann, *Roman Law in the State of Nature*, p. 68. (IBP, p. 159).

[342] P. Haggenmacher explains that Grotius seems to have changed his mind as soon as he addressed the question of the law of booty under a *iure belli* perspective. He argues that Grotius introduces the concept of bilateral justice of war precisely in order to make use of historical evidence as a source for the law of nations. This resulted in a change of Grotius' *divisio iuris* over time. "[…] Pourquoi Grotius a introduit dans son système la principe du droit de guerre bilateral, alors qu'il allait à l'encontre de la logique générale du Mémoire et qu'il devait même plutôt entraver la démostration? La réponse la plus adequate serait, nous semble-t-il, qu'il n'avait pas véritablment besoin d'y introduire ce principe puisqu'il devait d'emblée s'y trouver, aux yeux de l'historien et de l'observateur attentive des usages entre belligérants: le problème de Grotius était donc plutôt, à default de pouvoir l'ignorer ou l'en expulser, de la réduire à la portion congrue. Comment cet humaniste aurait-il pu, en effet, faire fi de tous les

I have likewise, towards the Proof of this Law, made Use of the Testimonies of Philosophers, Historians, Poets, and in the last Place, Orators; not as if they were to be implicitly believed; for it is usual with them to accommodate themselves to the Prejudices of their Sect, the nature of their Subject, and the Interest of their Cause: But that when many Men of different Times and Places unanimously affirm the same thing for truth, this ought to be ascribed to a general cause; which in the Questions treated of by us, can be no other than either a just Inference drawn from the Principles of Nature, or an universal consent.[343]

In Grotius' words, whereas *a priori* proof of natural law can be provided by deducing the fitness of a given norm to sociable nature, *a posteriori* proof of natural law is provided by arguments *de consensu omnium*, namely by searching for unanimity of consensus in the literature of the past. In Chapter 2 we have seen that Gentili also makes use of such arguments, which are derived from a Stoic doctrine, in order to prove the consistency between natural law and the approbation of scholars over time and space. Such consistency relies upon the Ciceronian motto that "*consensio omnium* ought to be considered natural law", and that therefore a close connection exists between what everybody (i.e. authoritative sources) thinks and the normative core of natural law. However, as he equated natural law with *ius gentium*, he did not address the issue of what method better suits what legal regime. Grotius instead faces the problem of the implications of his methodological choices for his distinction between natural law and *ius gentium* as two separate legal regimes. However, Grotius specifies that the distinction between natural law and *ius gentium* is not one of method, but rather method is determined by the "*qualitas materiae*", namely the quality of the subject in question.[344] This explains why the law of nations can only be proved through *a posteriori* proof, as it is impossible to deduce it from certain principles.

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témoignages litteraires sur la question? Et maint auteur modern ne s'était-il pas chargé de rappeler, même aux savants les plus éloignés des affaires, que la pratique avait consacré la règle entre Etats? Ne pouvant nier l'évidence, il fallait trouver le moyen d'en restreindre la portée et les repercussions, afin que le reste du système demeurât sauf. Tel est le problème qui a provoqué, semble-t-il, cette contruction qui jusque dans son état final, ne s'éclaircit pas entièrement" (P. Haggenmacher, *Grotius e la doctrine de la guerre juste*, PUF, Paris 1983, p. 398).

[343] IBP, p. 112: "*usus sum ad iuris huius probationem testimoniis Philosophorum, historicorum, poetarum, postremo et oratorum: non quod illis indiscrete credendum sit; solent enim sectae, argumento, causae servire: sed quod ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat: quae in nostris quaestionibus alia esse non potest, quam aut recta illatione ex naturae principiis procedens, aut communis aliquis consensus*." (*Proleg*. §40).

[344] "*illa ius naturae indicat hic ius gentium: quorum discrimen non quidem ex ipsis testimoniis, passim enim scriptores voces iuris naturae et gentium permiscent) sed ex materiae qualitate intelligentum est. Quod enim ex certis principiis certa argumentatione deduci non potest, et tamen ubique observatum apapret, sequitur ut ex voluntate libera ortum habeat*" (*Ivi*).

In both cases however, Grotius relies upon what has been described as a rhetorical method,[345] by further expanding and systematizing a method which was already applied by Gentili to the study of natural law and *ius gentium*, as already mentioned. This is particularly true if we think that Grotius was also trained as a humanist. Indeed Grotius, together with Franciscus Junius, Gerard Vossius and Peter Cunaeus, was taught a proper historical method consisting of textual criticism and discussion of literary texts by Joseph Justus Scaliger. Scaliger derived a method of analysis where historicism was the basis of a universalistic, cosmopolitan project.[346]

Grotius' "systematization", intended to be an attempt to provide more rigorous foundations to the rhetorical method, mostly consists in two different phases: 1) selection and organization of the reliability of sources; 2) organization of sources into *loci*, used as typical arguments to convey specific ideas.

In the first phase, Grotius seeks to classify sources according to criteria of trustworthiness and reliability. In other words, he assigns a specific argumentative value to each source according to whether it is a historiographical source, poetic, philosophical, etc. Whereas Gentili gave us no indication concerning the ranking of sources to be taken into account to provide evidence of natural law (although he of course was aware of the potential problems of his choices), Grotius concedes a specific, hierarchical degree of reliability to each source. At the top of his list, Grotius concedes a special value and trustworthiness to the testimony of historians, as they provide us with both "*exempla*" and "*iudicia*":

> examples, the better the times and the wiser the People were, are of so much greater Authority; for which Reason we have preferred those of the ancient Grecians and Romans before others. Nor are the Judgments we

[345] As argued by B. Straumann, *Roman Law in the State of Nature*, pp. 51-82.
[346] M.Somos, *Secularisation and the Leiden Circle*, Brill, Leiden-Boston 2011, p. 57. In this respect, an interesting insight into this issue is given by a comparison of Grotius' deductive historical method with that of his friend and contemporary Gerard J. Vossius, also a pupil of Scaliger. The comparative reading of both Dutch authors might suggest that Grotius was influenced by the works of Vossius, who severely distinguishes history from rhetoric, by criticizing Jacopo Zabarella and Francesco Patrizi, the famous Paduan humanists who merged both fields of inquiry into one single *ars*. Quite interestingly, Gentili was a declared follower of these authors, as he considered the legal phenomenon as intrinsically rhetoric. However, this is not the case with Grotius, whose deductive urges are far more compelling than those of Gentili's *iurisprudentia*. Also, Gentili thought of history and rhetoric as of deeply intertwined disciplines. As for the relationship between Grotius and Vossius, Vossius sent a letter to Grotius on the 23rd of Aug 1627, to which Grotius replied on the 16th of October, praising the genius of Vossius and the merits of his historical work. See letters 1167 and 1189 in *The Correspondence of Hugo Grotius*, digital edition, 1st edition. October 2009. Online at http://grotius.huygens.knaw.nl

meet with in Histories to be despised, especially when they agree: for the Law of Nature, as we have already said, is in some Measure proved from hence, but of the Law of Nations there is no other Proof but this.[347]

In this quite evocative passage, Grotius argues that examples are paradigmatic representations of morally valuable behavior taken from the classical past. Although the term history has to be interpreted broadly as "literary-history" (comprising, therefore, sources from various disciplines, as Grotius himself has pointed out)[348], historiography *stricto sensu* plays a fundamental role in Grotius' legal doctrine. His *penchant* for Greek and Roman history, itself a typical characteristic of many humanistic jurists, has for Grotius a further legitimating, ideological purpose for his political present. As he claims in his *De antiquitate batavica*: "antiquity itself bestows a great degree of dignity […] for antiquity comes very close to God, since it resembles eternity […] which we should worship and admire in a state even more than in men, since men are mortal and old age in them is a sign of the approach of the end, but since a state is founded to exist immortally, it receives strength from its age, and grows stronger through aging."[349] This love for antiquity is also evident in Grotius' *Parallelon rerumpublicarum*, where he explicitly compares the Dutch Republic to the glories of its Greek and Roman precedents.[350] From this perspective, it is quite clear how antiquity plays a legitimizing role for the present, providing examples implicitly carrying legal force.[351]

As for judgments, their evidentiary role is far more problematic, as it entails the judgments that historians attach to events of the past.[352] For this reason, they need to be discussed and compared in search of a likely truth, and consequently, of the legal norm that is best enshrined in their judgments, as I will discuss later.

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[347] IBP, p. 124: "*historiae duplicem habent usum, qui nostri sit argumenti: nam et exempla suppeditant, et iudicia. Exempla quo meliorum sunt temporum ac populorum, eo plus habent auctoritatis: ideo Graeca et Romana vetera caeteris pretulimus nec spernenda iudicia, praesertim consentientia: ius enim naturae, ut diximus, aliquot modo inde probatur: ius vero gentium non est ut aliter probetur"* (*Proleg*. §47).

[348] B. Straumann, *Roman Law in the State of Nature*, p. 22: "at first glance, Grotius seemed to speak of antiquity quite generally, expending little effort on geographic or historical differences; it was ancient Grecians and Romans whom he preferred to all others, without showing any preferences within these rough categories. Such preferences emerge quickly, however, if one studies the historical development and normative substance of Grotius' natural law theory".

[349] H. Grotius, 'Dedication to the States of Holland', in *The Antiquity of the Batavian Republic, with the notes by Petrus Scriverius*, ed. and trans. by J. Waszink, Van Gorcum, Assen 2000, p. 5; also quoted by P. Piirimäe, 'Official Historiography and the State in Early Modern Europe', *Storia della Storiografia* 71/1 (2017), p. 62.

[350] H. Grotius, *Parallelon rerumpublicarum liber tertius, De moribus ingenioque populorum Atheniensium, Romanorum, Batavorum*, A. Loosjes, Haarlem 1801.

[351] History as "both the ultimate source and method in finding out what the law is": see M. Somos, 'Selden's *Mare Clausum*: the Secularization of International Law and the Rise of Soft Imperialism, *Journal of the History of International Law* 14/2 (2012), p. 288.

[352] B. Straumann, *Roman Law in the State of Nature*, p. 72.

Another important and controversial role is played by sources coming from poetry and oratory.[353] Grotius claims they both have a subsidiary role because they can be sectarian, but he seeks to amend this deficiency by selecting only authors who he considers "universal" and anti-sectarian. Additionally, Grotius argues that their testimonies do not add much to the demonstration and that he only quotes them to emphasize his claim. Such a qualification might suggest that Grotius only thought of this second kind of source as useful to provide a posteriori demonstration of natural principles – that is to say, of principles which are already self-evident and that do not need further demonstration. Once again, *consensio omnium* becomes a criterion for selecting poetic sources: the more their authority is widely acknowledged by a larger number of scholars belonging to different philosophical factions, the more they can be used as reliable expressions of natural law.

However, Grotius considers other sources: sacred books, canon law, Roman jurists, as well as medieval and modern jurists.[354] Additionally, poetic and oratorical sources are also organized in a way that is, for Grotius, instrumental to the empowerment of his own arguments.[355] This leads us to the second aspect of Grotius' rhetorical method, that of the creation of *loci*. Rhetorical persuasion[356] is grounded in the theory of *loci*, which categorizes sets of plausible arguments that have to be made up (*inventio*) in order to gain credibility before the audience.[357] In so doing, Grotius succeeds in producing arguments by relying on typical sources, the analysis of which is for us informative of his train of thought and ideological intentions.

Grotius' rhetorical method is fully displayed in his treatment of customary law as a source of the law of nations. In the following pages, I will describe it more in detail in so far as such method is involved in the "invention" of the concept of customary law of nations.

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[353] IBP, p. 124.
[354] IBP, pp. 124-131.
[355] See K. H. Ziegler, 'Grotius Topical, or the Import of Antiquity into the International Law of Europe', *Grotiana* 12-13 (1991-1992), pp. 78-88; D. Bederman, 'Reception of the Classical Tradition', in International Law: Grotius' De Jure Belli ac Pacis', *Grotiana* 16-17 (1995), p. 28; R. Schnepf, 'Naturrecht und Geschichte bei Hugo Grotius. Ein methodologisches Problem rechtsphilosophischer Begründung', *Zeitschrift für Neuere Rechtsgeschichte* 20 (1998), pp. 1-14.
[356] Quoted in A. Weststeijn, *Commercial Republicanism in the Dutch Golden Age: The Political Thought of Johan ad Pieter de la Court,* Brill, Leiden 2012.
[357] See W. Schmidt-Biggeman, *Topica Universalis*: *eine Modellgeschichte humanistischer und barocker Wissenschaft*, Meiner, Hamburg 1983.

To conclude, it is important to emphasize that, similarly to Gentili, the rhetorical *inventio* of *loci* coincides, for Grotius, with the actual invention of a legal regime, that of customary law of nations.

4.3 Grotius, Dio Chrysostom and the "invention" of custom

In different passages of his works, Grotius mentions custom as an important element of the international phenomenon, but what precisely he means by 'custom' is controversial.

To start with, one could wonder whether Grotius thinks of custom as a reality of international relations. At first glance, he seems to rule out this possibility. In his *Mare Liberum*, Grotius argues that the law of nations cannot be based on custom and prescription – namely, state practice – because no custom can derogate from the law of nations, which is of divine origin.[358] Accordingly, his famous argument goes, no one shall own the sea, which is free *iure gentium*: both because it is, naturally, an element that cannot be the object of *dominium*, and because the liberty of trade serves the purpose of guaranteeing exchanges between distant members of humankind. In fact, "the liberty of trading is agreeable to the primary law of nations which hath a natural and perpetual cause and therefore cannot be taken away and, if it might, yet could it not but by the consent of all nations, so far off is it that any nation, by any means, may justly hinder two nations that are willing to trade between themselves".[359]

According to Grotius, therefore, custom is problematic because the mere repetition of an (originally unjust) legal fact does not make it just by virtue of the mere passing of time. Another problem with custom is the concept of tacit consensus. In this respect, when dealing with the questions of *usucapio* and prescription, closely related to that of custom, Grotius takes the chance to bring the similarity even further:

> What shall we say then? The effects of Right, which depend on the will, cannot however take place, in Consequence of a mere Act of the Mind; but the internal act must be manifested by some external Sign. For, since the Thoughts of Man cannot be discovered but by outward Signs, it would be absurd and repugnant to our Nature, to attribute that Effect of Right to the bare Act of the Mind, and therefore it is, that mere inward Motions do not come under the Cognizance of Human Laws. Nor do Signs indeed give us a demonstrative, but only a probable

[358]ML, p. 5. On Grotius and the state practice of his day, see C. Roelofsen, 'Grotius and the Practice of His Day', *Grotiana*, 10/1 (1989), pp. 3-46.
[359] ML, p. 51.

Certainty of the Thoughts and Motions of the Mind; for Men may speak otherwise than they design or think, and by their Actions may give to understand a different Thing from what they have in their Thoughts. However, as the Constitution of human Society does not permit the Acts of the mind, sufficiently manifested, to remain without Effect, whatever one declares by sufficient Signs, passes for the real Thought and true Intention of him that uses those Signs. If his Words or Actions are contrary to his Intentions, so much the worse for him. What I have said is liable to no Difficulty, when the question is in reference to Words.[360].

In other words, the tacit expression of human will is complicated by the fact that in order to detect the consensus behind it, one has to engage in a probabilistic analysis of the "signs" that the parties in question produce as evidence of such consensus. Moreover, reading between the lines of Grotius' argument, what the potential asymmetry between what one thinks and what one says might compromise is the *fides* behind human interaction, and could ultimately destroy the natural principle of *pacta sunt servanda*. Grotius suggests facing these problems by undertaking a probabilistic analysis of signs expressing consensus. Such analysis cannot be done by simply deducing their intentions, but rather by identifying the plausible *conjectura voluntatis* behind such sign,[361] something that appears to be very close to,

[…] the Establishment of a Custom. For this too (setting aside the Civil Law, which regulates the Time and Manner of it) may be introduced by the Subjects, if the Sovereign tolerates and connives at it. It is true, the Time required to give this Custom any Effect of Right as in general no fixed Limits; but it ought to be sufficiently long, in Order to give Room to suppose the Consent of the Prince.

In Grotius' words therefore, prescription shares resemblance with custom. Additionally, the claim of probability of *voluntatis conjectura* further emphasizes the inherently rhetorical nature of custom. Interestingly, to make his point Grotius quotes two very authoritative sources

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[360] IBP, pp. 486-7: *"quid dicemus? Iuris effectus qui ab animo pendent, non possunt tamen ad solum animi actum consequi, nisi is actus signis quibusdam indicatus sit. Quia nudis animi actibus efficientiam iuris tribuere non fuerat congruum naturae humanae, quae nisi ex signis actus cognoscere non potest: qua de causa etiam interni actus meri legibus humani non subjacent. Signa autem nulla de animi actibus certitudinem habent mathematicam, sed probabilem tantum: nam et verbis eloqui aliud possunt homines quam quod volunt et sentiunt, et factis simulare. Neque tamen patitur naturae humanae societatis, ut actibus animi sufficienter indicatis nulla sit efficacia. Ideo quod sufficienter indicatum est, pro vero habetur adversus eum qui indicavit. Ac de verbis quidem expedita res*".

[361] Concerning *conjectura voluntatis*, Grotius further stresses its importance in his chapter on interpretation (IBP, II, XVI, p. 849): "the best Rule of Interpretation is to guess at the Will by the most probable Sings, which Signs are of two Sorts, Words and Conjectures: which are sometimes considered separately, sometimes together" ("*rectae interpretationis mensura est collectio mentis ex signis maxime probabilibus. Ea signa sunt duum generum, verba et conjecturae aliae: quea aut seorsim considerantur, aut conjunctum*").

on this topic: Vázquez Menchaca and Suárez's *De legibus*.[362] Another crucial point he makes is that the question of custom is closely interconnected with the problem of time. Time is the most importance driving force of custom, since it helps us qualify whether legal meaning has been given to a certain behavior. In this passage, Grotius also seems to refer to custom as a "natural" human activity, as opposed to political power enforcing civil laws through its own authority. Whereas the latter regulates custom by establishing fixed times for its validity, "individual" custom requires, according to Grotius, a different probabilistic assessment of how much time signifies consensus, a consideration which might depend on different factors. How does Grotius suggest that this should be done, and according to what method?

When facing the issue of the interrelation between custom and time, Grotius quotes Dio Chrysostom, a 1st century orator from Roman Bithynia who is said to belong to the Second Sophistic.[363] Dio Chrysostom's position constitutes a fundamental turning point in Grotius' treatment of custom. The choice of this less-known philosopher and orator is quite significant. As a matter of fact, Grotius presumably read the complete edition of Chrysostom's *Discourses* published in 1604 by the Parisian editor Claude Morel. This edition was particularly useful as it was in both Greek and Latin, and therefore contributed to the rehabilitation of the figure of Dio during the 17th century. The Morel edition also comprised the famous *Diatriba* on Chrysostom, written by the humanist Isaac Casaubon, with whom Grotius was in contact[364]. It is in this diatribe that Casaubon explains why Chrysostom is such an important author for the modern age. Dio's doctrines are so universal not only because all kinds of philosophers would follow them, but rather they are so universal as they derive "from the very same sources of nature". In other words, Dio's anti-sectarianism provides us with "those divine things which are inside the heart of all humans, as well as knowledge of the honorable and dishonorable" ("*ex ipsis nempe naturae fontibus, et ea quae omnium mortalium animis insita est dei, et honesti atque inhonesti cognitio*").[365] This reference, if compared to Grotius' claims, is particularly illuminating, and will be important for Pufendorf's further expansion of the eclectic approach

[362] F. Suárez, DL VII, 15.
[363] On the figure of Dio Chrysostom (c. 40 CE- c. 115 CE, also known as Dio of Prusa), see C. P. Jones, *The Roman World of Dio Chrysostom*, Harvard University Press, Cambridge MA 1978; S. Swain, *Dio Chrysostom: politics, letters, and philosophy*, Oxford University Press, Oxford 2002; H. G. Nesselrath (Ed.), *Der Philosoph und sein Bild: Dion von Prusa*, Mohr Siebeck, Tübingen 2009; E. Amato, Xenophontis imitator fidelissimus: *studi su tradizione e fortuna erudite di Dione Crisostomo tra 16. e 19. secolo*, Edizioni dell'Orso, Alessandria 2011.
[364] On Casaubon and *consensio omnium*, see C. T. Callisen, 'Georg Calixtus, Isaac Casaubon and the Consensus of Antiquity', *Journal of the History of Ideas*, 73/1 (2012), pp. 1-23.
[365] I. Casaubon, *Diatriba*, in *Dionis Chrysostomi Orationes*, apud Federicum Morellum Parisiis 1604, p. 6. Quite interstingly, Gentili does not seem to know this text, and, to my knowledge, never quotes Dio in his works.

towards the study of the law of nature. Accordingly, Dio Chrysostom's definition of custom is particular apposite to the present analysis:

> Custom is a judgement common to those who use it, an unwritten law of tribe or city, a voluntary principle of justice, acceptable to all alike with reference of that same matters, an invention made, *not by any human being* [my emphasis], but rather by life and time. Therefore, while of the laws in general each obtains its power through having been approved one and for all, custom is constantly being subjected to scrutiny [*consuetudo semper probatur*]. Moreover, while no law will readily be chosen by everybody — for it is by the opinions of the majority that it is ratified — yet a custom could not come into being if not accepted by all. Again, while law by threats and violence maintains its mastery, it is only when we are persuaded by our customs that we deem them excellent and advantageous. […] Again, of the written laws, not one is in force in time of war, but the customs are observed by all, even if men proceed to the extremity of hatred.[366]

This passage is crucial to Grotius' understanding of custom. First, Dio Chrysostom claims that custom is a "voluntary principle of justice", that it has not been produced "by any human being", but rather it is an "invention"[367] of "life and time". There seems to be a presumption here that voluntary agreements can exist even though no proper act of will is put into being. This may sound contradictory, but it unravels the spontaneous character of the customary phenomenon. At the same time, being such a naturalized behavior, "custom has to be subjected to scrutiny" in order to assess whether the presumption concerning the existence of a "voluntary principle of justice" actually coincides with an agreement of wills, which by being expressed through signs cannot be presumed and therefore have to be tested.

Moreover, the persuasive force of custom, while hinting at its inherent rhetorical structure, also provides it with normative content. The only convincing customs are those with inherently just moral content, while bad customs do not receive or deserve our appreciation. Furthermore, and crucially, customs are also valid in times of war, unlike positive law, which is suspended by a situation of warfare – an element which makes Dio's account particularly apt to tackle the issue of customary *ius gentium*.

Relying on this framework, Grotius adopts two different rhetorical strategies to prove the existence of customs. These are based once again on their "*qualitas materiae*": arguments *de consensu omnium*, hinting at the naturalness of a given custom; and conjectural arguments,

[366] D. Chrysostom, *Discourses*, 76, trans. by J. W. Cohoon, Loeb Classical Library 339, 1939.
[367] "*Eurema*" (the original Greek term used by Dio) is the Greek word for the Latin "*invention*".

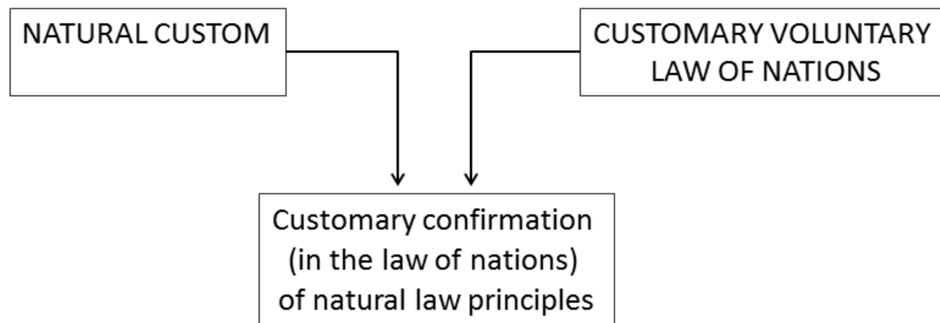
when customs cannot be derived directly by natural principles since they originate from voluntary agreements.

In this respect, it is worth adding that by interpreting Grotius' account, custom seems to be qualified as a legal regime operating between natural law and the law of nations, as it regulates what *ius gentium* permits (and is forbidden by the law of nature) and what the law of nature permits (while being forbidden by the law of nations):

> As the Law of Nations permits many Things, in the Sense we have explained, which are forbidden by the law of Nature, so it prohibits some Things allowed by this Law of Nature. For if we respect the law of Nature, when it is permitted to kill a Man, it signifies not much, whether we do it by the Sword or Poison. I say the Law of Nature, for indeed, it is more generous to attempt another Man's Life in such a manner, as to give him an Opportunity of defending himself, but we are under no Obligation to use such Generosity towards those who deserve to die. But the Law of Nations, if not of all, yet of the more civilized, allows not the taking the Life of an Enemy, by Poison; which Custom was established for a general Benefit, lest Dangers should be increased too much, since Wars were become so frequent.[368]

Custom is precisely situated in and regulates the grey area between natural law and the law of nations. Grotius articulates his account of the significant role of custom, once again, by dividing customs according to their "*qualitas materiae*", namely according to whether they originate from natural law or from the will of states:

[368] IBP, p. 1290.



By adopting different rhetorical strategies, Grotius seeks to achieve different purposes. First, he tries to show that a natural custom exists, which consists in customary practices whose naturalness (and therefore close connection with natural law principles) is better shown by a specific set of sources, including the Greek poets Hesiod and Euripides, as well as Seneca, Lactantius, Philo, Josephus and, of course, Dio Chrysostom. By presenting these sources as authoritative *exempla* of natural customs, Grotius intends to hint at the universality of such customs, which can be proved mostly by arguments *de consensu omnium*. Grotius values Dio's reasoning that custom is a spontaneous phenomenon, and therefore it cannot be the outcome of an intentional agreement. This is particularly interesting if compared with the Scholastic account, based on moral *habitus* and on the reproduction *iure publico* of the individual deliberative process, which is *presumed* to be intentionally reproduced each time a *habitus* is performed. This is not the case with Grotius, who does not rely on *habitus* to build his natural law doctrine.

A second rhetorical strategy is adopted to prove the existence of a customary law of nations originating from the will of states. To this end, Grotius brings the distinction between examples and judgments even further by claiming that *exempla* are insufficient to prove controversial customs pertaining to the voluntary law of nations. Rather, they can only be

proved by recurring to a conjectural method, namely by comparing and contrasting different judgments of scholars. The authorities that best suit this purpose are historiographers and modern jurists (most notably, those of the School of Salamanca). The first provide us with authoritative judgments on the classical past, which we can set as examples for our present; whereas the latter can provide us with legal expertise on controversial questions.

Thirdly, we might find a final type of custom at the intersection between natural and voluntary law, when rights originating from natural law are also confirmed by a shared *consensus* of nations. This third kind of custom is closer to Dio Chrysostom's model as it has been described so far, where the spontaneity of custom coincides with the need to ascertain and prove the legitimacy of the consensus from which it originates. However, in Grotius' natural law framework, the spontaneity of custom actually coincides with the natural principles of reason – it only finds further validation in a widespread consensus among nations. In this respect, whereas voluntary custom can only be proved by conjectural method, natural custom can be proved by a combination of all the methods described so far: compliance with natural law, ascertainment of *consensio omnium,* and confirmation in the will of sovereigns. In this last case, reason and persuasion coincide.

4.3.1 Natural custom

Indeed, by making use of this theoretical framework, Grotius manages to think of custom as a natural, yet binding, reality of international relations. By thinking of what we will call a "natural custom", which is coincident with the primary law of nations, Grotius links the whole natural law tradition to the Greek tradition of *nomoi agraphoi*. In this respect, in the following passage taken from Grotius' text, one of his sources is particularly relevant: the poet Euripides. Grotius draws on the poet's reputation as a *philosophus scenicus*. Euripides' tragedies can be considered as evidence of natural law because he is so well-versed in human affairs as to portray human nature precisely as natural law would. Following Euripides' *Suppliants*, Grotius identifies *nomoi agraphoi* with unwritten international law (rather than with divine law, as Sophocles does in his *Antigones*).[369] This move is rather important because it creates a fundamental connection between unwritten law and customary international law.[370]

[369] Whereas he quotes *Antigones* in IPC, p. 16.

[370] This point is made by G. Cerri, *Legislazione orale e tragedia greca. Studi sull'Antigone di Sofocle e sulle Supplici di Euripide,* Liguori Editore, Napoli 1979, p. 79. Cerri stresses out the continuity between Sophocles and

Euripides, in contrast with Sophocles' account of the *nomoi agraphoi* as divine law, claims that the right to burial for enemies is a "Pan-Hellenic law".[371]

In Chapter II of Book 1, Grotius famously asks whether it is lawful to make war. He starts by stating that this question "is to be first examined by the Law of Nature". The latter will show that it is every man's duty to preserve himself. This principle (which Grotius calls "the first impressions of nature") is sometimes in conflict with our sense of *decorum*, which leads us to act in conformity with our own reason.

> […] and this Conformity, in which Decorum consists, ought (says he) [*Cicero*] to be preferred to those Things, which mere natural Desire at first prompts us to; because, tho' the first Impressions of Nature recommend us to Right Reason; yet Right Reason should still be dearer to us than that natural Instinct. Since these Things are undoubtedly true, and easily allowed by Men of solid Judgment, without any farther Demonstration, we must then, in examining the Law of Nature, first consider whether the Point in Question be conformable to the first Impressions of Nature, and afterwards, whether it agrees with the other natural Principle, which, tho' posterior, is more excellent, and ought not only to be embraced when it presents itself, but also by all Means to be sought after.[372]

Grotius seems to hint at the fact that the naturalness of our social instinct of preservation, deduced *a priori*, is not sufficient to answer the question according to right reason. Therefore, some more investigation is required. At closer analysis, again relying on Ciceronian sources, Grotius argues that right reason only prohibits what is repugnant to society. Therefore, in cases of self-defense for example, it might be the case that violence is not repugnant to society, as it is meant to preserve (and not to destroy) social order. This rule of right reason is then proved by Grotius through recourse to an argument *de consensu omnium*, in order to infer the existence

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Euripides by arguing that "i termini legge non scritta e legge scritta (*agrapta nomima – nomoi ghegrammenoi*) ricorrono solo in due delle tragedie a noi note: rispettivamente nell'Antigone di Sofocle e nelle *Supplici* di Euripide. Tuttavia non mi risulta che si sia mai pensato, nemmeno in termini di pura ipotesi, ad un qualche rapporto tra i due drammi, cioè alla possibilità che Euripide componesse le *Supplici* con l'intenzione cosciente di ridiscutere le tesi implicite nell'Antigone". Also, Euripides conceives of unwritten law as a "pan-hellenic law": "la legge che Creonte ha infranto, impedendo la sepoltura dei nemici caduti in battaglia, è, come nell'Antigone, legge divina, ma non riceve nelle *Supplici* la designazione di legge non scritta. Diversa è la formula ripetutamente impiegata da Euripide: 'leggi di tutta la Grecia', 'legge dei Panelleni', 'questione comune di tutta la Grecia'" (*Ibid*., p. 81).

[371] Euripides, *Suppliants*, v. 311 (Euripides, *Bacchanals; Madness of Hercules; Children of Hercules; Phoenician Maidens; Suppliants*, ed. by A. S. Way, The Loeb Classical Library, Harvard University Press, Cambridge MA 1979).

[372] IBP, p. 181.

of a widespread consensus on the issue,[373] as well as the conformity between this provision of natural law and the law of nations:

> By the Law of Nature then, which may also be called the Law of Nations, it is plain, that every Kind of War is not to be condemned. History, and the Laws and Customs of all People, fully inform us, that War is not disallowed of by the Voluntary Law of Nations: Nay, Hermogenianus declares, that Wars were introduced by the Law of Nations, which I think ought to be interpreted somewhat different from what it generally is, viz. That the Law of Nations has established a certain Manner of making War; so that those Wars which are conformable to it, have, by the Rules of that Law, certain peculiar Effects: Whence arises that Distinction which we shall hereafter make use of, between a solemn War, which is also called Just, (that is, regular and complete) and a War not solemn, which yet does not therefore cease to be just, that is, agreeable to Right. For tho' the Law of Nations does not authorize Wars not solemn, yet it does not condemn them, (provided the Cause be just) as shall hereafter be more fully explained. By the Law of Nations, (says Livy), it is allowed to repel Force by Force.[374]

From this perspective, natural law is identified with the law of nations precisely because it consists of a sort of natural custom, which is the object of *consensus omnium* (a posteriori proof of natural law). Nobody has introduced this custom, therefore custom receives legitimation as follows: to make war is lawful not because everybody in the past seems to have done so, but because it was so natural according to our instinct and right reason (provided that we do not impair the social order), that the naturalness of such custom deserved shared acceptance. The example of war is particularly emblematic because it calls into question the issue of punishment, which Grotius' considers a sovereign prerogative originating from natural law.[375]

Finally, it is possible to identify a third, mixed situation, where we may find natural law receiving confirmation through acceptance of the law of nations. This situation is envisaged in the case of the right of burial, which is listed among the matters governed by the voluntary law of nations. Grotius describes it as follows:

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[373]IBP, p. 187.

[374]IBP, p. 189.

[375] As he claims in his *Commentarius in Theses XI*: the sovereign right to punish arises out of necessity, because there is no superior authority among nations in charge of settling disputes among them. This necessarily implies, according to Grotius, that sovereigns are *naturally* endowed with the right to punish offenses (in P. Borschberg, *H. Grotius "Commentarius in Theses XI": an Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, Peter Lang, Berne 1994, p. 245.

> There are also other Rights belonging to us by the arbitrary Law of Nations, […] For all these, tho' they have their Rise in some Measure from the Law of Nature, yet do they receive an additional Confirmation from human Laws, whether against the Uncertainty of Conjectures, or against some Exceptions, which natural Reason might perhaps suggest; as we have already shown when we treated of the Law of Nature.[376]

It might be the case that some natural rights become part of the voluntary law of nations only after they received "confirmation", namely they were accepted by nations. The right of burial seems to fall into this category, as it is as natural as a customary natural law, but its status received confirmation over time. In fact, at first such a right was derived from God, then it was respected for reasons of humanity, so that animals did not waste human bodies.[377] Such a right is so sacred that it is also due to enemies, even though we have occurrences of the contrary.[378] Quite interestingly, these occurrences "are condemned by the general voice of mankind":

> From the same arbitrary Law of Nations arises the Right of Burying the Bodies of the Dead. Dion Chrysostom, among those Customs which he opposes to written Laws, places this of Burial next to the Rights of Embassadors. And Seneca the Father, among those Laws that are unwritten, which yet are more certain than any that are written, inserts this of Interring the Dead. The Jewish Historians, Philo and Josephus, call it The Right of Nature. And Isidore Pelusiota, One of the Laws of Nature. As all common Customs, agreeable to natural Reason, are usually termed Laws of Nature, as we have observed elsewhere.[379]

Significantly, in this passage Grotius mentions the sources we identified as "typical" of his claims about natural custom (most notably, Dio Chrysostom and Euripides). This aspect might be read as hinting at the fact that even though he is treating the right of burial as a right stemming from the voluntary law of nations, he intends to insist on its naturalness to prove that it is a case where human will and natural law coincide. Here Grotius seems to acknowledge Dio Chrysostom's ambiguity concerning custom. Custom is the object of "life and time", and therefore it has to be validated either as a further proof against the "uncertainty of conjectures" or against "some exceptions" that might arise from natural reason. This third kind of custom, which Grotius defines as "agreeable to reason", is actually a combination of the two models of custom described above. It implies a re-assessment of natural rights against the erroneous

[376] IBP, p. 948.
[377] IBP, p. 935.
[378] IBP, p. 940.
[379] IBP, p. 925.

presumptions of voluntary custom (i.e. that the right of burial has not obtained a shared consensus among nations, and for this reason it does not deserve respect), as well as a further legitimation and validation (through recourse to the history of literary precedents) of such natural rights. Therefore, Grotius seems to suggest that in this case, the method of inquiry of natural law should prevail.

4.3.2 Voluntary customary *ius gentium* and the use of conjectural method

Grotius argues that there is no other way to prove *ius gentium* except by the *a posteriori* approach.[380] Besides, it is only at Chapter XIX of Book 2 of *De iure belli ac pacis* that he expressly declares that:

> We have hitherto treated of those Rights that belong to us by the Law of Nature, adding some Few that arise from the voluntary Law of Nations, as it is an Addition to the Law of Nature. Let us now come to consider, what Obligations that Law of Nations which we call voluntary, doth of itself lay us under.

This passage seems to hint at the fact that Grotius has devoted the first part of his book to the treatment of the primary law of nations, that which derives directly from natural law (however, Grotius admits that he added "some few" arising from the voluntary law of nations. This means, once again, that this distinction was not clear cut in his mind). In Chapter XIX of Book II he instead seems to suggest that thereafter in *De iure belli ac pacis* he will only take into account the voluntary law of nations, and immediately provides the right of embassy as a paradigmatic example. Grotius argues that:

> Concerning the latter Right of Embassadors, viz. that no Violence is to be offered them, the Question is more difficult, and variously handled by the great Men of the Age. Let us speak first of the Persons of Embassadors, and then of their Retinue and Goods. As to their Persons, some think that they are only protected from unjust Violence by the Law of Nations, imagining that their Privileges are to be explained by common Right. Others, that Violence ought not to be offered to an Embassador for every Cause, but only when he violates the Law of Nations,

[380] IBP, p. 124.

which is extensive enough; for in the Law of Nations that of Nature is included; so that, at this Rate, an Embassador may be punished for any Crime, except such as are committed against the Civil Law only.[381]

However,

Nothing of Certainty can be concluded from the Reasons each of these give to confirm their Opinions; for this Right is not grounded upon sure and infallible Principles, as a Right of Nature, but takes its Measures from the Will and Pleasure of Nations. […] We are therefore to consider how different nations have agreed in this Point, which cannot be proved by Instances [*exempla*] only. For Instances enough may be alleged on both sides. We must therefore have recourse both to the opinions of wise men, and Conjectures of the Will and Pleasure of nations.[382]

This aspect is emphasized by the fact that Grotius considers historical examples *insufficient* to prove the voluntary law of nations ("*ex solis exemplis evinci non potest"*). Therefore, the use of a conjectural method is required by the "contingent" nature of the topic investigated. What is striking is that Grotius is making use of no argument *de consensu omnium*.

On the contrary, Grotius' strategy is to contrast and compare different opinions on the same issue. From this perspective, Grotius' search for the *voluntatis conjectura* closely resembles a judicial method, where two historians are called to the bar and their respective witnesses are counter-examined.[383] In this way, Grotius compares two influential accounts on the question of the inviolability of ambassadors: those of Livy and Sallust. Grotius selects from the first historian an episode of Roman history concerning the ambassadors of the Tarquinians, who were involved in the plotting of a treason. Livy tells us the story of this Roman family, which was expelled from Rome by Brutus after years of tyranny over Rome. However, as the king Tarquinius Superbus could not accept life as a private citizen, he started to plot against Rome in order to take his reign back. To this end, Livy says, he sent his ambassadors to Rome in order to ask for the restoration of his own goods.[384] Interestingly enough, what the ambassadors are claiming is perfectly legitimate (forcing the Roman Senate to consider such a

[381] IBP, p. 906.
[382] IBP, p. 907-909: "*Spectandum ergo quousque gentes consenserint: quod ex solis exemplis evinci non potest. Exstant enim satis multa in partem utramque. Recurrendum igitur tum ad sapientum iudiciai, tum ad conjecturas*." This passage is reported exactly in the same manner in the editions of 1625, 1631 and 1632.
[383] A method powerfully used by Gentili in his *De armis romanis* (see chapter 2).
[384] Livy, *Ab Urbe Condita*, II, 2, 3 (Livy, *Livy: with an english translation in fourteen volumes*, The Loeb Classical Library, Harvard University Press, Cambridge MA 1967).

request, the denial of which would constitute a pretext for war),[385] although it hides their secret plans of conspiracy. When the plot was eventually discovered, the traitors were imprisoned but there was doubt concerning the treatment of ambassadors. Although they acted as enemies, the Romans preferred to respect the law of nations by granting their inviolability.[386]

To this evocative episode of Roman history, witnessing the overarching importance of the inviolability of ambassadors even in such grave cases, Grotius opposes an example drawn from Sallust, switching from one author to another according to a rhetorical argument called "*a maiore ad minus*", i.e. from the major but less persuasive argument to the minor and more convincing one. The persuasiveness of such an argument lies in its specificity. Indeed, Sallust here claims that inviolability should also be granted to the attendants of ambassadors, which is a powerful way to reinstate the validity of the main argument (i.e. that ambassadors are inviolable).

The Sallustian episode quoted by Grotius in this respect concerns Jugurtha's reliable emissary Bomilcar, who was sent to Rome to assault, and eventually kill, Massiva. The reason for such hostile intent was that Massiva, a Numidian like Jugurtha, had declared himself Jugurtha's enemy, and therefore Jugurtha considered it safer to get rid of him. After Bomilcar succeeded in killing Massiva, an ambassador from Numidia came to Rome with a safe conduct and Bomilcar was judged "more according to natural law than to the law of nations",[387] but then Jugurtha managed to send him to Numidia before he could be punished. The choice of this example is quite controversial, as Barbeyrac points out in his note to Grotius' text, as it would seem to contradict rather than to prove Grotius' argument.[388] Indeed, there are several problems. Firstly, Bomilcar is not technically an ambassador, but rather a ruffian (something which is however, allowed by Grotius' law of nations – provided employed ruffians are not under a duty of loyalty to that enemy).[389] In the present case, Bomilcar is a Numidian and therefore Jugurtha's conduct seems formally just. Secondly, Grotius elsewhere claims that only the just side in a war is entitled the right to punish spies according to the law of nature, in so doing implying that the Romans were on the just side of the conflict against Jugurtha.[390] Thirdly, the

[385] *Ibid*., II, 3, 5.
[386] *Ibid*., II, 4, 6.
[387] Sallust, *Bellum Jugurthinum*, XXXV (Sallust, *The War with Catiline; The War with Jugurtha*, trans. by J.C. Rolfe, rev. by J. T. Ramsey, Harvard University Press, Cambridge MA 20114).
[388] IBP, p. 910, fn. 5.
[389] IBP, p. 1295.
[390] Compare with IBP, p. 1295: "it is to no purpose to object, that such Men, being taken, are commonly put to exquisite Torments; for that is not because they violate the Law of Nations, but because, by the same Law of Nations, any Thing done against an Enemy is lawful, and everyone is more or less severe as he judges it proper

example implies that Bomilcar was actually punished (according to the law of nature), instead of being granted inviolability. However, as Grotius states many times, the law of nations often provides exceptions to what is generally observed under the law of nature. In this case, Grotius emphasizes that Bomilcar was exercising a public function, and although not formally an ambassador, he should have been granted the same inviolability as ambassadors. In this respect, Grotius insists that the specialty of the persons of ambassadors qualifies a distinct legal regime, "but if an embassador were only to be protected from unjust violence, this would be nothing extraordinary or peculiar. Besides the protection of an embassador from punishment outweighs the benefit, that could accrue to the publick by his punishment".[391]

In other words, the fact that protection is granted to ambassadors in cases where they committed hostilities is a sign of the fact that this right is so sacred and inviolable that not even the gravest crime committed by ambassadors would obliterate such a right. Moreover, it is for the sake of the sovereigns' common interests that, although some crimes might be manifest, "the danger, there generally is, in punishing embassadors, is sufficient reason for a general law against punishing them all".[392] To support this position, which echoes a similar point made by Gentili in his *De legationibus*,[393] Grotius quotes a plethora of ancient authors from profane and sacred history:

> Wherefore I am fully *persuaded* (my emphasis), that tho' it has prevailed as a common Custom every where, that all People that reside in Foreign Countries, should be subject to the Laws of those Countries; yet that an Exception should be made in Favor of Embassadors, who, as they are, by a Sort of Fiction, taken for the very Persons whom they represent, (he brought along with him, saith Cicero of a certain Embassador, The Majesty of a Senate, and the Authority of a Commonwealth) so may they by the same kind of Fiction be imagined to be out of the Territories of the Potentate, to whom they are sent.[394]

What Grotius' conjectural analysis of the custom concerning the inviolability of ambassadors ultimately shows, is that judgments of historians need to be interpreted in a

for his interest. For so are spies used, yet it is held lawful by the general Consent of Nations, to send such […] and that justly sometimes, by such that have manifestly a lawful Cause to make War, by others with Impunity, which the Law of Arms grants. But if there be any that will not make use of such service when offered, that is rather to be attributed to magnanimity, and the confidence of one's own strength, than to an opinion of its being unjust".

[391] IBP, p. 910.

[392] IBP, p. 912.

[393] See *supra*, p. 86.

[394] IBP, p. 912.

dialectical way, by juxtaposing them according to criteria of persuasiveness in order to see what fundamental claim they unravel. Moreover, as shown by the example of Bomilcar, Grotius' aim seems to present extremely radical - and even absurd - situations as persuasive rather than contradicting arguments. Evidence of given customary rules is better given by arguments "*a maiore ad minus*", where Grotius brings the judgment of the historian's witness to the limit in order to imply that a certain customary rule would find application even in apparently inappropriate situations.

To conclude, in another case Grotius considers it a better option to rely on the legal expertise of jurists of his own age, as opposed to wide recourse to poets for natural custom. As he did before, quoting Vázquez and Suárez to support his equation between prescription and custom, this option seems to Grotius a better rhetorical strategy by which he can conjecturally identify the existence of a voluntary custom concerning the goods and persons of subjects. According to Grotius, subjects are obliged for their prince's debts, as a means by which the subjects can contribute to their nation:

> But this was occasioned by a Kind of Necessity, otherwise there would be such a Loose give, as to let in all manner of Injuries, for the Goods of Princes cannot so easily be seized upon as those of private men, who, being many in Number, have each their own. Wherefore Justinian reckons it among those Rights which Nations have established amongst themselves, because they judge it useful and necessary to Mankind. Neither is this so disagreeable to Nature, that it might not be brought in by Custom, and the tacit consent of Nations, since Sureties stand obliged for other Men's Debts, without any other Cause than their own free Consent. […] That this has passed into a Custom, appears not only from complete Wars between Nation and Nations, (for what is practiced in such Wars the very Words of the Denunciation declare): *against the antient Latin People, and the Men of Old Latium, I denounce and make War*, says the Herald in Livy. […] but also from what is practiced where no perfect war is absolutely denounced. […] Agesilaus formerly told Pharnabazus, a Subject to the King of Persia, […] *when (o Pharnabazus) we were heretofore Friends to the King, we dealt friendly to all that belonged to him; but now being his Enemies, we shall use them all as Enemies; and therefore, since you resolve to continue one of his, we shall endeavor to hurt him through you*.[395]

[395] IBP, p. 1234; Here Grotius quotes the following references: *Institutiones*, 1.2; T. Aquinas, ST II.II q. 40 art.1; L. Molina, *Disputationes de contractibus*, *in quibus quaestiones omnes, atque difficultates, ad hanc materiam pertinentes, resolutae, ac summa cum diligentia decisae adeo videntur* (1601), disp. 120-121; G. Valentia, *Commentariorum theologicorum tomi quatuor* (1591), disp 3, q.16, n. 3; M. de Azpilcueta (known as "Navarrus", *Enchiridion sive Manuale confessariorum et poenitentium* (1575), cap. 27 n. 136.

Here Grotius combines historical judgments (quoting Livy again, as well as Plutarch) with the authority of theologians and modern jurists, most notably Luis de Molina, Gregorius de Valentia and Martin de Azpilcueta (known as 'Navarrus'), in order to show the existence of a tacit consensus at the basis of such custom. What his discussion of sources seeks to prove is that it is fictionally possible to imply that whatever a sovereign does, his subjects are involved in it. This is particularly evident in the declaration of war, with historical instances of subjects embodying their own sovereign's attitude towards enemies. This is evident both in formal declarations of war, as well in cases of informal hostilities. Once again, Grotius rhetorically proves that a given custom is accepted even in situations not formally and legally defined.

From this brief textual analysis, we can draw a number of conclusions. Three different situations were identified in order to grasp the meaning of the (sometimes blurred) distinction between the primary law of nations and the secondary law of nations, as well as its effect on the development of the concept of custom. It has been argued that the naturalness of custom helps us explain why it received acceptance, without questioning such acceptance. This case is exemplified by Grotius' argument about the lawfulness of war. In addition, such "natural" custom is simply the creation of life and time, and it is not a process of human intentional agreement. This aspect is particularly new, especially if compared with Suárez, who maintains a similar position but who vindicates, in a significantly different manner, *habitus* as the product and effect of human will.

As for the second category ("voluntary customary *ius gentium*") we have seen that the right of embassy provides a proper example of the voluntary law of nations, where the existence of intentional human agreements ties in with a radical methodological uncertainty. Grotius seeks to overcome this difficulty by presenting testimonies from the past not as evidence of a consensus, but by discussing them in a conjectural manner, i.e. by discussing contrasting historiographical judgments on a given customary rule, and where necessary, providing legal expertise to further support his claims. In this respect, Grotius' means of addressing the conjectural nature of the voluntary law of nations is to bring historical judgements to their limit by presenting situations which are not formally regulated by the law, but that nonetheless comply with a given custom, as proof of its validity.

With regards to the "third" mixed category of natural rights receiving confirmation from the law of nations, like the right of burial, here the intentional agreement of nations is even more evident. Grotius claims that there are some natural rights which pertain, potentially, to *ius*

gentium. There might be, in other words, a meeting point between the spontaneous agreement of natural law and the voluntary agreements of nations. In this respect, the example of the right of burial is quite significant, as it provides a combination of the above described models.

What is significant in Grotius' account of custom, and which will constitute the starting point for the 17th century debate on his reception, is that it is firmly grounded on the idea of consensus. For Grotius, *consensus* never qualifies as state practice, as it is an abstract concept that expresses a general agreement of views rather than a proper collection of sovereign wills amounting to a mutual, conventional agreement.[396] This aspect will be crucial for Pufendorf's re-articulation of the doctrine of the law of nations, and consequently for the role played by customary *ius gentium* in such a conceptual re-allocation.

Moreover, with Grotius the distinction between rhetoric and historical method starts to emerge, as he seems to connect the use of literary-historical record with naturalness.[397] This distinction will be relevant to the further development of the relationship between custom and *historia literaria* in Pufendorf.

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[396] On this, see T. Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries*, Martinus Nijhoff Brill, Leiden 2011. Toyoda's account of the concept of consensus in Pufendorf will be analyzed in the following chapter.

[397] Piirimäe argues that "the gradual shift of the focus of official historiography from grand chronicles to contemporary history with an emphasis on international affairs is a universal trend in modern Europe. There was a clear change of vision about what services history could and should render to the state. It has been argued that a shift from a rhetorical concept of history as a collection of virtuous deeds that served as examples for action to a more pragmatic concept of history which emphasized its role as a practical guide in politics began in late fifteenth century Italy" (P. Piirimäe, 'Official Historiography and the State in Early Modern Europe', p. 65).

Chapter 5. Custom in concentric circles: Samuel Pufendorf's customary *ius gentium* between glory and state interests

Grotius' bifurcation between natural and voluntary customary *ius gentium* will be particularly relevant to successive developments of the debate. Not surprisingly, Grotius' distinction between natural and voluntary law of nations is one of the polemical targets of Samuel Pufendorf (1632-1694). The conceptual innovations of the German jurist and historian constitute a fundamental turning point in our narrative of the customary law of nations.

The figure of Samuel Pufendorf has received much-deserved attention in many academic fields, from the history of philosophy, political theory, moral philosophy, to historical appraisals of his contribution to the science of *ius gentium*.[398] He was trained both as a historian and as a lawyer, and therefore exemplified an interesting merged practice of these two disciplines. In fact, he was first appointed professor of the law of nations in Heidelberg (1661) and in Lund (1668), and then royal historiographer at the Swedish court (1677) and in Brandenburg-Prussia (1688). His works were deeply influenced by the German post-Westphalian environment, where the reflection on natural law, and consequently on the theory of sovereignty, was an attempt to provide a de-confessionalized, secularized, and detranscendentalized[399] account of political power as answer to the recurrent interreligious conflicts that had been shaking the very foundations of Europe for more than a century.

Pufendorf is traditionally considered the follower of Grotius and Hobbes, whose thought he sought to synthesize. His natural law theory benefited from the phenomenon of the geometricization of science and philosophy that occurred in the 17th century thanks to the philosophical works of Descartes and Spinoza. His teacher E. Weigel considerably influenced one of his first legal works, his *Elementa iurisprudentiae universalis* (1660). The mathematical approach to the study of morality would also be adopted in his masterwork *De iure naturae ac gentium libri octo* (1672), although with some modifications.

Pufendorf's account of the law of nations is, at the same time, both problematic and essential to the development and evolution of international legal thought. As a follower of

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[398] On Pufendorf and his intellectual environment, see F. Palladini, & G. Hartung (Eds.), *Samuel Pufendorf und die europäische Frühaufklärung: Werk und Einfluss eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694-1994)*, Akademie Verlag, Berlin, 1996.

[399] On this topic, see I. Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany*, Cambridge University Press, Cambridge 2006.

Hobbes, Pufendorf embraces the Hobbesian skepticism towards the very existence of an international legal order. In other words, Pufendorf thinks that a proper law of nations (as the product of consensus among nations) does not exist, but that it is law of nature itself that regulates interstate relations.

Consequently, one might think that the idea of custom as a source of legal obligation does not have any relevance in such a theoretical framework. In this respect, it has been claimed by Carty that we have to wait for the 19th century historical school to find a proper concept of CIL, based on the interaction between doctrine and state practice. On the contrary, the 17th century natural law tradition only produced a concept of consensus.[400] This is in part true, but if one carefully takes into account Pufendorf's arguments, a more complex picture emerges. Indeed, by naturalizing and systematizing the whole language of *ius gentium* into axiomatic principles, Pufendorf introduces a significant conceptual innovation. This innovation consists in the acknowledgment of the importance of pragmatic state-interest based considerations in the international life of states. States have a duty to follow natural law, but on the other hand they have to practically balance their compliance with natural law with their own political and economic interests. While individuals are subject to a superior law (and cannot but abide by this law), states in the international realm are granted a certain degree of freedom. As a result, they are free to pursue their own interests (as a form of self-preservation), but they still must comply with some basic duties of *socialitas* (i.e. abiding by pacts). The way in which both aspects interact and coexist is peculiar to Pufendorf's account of the law of nations.

As for the concept of consensus, it undoubtedly plays an important role in Pufendorf, as suggested by Carty, and also constitutes the fundamental conceptual requirement on which the idea itself of custom can be grounded. Consensus is the "translation" of natural law precepts into the language of international political thought, most importantly of principles like respect for mutual agreements and compliance with general duties of humanity. Firstly, Pufendorf makes the political argument that this consensus among nations is dependent on the existence of a *systema civitatum*: namely, a political agreement of sovereign entities accepting the creation of a league and devoting some of their sovereign power to the administration of their external affairs. I will make the double claim that, first, this previous political agreement is a necessary requirement for the existence of mutually respected international norms of conduct, which are the result of a continuous dialectic between natural law and reason of state. This

[400] A. Carty, 'Doctrine Versus State Practice', in A. Peters, & B. Fassbender (Eds.), *The Oxford Handbook of the History of International Law*, p. 974.

consensus is “geo-determined”,[401] not only because it is the product of interstate agreements, but also of a historical and cultural process of cohesion first triggered by geographical proximity and cultural homogeneity. Secondly and consequently, the “system of states” doctrine also sets the conditions for a proper doctrine of customary *ius gentium* to emerge, as applied to “civilized nations” that, by having shared the same historical and cultural background, are capable of sharing homogenous customary behaviors.

As a matter of fact, Pufendorf thinks of custom as a distinctive feature of the rights of war. Therefore, it has non-binding character – because in a state of war, as Hobbes warned us, there can be no right but mere license and force (and Pufendorf buys this argument). Pufendorf seems to suggest that whereas consensus regulates interstate relations in times of peace, custom arises as a specific legal regime applicable to warfare. Although they are not binding, it is *convenient* to respect customs of war for several reasons. First, because they enhance the glory and honor of a sovereign. Second, because acting contrary to a custom accepted among civilized nations might be counterproductive: one’s own repugnant or cruel behavior may set as an example for others and eventually result in others performing the same behavior at one’s own expense. Third, because the interest of states, *qua* members of the system of states, is to cooperate and not to inflict useless harm on enemies that will eventually return to being our neighbors again once the hostilities cease (although, in principle, states would be allowed to do what they please by the very same fact of being in a state of war).

Furthermore, the method through which custom is observable is quite different from that of natural law. Whereas for the latter Pufendorf oscillates between a mathematical approach and a literary-historical one, in looking for the consensus of scholars no systematic account of custom can be provided methodologically. Nevertheless, in Pufendorf’s works on contemporary history we are able to observe how the interplay between natural law and reason of state converges to create an imperfect, variable order (whose effects are nevertheless necessary, as he will claim). An example of this is Pufendorf’s *Introduction to the History of the Principal Kingdoms and States of Europe* (1682). This work is a treasure trove of information regarding state practice contemporary to Pufendorf. It also provides a “screenshot” of the interest at stake for each state analyzed. It will be argued that if the partiality of Pufendorf’s position as a royal historiographer is inevitably problematic as far as his objectivity

[401] This “geographical claim” about the existence of an intra-European law of nations has been made by I. Hunter, ‘The Figure of Man and the Territorialisation of Justice in Enlightenment Natural Law: Pufendorf and Vattel’, *Intellectual History Review*, 23/3 (2013), pp. 289-307. For more discussion on this point, see next section on *systema civitatum*.

is concerned, it nonetheless provides a privileged point of view for us to understand what Pufendorf thought were the interests of the state he was writing for (Sweden), and consequently the customs it deemed appropriate to respect (or not). Through this concrete example, it will be possible to see an interesting application of his natural law theories.

5.1 Natural law as the science of morality: the fundamental innovations of Pufendorf

The fundamental starting point in order to understand Pufendorf's account of the law of nature is to address his doctrine of "moral entities".[402] Ian Hunter has pointed out that Pufendorf's purpose is to provide both a moral and a political theory "suited to the life in the desacralized states sanctioned by the Treaty of Westphalia".[403] In this respect, his re-conceptualization of natural law through the doctrine of moral entities is the most fundamental starting point in order to understand how Pufendorf manages to turn the whole language of natural law into a political vade mecum applicable to sovereigns. The question of what method is most suitable to the construction of such a science will also be addressed.

To begin with, Pufendorf distinguishes between physical and moral entities. Whereas the first are governed by rules of necessity, the realm of morality implies the exercise of human will, descending in turn from divine will.[404] However, following his mentor Weigel, Pufendorf creates a correspondence between the physical and the moral world by further expanding Grotius' anti-Aristotelian intuition that the investigation into morality might be conducted through the scientific method. According to Pufendorf, moral entities are attributes "superadded to natural things and motions by understanding beings, chiefly for the guiding and tempering the Freedom of voluntary Actions, and for procuring of a decent Regularity in the Method of life".[405] These modes flow either naturally "from the thing itself" or are superadded by "an intelligent power". In other words, they are either produced by man himself (as artificial means

[402] On the role of moral entities in Pufendorf's natural law theory, see H. Denzer, *Moralphilosophie und Naturrecht bei Samuel Pufendorf: Eine Geistes- und Wissenschaftsgeschichtliche Untersuchung*, Scientia, Aalen 1972; V. Fiorillo, *Tra egoismo e socialità. Il giusnaturalismo di Samuel Pufendorf*, Jovene, Napoli 1991; K. Saastamoinen, *The Morality of the Fallen Man. Samuel Pufendorf on Natural Law*, Finnish Historical Society, Helsinki 1995; K. Haakonssen, *Natural law and Moral Philosophy. From Grotius to the Scottish Enlightenment*, pp. 37-42; S. Darwall, 'Pufendorf on Morality, Sociability, and Moral Powers', *Journal of the History of Philosophy*, 50/2 (2012), pp. 213-238; J. B. Schneewind, *The Invention of Autonomy,* pp. 119-122.

[403] I. Hunter, *Rival Enlightenments*, p. 148.

[404] S. Pufendorf, *De Jure Naturae ac Gentium Libri Octo*, 1672 I, I, §3 (fromhereafter: DJNG). I here take into account the English translation of Jean Barbeyrac's edition: S. Pufendorf, *On the Laws of Nature and Nations, Eight Books,* 1729. Some excerpts of DJNG have been translated by M. J. Seidler, & C. L. Carr (Eds.), *The Political Writings of Samuel Pufendorf*, Oxford University Press, New York 1994.

[405] DJNG, I, I, §3.

to regulate and give order to his own life)[406] or by God, who does not want man to live "like beasts without civilization and moral law".[407] What makes them so vital to the science of morality is that they are inherently accidental, as opposed to a necessity of "substance". By analogy with physical objects that are situated in a space, Pufendorf argues that modes imply a certain "state" in which human actions take place.[408] There can be natural states or "adventitious" states, the first ones being imposed by God on man, the second those "which obligeth man at, or after their birth, by the Authority of some human constitution".[409] More particularly, "being a man is a state obliging to certain duties (*officia*) and giving a title to certain rights".[410]

Pufendorf makes use of this complex structure of thought to make the claim that human actions, understood as *modes* and taking place in *states*, are transient with regards to their cause, as opposed to the self-subsistence of substance. In addition to this, modes are not necessary in an absolute sense, although the fact that they are super-imposed might lead us to think so. Additionally, the category of necessity is not applicable to modes because human actions, which modes seek to regulate, are essentially free: "for it is evident, that the acts which fall under the conduct of the law of nature, do in themselves contain an intrinsic force and power, directing towards a sociable life, though the actual exercise of them depends on the free will of man".[411] According to Pufendorf however, human actions are contingent only in terms of their legitimating source, meaning that "while we deliberate, we are properly said to be free, and the effects which are to proceed from our actions are, with respect to the freedom, rightly termed contingent: but when we have once determined which way to act, the connection between our actions and the depending effects is necessary and natural, and consequently capable of demonstration".[412] The influence of Hobbes' mechanicism is evident here, and will have implications for the law of nations, as we will see later.

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[406] For a discussion on the origin of moral entities, see T. Behme, *Samuel von Pufendorf: Naturrecht und Staat. Eine Analyse und Interpretation seiner Theorie, ihrer Grundlagen und Probleme*, Vandenhoeck & Ruprecht, Göttingen 1995, p. 44.
[407] *Ivi*, quoting DJNG, I, I, §3.
[408] As claimed by Seidler, "as in the physical realm, moral 'states' designate a kind of (moral-legal) space in which persons (like bodies) operate and orient themselves". M. Seidler, 'Pufendorf's Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy*, ed. by E. N. Zalta, Winter 2015, 3.1. Available online at https://plato.stanford.edu/entries/pufendorf-moral/
[409] DJNG, I, I, §3.
[410] *Ivi*.
[411] DJNG, I, II, §5.
[412] *Ivi*.

Moreover, Pufendorf uses his theorization of modes in order to develop a multiple concept of *persona*, by further developing the Hobbesian concept of personality. While doing so, he displaces the "Christian-metaphysical figuration of the person with a pluralistic construction that was perhaps unprecedented in early modernity".[413] Through this expression, Hunter very powerfully makes the point that Pufendorf opposes the theological equation between person and substance, which rests on the traditional understanding of Aquinas' reading of Aristotle. According to this reading, the "person" is a substance in the sense that it subsists individually. Kobusch claimed that in doing so, Pufendorf founded a real "metaphysics of the person", where "modes" are the different states or "masks" that one person can wear to perform his social duties.[414] Hunter opposes Kobusch's "Cartesianization" of Pufendorf by vindicating the existence of a genuine political intent behind his doctrine of *entia moralia*. In Hunter's words, "it is quite misleading, therefore, for Theo Kobusch to interpret Pufendorf's conception of moral entity as if it were a development of the neo-scholastic conception of the person as moral substance, bearing inalienable rights and duties".[415] Quite on the contrary, "Pufendorf's separation of moral from natural being is intended to divorce duties and rights from all ontological foundations and salvific aspirations, grounding them instead in imposed offices which originate in a civil rather than a metaphysical order".[416]

This is actually the case, as confirmed by Haakonssen, as Pufendorf's doctrine of *officia* cannot be separated from that of political obligation. Such *officia* are generated, as rightly pointed out by Hunter, by *socialitas*, which is the inclination (not the *capability*, as *sociabilitas* was in Grotius) that humans have to enter into society, in order to escape from the state of nature and to secure their flourishing and wellness. *Socialitas* is the outcome of their *imbecillitas*, namely the constitutional weakness that prevents human beings from living alone. In other words, humans not only need each other but they also have mutual duties.

Additionally, *socialitas* provides us with the only content of natural law, through which we are able to acknowledge the "most general and universal Rule of human actions, to which every man is obliged to conform, as he is a reasonable creature".[417] The most fundamental of these rules is that "every man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main end and disposition of human race in

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[413] I. Hunter, *Rival Enlightenments*, p. 165.
[414] T. Kobusch, *Die Entdeckung der Person: Metaphysik der Freiheit und modernes Menschenbild*, Herder, Freiburg 1993, pp. 71-82.
[415] I. Hunter, *Rival Enlightenments*, p. 165.
[416] *Ibid*., p. 165-166.
[417] DJNG, II, III, §1.

general".[418] However, Pufendorf claims in a Hobbesian vein, this disposition itself is insufficient to guarantee humanity a state of peace, hence the need to establish a political society through a contract made by equal individuals (equality being a corollary of *socialitas*). Through this contractualist argument, Pufendorf merges the Hobbesian instinct of self-preservation with the sociable nature he acknowledges to humanity: men have to create society both to limit their self-interest and to enjoy mutual benefits. This is because, according to Pufendorf, in a state of nature prior to every political constitution, men do not have the capacity to oblige themselves as obligation only comes from a superior. Again, Pufendorf's attempt to de-transcendentalize natural law is here fully evident. God's command, although providing natural law with normative force, alone proves insufficient to provide men with the obligation that makes their social relationships enforceable. The existence of a political authority creates the necessary pre-conditions for obligation to a superior, as a man cannot oblige himself (he can only preserve himself). This sense of obligation can only come from the command of a superior. Additionally, the capacity of men to produce mutual agreements is conditional on the establishment of a superior authority.

Another important element is the distinction between compact and law. According to Pufendorf, nature is not the only source of obligation, although it instigates the most fundamental one – the duty to create a society. However, once society has been instituted individuals can benefit from the protection and guarantees of a superior authority, and therefore are in the position to enter into mutual agreements. Compacts are, therefore, another source of obligation. They are also particularly advantageous because whereas obligations stemming from nature are generally designed to profit others (to the purpose of limiting one's own personal interest), with compacts we can provide benefits to ourselves. Nevertheless, Pufendorf adds, these two sources of obligations "do afford a mutual assistance and supply to eachother",[419] as,

> when men have once engaged themselves by pacts, their nature obliges them, as social creatures, most religiously to observe and perform them. For were this assurance wanting, mankind would lose a great part of that common advantage, which continually arises from the mutual intercourse of good turns. […] We are therefore to

[418] DJNG, II, III, §15.
[419] DJNG, III, IV, §1.

esteem it a most sacred command of the law of nature […] that every man keep his faith, or which amounts to the same, that he fulfil his contracts, and discharge his promises.[420]

In other words, the capacity of producing mutually binding agreements not only rests on natural law in terms of genealogy, but natural law also governs such agreements by normatively prescribing obligations to respect them. From this perspective, the obligation of the pact derives from the content of the pact itself, whereas the obligation to respect it is a sacred command of nature.

5.2 Custom and *consensio*: method and the problem of custom within a natural law framework

Notwithstanding the overarching primacy of natural law, the existence of pacts as binding means of regulating everyday life hints at the fact that nature alone does not explain the whole complexity of human life, which consists of natural inclinations as well as of voluntary choices. The persistence of the voluntary element limits, as in Grotius, the possibility of systematizing and subsuming all moral actions into deductive principles, and similarly, it calls into question the issue of Pufendorf's method of deducing natural law. But whereas in Grotius it results in a distinction between natural and voluntary law, each of which have different methods of enquiry as we have shown, Pufendorf strongly rejects such an option. In his view, Grotius is wrong in considering natural law the object of empirical observation. According to Pufendorf, it is impossible to collect evidence of natural law from the customs of different countries in the world, which are too irregular to be compared on a valid basis, and consequently cannot provide a regular pattern of evidence as Grotius would have hoped.

This polemical attitude of Pufendorf has important implications for the role that custom plays in his legal doctrine. Custom no longer provides *a posteriori* evidence of natural law, nor is it the expression of a general consensus of nations. Rather, it is a non-binding legal regime exclusively applicable to warfare. Pufendorf conceives of it as a culturally, politically, geographically determined concept, which is the result of a long historical process that bears witness to the most fundamental values. Pufendorf's positive proposal is to correct Grotius with Hobbes, and to consider the method of natural law a combination of mathematical approach and eclecticism, which constitutes an expansion of the method of *historia literaria* used by

[420] DJNG, III, IV, §2.

Grotius. My claim is that Pufendorf's historicization of the idea of *consensio omnium*, intended to represent the scholarly consensus on natural law principles, has the purpose of situating custom within a context of cultural proximity in which civilized nations can recognize themselves.

This result is achieved by Pufendorf in four steps. First, he deconstructs the concept of *consensio omnium* and detaches it from the actual consensus of nations (something that was already done by Grotius but misinterpreted by his commentators). Second, he emphasizes the eclectic nature of the method of *historia literaria* by vindicating its anti-sectarian vocation. Third, Pufendorf oscillates between two opposite poles. On the one hand, he suggests that *ius gentium* only applies to civilized nations. On the other, he almost self-critically warns himself that one cannot apply one's own cultural standards as if they were universal. Every culture tends to do that in order to claim their superiority over other ones. However, as we will see, the claim of a law of nations made by "civilized nations" is, itself, a relativist claim. Fourth and consequently, in order to reconcile these two conflicting views, Pufendorf suggests that custom develops itself in concentric circles, according to a criterion of proximity which derives from the acknowledgment that neighboring nations often have concurring interests. His political theorization of the "system of states" is a crucial part of understanding this passage.

Before examining this aspect, it is worth first addressing the question of the reception of Grotius's concept of consensus. It is by misinterpreting this concept that, according to Toyoda, the 17th century German commentators of Grotius consequently misunderstood his concept of the law of nations:

> Grotius did not write that the law of nations is based on agreements of particular wills (*conventio*). He only said that the law of nations originates between all or many states by agreement in the sense of *consensus*. A *consensus* is different from a *conventio*. A consensus is a kind of agreement, but it seems to be more a general agreement of the society than a particular agreement between individuals or individual states. […] Grotius also wrote that 'this law of nations is proved in the same manner as the unwritten state law, by constant usage and the testimony of experts'.[421]

Indeed, as further proof of this argument, Toyoda claims that when Grotius speaks about public treaties among nations he does not mention *consensus gentium* as a distinctive feature.

[421] T. Toyoda, *Theory and Politics of the Law of Nations,* p. 24.

This is because, as we have seen, Grotius' account of customary *ius gentium* lacks consideration of state practice: custom cannot be the reiteration of a potentially illegitimate behavior. Grotius also uses the term *consensio omnium* as an argumentative device providing *a posteriori* proof of the law of nature.

In other words, that fact that the 17th century post-Grotius debate has considered the *consensus omnium gentium* as synonymous with an agreement of wills (rather than a mere agreement of views) has had implications for Pufendorf's understanding of the concept. According to Toyoda, Johann Boecler and Caspar Ziegler mainly responsible for this misunderstanding, which consisted of identifying *consensus omnium* with an unstable voluntary consensus among nations, rather than with a general agreement of views. In turn, the concept of consensus itself sounded unstable and therefore became subject to criticism. Thomas Hobbes will provide the most influential of such criticisms, as we read in his *De Cive*:

> All authors agree not concerning the definition of the natural law, who notwithstanding do very often make use of his term in their writings. The method therefore, wherein we begin from definitions and exclusion of all equivocation, is only proper to them who leave no place for contrary disputes. For the rest, if any man says, that somewhat is done against the law of nature, one proves it hence, because it was done against the general agreement of all the most wise and learned nations: but this declares not who shall be the judge of the wisdom and learning of all nations. Another hence, that it was done against the general consent of all mankind; which definition is by no means to be admitted. For then it were impossible for any but children and fools, to offend against such a law; for sure, under the notion of mankind, they comprehend all men actually endowed with reason. There therefore either do nought against it, or if they do aught, it is without their joint accord, and therefore ought to be excused. But to receive the laws of nature from the consents of them, who oftener break, than observe them, is in truth unreasonable. Besides, men condemn the same things in others, which they approve in themselves; on the other side, they publicly commend what they privately condemn; and they deliver their opinions more by hearsay, than any speculation of their own; and they accord more through hatred of some object, through fear hope, love, or some other perturbation of mind, than true reason.[422]

Here Hobbes is criticizing Grotius' method of deducing natural law from *consensio omnium gentium*, by famously questioning: a) the role of *recta ratio* as an allegedly valid and universal criterion to derive natural principles; and b) the very possibility that such a *ratio* can be discovered, imbued as we are with our party zeal and personal inclinations. As he states in

[422] T. Hobbes, *De cive*, II, 1 (D. Baumgold (Ed.), *Three-text edition of Thomas Hobbes's Political Theory: The Elements of Law,* De Cive *and Leviathan*, Cambridge University Press, Cambridge 2017, p. 143).

his Leviathan, disputes among conflicting reasons can only be settled by a third arbiter who is in charge of judging between two equally valid assertions, and with whose sentence both parties will comply. At closer analysis, Hobbes' criticism of the concept of *consensus omnium* concerns an epistemological problem, regarding the validity of reason as a criterion for law, rather than the question of the possibility itself that the law of nations exists. This epistemological question has, of course, consequences in so far as the law of nations is concerned. If sovereigns are in a state of nature, as they do not recognize any superior authority, then there can be neither *consensus* nor *ius gentium* properly speaking.

As a matter of fact, by quoting the same Hobbesian passage above, Pufendorf rejects *consensus omnium gentium* as chimerical, namely,

> it would not be fair to gather the Laws of Nature from the Consent of those who break them more frequently than they observe them. […] Nor is it any happier to appeal to the agreement of all nations; for who knows the language of all peoples both ancient and modern, not to mention their customs and institutions. Nor will the case be any better, if we say that agreement of the part of the more civilized peoples will suffice, and that no account need be taken of barbarians. For what people, endowed with enough judgment to preserve its existence, will be willing to acknowledge that it is barbarous? Or what nation will claim so much for itself as to demand that all other nations be measured by its customs, and to adjudge that one barbarous which depart from them? In former days the Greeks, in their pride, looked down upon other peoples as barbarians, and the Romans succeeded to their arrogance; and to-day in Europe some of us claim for ourselves to be superior to others in the development of our culture, while, on the other hand, there are peoples who rank themselves far above us. The Chinese have long held that the Europeans have only one eye, and that all other peoples are condemned to blindness.[423]

What is interesting about Pufendorf's passage is that he adds to Hobbes' critique a claim of relativism. In other words, the idea of *consenus omnium gentium* is unfeasible for the very precise reason that it is impossible to find a homogenous criterion among different customs, laws and usages of all the different countries in the world. However, whereas for Gentili and Grotius the Stoic ideal of *societas humani generis* was strong enough to overcome these differences in the name of universalism, for Pufendorf this is not sufficient. What he claims, rather, is that natural law, although already being self-evident to natural reason, can also be found in the "full consent of the greatest part of learned men".[424] Here Pufendorf is expanding Grotius' intuition about the importance of *historia literaria* to the study of natural law.

[423] DJNG, II, III, §7.
[424] DJNG, II, III, §15.

However, one could level the same relativist objection: isn't European literary history itself a cultural product of a specific, geographically determined, region of the world? How can this cultural "regionalism" coexist with the demands of the mathematical method, the use of which in the study of moral entities Pufendorf seems to be a declared follower? My claim is that this conceptual turning point is particularly important because it helps us understand why the (European) historical record enshrines a number of normative values coincident with natural law, like the ideals of glory and honor, which are respected only by those who recognize those same values. This aspect constitutes the cultural substratum on which customary *ius gentium* is developed, as I will show.

Before addressing the question of custom in more detail, and in order to understand these conceptual ambiguities, a more precise account of Pufendorf's method has to be provided. According to Hochstrasser, Pufendorf's fascination with the mathematical demonstrative method as applied to the study of morality was particularly strong in the early years of his intellectual work on natural law (see his *Elementorum iurisprudentiae universalis libri duo*, 1660), and had actually acquired less and less cogency by the time he writes his *De iure naturae ac gentium libri octo* (1672).[425] In this first text, which secured Pufendorf his career in Heidelberg, the application of a Euclidean method of demonstration (consisting of definitions, axioms, etc.) results in the total absence of references from past authorities. Conversely, he appears to have been re-shaping his intuitions several years later in his *De iure naturae ac gentium libri octo* (1672) according to a literary-historical method, similar to that implied by Grotius but better organized in terms of coherency. Such a change of mind is, according to Hochstrasser, the result of a vivid debate Pufendorf was joining together with other intellectuals contemporary to him, Hermann Conring and Johann Böcler. Both of them were at the same time fascinated by, and worried about the introduction of the mathematical method into the study of morals. Whereas the certainty of its demonstration powerfully answers the question of legitimacy, its abstractness is totally incapable of justifying the empirical element inherent in human life. Quite interestingly, whereas Böcler was the above-mentioned commentator on Grotius' *De iure belli ac pacis*, Conring was one of the initiators of the German tradition of *historia literaria*. Such a project has the political purpose of fighting the sectarianism of the puritan factions in the German universities by providing eclecticism as an alternative method.[426] Initially, Pufendorf seemed reluctant to accept these criticisms, but according to Hochstrasser,

[425] T. Hochstrasser, *Natural Law Theories*, pp. 43-47.
[426] On this aspect, see U. J. Schneider, 'Eclecticism and the History of Philosophy', in *History and the Disciplines*, p. 86.

he might have realized that through severe scrutiny of the apparatus of sources employed by Grotius he would have been able to react to Hobbes's critique of consensus.[427] Moreover, Hochstrasser underlines that the eclectic method is for Pufendorf "the product of praxis, a result of discovering a way through his doctrinal difficulties, rather than a product of self-conscious abstract reflection on philosophical method".[428]

Another strand in the literature interpreted the need to combine demonstrations with historical argumentation as a sign of the inclusiveness of Pufendorf's method. In this respect, Krieger claims that whereas Hobbes simply excluded "uncoordinated phenomena" through logic, Pufendorf "would save both the inconclusiveness of the one and the uniformity of the other".[429]

According to Krieger, Pufendorf's inclusive method, which equates "rational axioms with experimental observations as first principles",[430] is the result of his distinction between physical and moral entities. More precisely, Pufendorf "conceived of moral and physical objects as formally analogous and as substantially different".[431] To put it more clearly, the formal analogy between physical and moral entities allows that an analogous mathematical method can be applied to both realms. At the same time, being different in terms of substance (as moral entities are attributes, as we said), the study of morality inevitably has to come to terms with the "fundamental facts of social existence".[432] The way in which Pufendorf includes these empirical facts in his analysis of natural law will be particularly relevant as far as the law of nations is concerned, as we will see.

We have already seen in Grotius how the idea was conveyed that, the more eclectic his sources were, the more reliable their ability to bear witness. This, as has already been said, had the purpose of preventing dogmatism and creating an academic space of toleration. As argued by Pufendorf, "we […] are not at all influenced by the name of a single philosopher".[433] Furthermore, the approach of *historia literaria,* as we will see, has some important implications for the doctrine of natural law, as it provides it with further evidence and empirical

[427] T. Hochstrasser, *Natural Law Theories*, p. 64.
[428] *Ivi*.
[429] L. Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law*, University of Chicago Press, Chicago-London 1965.
[430] *Ibid.,* p. 53.
[431] *Ibid.,* p. 59.
[432] *Ibid.,* pp. 64-5.
[433] DJNG, I, I, §1.

substantiation.[434] However, Pufendorf warns us that we do not have to confuse the realm of moral certitude,

> [...] with that which is so often applied to matters of fact; as, when we declare (for example) such a thing to be morally certain, because it has been confirmed by creditable witnesses: for, this latter sort of moral certitude is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us.

Here Pufendorf refers to the misleading role played by "probable reasons", hinting at the fact that Grotius might have chosen a rhetorical method to discover natural law principles. However, in the following passage, it becomes clear that Pufendorf criticizes Ziegler, rather than Grotius:

> Ziegler, in his notes on Grotius, has not sufficiently distinguished this inferior certainty from the former and the more noble kind, while, though he grants the more general precepts of ethics to bear an equal evidence with the propositions of any science properly called, yet he affirms 'that the particular conclusions have a much shorter degree of certitude, and are often involved in dark obscurities, by reason that the things themselves, concerning which such conclusions are formed, are many ways changeable and contingent: and the example he brings is this: we have moral certitude and evidence, that an honest and serious person, when he takes an oath, swears truly. And yet this evidence is not absolutely such, but conditionally, because it is not directly impossible, but that a man of these good qualities may forswear himself, since he may fall from his Virtue and Integrity'. But now that certitude, by which we know perjury to be an evil, is very different from that by which we believe a good man is not guilty of perjury; nor is the latter proposition deduced fairly, as a conclusion from the former. Thus, in the same manner, the faith we give to historians is reckon'd morally certain when they testify a thing vastly remote from our memory and knowledge, and of which there is nor real and demonstrative proof now extant; and especially if many agree in the relation: because it is not probable that many persons should join together by compact, in putting a trick on posterity, or should entertain any hopes, that the lie would not in time be discovered. And yet for all this, if occasion were, we could produce examples of many popular fabels that have passed through several ages, under the colour and a character of Truth." [435]

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[434] On the relationship between history and natural law, see L. Krieger, 'History and Law in the Seventeenth Century: Pufendorf', Journal of the History of Ideas, 21/2 (1960), pp. 198-210; M. J. Seidler, 'Natural Law and History: Pufendorf's Philosophical Historiography', in D. R. Kelley (Ed.), *History and the Disciplines. The Reclassification of Knowledge in Early Modern Europe,* University of Rochester Press, Rochester, NY 1997, pp. 203-222.

[435] DJNG, I, II, §11.

Indeed, there seems to be a continuity in terms of the importance conceded to the historical method for the inquiry of natural law, between Grotius and Pufendorf. History, provided that it is not considered as itself being the originating source of natural law, allows us to get to know events and circumstances so distant in time that we would not otherwise have the chance to know about. Additionally, when the testimonies of historians agree, it is likely that they are telling the truth, again provided they did not hide fantastic stories under the name of history. However, Pufendorf seems to express a faith in the fact that the exercise of *sana ratio,* through the critical approach of eclecticism, guarantees the historical discipline with a sort of self-emendating power, according to which deceptive historical witnesses are unmasked, and their dangerous potential is therefore neutralized.

Offering an alternative reading of Toyoda's account of the problem of *consensus gentium*, we might say that Pufendorf accepts Hobbes's criticisms, while rejecting Boecler's and Ziegler's reading of Grotius, which is based on the assumption that assertions regarding principles of natural law can be confused with factual statements about the law. What Pufendorf rejects in Grotius is the employment of whatsoever rhetorical method, which he seems to turn into that of *historia literaria*. We will see an example of this in the section devoted to the duties of humanity, where Pufendorf makes explicit use of this method. At the same time, the *facts* of human life are addressed through recourse to contemporary history, where actual instances of practice are to be found. As Pufendorf powerfully states, questions concerning the law of nations are not to be addressed juridically, but the fact that they concern the life of states makes them enter into the realm of pragmatic history.[436]

5. 3 The Hobbesian problem: is there a law of nations?

The difference between law and compact has significant implications for the role of the law of nations in Pufendorf's theorization of natural law. As a matter of fact, if the problem of the empirical element present in human affairs significantly affects natural law, it is even more so the case when it comes to the law of nations, which is more subject to changes because it applies to the contingencies of interstate relations. But what about *ius gentium* in Pufendorf? Does it coincide with the law of nature or does it arise out of pacts among nations?

[436] DJNG, II, III, §23.

In order to answer these questions, a fundamental contextual remark has to be made. Pufendorf writes in the aftermath of the publication of Hobbes's *Leviathan* in post-Westphalian Europe.[437] These two factors – the conceptual earthquake instigated by the *Leviathan* and the peace of Westphalia – changed the very essence of *ius gentium*. On the one hand, Hobbes denied the existence of any *ius gentium* by claiming that states are a concrete manifestation of that state of nature he theorized; on the other, the peace of Westphalia famously affirmed sovereignty as the fundamental principle governing international relations.

As for Hobbes' influence on Pufendorf, the latter is certainly responsible for having taken seriously the former's idea that the most concrete representation of a state of nature is the perpetual state of war among sovereigns, who act like gladiators in a circus.[438] In Hobbes, this bitter acknowledgment results in a dismissal of *ius gentium* tout court – as nations will never accept a sovereign authority the way individuals did with the Leviathan. However, through the science of morality Pufendorf builds a doctrine of *ius gentium* quite different from that of Grotius and Hobbes and succeeds in improving the former's biased concept of the voluntary law of nations with the latter's skepticism. He does so in three theoretical steps.

To begin with, he reinforces the application of natural law vocabulary to *ius gentium* as a result of the Hobbesian equation between the law of nature and the law of nations. This aspect is evident from the very structure of Pufendorf's *De iure naturae ac gentium*. The first six books deal with questions of the law of nature, which include the law of the sea, the law of *dominium*, and other typical matters of *ius gentium*. Those matters are now conceived of as natural law, and they apply to individuals as well as to sovereigns. Only the last book takes into account the allegedly "customary" law of nations (i.e. the rights of war). However, as we will see, Pufendorf's Hobbesian account of *ius gentium* does not result in a denial of the possibility itself that sovereigns can engage in mutually valid agreements – rather, it is precisely natural law that governs such agreements.

Secondly, Pufendorf denies that anything like universal justice exists, due to the differences in customs and institutions of the different countries of the world. Additionally, he refutes the Scholastic equation between *ratio* and conscience, and therefore the capability of the latter to deduce *in foro interno* universally valid behaviors. Pufendorf says that conscience is the judge of our actions only after we have committed them, not the driving force behind

[437] For a reassessment of Pufendorf in the theory of international relations see D. Boucher, 'Resurrecting Pufendorf and Capturing the Westphalian Moment', *Review of International Studies*, 27 (2001), pp. 557-577.
[438] T. Hobbes, *Leviathan*, I, XII.

them. Such force is, instead, the light of reason.[439] Conscience can no longer be the source of law that Vitoria, Gentili and Suárez held it to be. Rather, Pufendorf refers to conscience as "doubtful".[440] The dissolution of the 16th century idea of conscience, according to which each individual was capable of finding in himself universally valid rules of conduct has significant political and epistemic consequences. In political terms, the individual is no longer part of a universal society. He is part of the political society and has duties of humanity to respect towards his fellow citizens. Rather, states are the *subjects* of the international society. States cannot make use of conscience. Quite on the contrary, they can, and have to make use of reason to calculate and secure their interests. Epistemically, the "Cartesian" doubtfulness of conscience implies that in case of quandaries, one has to trust the judgment of those who know more: scholars. In this respect, we can see how the scholarly consensus (*consensio omnium*) provides us with a valid aid in the understanding of controversial legal and moral issues (however, Pufendorf has made clear that such agreement of scholarly views does not ground the validity of a given rule *per se*: it just provides us with a further evidence of its validity). On the other hand, considered from a political perspective, the dissolution of early modern conscience means that political authority has a completely new role, as it is state interest (and no longer abstract universal justice) that constitutes the pragmatic counterpart of natural law. This "political element" is particularly important as it is at the very basis of the concept of *systema civitatum*, as we will later.

5.3 Law of nations in times of peace: international agreements and reason of state

This leads us to the third aspect of Pufendorf's doctrine of *ius gentium*. The political importance of the concept of sovereignty seems to contradict the assumption that the law of nations is nothing but natural law. Indeed, Pufendorf conceives of the law as a command of a superior. Is he excluding, in a Hobbesian vein, the existence of *ius gentium* properly speaking? Should we simply accept, as he holds, that what is generally called the law of nations is nothing but natural law?[441] What is challenging in Pufendorf's account is that "even the denial of

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[439] DJNG, I, II, §4

[440] DJNG, I, III, §8.

[441] DJNG, II, III, §23. See Hunter: "if *ius naturae* becomes law only in the command of territorial sovereigns, then, as the source of norms supposedly binding on such sovereigns, *ius gentium* cannot be regarded as law, and justice must be internal to territorial jurisdiction. Just as there is no obligative law or right below the level of the territorial state – owing to the fact that the norms of sociability must be determined and imposed by a territorial sovereign in the form of positive laws – so there is no law or right above the level of the state, for the same reason; apart of course from the unenforceable and indeterminate law of nature. […] For Pufendorf, relations between states are

positive law of nations does not lead to the denial of the sources of positive law; it only leads to a re-classification and re-appraisal of their basis and relevance”.[442] However, this is problematic because if the distinction between law and compact applies also to the law of nations, does natural law have a sort of self-legislating function which is itself sufficient to guarantee that pacts are respected? If not, what kind of political authority is necessary to make them enforceable, in a state of nature like that of the interstate relations?

Whereas Krieger rejects the whole idea that Pufendorf applies the dichotomy between law and compact to *ius gentium*,[443] other scholars like Reibstein acknowledge that natural right constitutes the fundamental core of Pufendorf's law of nations.[444] As quoted in the *Elements*, the law of nations is “nothing other than the law of nature, in so far as different nations, not united with another by a supreme sovereignty, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature”.[445] Similarly, Goyard Fabre has claimed that Pufendorf's conception of *ius gentium*, although non-programmatic, is still an extension of private and public law, where “*interfèrent et se complètent les parts respectives de la nature et des conventions*”.[446] Such *ius gentium* has the purpose of securing a space of peace for Europe, to the extent that sovereigns agree to abide by natural law. The way in which they do that is by agreeing to create a *systema civitatum*, as suggested by Dufour[447] among others, and most recently, by Schröder.[448] According to both scholars, the

governed not by law and justice but by treaties and custom. Treaties differ from laws in their lack of an authority – comparable with that of the territorial sovereign – that could determine how the natural law of sociability should be specified and implemented as positive law between nations. From this lack arises the instability of treaties and their tendency to dissolve into war” (I. Hunter, ‘The Figure of Man’, p. 296).

[442] A. Orakhelashvili (Ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham UK 2011, p. 98.

[443] L. Krieger, *The Politics of Discretion*, p. 65.

[444] “Es ist das paradoxe Ergebnis der von Pufendorf estrebten Strafung des Wissenschaftscharakters der Naturrechtslehre, dass gerade deren Zentralbegriff, das *ius naturae et gentium*, philosophisch-kristisch aufgelockert wird und seine juristische Stringenz verliert; Aristotelismus und römischrechtliche Dogmatik gehen bei Pufendorf unter dem Patronat von Hobbes einen späten Bund ein, indem sie gemeinsam dekretieren: nur die *lex civilis*, das vom Staat (*civitas*) gesetze Recht, ihres imperium bestimmmt, was im eigentlichen Sinn Recht und Unrecht ist. Das naturliche Recht is nur Recht im uneigentlichen, unvolkommenen Sinn, auch und gerade dort, wo es für Volker bzw. Staaten gilt, also in ihrem gegenseitigen Beziehungen, im *ius gentium*” (E. Reibstein, ‘Pufendorfs’ Völkerrechtslehre’, *Österreichische Zeitschrift für öffentliches Recht*, 7/4 (1955), p. 47.

[445] S. Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (1660), I, XIII, §24 (ed. by T. Behme, Liberty Fund, Indianapolis 2009, p. 221).

[446] S. Goyard-Fabre, *Pufendorf et le droit naturale*, Presses Universitaires de France, Paris 1994, p. 208.

[447] A. Dufour, ‘Pufendorfs föderalistische Denken und die Staatsräsonlehre’, in F. Palladini & G. Hartung (Eds.), *Samuel Pufendorf und die euroopäische Frühaufklarung*, pp. 105-22; see also M. Wight, *Systems of States*, Leicester University Press, Leicester 1977, p. 21; M. J. Seidler, ‘Monstruous Pufendorf: Sovereignty and System in the Dissertations’, in C. Cuttica & G. Burgess (Eds.), *Monarchism and Absolutism in Early Modern Europe*, Routledge, New York 2016.

[448] According to Schröder, Pufendorf tries to address the problem of *trust* among sovereign in post-Westphalian Europe: how can states *trust* eachother? How can we be sure that *pacta sunt servanda* is a commonly shared principle that every nation has to respect? The concept of trust was of course at disposal of the previous generations

doctrine of *systema civitatum* provides us with a fundamental insight into the "political" nature of the Pufendorfian law of nations.

Pufendorf addresses the idea of a "system among states" when dealing with irregular constitutions in several of his works,[449] most notably his academic dissertation *De Systematibus Civitatum* (1667): "we call 'systems of states' many states connected together into one by virtue of a certain bond, as they seem to constitute a same body, of which, however, the single parts retain some sovereign power for them".[450] Pufendorf here specifies that he is not referring to a general bond keeping humanity together (as in the Stoic idea of *societas humani generis*, as well as Gentili's political community governed by *ius gentium*), but to a specific political body bound together by a "tighter vinculum", which is peculiar of "the communion of people, and a particular kindred, which shares, for the most part (*plerumque*), a conjuncted similarity of language and customs".[451] Pufendorf acknowledges two kinds of systems, those where two or more states actually give birth to a new state by merging together, and those where states are bound together by a pact without losing their sovereign power. The second ones are of course more interesting to the purposes of the present analysis. Pufendorf distinguishes them in turn between perpetual pacts and pacts with specific obligations. While the second ones are instrumental to the fulfillment of certain shared goals among two or more sovereigns, the first "perpetual" kind of pacts ("*systematica foedera*") have as their aims the taking care of the common wellness, and to this end they suspend the exercise of certain sovereign prerogatives.[452] Those "parts" of sovereign power which depend on mutual consensus concern matters of war and peace, which are external powers of the state and therefore do not jeopardize their absolute sovereignty. These alliances therefore regulate the rights of war: states do not have to attack each other, rather they defend each other in case of external attack and declare war only with each other's mutual consensus.

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of jurists, but the way in which they are shaped by Pufendorf is completely new (P. Schröder, *Trust in Early Modern International Political Thought*, Cambridge University Press, Cambridge 2017). On the problem of trust, see also L. Kontler & M. Somos (Eds.), *Trust and Happiness in the History of European Political Thought*, Brill, Leiden-Boston 2018.

[449] DJNG, VII, V, §17; also, the same reference to *systema civitatum* is present in Pufendorf's abridged version of DJNG, namely his *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo*, published in 1673 (S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. by J. Tully, Cambridge University Press, Cambridge 1991, p. 145).

[450] S. Pufendorf, *De Systematibus Civitatum*, in *Dissertationes academicae selectiores*, 1675, p. 266. My translation.

[451] *Ibid.,* p. 270.

[452] *Ibid.,* p. 307.

In this respect, Schröder has argued that "natural law can be meaningful in regulating interstate relations only in the specific context of a system of states. Because natural law thereby acquires a new place within interstate relations, it would be wrong to privilege the concept of interest as foundational for Pufendorf's international political thought".[453] Indeed, differently from Hobbes, Pufendorf believes that states' conduct can be governed by natural law, whose only principle is that of *socialitas*. However, state interest still plays a fundamental role – especially in custom. Customs of war have arisen because glory is a fundamental value of European culture, but at the same time what prevents them from being binding (as natural law and compacts) is that they are exclusively applicable during wartime, where self-interest is more important than anything else. However, Pufendorf claims, sometimes respecting customs of war might be in the state's self-interest. In this respect, how can state interest be reconciled with the duty of faith that states are obliged to once they enter into a *systema civitatum*? This question has two different answers, depending on whether the state in question finds itself in a state of peace or in a state of war. In the first case, it has to abide by the agreements because natural law mandates it to do so. More precisely, as far as duties of humanity are concerned, states have to comply with them in the same way as individuals would do. These duties of humanity receive their compelling force from natural law, but evidence of them can be found in literary precedents, which provide us with "lessons of humanity". Conversely, in the state of war the situation changes radically, as I will explain below.

Let us first briefly address the question of interstate agreements, in order to understand how Pufendorf conceives of them. In his view, there are two ways in which interstate consensus can be established: either expressing our present mind about a future act (in this case changes of mind before our final resolution are possible[454] – although we might expose ourselves to the judgment of others)[455] or by making an oath, where we commit ourselves to perform an obligation. In this case, if the obligation has already been fulfilled, breaking faith is an injury to both our reputation and to the other party's reasonable expectations. Moreover, no fraud or

[453] Additionally, Schröder's faith in interstate trust resides in the belief that states are composite moral person, which would make them less short-sighted than individuals and more incline to comply with natural law: sovereigns are, in other words, "augmented individuals" which act on the basis of different inputs and their actions have implications far more relevant than those of the individual in a given society. (P. Schröder, Trust in Early Modern International Political Thought, p. 128). Also, a reference to a "system of the law of nations" can be found in Pufendorf's letter to Boineburg, as pointed out by Hochstrasser (T. Hochstrasser, *Natural Law Theories*, p. 53).

[454] DJNG, III, VI, §2.

[455] On this point, see chapter 7 on Vattel.

deceit can be perpetrated while contracting an obligation, because it would contravene natural law.[456]

In so far as far as this applies to the law of nations, Pufendorf states the existence of a general duty of humanity in this regard: that we have to do good without any considerable prejudices to ourselves.[457] Therefore "articles and agreements made between the princes and the people of different nations, so long as nothing has been yet performed on either side, are invalid; and especially in such places where no particular forms of leagues or covenants have received into use".[458] However, Pufendorf accepts that pacts are valid in a state of nature, provided we do not rely on them too much: "yet it is in some measure capable of good use, in as much as we may draw from it the following rules of prudence; never to depend much on a covenant, but when we know that the interest of the other party as concerned in the performance of it, as well as our own; and that upon default he is likely to suffer some greater evil or inconvenience, that he can incur by standing to the agreement".[459] Still, Pufendorf claims that "I dare not venture to place the security of our affairs in a league. For such is the nature of confederacies, that they are frequently hindered and interrupted by various events of things; different ends proposed draw the strength and minds of the allies different ways; and whilst each state pursues its own private interest, the common good is disregarded or betrayed."[460]

In this respect, Rebstein has rightly argued that in Pufendorf, "the two extremes of natural law rationalism and political opportunism come into contact"[461] and consequently,

> it is no coincidence that Pufendorf considers them to be 'legal transactions of the political and diplomatic kind, belonging as such not to jurisprudence but to history'. In fact, according to Pufendorf, the special conventions between two or more states, such as alliances or peace treaties, do not come under the law of nations, despite their being carried out in fulfilment of the duty to religiously abide by the given word. Not only do many such treaties have obligatory force only for a limited time, but they are also similar to those private contracts between citizens

[456] DJNG, III, VI, §8.
[457] DJNG, III, V, §5.
[458] *Ivi.*
[459] DJNG, III, VI, §9. This "economic" argument resonates with Pufendorf's impact on the history of economic thought, especially as far as the "commercial" implications of *socialitas* are concerned. On this, see I. Hont, 'The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the 'Four Stages Theory', in A. Pagden (Ed.), *The Language of Political Theory*, pp. 253-276; A. Sæther, *Natural Law and the Origin of Political Economy: Samuel Pufendorf and the History of Economics*, Routledge, New York 2017.
[460] DJNG, III, VI, §9.
[461] E. Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis*, Freiburg, München 1958, quoted in V. Fiorillo, 'States, as Ethico-Political Subjects of International Law: The Relationship between Theory and Practice in the International Politics of Samuel Pufendorf', in *System, Order and International law*, p. 210.

which are not included under civil law, but are rather part of history and custom or practices that may or may or may not be followed, depending on the will of the contracting parties.[462]

As we have mentioned, in his doctrine of the law of nature and nations, Pufendorf does not only make use of ancient history. By the time he takes a positon as a royal historiographer at the Swedish court, his historical method is subject to a profound transformation. He does not deny the role and importance of ancient history, but he claims that it alone is insufficient to address the real life of sovereigns, which is made of changing interests and prerogatives. In other words, contemporary history replaces rhetoric, which is deemed incompatible with the demonstrative fashion of Pufendorf's method, in the attempt to portray the variable, unstable and incoherent fluctuation of sovereign interests.

The question then arises of the relationship between ancient, codified history and ever-changing contemporary history, and to what extent the latter can be of any use for the identification of rules of law of nations. On the one hand, Scattola has put forward the idea that history serves a pragmatic purpose, and in that respect ancient history sets as an example for the present.[463] Quite differently, Seidler has made the claim that,

> the consideration of states' interests is continuous with the analysis of their natural law foundations [*because states, being subject of natural law, do have to balance self-preservation with* socialitas, my addition]. The latter is an internal, constitutive matter involving a state's legitimate claim to sovereign authority over its members, while the former is externally oriented and concerns the effective performance of its natural law obligations (particularly security) in an international context, on which the claim to internal sovereignty rests. In short, a state's *raison d'état* is rooted in its *raison d'être*.[464]

In other words, the balance between natural law and state interest is, according to Seidler, not only a distinctive feature of Pufendorf's account of the law of nations, but is constitutive of it, to the extent that a strong relationship exists between the state's instinct of self-preservation and its legitimate exercise of sovereignty over his subjects. This co-

[462] V. Fiorillo, 'States, as Ethico-Political Subjects', p. 211, quoting E. Reibstein, 'Pufendorfs Völkerrechtslehre', p. 63.
[463] M. Scattola, '*Historia literaria* als *Historia Pragmatica*. Die pragmatische Bedeutung der Geschichtsschreibung im intellektuellen Unternehmen der Gelehrtengeschichte', in F. Grunert & F. Vollhardt (Eds.), *Historia Literaria*, p. 39.
[464] M. J. Seidler, 'Introductory Essay', in S. Pufendorf, *An Introduction to the History of the Principal Kingdoms and States of Europe*, ed. by M. J. Seidler, Liberty Fund, Indianapolis 2013, pp. xxxii-xxxiii.

constitutiveness also explains why historical consensus offers important evidence of political consensus. Such is the relationship between history and politics that the law of nations cannot but be applicable to a precise geographic context, and more precisely, to civilized nations. This is made clear by Pufendorf's portrait of the states of Europe in the *Introduction to the Principal Kingdoms and States of Europe*, where he writes a history of every state in order to explain why it has certain cultural and political characteristics, and what historical events contributed to making it the way it is in the years he is writing.[465] As he makes clear in the text, political arrangements are the result of a historical process of a constant negotiation between state interest and natural law.[466]

A more concrete example of this process of negotiation is provided by Pufendorf's actual treatment of the Swedish king's decision-making process in his *Introduction.* This text constitutes a privileged point of observation, because Pufendorf's role as a royal historiographer is actually to portray Sweden's interests. For example, Gustav Adolphus is portrayed as a faithful observer of natural law (he obliges the Elector of Brandeburg "partly by fair words and partly by threats"[467]) but considers it legitimate to recur to arms when treaties prove ineffective.[468] He also feels free to make "a resolution quite contrary to his promise, with an intention to obtain by force what he could not obtain by fair means".[469] Other examples will be provided in the following sections.

From what has been said, a quite complex picture of Pufendorf's thought emerges, which I will try to schematize as follows:

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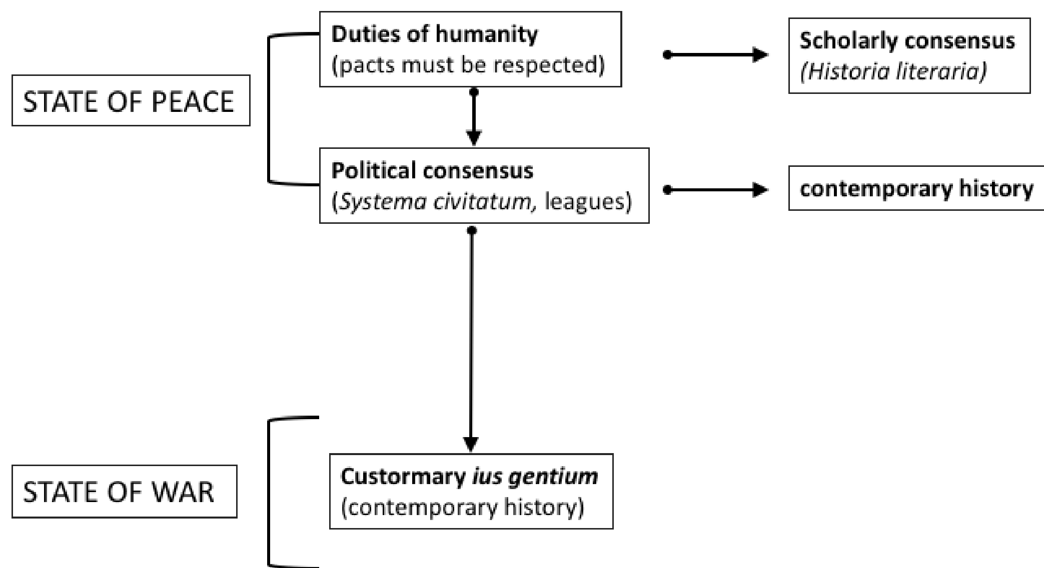
[465] S. Pufendorf, *Einleitung zu der Historie der vornehmsten Reiche und Staaten in Europa*, 1682 (references from this text will be taken from the English edition by M. J. Seidler).
[466] See P. Piirimäe, P., 'Official Historiography and the State in Early Modern Europe', *Storia della Storiografia* 71/1 (2017), pp. 47-75.

[467] S. Pufendorf, *Introduction*, p. 582.
[468] *Ibid.,* p. 573.
[469] *Ibid.,* p. 571.



In other words, natural law prescribes to states the obligation to respect general duties of humanity, among them the duty to respect pacts. These duties are obligations deriving from natural law, which can also be observed in the literary-historical record. Secondly, natural law governs, in terms of the duty to keep faith, the establishment of leagues and pacts among nations. However, as state interest is as important as common interest, nations have to do the best they can to make compliance with natural law compatible with their own interests. This is possible in times of peace, where the general purpose is to guarantee a state of peace and wellness beneficial to everybody. Accordingly, in times of peace some "customary" rules emerge in the form of "tacit pacts", namely general presumptions of accepted principles.

The situation radically changes in times of war, where a distinctively customary regime applies. Those presumed "customs" are, according to Pufendorf, nothing but the expression of a convention that has emerged with the purpose of "civilizing" warfare, but which are not as binding as natural law. He claims for example, provided that one engages in a just war, the fact that one acts with cruelty does not amount to a violation of the law of nature, and consequently, of the law of nations. It is however, a behavior which is customarily condemned by the majority of civilized nations. As a matter of fact, although he naturalizes *ius gentium* in the way we have described, he also seems to hint at the existence of some customary rules of the law of nations.

Quite ironically, one may argue that a genuine, contemporary concept of customary international law starts to emerge precisely as a "precipitate" of the process of naturalization of the voluntary law of nations. Such customary rules do not have the same universal applicability of natural law but are still a reality of international life (even though respect for these customary rules of conduct is not as mandatory as that required by natural law). The example of moderation towards enemies during warfare is emblematic of this status. Another more striking example concerns the legitimacy of using fraud and deceit during warfare. Whereas this was inacceptable *tout court* for Gentili,[470] Pufendorf claims that to lie to the enemy is legitimate provided that: 1) it does not injure him in a way contrary to *socialitas*; 2) the betrayal of his *fides* does not entail the content of a pact.[471] In this respect, a genuine concept of customary international law emerges, "residually" and via exclusion, from duties of humanity and interstate pacts. This turning point will become crucial for Christian Wolff, who will develop a doctrine of *ius gentium consuetudinarium*, intended as a "particular" source of obligation among nations (as opposed to the more "general" principles of the voluntary law of nations).[472]

5.3.1 Duties of humanity

The constitutive relationship between self-interest and *socialitas* is described by Pufendorf through a verse of the Roman poet Ennius, saying that he who lights a candle can benefit others without expense to himself.[473] Pufendorf claims that "from this one example we may sufficiently apprehend, that whatsoever we can part with to another, without any damage to ourselves, this it is our duty to give, though to a stranger".[474]

History provides a lot of lessons of humanity and through the category of duty of humanity Pufendorf reads the obligations that natural law prescribes for us. As a result, most of the rights that before him were considered part of the law of nations, are now included in the realm of natural law. Some examples concern for example the free sea: "to the same head belongs the use of running water, for the ordinary occasions of life", plus, "we see then that

[470] A. Gentili, DIB, II, III.
[471] S. Pufendorf, *On the duty of Man and Citizen*, p. 169.
[472] C. Wolff, *Jus Gentium Methodo Scientifica Pertractata,* Halle 1750, Prolegomena §4, §22.
[473] Ennius' verse is quoted by Cicero, *De officis*, I, 15.
[474] DJNG, III, III, §3.

duties of this kind do originally belong to the law of nature; yet it is not unusual to have many of them confirmed by civil constitution".[475]

But most importantly, Pufendorf conceives of the right of free passage as a duty of humanity. This right, quite interestingly, has a corresponding custom in times of war.[476] According to some, Pufendorf argues, the right to passage for trade, to live, to engage in just war, is not a "mere natural right", but that its source of obligation is a compact. This is because the question is particularly controversial. This makes Pufendorf suppose that its source of obligation lies outside natural law. It seems, in other words, that a compact has to intervene, "especially when the case is that an enemy to some of our neighboring states desires leave to carry his troops against them, through our territories. For it seems to be part of the duties, which we owe to our neighbors, especially any hostile power to march along our country to their prejudice, provided we can hinder the design with no great inconvenience to ourselves. And it is indeed on express article in most leagues, that neither party shall grant passage to the foes of the other". Here Pufendorf seems to recall the Grotian idea that natural law (or Grotius' natural custom, as we have named it) may find confirmation in compacts. What is relevant is that in this case, considerations about the justice or injustice of our neighbors' wars are useless (because we cannot be arbiters in a situation involving the sovereign equality of interstate relations). Therefore, it is better to deny passage to the enemy of our neighbors. Examples from ancient history (taken from the Bible and Roman history), says Pufendorf, show that the right has been granted to some and refused to others. As the duty of humanity is to do good insofar as it does not harm ourselves, in situations of uncertainty it is better to do nothing. We find further confirmation of the fact that this right is unclear from an example taken from the *Introduction to the States of Europe*, regarding interstate relations between Poland and Turkey: "there is not anything which would more conveniently secure the Poles against the Turks, than if the Princes of Moldavia, Wallachia and Transylvania, did belong to Poland, they being able to hinder the passage of the Turks into Poland. But because the Poles have long ago lost this advantage, or rather neglected it, it is their business now, to take care that [the Turks do not advance deeper into the Country]".[477]

From this example, we can also see an instance of Pufendorf's use of the historical literary method. Where there is no *consensio omnium* among sources, this is a further hint at

[475] DJNG, III, III, §4.
[476] DJNG, III; III; § 5.
[477] S. Pufendorf, *Introduction*, p. 405.

the fact that the matter in question is unclear (but not the reason why it is unclear, which is because it cannot be sufficiently derived from nature). Conversely, the right of free sea shares a wider scholarly consensus.[478]

5.3.2 Presumption of tacit consensus

At a first glance, one might have the impression that Pufendorf is quite skeptical of tacit consensus. He thinks that instances of tacit consent must be interpreted with severe scrutiny, because they imply a presumption the validity of which has to be ascertained.[479] An example of this, to be read in the light of the preceding section on duties of humanity, is the right of passage: "a stranger comes into a state with friendly intentions", therefore "the government *tacitly* engages to grant him security and protection".[480] We have seen before that, quite on the contrary, the source of obligation of the right of passage to engage in just war is natural law, except when we have to grant passage to our neighbor's enemy. In that case, a prudential reasoning applies: in cases where it is doubtful whether we can fulfil our duty to help others because we would prejudice our interests, we should secure our interests first.

Instances of tacit consent are controversial because it is problematic where their obligatory force should derive from, whether from the general duties of humanity or from compacts. However, from the comparison with the above-mentioned passage ("the government *tacitly* engages into…") with that on the duty of humanity, it can be argued that according to Pufendorf, a general presumption as to the right of passage exists (and is confirmed by compacts), provided it is peaceful. Hostile passage is far more problematic, because it calls into question a very different legal regime, that of war, where there is no right but mere license. The right of passage with hostile intention is therefore a custom, as it is non-binding and uncertain: because if it is true that the law of nations is not a perpetual state of war (and that compacts are valid), it is however true that war triggers a suspension of rights which makes law uncertain and causes custom to emerge. On the other hand, tacit consensus is a general presumption of customary conduct in times of peace. Such a presumption must be confirmed by pacts and be consistent with natural law.

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[478] Pufendorf quotes Ovid, the Bible, Plutarch, Xenophon.
[479] DJNG, III, VI, §2.
[480] *Ivi*. [my emphasis added]

5. 4 Law of nations in times of war: customary *ius gentium* between glory and state interest

According to Pufendorf, the fact that custom rests upon tacit consent demonstrates that nations have the "liberty of absolving themselves from them".[481] Furthermore, there is "more excellency and worth in any custom to derive it from the law of nature, than to establish it only on the Consent of different people".[482] Although he seems quite dismissive of the customary phenomenon, he nevertheless acknowledges the existence of customary, non-binding rules in the context of warfare for the first time in his *Elements of Universal Jurisprudence*:

> finally, there are wont to be listed under the name of the law of nations among most nations (at least those which claim the reputation of being more civilized and humane), those customs which, by a certain tacit consent, are habitually employed especially in regard to war. For after these more civilized nations came to regard it as their greatest honor to seek glory in war [...], and so unnecessary or unjust wars were entered into; under these conditions, in order to avoid exposing their ambition to excessive ill will, if they exercised the full licence of a just war, most nations have seen fit to temper the harshness of war by some humanity and a certain show of magnanimity. Hence came customs regarding the exemption of definite things and persons from the violence of war, a fixed way of injuring foes, a fixed way of treating prisoners, and the like. And, if any one in legitimate warfare disregard these exemptions, in cases, of course, where the law of nature allows such an act, he cannot be said to have contravened a valid obligation; he is merely, as a general thing, blamed for his rudeness, because he has not conformed to the customs of those who regard war as one of the liberal arts, precisely as, among gladiators, he who has wounded his opponent contrary to the rule of the art, is accused of being maladroit.

Quite interestingly, here Pufendorf quotes Hobbes' metaphor that sovereigns relate towards one another like gladiators in a circus.[483] The Hobbesian vein of the argument is also further confirmed by Pufendorf's claim that only natural law can govern the conduct of warfare:

> If, therefore, a man wage just wars, he can conduct them by the law of nature alone, and he is not bound by any law to these customs just mentioned, unless of his own accord he so wish, in order to obtain some advantage of his own. But he who ravens in unjust wars ought to observe those laws, so that he inflict his injuries with at least some kind of moderation. But they are assuredly wasting their efforts who collect what the nations in common

[481] DJNG, II, III, §23.
[482] *Ivi*.
[483] T. Hobbes, *Leviathan*, I, XII.

with one another habitually practise, especially in war, and conclude these matters to be legitimate on the basis of the law of nations; as if, in truth, there were less injustice, cruelty, and avarice in what is found to have been done often by those whose crimes have gone unpunished among men, because they had no one over them, and so they have not been vehemently castigated, since the rest of men do not shrink from perpetrating the same crimes. And, assuredly, if some special law ought to be set up on the basis of the common usage of nations, the very first heading in it will treat of the legitimate waging of wars for mere ambition, or with the prospect of making gain, than which nothing is more frequent among most nations.[484]

However, in his *De iure naturae ac gentium*, perhaps consistent with his changing methodological approach, Pufendorf claims that his purpose is to "enquire what may be supposed common to the wars of men and commonwealths and then what has either by custom or nature become appropriated".[485] This passage seems to hint at the structure we have delineated. First, Pufendorf seeks to understand what is "supposed" to be common to both conflicts among individuals and among states. For both kinds of conflicts nature prescribes a responsibility not to injure others, to be human towards each other, and to respect pacts.[486] War should only be declared when we cannot obtain our rights by means other than war. Causes of war must be evident and not depend on the "imaginary interests" of states hiding their real interests behind the pretext of war. Second, from the very moment war is engaged, rights are suspended as in a state of mere license.[487] However, Pufendorf claims that some "laws of humanity" should be observed (namely, that have become "appropriate" either by custom or by nature), not because they are binding, but because:

[…] it may be proper for a generous conqueror to inflict. And, therefore, they ought to be particularly careful, that as far as is possible, and their own necessary defence and future security will permit, to proportion the evils they inflict upon their enemy, to the measures and moderation observed by civil courts in punishing criminals and offenders. […] But besides, the uncertainties and turns of fortune which may happen in war, ought to persuade men to be very temperate in the use of those liberties, for fear of an alteration in affairs should, as it were, make their own weapons recoil, and return upon themselves the usage they gave others.[488]

[484] EUJ, I, XIII, §25.
[485] DJNG, VIII, VI, §1.
[486] DJNG, VIII, VI, §2
[487] Seidler claims that, according to Pufendorf, contemporary history is particularly useful precisely in unmasking the imaginary interests of those sovereigns who declare war without a certain, legitimate cause (M. Seidler, 'Natural Law and History', p. 208).
[488] DJNG, VIII, VI, §7.

The classical *topos* of the changing of fortunes typical of warfare is a further invitation to observe moderation. Due to a change of circumstances, we may find ourselves in a radically different situation where we happen to suffer what we have previously inflicted on our enemies as a form of retaliation.[489] Pufendorf provides some concrete historical instances of cruelty in his treatment of Sweden in the *Introduction*. During the war among Denmark and Sweden, the Danish king Christian II wanted to bring the "Swedes under the Danish yoke, by all manner of inhumane Barbarities", including by inflicting sufferance on the king to-be Gustav I of Sweden. When Gustav was eventually elected king, the Swedes "repaid the Danes with the same coin wherever they met them", and successfully besieged Stockholm in 1522, which before that had belonged to the Danes.

The reason these laws of humanity[490] are not always respected, although generals give instructions to soldiers about how to treat enemies, is because:

> they suppose the enemy is or may be injured, but because it is necessary that the General's orders should be obeyed, […] so that though a person, who in a solemn war had behaved himself with greater cruelty and outrage than the Law of Nature will permit, should afterwards happen to be indicted or accused for it in any third commonwealth unconcerned in the war, it would be a very uncommon way of proceeding, should he be sentenced for a ruffian or a murderer, and be used as such; because as it does not belong to the People of one nation to enquire what others are guilty of abroad, so here seems to have been a tacit kind of agreement of nations, that one should not pass judgment upon the wars another engages in. […] So that in short, it is safer to leave these things to the consciences of the parties engaged in the war, than to venture to give sentence upon an affair, the condemning of which may be of dangerous consequence to ourselves; especially since the parties at war themselves, by a tacit sort of compact, agreed either to increase or abate the heat of the war, as they please.[491]

[489] Pufendorf recalls the example of the fight of Lepanto against the Turks, where the latter were made prisoners and well treated in Rome as an example of civilization, with such mercy the Turks replied that they "understood well enough to take prisoners, but never thought of being made such" (*ivi*). The *topos* of changes of fortune is also a classical one, discussed already by Gentili, who deemed it peculiar to the epic genre. Quite interstingly, and in line with the Gentilian reasoning, Pufendorf here quotes Vergil to make the same point about the uncertainty of fortune during wartime. It is interesting to note that there seems to be a continuity between this *topos* and the 'birth' of customary *ius gentium* as a means of reacting to human radical uncertainty.

[490] Quite interestingly, Pufendorf does not call these laws of moderation *officia humanitatis* (duties of humanity), but rather *lex humanitatis*, laws of humanity. *Lex* is the term used to indicate a command of a superior authority, whereas *ius* means the mere license that would be typical of the military phenomenon. It is unclear what kind of authority should issue a *lex humanitatis*, although Pufendorf's attempt to regulate warfare is clear in this passage. However, the use of the word *lex* instead of the stronger concept of *officium* might suggest that he still does not mean to consider customary practices as binding duties of humanity.

[491] DJNG, VIII, VI, §16.

Here Pufendorf is engaging in a very interesting argument. He grounds the existence of a customary rule concerning moderation during warfare on the presumption of two tacit agreements. On the one hand, he says that there seems to be a "tacit agreement" that states should not judge over each other's wars. He comes to this conclusion through a counterfactual argument,[492] by fictionally imagining that a soldier who committed barbarities during warfare was judged by a third country. In a case like this, he says this soldier would never be charged with murder, both because his actions were limited to the context of hostilities, and most importantly because each nation must be impartial as far as the others nations' affairs are concerned. This, of course, is a corollary of the principle of sovereign equality, which in turn clearly derives from natural law.

On the other hand, there is another presumption on which the customary principle of moderation relies. By virtue of the very same fact that they engage in war, states conclude a "tacit agreement" to regulate as they please the manner of conducting hostilities. This conceptual turning point seems to introduce a tension in the whole argument: are conflicting parties bound by the tacit agreement in question? Namely, should they respect reciprocal commitments concerning for example, the beginning of the hostilities, the declaration of truces, etc.? In other words, is faith to be kept even with enemies?

In principle, Pufendorf says that we are not bound to enemies properly speaking. An example of this, according to Pufendorf, is the fact that we can legitimately convince the subjects of our enemy to betray their sovereign and to join us in the hostilities.[493] Conversely, the same act of betrayal, if committed by a nation with which a previous alliance was made, contravenes the law of nature. An example of this is recorded by Pufendorf in the *Introduction*, where he blames the behavior of the Duke of Launenberg, an ally of Gustav Adolphus against the imperialists during the Thirty Years War, by intimating to the reader the possibility that the Duke was responsible for the death of King Gustav during the Battle of Lützen (1632). According to Pufendorf, the Duke of Launenburg intentionally brought Gustav to an isolated place, where he was then killed.[494] This event consequently and legitimately instigated the Swedes' reaction.

[492] Behme has pointed out that Pufendorf only makes use of *fictiones contrarii*, i.e. counterfactual arguments, to make his points: see T. Behme, 'Die *fictio contrarii* als methodisches Werkzeug in Pufendorfs Naturrechtslehre', in L. Danneberg, C. Spoerhase, & D. Werle (eds.), *Begriffe, Metaphern und Imaginationen in Philosophie und Wissenschaftsgeschichte*, Harassowitz, Wiesbaden 2009, pp. 266-86.
[493] DJNG, VIII, VI, §18.
[494] S. Pufendorf, *Introduction*, p. 588.

However, concerning compacts made with an enemy to regulate the conduct of hostilities, Pufendorf contends that it is convenient and customary to perform them:

> And therefore, since by compacts, that tend only to moderate and qualify hostilities, the war is only drawn not into greater length; it is evident they must be contrary to nature. But however this be, it is a custom which among others hath obtained in the more civilized part of the world (perhaps out of a particular respect to military bravery) that such compacts should be looked upon to be valid, which were not intended to put an end to the state of war, but only to abate the heat of it, and give the parties engaged, liberty to take breath. Of this sort are truces for certain days, and sometimes hours to bury the slain; the agreement to grant passage through another's guards.[495]

Quite interestingly, Pufendorf insists on the importance of the right of passage with peaceful intentions. He also stresses that the rationale behind customs regulating warfare rests upon the importance conceded to military honor, which seems to be a shared value among civilized nations.

To conclude, Pufendorf's conceptualization of custom seems to rest on three fundamental pillars: a tacit consensus among nations concerning the role of war, the importance of honor and glory, and the pursuit of the state's interest.[496] Concerning the first point, states have tacitly agreed to settle their dispute by war if any other means of reconciliation are unfeasible, and to not interfere with each other's decisions concerning war. This tacit agreement is echoed in the fact that the right of passage, which is a customary principle acknowledged by Pufendorf, is not granted in cases where it might jeopardize our impartiality as a third party towards two other conflicting nations (especially, neighboring states). This is why customs of warfare have emerged to regulate warfare, although they are not binding *stricto sensu*. There is also a historical reason for their emergence, consisting in the fact that those nations who respect them are likely to concede the same value to military glory, as a sign of prestige and power.

Finally, and consequently, respect for customs concerning moderation in warfare depend on a combination of considerations concerning glory and state interest. Sometimes these two considerations coincide (to raise the nation's glory might be in its interest). At other times their relationship is more problematic and state interest seems to prevail. However,

[495] DJNG, VIII, VII, §2.

[496] In the *Introduction*, there are several instances of Pufendorf mentioning Gustav Adolph's success in conducting war with great glory for his country (S. Pufendorf, *Introduction*, pp. 579, 596)

notwithstanding the fact that Pufendorf reports many instances of contrary practice in his *Introduction*, he seems to suggest that it is convenient to respect them.

Chapter 6. Christian Wolff and his *ius gentium consuetudinarium*

In the last chapter, it has been argued that *historia literaria* contributed to the formation of the concept of 'natural custom' by providing it with a non-sectarian method to find evidence of customary practice in various sources of the literary past. Eclecticism and a secularized account of science were two of the main motives for such a methodological approach, and their application to the study of natural law was deemed to provide an answer to the criticality of the Grotian method. As a matter of fact, Grotius failed in providing natural law with a comprehensive body of literary sources, only selecting some of them according to a rhetorical method. Pufendorf's efforts in this direction were carried on by his pupil Christian Thomasius, who played a fundamental role in systematizing the methods of *historia literaria*.[497] However, the more he claims for its universality, the less he argues for the existence of a customary practice among states.[498] This is an achievement which even Pufendorf acknowledged only subject to certain conditions, as we have shown, and by vindicating the use of a rather pragmatic approach towards contemporary history (instead of a literary one). If histories from the past succeeded in providing accurate depictions of human rationality, at the same time they turned out to be incapable of grasping the variability of human will as well as the prudential reasoning of states – which indeed was the purpose of contemporary history, especially official historiography.

However, from a methodological point of view, the accusations levelled at the Grotian "acritical" method were not overcome by the employment of comprehensiveness as a fundamental criterion for *historia literaria*. The question of the legitimacy of knowledge (and of its sources) starts to arise. How can we build a *Weltweisheit*, namely a universal and secularized knowledge, if we don't question its very foundations (or even the possibility of it) and rather we simply expand the width of our sources, without even questioning their reliability?[499]

[497] See F. Grunert & F. Vollhardt, *Historia Literaria*, Akademia Verlag, Berlin 2007.

[498] See C. Thomasius, *Dissertatio de Jure Consuetudinis*, §21-22 (1722); *Tractatio Juridica de Jure Asylii Legatorum*, §25 (1737).

[499] No wonder Wolff was considered by Kant one of the most important sources on which he would build his critical enterprise (see I. Kant, *Critical of Pure Reason*, Cambridge University Press, Cambridge, 1998). On *Weltweisheit*, see W. Schneiders, '*Deus est philosophus absolute summus*. Über Christian Wolffs Philosophie und Philosophiebegriff', in W. Schneiders (Ed.), *Christian Wolff 1679-1754: Interpretationen zu seiner Philosophie und deren Wirkung,* Felix Meiner Verlag, Hamburg 1986.

Therefore, in the German academic environment of the end of the 17th century we find a contrast between Leibniz's metaphysical investigations and Christian Thomasius' eclecticism of *historia literaria*. With Leibniz, the idea starts to emerge that not only is philosophy the master science, consequently having far more importance than jurisprudence (indeed, jurisprudence is subaltern of metaphysics), but also some important new metaphysical insights that literally broke with the preceding theological tradition.[500] This conceptual shift is quite significant as we approach the conclusion of our analysis. The method of authors like Wolff, a declared follower of Leibniz, becomes strictly philosophical, as a result of philosophical discoveries like these and the consequent systematization of sciences. There was also a question of lexicon, which is a leitmotif of the *Frühaufklärung*: authors like Wolff start to write in German and to translate concepts from Latin into their own mother language, an element which also provides us with a significant shift in terms of conceptual vocabulary.[501]

The figure of Christian Wolff has been given incredible attention by philosophers and by international lawyers, but the asperities of his metaphysical reflections made understanding his thought particularly problematic in terms of its application to questions of international law. However, his most known contribution to the history of international law is undoubtedly his doctrine of *civitas maxima*, the ideal republic of *gentes* that Wolff puts at the apex of his international legal doctrine. Wolff's supranational argument is so relevant because, relying on the framework of Leibniz's *civitas dei*, for the first time in the history of international law he claims the existence of such mutual obligations among nations so as to justify treating them as though they were derived by an international *civitas*. More specifically, Wolff is also often mentioned as the father of *jus cogens* – an expression which he indeed made use of.[502]

Wolff's theorization of *civitas maxima* is based on a strong analogy between states and individuals: nations have the same rights and obligations as individuals, qua moral *personae*, and therefore have to organize themselves in some sort of political government. This option was timidly pursued by Pufendorf, as we have seen, but with several problems regarding the

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[500] See, most notably, Leibniz's doctrine of pre-established harmony and monadology. On the question of secularization, see also I. Hunter, *The Secularisation of the Confessional State: The Political Thought of Christian Thomasius*, Cambridge University Press, Cambridge 2007.

[501] D. von Wille, *Lessico filosofico della* Frühaufklarung. *Christian Thomasius, Christian Wolff, J. G. Walch*, Edizioni dell'Ateneo, Rome 1991.

[502] As argued by M. Thomann, 'Introduction', in C. Wolff, *Jus gentium*, Olms, Hildesheim 1972; T. Kleinlein, 'Christian Wolff: System as an Episode?", in *System, Order and International Law,* p. 219; and objected by Kadelbach, who vindicates the concept later originated within the 19th century Pandectist school (S. Kadelbach, 'Genesis, Function and Identification of *Jus Cogens* Norms', *Netherlands Yearbook of International Law* 46 (2015), p. 150. For Wolff's use of the term *jus cogendi*, see *infra* at p. 194.

effectiveness of his “system of states”. Such systems were subject to changes of the states’ self-interests, although Pufendorf attempted to submit them under the yoke of natural law.

In terms of interpretations of Wolff’s *civitas maxima*, authors like Onuf have emphasized its ‘republican’ character,[503] whereas Cavallar has instead highlighted the colonialist claim behind Wolff’s theorization of a *ius gentium* designed by Europeans and therefore restricted to Europe[504] – a problem that as we have seen, had already been encountered by Pufendorf. Recently Kleinlein has insisted on the utopian and fictitious character of Wolff’s *civitas maxima,* and in general on the ‘systematic’ character of Wolff’s legal theory.[505] By placing the foundations of such theory in the wider context of Wolff’s philosophical system, he was able to demonstrate that Wolff was “unconsciously” responsible for some fundamental transitions in international political thought, such as the “autonomization” of international law as a positive science, as well as the increasing (international) legal relevance of commercial transactions.[506] What is really relevant in Wolff’s innovation, as we will see, is the cogent character of the legal regime flowing from *civitas maxima*. Such cogency can only be appreciated through an analysis of Wolff’s wider philosophical doctrine.

In this respect, a few methodological considerations should be made, following the suggestions of Kleinlein and Petersen on this point.[507] Some years after Wolff, the Swiss jurist Emer de Vattel, who in his *Le droit des gens* attempted to vulgarize Wolff’s philosophy,[508] argued that Wolff’s legal doctrine is so dependent on his philosophy that “in order to read and understand it, it is necessary to have previously studied sixteen or seventeen quarto volumes which precede it”.[509] This was already perceived by Vattel as an obstacle to the circulation of Wolff’s thought, and was also exacerbated by the fact that Wolff only wrote in German or Latin – in a time in which the latter was doomed to be replaced by French as the language of European academic culture.

[503] As a democratic polity governed by a fictitious governor, Onuf claims that *civitas maxima* is a *respublica composita*, made of different *civitates* orienting themselves towards common good. N. G. Onuf, ‘*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism’, *American Journal of International Law* 88/2 (1994), pp. 280-303.
[504] G. Cavallar, ‘Vitoria, Gortius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?’, *Journal of the History of International Law*, 10/2 (2008), pp. 181-209.
[505] T. Kleinlein, ‘Christian Wolff: System as an Episode?”, pp. 216-7.
[506] *Ibid.,* p. 221.
[507] Kleinlein here follows C. Petersen, ‘What Has Logic Got to Do with it? On the Use of Logic in Christian Wolff’s Theory of Natural Law’, *Scandinavian Studies in Law*, 48 (2005), pp. 310-20.
[508] See *infra* at p. 204.
[509] *Ivi*.

From this perspective, in this chapter I will try to deconstruct Wolff's understanding of customary *ius gentium* precisely by looking at his more theoretical works. This methodological choice is also justified by the fact that Wolff's aim is to offer a general theory of customary *ius gentium*, instead of a concrete method to identify it.

As an initial consideration, we find in Wolff the very expression *ius gentium consuetudinarium* for the very first time and in an explicit way. Wolff also provides a translation of the concept into the German *das Herkommen*, which will become particularly fortunate in the 19th century German context. However, at a first glance, despite such explicitness, Wolff's concept of customary *ius gentium* seems controversial. On the one hand, he acknowledges its existence as a proper kind of *ius gentium*, distinguished from the voluntary *ius gentium*. Here Wolff radicalizes Pufendorf with Grotius, by contending that the voluntary law of nations must be distinguished from the natural law of nations, but at the same time contending that the voluntary law of nations must be distinguished from *ius gentium* based on custom and treaties. This aspect of his thought is particularly relevant and will be addressed in due course.

On the other hand, scholars complain that he barely describes what this specific customary *ius gentium* consists of.[510] This difficulty is due to several conceptual problems encountered by Wolff himself. As a matter of fact, to search for empirical manifestations of customary *ius gentium* in Wolff's philosophy would be misleading. Indeed, Wolff thinks that such empirical manifestations should be investigated by history (rather than by philosophical theory). Therefore, we do not find any actual reference to contemporary custom in Wolff. What we do find instead, is a conceptual, metaphysical, psychological and moral elaboration of the concept of *consensus*. Wolff's 'philosophicization' of customary *ius gentium* will mark a fundamental point of no return in the narrative we have been trying to trace, and not only because Wolff's theoretical premises will be the foundation of Vattel's treatment of custom. Indeed, this theoretical process leads to two important results. Firstly, the normative character of customary law of nations is enhanced by the heavily ontologized, moralized framework of the *civitas maxima* Wolff is proposing. Secondly, Wolff's abandonment of divine voluntarism allows custom to become a source of legal obligation among states *tout court*. The question is no longer, in the words of Wolff's predecessors, whether custom is binding or not. Rather, Wolff assumes custom is binding because it is based on a double, fictional argument: customary

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[510] T. Kleinlein, 'Christian Wolff: System as an Episode?", in *System, Order and International Law,* pp. 219, 230; C. Covell, *The Law of Nations in Political Thought*, pp. 91 ff.

ius gentium exists *as* though it was a treaty and it is based on tacit consensus, namely a consensus which is assumed to be as valid *as* if it were explicit.

I will analyze the Wolffian contribution to the concept of customary law of nations in three steps. First, I will describe Wolff's multi-layered concept of *consensus*, which is at the basis of his legal doctrine and his theory of *civitas maxima*. *Consensus* is understood by Wolff as the agreement among the faculties of human understanding, resulting in compliance with the ideal of *perfectio*. Perfection is the aim towards which human beings are naturally oriented.

Second, such conceptualization of *consensus* is made possible by the theory of *concursus*. *Concursus* is sometimes used by Wolff as synonymous with *consensus* and is a fundamental part of the customary process, which implies our actual involvement and concurrence in changing other people's behavior, not only by imitation but also, and more specifically, by informing, persuading, teaching them the *motivum agendi*, namely the precise reasons behind such behavior.

Third, I will show how the concepts of *concursus* and *consensus* impact on customary *ius gentium*. My claim is that they enhance the normative character of customary *ius gentium*, because differently from Grotius and Pufendorf, Wolff does not question its cogency (which is asserted), only its limited application. In this respect, Wolff's legal theory does not distinguish between natural obligation and pacts, and by including all sources of obligation into one pyramidal system (flowing from the apex of *civitas maxima*, to the more limited sources of *ius gentium* like treaty and custom), it manages to consider what is consensual as binding as if it was natural. The role of the philosopher is then that of ascertaining the compliance of international customs with nature, and by so doing providing a theory of international custom rather than a pragmatic method for the jurist to identify it. This latter enterprise will be undertaken by Emer de Vattel, who agrees with Wolff's idea that the historical method is supposed to shed light on the formation, rationale and, eventually, identification of international customs. Vattel will make great use of European historians from the Middle Age to the 18th century to detect international customs.[511] From this perspective, Vattel's chapter will complete

[511] On this, see M. Fumaroli, *Historiographie de la France et mémoire du royaume au XVIII e siècle. Actes des journées d'étude des 4 et 11 février, 4 et 11 mars 2002. Collège de France. Textes réunis par Marc Fumaroli et Chantal Grell, avec la collaboration de Catherine Fabre*, Champion, Paris 2006. Vattel relies on French historiography of the 18th century (memoirs, lives of kings, etc.). He also claims that modern historiography should be preferred over literary history because, Vattel claims, his predecessors (Grotius especially) already gave us plenty of information on the past (E. Vattel, *The Law of Nations*, Liberty Fund, Indianapolis, 2008, *Preface*, p. 17). But what kind of historiography does Vattel rely upon? How can *mémoirs* be of help? How can they be objective? See chapter 7.

the Wolffian analysis undertaken in this section. In fact, Vattel will reject some of the assumptions made by Wolff (most notably, the idea of *civitas maxima*) but will accept his general framework and division among various sources of *ius gentium.*

6.1 Wolff's system: the psychological foundations of natural law

In order to understand Wolff's account of natural law and *ius gentium*, some clarifications of his philosophical system might support the discussion. To begin with, it has been rightly pointed out by recent scholarship that Wolff conceives of philosophy as a *connubium* between reason and experience.[512] This has also been advanced as a reaction to the trend in the scholarship that considered Wolff a scholastic thinker.[513] With the expression "*connubium* of reason and experience", Wolff means that philosophical analysis consists of the bond between reason and experience, where experience plays the role of *fundamentum* on which reason can base its propositions. However, it would be misleading to think of Wolff as a supporter of empiricism. Rather, from his own perspective what he claims is in contemporary terms an *experiential* account of reason. In other words, Wolff's methodological approach is not to look at phenomena in human reason *and* in the empirical realm, but to consider cognitive content deriving from experience as belonging to the conscience as well.[514] This aspect will be particularly relevant for our discussion, as it seems to permeate the totality of Wolff's thought. Indeed, as he writes in his *Psychologia empirica* (1732), "observation is experience, which deals with natural facts happening without our intervention. Rather, an experiment is an experience, which deals with natural facts that could not happen without our own intervention".[515] From this perspective, the science of human beings only deals with the latter

[512] L. Cataldi Madonna, 'Il connubio della ragione con l'esperienza come fondamento e scopo del programma filosofico wolffiano', in G. Cacciatore, V. Gessa Kurotschka, H. Poser & M. Sanna (Eds.), *La filosofia pratica tra metafisica e antropologia nell'età di Wolff e Vico*, Alfredo Guida Editore, Napoli 1999, pp. 111-129.
[513] S. Carboncini, 'L'ontologia di Wolff tra scolastica e cartesianismo', in J. École (Ed.), *Autour de la philosophie Wolffienne. Textes de Hans Werner Arndt, Sonia Carboncini-Gavanelli et Jean École*, Olms, Hildesheim 2001, pp. 70-94; J. École, 'Christian Wolffs Metaphysik und die Scholastik', in H. P. Delfosse, M. Oberhausen, R. Pozzo (Eds.), *Vernunftkritik und Aufklärung. Studien zur Philosophie Kants und seines Jahrhunderts,* Frommann-Holzboog, Stuttgart-Bad Cannstat 2001, pp. 11-128.
[514] F. L. Marcolungo, 'Christian Wolff e il progetto di una psicologia filosofica', in F. Marcolungo (Ed.), *Christian Wolff tra psciologia empirica e razionale: atti del convegno internazionale di studi Verona, 13-14 maggio 2005*, Olms, Hildesheim 2007: "se è pur vero che all'inizio della Logica tedesca, con un'impostazione che risente del dettato lockiano, Wolff aveva sottolineato l'importanza di ciò che noi sentiamo e percepiamo (*empfinden*), non va dimenticato che pur sempre tali contenuti appartengono alla mente, in quanto ne siamo consapevoli" (p. 23).
[515] C. Wolff, *Psychologia Empirica*, 1732, §456: "*observatio est experientia, quae versatur circa facta naturae sine nostra opera contingentia. Experimentum est experientia, quae versatur circa facta naturae, quae nonnisi interveniente opera nostra contingunt*".

category, and the question for the philosopher is that of ascertaining whether that experiential content is in agreement with the universal truths that can be deduced by reason ("it is called 'compliant to or 'in agreement with' reason what can be connected with known truths and true universal propositions").[516] Indeed, reason needs support from experience, as the latter concurs with the creation of human knowledge ("when reason is not pure, it concurs with experience to the process of knowledge").[517] From these premises, Wolff draws an important methodological conclusion: "science derives from reason, history from experience".[518]

In other words, Wolff articulates his architecture of knowledge according to the fundamental distinction (and yet co-dependence) between reason and experience. In his words, knowledge can be divided into *cognitio historica* (the knowledge of what happens in the world[519]) and *cognitio philosophica*, the knowledge of why things are the way they are.[520] Historical knowledge is the basis for philosophy, but philosophy can go beyond the mere *factum*, as it is the *scientia possibilium* (the "science of the possible"). In this perspective, Wolff's methodological insights can be interpreted as a reaction to *historia literaria*, which consisted precisely in the tight bond between the eclecticism of reason and history, which Wolff rejects.[521]

From this methodological premise, Wolff articulates the architecture of his philosophical system.[522] It is conceived of as a *metaphysica generalis*, based on ontology and logic. Furthermore, metaphysics deals with God, the human soul and physical objects. If one wants to investigate human nature, the first steps in order to understand the functioning of the human mind are *logica* and *psychologia*.[523] *Psychologia* is either rational or empirical (recalling Wolff's prior distinction): the *fundamentum* of *psychologia* lies in *logica*[524], from which it

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[516] *Ibid.,* §485: "*rationi conforme vel consentaneum vocatur, quod cum veritatibus cognitis seu propositionibus universalibus veris connectitur*".
[517] *Ibid*. §496: "*quando ratio pura non est, experientia cum eadem in cognoscendo concurrit*".
[518] *Ibid*. §498
[519] As argued by Wolff in his *Discursus praeliminaris de philosophia in genere*, which he wrote as an introduction to his *Philosophia rationalis sive logica*, (1728), §3.
[520] C. Wolff, *Discursus*, §4.
[521] On this, see C. Wellmon, *Organizing Enlightenment. Information Overload and the Invention of the Modern Research University*, John Hopkins University Press, Baltimore 2015.
[522] See T. Kleinlein, 'Christian Wolff: System as an Episode?', p. 222. Also, on the question of whether Wolff's philosophy qualify as a system – philosophically speaking, see H. Poser, '*Philosophia practica* come sistema. La scienza nuova dell'agire di Christian Wolff', in G. Cacciatore et al. (Eds.), *La filosofia pratica tra metafisica e antropologia*, pp. 1-24.
[523] On the importance of Wolff's contribution to the history of psychology as we know it now, see N. Hinske, 'La psicologia empirica di Wolff e l'*Antropologia Pragmatica* di Kant. La fondazione di una nuova scienza empirica e le sue complicazioni', in G. Cacciatore et al. (Eds.), *La filosofia pratica tra metafisica e antropologia*, pp. 207-224.
[524] C. Wolff, *Discursus*, §90.

borrows a demonstrative method (as well as the two principles of sufficient reason and non-contradiction). Psychology is the science of the faculties of the human mind (Wolff calls them *possibilia*). Practical philosophy, instead, derives its principles from metaphysics, and it is the science that "instills the right use of the faculty of desire (*facultas appetitiva*), in choosing moral good and rejecting evil[525]", and to orient one's own actions both in theory and in practice. Therefore, whereas *philosophia practica universalis* delivers "general rules" concerning both aspects,[526] natural law is conceived of as a special part of practical philosophy[527]. Kleinlein rightly argues that "practical philosophy is made up of general practical philosophy and natural law as theoretical disciplines (consisting of the parts of *jus naturale ethicum*, *oeconomicum*, and *politicum* (*jus publicum universale*). The practical counterparts of natural law are practical ethics, economics, and politics. Remarkably, the classical social studies – ethics, economics and politics – are transferred to legal concepts in this structure".[528]

Another much-debated question is that of the relationship between reason and will (or even the primacy of one over another) and the impact of this relationship on the ultimate source of legal obligation. This has been the conceptual problem of all the authors we have addressed so far, in their effort (think for example of Grotius) to make natural law as secularized as possible and to detach its source of obligation from its divine origins. Wolff plays a fundamental role in this transitional period of European legal history, as one of the most important figures contributing to the shift from natural law to rational law. By rational law is meant a natural law solely based on human reason, which finds in human reason itself the only legitimate source of obligation – by so doing, marking the end of divine voluntarism.

In this respect, Pufendorf's legacy in the German academic debate was still quite cumbersome in the years in which Wolff was writing. The question of the source of obligation of natural law was far from settled. Indeed, its account of law as a command, and yet as completely deducible from human reason, was particularly problematic according to philosophers like Leibniz. Leibniz thought that these two views were incompatible, and that one should simply concede the intrinsically rational character of natural law by abolishing any reference to divine voluntarism – and blamed Wolff for his initial enthusiasm towards

[525] C. Wolff, *Discursus*, §103.
[526] C. Wolff, *Discursus* §103; C. Wolff, *Philosophia practica universalis* (1738-9), *Prolegomena* §3.
[527] C. Wolff, *Discursus* §104.
[528] T. Kleinlein, 'C. Wolff: System as an Episode?', p. 222, quoting K.G. Lutterbeck, *Staat und Gesellschaft bei Christian Thomasius und Christian Wolff: Eine historische Untersuchung in systematischer Absicht,* Fromman-Holzboog, Bad-Canstatt 2002, p. 183.

Pufendorf's conceptually weak position.[529] Indeed, Wolff will later change his mind, following Leibniz's advice by articulating a rational doctrine of natural law and *ius gentium*, where the divine element was excluded in terms of voluntarism and introduced as a teleological argument. In other words, God still plays a role in Wolff's theorization of natural law, and indeed a very important one. By adopting Leibniz's view of the pre-established harmony, and the ideal of perfection as the driving force behind all human actions, Wolff manages to build a secularized account of morality by vindicating its inherent afflatus towards good. Wolff here recalls an old Aristotelian position in the *Nichomachean Ethics*,[530] that the specific task (*ergon*) of human beings is to perfect themselves. Wolff turns this *ergon* into a duty and articulates the finalism of human reason in three steps. First, in order to achieve perfection there must be *consensus* among all human faculties, most notably intellect and volition; and such consensus is actually a *concursus* of all these faculty towards the same object (moral good), a *concursus* reflecting God's co-causal concurrence on human actions. Second, by claiming that we have the moral duty to help other people to achieve this perfection, and that we must engage in moral persuasion and convince them to do so. The inherent persuasiveness of *perfectio* also allows human being to create *consensus* among them, by specifically concurring in the achievement of each other's *perfectio*. Third, by claiming that perfection is the end of human action (and *not* the source of its obligation, which always rests upon reason itself), Wolff manages to build a doctrine of natural law where there is a convergence of human and divine intentions, simply due to the fact that men tend to achieve *perfectio*, which is also the end that God has pre-established for this world.

This argument will cause Wolff many problems (most importantly, his exile from Halle)[531] and will be the starting point of Kant's critical reflections. What was potentially so dangerous in Wolff's argument was the idea that human actions were co-caused by both men themselves and God, which raised the question of accountability for human actions. Indeed, when Wolff first presented this idea in his *Oratio de Sinarum Philosophia Practica* (1721), the rumor started to spread in the Prussian court of the time that Wolff's philosophy implicitly authorized unaccountable army defections – an option that Friedrick I was not open to accepting in his military state. Indeed, apart from the political repercussions, the question was also later

[529] C. I. Gerhardt (Ed.), *Briefwechsel zwischen Leibniz und Christian Wolff,* Olms, Hildesheim 1963, p. 18-9.
[530] Aristotle, *Nichomachean Ethics*, 1097b22–1098a20 (ed. by R. Crisp, Cambridge University Press, Cambridge 2014).
[531] See M. Hettche, 'Christian Wolff', *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), in E. N. Zalta (Ed.), URL: https://plato.stanford.edu/archives/win2016/entries/wolff-christian

perceived as philosophically dangerous by Kant. Kant claimed in one of his early works that in a state of affairs like that described by Wolff,[532] the question of human accountability could simply be discharged on God, and by so doing, it could create the absurd situation in which God is to be held accountable for our wrongs.

In order to unpack Wolff's metaphysical reasoning, in the following section I will explain it by analyzing three key-concepts in Wolff's argument: *consensus; perfectio; concursus.* Through them Wolff succeeds in getting rid of divine voluntarism by proposing a heavily ontologized theory of consensus. This also sets the basis for understanding of the concept of custom.

6.1.1 *Consensus*

In the *Praefatio* to his *Psychologia Empirica* (1732), Wolff explains the connection between psychological analysis and natural law:

> it will become clear also to anyone casting a glance at this issue how much of empirical psychology there is in the use of habits in our praxis. Indeed, it already emerges in our *Philosophia practica universalis*, where we will provide a general theory of that praxis. Empirical psychology has also an eminent, although until now neglected, use in the investigation and clarification of the same notion of natural law and natural obligation; which, again, results clear from our *Philosophia practica universalis*. […] We deduce the civic doctrine precisely from natural law and moral philosophy as a priori principles.[533]

In other words, Wolff is here vindicating a new realm of inquiry, namely that of a "psychological" study of natural law.[534] The reason "empirical psychology provides us with principles of natural law",[535] is that it shows the functioning of human faculties of sensitivity, imagination, intellect and volition. The aim of such faculties is to be in agreement with each other, and therefore to tend towards *perfectio*, i.e. moral good. The more they are in agreement

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[532] I. Kant, *Principiorum primorum cognitionis metaphysicae nova dilucidatio*, 1755.
[533] C. Wolff, *Psychologia Empirica*, *Praefatio*.
[534] It is true that it was neglected, but it is also true that Wolff gave the concept "*psychologia*" a totally different meaning than it had before. In the scholastic tradition, psychology was the science of the soul and was inevitably connected with theology (see, for example, chapter 1 on Vitoria).
[535] C. Wolff*, Psychologia Empirica, Prolegomena* §6.

with each other, the more they are *consentaneae* to ("in agreement with") nature. Additionally, human beings must take care that their own actions are free, and in this respect, have an obligation "to perform intrinsically good actions".[536] Indeed, such harmonious agreement among faculties creates *consensus*, which is a tendency of both the sensitive and intellectual faculty towards the same object.[537] Wolff explains the circumstances from which such *consensus* originates in more detail later: if we think something good either confusingly, or distinctly, "the sensitive appetite agrees with the rational"; if we have a confusing idea of something 'good', the sensitive faculty will still *tend* to agree with the rational one (because of its natural tendency towards good).[538] According to Wolff, this is quite easy to grasp in theory, but hard to observe in practice. Such perfect convergence of reason and sensations to create *consensus* is "very rare", and only a wise man like Confucius could be able to follow his rational appetite, only to discover at a very old age that his sensitive appetite was almost automatically in agreement with it. According to Wolff, to achieve such perfection is the main problem of moral philosophy.[539]

As a matter of fact, *consensus* takes place when we desire what makes us perfect (and in turn, rational). The question of the finalism of human reason is better explained by Wolff through the concept of *perfectio*.

6.1.2. *Perfectio*

Perfectio is the core of Wolff's moral and legal theory and it has multiple meanings. It is meant by Wolff as: 1) *consensus* of different faculties, as we already pointed out; 2) the goal of human nature; 3) the criterion for good moral action – good is what makes us perfect.

The harmonious agreement among faculties left unexplained why it is so important, and yet so difficult to achieve such *consensus*. Wolff talks about a consistency in volition, which is typically the result of *consensus* among intellect and volition. The more we know an object, the more we desire it and the more our appetite towards it is stable over time: "if we know what is good, we also derive pleasure from it".[540] Consequently, if the good we believe we know is just

[536] C. Wolff, *Philosophia Practica Universalis, Pars Prior*, §127.
[537] C. Wolff, *Psychologia Empirica*, §908.
[538] *Ivi*.
[539] *Ibid.,* §909.
[540] *Ibid.,* §558

apparent, our desire for it will inevitably be superficial, only the desire of moral good is consistent over time.[541] In other words, for Wolff moral good is what perfects us, whereas moral evil "makes us and our internal states more imperfect" (because it makes our desires inconsistent and unstable).[542] From this perspective, the criterion of perfection shows us that it is wrong to say that moral evil is what we perceive as blameworthy (like Gentili would have said); rather, we blame evil because it makes us imperfect. In Wolff's words, blame (*taedium*) is an unintended consequence of evil (*per accidens*), precisely as blame can also be a consequence of moral good, not because moral good is despicable in itself, but because it happens to be so in some of its manifestations. For example, medicines are good for human health, but they happen to be the object of despise because they accidentally taste bad.[543]

Wolff's reasoning here resonates with Suárez' moral foundation of *habitus*, where he said that there cannot be morally bad *habitus* precisely because bad behaviors are always inconsistent and unstable, and therefore they can barely turn into a *habitus*. By quoting Suárez here I by no means intend to provide an interpretation of Wolff as a scholastic, a label which has been the object of a wide debate in the literature and that is nowadays considered obsolete.[544] Furthermore, Suárez's argument relied on a strong voluntaristic vision of morality, a position which Wolff overtly seeks to overcome. Wolff's doctrine of *habitus* and custom also relies on a totally different (and Leibnizian) concept, that of *concursus*, as I will explain in the next paragraph. However, it is worth pointing out the similarities between Suárez and Wolff in terms of teleological reasoning. To conclude this section, it is also worth noticing that the achievement of *perfectio* through the consensus of all the faculties of the mind amounts to an obligation. An obligation to have a distinct knowledge of the possible and to tend towards good is at the basis of ethics and natural law. However, Wolff argues that there is a difference between the two. Whereas ethics teaches how to acquire virtue and to develop moral habits accordingly, natural law is only concerned with distinguishing bad from good habits.[545] Quite interestingly, Wolff reinstates the classical doctrine of *habitus* (which was abandoned after Grotius as a basis of the customary process), although with significant theoretical modifications.

[541] *Ibid.,* §564
[542] *Ibid.,* §566
[543] *Ibid.,* §576, 578.
[544] See footnote 513.
[545] C. Wolff, *Philosophia moralis sive ethica*, 1750-3, §4.

6.1.3. *Concursus*

Another important conclusion that Wolff draws out through the adoption of *consensus* and *perfectio* as fundamental features of his moral theory, is that we are responsible not only for the achievement of our own moral perfection, but actually have to help other people to achieve it. In his *De iure naturae ac gentium* Pufendorf said, by quoting an example from the Roman poet Ennius, that we can easily light a candle for other people with no additional expense for us if we originally meant to light it for ourselves. Indeed, for Pufendorf, besides the duties of humanity, which had cogent character, the question of one's own involvement in someone else's interests was always problematic. If we recall the example of the right of passage of an enemy into the land of a neighbor, it was evident that Pufendorf preferred to adopt a prudentially cautious approach when the question at stake was the possibility of interfering with the interests of another nation. With Wolff the situation is rather different, and by paraphrasing Ennius' example, we could say that not only do we have to duty to provide light to other people with our own candle, but we should actually help them light their own candle. In the words of Wolff, this is even more true at the international level: while individuals might be "makers of their own fortune", although they still have an obligation to help others, nations cannot only be responsible for their own fate, they must also be responsible for that of other nations.[546] This is a very strong claim, foreshadowing the conceptualization of an international community.

This pervasive aspect of Wolff's thought has been rightly described as paternalistic.[547] However, it is deeply grounded in Wolff's theory of *concursus*, a multi-layered, pervasive concept used by Wolff to explain why and how we get from *consensus* to *perfectio*. There are at least three senses in which Wolff uses the term *concursus*, and they are all interconnected. First, in his *German Metaphysics*, Wolff speaks of *concursus Dei ad actiones humanas*.[548] With this expression he means to qualify the nature and purpose of God's intervention in human actions. As we have pointed out, such divine contribution does not precede human action but is actually co-causal and concurrent with it. This is because, as the idea of *perfectio* emphasizes,

[546] C. Wolff, *Jus gentium*, §574. Onuf rightly rejects the translation of *civitas* to community; the difference between *jus perfectum* and *imperfectum* is a further proof of it. See next paragraph.
[547] T. Kleinlein, 'Christian Wolff: System as an Episode?', p. 228.
[548] C. Wolff, *Deutsche Metaphysik*, 1719, §1009.

man is meant to pursue moral good (both because it makes him perfect, and because this decision concurs with the divine plan).

Second, such *concursus* happens when there is *consensus* among human faculties, as we have seen, namely when intellect and volition *concur* towards the same object (which makes it a stable desire). Wolff also uses *concursus* as a synonym of *consensus*.

There is a third interpretation that Wolff gives to the term *concursus*, strongly related to the previous two. Wolff calls *concursus* our concrete engagement in other people's moral decisions (*concursus hominis ad actiones alterius*), which is something that often happens in reality, as he claims.[549] Such engagement might produce *consensus*, in cases where we manage to convince other people to adopt behaviors pursuing perfection, or a clash of views and arguments, in which case we do not reach *consensus*.[550] Quite interestingly, Wolff is uninterested in this later option, which was instead addressed by Leibniz. Significantly, Leibniz connected this question to the elaboration of a probabilistic logic, which would have helped him draw some general probable rules concerning the art of controversies.

As for our commitment to change other people's minds or behaviors, it is particularly relevant in our analysis of Wolff because it gives a further meaning to the word *consuetudo*, which we have analyzed in different authors and contexts. Wolff says that on a first level of analysis, *consuetudo* is *habitus* in the sense that it is the product of a *consensus* between reason and will.

But Wolff adds a further, relational and unprecedented meaning of *consuetudo* in this respect. *Consuetudo* is conceived of as the mutual habits resulting from the moral *concursus* of two or more persons: "the mere frequentation of morally good persons does not correct willingness and unwillingness, but only results in producing external acts which are compliant with the laws of nature. […] For this reason, if we do not assume nothing behind *consuetudo* itself, it alone cannot but instill a mere empirical imitation of the behaviors of those persons with whom it occurs".[551] In other words, *consuetudo* (intended as interaction with morally good people) is not enough to correct a morally bad volition. What is necessary for us to achieve and imitate exemplary action, is to grasp the "*motivum agendi*", the reason behind such behavior.[552]

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[549] C. Wolff, *Institutiones Juris Naturae et Gentium,* 1750, §26
[550] See M. Dascal, *G. W. Leibniz, the Art of Controversies*, Springer, Dordrecht 2008, p. 145.
[551] C. Wolff, *Philosophia moralis sive ethica*, §217.
[552] We find a similar passage in C. Wolff, *Jus gentium*, §184, where good *gentes* have to set as an example to others, but imitation seems to be based on opportunism: "*gentium imitatio rationalis, non coeca esse debet. Gentium aliarum imitatio non infrequens est, praesertium in Europea; ast plerumque coeca esse solet, non*

This passage is connected to a similar one we find in *Philosophia Practica Universalis*: "indeed not only the behaviors of those, with which there is familiarity (*consuetudo*), tacitly instill in our souls, but those very same people we frequent concur to their formation or their transformation, by teaching, suggesting, praying, exhorting, inciting, encouraging, pushing, coaxing, attracting, persuading, soliciting".[553] Wolff also opens his *Institutiones juris naturae et gentium* (a compendium of both his monumental *Jus naturae*, 1740-8, and his *Jus gentium*, 1749)[554] with a very similar passage further emphasizing that we are also responsible for other people's actions that we concur in instigating.[555]

In conclusion, *concursus* of our actions with other people's may result both in behaviors which tacitly intrude into our souls, and in those which we actively contribute to teach, to suggest, to exhort. What matters here is that custom is conceived of as relational. Wolff is uninterested in any diachronic analysis of its formation. All that really matters is the *motivum agendi* (i.e. the driving force behind action), the rightness of which can be discovered through psychology and *philosophia practica universalis*.

6.2 Laws of nature, natural law and *ius gentium*: the perfection of *civitas maxima*

The most immediate consequence of Wolff's theoretical innovations is the end of divine voluntarism. In this respect, Wolff no longer speaks of divine will, but rather of divine *concurrence* with the human state of affairs, for the creation of which humans are personally and actively responsible. Ontologically however, the divine element is translated in terms of the natural human orientation towards perfection. This leads humans to produce *consensus* between their internal faculties and external actions. The concept of *consensus* helped us to explain why it is important for man to achieve perfection, and why from a legal point of view, this tendency even amounts to an obligation. From this reasoning it is now clear, Wolff would claim, that the source of such obligation is no longer God, but rather solely human reason. For this reason, Wolff's legal theory has rightly been described as a combination of "fictitious contractualism" and "natural teleology".[556] As a matter of fact, on the one hand Wolff insists on *consensus*, creating a fictitious situation in which individuals (or *gentes*) all contribute to

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rationalis… ideo imitari [plerique] solent ea, quae a gentibus aliis utiliter constituta vident".

[553] C. Wolff, *Philosophia practica universalis*, *Pars Prior*, §110.

[554] The *Institutiones* were published in 1750.

[555] C. Wolff, *Institutiones*, §26.

[556] T. Kleinlein, 'Christian Wolff: System as an Episode?', p. 225.

each other's flourishment. By concurring on each other's behaviors, we are able to produce an interpersonal and international consensus. Such agreement is based on the ideal of *perfectio*, as we have seen, and cannot but be counterfactual: it is a normative, teleological orientation of the system, rather than a state of affairs.[557] It also applies equally to individuals and to states, as a result of their intrinsic analogy as moral *personae*.

This is why the three key concepts of *consensus*, *perfectio* and *concursus* are so relevant to understanding Wolff's theorization of natural law and of *civitas maxima.* For the sake of clarification and in order to grasp the Wolffian argument, it is important to mention that Wolff distinguishes between laws of nature and natural law. Laws of nature are the expression of *consensus* with nature and *perfectio,*[558] whereas natural law is the science through which such laws have to be demonstrated and explained. Consistent with his theorization of the human mind, Wolff claims that human reason is the only source of obligation, and that in the study of natural law we have to investigate such obligations in more detail (and the duties we derive from them).[559] The most important ones are *obligationes connatae* (innate obligations),[560] which according to Wolff are perfect, namely they demand absolute and necessary respect. All those obligations concern the pursuit of perfection, as is now easy to imagine. For this reason, innate obligations give rise to *iura perfecta*.[561] The term "perfect right" has, from the Wolffian perspective, a double meaning. On the one hand, it hints at the fact that they are absolutely binding and executive (the Latin verb *perficio* means to "to execute, to accomplish, to bring to a conclusion"). On the other, the reason the observance of such rights is so cogent that no one can impair it, and everyone can demand its respect, is that they comply with the ideal of *perfectio* (and therefore, they are perfect).[562]

However, Wolff thinks that some space should be left for human liberty - quite interestingly, that very same space left empty by the subsumption of human will into reason. Indeed, some obligations are imperfect not because nature is imperfect, but rather because it is the task of human liberty to finalize them. A famous example, drawn from Wolff's *Jus gentium*, of the distinction between perfect and imperfect rights, is the right to commerce. Whereas Wolff claims that it is a perfect right (an innate obligation) of a nation to enhance one's own commerce, the obligation to trade with foreign states is an imperfect one. To make it perfect,

[557] *Ibid.,* p. 226.
[558] C. Wolff, *Institutiones*, §43.
[559] C. Wolff, *Jus naturae methodo scientifica pertractata*, *Praefatio*, §3.
[560] C. Wolff, *Jus naturae*, §20.
[561] C. Wolff, *Institutiones*, §81.
[562] G. Gozzi, G. Oestreich, *Storia dei diritti umani e delle libertà fondamentali*, Laterza, Bari 2001, chapter X.

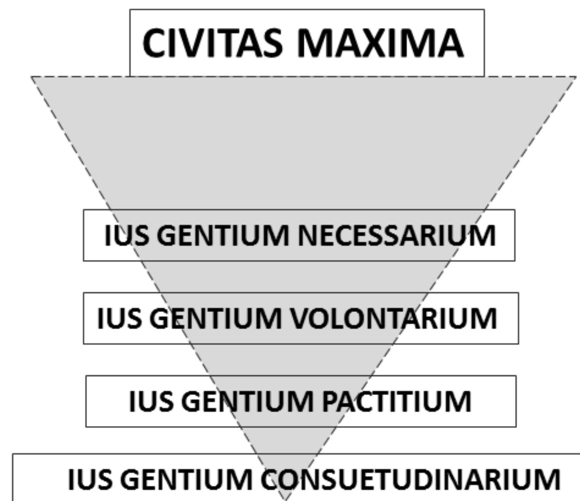
some specific pacts among nations are needed. This aspect of Wolff's thought is particularly relevant for two reasons. On the one hand, because it transforms the old Pufendorfian distinction between natural and adventitious obligations into a single, cogent legal regime, where the question is only one of finalizing agreements according to individual liberty or state interest. From this perspective, this shift is quite important because the difference between perfect and imperfect rights is not one of effectiveness – law is binding either way, both in the form of an imperfect or as a perfect right. On the other hand, this theoretical shift produces a significant change in terms of how Wolff conceives of the relationship between natural law and *ius gentium*. Again, the question is no longer that of reconciling the naturalness of natural obligations with the instability of those arising from human will. This allows Wolff to distinguish among different legal regimes (*ius gentium volontarium, ius gentium pactitium* and *ius gentium consuetudinarium*) without questioning their validity and cogency.

These different legal regimes, as has been pointed out several times, flow from the ideal of *civitas maxima. Civitas maxima* is the society which *gentes* are thought to join, as citizens are members of a political community.[563] According to Wolff, the universal society of mankind cannot but be imagined as though it were an actual political community. He claims that Grotius already had this intuition, but failed to understand that voluntary law of nations derived from nothing but *civitas maxima*.[564] This particular aspect is due, according to Wolff, to the fact that *civitas maxima* has the power to prescribe, through its rules, the means through which common good can be pursued.[565] This is because "nature itself forces nations into a *civitas maxima*".[566] According to Wolff, this obliging force amounts to a proper *jus cogendi*, namely a right to compel, which nations as a whole have towards individual nations.[567] Interestingly, the way in which Wolff uses the expression *jus cogendi*, although very different from the contemporary *jus cogens*, nonetheless hints at the existence of the overarching normative power protecting collective interests such as the common good and *perfectio*. Accordingly, Wolff conceives of this *jus cogendi* as an axiomatic demonstration, which serves as an unchallenged basis for his further arguments.[568]

[563] C. Wolff, *Jus gentium*, §10.
[564] *Ivi*.
[565] C. Wolff, *Jus gentium,* §11
[566] C. Wolff, *Jus gentium*, §12.
[567] C. Wolff, *Jus gentium*, §13.
[568] *Ivi*.

Additionally, the necessity of *civitas maxima* is due to the fact that, like civil societies, the international one also has to give herself some rules,[569] and this obligation is so pressing that "they have to give their consent to it, or they have to be presumed to have given such consent".[570] Indeed, if they were *instructed* as to the reason behind such consent (the achievement of *perfectio* through mutual *concursus*), they would necessarily agree with it.[571] Wolff's argument is indeed a fictional one,[572] and consistent with his psychological and moral doctrine. Consequently, the *perfectio gentium* (perfection of nations) consists in the "attitude to achieve the goal of the *civitas*"[573] by complying with the obligation of self-preservation;[574] of avoiding dangers;[575] being educated and not barbarians;[576] trading (first, *commercia interna*);[577] giving to each his own; and defending one's own right. [578]

[569] C. Wolff, *Institutiones*, §1090.
[570] C. Wolff*,* *Jus gentium*, §12
[571] C. Wolff, *Jus gentium*, §12.
[572] In his famous book on the fiction of "*als ob*", Vaihinger dedicates a chapter to Wolff, as one of the first philosophers providing a theory of *fictio* (H. Vaihinger, *Die Philosophie des Als-Ob*, Felix Meiner Verlag, Leipzig 1922). On this aspect, see also K. A. Appiah*, As If: Idealization and Ideals*, Harvard University Press, Cambridge MA 2017.
[573] C. Wolff, *Jus Gentium*, §29.
[574] *Ibid.,* §31.
[575] *Ibid.,* §33.
[576] *Ibid.,* §54.
[577] *Ibid.,* §64.
[578] *Ibid.,* §265.



From *civitas maxima*, the following legal regimes arise: the necessary law of nations; the voluntary law of nations; the *ius gentium pactitium;* and finally, the *ius gentium consuetudinarium*. The first kind of *ius gentium* is nothing but natural law applied to states, and therefore it is immutable and perfect.[579] A more imperfect right also derives from the *civitas maxima* as if it was "issued by a fictitious governor".[580] It is the voluntary law of nations, through which "nations, joining their forces, obliged themselves and also commit to finalize (*perficere*); the very same nature has established a certain society among nations, to which by virtue of natural obligation they are due to give their consent, almost as if it was produced by a pact".[581] The two latter kinds of *ius gentium, ius gentium pactitium* and *consuetudinarium* are considered by Wolff to be expressed or tacit pacts among nations. What distinguishes them from the natural and voluntary law of nations is their narrower application. They both only apply to those nations who explicitly gave their consent to them.[582] In other words, their acceptance cannot be presumed, like the *consensus* underlying the *civitas maxima*, but has to be deduced according to a rule of conformity with nature. Once such validity has been deduced,

[579] *Ibid*., §40-42; C. Wolff, *Institutiones*, §1088.
[580] C. Wolff, *Jus gentium*, §22.
[581] C. Wolff, *Institutiones*, §1090.
[582] C. Wolff, *Jus gentium*, §23-4.

their bindingness in not questioned and they have to be respected by those who approved them. Custom is no different from pacts in this respect. Wolff considers them tacit treaties, the validity of which is sometimes more difficult to deduce, as we will see in the next paragraph.

6.3 *Ius gentium consuetudinarium:* between philosophy and history.

As has been pointed out, what is peculiar to Wolff's system is that the same dialectics between *consensus*, *concursus* and *perfectio* apply to all levels of his legal theory. Following the figure above, it could be argued that from *civitas maxima* to customary *ius gentium* we do not have a decrease in the degree of perfection, as even imperfect rights can be turned into perfect ones through pacts. From this perspective, qualitatively, *ius gentium consuetudinarium* has the same value and bindingness as the natural obligations pursued by the *civitas maxima,* since it is supported by the same psychological-empirical structure we have described (namely, compliance with *consensus*, *concursus* and *perfectio*). Rather, the difference is twofold. There is a difference in the scale of application. Whereas the *civitas maxima* ideally extends to all the nations in the world, custom only and more narrowly applies to those nations who consented to it. This results in a difference in the degree of consensus we are allowed to presume, flowing to the maximum degree of the *civitas maxima*, to the minimum of *ius gentium consuetudinarium.* Such consensus is presumed both by counterfactual reasoning (if all the nations could be convinced that *civitas maxima* is the only way to pursue common good, they would agree with us) and by the idea of a "fictional legislator",[583] who has the power to validate and enforce both perfect and imperfect obligations. Most importantly, we owe to the fictional legislator the foundation of the voluntary law of nations, which is not, as Woff thinks happens in Grotius, derived from the "blind impetus" of facts, customs and opinions of the most civilized nations.[584] Rather, Wolff says that it relies on stable and solid principles and on an almost universal consensus, as Grotius seemed to "feel".[585] In other words, what Wolff seems to imply here is that Grotius was only able to intuitively grasp the real meaning of the voluntary law of nations. According to Wolff, he almost equated it with the conventional law of nations based on custom and treaties.

[583] C. Wolff, *Jus gentium*, §21.
[584] C. Wolff, *Jus gentium*, §22.
[585] *Ivi*.

To this picture, Wolff adds a further consideration, derived from his methodological choices as a philosopher and directly impacting on *ius gentium consuetudinarium*. In his *Jus gentium*, Wolff explicitly distinguishes between theory and history of the customary law of nations.[586] Such a distinction recalls Wolff's division of knowledge into *cognitio historica* and *philosophica*. Accordingly, Wolff's purpose is not to retrace the historical validity of *ius gentium consuetudinarium*, but to check whether it agrees or not with nature; and for this only a philosophical, deductive method can be of help. Such a procedure also relies on a fictional argument: custom is equated with pacts, pacts are governed by natural law and ultimately rely on the fiction of *civitas maxima*. Although custom has a more narrow application (only among *gentes* who agree to agree) than obligatory rights stemming from *civitas maxima*, Wolff is still interested in seeing whether they are good or bad customs (i.e. whether they are *consentaneae* with nature). From such a perspective, the role of historiography becomes marginal. It does not add anything to the legitimacy of a custom and its compliance with nature and reason, but it can help retrace the origins of customs. This aspect is particularly important and will be addressed in the final chapter on Vattel.

Some clarification is needed in so far as Wolff's equation of custom with treaties is concerned. This equation is based on the substantial equivalence between the *consensus* expressed via treaties and customs. It was an equation that was already present in Pufendorf's thought and that had the advantage of making the creation of pacts subject to the rules of natural law. What changes significantly here is the framework in which such an analogy is comprehended, and more specifically, Wolff's theory of perfect and imperfect rights. In a chapter of his *Jus naturae* dedicated to the analysis of how it is possible to create obligations with pacts ("*De modo sese obligandi, ubi de promissione et pactis in genere*"), Wolff says that "the mutual, natural obligation to give and do is imperfect", because it depends on the will of the person who gives or does. The problem with such will is that it can be changed, if it does not damage the other people's rights, and therefore it has to be finalized and turned into a perfect right by a pact.[587] Pacts[588] are therefore useful tools of human liberty through which we concur to create perfect rights, and that we are therefore bound to respect. As a result of the stipulation of pacts, the rule "*pacta sunt servanda*" becomes a natural obligation.[589]

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[586] C. Wolff, *Jus gentium*, §23.
[587] C. Wolff, *Jus naturae*, *pars* IV, §354, §374, §377.
[588] C. Wolff, *Jus gentium*, §369.

[589] *Ibid.,* §376.

Consequently, these very same rules apply to *ius gentium consuetudinarium*. For this reason, their violation amounts to *iniuria*,[590] because they qualify as violations of a perfect right produced by our *fides* and in compliance with natural law. Furthermore, custom is based on tacit rather than on expressed consensus. Indeed, "customary *ius gentium* is only valid among those nations, which approve it with a certain tacit consensus, and consequently, as long as it seems appropriate to them, as nations are free, and therefore none of them is dependent on the will of another nation; also, none of them is obliged to approve something which is only produced by custom only to do a favor to others, and consequently if it did not want to respect it any longer, this should be permitted according to its own judgment".[591] However, for Wolff this does not mean that nations are allowed to violate the *tacita fides* behind custom (which would amount to *iniuria*, or, more specifically, fraud[592]). It just means that in principle nobody is bound to agree to a custom because it is not a perfect right – but it becomes one as soon as there is an engagement producing consensus. However, Wolff's reasoning seems to hint at the fact that there is a chance for a nation to not to be bound any longer (*diutius*) by that same custom. This introduces a tension in the whole argument, but at the same time justifies the fact that not everybody is deemed to agree on everything. Additionally, the consensus at the basis of *ius gentium consuetudinarium* also relies on a counterfactual argument, similarly to the presumed one at the foundations of *civitas maxima*.[593] As Wolff claims, tacit consensus is real consent, because it should be considered as if it was expressed.[594] For a more complete treatment of this theory of consent Wolff explicitly refers to his *Philosophia practica universalis*, where he tries to provide some guidelines in order to detect consensus "in the absence of words" and "either from facts or omissions".[595] Here Wolff presents some of these rationally deducible criteria to detect tacit consensus, somewhat ironically, by proving Hegel right in his desecrating analysis of the banality of some of Wolff's deductions.[596] There is tacit consensus when "someone does what he could not do, unless he wished something else to happen".[597] Conversely, there is no consensus if "someone did not do, what he should have done, unless he wanted something else to happen",[598] and so on. These demonstrations do not

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[590] *Ibid.,* §558
[591] *Ibid.,* §1048.
[592] *Ibid.,* §560.
[593] On this, see F. Cheneval, 'Der präsumtiv vernünftige Konsens der Menschen und Völker – Christian Wolffs Theorie der *civitas maxima*', *Archiv für Rechts- und Sozialphilosophie* 85/4 (1999), pp. 563-80.
[594] C. Wolff, *Jus gentium*, §558, 9.
[595] C. Wolff, *Philosophia practica universalis, Pars prior*, §660.
[596] G. W. Hegel, *Lectures on the History of Philosophy*, University of Nebraska Press, Lincoln and London, 1995, p. 348.
[597] C. Wolff, *Philosophia practica universalis, pars prior*, §663.
[598] *Ibid.,* §664.

add much to Wolff's analysis of customary *ius gentium*, which ultimately rests on the three criteria which we have above mentioned.

In order to further substantiate Wolff's theory of custom, notwithstanding its lack of concrete examples from his contemporary state practice for the reasons explained above, let us take a look at his *Jus gentium*, where Wolff provides some examples of his style of reasoning. What he qualifies as *ius gentium consuetudinarium* is quite important in the light of the preceding, mostly Grotian and Pufendorfian tradition. In Wolff's writing we find confirmation or denial of many of the customary norms we have been discussing until now. To begin with, Wolff specifies that one must be careful not to confuse the truth with "the common opinion of nations". Indeed, Wolff acknowledges only those customs which are compliant with the "natural theory of civil laws", while rejecting those customary norms disguised as natural laws.[599]

Most notably, although unsurprisingly at this point of our analysis, the international customs acknowledged by Wolff are the laws of embassy, the right of passage, and the rights concerning the declaration of war. Starting with the first, almost "classical" one, Wolff claims that the laws of embassies almost entirely consist of *ius gentium pactitium* and *consuetudinarium*, and show representativeness and extraterritoriality as fundamental features, which are unknown in the natural and voluntary law of nations.[600] However, Wolff's purpose is not that of retracing the origins of such customs in European history, but only to assess their normativity. Accordingly, the rationale behind such custom is that the *civitas maxima* requires that the mutual offices of nations are guaranteed by permanent embassies.

As for the right of passage, Wolff agrees with Pufendorf that it amounts to an international custom.[601]According to Wolff, this is evident from the very same definition of custom, which is what nations "mutually" and "uninterruptedly" do to each other. These two characteristics of custom apply with particular cogency to the rights of passage, which is *par excellence* the right through which neighboring nations regulate passage in their respective territories. From this theoretical perspective, Wolff is uninterested in providing general rules concerning such rights, as Pufendorf attempted to offer. Rather, Wolff simply seems to suggest searching in historical treatises for a detailed analysis of them in a regional context.

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[599] C. Wolff, *Jus gentium*, §572
[600] *Ibid.,* §1066.
[601] *Ibid.,* §557.

Lastly, there is the international custom concerning the ability to declare war. There is no doubt, Wolff claims, that nations would all agree that the declaration of war is a customary norm they all apply for such time during which (*quamdiu*) no one contradicts the existence of such right.[602] Again Wolff seems to hint at the existence of a complicated relationship between time and custom. There might be a moment in time in which a nation decides to opt out from a customary norm. If that is the case, it is not clear whether the custom ceases to be binding on all nations, or rather, in the fashion of a "persistent objector doctrine", just the nation that explicitly objects to it. This point is particularly problematic, but it seems to convey the idea that *ius gentium consuetudinarium* is not only spatially but also temporally limited. It is also not clear how this temporal element can be reconciled with the obligation to respect pacts. There is, in other words, an unresolved conflict among the a-temporal dimension of fictional consensus and the temporal dimension of the development of custom – a tension that perhaps only Vattel's historical analysis of the customary law of nations will reconcile, by distinguishing the moment of formation, from the identification of custom.

[602] *Ibid.,* §707.

Chapter 7. International law is a winning game: Vattel's customary law of nations between principles and state practice

> "When there is no-one left who fancies that he understands war, perhaps it will no longer be waged. If all the Courts in Europe had busied themselves with puppets, should we today see those cruel dissensions which devastate our lands? Oh, sweet Frivolity! Win over a few more heads and soon we shall be making fun of the great interest of nations, which cause so much blood to be shed. Princes will play for their claims at dice, just as the courtiers already stake their inheritance at it. If I did not fear making myself look serious, I would put forward this means of securing perpetual peace to all Europe. It would certainly be more practical than the fantasies of the Abbé de St. Pierre."
>
> (E. Vattel, *Eloge de la frivolité*, in *Mélanges de literature, de morale et politique*, 1760)

In two of his minor essays, the famous jurist Emer de Vattel (1714-1767), suggests that introducing some frivolity into the life of states (for example, through games, as he argues in his *Essai sur l'utilité du jeu*[603]), would be a better antidote to wars than the boring seriousness of the project of the Abbé Saint Pierre. To the contemporary reader, this is a surprising claim, since it comes from a writer considered to be the father of "positive international law" by centuries of scholarship. A student in Geneva of Jean-Jacques Burlamaqui, and a representative figure of the so-called school Swiss School of Natural Law together with Jean Barbeyrac, Vattel was one of the most influential jurists of the 18th century, whose scholarship deeply influenced the formation of 19th century positive international law.[604] A citizen of the Swiss Principality of Neuchâtel, which was under the Prussian dominium, Vattel worked as a diplomat for the Elector of Saxony. With the outbreak of the Seven Years War, triggered by Frederick II of Prussia's

[603] E. de Vattel, *Le Loisir Philosophique, ou Pieces Diverses de Philosophie, de Morale et d'Amusement*, 1747.
[604] E. Fiocchi Malaspina, *L'eterno ritorno del Droit des Gens di Emer de Vattel (secc. XVIII-XIX): L'impatto sulla cultura giuridica in prospettiva globale*, Max Planck Institute for European Legal History, Frankfurt 2017; V. Chetail & P. Haggenmacher (Eds.), *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu du XXIe Siècle*, Brill, Leiden 2011; C. Good, *Emer de Vattel (1714-1767) – naturrechtliche Ansätze einer Menschenrechtsidee und des humanitären Völkerrechts im Zeitalter der Aufklärung*, Nomos Verlag, Berlin 2011. I refer to these books for further references concerning Vattel's fortunes as a "father" of international law.

invasion of Saxony, his position as a Prussian citizen serving the Elector of Saxony became particularly controversial.[605]

Notwithstanding (if not by virtue of) these biographical characteristics, Vattel witnessed an incredibly vivid moment of international life, and the success of his *Droit des Gens* (1758) is mainly due to his capacity to integrate the analysis of natural law with practical considerations concerning the life and interest of states after a timid attempt made by Pufendorf.

One could then question his interest in vindicating the utility of frivolity and of games. Vattel's interest retraces that of Barbeyrac, who some years before published a *Traité du jeu*, where he claimed that games were a serious activity in which all parties were free, equal and loyal to each other.[606] Participants are called to pursue their own interest (victory) by complying to rules of fair play. Indeed, it is in their interest to comply with such rules. Additionally, like contracts, games are void whenever their object is illicit.

The metaphor of the game (more specifically, a cooperative game) accurately describes the structure of Vattel's law of nations. This is perhaps why Vattel conceives of it as a better solution to the problems of his contemporary politics than projects that sought universal peace.[607] More specifically, Vattel conceives of the law of nations as governed by the states' self-interests, which are better pursued through compliance with natural law principles. In other words, by making this anti-Hobbesian claim, Vattel seeks to construct a law of nations where publicity and fairness are fundamental values that allow nations to behave as if they were in a state of natural liberty: free, equal and loyal. If they would understand that their own interests are better pursued by following their own nature, they would comply with the rules of the game. For this reason, Vattel thinks of his *Droit des Gens* as a *vademecum* for politicians.

From this perspective, custom plays a fundamental role. For Vattel customary law of nations is an important source of obligation for states. My claim is that he accurately depicts a general theory of customary law of nations by implicitly distinguishing different aspects of the customary phenomenon, most notably the process leading to its formation from its subsequent identification by the jurist.

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[605] T. Toyoda, *Theory and Politics of the Law of Nations*, p. 164 ff.

[606] The importance of these treaties on games is mentioned by A. Sæther as an important factor in the development of political economy, see the already mentioned A. Sæther, *Natural Law and the Origin of Political Economy,* p. 174.

[607] Although, of course, he is not explicit about this. However, I think that the game metaphor might be useful as a mere example. The example does not seek to provide an anachronistic interpretation of Vattel as a founder of game theory as applied to international law.

Vattel envisages two scenarios concerning the formation of international customs. Either custom is coincident with (although distinguished from) natural law principles, or it has a normatively indifferent content. The way in which a custom emerged also reflects the identification process the jurist must engage in to detect it. In the first case, Vattel manages to prove coincidence with natural law principles with the help of historical examples by showing that at a given moment in time, a given custom has crystalized into a generally accepted norm. In this respect, the identification of custom will retrace the steps of its formation. The modern history of European states provides the jurist with a valid aid to trace the birth, modification and eventual crystallization of a given custom through time. Even violations are useful markers of this process. However, such crystallization calls into question the issue of change: can an established custom, which crystallized into a perfect coincidence of natural law principles and state practice, ever change?

In the second case, custom is indifferent as to its normative content. Therefore, Vattel suggests that in such situations we have to consider how much value and importance sovereigns attribute to that custom. Again, as far as the process of identification is involved, historical analysis offers a valid instrument. It allows us to detect the existence of an *opinio* witnessing that, although a custom might be indifferent as to its relationship with natural law, it might not be indifferent to the life of states, which voluntarily decided to respect it. In a quite modern way, Vattel argues that states should facilitate the identification of such *opinio* by expressly stating whether they wish to comply or opt-out from a customary rule. This aspect is particularly important because custom stops being considered a "mute" legal source of obligation. Despite still being based on tacit consensus, the publicity of a customary law of nations allows states to facilitate cooperation by being clearer and explicit about what kind of 'rules of the game' they want to be bound by. Additionally, Vattel considers the *opinio* of states as so important that it allows us to treat those customs that they really possessed as all the value that is conceded to them.

In order to prove this, I will divide the analysis into three sections. Firstly, I will address the question of the relationship between Vattel and Wolff, to whose doctrine Vattel explicitly refers to, by noting both continuity and rupture within Vattel's reception of Wolff. Secondly, I will take into account the distinction made by Vattel between natural law of nations, voluntary law of nations and conventional law of nations. Custom belongs to this latter legal regime, although it is closely related to natural law as I have already implied. Finally, I will provide a

sketch of Vattel's concept of customary law of nations, by describing its general rules and providing examples of different cases and circumstances to which they apply.

7.1 Application of natural law, *perfectio* and *civitas maxima*: Vattel vs. Wolff

At the beginning of Book II of his *Droit des gens*, Vattel expresses his fear that "the following maxims will appear very strange to cabinet politicians: and such is the misfortune of mankind, that, to many of those refined conductors of nations, the doctrine of this chapter will be a subject of ridicule. Be it so! – but we will nevertheless boldly lay down what the law of nature prescribes to nations. Shall we be intimidated by ridicule, when we speak after Cicero? […] The punctual observance of the law of nature he considered as the most salutary policy to the state".[608] Vattel's concerns might appear ironic to the contemporary reader, considering the immediate success of his book as the standard source for the positive law of nations. However, this passage gives us a more complex picture than that of 'Vattel the positive lawyer' by hinting at the normative character of his theoretical enterprise.

As a matter of fact, scholars have insisted on the fundamental role played by Vattel in the emergence[609] of international law as we know of it today. However, Vattel's reflections on the nature and scope of the law of nations have been subject to many contrasting interpretations. I will only note some of the most important here, which are relevant to an understanding of Vattel's context and his conceptualization of custom. To begin with, the relationship between Wolff and Vattel needs to be addressed. Vattel avowedly engages in a vulgarization of Wolff's doctrine, but with some significant differences. The most relevant of them concerns the question of the *application* of the law of nature to states. This issue was, in the words of Vattel, an original contribution of Wolff. Whereas Roman jurists wrongfully confused *ius gentium* with *ius naturae*,[610] and Grotius was too preoccupied with showing the differences between them in the erudite sources,[611] Vattel claims we owe to Hobbes and Pufendorf the idea (although still

[608] Hereafter I will refer to the English edition of Vattel's *Droit des Gens* (1758): E. de Vattel, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Liberty Fund, Indianapolis 2008.
[609] E. Jouannet, *Emer de Vattel et l'émergence doctrinal du droit international classique*, Pedone, Paris, 1998.
[610] According to R. Domingo, Vattel's misunderstanding of the Roman legal tradition resulted in a misinterpretation of the tripartition of *res*, *personae*, and *actiones*, originating the statist paradigm that still survives in contemporary positive international law. R. Domingo, 'Gaius, Vattel, and the New Global Law Paradigm', *European Journal of International Law*, 22/3 (2011), pp. 627-47.
[611] E. de Vattel, *Preface*, *The Law of Nations*, pp. 7-8.

incomplete) that the laws of nature and of nations deserve different spheres of application, depending on the nature of the subjects they refer to. However, as has already been pointed out, they founded this early and incomplete division on a substantial analogy between the individual and states based on their qualification as moral *personae*, which puts the original intuition of the distinction to a dead end (and merges the law of nations into the body of natural law).[612]

Indeed, according to Vattel, Wolff has the merit of having realized that "the law of nature could not, with such modifications as the nature of the subjects required, and with sufficient precision, clearness, and solidity, be applied to incorporated nations or states, without the assistance of those general principles and leading ideas by which the application is to be directed".[613] But what exactly are "those general principles" that should guide the application of natural law to the conduct of states? Vattel excludes the existence of a *civitas maxima* both as a political and conceptual framework through which such law can be applied. Wolff's *civitas maxima* was a quasi-political community of nations aiming to perfect each other. Quite on the contrary, for Vattel the fact that natural law principles have to be applied to states does not mean that it is necessary to coerce them into a political community, since by their natural liberty they are already gathered together to live in a natural society.[614] Furthermore, Vattel's argument is that natural law is based on the rules of human nature, not on the peculiar essence of nations. That is why Vattel insists on the essence of the nature of states, *sovereignty*, and conceives of the application of natural law to them accordingly. In the words of Beaulac, in order to achieve this goal, Vattel operated an "externalization of sovereignty". With the idea of sovereignty his "*Droit des Gens* attempted the externalization of power, which was transposed from the internal plane to the international plane. Accordingly, his utilization of sovereignty creates a new reality, that of the exclusivity of authority without".[615] Sovereignty then, has a pivotal role and Vattel adds to Wolff's architecture a chapter on the duties of nations towards each other.

However, several problems arise. What is Vattel's concept of reason? Is it a secularized or transcendental concept, at the basis of a universalist conception of justice? With Wolff we

[612] *Ibid.,* pp. 8-9.
[613] *Ibid.,* p. 10. According to Hunter, there are two senses in which the word "application" as used by Vattel in this context has been interpreted by scholars. The first is that employed by Jouannet, who implies that application refers to the "practical" application of principles to practice. This interpretation relies on the view that there is a presumption of general acceptance justifying such application (I. Hunter, Law, 'War and Casuistry in Vattel's *Jus Gentium*', *Parergon*, 28/2 (2011), p. 92, quoting E. Jouannet, *Emer de Vattel et l'émergence doctrinale*, p. 403-417).
[614] E. de Vattel, *Preface*, *The Law of Nations*, p. 14.
[615] S. Beaulac, 'Emer de Vattel and The Externalization of Sovereignty', *Journal of the History of International Law* 5 (2003), p. 247.

have seen how natural law was dependent on a transcendent argument based on the three concepts of *consensus*, *perfectio* and *concursus*. This architecture of thought allowed Wolff to presume that even imperfect rights were aimed at achieving *perfectio*, because of the doctrine of *concursus* and because of the "existence" of a fictional legislator governing the *civitas maxima*. On the other hand, whereas for Wolff innate obligations were always perfect, because of his perfectionist anthropology, Vattel questions this claim. As a matter of fact, Vattel replaces Wolffian *perfectio* (the purpose of human reason as the foundation of obligation) with self-interest. The coercive power of natural law resides in the basic motive behind our actions, creating a situation where motives and actions coincide (which is a requirement for the fulfilment of an obligation): "each individual has as a general and overriding motive his own self-interest, and this motive creates the obligation to which he is liable".[616] This is the foundation of natural law but does not give us an answer and an appropriate reason to compel. It is not a will of the superior, rather "it is surely sufficient to respond that when we say that self-interest provides the foundation or the principle of obligation, we are speaking of a noble and agreed expediency, which is located mainly in the observance and practice of virtue – because this observance and practice bring us closer to perfection" and "reconciles us with the good will of the Creator".[617] Furthermore, "those who perform good actions not through a motive of hope or fear in respect of a superior but following the inclination of their hearts, do not act with justice. On the contrary, those who act most justly are those who imitate in some way the justice of God".[618] This imitation produces, according to Vattel, pleasure in our action itself (which is the essence of true love).[619]

As emerges from these passages, Vattel capsizes Wolff's argument and claim that it is self-love (or expediency, but of a noble kind and not to be confused with individual interests) that allows us to achieve perfection. This fundamental change of perspective, relying on an anti-Hobbesian interpretation of self-interest, also results in a radical modification of our interpersonal relations (and of the obligations that we owe to each other). Since it is our duty to achieve perfection, but this is not the motive behind our action, we must then subject our search for perfection to our own judgment, and so shall other people do the same. Self-interest allows Vattel to introduce a non-judgmental criterion in order to deal with other nations. It is in the sovereigns' interest to pursue their own good and to live in a society (because it is natural), and

[616] E. de Vattel, *Essay on the Foundation of Natural Law and on the First Principle of the Obligation Men find Themselves Under to Observe Laws*, in *The Law of Nations*, p. 754.
[617] *Ibid.,* p. 762.
[618] *Ibid.,* p. 771.
[619] *Ivi*.

they have to let other nations do the same without intruding on their choices. In this respect, it is easy to see Vattel's distance from the paternalism of Wolffian *concursus*. If we apply this reasoning to sovereigns, the result would be consistent with Vattel's rejection of *civitas maxima*. The interest of a nation is to pursue its own good in a society to which it naturally belongs, with no need to create an artificial one. Additionally, no nation can intrude into the internal sphere of judgment of the other because it is precisely their self-interest that leads them to national and international perfection. If we recall Pufendorf's example of the candle, we could say that for Wolff not only we have the duty to provide light to other people with our own candle, but that we should help them light their own candle. For Vattel, again paraphrasing the same example, the fact that we light a candle for ourselves is actually what makes us closer to perfection, because we act according to self-interest but also to the rules of natural society (it is natural to search for the light). However, we cannot help other people light their own candle because it is ultimately their own choice to decide whether they want the light or not.

We can provide two more concrete examples of this crucial argument, both quoted by Wolff and Vattel. The first concerns the problem of how to reconcile duties towards ourselves with duties towards other people. In his *Questions de droit naturel*, a commentary of selected passaged of Wolff's *Jus Naturae*, Vattel tackles this issue by rejecting Wolff's permissive argument regarding the legality of the use of poisoned arms during war. Vattel says that in situations of conflicting obligations, one has to reconcile internal with external duties by choosing "*le plus grand bien, ou le moindre mal; mais en considérant la chose dans toute son étendue, avec toutes les liaisons et toutes ses consequences et dépendances. Car la decision ne doit pas se fonder seulement sur le cas present, considéré en lui même et indépendamment de ses consequences dans le monde*".[620] It is precisely by overlooking these consequences that Wolff concedes to the use of poisoned arms during conflict.[621] However Vattel suggests, against Wolff, that if one thinks of the issue abstractly he is led to think that it might be lawful to poison enemies. However, if one thinks of the consequences of such action, "*il faut considerer, que si un parti se sert d'armes empoisonnées, l'autre ne manquera pas de s'en server aussi, et que si une fois l'usage s'en établissoit, la guerre deviendroit atroce*", because this bad custom would give someone who is being unjustly attacked no possibility for defense, "*parece qu'il seroit incessamment imité par son ennemi*".[622] This argument from Vattel reproduces a similar one

[620] E. de Vattel, *Questions de Droit Naturel et Observation sur le Traité du Droit de la Nature de M. le Baron de Wolf*, 1762, p. 212.
[621] *Ibid.,* p. 213.
[622] *Ivi*.

put forward by Pufendorf, according to whose prudential reasoning it was highly recommended to respect some basic rules of moderation during war precisely in order not to escalate violence through reciprocal imitation (and to enhance one's own glory and interest).

The second example concerns the liberty of commerce, which was for Wolff limited to a general liberty of each nation to enhance its own commerce. This liberty was a perfect right originated by an innate obligation. On the contrary, foreign commerce was an imperfect right which had to be finalized by the signing of a treaty. As a result of his different theoretical assumptions, Vattel once again capsizes Wolff's reasoning. Nations not only have an obligation to carry on domestic, but also foreign trade as a consequence of the nation's self-interest rather than its search for *perfectio*. *Perfectio* would only lead a nation to pursue domestic commerce. Only self-interest can reveal the shortsightedness of this argument, because by promoting foreign commerce a nation actually enhances her own power and resources more than by just promoting domestic trade.

These examples allow us to draw a general conclusion. As a consequence of the application of natural law to sovereigns and of the changes to Wolff's structure, Vattel's understanding of law as a perfecting device is less 'totalizing' than that of Wolff, but nonetheless he maintains in his legal doctrine a tendency towards a higher degree of perfection, which cannot always be realized by the actual course of events but that nonetheless provides natural law with a solid principle, as I will show in the next paragraph. However, an inconsistency in Vattel's interpretation of Wolff seems to emerge. He first grants his predecessor the merit of having understood that individuals and sovereigns are in fact different entities, but in so doing he seems to fail to recognize the profoundly psychological foundations of the Wolffian law of nations. However, such inconsistency can be explained with the fact that according to Vattel, nature prescribes to sovereigns no duty to gather in the *civitas maxima*, but rather just a general obligation of living in a natural society with basic obligations. This will be discussed in the next section.

7.1.2 Distinguished, yet not treated separately: natural law of nations and positive law of nations

Having made these clarifications, let us now move to the analysis of the impact of Vattel's reading of Wolff on his doctrine of the law of nations, which Vattel distinguishes into natural (or necessary) law of nations, voluntary law of nations and conventional law of nations

(i.e. treaties and customs). In order to understand the place and importance of customary law of nations within Vattel's doctrine, it is important to highlight the main characteristics of it as a whole. Vattel claims that the "*droit des gens naturel*" is necessary, immutable and consists in the application of natural law principles to the conduct of states.[623] As we have said, according to Vattel the application of natural law to nations is mediated by the concept of sovereignty, and therefore produces two important effects. On the one hand, natural law principles provide the foundations for the natural society of men, which is "a necessary consequence of the nature of man".[624] Additionally, they act as a criterion to judge the rightness of conventional law of nations (treaties and customs, as he says, are unjust if they are against natural law[625]), as I will point out. However, as we have highlighted, the natural society of men is not exactly the same as the society of nations. Its general, fundamental rules seek to promote general perfection and to preserve each nation's independency, equality and freedom of judgment.

The question of how Vattel seeks to reconcile these two fundamental obligations is one of the most controversial aspects of his thought.[626] The particular co-existence of these two elements, the independence of sovereign judgment and the desire for justice generates, according to Hunter, a "double law".[627] On the one hand this double law consists in the natural law of nations binding in the conscience of states; on the other it consists in a voluntary law of nations the rules of which are deduced by natural law: "since nations are free, independent, and equal, - and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfil her duties,- the effect of the whole is, to produce, *at least externally and in the eyes of mankind*, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that whatever may be done by any one nation, may be done by any other; and they ought, in human society, to be considered as possessing equal rights".[628] However, as we have described, Vattel conceives of the foundation of such a voluntary law of nations in opposition to that of Wolff (namely, based on a principle of self-interest rather than on mere *perfectio*). In other words, as argued by Zurbuchen, "what nations may do by internal right is stated in the

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[623] E. de Vattel, *The Law of Nations*, p. 70.
[624] *Ibid.,* p. 72.
[625] *Ibid.,* p. 70.
[626] For example, Remec's positivist interpretation of the law of nations in P. P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, Martinus Nijhoff, The Hague 1960.
[627] I. Hunter, 'Law, War and Casuistry', p. 92.
[628] E. de Vattel, *The Law of Nations*, p. 75. [my emphasis]

necessary law of nations; the voluntary law regulates the domain of external right. Whereas the necessary law corresponds to the 'immutable laws of justice', the voluntary law indicates what needs to be tolerated 'through necessity'."[629] Indeed what is relevant here is that both the natural and voluntary law of nations are derived by Vattel from nature.[630] Perhaps for this reason, Vattel's account of the voluntary law of nations is particularly confusing.

One possible interpretative key suggested by Zurbuchen is to distinguish between internal and external obligations and internal and external rights. Whereas the former refer to the natural law of nations, the latter distinguish the natural from the voluntary law of nations.[631] Internal obligations are always the same (although they vary in degree), whereas external obligations can be perfect or imperfect: "our obligation is always imperfect with respect to other people, while we possess the liberty of judging how we are to act".[632] This passage is quite significant as it shows that an obligation is imperfect whenever the judgment of another party is involved. Nevertheless, nations retain liberty to act, and each of their actions is the result of a specific act of judgment binding in conscience. As a consequence, while their violation can *always* be condemned as unlawful in the internal realm of conscience, this does not always happen in the external realm. However, as rightly pointed out by Silvestrini, the fact that natural law is *always* binding in conscience does not mean that it is *only* binding in conscience.[633]

Vice versa, according to Zurbuchen external and internal rights qualify what we must by necessity tolerate by virtue of the voluntary law of nations. A voluntary law of nations might be conceived of as the external effect of the natural law of nations. As each nation maintains that she has justice on her side and no one can contradict her judgment, "the party who is in the wrong is guilty of a crime against her own conscience: but as there exists a possibility that she may perhaps have justice on her side, we cannot accuse her of violating the laws of society. It is therefore necessary, on many occasions, that nations should suffer certain things to be done, though in their own nature unjust and condemnable; because they cannot oppose them by open force, without violating the liberty of some particular state, and destroying the foundations of

[629] S. Zurbuchen, 'Emer de Vattel on the Society of Nations and the Political System of Europe', in *System, Order and International Law*, p. 268.
[630] *Ivi*.
[631] *Ibid.,* p. 271.
[632] E. de Vattel, *The Law of Nations*, p. 75.
[633] G. Silvestrini, 'Justice, War and Inequality. The Unjust Aggressor and the Enemy of the Human Race in Vattel's Theory of the Law of Nations', *Grotiana* 31 (2010), p. 53.

their natural society. And since they are bound to cultivate that society, it is of course presumed that all nations have consented to the principle we have just established".[634]

However, Vattel further claims that there might be cases in which a nation has a right to react to violations of such presumed consensus at the basis of voluntary law of nations (as an external effect of the 'necessary law of nations'): "now all men and all states have a perfect right, to those things that are necessary for their preservation, since that right corresponds to an indispensable obligation. All nations have therefore a right to resort to forcible means for the purpose of repressing any one particular nation who openly violates the laws of the society which nature has established between them".[635] However, Vattel specifies that such a right must be limited, in order to prevent its abuse. Indeed, Vattel claims that each nation aims to achieve a double perfection, one that originates from nature and another from will. However, differently from individuals organized into a political society, nations have duties of humanity towards each other, "reciprocally to cultivate human society, [nations] are bound to observe towards each other all the duties which the safety and advantage of that society require".[636] The duty to contribute to the perfection of other nations is not "by force", as we have already pointed out: "but though a nation be obliged to promote, as far as lies in its power the perfection of others, it is not entitled forcibly to obtrude these good offices on them,"[637] and the nation who receives them is entitled to judge whether they are really necessary or not. However, differently from the duties of humanity, which are dependent on the consensus of other nations, each nation has a duty to respect the justice of the natural law of nations. Namely, the liberty and independence of other nations. According to Zurbuchen, it is possible to draw a parallel between the natural law of nations and the duties of justice on the one hand, and between the voluntary of nations and the offices of humanity on the other. Through this distinction, she claims, it is possible to understand Vattel's complex legal reasoning.[638]

This crucial point of Vattel's doctrine has been the object of many diverse interpretations, from the responsibility to perfect[639] to the duty not to interfere in the affairs of another nation.[640] What are the boundaries between the duty of a nation towards herself and

[634] E. de Vattel, *The Law of Nations*, p. 76.
[635] *Ibid.,* p. 77.
[636] *Ibid.,* p. 261.
[637] *Ibid.,* p. 265.
[638] S. Zurbuchen, 'Emer de Vattel on the Society of Nations', p. 271.
[639] L. Glanville, 'Responsibility to Perfect: Vattel's Conception of Duties Beyond Borders', *International Studies Quarterly* 61 (2017), pp. 385-395.
[640] S. Zurbuchen, 'Vattel's Law of Nations and the Principle of Non Intervention', *Grotiana* 31 (2010), pp. 69-84.

towards other nations? Whereas, according to Zurbuchen, Vattel sets a very high threshold for intervention, Rech has claimed that diminishing that threshold is the only way Vattel can collectively enforce the law of nations, and in this way Vattel actually introduced oppression and despotism in what he thought would be free, egalitarian community of states.[641]

However, it is important to bear in mind that Vattel's theory of enforcement by intervention is only justified in the presence of 'presumed consensus'. The fact that it is presumed invites us to adopt extreme caution, as it is better to leave a violation of natural liberty unpunished than to violate sovereign independence and freedom.[642]

Ultimately, what all these problems call into question is the (unresolved Wolffian) relationship between natural law and *perfectio*. How should we conceive of an international society based on the dichotomy between sovereign independence and the need to achieve *perfectio*? This question is addressed by Vattel in his *Dissertation on this question: Can Natural Law Bring Society to Perfection Without the Assistance of Political Laws?*[643] Vattel says that "if men were as they ought to be", natural law itself would be sufficient to bring society to perfection.[644] To prove this point, he provides an interesting thought experiment:

> Let us imagine one thousand people of both sexes, chosen from the most rational and virtuous in Europe, and that together they form a kind of small republic. Who can doubt that this society would not be better regulated by natural law alone, than has been any other state with the support of political laws? These one thousand people will be enlightened enough to get to know natural law, and to be convinced that their best interest requires that they conform to it exactly. As a result, their society will be as perfect a human society as any such can. They will have a body of law, just, wise, and complete, which is known to all the members and accompanied by sufficient incentives to shape their will. Without the need for subordination to the authority of a government, they will acknowledge themselves under the obligation of this law that they derive from nature to provide for the common good. They will focus their talents and labor on this goal; everyone will compete[645] to preserve order and peace. If differences arise, they will choose arbitrators to resolve them. And if it should happen that one individual, possessed by the force of a violent passion, departs from his duty, then the others, whose reason would not be obscured by the same clouds, would they not readily and with one will restrain him without provoking the least

[641] W. Rech, *Enemies of Mankind: Vattel's Theory of Collective Security*, Brill, Leiden 2013, p. 122.

[642] For a pluralistic and anti-hegemonic reading of sovereign intervention, as conceived by Vattel's doctrine of regular war, see P. Kalmanovitz, 'Sovereignty, Pluralism, and Regular War: Wolff and Vattel's Enlightenment Critique of Just War,' *Political Theory* 45 (2017), pp. 1-24.

[643] A translation of this essay can be found in E. de Vattel, *The Law of Nations*, pp. 773-781.

[644] *Ibid.,* p. 776.

[645] E. de Vattel, *Dissertation*, in *The Law of Nations*, p. 777; "Ils dirigeront à ce but, leurs talens, leurs travaux: tous concoureront à maintenir l'ordre et la paix". In the French text, Vattel here uses the verb *concourir*, as a clear reference to Wolff. The original French edition is in E. de Vattel, *Le loisir philosophique ou pieces diverses de philosophie, de morale et d'amusement* (1747)

social dislocation? Some might vainly object that regulations would be required for trade, for example, or for crucial periods of war and epidemic disease, and a sovereign authority to ensure that they are observed. But reason will promote wise measures in these instances to the people as we have imagined them, and natural law will oblige them to preserve those rules devotedly, as they will tend to social benefit. XIV But men are very different from what they ought to be and from these one thousand people of whom we have just spoken.[646]

People do not always know the real content of natural law and are not that well informed of the fact that their interests are better pursued by compliance with natural law. Thus, according to Vattel, the answer to this problem is to "extend the knowledge of natural law by making its application easy, and as a result reducing it to clearly publicized general rules" and to establish "public authority, and adding a positive obligation to natural obligation, through the means of punishment".[647] This passage recalls that in which Vattel says that we ought "to produce, *at least externally and in the eyes of mankind* [my emphasis], a perfect equality of rights between nations". Publicity is what helps us achieve this goal. Therefore, Vattel says, "in the current condition of the human race, natural law cannot bring society to perfection without the assistance of political laws".[648] From this statement Vattel seems to imply that, whereas the possibility of an international legal order governed by a self-legislating natural law sounds unfeasible in his peculiar historical moment, this does not prevent us from actually knowing that we are in principle capable of that. To understand this, we must engage in a fictional reasoning, namely to think of human beings *as* they really are in their natural liberty, and to promote the signing of agreements among nations to secure their reciprocal rights.

On the other hand, besides the voluntary law of nations (introduced and presumed according to the dictates of natural liberty) Vattel introduces another kind of law of nations, the conventional one to which treaties and custom belong. Interestingly, for Vattel custom plays a fundamental connecting role between the voluntary law of nations (as the rules deduced from natural law indicating what we can tolerate) and treaties (as proactive means to secure the interests of states and the scope of what they can demand from others).

Whereas treaties rely on an express consensus, custom is based on tacit consensus. However, differently from all his predecessors, Vattel conceives of tacit consensus in an innovative way. The fact that it is tacit refers to its formation, but not to its identification. In

[646] *Ivi*.
[647] *Ibid.,* p. 779.
[648] *Ivi*.

other words, nations are invited to publicly express through political statements whether they wish to be bound or not by a given custom, and to turn them into treaties (see above: according to publicity and promotion). Additionally, Vattel says he will only lay down some "general rules" that nations are bound to respect with regard to conventions (treaties and customs),[649] as I will show in the next section.

To conclude with, Vattel adds that the voluntary law of nations and conventional law of nations, taken together, can be called positive law of nations. This law must be distinguished, but not treated separately from natural law. The two sometimes overlap, whereas other times they do not. However, it is impossible to confuse them with natural law, which has to remain the guiding principle. In so doing, Vattel hints at the normative character of his law of nations. However, the following question arises: how is it then possible to judge the rightness of a conventional law (a treaty or a custom) if no nation can judge the other? It is precisely the content of natural law (the general rules promoting perfection and yet respecting sovereign independence of judgment) that provides us with a valid criterion in order to understand whether customary rules are compliant with natural law. Additionally, Vattel solves this problem by conceding fundamental importance to public statements: through them, nations 'activate' their rights. This is particularly evident in customs of war, especially those concerning declarations of war.[650] Vattel's customary law of nations consists precisely in a series of unilateral acts producing effects on others, by stating, refusing or applying certain rules without necessarily demanding their respect from others but only stating each nation's position on the issue, if such rights are imperfect rights. This guarantees them freedom and independence, and with power to constrain only if such rules are the object of a perfect right. The fact that each nation expresses publicly her position on a given issue secures her from being attacked. *Vice versa*, as we will see, there are customs originating from perfect rights which are perfectly binding on the parties involved unless they opt out in time.

7.1.1 Vattel's method: an enlightened history of state practice

Finally, the question of his method has to be addressed. As we read from the *Preface* to his *Droit des Gens*, Vattel's intent is clearly anti-philosophical insofar as he wishes to make

[649] E. de Vattel, *The Law of Nations*, p. 77.
[650] G. Silvestrini, 'Justice, War and Inequality', p. 59.

Wolff's doctrine more understandable to the greater public. However, he clearly also intends to add his own perspective to his treatise, as he underlines by taking distance from Wolff on a series of fundamental issues, as we have discussed. From this perspective, Vattel also introduces significant differences in terms of the methods and sources he uses to prove his points, in this aspect being closer to Pufendorf than to Wolff. In other words, Vattel seems preoccupied with explaining his legal argument with facts and *vice versa*. In this respect, scholarship has oscillated between two main positions. Both of them are a result of the interpretation of Vattel's concept of justice. On the one hand, scholars claim that there is a clearly recognizable concept of justice in Vattel that allows him to make general claims about universal rules applicable to different contexts. On the other hand, the absence of a coherent criterion of justice for the law of nations results in Vattel's adoption of a casuistic method, where he rather seeks to reconcile general rules with considerations of political expediency.[651]

As for the casuistic method, the expression is perhaps unfortunate since it evokes some sinister Jesuit method as well anticipating Kant's concerns about mental reservations in his *Perpetual Peace*, but it is worth recalling the stakes attached to Hunter's argument. Hunter reflects on the question of the application of the law of nature to the conduct of states: "Vattel conceives application in terms of the operation of what he calls a double law. He acknowledges that there is indeed a conception of the law of nations as arising directly from the application of the natural law principle of reciprocal self-perfection to nations, issuing in a 'natural and necessary law of nations'." However, Vattel introduces a second principle concerning the voluntary law of nations: "each nation's self-interested calculations regarding its own safety and welfare, hence on voluntary and prudential agreements rather than a morally necessary one".[652] This is based on a natural law principle of necessity, that one has to pursue common good until it does not harm one's own safety and self-interest. Consequently, there is no international justice because no nation is entitled to judge the others. "The discursive art of judgment that takes central stage in the *Droit des gens* may thus properly be characterized as casuistic, in the non-pejorative historical sense of a discourse that mediates between conflicting principles, and that adjusts principles to cases and circumstances",[653] by negotiating between "the metaphysical principle of natural law to cases drawn from diplomatic history, treaty practice and public law".[654] This aspect is, once again, particularly evident in Vattel's treatment

[651] I. Hunter, 'Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation', *Grotiana* 31 (2010), pp. 108-9.
[652] I. Hunter, 'Vattel's Law of Nations', p. 123.
[653] *Ibid*., p. 125.
[654] *Ivi*.

of the laws of war, which "exemplify a casuistry designed to set the limits within which sovereign powers can adjust the principle of right to their own interests".[655]

Against Hunter, it has been argued by Glanville that Vattel's casuistic method is not a case-by-case approach aimed at making sense of confused state practice, but rather aimed at extracting principles of justice.[656] In such an attempt, the method adopted by Vattel would be a reconciliation of Wolff's principles with Pufendorf's pragmatic approach. In this respect, Oeter rightly argues that if Vattel's doctrines did not stand out in terms of originality, their merits have to be found somewhere else: "he [Vattel] merged in a very fruitful way natural law doctrine, as he took it from the seminal writings of Christian Wolff, with the empirical material of contemporary diplomatic practice – and thus created (for the first time ever) a systematic linkage between natural law doctrine, which hitherto had been a current of philosophical thinking, to political practice, as expressed in diplomatic experiences".[657]

Although the question of Vattel's method is particularly problematic, as these many interpretations suggest, and the debate is far from being solved in a definitive way, I think that it provides us with some useful insights in order to address the question of custom in Vattel. As we have seen, it is difficult to imagine a completely positive Vattelian law of nations, and we have emphasized its core normative elements. However, my claim is that in no way does arguing that Vattel is making a normative claim about the law of nations exclude the idea that he makes use of a pragmatic method to assess its content, as he says that natural and positive law must be distinguished but not separated. This is particularly relevant for Vattel's doctrine of custom, which supports a co-existence of normative judgments and practical considerations. With Pufendorf we have seen how problematic his use of contemporary history was, and most of all his position as royal historiographer. However, we have also pointed out how the peculiar situation of partiality experienced by Pufendorf could be interpreted by us as a privileged standpoint, especially as the idea emerges that custom is a particular source of obligation (as opposed to natural law), the application of which is only restricted to the nations that agree to

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[655] *Ivi*. Hunter further describes the features of Vattel's casuistry in 'Law, War, Casuistry', p. 94: "For in this space, the 'arbitrary' or 'customary' agreements into which sovereigns have entered voluntarily in pursuit of their own advantage are seen against the backdrop of the 'necessary' agreements they would be obligated to enter as a matter of conscience by the perfectionist law of nature. At the same time, though, Vattel does not conceive the judicial form of the law of nations in terms of the conclusive theoretical execution of natural law justice in the practical domain of diplomatic agreements. Rather, he treats this domain as the source of a vast array of 'cases', 'circumstances', and 'occasions' in relation to which an open-ended series of 'exemptions to… and moderations of the rigour of the necessary law' will be determined in accordance with national judgement and national interest."

[656] L. Glanville, 'Responsibility to Perfect', p. 389.

[657] S. Oeter, 'Neutrality and Alliances', in V. Chetail & P. Haggenmacher (Eds.), *Vattel's International Law*, pp. 336-7.

it. Vattel is uninterested, unlike Wolff, in "what's behind custom" and in the formation of consensus (his only concern being that custom is consistent with natural law). He concedes to the "mere empirical imitation" that Wolff was afraid of an important place in his legal theory, whenever possible overlapping facts with principles and contending that evil customs can never be really binding and enforceable. The tension between practice and principles will be investigated by Vattel mostly by looking at the historical record. Vattel makes great use of the works of national historiographers and memorialists to make his points, and quite differently from his predecessors, he expresses here and there his skepticism towards classical history, which is no longer conceived of as the repository of perfect and generally accepted behaviors, as it was in Gentili, Grotius or Pufendorf. Vattel contrasts the errors of a past which is now perceived as far away, with the vivid descriptions of contemporary historians and memorialists. This is an interesting aspect, reflecting the changes in the historical discipline from an erudite source of knowledge into a first-person description of events, where accuracy is less important than a direct witness of and involvement in the facts narrated (Vattel himself is author of different *Mémoirs*).[658] However, it is worth pointing out an evolution in his own thought. Whereas he makes moderate use of examples in the 1758 edition, he provides more examples in the posthumous editions, which were published according to Vattel's manuscripts and revisions of the first one. This might suggest an increasing need, perceived by the author, to provide the reader with examples. Although they are not substantial to the argument, as he points out many times, they nonetheless provide for us a precious source of information for historical customary behaviors which he conceived of as established practice.

7.2. Formation of customary law of nations, compliance with natural law and rules for its identification

Three main claims are made in this section. First of all, that whenever possible Vattel seeks to provide a reconciliation of principles of natural law and practice of states. Historical analysis is particularly helpful in this respect. This coincidence between facts and principles shows the normative commitment of Vattel (subordinated to the structure and *divisio iuris* we described above) as well as his need to give instructions to "cabinet politicians" about customs. Secondly, that by doing so Vattel implicitly distinguishes between the process of formation of

[658] See for example E. de Vattel, *Mémoires pour server à l'Histoire de notre tems, par l'Observateur hollandois, rédigez et augmentez par M. D. V* (1757).

custom and that of its identification. Whereas the fact that a custom has received acceptance depends on its compliance with natural law, the identification is a distinct, pragmatic activity in which the jurist or the politician is engaged in his daily life. Therefore, whenever facts and principles do not coincide, Vattel provides us with a useful set of tools to identify and detect customs. He calls them "general rules of custom", and as Wolff did, he refers to historical analysis for particular occurrences of custom. However, such historical analysis is not excluded as in Wolff but integrated in the *Droit des Gens.* From reading Vattel's text it is possible to extract three general rules to identify international customs. For each of them I will provide an example, which will also help us to understand the nature and function of Vattel's pragmatic-historical (rather than casuistic) method.

In the *Preface* to his *Droit des Gens*, Vattel already anticipates the importance of custom,[659] but it is in his *Preliminaries* that he gives us a full account of what he means by "customary law of nations":

> Certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law, form the customary law of nations, or the custom of nations. This law is founded on a tacit consent, or, if you please, on a tacit convention of the nations that observe it towards each other. Whence it appears that it is not obligatory except on those nations who have adopted it, and that it is not universal, any more than the conventional law. The same remark, therefore, is equally applicable to this customary law, viz. that a minute detail of its particulars does not belong to a systematic treatise on the law of nations, but that we must content ourselves with giving a general theory of it, - that is to say, the rules which are to be observed in it, as well with a view to its effects, as to its substance: and, with respect to the latter those rules will serve to distinguish lawful and innocent customs from those that are unjust and unlawful.[660]

Like Wolff, Vattel emphasizes the importance of custom as a particular source of law (as opposed to the universality of voluntary and natural law of nations). The regionalism of custom,[661] as already pointed out by Pufendorf, seems to restrict the application of customs to

[659] E. de Vattel, *Preface*, *The Law of Nations*, p. 17.
[660] *Ibid.,* p. 77.
[661] Haggenmacher has emphasized the 'regional' character of custom in Vattel: "la situation n'est guère differente pour le droit des gens coutumier, du moins au niveau des principes: selon une conception volontariste d'origine romaine, encore généralmement recue de son temps, Vattel n'y voit que des conventions tacites soumises, par consequent, au principe de la relativité des conventions. Pas plus que les traités, le droit coutumier ne peut ainsi pretender à une validité universelle. Vattel reconnait cependant qu'il est plus malleable et qu'il peut donc y avoir des usages généralement établis, soit entre toutes les Nations policées du Mond, soit seulement entre toutes ces Nations-là, qui sont censées y avoir donné leur consentement;" si bien qu'elles sont "tenues à l'observer les unes envers les autres, tant qu'elles n'ont pas déclaré expressement ne vouloir plus la suivre". La coutume internationale

the European civilized nations through the attempt to construct a unitary source of obligation automatically excluding non-European customs. In this respect, Rech claims that the generation of jurists before Vattel were promoting a pluralistic doctrine of customary international law, with figures like Gentili and Grotius conceiving of custom as an inclusive phenomenon. According to Rech's interpretation, as a consequence of Vattel's system of collective security and enforcement, his concept of custom is meant to exclude non-Europeans.[662] We could say that, since he claims that no one has a right to convince others to pursue *perfectio*, as Wolff thought, Vattel's conception of custom is implicitly intra-European, a feature that would place him closer to Pufendorf, as Hunter has pointed out.[663] However, together with the customs adopted by certain specific nations (like those, for examples, concerning the formalities of the declaration of war), Vattel also mentions "universal customs" with reference to a specific aspect of the laws of embassy, as we will see. It seems therefore, that there are different degrees of application of custom, depending of course on whether they coincide with principles and on whether they seek to regulate fundamental values of the international order, like for example sovereign independency. Regional customs also seem to be particular applications of general principles which are now settled as practice. Universal customs are rather the customary expression of natural law principles (like that of sovereign authority, as we will see).

Consistent with these questions, the analysis in this section seeks to extract from Vattel's *Droit des Gens* some general rules concerning the formation and identification of custom that he presents in his examples. These rules concern, as he writes in the above-mentioned passage, both the general functioning of custom and the way to assess its legality and compliance with natural law. It is possible to identify three situations. The first, in which Vattel claims there is a convergence of facts and principles, corresponds to the ideal situation in which nations behave as they should. In this case, customs are inherently compliant with natural law. As for the method of identification, Vattel provides examples from history that are, according to him, paradigmatic. He will later be accused by the Italian jurist Ferdinando Galiani for being too selective and partial in the choice of examples, most of them being limited to Switzerland.[664]

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ainsi concue tend dès lors, dans notre jargon modern, à n'etre que régionale, voire locale; elle ne sera générale qu'à titre exceptionnel, et meme alors elle reste foncièrement précaire. C'est la position dans laquelle auraient pu encore se reconnaitre au tournant du xx siècle des positivistes tels que Triepel ou Anzillotti et dont l'avatar le plus connu est l'affaire du *Lotus* de 1927" (P. Haggenmacher, 'Introduction', in *Vattel's International Law*, p. 19).

[662] W. Rech, *Enemies of Mankind*, p. 124. On Vattel's pluralism, see also A. Hurrell, 'Vattel: Pluralism and its Limits', in I. Clark & I. B. Neumann (Eds.), *Classical Theories of International Relations*, Macmillan Press, London 1996, pp. 233-255.

[663] I. Hunter, 'The Figure of Man', pp. 290-1.

[664] As quoted by E. Fiocchi Malaspina, *L'eterno ritorno del* Droit des Gens, pp. 134-5.

However, we must not forget Vattel's biographical situation and his interest in the political debates of his time. Questions like that of the neutrality of commerce were far from established practice. Vattel's attempt seems here to be one of crystalizing customs. In this respect, and in order to avoid episodes of non-compliance, he suggests that such customs are turned into treaties in order to make them even more explicit and public.

Vattel introduces a second category of customs which are by their nature "indifferent" as far as their content is concerned, since they originated from the liberty and will of nations. In this second case, the question of compliance with natural law is not of primary importance unless they are manifestly against the law of nature. In that case, their content would no longer be indifferent. In this case, Vattel provides us with three methods for the identification of customs consistent with the structure of his legal doctrine: a criterion of non-indifference (very close to our contemporary *opinio iuris*); acknowledgment by public statement; and by violation.

In addition to this, he addresses a fundamental problem: is custom enforceable? The answer to this question will once again call into question the distinction between internal and external obligations and perfect and imperfect rights.

7.2.1 Facts with meaning: customs originating in an overlapping of practice and principles

The overlapping of facts and principles is a characteristic of most of the customary norms mentioned by Vattel. Such an account of custom, normative and pragmatic at the same time, might have been influenced by the Dutch jurist Cornelius van Bynkershoek, who is frequently quoted in the *Droit des Gens,* and who claimed in his *De foro legatorum*, that custom is made of *ratio* and *usus*.[665] Reason was what gave meaning to mere *usus*, namely practice based on repetition, as it provides it with persuasive force.[666] The reference to Bynkershoek is explicit in Book IV of the *Droit des Gens*, where Vattel discusses the laws of embassies regarding the liability of the ambassador in cases of lawsuits:

> it may be seen, in monsieur de Bynkershoek's treatise, that custom coincides with the principles laid down in this and the preceding section. In suing an ambassador in either of the two cases just mentioned, - that is to say,

[665] C. Bynkershoek, *De foro legatorum*, 1721.
[666] As claimed by K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law*, Kluwer Law International, The Hague, 1998, p. 37.

on the subject of any immovable property lying in the country, or of movable effects which have no connection with the embassy, - the embassador is to be summoned in the same manner as an absent person, since he is reputed to be out of the country, and his independency does not permit any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him.[667]

To paraphrase this passage, what exempts the ambassador from civil jurisdiction is the fact that his independence is an expression of sovereign independence, one of the core, immutable tenets of Vattel's law of nations.

I will provide two more examples of overlapping facts and principles, one concerning the custom of declaring war and the other on the neutrality of commerce.

Concerning the first, the declaration of war is an essential moment of Vattel's doctrine of the war in regular form.[668] In this respect, "it is necessary that the declaration of war be known to the state against whom it is made. This is all which the natural law of nations requires. Nevertheless, if custom has introduced certain formalities in the business, those nations, who, by adopting the custom, have given their tacit consent to such formalities, are under an obligation of observing them, as long as they have not set them aside by a public renunciation".[669] Here Vattel hints precisely at the "regionalism" of customary formalities concerning the declaration of war, and also introduces a fundamental characteristic of custom. Vattel thinks that the declaration of war is required by the natural law of nations (as a way of making the intentions of sovereigns explicit and therefore accountable). In order to activate such customs, nations can either respect them, opt out from them with a public statement, or even violate them, as we will see. What is more important is that an internal obligation is turned into a perfect one by statement or action (not necessarily by turning it into a treaty). Nations shall manifest their intentions, based on their unquestionable judgment, so that other nations know how to behave, and most importantly, the natural law of nations is applied to their conduct. Another similar example concerns the meaning of the declaration: "when the sovereign or ruler of the state declares war against another sovereign, it is understood that the whole nation declares war against another nation: for the sovereign represents the nation, and

[667] E. de Vattel, *The Law of Nations*, p. 736.
[668] As it marks the exit from the natural law of nations and the entry into a consensual regime of the voluntary law of nations, as argued by G. Silvestrini, 'Justice, War and Inequality', p. 60; Kalmanovitz has also connected the doctrine of regular warfare with pluralism, as "multeralism operates as a filter against the spurious claims for disqualification. Lastly, collective security is first and foremost a principle for the conservation of order" (P. Kalmanovitz, 'Sovereignty, Pluralism and Regular War', p. 15).
[669] E. de Vattel, *The Law of Nations*, p. 502.

acts in the name of the whole society (I, §40-41); and it is only in a body, and in her national character, that one nation has to do with another. Hence, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other. In this particular, custom and principles are in accord".[670]

Another example is that of the distinction employed by Vattel concerning war and commerce. During the Seven Years War the question of neutrality of commerce was particularly urgent because the idea started to emerge that if the trade of an allegedly neutral nation was supporting one of the nations in war, then this should be contrary to the law of nations.[671] Vattel holds that the issue needs to be addressed by distinguishing between neutral goods and military goods. Whereas it would be a violation of the law of nations to forbid the first, innocent kind of commerce, it is legitimate to forbid the second kind, which constitutes a breach of neutrality. However, Vattel says that the custom contemporary to him is to avoid whenever possible the intrusion of neutral nations into the commercial affairs of an enemy nation.[672] However, how should we treat those who help our enemies? They are in principle enemies as well, and therefore I can ask them to account for their conduct. However, Vattel suggests to exercise this right with prudence:

> this prudent caution, of not always coming to an open rupture with those who give such assistance to our enemy, that we may not force them to join him with all their strength – this forbearance, I say, has gradually introduced the custom of not looking on such assistance as an act of hostility, especially when it consists only in the permission to enlist volunteers. How often have the Switzers granted levies to France, at the same time that they refused such an indulgence to the house of Austria, though both powers were in alliance with them! How often have they allowed one prince to levy troops in their country, and refused the same permission to his enemy, when they were not in alliance with either! They granted or denied that favor according as they judged it most expedient for themselves; and no power has ever dared to attack them on that account. But if prudence dissuades us from making use of all our right, it does not thereby destroy that right. A cautious nation chooses rather to overlook certain points than unnecessarily to increase the number of her enemies.[673]

[670] *Ibid.,* p. 509. Compare this passage with Grotius' analogous claim in Chapter 4, see *supra* at pp. 142-143.
[671] For example, see contributions in A. Alimento (Ed.), *War, Trade and Neutrality. Europe in the Mediterranean in seventeenth and eighteenth century*, Franco Angeli, Milano 2011; S. Oeter, 'Neutrality and Alliance', pp. 335-352; T. Helfman, 'Neutrality, the Law of Nations and the Natural Law Tradition: A Study of the Seven Years' War, *Yale Journal of International Law*, 30/2 (2005), pp. 549-584.
[672] E. de Vattel, *The Law of Nations*, p. 511.
[673] *Ibid.,* p. 518-9.

Here we can understand Galiani's accusations of partiality. However, behind such criticisms, the idea that Vattel seems to convey is that it is more prudential and convenient to a nation not to demand the absolute respect of their rights, and that this does not necessarily mean to abandon such rights. This hints at the fictional character of custom, as a "virtual" set of rules that needs to be activated (but the existence of which is not dependent on such activation). On the contrary, if they made use of such right too often:

> […] the contrary principles would tend to multiply wars, and spread them beyond all bounds, to the common ruin of nations. It is happy for Europe, that, in this instance, the established custom is in accord with the true principles. A prince seldom presumes to complain of a nation's contributing to the defence of her ally by furnishing him with succour which were promised in former treaties – in treaties that were not made against that prince in particular. In the last war, the United Provinces long continued to supply the queen of Hungary with subsidies, and even with troops; and France never complained of these proceedings till those troops marched into Alsace to attack the French frontier. Switzerland, in virtue of her alliance with France, furnishes that crown with numerous bodies of troops, and nevertheless, lives in peace with all Europe.[674]

Another circumstance arises when a supposedly neutral nation engages in illicit trade with our enemy. If this occurs, do nations have a right to confiscate such contraband goods?

> Barely to stop those goods would in general prove an ineffectual mode, especially at sea, where there is no possibility of entirely cutting off all access to the enemy's harbours. Recourse is therefore had to the expedient of confiscating all contraband goods that we can seize on, in order that the fear of loss may operate as a check on the avidity of gain, and deter the merchants of neutral countries from supplying the enemy with such commodities. And indeed it is an object of such high importance to a nation at war to prevent, as far as possible, the enemy's being supplied with such articles as will add to his strength and render him more dangerous, that necessity and the care for her own welfare and safety authorize her to take effectual methods to that purpose, and to declare that all commodities of that nature, destined for the enemy, shall be considered as lawful prize. On this account she notifies to the neutral states her declaration of war (§63); whereupon, the latter usually give order to their subjects to refrain from all contraband commerce with the nations at war, declaring that if they are captured in carrying on such trade, the sovereign will not protect them. This rule is the point where the general custom of Europe seems at present fixed, after a number of variations, as will appear from the note of Grotius which we have just quoted,[675] and particularly from the ordinances of the kings of France, in the years 1543 and 1584, which only allow the French

[674] *Ibid.,* p. 521.
[675] H. Grotius, IBP, III, I, §5.

to seize contraband goods, and to keep them on paying the value. The modern usage is certainly the most agreeable to the mutual duties of nations, and the best calculated to reconcile their respective rights.[676]

Vattel's passage is quite distinctive of what happens before a custom becomes a generally established practice. There might be variations where a particular custom is introduced, eventually resulting in the current state of events (which historical analysis might even help us to date, as with the example of France quoted above). Moreover, Vattel says that the custom in question is most "suitable and compliant with principles of natural law". At the same time, he specifies that this current state of affairs is not only the result of past modifications but also of possible future ones ("this rule is *the point* where the general custom of Europe seems *at present* fixed"). However, following his argument, it is hard to imagine that a custom so coincident with both "mutual duties of nations" and their respective rights could change in time without causing a violation of the natural law principles with which it is so agreeable.

This tension might be interpreted on the one hand as an instance of regionalism, i.e. a particular external expression in a given context and time of a normative principle, which crystalizes over time with no further need for modifications once it is fixed. Such an "evolutionary" interpretation might pose the problem of considering custom to be natural law, and in so doing confusing the two legal regimes (an option which Vattel warns us not to choose). On the other hand, it is possible to argue that the "present custom" is the best possible option that nations can strive for under current circumstances, but that it does not exclude even better applications of the principles it expresses. This interpretation seems to be in line with Vattel's thought experiment using the wise one thousand Europeans governing themselves by only applying natural law. That situation is not a cosmopolitan[677] society to strive for, but the natural state of affairs of men if only they were as they are supposed to be. If the custom at stake is

[676] E. de Vattel, *The Law of Nations*, p. 531.
[677] According to Hunter, "The actual practice of abstraction through which Vattel 'applies' the natural law to the conduct of nations is thus not one in which he makes the maxims of the latter conform to the principle of the forme, or else fails to. Rather it is one in which he deploys both principles in order to structure a specialized practice of judgment. Here it is the difficulty of applying the cosmopolitan principle of natural law to the self-interested conduct of nations that is used to admit a whole series of accomodationist maxims and conventions – the voluntary law of nations – that are to be regarded nonetheless as if they were imperfect approximations of naturel law cosmopolitanism" (I. Hunter, 'Law, War and Casuistry', 2011, p. 94). In my view, according to what I called Vattel's fictional reasoning of considering men perfect as they would be if they were following natural principles, they should rather be looked at as *perfect* (although maybe temporary) approximations of natural law cosmopolitanism.

agreeable to that natural state of affairs, then it might be interpreted as the best "external" approximation of the natural law of nations.

To conclude this section, it is also worth mentioning that Vattel interestingly suggests that instances of violations are nothing but confirmations of customs:

> it is not on account of the sacredness of their person that embassadors cannot be sued: it is because they are independent of the jurisdiction of the country to which they are sent; and the substantial reasons on which that independency is grounded, may be seen in a preceding part of this work (§92). Let us here add that it is in every respect highly proper, and even necessary, that an embassador should be exempt from judicial prosecution even in civil causes, in order that he may be free from molestation in the exercise of his functions. For a similar reason, it was not allowed among the Romans to summon a priest whilst he was employed in his sacred offices: but at other times he was open to the law. The reason which we have here alleged for the exemption is also assigned in the Roman law: "*ideo enim non datur actio (adversus legatum) ne ab officio suscepto legationis avocetur, ne impediatur legatio*." But there was an exception as those transactions which had taken place during the embassy. This was reasonable with regards to those *legati* or ministers of whom the Roman law here speaks, who, being sent only be nations subject to the empire, could not lay claim to the independency enjoyed by a foreign minister. As they were subjects of the state, the legislature was at liberty to establish whatever regulations it thought most proper respecting them: but a sovereign has not the like power of obliging the minister of another sovereign to submit to his jurisdiction: and even if such power was vested in him by convention or otherwise, the exercise of it would be highly improper: because, under that pretext, the embassador might be often molested in his ministry, and the state involved in very disagreeable quarrels, for the trifling concerns of some private individuals, who might and ought to have taken better precautions for their own security. It is, therefore, only in conformity to the mutual duties which states owe to each other, and in accord with the grand principles of the law of nations, that an ambassador or public minister is at present, by the universal custom and consent of nations, independent of all jurisdiction in the country where he resides, either in civil or criminal cases. I know there have occurred some instances to the contrary; but a few facts do not establish a custom: on the contrary, those to which I allude, only contribute, by the censure passed on them, to prove the custom such as I have asserted it to be.[678]

To this end, Vattel also quotes two examples from Bynkershoek: "in the year 1668 the Portuguese resident at The Hague was, by an order of the court of justice, arrested and imprisoned for debt. But an illustrious member of that same court [Bynkershoek himself] very justly thinks that the procedure was unjustifiable, and contrary to the law of nations. In the year 1657, a resident of the elector of Brandenburg was also arrested for debt in England. But he

[678] E. de Vattel, *The Law of Nations*, p. 730.

was set at liberty, as having been illegally arrested; and even the creditors and officers of justice who had offered him that insult were punished".

To conclude, acknowledgment by violation is nothing but a reinstatement of the doctrine of the overlapping of facts and principles. Again, the reference to Bynkershoek is evident here, as we have mentioned above: "it may be seen, in monsieur de Bynkershoek's treatise, that custom coincides with the principles laid down in this and the preceding section. In suing an ambassador in either of the two cases just mentioned, - that is to say, on the subject of any immovable property lying in the country, or of movable effects which have no connection with the embassy, - the embassador is to be summoned in the same manner as an absent person, since he is reputed to be out of the country, and his independency does not permit any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him".[679] Recalling Bynkershoek's distinction between *usus* and *ratio*, it seems that what gives customs originating in the overlap of facts and principle particular cogency is the fact that their rationale is to pursue and ensure collective interest. As argued in Vattel's analysis, self-interest provides natural law with its foundational and obliging principle, resulting in the statement that states living in their natural liberty would spontaneously follow natural law (as the best expression of their self-interest). In other words, the correspondence between principles and facts, as observed in the historical record, is nothing but proof that ultimately self-interests and collective interests might peacefully coexist. Bringing Vattel's argument even further, not only might they coincide (because if nations pursued their own "noble" expediency, they could simply regulate their interaction by natural law), but they also provide custom with cogency and universality. This implies that custom that perfectly crystalizes natural law principles via factual occurrences can only change insofar as a new custom is established, which provides a better approximation of the perfection of natural law.

7.3 Indifferent Customs: three criteria to identify customary law of nations

This is the first rule established by Vattel:

> When a custom or usage is generally established, either between all the civilized nations in the world, or only between those of a certain continent, as of Europe, for example, or between those who have a more frequent

[679] *Ibid*., p. 736.

intercourse with each other, - if that custom is in its own nature indifferent, and much more, if it be useful and reasonable, it becomes obligatory on all the nations in question, who are considered as having given their consent to it, and are bound to observe it towards each other, as long as they have not expressly declared their resolution of not observing it in future. But if that custom contains anything unjust or unlawful it is not obligatory: on the contrary, every nation is bound to relinquish it, since nothing can oblige or authorize her to violate the law of nature.[680]

An interesting parallel is offered by Vattel when he says, in his *Essay on the foundation of natural law*, that natural law by virtue of its own nature cannot be indifferent as far as its normative content is concerned: "from there it follows that natural law is universal. Since it requires us to do all that is most suited to our nature, there is no situation in which it can let us down; for in every situation in which there is a better option to take, we are ordered to take it; and if it were possible to find a case of perfect indifference, no law would be of any use in resolving the matter".[681] If natural law provided us with a case of perfect indifference, no law would serve as a criterion, since it is only natural law that prescribes to us what is more suitable to our nature (through self-interest as the principle of obligation).

Vattel provides an application of what we will call a "fictional criterion of non-indifference" in his book IV on the law of embassies:

and it must be observed here, with regard to things of institution and custom, that, when a practice is so established, as to impart, according to the usages and manners of the age, a real value and a settled signification to things which are in their own nature indifferent, the natural and necessary law of nations requires that we should pay deference to such institution, and act, with respect to such things in the same manner *as if* [my emphasis] they really possessed all that value which the opinion of mankind has annexed to them.[682]

In other words, Vattel suggests applying counterfactual reasoning in case of normative indifference of a given custom. From this mental experiment, we are able to see that the normative value of a customary rule is not directly derived by natural law principles but by the generally accepted opinion of mankind which makes such custom meaningful. Of course, this does not mean that "indifferent customs" can be inconsistent with natural law. Rather, Vattel

[680] *Ibid.*, p. 78.
[681] E. de Vattel, *Dissertation*, in *The Law of Nations*, p. 775.
[682] E. de Vattel, *The Law of Nations*, p. 695.

suggests the interpreter distinguish among different sources of obligation. However, Vattel's insistence on the sense of legal obligation perceived while observing a certain custom might raise the question of whether his definition qualifies as a first instance of the doctrine of *opinio iuris*. Rather than a proper constitutive element of custom, as in the case of the contemporary doctrine of CIL, Vattel's argument seems to specify one possible method of identifying custom in cases where its pragmatic observance does not directly coincide with natural law principles. However, what his fictional argument points out is that such a sense of obligation annexed to a given customary norm should be regarded *as* if that norm really possessed that value, i.e. as if the value added to its *usus* were an instance of its *ratio*.

Another question addressed by Vattel is the issue concerning the abrogation of custom. He admits that it is possible for a nation to refuse to adhere to a custom before the moment of application itself. In his words,

> but when once a custom, indifferent in itself, has been generally established and received, it carries the force of an obligation on the states which have tacitly or expressly adopted it. Nevertheless, if, in process of time, any nation perceives that such custom is attended with inconveniences, she is at liberty to declare that she no longer chooses to conform to it: and when once she has made this explicit declaration, no cause of complaint lies against her for refusing thenceforward to observe the custom in question. But such a declaration should be made beforehand, and at a time when it does not affect any particular nation: it is too late to make it when the case actually exists: for it is a maxim universally received, that a law must never be changed at the moment of the actually existence of the particular case to which we would apply it.[683]

Here the difference between formation and identification is more evident. The fact that custom is a tacit and "virtual" legal regime does not mean that nations are a society of mute legal subjects. Quite on the contrary, since it is unfeasible that they be governed by natural law alone, they have to publicly state and express their position and promote the signing of positive agreements (through which they can reciprocally demand rights from one another). The fact that the content of custom is normatively indifferent allows us to change it over time.

However, the question once again arises of whether it is possible for sovereigns to opt-out from all kinds of customs. Universal customs like those concerning the inviolability of the ambassador seem to be more cogent than "particular ones". Vattel provides an example of such

[683] *Ibid.,* 724.

universal customs, deriving directly from the natural law of nations. To prove this point, Vattel quotes examples of non-European nations respecting them (Chinese, Mexicans, North-American tribes, etc.).[684] In so doing, he seeks to prove the general acceptance of this customary rule by insisting on the cultural value that various and diverse nations have attached to it.

Interestingly enough, the following passage concerning the inviolability of the ambassador is supported by historical examples, although Vattel declares that they do not add any content to the rule and that he uses them just for the sake of explanation. However, historical examples are more abundant each time Vattel is not explicitly making the claim that facts coincide with principles. This might suggest that history is essential in ascertaining the value and opinion that "mankind has annexed" to a given custom, whereas in cases of factual overlapping of custom and principles it aims to help the jurist to deduce law from facts, by tracing their first occurrence in time. The choice of historical sources is particularly innovative if compared to Vattel's predecessors. French historians like Mezeray and Choisy are quoted, as well as Ockley's *History of the Saracens*.[685] The most relevant of these examples is taken from Abbé de Choisy, who wrote a history of S. Louis:

> Saint Louis, when at Acra in Palestine, gave a remarkable instance of the protection due to public ministers: -an ambassador from the Old Man of the Mountain, or prince of the Assassins, speaking insolently to the French monarch, the grand masters of the orders of the Temple and the Hospital informed that minister, that, 'were it not for the respect paid to the character with which he was invested, they would cause him to be thrown into the sea'. The king however dismissed him without suffering the slightest injury to be done him. Nevertheless, as the prince of the Assassins was on his own part guilty of grossly violating the most sacred right of nations, it would have been reasonable to suppose that his embassador had no claim to protection, except indeed on this single consideration, that, as the privilege of inviolability is founded on the necessity of keeping open a safe channel of communication, through which sovereigns may reciprocally make proposals to each other, and carry on negotiations both in peace and in war, the protection should therefore extend even to the envoys of those princes, who, guilty themselves of violating the law of nations, would otherwise have no title to our respect.[686]

The rationale behind the privileges granted to ambassadors is therefore that it is better to leave an ambassador unpunished than to violate his immunity (an argument interestingly also

[684] *Ibid.,* p. 721.
[685] On the 18th century development of the historical disciplines, as well on memorialists, see C. Grell & J. M. Dufay (Eds.), *Pratiques et Concepts de l'Histoire en Europe XVIème-XVIIIème siècles*, Presses de l'Université de Paris-Sorbonne, Paris 1990.
[686] E. de Vattel, *The Law of Nations*, p. 722.

put forward by Gentili and Grotius, quoting Roman history as an example). Therefore, it is better to overlook such instances of violation than to put at risk the necessity of nations to communicate and to carry on negotiations.

7.4 Is the violation of custom enforceable?

The possibility to enforce of a breach of a customary rule depends on different factors. Most importantly, as a general rule and consistent with his theoretical assumptions, Vattel seems to suggest that the decision concerning the enforcement of a customary rule calls into question the criterion of compliance with natural law: will such enforcement impair the sovereign's search for perfection and independence of judgment? In principle therefore, violation of custom is not enforceable for Vattel. Indeed,

> We have already observed that the life of a hostage cannot be lawfully taken away on account of the perfidy of the party who has delivered him. The custom of nations, the most constant practice, cannot justify such an instance of barbarous cruelty, repugnant to the law of nature. Even at a time when that dreadful custom was but too much authorized, the great Scipio publicly declared that he would not suffer his vengeance to tail on innocent hostages, but on the persons themselves who have incurred the guilt of perfidy, and that he was incapable of punishing any but armed enemies. The emperor Julian made the same declaration. All that such a custom can produce, is impunity among the nations who practice it. Whoever is guilty of it cannot complain that another is so too: but every nation may and ought to declare, that she considers the action as a barbarity injurious to human nature.[687]

As we have stated before, nations can publicly state their position on a given issue by respecting, violating or expressing their support for a given custom. As a general rule, therefore, only violations of the voluntary law of nations (the law deduced by natural law and applied to states) are collectively enforceable, subject to certain conditions and moderation. However, as discussed by Toyoda,[688] a letter to Brühl Vattel writes that there is a passage in his *Droit des gens* justifying collective intervention on the part of European nations to punish Frederick of Prussia for having introduced those "sinister customs of war" (i.e. the invasion of Saxony with no declaration of war). In this case, we can argue that we are dealing with different customs.

[687] *Ibid.,* p. 115.
[688] T. Toyoda, *Theory and Politics of the Law of Nations*, p. 170.

The custom concerning the declaration of war directly stems from natural law and calls into question the justice of the cause, which substantiates itself in the conduct of a regular war. The Prussian invasion of Saxony does not seem to meet these requirements, as the purpose of declaring war is to inform the neighboring states about one's own intentions once all peaceful methods of dispute settlement have been exhausted. Furthermore, Frederick's act may introduce, if imitated by other nations, a sinister custom of war and therefore it might be right to intervene against him. In other words, this example shows a conflict between custom and sovereign judgment: how do we enforce a custom (or respond to its violation), when in order to do so we have to significantly intrude into another sovereign's judgment? This aspect is controversial because it implies on the one hand the relationship of states *vis à vis* states, and on the other it calls into question the problem of Vattel's account being politically loaded.[689]

Quite on the contrary, the custom of moderation in war does not concern the relationship of states *versus* states but of states *versus* individuals. It does not imply judgment about the justice of the war (duties of justice), but rather a general duty of moderation that sovereigns have to follow (duties of humanity). In Vattel's words, compassion towards a prisoner is a custom, but if a sovereign cannot comply with it for reasons of *force majeure*, he may not be charged with violating the laws of war.[690] Again, Vattel provides historical examples of moderation, taken from contemporary history rather than from Roman history. This is quite original, because for early modern jurists Roman leaders were examples of *pietas* and *clementia* – a myth that Vattel no longer seems fascinated by.[691] Indeed, ancient customs about the treatment of prisoners were wrong because they permitted their death. Contemporary customs, especially those of civilized countries like England or France,[692] are more suitable to human nature, "and, what is more, by a custom which equally displays the honor and humanity of Europeans, an officer, taken prisoner in war, is released on his parole, and enjoys the comfort of passing the time of his captivity in his own country, in the midst of his family; and the party who have thus released him rest as perfectly sure of him as if they are taken prisoner in war".[693]

On the contrary, regional customs can be enforced because they are formalities more than customary rules (they are similar to our contemporary "acts of courtesy"). As an instance

[689] *Ivi*.
[690] E. de Vattel, *The Law of Nations*, p. 551.
[691] See R. Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription', *European Journal of International Law* 16 (2005), p. 37 (quoted by M. Somos, 'Selden's *Mare Clausum*', p. 305).
[692] *Ibid.,* p. 553.
[693] *Ivi*.

of this, Vattel quotes the example of the honors due to ambassadors. Vattel mentions the usage that an ambassador be received with a hat, as a sign of deference due to his *persona* as a representative of the sovereign. To make this point, he mentions that in 1663 ambassadors from Switzerland "suffered the king of France, and the nobles of his court, to refuse them those honors which custom has rendered essential to the ambassadors of sovereigns, and particularly that of being covered before the king at their audience. Some of their number, who knew better what they owed to the glory of their republic, strongly *insisted* on that essential and distinctive honor: but the opinion of the majority prevailed, and at length they all yielded…[…] Whatever extraordinary honors may in other respects be paid to her ambassadors, she will not in future suffer herself to be so far blinded by those empty marks of distinction, as to overlook that peculiar prerogative which custom has rendered essential".[694] Later, when Louis XV visited Alsace in 1755, the Swiss sent no ambassadors precisely because their "just demand" was rejected. Again, the partiality of Vattel's example is itself insufficient to claim that there was a general acceptance of such custom, however it makes the position of Switzerland clear on this issue.

7.5 Customs *de lege ferenda*: "this should be turned into a conventional law"

To conclude, and to avoid problems related to enforcement, Vattel suggests that on many occasions it is wiser for nations to turn customs into treaties. For example, a nation which by a long custom trades with another one (like Portugal selling wine to England) and "desires any right of commerce which shall no longer depend on the will of another, she must acquire it by treaty".[695] Usucapion and prescription are also examples of customs which Vattel suggests should be turned into treaties: but, "if, in default of treaties, custom has determined anything in this matter, the nations between whom this custom is in force, ought to conform to it".[696] This passage shows that Vattel does not think of custom as an insufficient source of obligation; he just argues that for vital matters of the life of a state, sovereign interests are better secured by the signing of a treaty.

To conclude, and to recall one of the criticisms that Vattel directs towards Wolff and which we have mentioned above, Vattel suggests for example that a custom should be

[694] *Ibid.*, p. 695.
[695] *Ibid.,* p. 137.
[696] *Ibid.,* pp. 337-8.

introduced to prevent the poisoning of arms. Vattel's polemical target here, besides Wolff, is Bynkershoek, according to whom all means are licit in a war. Vattel disagrees with this view and contends that:

> if anyone has absolutely condemned such bold strokes, his censure only proceeded from a desire to flatter those among the great, who would wish to leave all the dangerous part of war to the soldiery and inferior officers. It is true indeed that the agents in such attempts are usually punished with some painful death. But this is because the prince or general who is thus attacked, exercises his own right in turn, - has an eye to his own safety, and endeavours, by the dread of a cruel punishment, to deter his enemies from attacking him otherwise than by open force. He may proportion his severity towards an enemy according as his own safety requires. Indeed, it would be more commendable on both sides to renounce every kind of hostility which lays the enemy under a necessity of employing cruel punishments in order to secure himself against it. This might be made an established custom, - a conventional law of war.[697]

Whereas for Pufendorf, honor and glory were the primary interests of a state, Vattel's doctrine of the law of nations is a constant reinstatement of the fact that self-love is the best of collective interests. To recall the "game metaphor" mentioned at the beginning of this chapter, international law is a cooperative game where one participant's victory is actually a win for all the participants. The fairer, more public and explicit the rules of the game, the better the outcome.

[697] *Ibid.,* pp. 558-9.

Conclusion

In the *Introduction*, it has been argued that the importance of customary international law is widely acknowledged in the contemporary debate, despite some skeptical and critical accounts questioning its validity and legitimacy as a source of law for the global world. One important aim of this dissertation was precisely to assess whether (and to what extent) the historical development of the concept of custom within the modern natural law tradition allows us to explain the reasons for the importance conceded to it. At the end of this analysis, it is possible to make some remarks concerning this question. To this effect, I will enunciate three important findings of this thesis.

The "fiction" of custom.

In various ways, the present analysis of customary law of nations has shown the employment of fictional arguments as a consistently acknowledged feature of custom. More specifically, what I mean to convey is the idea that in order to conceptualize custom, recourse to fictional arguments constitutes a powerful means of articulating the conceptual ambiguity of custom. There are at least two senses in which custom might be interpreted by analogy with fiction. On the one hand, and most intuitively, fictional arguments help us to deduce and presume the existence of a universal consensus legitimating custom. As we have seen, this is particularly evident in Vitoria, whose epistemological argument was based on the deduction of universal principles of human nature. From this perspective, in order to identify custom Vitoria suggested that the following counterfactual argument could be employed: what would sovereign *x* do in a given situation *y*? The answer to this question was immutable both with regard to its genealogy (since it was directly deduced from human reason) and to its application (which was deemed universally valid in different times and spaces). Quite interestingly, Vattel also makes use of fictional arguments to argue for the existence of customary rules binding on sovereigns, although such arguments are totally different in their fundamental premises. On the one hand, he claims that customs should be judged according to natural law, whose foundational principle is a noble self-interest. This allows custom to enshrine and secure collective as well as individual interests. Indeed, if nations acted according to self-interest *as* they would in a condition of natural liberty, they would inevitably comply with natural law. In this respect,

custom is what nations seems to observe (both in theory and in practice) as a reminder of their original natural liberty. Fiction powerfully helps nations recall that often forgotten original state.

On the other hand, more technically, fiction is also used by Vattel to provide jurists and politician with a criterion to identify customs. This closely resembles *opinio iuris*. In cases in which a strong sense of obligation is attached to an otherwise normatively indifferent conduct, Vattel claims that we should treat that conduct *as if* it really possessed all that legal meaning and value. In a similar vein, Wolff's suggestion to conceive of customs *as if* they were treaties also implies the fictional reasoning that tacit consensus has to be interpreted (and considered as legally cogent) *as if* it was expressed.

What the comparison between Vitoria and Vattel's use of counterfactual arguments to deduce the importance and existence of customary rules ultimately shows, is that fiction is considered a valid reaction to both the conceptual elusiveness and the temporal paradox of custom.

Concerning custom's conceptual elusiveness, custom is sometimes so difficult to grasp that a useful conceptual strategy is to fictionally 'bracket' its existence and validity, in order to assess what the imaginary consequences of such a process of abstraction would be. For Vitoria, the result of such a mental experiment is that if custom did not exist, the whole of *ius gentium* would not exist. Alternatively, a more proper legal fiction might be employed, conceiving of custom as analogous to something which already existent (like treaties for Wolff) or to something which already possesses value (natural law principles for Vattel), in order to argue for equal legal effects stemming from such an analogy. Fictionally imagining all these possible scenarios helps the jurist to visualize, conceptualize, and eventually to identify a notion as slippery as that of custom.

The temporal paradox of custom concerns the problematic relationship between time and custom. As has been pointed out many times, the temporal aspect of custom is not just a problem of contemporary CIL (concerning the possibility for a new customary rule to emerge, as pointed out in the *Introduction*). Rather, it is also a fundamental feature of modern customary law of nations in at least three respects. First of all, it concerns the question of the introduction of custom. Whereas the preoccupation of 'who introduced custom' seems to be a more recent invention,[698] nonetheless the question of human agency as the first moving cause of custom is

[698] Famously, the 19th century legal scholar G. F. Puchta contended that for the establishment of a custom, an *actus*

particularly problematic, leading Grotius to get rid of the problematic notion of *habitus*. In other words, the doctrine of *habitus* called into question the potential reiteration over time of a bad habit, a problem which early modern jurists sought to contrast by relying on a solid notion of conscience as the ultimate arbiter of morality. From this perspective, fictional arguments are used in order to deduce universally valid customs without asking who introduced them. This claim leads us to a second sense in which we might understand the term fiction in its close relation with custom. We have emphasized the importance of the rhetorical tradition as far as the invention of the concept of custom is involved. This importance relies on the assumption, supported by authors like Gentili and Grotius, that when it comes to custom it is not always possible to deduce its existence by merely asking what would happen if such a custom did not exist. Rather, these two authors explicitly refute the Scholastic model by contrasting it with an account of human reason that takes into account the variability and fluctuations inherent in human life. In this respect, customary behaviors are no longer perfectly deducible from a universal reason. Even when it is possible to reduce its main features into a main obliging principle, as Grotius does with the principle of *sociabilitas*, a fundamental portion of human life yet remains uncovered by this attempted systematization.

In this respect, another kind of fiction is employed: literary fiction as a reflection of human nature. Gentili and Grotius both make use of literary *fictio*, understood as the body of different historical, philosophical and poetic sources of the classical textual tradition, to make the claim that *fictio* is either a powerful imitative practice (of which *exempla* from the past are particularly significant evidence since they provide moral guidance), or an important means to collect further evidence of natural law principles. In both cases, their claim is that customary law of nations becomes visible through the fabric of intertextuality. To this end, the fact that literary fiction provides an important source of information implies, to a certain extent, the fictional argument that the same rules so perfectly enshrined in the classical past are also valid for the present, simply by virtue of their paradigmatic, normative force.

The "Pufendorf-paradox"

The question of time affects the conceptualization of custom in so far as the significance of consensus is concerned. In other words, the question of how much time is needed for a

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introductivus consuetudinis was needed (G. F. Puchta, *Das Gewohnheitsrecht,* Erste Teil, 1828, pp. 177-8).

custom to become binding becomes crucial, especially as it implies an assessment of which acts or omissions qualify as reiterated acceptance of a given custom. Finally, temporal considerations related to custom impact on the question of change: how is it possible to change custom? As we have seen, different options include abandoning, opting-out from, or even violating a given custom as possible ways of breaking the cycle of reiteration of customary behaviors, in order to introduce new customs or simply to reject old ones.

From this perspective, this question was mainly addressed through the lens of the distinction between natural law and positive law by arguing what kind of impact such a distinction might have had on the theorization of custom. In this regard, the main finding of this thesis is that there is a strong, co-constitutive relationship between natural law and custom, despite the fact that one might think that a better understanding of customary *ius gentium* might derive from the acknowledgment of the positive nature of the law of nations. This might sound counterintuitive, because the existence of customary agreements among nations is generally associated with an acknowledgment of their capacity to produce voluntary agreements as a form of positive law of nations. However, what the present analysis has shown, is that the conceptual insistence on the voluntary law of nations eventually produces a weak concept of custom, which is always dependent on the existence of a sovereign authority legitimizing it.

A possible strategy to overcome such an impasse, envisaged in different ways by both Suárez and Wolff, is to postulate the existence of an international society (be it a *communitas perfecta* or a *civitas maxima*), in order to guarantee the orientation of international relations towards a communal perspective of mutual good and flourishing. By so doing, while downplaying the importance of natural law as the originating source of customary obligation, teleological accounts of custom share two fundamental features. First of all, they introduce into the theorization of custom a criterion of perfection, which serves the double purpose of providing voluntary, customary law with a normative orientation as well as with a self-emendating capacity. Custom, as a perfecting source of obligation, cannot be bad since reiteration of a morally bad *habitus* only reinforces injustice, without producing any legal effect. This leads us to the second characteristic. While ruling out the possibility that custom originates from natural law, the primacy of voluntary law is reinstated at the expenses of the naturalness of custom by strongly introducing a moral argument into the legal discourse which eventually calls into question the changeability of custom.

On the contrary, authors that deny any difference between natural law and the law of nations can count on the capacity of the former legal regime to infuse the latter with normative

content. Such a theoretical juxtaposition creates a situation in which "what is real is rational, what is rational is real", so to speak. In the narrative that I have been tracing, this process takes place into two steps. One first possibility to legitimate custom *via* natural law is, as Gentili's account of custom showed, to challenge the allegedly universal idea of human nature and human reason at the basis of natural law. Gentili re-articulates the very concept of natural law by acknowledging human uncertainty as its fundamental feature and by insisting on the imitative nature of the customary phenomenon, as it has been described above. The equation between natural law and *ius gentium* allows him to conceive of customary *ius gentium* as an inherently rhetorical construct, based on the radical uncertainty of human nature as well on its capacity to reproduce and reiterate morally praiseworthy behaviors. Moral, natural law and *ius gentium* are all intertwined in a theory of custom where the opinion of scholars merely has the subsidiary role of ascertaining the approbation given by conscience to a given custom. What makes Gentili's account so different from that of the Scholastics, as has been said, is the introduction of a rhetorical, inductive method of ascertaining custom, consequent to his refusal to deduce custom from the universal principles of human reason.

A second fundamental leitmotif of this story is marked by two important factors: the progressive end of divine voluntarism; and the consequent urge towards systematization perceived by natural law authors, most notably Grotius and Pufendorf. Both elements play a fundamental role in re-conceptualizing the role and physiognomy of customary *ius gentium*. Grotius, by claiming that God is only the genealogical source of natural law (rather than the originating source of obligation)[699] provides a perfect example of the dichotomy between voluntary law and natural law by attributing customary features to both legal regimes. The claim for spontaneity is an attempt to face the question of *habitus*, which is simply resolved by arguing that custom resembles natural law (which has no need to be introduced by any morally qualified action). In other words, the naturalness and eternity of custom is portrayed by Grotius as just an *invention* of "life and time". Again, Grotius insists on the close relationship between rhetorical method and custom, according to the double meaning of the term *inventio* (as both a rhetorical strategy to collect arguments and as a creative, fictional and legal process of finding customary rules).

As has been shown, Grotius claimed that this natural custom coexisted with voluntary customary law of nations. Pufendorf, however, strongly reacts to this distinction by replacing it with the Hobbesian claim that there is no law of nations other than the laws of nature applied

[699] B. Straumann, *Roman Law in the State of Nature*, p. 46.

to states. In this respect, we have argued that, contrary to what one could expect, the concept of customary *ius gentium* is enhanced rather than threatened by Pufendorf's systematization of natural law, generating what we could call a "Pufendorf-paradox". We have argued that a proper, distinctive concept of custom (although still non-binding) emerged as a "precipitate" of Pufendorf's process of systematization of natural law. By vindicating the existence of an extra-legal space where nations regulate their mutual affairs in times of war through non-binding customs, Pufendorf manages to create a genuine concept of customary law of nations. What is so special about Pufendorf's discovery of this new and independent legal regime is, on the one hand, the acknowledgment of the variability of customs, an aspect which is exacerbated by the replacement of literary history with contemporary history as a source of information of state interests. On the other hand, Pufendorf recognizes the legal value of customary law of nations despite its non-bindingness. This is a crucial aspect, because it answers the question of *why do we need customary law of nations*, which is still one of the most debated contemporary questions of customary international law, as we have pointed out many times. Pufendorf suggests that the value of custom goes beyond its merely legal significance, emphasizing the widely accepted cultural significance of its most important principles: glory and interest. This also justifies the choice of historical method as a privileged standpoint to observe the interaction of these two principles with customary behaviors. From this perspective, partiality is an added value that authors like Pufendorf, and later Vattel make use of in order to argue for the relativism of certain customs and to make the position of a state (concerning its acceptance of a given custom) more explicit.

After Pufendorf however, to claim that customary *ius gentium* was a commonly recognized value of the most civilized nations was not enough. Rather, the challenge taken up by the following authors was to figure out ways of making custom effectively binding for states, both in times of war and peace.

"Unilateral" custom vs. universal custom?

In seeking to substantiate the bindingness of customary law of nations and to guarantee its efficiency as a concept, Wolff and Vattel strategically restrict its application by vindicating its special character as source of law. This allows them to contain the demands of the universality of custom by securing their application and cogency. Whereas for Wolff such an

operation does not entail the perfection of custom as a source of law (both because it aims for perfection and because it is a perfectly enforceable right), Vattel's refutation of *civitas maxima* problematizes the question of the relationship between custom, sovereign interests and the strive for collective perfection. On the one hand, he claims that customs are the unilateral expression of sovereign interests, either by acts or by public statements. Such statements are not mutually enforceable, except in grave cases of violation voluntary law of nations. The idea seems to emerge, therefore, that the jurist shall engage in a case-by-case approach to identify the acceptance of a custom, individually evaluating the position of each state and comparing their respective understandings of custom in instance where there is a conflict between them. On the other hand, he argues that there are some universal customs resulting from a perfect combination of facts and principles, hinting at the existence of a normative order that approximates the natural state of liberty.

The analysis undertaken in this thesis therefore enigmatically ends with Vattel's praise of the unilateralism of custom as the best way to fairly participate in the cooperative game called international law. Consistently, whereas the doctrine of persistent objector is widely acknowledged (starting with Suárez), only a cautious statement of the existence of non-derogable customs is provided by Vattel. In this respect, I have argued that perfect crystallization of customary norms (in which facts coincide with principle) might be temporary, and therefore replaced in time by better approximations. This movement goes hand in hand with the progressive decrease of fictional, universal consensus as a basis for custom. From Vitoria (where we had the maximum presumption of principles that could be simply presumed from universal human reason) to Vattel (where we have the minimum of presumption and the maximum of unilateralism – the state is the only judge and cannot therefore say what custom better applies to nations others than herself). On the one hand this is the consequence of a process of de-transcendentalization of custom, but also an acknowledgment of its more "realistic" usefulness for the life of states. This process is also evident in the fact that Vattel breaks the long-running taboo concerning the "muteness" of custom.

At the same time, one could wonder whether natural law still offers contemporary international law with some conceptual support. We have highlighted that late 18th century accounts of custom helped conceptualize difference rather than unity, restricted application rather than universalism. From this perspective, it is no wonder that international lawyers have turned to Vitoria to legitimize the universalism of international law (or to Wolff for the importance of *jus cogens*), whereas Pufendorf's significance for the doctrine of customary

international law has been widely neglected by international lawyers (and widely acknowledged by historians dealing with historiographic debates).

One possible explanation of this phenomenon lies in the 19th century evolution of the concept of custom, whose birth as a contemporary source of international law is generally associated with the growth of the common conscience of civilized nations. The 'civilized nations' argument was also present in Grotius and Pufendorf but has a totally different meaning in the 19th century, when finding a common background (the so-called "*esprit d'internationalité*"[700]) was more important than claiming that custom was an important source of law, although with dubious legal cogency and with limited application. In this respect, recourse to the natural law tradition famously had a legitimizing and apologetic purpose, as witnessed for example by James Brown Scott's powerful revival of Vitoria.[701] However, natural law was hardly acknowledged as the normative source of custom. Eventually, in Franz von Liszt's famous description of customary international law, natural law was excluded from the sources that help the jurist to identify custom, replaced by a comparative approach looking at domestic legislation.[702]

However, although the tension between unilateral and collective interests seems to be echoed by contemporary debates concerning the relevance of custom within human rights and *jus cogens*,[703] the conceptual dynamism of modern natural law and custom seems far from contemporary arguments concerning the existence of non-derogable, peremptory norms at the apex of the international legal order. Arguably, this is a conceptual derivative of Kantian universalism and cosmopolitism, the influence of which was so pervasive in the 20th century.

What is left then, of the natural law tradition? How does historical analysis help us to understand contemporary CIL? The most immediate answer to this question is that an historical survey of the concept of custom unravels the perennial urge to regulate interstate affairs with a source of law that contains in itself the possibility of change as well as normativity. All the authors taken into account bear witness to this tension. By sharing this fundamental need,

[700] M. Koskenniemi, *The Gentle Civilizer of Nations*, pp. 13-14.
[701] A. Orford, *The Past as Law*, pp. 16-17.
[702] F. von Liszt, *Das Völkerrecht: Systematisch Dargestellt,* 1898.
[703] J. Tasioulas, 'Custom, *Jus Cogens*, and Human Rights', in *Custom's Future,* pp. 95-116; J. Tasioulas, 'Customary International Law and the Quest for Human Justice', in *The Nature of Customary Law*, pp. 307-335; U. Fastenrath (Ed.), *From Bilateralism to Community Interests: Essays in honor of Judge Bruno Simma*, Oxford University Press, Oxford 2011; A. Cassese (Ed.), *Realizing Utopia: the Future of International Law*, Oxford University Press, Oxford 2012.

notwithstanding the different conceptual categories they employ, there is no difference between customary *ius gentium* and contemporary customary international law.

Rather, the huge difference concerns the role of history. It is quite striking that what was deemed to be for centuries the privileged method to ascertain custom, history, is now excluded by contemporary international law, which replaced the alleged partiality of history with the formalism of its doctrinal analysis. From this perspective, what is left of the past also hints at what is gone. What I have tried to show in this analysis is that not only are historical precedents powerfully capable of dealing with the partiality of custom by offering comparative-historical assessments of it, but that history was precisely the added value of custom. This was either because its acknowledged importance helped the jurists to relativize customs by carefully considering whether such values were culturally shared before presuming their universality, or because genealogically the concept of customary international law owes its more mature physiognomy to the interplay between custom and historiographic practices, as shown by Pufendorf. In other words, the histories in which we recognize ourselves say a lot about our preferences, ideological orientations and desires. Thus, in the light of current debates on comparative international law the question remains open as to whether comparative history might also play a fundamental role in the reflection on, ascertaining and possible abandonment of custom as a source of international obligation. Is it just a nostalgic view, or rather does history still have something to tell us about the cultural, political and legal value we and non-Western peoples concede to customary international law?

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