

# *Suárez resurgitur*: Adapting the Early Modern *Jus Gentium* in Contemporary International Jurisprudence

*On the fourth centenary of Francisco Suárez's De legibus*

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## Abstract

Taking its cues from Francisco Suárez's treatise *De legibus* (1612) and from a recent case before the International Court of Justice, this article examines the parallels between the Spanish philosopher's view of the *jus gentium*, as a law concerning both the relations between states and humanity as a whole, and contemporary trends in international jurisprudence, which reject the exclusively inter-state conception of international law that shaped its underlying philosophy and practice for over three centuries after the Treaty of Westphalia (1648). In the context of the gradual recognition of individuals as true subjects of international law, resulting from the rise of humanitarian and human rights law and accelerated by globalisation, Suárez's vision of a strong complementary connection between individuals and states as holders of rights and bearers of obligations may offer some useful insights and perspectives for the philosophical underpinning of future developments in international law.

**KEYWORDS:** *Francisco Suárez (1548-1617), International Court of Justice, International law, Jus gentium; philosophy of law, political philosophy*

## States, Individuals and the *Jus gentium*: A Recent Case

In a recent case concerning the Jurisdictional Immunities of the State, which was heard before the International Court of Justice (ICJ) between December 2008 and February 2012, Germany opposed Italy on a matter that traces its origins to the Second World War. In 1944, soldiers belonging to the German Waffen-SS killed 218 men, women and children in the Greek village of Distomo in retaliation against partisan resistance. Recognising that the Distomo

massacre constituted a serious violation of human rights and international humanitarian law, the Greek courts had decided that the Federal Republic of Germany should pay a total of €28 million in compensation to the victims' families. However, this decision could not be enforced due to procedural provisions in Greek law. In view of this, and after earlier claims of enforceability were rejected by German courts as well as the European Court of Human Rights, the Greek individuals concerned sought the recognition and enforcement of the Greek Court's decision in Italy, which had since awarded compensation to Italian victims of the German occupation. The Greek victims' families sought and obtained the enforceability of the decision granting them civil claims damages and, in November 2008, an Italian court awarded them a villa that belonged to a German state organisation. Germany appealed against this decision, claiming State Immunity, but the Italian courts rejected this argument. A month later, in December 2008, the Federal Republic of Germany instituted proceedings before the ICJ against the enforceability of the Italian court's decision. In the judgement handed down on 3 February 2012, a majority of judges voted in favour of Germany's claim that the lawsuit did not fall under the competence of the Italian Courts and that therefore their rulings on this matter amounted to an infringement of Germany's sovereign rights and immunities under international law.

The focus of this contribution is not on the merits of the case or on the ICJ's final decision, but rather on a number of points raised in two separate submissions by a particular judge, Antônio Augusto Cançado Trindade: a *Separate Opinion* on an application submitted by Greece in the course of the proceedings and a *Dissenting Opinion* accompanying the Court's final decision.<sup>1</sup>

On 13 January 2011 Greece applied to the Court for permission to intervene, stating clearly that it was not doing so as a litigating party in the case but in order to 'inform' the Court of how a decision of the same Court could have affected its legal rights and interests, since Germany was opposing an Italian court's enforcement of a previous decision by a Greek Court.<sup>2</sup> While Italy had no objections to Greece intervening, Germany asserted that it did not *formally* object to it, but noted that the Application *substantially* contradicted the grounds of Greece's purported intervention under Article 62 of the ICJ Statute. Germany argued that while Greece was claiming that the Court's judgement would eventually affect its interest as a State, since it related to a Greek judicial body, the case ultimately concerned the rights of and compensation to *individuals*, and the two were separate. In its Order, the Court eventually ruled in favour of Greece's Application, thus establishing what judge Cançado Trindade refers to in his *Separate Opinion* motivating his vote in favour of the Order as 'the *resurrectio* of intervention in contemporary international

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1 Separate Opinion of Judge Cançado Trindade (International Court of Justice, 4 July 2011) <<http://www.icj-cij.org/docket/files/143/16558.pdf>> [accessed 25 June 2012]; Dissenting Opinion of Judge Cançado Trindade (International Court of Justice, 3 February 2012). <<http://www.icj-cij.org/docket/files/143/16891.pdf>> [accessed 25 June 2012].

2 The Application was submitted by Greece under Article 62 of the ICJ Statute.

litigation'.<sup>3</sup> The most relevant aspect of this important piece of jurisprudence is that the rights of a State (Greece in this case) were seen to be in consonance with the rights of individuals (Greek nationals): both states and individuals were recognised as *titulaires* (bearers) of rights. This is not always the case in international jurisprudence, which often adopts a hierarchy of value that places rights of states above, rather than at par with, those of individuals. In his *Separate Opinion*, Judge Cançado Trindade cites from his dissenting opinion to a previous Order of the Court in the same case to back his argument that claims concerning rights which are inherent to human beings cannot be waived by States by means of inter-state agreements:

States may, if they so wish, waive claims as to *their own* rights. But they cannot waive claims for reparation of serious breaches of rights that are *not* theirs, rights that are inherent to the human person. A purported waiver to this effect runs against the international *ordre public*, is in breach of *jus cogens*. This broader outlook, in a higher scale of *values*, is in line with the vision of the so-called "founding fathers" of the law of nations (the *droit de gens*, the *jus gentium*), and with what I regard as the most lucid trend of contemporary international legal thinking.<sup>4</sup>

The list of works of the 'founding fathers of the law of nations' cited by Judge Cançado Trindade includes Francisco de Vitoria's *Relecciones teológicas* (1538-39), Alberico Gentili's *De jure belli* (1598), Francisco Suárez's *De legibus ac Deo legislatore* (1612), Hugo Grotius' *De jure belli ac pacis* (1625), Samuel Pufendorf's *De jure naturae et gentium* (1672) and Christian Wolff's *Jus gentium methodo scientifica pertractatum* (1749). The judge's succinct reference to Suárez's vision of the 'law of nations [which] discloses the unity and universality of humankind, and regulates the States in their relations as members of the universal society' captures the two complementary senses of the notion of *jus gentium* expounded by the *Doctor eximius*.<sup>5</sup> The next section will turn the spotlight onto this vision as it emerges in *De legibus ac Deo legislatore*, a treatise published for the first time four centuries ago. This will enable us to then examine the extent to which the *broader outlook* of which this vision forms part may be of inspiration to what the judge considers as "the most lucid trend" in the contemporary philosophy and practice of international law.

### Suárez on Law, Rights and the *Jus gentium*

At the age of sixteen or so, Francisco Suárez (Granada, 1548 – Lisbon, 1617) was among fifty young men who asked to join the Jesuits at the College of Salamanca. Considered at first to be below the required standards, Suárez

3 *Separate Opinion* (4 July 2011), §61.

4 Dissenting Opinion of Judge Cançado Trindade (International Court of Justice, 6 July 2010), §178 <<http://www.icj-cij.org/docket/files/143/16031.pdf>> [accessed 25 June 2012].

5 *Separate Opinion* (4 July 2011), §27. Suárez was given the byname *Doctor eximius* (Excellent Doctor) in the same fashion as other great theologians such as Bonaventure (*Doctor seraphicus*), Thomas Aquinas (*Doctor angelicus*) and Duns Scotus (*Doctor subtilis*).

was eventually admitted provisionally. During his course in philosophy he was called a *dumb ox* – an appellation that did not bode well, had it not been employed a couple of centuries earlier by St. Albert the Great to describe St. Thomas Aquinas. Suárez took his studies very seriously and eventually excelled in philosophy and soon moved on to theology, the subject in which he became a true master. In the history of philosophy, he is known mostly for his contribution to metaphysics.<sup>6</sup> Considered a highly intelligent scholar, but not a particularly gifted orator, he held a number of lectureships in both philosophy and theology in Spain, until he was transferred to Rome to take up one of the most prestigious academic positions within the Society of Jesus, the Chair of Theology at the *Collegium Romanum*. He later returned to Spain, where he taught at the universities of Alcalá, Coimbra and Salamanca. During his first stay at Salamanca, the Rector of the university invited Suárez to teach a course on law, which dealt with the same themes discussed by his predecessor at that university, Francisco de Vitoria, and by two of his great contemporaries, the Dominican Domingo de Soto and the Jesuit Luis de Molina, all of whom made important contributions to early modern legal philosophy. This course was published in 1612 as the treatise *De legibus ac Deo legislatore* (*On Laws and God the Lawgiver*). It is divided into ten books and follows the typical scholastic method of structuring the subject matter around a series of successive and conceptually related *quaestiones* and *responsiones*, starting with the meaning of the word *law* and the nature of the concept through to its various kinds and subdivisions.

Suárez was a natural law theorist who drew his ideas primarily from Aquinas but also from the long tradition that preceded him, which included the corpus of Roman law (in particular Justinian's *Codex iuris civilis*) and other important authors, such as Isidore of Seville. Suárez's general philosophical approach is that of an *independent Thomist*. In his general definition of law, for instance, he moves away from the Thomistic focus on reason and instead places an emphasis on the will: law, for Suárez, is 'an act of a just and right will, by which a superior wills to oblige an inferior to doing this or that.'<sup>7</sup> In his introduction (*De legibus*, bk 1), the philosopher of Granada illustrates a political philosophy whereby political association is on the one hand natural (following the Aristotelico-Thomistic view) but also a result of the will of human beings as free agents who agree to form such associations. Human societies and political authority, therefore, are in a sense natural but arise also from the tacit or explicit *consent* of the people, who chose which form of government and which laws to adopt. This contractarian conception accounts for both political and legal variety. Sovereignty places each state on an equal level with

6 For instance, his discussion of the principle of individuation, expounded in *Disputationes Metaphysicae* (1597), had a significant influence on the ideas of Leibniz.

7 Francisco Suárez, *De legibus ac Deo legislatore*, in *Opera omnia*, 26 vols. (Paris: L. Vivès, 1856-1866), vols. 5 and 6, [book] 1, [chapter] 5, [section] 24: '[lex est] actus voluntatis iustae et rectae, quo superior vult inferiorem obligare ad hoc vel illud faciendum.' Cf. Thomas Aquinas, *Summa Theologiae*, 1-11, q. 90, a. 4: '[Law is] an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'



other states in the exercise of its power, including its judicial power: a state can make its own laws, which cannot be appealed in any court or tribunal of another state. Yet, for Suárez, the sovereignty of the state (or the ruler, where the ruler embodies the state) is not absolute. In the section concerning positive law in *De legibus*, he clearly lays down the parameters of the limits of state sovereignty and state intervention: civil authority should not interfere in the private domain of families and individuals, unless in function of the common good or the observance of laws, because by nature they are prior to the state.<sup>8</sup>

The main principles of the *jus gentium* are discussed in the last four chapters (17-20) of Book II of *De legibus*. One of the vexed questions in medieval and especially early modern natural law theory was whether the *jus gentium* pertains to the sphere of natural law or positive law. Thomas himself had been ambivalent, while Isidore of Seville had emphasised the customary nature of this kind of law. Suárez refers to it as a 'quasi-medium between natural and human law' insofar as it follows from, but is not quite as necessary as, natural law.<sup>9</sup> The qualification *quasi* is significant because later Suárez suggests that the character of the *jus gentium*, in fact, is that of a positive human law.<sup>10</sup> What distinguishes the law of, or among, people (*jus inter gentes*) from the civil law pertaining to a particular state (*jus intra gentes*) is the fact that the former is customary while the latter is usually written. The *jus gentium* then, like positive law, depends on the consent of the people who recognise its principles.

In general, Suárez speaks of the *jus gentium* in terms of objective rather than subjective rights, whereby it functions in virtue of an objective good that exists prior to the law (be it written or customary). This kind of *jus* (as "law") declares rather than creates a good that ought to be followed. But the term *jus* in *jus gentium* can in some cases be understood as *right*, i.e. as the moral faculty pertaining to individuals, such as the right to self-defence. Suárez writes:

*Jus* sometimes means a moral faculty [a right] either for something or over something ... Sometimes, however, *jus* means a law, which is the rule of acting with probity and which establishes a certain fairness in things and is the reason for *jus* as it is taken in the first way ... Hence, for the sake of brevity, we may call the first a beneficial right [*jus utile*] and the second a right that ought to be respected [*honestum*], or the first a real right and the second a legal right.<sup>11</sup>

8 Ibid., III, 11, 8: 'Potestas civilis ... non dirigit oeconomicum regimen, nisi in his quae redundant in commune bonum civitatis ... Ergo simili propositione ac ratione non spectat ad leges civiles ... privata honestas singulorum, ut tales sunt, sed solum ea morum rectitudo per has leges constituitur, quae bono civile vel necessaria vel valde utilis est.'

9 Ibid., II, 17, 1: 'quasi medium inter naturale jus, et humanum.'

10 Ibid., II, 19, 3: 'Unde tandem concludi videtur jus gentium simpliciter esse humanum ac positivum.'

11 Suárez, *De legibus*, II, 17, 2: 'Jus enim interdum significat moralem facultatem ad rem aliquam, vel in re, sive sit verum dominium, sive aliqua participatio ejus, quod est proprium objectum justitiae, ut constat ex D. Thoma ... Aliquando vero jus significat legem, quae est regula honeste operandi, et in rebus quamdam aequitatem constituit, et est ratio ipsius juris priori modo sumpti, ut dixit ibidem D. Thomas ... qua ratio est ipsa lex, ut ibi dicit, et ita

A *real* or *beneficial* right pertains to the subject and is thus what we may call a *subjective* right, while a *legal* right which imposes an obligation of observance resides outside the subject and may thus be termed an *objective* right, or law. The Jesuit philosopher does not use the term *subjective rights* in his works but he emphasises, perhaps more than any other Thomist before him, this element which had already been present in the Thomistic corpus. The fact that Suárez draws the distinction between the two meanings of *jus* in the first of four chapters dealing specifically with the *jus gentium* is of course very telling, since it shows quite clearly that a proper understanding of this kind of law depends heavily on the complementary understanding of these two senses of the word. It is important to note (in view of what will be argued later) the coincidence between these two facets of the same notion, *jus*, which is ‘the proper object of justice’ (*proprium objectum justitiae*).<sup>12</sup>

In Suárez's view, the right to self-defence is the greatest of all subjective rights insofar as it is related to the most fundamental of all rights: the right to life. All other rights, such as the right to food for the preservation of one's body and the right to security for the preservation of one's possessions, though perhaps less basic, function always as predicates of this fundamental right. These rights belong to all human beings and thus form the basis on which the *jus gentium*, now taken as the *law* common to all mankind, serves as the reason (*ratio*) for *jus* taken in the first sense as the *right* common to all mankind. Suárez's idea of *jus* as a natural, moral faculty – or his doctrine of subjective rights – is therefore not set within the discourse of moral autonomy of individuals but within that of an objective moral order. In other words, natural rights always emanate from, and point towards, natural law as an objective moral law that can never be transgressed by positive law or other forms of human agreement.

### State Sovereignty and the Rights Common to Mankind

Just as *jus* in *jus gentium* can be translated as “law” or “right”, the genitive *gentium* can be (and has been) translated as “of peoples” or “of nations”.<sup>13</sup> Here too, the term incorporates two different yet complementary meanings that together indicate the very essence of the notion of *jus gentium*. Suárez, like Grotius after him, developed his vision of *jus gentium* in an attempt to overcome the tension between Machiavellism (where the individual state, such as the one ruled by Cesare Borgia, is at the apex of the political process) and universal idealism (which emphasised human unity through a transcendent conception of legal obligation). In fact, for Suárez, the *jus gentium* is a *fundamental law* that, unlike purely positive law that operates within the boundaries of a particular jurisdiction, is applicable among persons from different nations on

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jus coincidit cum lege, ... unde, ut habeamus brevina nomina quibus uti possimus, primum vocare possumus jus utile, secundum honestum: vel primum jus reale, secundum legale.<sup>1</sup>

<sup>12</sup> Suárez, *De legibus*, II, 17.

<sup>13</sup> Whether *jus gentium* is translated as “law of nations”, “law of peoples”, “right of nations” or “right of peoples”, the English translation always loses something of the deeper meaning of the original term (hence my choice to retain the Latin phrase).

account of the fact that its principles are common to all, or at least many, communities. The *jus gentium* has its customary origin in the laws ‘which individual states or kingdoms observe within their own border’, or *intra se* (within them).<sup>14</sup> However, this customary origin in domestic law develops into an understanding of *jus gentium inter se* (among them), as that law which “all the various peoples ought to observe in their relations with each other.” When referring to the *jus gentium inter se*, Suárez uses the words “omnes populi et gentes varias”. *Populi* is of course peoples, which would also be the closest English translation of *gentes*, which in turn could also mean groupings of people, or communities. The point, however, is that since Suárez does not use the words *nationes* or *respublicæ*, it cannot be assumed that *populi* or *gentes* imply nations or states in the modern meaning of these terms.

While maintaining the universality of the *jus gentium* that reflects the unity of mankind as a whole, Suárez also draws important distinctions between natural law and the *jus gentium* to then illustrate the latter’s affirmative precepts and mandates, its qualified universality and above all its status as human, positive and customary law that is created by the will (*voluntas*) of legislators. This exposes the inner tension within the idea of the *jus gentium*: on the one hand it depends on the declarative force originating in the customary law of the many particular jurisdictions, and therefore on their respective legislators, but, on the other hand, it transcends the limits of individual states when *jus gentium* is taken as the law which binds peoples (*populi, gentes*) to each other, and more so when it is taken as the law common to the whole of mankind. It should be clear, then, that although Suárez – unlike other theorists of the *jus gentium* such as his predecessor Francisco de Vitoria and his contemporary Tommaso Campanella – tends more towards a positivistic understanding of the *jus gentium* as separate from natural law in virtue of the fact that it is written in the form of pacts and covenants between peoples, there is also another sense in which its customary nature reveals the bond with natural and divine law.<sup>15</sup> This is what makes it, as pointed out earlier, almost a median between natural law and positive law.

Within the general Thomistic framework, to which Suárez and the other scholars of the School of Salamanca or the *Second Scholastic* subscribed, human positive law can never transgress or contravene a higher law. What first

14 Suárez, *De legibus*, II, 19, 8: ‘Adde vero ad majorem declarationem, duobus modis (quantum ex Isidoro, et aliis juribus, auctoribus colligo) dici aliquid de jure gentium, uno modo qui est jus, quod omnes populi, et gentes varia inter se servare debent, alio modo quia est jus, quod singulae civitates, vel regna intra se observant, per similitudinem autem, et convenientiam jus gentium appellatur.’

15 Suárez, *De legibus*, II, 17, 8: ‘praecepta juris gentium ad hominibus introducta sunt per arbitrium, et consensum illorum, sive in tota hominum communitatem, sive in majori parte; ergo non possunt dici scripta in cordibus hominum ab auctore naturae ergo sunt juris humani, et non naturalis.’ On Vitoria, see James Brown Scott, *Law, the State, and the International Community*, vol. 1 (Columbia: Columbia U.P., 1939; repr. Westport: Greenwood Press, 1970), chapter 22; On Campanella, see Jean-Paul De Lucca, ‘Jus gentium’, in *Enciclopedia Bruniana e Campanelliana*, vol. 2, ed. by Eugenio Canone and Germana Ernst (Rome: Serra Editore, 2011), pp.243-256.

appears as an ambivalent or even contradictory account of the *jus gentium* in the end turns out to be a careful understanding of the fact that some elements of the *jus gentium* are more closely associated with human positive law, while other aspects of it connect it more closely to the few, basic principles of natural law. While insisting that one ought not to confuse the *jus gentium* with natural law, Suárez is still thinking within the Thomistic framework of a *hierarchy* of laws wherein a lower form of law can never contravene a higher one.<sup>16</sup> It follows, then, that for Suárez, the domestic laws of individual states can never contravene the *jus gentium*, whether it is understood as an inter-state law resulting from the agreement between states or a set of precepts which emanate from the rights common to all human beings, *populi* or *gentes*.<sup>17</sup> No one, not even a state or its laws, may violate the rights held by individuals in virtue of their membership in the community of mankind. This places a limit on the sovereignty of the state where individual rights are concerned. This subject was discussed extensively by great early modern legal theorists, from Vitoria to Gentili and from Bodin to Grotius.

The *Doctor eximius* was a strong advocate of state sovereignty, but he did not consider it to be absolute. In *De legibus*, he applies his theory of subjective rights to what he calls the “great question”: whether subjects have the right to resist or depose a tyrannical ruler. While Thomists after Aquinas more or less relied on classical political theory to advocate the natural basis of political authority and to argue, in some way or other, that a ruler who resorts to tyranny is a usurper and may thus be resisted and deposed on account of his illegitimacy, modern political theorists such as Hobbes and Locke were more inclined to base their argument for resistance on the ruler's failed adherence to the social contract to which he and his subjects were parties.<sup>18</sup> Suárez's argument for the resistance to tyrants is grounded on the *jus se conservandi*, i.e. the fundamental individual right to self-preservation.<sup>19</sup> Subjects may only resist or depose a ruler in those circumstances where the preservation of the community requires such action, and always as a form of self-defence. The right to self-defence advocated for individual subjects is extended to states, which Suárez describes as natural communities of free persons who choose which form of government to adopt on the basis of experience, good custom and the exigencies of the community itself.<sup>20</sup> States, like individual subjects, have the right

16 Ibid.: ‘Quod si de aliquibus praeceptis juris gentium hoc necessario fatendum est, ut ostendemus, non oportet jus gentium cum naturali confundere, nec propter solas illationes etiam plures ita vocare jus illud, quod simpliciter naturale est ...’

17 In virtue of the *pacta sunt servanda* (agreements are to be observed) principle, which is still today one of the main principles of international law.

18 Suárez has sometimes been credited with offering an earlier version of the social contract, and his views on the right to resist are closely related to the contractarian principle which he formulates as the *pactum subjectionis* (political contract) and *pactum unionis* (contract of association), which bind rulers and subjects, and subjects among themselves respectively.

19 This position was common among early modern natural law theorists, such as Domingo de Soto (see Annabel S. Brett, *Changes of State. Nature and the Limits of the City in Early Modern Natural Law*. (Princeton, NJ: Princeton U. P., 2011), p.20.

20 See Suárez, *De legibus*, III, 4, 1.



to defend themselves against external threats to their very existence and, just as individuals may rightfully defend their property and goods as an extension of their right to life, states may defend their property and territory so as to safeguard their very existence. Under the *jus gentium* (taken as an inter-state law) states regulate the relations between them on the basis of custom as well as written pacts or agreements, in very much the same manner as members of a political community regulate the relations among themselves (*intra se*) on matters pertaining to commutative and distributive justice through domestic law. Individual states thus establish their own territorial sovereignty and political immunity, which are in turn mutually recognised by other states. It is on this basis, for instance, that the inter-state law guarantees the immunity of ambassadors or emissaries in foreign states.

Taken in its second sense as the *jus* (in the sense of both “law” and “right”) common to all mankind, the *jus gentium* also binds each state to respect the rights held by individuals living within its territory and irrespective of their nationality. Therefore, the *jus gentium* at once serves to establish and guarantee the sovereignty and immunity of each state in relation to other states, and to *limit* that same sovereignty of an individual state with respect to those living within its territory. The limit to sovereignty and political authority arises from the consideration that even though an individual is “part of” the state, he retains his status as an individual and, consequently, his natural subjective rights. Individuals are not ontologically absorbed in the notion of the state and, therefore, in the exercise of its legitimate sovereignty the state may not violate an individual’s basic rights: ‘[the] state or its ruler does not own the life of citizens ... and therefore it may not lightly or ordinarily compel citizens to lose their lives.’<sup>21</sup>

In Suárez’s system, the *jus gentium* understood as inter-state agreements remains subject to the universal principles of the *jus gentium* which declare and safeguard the fundamental rights of individuals. The violation of such rights remains illegitimate even if states agree among themselves that they may be violated.<sup>22</sup> Inter-state law is based on the principle of good faith, the *pacta sunt servanda* principle, which binds each state to respect treaties and agreements. However, there is a fundamental limit on this principle and on the kind of agreements it may cover, which has come to be known in modern international law as the *jus cogens* (compelling law), i.e. the set of peremptory norms which admit no derogation. Francisco Suárez was arguably the first theorist to have sustained in such a clear manner this fundamental limit to authority on the grounds of basic principles, and in this sense he can be seen as a “founding father” of at least one important aspect of modern international law.<sup>23</sup> However, the next section will illustrate why – to Suárez’s credit – this designation cannot be taken too far: international law as it developed in the centuries after his death moved in a

21 Suárez, *De legibus*, III, 30, 5: ‘... quia respublica vel magistratus ejus non habet dominium vitae civium ... et ideo non potest ex levibus vel ordinariis causis cogere cives ad perdendam vitam.’

22 Cf. Judge Cançado Trindade’s observation in note 4 above.

23 See, for instance, David B. Kopel, Paul Gallant and Joanne D. Eisen, ‘Is Resisting Genocide a Human Right?’, *Notre Dame Law Review*, 81:4 (2006), pp.1275-1346 (p.1328).

direction quite opposite to the philosopher of Granada's more holistic and dual-faceted understanding of the *jus gentium*.

### **The Exclusion of the Individual and the Reconfiguration of State Sovereignty**

Suárez wrote his *De legibus ac Deo legislatore* six years before the beginning of the Thirty Years' War (1618-1648). Beyond the religious pretext which motivated it, this prolonged war involving most European states was nothing less than a series of attempts at territorial expansion which consequently challenged the sovereignty of other states. Since the early sixteenth century, the geopolitics of the old continent had changed considerably with the rise and consolidation of great nations such as Spain and France and the colonisation of the Americas (a subject on which Suárez and other theorists of the School of Salamanca wrote extensively). The treatises on the New World, such as Francisco de Vitoria's *De Indiis* and Bartolomé De Las Casas' *Memorial de Remedios para las Indias* contain much of the groundwork of what later developed into international humanitarian and human rights law. In many ways, they prefigured the arguments for safeguarding individual and community rights against states. By the end of the Thirty Years' War, however, Europe moved in an opposite direction. The Treaty of Westphalia (1648), which sealed the end of the conflict and marked the beginning of the modern international law system, sought to resolve the contentious questions about religious affiliation and state sovereignty and immunity respectively. It established the *cujus regio ejus religio* principle, i.e. that the religion of the state (or ruler) determined the religion of the citizens (or the ruled). This piecemeal arrangement between states, which effectively undermined the right and liberty of individuals to choose their religion, is emblematic of how far removed the beginning of modern international law was from the principles of the early modern *jus gentium*. In this respect, Suárez can hardly be considered a "founding father" of modern international law.

The Treaty of Westphalia also recalibrated and exalted the principle of state sovereignty, to the extent of mandating that no state could interfere in the internal affairs of another state. This implied, in practice, that no state could intervene to defend the rights of persecuted minorities in another state since these were subject exclusively to the domestic laws of that state. In *Defensor fidei* (1613), Suárez had defended the right to intervene on the grounds of safeguarding the rights of minorities or of assisting them to depose a tyrannical ruler. But the reinforcement of borders through the arrangements of Westphalia had effectively removed the strength of enforceability of individual rights found in the earlier notion of *jus gentium*, which transcended borders and viewed individuals primarily as "citizens of the world" and members of the community of mankind. Westphalia had established a system of international relations and international law that was concerned exclusively with inter-state relations. It failed to recognise and engage individuals as true subjects of international law, as holders of rights and bearers of obligations. For almost three centuries, individuals were practically invisible in the eyes

of international law. This exclusive state-centricity found sustenance in philosophical underpinnings as diverse as Hegelian idealism and classical legal positivism.

Hegel conceived the state as the highest and total expression of individuals, the *Volksgeist*, the *unique* spirit of the nation that practically obliterated the individual personality of its components. This runs directly counter to the ontological distinction highlighted earlier in Suárez between the whole and its parts, the state and the individuals who compose it. Other legal theorists of the "Romantic" period, such as Friedrich Carl von Savigny, spoke of the law itself as being based on the *Volksgeist*, the innate consciousness of a people emanating from custom.<sup>24</sup> As far as its application to international law is concerned, Hegelian idealism seems to have won the day over Kant's idea of the *jus cosmopolitanicum*, a law separate from national and international laws which considered the rights of both states and individuals and which primarily valued individuals as holders of fundamental rights and as "citizens of the world", rather than of particular states.<sup>25</sup>

Classical legal positivism, on the other hand, posited the reductionist account of legal validity based simply on the agreement of those bound by the law, with no reference to objective moral principles. And in the case of international law, the actors involved were states, not individuals. By this account, too, individuals were left aside. It is not a coincidence that after World War II legal positivism came in the line of fire of those who accused it of legitimising the atrocities that were committed, or even providing the legal basis for their justification.<sup>26</sup> The major post-war proponent of this legal tradition, H. L. A. Hart, went to great lengths to revise Austin's classical utilitarianism and question its formalist interpretations, in a bid to show how the positivist thesis on the separation between law and morality did not imply or justify the gross infringements of human rights perpetrated during the war.<sup>27</sup>

In the immediate aftermath of World War II there was a shared feeling about the inadequacy of the exclusively state-centric stance in international law which strongly affirmed the principle of non-intervention and acted as a gatekeeper of immunities. The Nuremberg trials inaugurated a new era in which individuals responsible for crimes could be brought to justice under international law, thus giving individuals a standing as bearers of rights and

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24 It would be interesting to investigate the extent to which Savigny's idealisation of customary law as the most perfect kind of law tallies or otherwise with Suárez's idea of the *jus gentium* as customary law, but this would require a study far beyond the scope of this article.

25 It is not a coincidence that this idea was taken up in recent years – in a globalised context – by philosophers such as Derrida and Nussbaum. See Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001); Martha Nussbaum, 'Patriotism and Cosmopolitanism', *Boston Review*, 19:5 (1994), pp.3–34.

26 In his *Separate Opinion* (4 July 2011), §33, Judge Cañado Trindade relates Distomo to both statism and the 'darkness' of legal positivism.

27 See, for instance, H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71:4 (1958), pp.593–629 (p.613 *et seq.*). On international law, see H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford U.P., 1994), chapter 10.

responsibilities.<sup>28</sup> In practice, however, there seemed to be a special focus on individuals as objects of regulation or bearers of responsibilities, rather than as holders of rights. This emphasis on individual obligations with regard to international crimes remained visible, for instance, in the fairly recent establishment of the International Criminal Court. The Universal Declaration of Human Rights, which was also an outcome of World War II, was gradually enshrined in domestic laws and was sustained by the developments in international human rights and humanitarian law. It also inspired many political initiatives and the creation of important regional legal institutions, such as the European Court of Human Rights (ECHR). However, the enforcement of individual human rights under international law remains a far more problematic affair than bringing individuals to justice in relation to international crimes such as genocide. While the very notion of legal personality in international law has changed dramatically since 1945, with individuals becoming explicitly subjects of international law, by and large, states still retain a complete monopoly over rights, obligations and access. As Kate Parlett puts it, there still is a clear 'differential treatment of states and individuals: between active subjects and passive recipients of rights and obligations in the international legal system.'<sup>29</sup> The fact that Parlett's very recent book on *The Individual in the International Legal System* is one of the very few comprehensive treatments of this subject says a lot about the need to sustain future developments with serious scholarship.<sup>30</sup> The main question that arises here is whether the current predominant status of individuals as passive recipients of rights and obligations is sufficient to provide for individuals' adequate access to justice. Judge Cançado Trindade dedicated a book to this subject, in which he argues that the right to access to justice is a right which belongs to the domain of the *jus cogens*, since it lies at the very basis of a legal system.<sup>31</sup> His *Dissenting Opinion* accompanying the ICJ's final judgement on the Distomo case is very much based on the argument that, in his view, the Court's majority had failed to take into consideration the status of individuals as holders of rights, thus reducing a matter arising from the breach of fundamental rights to a consideration of state jurisdiction and immunity.

### Returning towards a Dovetail Approach?

The judgement in the case concerning the Jurisdictional Immunities of the State opposing Germany to Italy illustrates the earlier observation that states still retain a monopoly over rights, obligations and access. It also shows that

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28 Exceptions in the pre-Nuremberg world bore little or no influence on the development of international law until then.

29 Kate Parlett, *The Individual in the International Legal System* (Cambridge: Cambridge U. P., 2011), pp.352-253

30 See also Roland Portmann, *Legal Personality in International Law* (Cambridge, Cambridge U.P., 2010), especially Part III.

31 Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford: Oxford U. P., 2011).



the issue of access to justice is an important test for assessing the role of individuals in the international legal system. In this case, it was clear that the ICJ's decision would affect individuals (the families of the victims of the Distomo massacre). It was only at the stage of Greece's successful application to intervene in the proceedings that the interests of individuals seem to have been given some consideration, and this was because in that particular instance their interests coincided with the interests of a state. Although they were, in a way, holders of rights and bearers of obligations under international law, their role in the international legal system was manifestly passive in this particular case which concerned them directly. While the individuals involved had made direct recourse to domestic courts (in Greece, Germany and Italy) and European courts (the ECtHR), they could not intervene as individuals in the proceedings of a case which considered the jurisdiction of the courts before which they had previously appeared as litigating parties, and therefore the validity or otherwise of the judgments directly affecting them. The individuals suddenly receded to a passive back seat position. While Greece was allowed to intervene in order to 'inform' the Court on matters pertaining to or affecting its interest, the individuals concerned do not enjoy analogous rights under any provision similar to Article 62 of the ICJ Statute. Yet the situation is not so bleak: even though the judgement ultimately failed to give individuals both material and formal access to justice (due to international law as it stands today), the Order allowing Greece to intervene earlier in the proceedings may set an important standard for future jurisprudence. In his *Separate Opinion* supporting the majority of judges in the Order accepting Greece's request, Judge Cançado Trindade notes that...

this is a case which has a direct bearing on the evolution of international law in our times. There is no reason for keeping on overlooking the rights of States while at the same time overlooking the rights of individuals. One and the other are meant to develop *pari passu* in our days ... State immunity and the fundamental rights of the human person are not to exclude each other, as that would make immunity unacceptably tantamount to impunity.<sup>32</sup>

He further observes that since the case in question had its origins in breaches of human rights and international humanitarian law, 'we cannot approach a matter like that of the jurisdictional immunities of the State ... from a strictly inter-State dimension. In the present proceedings before the Court [i.e. Order, not the Judgement], consideration has been given to States as *titulaires* of rights, as well as to individuals as *titulaires* of rights.'<sup>33</sup> The judge argues that Greece was given the right to intervene even in virtue of the fact that it manifestly represented the interest of the individuals concerned. Through the '*resurrectio* of intervention in present-day litigation,' after it had 'lay dormant in the Peace Palace [i.e. the ICJ's headquarters in The Hague] for most of the time of the Court's history,' future developments in international

32 *Separate Opinion* (4 July 2011), §54.

33 *Ibid.*, §60

jurisprudence may come to satisfy the needs not only of the States concerned, but of the individuals concerned as well, 'and ultimately of the international community as a whole, in the conceptual universe of the new *jus gentium* of our times.'<sup>34</sup> As the judge himself notes, our times do not quite aspire to some sort of world-state, a *civitas maxima gentium* ruled by the *jus gentium*, but there seems to be 'an aspiration ... to the effect of the construction of an international legal order applicable both to States (and international organisations) and to individuals, pursuant to certain universal standards of justice.'<sup>35</sup>

The fact that the case before the ICJ traces its origins to the Distomo massacre shows not only the short lapse of time between then and now, but also how international legal institutions which have been established in the meantime operate within a framework of differential treatment of individuals and states in both substantive and procedural aspects of international law. But the reconfiguration of the roles of states and individuals in the international legal system is a continuously evolving process. Jurisprudence (in both senses of the word, as philosophy of law and as case law) contributes in no mean way to this process. The learned opinions expressed in judgements or opinions such as the ones cited above contain much that is of philosophical importance and just goes to show why this area of inquiry falls within the domain of practical philosophy. Ultimately, the central questions on the *legal personality* of individuals in international law and on what constitutes *true* subjects of international law are philosophical questions that engage legal philosophers as well as jurists and practitioners in the field. These contemporary analytic discussions in legal and political philosophy can draw much inspiration from the views and perspectives of past authors. Even though they wrote in a significantly different world, their views form part of a long tradition which enhances the meaning of present-day realities. In the words of John Cottingham, a leading British analytic philosopher who does not suffer from the historiophobia that so often affects many of his colleagues, ...

philosophical argument does not spring out of nowhere [but] is part of a cultural tradition that delivered us to where we are today; and if we ignore that tradition, we will lack full awareness of the significance of the philosophical moves we make, with potentially disastrous results.<sup>36</sup>

This applies to legal and political philosophy as much as it applies to philosophy in general – and perhaps even more so, since law and politics are by their very nature historically and culturally situated. Views such as those expounded by Suárez, who considered both states and individuals as being at once safeguarded and bound by the *jus gentium*, can be quite enlightening. It follows from the common understanding of *jus* (which Suárez calls the 'the proper object of justice') as the link between justice (*justitia*) and law (*lex*)

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34 Ibid., §56, §61

35 Ibid., §36

36 John Cottingham, 'Why Should Analytic Philosophers Do History of Philosophy', in *Analytic Philosophy and History of Philosophy*, ed. by Tom Sorrell and G. A. J. Rogers (Oxford: Oxford U.P., 2005), pp.25-41 (p.39).

that any law or legal system, including international law, is not quite fully a law (*ius*) if, for instance, it limits or lacks the access to justice. And in international law, it is not only states that should have formal access to justice at international level, but also individuals. Without access, justice cannot be fully realised. It is equally important, however, not to see successful initiatives such as the establishment of the European Court of Human Rights as the mere emancipation of the individual-versus-state-centricity. Indeed, state-centricity should not necessarily be seen in a pejorative manner, as long as the rights of individuals are recognised (including the right to access to justice in international law) and their capacity enabled. There is little benefit in continuing to view the individual and the state as exclusive of one another, rather than seek ways of integrating their respective roles. This is what political development in democratic societies is ultimately about: a democratic society based on the rule of law crystallises the rights of the individual vis-à-vis the state, but it does not in any way render the state useless, nor does it obliterate its sovereignty. If anything, it places the state at the service of the individual. And this is perhaps what states should be made more aware of when envisaging and constructing the international legal order. Rather than being self-serving, the interests of states can and should take into account and enhance the role of individuals as true subjects of international law. The possibilities for doing so have increased multi-fold through the reconfiguration in recent decades of the very idea of sovereignty in a landscape of increased regional and international cooperation, networking and sometimes integration, as part of the overall process of globalisation. Legal theory and international law should follow on this process, not only with respect to arrangements regulating relations between countries and groupings, but also with regard to where the individual stands vis-à-vis the state. In spite of all the problems it faces, democratisation has often worked quite well in domestic and regional legislative settings and juridical practices. There is no reason in principle why it should not work well at the level of international law. There is enough experience, or custom, to push for a move in this direction. After all, as Suárez reminds us, the legal customs of particular states lie at the basis of the *ius gentium*. The same could apply to the *ius gentium* of our times.

What we are looking at here goes beyond the 'resurrection' (as the judge calls it) of the right to intervene. At least some of the salient developments in international law and politics over the last seventy years or so have resurrected some of the key features of the early modern idea of the *ius gentium*, such as that formulated by Suárez, whose ideal of a universal community is actually being facilitated and made possible through the process of globalisation and democratisation. This marks a renewed aspiration of an international legal order which the Westphalian system, operating between then and now, had effectively euthanized. The principles of the early modern *ius gentium* which avoided placing state sovereignty and individual rights at loggerheads, together with the dovetail approach of sixteenth and seventeenth century philosophers such as the one illustrated in fairly broad strokes above, have a lot to teach us as we explore possible future directions in international law.