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Salle des Conseils, University Paris II**

***Ius Gentium* - Ideas and Practices of International Law
in Early Modern Law and Theology**

Scientific Committee

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CALL FOR CONTRIBUTIONS

Long forgotten by historiography and legal theorists, the classic doctrine of *ius gentium* elaborated in the sixteenth century was reintroduced into the field of thought at the beginning of the twentieth century thanks to important monographs devoted to Francisco de Vitoria and Francisco Suarez¹. It was then taken up by Ernest Nys² and James Brown Scott³, in a context dominated by the voluntarist interpretation of the international law, which considered *ius gentium* as the expression of the all-powerful will of the States⁴. Stressing that men and peoples appear as the great absent of the voluntarist doctrine, Nys, Scott and other great internationalists in the early twentieth century re-interpreted the idea of a consensual law jointly decided by the nations, in relation to their interests and that of men. In doing so, they relied on the authority of classic doctrine of *ius gentium* developed in the works of sixteenth and seventeenth century authors. The classical doctrine of *ius gentium* also formed the basis of major contributions by jurists to rethink the establishment of peace between men, thus illustrating its major significance for human societies⁵.

The secondary literature that is now devoted to the early modern doctrine of *ius gentium*⁶ is part of a slightly different spirit. This classical doctrine is no longer interpreted in comparison with classical international law of the 17th century, of which it would have constituted an uncompleted precedent.

¹ Pierre Avril, Henri Bailly, Joseph Barthélémy, *Les fondateurs du droit international – leurs œuvres – leurs doctrines*, V. Giard & E. Brière, 1904 ; Luis Alonso-Getino, *El Maestro Fr. Francisco de Vitoria y el Renacimiento Filosófico-Teológico del Siglo XVI*, Sorlot, Madrid, 1914; Association Internationale Vitoria-Suarez, *Vitoria et Suarez. Contribution des théologiens au droit international moderne*, introduction par Yves de la Brière, Paris, Pédone, 1939 ; Camilo Barcia-Trelles, “Francisco de Vitoria et l’Ecole moderne du droit international”, *RCADI*, vol. 17, Paris, Hachette, 1928 ; Albert Geouffre de La Pradelle, *Maîtres et doctrines du droit des gens*, Paris, Ed. internationales, 1950.

² Ernest Nys, *Le droit des gens et les anciens jurisconsultes espagnols*, La Haye, Martinus Nijhoff, 1914.

³ James Brown Scott, *The Spanish Origin of International Law*, Oxford, Clarendon Press/Londres, Humphrey Milford, 1934 ; Id., *The Spanish Origin of International Law*, Oxford, Clarendon Press/Londres, Humphrey Milford, 1934.

⁴ Henrich Triepel, *Landesrecht und Völkerrecht*, Leipzig, Hirschfeld Verlag, 1899; Id., *Die Zukunft des Völkerrechts*, Leipzig, 1916 ; Dionisio Anzilotti, *Diritto internazionale nei giudizi interni*, Bologne, 1905.

⁵ Georges Scelle, *Précis de droit des gens. Principes et systématique* (1932), Paris, Dalloz, 2008.

⁶ Marie-France Renoux-Zagamé (“La disparition du droit des gens classique”, *Revue d’Histoire des facultés de droit et de la science juridique*, 4, 1984, p. 26) proposes this denomination to name the new doctrine of *ius gentium* elaborated by the Second Scholastic in the sixteenth century. Corresponding also to our object, we resume here its terminology. The hypothesis of such a doctrinal unity, bringing together certain authors of legal humanism and of second scholasticism, will be the subject of a communication proposed by the organizers of this symposium.

Rather, it is studied for its own sake, with regard to the historical needs of the societies of the time, to its practical interest, and to intellectual schemata and references mobilized by theorists of the 16th to develop it⁷. Today, scholarship proceeds to a more precise analysis of the historical background from which the idea of interhuman normativity emerged at the very moment when political power was territorialized and where the newly acquired autonomy of the states threatened to set them up against others⁸. Contemporary scholarship pays also attention to the driving role of the doctrine, mobilized most often within broader issues, such as whether the nation is the owner of its public space or whether it remains common to humanity⁹. Furthermore, investigation into the early modern literature on *ius gentium* is no longer limited to emblematic figures such as Francisco de Vitoria and Francisco Suarez; these authors are seen as part of a much broader intellectual current¹⁰. Finally, the doctrinal sources are read in light of the great historical and geopolitical events of the time, illustrating their practical significance¹¹.

The richness of these perspectives calls for the exploration of at least the five following axes:

1. The generic definitions of *ius gentium* between theory and practice,
2. the references to *dominium*, kingdoms, borders and international trade,
3. the study of references to humanity, the Church, the Empire and the State,
4. the question of global stability and of the binding force of *ius gentium*,
5. Theory and practice - The right to war, the intermediaries of peace and the question of the use of the law of nations in the event of international conflict.

Papers can be presented in English or French.

Subject to peer-review, the contributions to the symposium will be published.

Deadline to submit an abstract of the communication is July 30, 2018.

Please send your paper proposal to Gaëlle Demelemestre (gdemelemestre@gmail.com).

⁷ Giovanni Ambrosetti, "Diritto private ed economia nella seconda scolastica", in P. Grossi (dir.), *La seconda scolastica nella formazione del diritto privato moderno*, Milan, Giuffrè Editore, 1973 p. 23-52 ; Rainer Sprecht, "Die Spanische Spätscholastik im Kontext ihrer Zeit", in F. Grunert, K. Seelmann, *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Tübingen, Max Niemeyer Verlag, 2001, p. 3-18 ; Francisco Carpintero, "« Mos italicus », « mos gallicus » y el Humanismo racionalista. Una contribucion a la historia de la metodologia juridical", *Ius Commune*, VI, 1977, p. 108-171 ; Bart Wauters, Marco de Benito, *The History of Law in Europe. An Introduction*, Edward Elgar Publishing, 2017.

⁸ David Kennedy, "Primitive legal scholarship", *Harvard International Law Journal*, 27, 1986, p. 1-99; Anthony Pagden, *The fall of natural man. The American Indian and the origins of comparative ethnology*, Cambridge, Cambridge University Press, 1982, p. 71; Andreas Wagner, "Legal Character of the Global Commonwealth", *Oxford Journal of Legal Studies*, Vol. 31/3, 2011, p. 565-582 ; Id., "Völkerrecht und Rechtsbegriff bei Francisco de Vitoria", in K. Bunge, A. Spindler, A. Wagner (éds.), *Die Normativität des Rechts bei Francisco de Vitoria*, Stuttgart, Frommann-Holzboog, 2011, p. 255-286.

⁹ Annabal Brett, *Changes of State. Nature and the limits of the City in Early Modern Natural Law*, Princeton, Oxford, Princeton University Press, 2011.

¹⁰ Merio Scattola, "La virtud de la justicia en la doctrine de Domingo de Soto", *Anuario Filosófico*, 45, 2012, p. 313-341 ; Kristin Bunge, "Universale Rechtsgemeinschaft und partikulare Gemeinwesen", in K. Bunge, A. Spindler, A. Wagner (éds.), *Die Normativität des Rechts bei Francisco de Vitoria*, Stuttgart, Frommann-Holzboog, 2011, p. 201-227 ; Wim Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)*, Leiden, Nijhoff, 2013 ; Peter Haggemacher, *Grotius et la doctrine de la guerre juste*, Genève, Paris, PUF, 1983 ; Paolo Grossi, "La Proprietà nel sistema privatistico della seconda scolastica", in P. Grossi (éd.), *La seconda scolastica nella formazione del diritto privato moderno*, Milan, Giuffrè, 1973, p. 117-222 ; Peter Nitschke (dir.), *Gottfried W. Leibniz: Die richtige Ordnung der Staates*, Baden-Baden, Nomos, 2015.

¹¹ Randall Lesaffer, "Peace Treaties from Lodi to Westphalia", in R. Lesaffer (éd.), *Peace Treaties and International Law in European History*, Cambridge University Press, 2004, p. 9-44 ; Sébastien Schick, "Négociations diplomatiques et pluralité des droits : le Saint-Empire, l'Europe et le problème des "affaires étrangères""", *Revue d'histoire moderne et contemporaine*, 64/3, 2017, p. 39-63.

Synopsis

This symposium proposes to explore five major issues related to the early modern theory and practice of *ius gentium*:

1. The generic definitions of *ius gentium* between theory and practice

According to Vitoria, the law of nations is established by a "rationally established human decree" to ensure "an order for peace and concord between men"¹². He conceives it as an intermediate law between natural law and particular civil law, but he does not settle the question of its nature, bringing its characteristics sometimes closer to natural law, sometimes to positive law. His successors Domingo de Soto and Diego de Covarrubias, conversely, follow the analyzes of the humanist jurist François Connan, arguing that it is a positive human law responding to the usefulness of peoples¹³. Being a product of human reason, each man can find its standards and understand its merits. Its positivity makes it possible to conceive it as a law created by men according to their needs, but which nevertheless possesses an intrinsic binding force since it comes from reason¹⁴.

This definition of the law of nations as a positive law answering to the needs of the people did not however meet unanimity at the time. Some jurists, like François le Douaren, refuse to consider it as a positive law, and link it closely to natural law. They thus inflect the doctrine in a function of palliative to the too great generality of the precepts of natural law¹⁵. On what basis do they ground their refusal to consider the law of nations as a positive law? Are there legal arguments to refuse the recognition of *ius gentium* as human law? How did Le Douaren and other jurists belonging to the *mos gallicus*, who were particularly attentive to the historicity of legal concepts, reconcile their position with the meaning of *ius gentium* in the Roman tradition?

Another trend has developed, uniting the law of nations to specific positive law more closely. By arguing that reason only accesses natural law, certain Jesuit theologians refuse to consider that it can be mobilized to engender a positive right, relating to contingent needs¹⁶. Thus, they deny *ius gentium* its rationality, and hence its binding force, to regard it as a simple customary law whose

¹² Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomas. De Justitia QQ. 57-66*, B. de Heredia (éd.), Salamanca, Apartado, 1934, q. 57, a. 3, p. 12 et 14.

¹³ François Connan, *Commentariorum*, I, 5, fo. 14 ; Diego de Covarrubias, *Regulae Peccatum. De regul. Iuris libri 6 Relectio*, Lyon, Sebastianus Honoratum, 1560, II, 11, p. 283. See Merio Scattola, "Naturrecht als Rechtstheorie : Die Systematisierung der „res scholastica“ in der Naturrechtslehre des Domingo de Soto", *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Tübingen, Max Niemeyer, 2001, p. 47 ; Antonio Marin Lopez, "El concepto del derecho de gentes en Diego Covarrubias y Leyva", *Revista española de derecho internacional*, Vol. 7, 1, Madrid, 1954, p. 505-528 ; Francisco Carpintero, "« Mos italicus », « mos gallicus » y el Humanismo racionalista. Una contribucion a la historia de la metodolia juridica", *Ius commune*, 6, 1977. Domingo Bañez and Fernando Vazquez de Menchaca formulate variants of this thesis, the first tending to devalue it because of its positivity, the latter distinguishing, in the lineage of Bartole, a primary meaning bringing it closer to natural law, and a second meaning positive, close to the definition given by its co-religionists.

¹⁴ Vincente Piano Mortari, "La sistemática come ideale umanistico", Leo S. Olschki (éd.), *La storia del diritto nel quadro delle scienze storiche*, Florence, 1966, p. 527 ; Joseph Delos, *La Société internationale et les Principes du Droit public*, Paris, Pedone, 1929, p. 200.

¹⁵ Such was the case of François Le Douaren, for example. It is also the position of the Jesuit Juan Azor and the Spanish jurist Fernando de Mendoza. See Donald R. Kelley, *Foundations of modern historical scholarship : language, law, and history in the French Renaissance*, Columbia University Press, 1970. Other jurists, such as Hugues Doneau (*Commentariorum de iure civili*, I, VII), also consider that the law of nations is derived from natural law because it proceeds from the *recta ratio*, and therefore can not be contingent. It loses its capacity to satisfy the cyclical needs of the peoples.

¹⁶ Annabel Brett, *Changes of State. Nature ad the Limits of the City in Early Modern Natural Law*, Princeton/Oxford, Princeton University Press, 2011, p. 84.

existence is due to the regular observance of its norms by sovereigns¹⁷. The law of nations thus becomes for Francisco Suarez and Gabriel Vazquez as contingent as any customary rule, the sovereigns being not obliged to respect it¹⁸. The interpretative differences of law within the Dominican and Jesuit orders deserve a thorough analysis. Are we in the presence, within the second scholastic, of two different legal traditions, veiled by their common reference to the Thomist tradition?

A third attack then weakens the classical doctrine of *ius gentium* by attacking its foundations. It follows a transformation of the representation of the duty of obedience to the law. For the Dominicans, it is the rational norms found by men using reason that ensure the binding force of the law of nations. It is understood that every man naturally obeys the reasonable commandments. Another conception of the obligation had, however, been formulated by Luther, arguing that the constraint came from a superior authority imposing its command on the subject. This epistemological change in the foundation of law is taken up by Pufendorf, who considers that the binding force of law comes from the fact that it is decided by a higher authority¹⁹. Since humanity does not constitute a superior authority like the State, it can not pretend to lay down a right capable of imposing itself on sovereigns²⁰. The law of nations thus loses its subject and its object. Can the eviction of doctrine be interpreted as a consequence of the geopolitical evolution of the seventeenth century? Is the reinforcement of territorial sovereignty enough to discredit the idea that men share a community of law superior to that of national law²¹?

It has also to be stressed that the analysis of the notion in the predominantly German Protestant tradition has not been so much studied as the Catholic Spanish tradition²². It would need to be deepened to allow an overview of the perspectives opened at that time on the idea of a common law for all members of humanity.

Despite all theoretical attempts at clarifying what *ius gentium* is or should be, it is also necessary to recall that, in practice, early modern jurists and theologians understood *ius gentium* in a very flexible way. As Daniel Coquillette and Alain Wijffels have shown with regards to the situation in early modern England, the notion of law of nations was used there in a variety of ways by the same

¹⁷ This is the case of Augustinian friars Aragon and Miguel de Salon, and to the Jesuits Luis de Molina and Gregory of Valentia, up to Gabriel Vazquez, who radicalizes this position by refusing to *ius gentium* the status of customary law, considering it simply as a set of legal permissions. See Franco Todescan, "*Jus gentium medium est intra jus naturale et jus civile* : la « double face » du droit des gens dans la scolastique espagnole du 16^{ème} siècle", in P.-M. Dupuy, V. Chetail (éds), *The Roots of International Law*, Leiden-Boston, Martinus Nijhoff, 2014, p. 172 ; Jean-François Courtine, *Nature et empire de la loi* 1999, p. 147.

¹⁸ Mathias Lutz-Bachmann, "Die Normativität des Völkerrechts : Zum Begriff des *ius gentium* bei Francisco Suárez im Vergleich mit Thomas von Aquin", in A. Fidora, M. Lutz-Bachmann, A. Wagner (éds.), *Lex und Ius. Lex and Ius*, Stuttgart-Bad Cannstatt, Fromman-Holzboog, 2010, p. 467 ; Annabel Brett, *Changes of State*, p. 86-87.

¹⁹ Samuel Pufendorf, *Of the Law of Nature and Nations*, New Jersey, The Lawbook Exchange, 2005, II, 3, p. 213. See Pierre Laurent, *Pufendorf et la loi naturelle*, Vrin, 1982, p. 80. Leibniz will violently oppose this interpretation, maintaining that the nations resort to a positive right specifically devolved to the regulation of their relations, which he describes as "the sphere of the voluntary law of nations, accepted by the tacit consent of the peoples"

(Gottfried Leibniz, *Code diplomatique du droit des gens* (1693), in *Le droit de la raison*, textes réunis et présentés par R. Sève, Vrin, 1994, p. 167.

²⁰ Simone Goyard-Fabre, *Pufendorf et le droit naturel*, Paris, PUF, 1994, p. 237.

²¹ Peter Schröder, "Staat, Religion und Völkerrecht in der politischen Philosophie von Leibniz", Peter Nitschke (dir.), *Gottfried W. Leibniz: Die richtige Ordnung der Staates*, Baden-Baden, Nomos, 2015, p. 38.

²¹ René Sève, *Leibniz et l'Ecole moderne du droit naturel*, Paris, PUF, 1989, p. 70 et 75.

²² Apart from the presentation of Mathias Schmoeckel ("Die Reformation als Grundlage des modernen Völkerrechts", in M. Germann, W. Decock (eds.), *Das Gewissen in den Rechtslehren der Protestantischen und katholischen Reformationen*, Leipzig, 2007, pp. 226-269), there is still no thorough explicit study of the notion of the law of nations within the German Protestant currents of the sixteenth century, a gap that should be addressed. The Protestant tradition on the border of the 17th century, however, has been the subject of specific studies. See e.g. Paulo Emilio Vauthier Borges de Macedo, *Catholic and reformed traditions in International law. A Comparison between the Suarezian and the Grotian Concept of Ius Gentium*, Springer, Cham, 2017 ; Dominik Recknagel, *Einheit des Denkens trotz konfessioneller Spaltung. Parallelen zwischen den Rechtslehren von Francisco Suárez und Hugo Grotius*, Frankfurt-am-Main, Peter Lang, 2010.

authorities at the same time²³. This raises questions about the pragmatic use of references to *ius gentium* in the early modern period. This is the case not only in writings explicitly dealing with matters that, from today's perspective, fall under the scope of international law, but also in treatises or cases about other subjects, such as sale contracts or the law of succession. One could think of the strategic use of arguments from *ius gentium* in the collections of court decisions (*decisiones*) or in the legal advice-literature (*consilia*). What did jurists and theologians in the early modern period try to achieve when grounding arguments on *ius gentium*? They were certainly not always thinking of writing grand theories about international law. This section therefore also welcomes papers that reflect on this pragmatical dimension of the references to *ius gentium* in the context of legal and pastoral practice.

2. *Dominium*, kingdoms, borders and international trade

The law of nations is not simply mobilized by the theorists of the sixteenth century to provide a solution to short-term problems. It is also integrated into the axiology of law that they wish to shape, and that they re-inscribed in the history of humanity. The authors who are interested in it apprehend it through a semi-historical narrative²⁴. In the prelapsarian situation, they imagine that all the goods were common²⁵. But after the Fall, humanity did not remain united; it was divided into different peoples on the surface of the Earth, who agreed that the territories would belong to the first-comer. They settled on separate land and instituted political governments to better support themselves. It was necessary to privatize *dominium* to prevent disputes between men and to favor the increase of wealth²⁶. The political communities thus distinguished themselves from each other by their own political power exerted within their borders, delimiting their rights and prerogatives²⁷. The law of nations justified the introduction of the private *dominium*, gradually interpreted as an inviolable subjective right²⁸. Can we find examples of *ius gentium* used as an argument to establish the legal and conceptual distinctions between private and public domains? The law of nations establishes reciprocal recognition of state autonomy. Has the whole of the earth been shared among men, or are there pieces of land and objects that remain common to humanity²⁹? What were the arguments put forward to justify the freedom of the seas, which, according to the law of nations, can

²³ D.R. Coquillette, *The Civilian Writers of Doctors' Commons, London. Three Centuries of Juristic Innovation in Comparative, Commercial and International Law*, Berlin, 1988, 32-37 ; A. Wijffels, in A.D.E. Lewis and D.J. Ibbetson, *The Roman Law Tradition*, Cambridge, CUP, 1994, 119-134.

²⁴ François Connan, *Commentariorum*, fo. 16 ; Domingo de Soto, *De Iustitia et Iure*, Lyon, 1582, IV, 3, 1 ; Luis de Molina, *De Iustitia et Iure opera omnia, Tractatibus quinque*, vol. I, *De iustitia in genere partibusque illi subiecti*, Venise, 1594, II, disp. 3.

²⁵ On these issues, see Harro Höpfl, *Jesuit political Thought. The Society of Jesus and the State, c.1540–1630*, Cambridge University Press, 2004.

²⁶ Merio Scattola, "Naturrecht als Rechtstheorie: Die Systematisierung der „res scholastica“ in der Naturrechtslehre des Domingo de Soto », *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Tübingen, Max Niemeyer, 2001, p. 39.

²⁷ Annabel Brett, *Liberty, right and nature. Individual rights in later scholastic thought*, Cambridge, Cambridge University Press, 2003, p. 156-159 ; Kaufmann, Matthias, "Das Verhältnis von Recht und Gesetz bei Luis de Molina" , in A. Fidora, M. Lutz-Bachmann, A. Wagner (dir.), *Lex und Ius. Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, Stuttgart-Bad Cannstatt, Frommann-Holzboog, 2010, p. 369-391.

²⁸ Xavier Prévost, "Mos gallicus jura docendi. La réforme humaniste de la formation des juristes", *Revue historique de droit français et étranger*, n° 4, 2011, p. 493 ; Jörg A. Tellkamp, "Rights and Dominium", in M. Kaufmann, A. Aichele (éd.), *A companion of Luis de Molina*, Boston, Brill, 2014, p. 125-153.

²⁹ Faith is thus one of the objects considered to be shared by all men. Europeans, therefore, have a duty to spread the Gospel over the whole surface of the Earth, and to preach it in particular to newly discovered Indians who are ignorant of the divine Word. The Jesuits are particularly involved in these campaigns of evangelization of the Amerindian peoples. See Hervé Pujol, "La christianisation de la Nouvelle-Espagne ou le rêve d'une église indienne : les agents de l'évangélisation », *Cahiers d'études du religieux. Recherches interdisciplinaires*, 10, 2012.

not belong to anybody and should remain of free use³⁰? Can we trade its products? The law of nations also justifies the establishment of public authority to organize the different communities of life. But what is the exact scope of public power's grip over its territory? Is the public space unique to the nation? Are the riches of the earth materials within its frontiers part of the undivided property of humanity, or do they belong to the nation as a matter of *ius gentium*³¹?

The proponents of the doctrine of *ius gentium* start from the idea that all human beings are by nature living in community to argue that they also share a specific community of law, the end of which is to provide a normative framework to regulate their exchanges. They thus imagine rules and rights applicable to all men, building the *ius gentium*, even if these men are born in different territories subject to different legislations³². They distinguish one essential right deriving from the law of nations, viz. the *ius communicationis*, of which commentators have distinguished four elements: the right to transit over all the territories of the Earth (*ius transitus innoxii*), the right to halt and reside there (*ius peregrinandi*), the right to trade with all men (*ius commercii*), and the right to enter into contracts³³. The first two aspects of the *ius communications* make it possible to consider that States were not conceived of by the early modern theologians and lawyers as hermetic entities, but that they remained open to the different members of humanity. Much more ambitious than Kantian cosmopolitan law, which recognizes only a right of temporary hospitality, a large part of the doctrine of the law of nations in the sixteenth and seventeenth centuries defends the idea that the state borders cannot stop the human trade, the various forms of exchange between men³⁴. Which arguments did they put forward to defend such freedom of movement and residence? Were there situations justifying the closing of borders? Did war, at least, invalidate the right of passage for civilians on hostile territory? At a time when the question of borders agitates the public opinion, and where it is widely debated in the intellectual circles, the political sphere and the civil society, it would be quite opportune to deepen the arguments advanced in the 16th century to defend the *ius peregrinandi* inherent to human nature³⁵.

³⁰ Ernst Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts. Studien zu den „Controversiae illustres“ des Fernandus Vasquius (1559)*, Bern, 1949, p. 226 ; Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Genève-paris, PUF, 1983, p. 388.

³¹ Annabel Brett, *Changes of state. Nature ad the limits of the city in Early Modern Natural Law*, Princeton-Oxford, Princeton university Press, 2011, p. 25; Martti Koskenniemi, "Empire and International Law: The real Spanish contribution", *University of Toronto Law Journal*, 61, 2011, p. 14.

³² We find such developments by Jacques Cujas Jacques Cujas, Charles Dumoulin, Antoine Loysel, Chrétien-Guillaume de Lamoignon et Robert-Joseph Pothier. See Marc Ancel, "L'Humanisme et le droit", *Bulletin de l'Association Guillaume Budé*, 3, 1947, p. 40.

³³ Jean Moreau-Reibel, "Le droit de société interhumaine et le "jus gentium". Essai sur les origines et le développement des notions jusqu'à Grotius", *RCADI*, 77, 1927, p. 515.

³⁴ Camillo Barcia Trelles, "Francisco de Vitoria et l'Ecole moderne du droit international", *RCADI*, vol. 17, 1928, p. 196-197 ; Joseph Soder, *Die Idee der Völkergemeinschaft. Francisco de Vitoria und die philosophischen Grundlagen des Völkerrechts*, Alfred Metner Verlag, 1955, p. 52-53 ; Pierre Haggenmacher, "La place de Vitoria parmi les fondateurs du droit international", in *Actualité de la pensée juridique de Francisco de Vitoria*, Bruxelles, Bruyant, 1988, p. 52.

³⁵ There is no intention here of trying to apply ancient law to our modern societies, but of discussing the different theorizations based on the suppression or the opening of the frontiers with regard to the anthropological considerations introduced by its theoreticians. See in particular Phillip Cole, *Philosophies of exclusion. Liberal Political Theory and Immigration*, Edinburgh University Press, 2000; Christopher H. Wellman, Phillip Cole, *Debating the Ethics of Immigration. Is there a Right to exclude?*, Oxford, Oxford University Press, 2011; Joseph Carens, "Aliens and Citizens : The Case for Open Borders", *Review of Politics*, 49, 1987, p. 251-273; Simon Caney, *Justice beyond Borders. A Global Political Theory*, Oxford, Oxford University Press, 2005 ; Yasmine Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago, Chicago University Press, 1994 ; R. Fine, *Cosmopolitanism*, Routledge, 2007 ; Daniel Archibugi, David Held, "Cosmopolitan Democracy: Paths and Agents", *Ethics & International Affairs*, 25/4, 2011; Brian Barry, Robert E. Goodin, *Free movement. Ethical issues in the transnational migration of people and of money*, The Pennsylvania State University Press, 1992 ; Seyla Benhabib, *Another Cosmopolitanism*, Oxford, Oxford University Press, 2006 ; Simon Caney, *Justice beyond Borders. A Global Political Theory*, Oxford, Oxford University Press, 2005; J. Woodward, "Commentary: Liberalism and migration", in B. Barry, R. E. Goodin (éds.), *Free Movement*, p. 59-84.

The third element of the *ius communicationis* regulates the sphere of exchanges between men. It comprises their fraternal or intellectual relations, which transcend borders, but also the more specific sector of commercial exchanges³⁶. The promoters of the law of nations consider that trade belongs to the private domain, and that it escapes the grip of the particular public authorities³⁷. Men can trade with each other on the basis of a right independent of the national legislatures³⁸. However, a precise study of this theme is still lacking. The relations between *lex mercatoria* and *ius gentium* should be further analyzed.

The fourth element of the law of nations covers all the contracts that can unite men. Connan has played a seminal role in articulating this idea by extending the category of *actiones* that can be used by men³⁹. The various bonds of obligation conditioning the interhuman relations fall under the scope of all the forms of contract which men employ in their practical life⁴⁰. According to Connan, they were gradually introduced over the businesses maintained by the various companies. He takes the example of the invention of money which was introduced during the Trojan War to facilitate trade and which, given its usefulness, was then used by all other peoples⁴¹. The commercial contract has thus instituted a new and binding relationship between members of different peoples. Similarly, the testamentary contract that originally came under the particular private law showed its weaknesses when heirs or inherited property were no longer in their country of origin. It had to be reformulated to be one of the norms of the law of the people, and now connects all the members of the Earth⁴². The *ius gentium* thus expresses all the obligations and the possibilities which are imposed or are offered to the men because of their humanity⁴³. The thematization of a private international law proposed by Connan will then be deepened by Hugues Doneau, who defines the rights belonging to each man as faculties, thus clearing the notion of subjective right⁴⁴. This development deserves to be made explicit.

3. Humanity, Church, Empire and State

One of the specificities of the classical doctrine of the law of nations is to have conceived it as a body of law proper to humanity as such, despite its division into different nations⁴⁵. The *ius gentium* is a law the authority of which is superior to that of the particular civil law of nations. This conceptualization mobilizes the central notions of *societas humana* and of unity of human race. The distribution of men in distinct political communities does not alter the community of essence

³⁶ Vitoria, *On the American Indians*, in Vitoria, *Political Writings*, A. Pagden, J. Lawrance (eds.), Cambridge University Press, 1991, p. 279.

³⁷ Rudolf Schüssler, "The economic thought of Luis de Molina", in Kaufmann, Matthias et Aichele, Alexander (éd.), *A companion to Luis de Molina*, Boston, Brill, 2014, p. 257-288.

³⁸ Carlos J. Moreiro Gonzalez, *Organizacion del mercado e integracion europea*, Madrid, 1998, p. 25 ; Win Decock, Christiane Birr, *Recht und Moral in der Scholastik der frühen Neuzeit (1500-1750)*, Berlin/Boston, De Gruyter, 2016, p. 74.

³⁹ Vincenzo Piano Mortari, "La sistematica come ideale umanistico dell'opera di Francesco Connano", in Leo S. Olschki (éd.), *La storia del diritto nel quadro delle scienze storiche*, Florence, 1966, p. 528.

⁴⁰ Connan, *Commentariorum*, fo. 15.

⁴¹ *Ibid.*, fo. 17.

⁴² *Ibid.*, fo. 16.

⁴³ In the last five books of his book, Connan formulates the set of rules of private law regulating the relations between men by considering exhaustively all the legal acts included in the same category. Book V is dedicated to conventions, where pacts, public conventions and contracts are distinguished. Next, Connan discusses transactions, donations and stipulations. Book VIII, devoted to marriage, deals equally with the different contracts that the spouses can contract, the right of dowry, gifts between spouses and concubinage.

⁴⁴ Hugues Doneau, *Commentarii de iure civili*, vol. 1 (6^e éd.), Nuremberg, 1832.

⁴⁵ On the difference between the form of universality mobilized by the classical doctrine of the law of the people and the ancient cosmopolitanism, see Etienne Tassin, *Un monde commun. Pour une cosmo-politique des conflits*, Paris, Seuil, 2013, p. 164-165.

uniting all the members of humanity⁴⁶. These ideas indicate that the founders of international law considered mankind in its mere temporal life, fulfilling in their eyes perfectly the practical and moral finality of man, without considering his spiritual dimension⁴⁷. In contrast to their medieval predecessors, the theorists of the classic *ius gentium* apprehend it outside the Church and all its institutions⁴⁸. They no longer inscribe human existence in tension towards a universalist power which would accomplish its nature; its theorists reject the idea that humanity would be called to be unified by the political form of the Empire or the Church⁴⁹.

According to them, the state is the right scale for institutionalizing a community of life. Large enough to provide the necessary means of subsistence, and small enough to integrate all its members, it becomes the pillar of the political achievement of man⁵⁰. The theoreticians of the law of nations thus open a field of reflection strictly political, where is studied the political dimension of humanity, the capacity of men to organize themselves to provide for their needs and to live comfortably. Would the law of nations, therefore, make it possible to specify the nature of the political link uniting the citizens of a nation, and more generally all the members of humanity? Can natural sociability engender norms capable of organizing the human community? The law of nations considers men as members of a particular nation, but their membership of humanity gives it a binding force superior to that of their state. Can we identify a set of rights that humanity in every man obliges states to respect⁵¹? What sanctions can be considered in case of violation of the rules of the law of nations?

Some of the theorists of *ius gentium*, on the other hand, have identified his universality with the very form of the institutions of law. Connan already remarked that the form of law, resting on innate, self-evident and general principles, perfectly embodied the essence of reason, which proceeds from the same principle of truth by enunciating general rules⁵². Bodin⁵³ and Althusius⁵⁴ reclaim the idea of the law of nations as a common law of all nations. But they replace the idea that it governs their relations by the thesis of a common law by transposition: according to them, the *ius gentium* comprises the set of legal categories used by all the nations⁵⁵. He formulates the universal rules that are the foundation of political institutions. For Bodin as well as Althusius, "the universal

⁴⁶ Vitoria, *On civil power*, in *Political Writings*, p. 41 ; Connan, *Commentariorum*, fo.18 ; Covarrubias, *Quaestionum practicarum*, Francfort, Nicolai Baffaei, 1573, I, 1, p. 6 ; Suarez, *De legibus ac Deo legislatore. Über die Gesetze und Gott den Gesetzgeber*, Lib. II : *De lege aeterna et naturali, ac iure gentium. Das ewige Gesetz, das natürliche Gesetz und das Völkerrecht*, éd., intro. et trad. all. d'O. Bach, N. Brieskorn et G. Stiening, Stuttgart-Bad Cannstatt, Frommann-holzboog, 2016, II, XIX, 9, p. 424 ; Alberico Gentili, *De Jure belli libri tres*, Hanovre, Guill. Antonius, 1598, I, chap. 5.

⁴⁷ Pierre Michaud-Quantin, *Universitas. Expressions du mouvement communautaire dans le Moyen-Âge latin*, Vrin, 1970, p. 13 ; Nicolai Rubinstein, "The history of the word politicus", in *The Languages of Political Theory in Early-Modern Europe*, A. Pagden (éd.), Cambridge University Press, 1987, p. 45.

⁴⁸ It has to be stressed, because it is not the case of all sixteenth and seventeenth century theologians and lawyers.

⁴⁹ Andreas Wagner, "Legal Character of the Global Commonwealth", *Oxford Journal of Legal Studies*, Vol. 31, No. 3, 2011, p. 572. They thus stand out from the project of unifying humanity under the aegis of a common emperor formalized by Dante in *La monarchie* (trad. Michèle Gally, Préface de Claude Lefort, Belin, 1993), p. 83. See Cl. Lefort, Préface à Dante, *La monarchie*, p.17.

⁵⁰ Anthony Pagden, *The fall of natural man*, p. 68 ; Jean-François Courtine, *Nature et empire de la loi. Etudes suarésiennes*, Paris, Vrin/EHESS, 1999, p. 143-151 ; Francisco Todescan, "Jus gentium medium est intra jus naturale et jus civile : la « double face » du droit des gens dans la scolastique espagnole du 16^{ème} siècle", in P.-M. Dupuy et V. Chetail (éds), *The Roots of International Law*, Leiden-Boston, Martinus Nijhoff, 2014, p. 171-173.

⁵¹ J. Soder, *Die Idee der Völkergemeinschaft*, p. 94 ; Gaëlle Demelemestre, "Des relations entre les doctrines dominicaine et jésuite au XVI^e siècle. Etude comparative des théories juridique et politique de Domingo de Soto et de Luis de Molina", *Laval théologique et philosophique*, 73/2, 2017, p. 184-186.

⁵² Connan, *Commentarium*, fo. 17.

⁵³ Jean Bodin, *Exposé du droit universel*, trad. L. Jerphagnon, Commentaire de S. Goyard-Fabre, Paris, PUF, 1985.

⁵⁴ Johannes Althusius, *Dicaeologica libri tres, totum et universum ius, quo utimur, methodicem complectentes*, Francfort, 1649.

⁵⁵ "Before Althusius, Bodin deciphers the legal universe, like the cosmic world, through the grids of a pure reason whose language is mathematics and, even if his theory reveals, in the vocabulary, some Aristotelian reminiscences, the idea of rational universal law has supplanted, if not erased, the venerable theses of natural law. ", Simone Goyard-Fabre, Commentaire à Bodin, *Exposé du droit universel*, p. 164.

law expresses the rational powers and imposes itself, immutably, beyond the contingency of time and place, as the necessary rule of the organization of societies⁵⁶". Our open societies confront us today with a type of questioning echoing these reflections. Should all human societies share the same forms of institutions? Is there an institutional archetype of power perfectly adequate to corporate governance? Should this universal law be conceived of as an ideal scheme gradually updated by nations, or rather as the progressive result of "ordered pluralism"⁵⁷?

In addition, the practical significance of the lack of consideration of religion by its theorists must be emphasized. In their eyes, confession is not a relevant criterion to exclude some men from this community of law⁵⁸. The Ottomans, the Gentiles, the Jews, as well as the Indians, ignorant of the divine Word, are full members of it. Religion does not change the human essence. The *ius gentium* considering only the belonging to the human race, all men share the same community of law obliging to the respect of certain rights and certain duties. The practical contributions of the classical doctrine of the law of nations are known for all matters relating to the Indians⁵⁹. It seems, however, that it was not mobilized during the religious wars that divided Europe as early as 1560. How to explain this absence if it can be confirmed?

4. The question of global stability and of the binding force of the law of nations

The doctrine of the law of nations considers states as autonomous, but not as disconnected. It considers that states are necessarily interdependent because they need each other to support the needs of their people. This is why one of its central aims is to ensure world stability and peace, allowing the different powers to coexist without entering into power relations⁶⁰. The law of nations thus has one of the noblest ends, since it aims at the common good of the whole earth (*totus orbis*), as thematized by Connan and Vitoria⁶¹.

However, the meaning of the reference to world peace at this time should be clarified⁶². Was it conceived as a balance of powers, like a temporary situation where a sovereign manages to neutralize the strength of a competitor, or as the establishment of a collaboration between the states for the preservation of world justice?

The idea of a world authority to decide between States would also deserve special attention. The need for global stability for the preservation of human integrity seems necessarily to raise questions about the conditions for establishing such authority⁶³. Do the authors view it as essentially different

⁵⁶ *Ibid.*, p. 154.

⁵⁷ Mireille Delmas-Marty, *Les forces imaginantes du droit II. Le pluralisme ordonné*, Paris, Seuil, 2004, p. 26.

⁵⁸ Alberico Gentili explicitly exposes this thesis by repeating the arguments of the opposing parties. See Alberico Gentili, *De Legationibus libri III*, Londres, 1583, I, IV ; *De Jure belli libri tres*, Amsterdam, 1645, I, chap. 5. See also J. Moreau-Reibel, « Le droit de société interhumaine et le "jus gentium" », p. 546.

⁵⁹ The Lesson on the Indians, which Vitoria publicly pronounced in January 1539, is an essential reference, but his effort will be prolonged by his co-religionists. In 1546-1548, Covarrubias conducted a course on the conquest of America entitled "De iustitia belli adversus indios", in which he refuted the theories of the naturalness of slavery. See M. Koskenniemi, "Empire and International Law", p. 3-7 ; Joseph Pérez, *De l'humanisme aux Lumières. Etudes sur l'Espagne et l'Amérique*, Madrid, Casa de Velazquez, 2000, p. 383.

⁶⁰ Joseph Delos, *La Société internationale et les Principes du Droit public*, Paris, Pedone, 1929, p. 200.

⁶¹ Francisco de Vitoria, *On civil power*, p. 17 ; Connan, *Commentariorum*, I, 6, fo. 18.

⁶² Such research was done for Vitoria (Daniel Deckers, *Gerechtigkeit und Recht. Eine historisch-kritische Untersuchung der Gerechtigkeit des Francisco de Vitoria*, Fribourg, Herder Verlag, 1991) and Suarez (*Suarez: Guerra, intervencion, paz internacional*, Estudio, traducción y notas por Luciano Perena, Madrid, 1956; Antonio O. Fernandez-Largo, "El derecho de la paz en la escuela española del derecho natural", *Anuario de filosofía del derecho*, p. 195-206), but it is still lacking for the other theoreticians of the law of nations.

⁶³ This is a controversial issue among law theorists. Some (Connan, Vitoria) defend the idea of the institution of a world authority capable of compelling the respect of its rules, others (Soto, Covarrubias) reject it by pointing out the fact that their binding force stems from their rational foundation, obliging by nature every man to respect them. Other currents, rejecting the idea of making it a law, abandon the idea of a possible organization of the human community independent of the States. See Jaime Brufau Prats, *El pensamiento político de Domingo de Soto y su concepción del poder*, Salamanca, Ediciones Universidad Salamanca, 1960, p. 177 ; J. Moreau-Reibel, "Le droit de société interhumaine et le

from the states, like a world parliament, or as an association of sovereigns to intervene when a peer violates the law of nations or the rights of the people? Is there a right of interference for a violation of the rules of the law of nations⁶⁴? The contemporary relevance of this question would justify an attempt to identify the arguments put forward on both sides to defend or invalidate such a right.

5. Theory and practices - The right to war, the intermediaries of peace and the question of the use of the law of nations in case of conflict

We are generally familiar with the changes in the concept of just war brought about by the classic doctrine of the law of nations. Its theoreticians take up the idea that war is morally justified under certain conditions. It originates in an intentional violation of the rule of law of nations by a power, which leaves no choice to the aggressed nation but to defend itself⁶⁵. A just war can only be defensive. Its theoreticians, however, gradually expand the analysis of the circumstances justifying a war, going as far as defending a right of intervention on a foreign territory in case of violation of the law by a sovereign against his people⁶⁶, then a right to offensive war, when it is preferable for a nation to openly trigger a conflict with a power ostensibly displaying its intention to harm it⁶⁷. Some of the later theorists will emancipate themselves from the classic frameworks of just war to advance the idea that each of the adversaries can go to war for a just cause⁶⁸. Thus opened the modern interpretation of an equal position of the belligerents vis-à-vis the law, the war, however, continuing to respond to a specific legislation whose specificity should be specified in relation to that of classical international law.

The jurists and theologians of the early modern period are also carrying out a precise analysis of the rules governing the war. Situations of international conflict constitute a breach in the regular course of law, but they do not escape the rule of law. His theoreticians consider that wars are part of a specific branch of the law of nations, regulating the entry into war (*ius ad bellum*), war itself (*ius in bello*), its completion and the restoration of justice (*ius post bellum* and *ius postliminii*). To legally frame these moments of destabilization of the international order, they detail the conditions justifying the outbreak of hostilities⁶⁹, the actions permitted or prohibited vis-à-vis the adversary, prisoners and civilians⁷⁰, and the fair estimate of the repairs which can claim the winner⁷¹.

Another of the advances of the theoreticians of the law of nations is to theorize the intermediaries of the peace, working with a foreign power to maintain peaceful relations, to collaborate for a joint operation, or to solve the tensions between nations⁷². These could include accredited ambassadors with the power to negotiate, or temporary envoys to inform an operation or to transmit official documents. Maintaining courteous relations between States by means of envoys was essential to

“jus gentium” ”, p. 511 ; Andreas Wagner, “Legal Character of the Global Commonwealth”, *Oxford Journal of Legal Studies*, 31/3, 2011, p. 572.

⁶⁴ Alberico Gentili, *De iure belli libri tres*, I, XVI.

⁶⁵ This idea of a just war, repeated today by Michael Walzer (*Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York, Basic Books, 2006), deserves to be deepened. See Daniel R. Brunstetter, Jean-Vincent Holeindre, “La guerre juste au prisme de la théorie politique », *Raisons politiques*, 45, 2012, p. 5-18.

⁶⁶ Vitoria, *On civil power*, p. 17.

⁶⁷ Molina, *De iustitia et iure*, vol. I, disp. 98-123.

⁶⁸ This is the case of Alberico Gentili, who argues that wars can be right on both sides. See A. Gentili, *De iure belli libri tres*, I, XII.

⁶⁹ Diego de Covarrubias, *Regulae Peccatum, De regul. Iuris libri 6 Relectio*, Lyon, Sebastianus Honoratum, 1560, II, 10, p. 256.

⁷⁰ Hugo Grotius, *The Rights of War and Peace*, Richard Tuck (ed. and Introduction), Indianapolis, Liberty Fund, 2005, Book III, Chap. VII.

⁷¹ Gentili, *De iure belli libri tres*, III, 1-11.

⁷² Before launching a war, the duty of the State is to try by all means to obtain satisfaction by peaceful means. See Richard Zouch, *Iuris et iudicii feccialis, sive Iuris inter gentes, et quaestionum de eodem explicatio* (1650), T. E. Holland (éd.), Washington, Carnegie Institution of Washington, 1911, II, sections 4-5.

securing international trade, enabling them to peacefully treat each other's interests⁷³. The establishment of negotiations and dealings rather than a war was also very quickly interpreted as a tool preserving international stability. It would be interesting in this respect to analyze the evolution of the diplomatic office with the emergence of the modern international configuration, in comparison with the medieval situation⁷⁴.

On the other hand, it would be very timely to clarify the actual use of the law of nations by sovereigns, and its impact on the practical resolution of international conflicts. We know that the theorization of the law of nations had an impact in Spain on the legislation of the Indies, imposing the respect of the natural freedom of the Indians, the abandonment of their enslavement, and the recognition of their political autonomy⁷⁵. Is this also the case in terms of relations between European states? Do European sovereigns mobilize the doctrine of the law of nations to justify their pretensions or their foreign policy? When they conclude agreements with each other, do they motivate their decisions through it? Do territorial claims take into consideration its rules? How to explain this absence if it turns out to be the case?

The centrality of the doctrine of *ius gentium* lies in the fact that its promoters forged it to meet the unprecedented practical needs of European nations at the beginning of the sixteenth century. Remaining until the seventeenth century in the heart of the analysis of relations between men and nations, it is difficult to conceive that it was not used by sovereigns. It would be necessary here to have a study of the impact of historical events on its development. Can we identify links between its transformation and the evolution of international circumstances? Can the major European treaties be considered as expressions of the rules of the law of nations, or do they only show an already well-established state of affairs on the European scene?

⁷³ Zouch, *Iuris et iudicii fecialis*, II, sect. 4, p. 283. See Charles Giry-DeLoison, "Le personnel diplomatique au début du XVI^e siècle. L'exemple des relations franco-anglaises de l'avènement de Henry VII au Camp du Drap d'Or (1485-1520)", *Journal des savants*, 1987, p. 205-253.

⁷⁴ Dante Fedele, "Naissance de la diplomatie moderne (XIII^e-XVIII^e siècles). L'ambassadeur au croisement du droit, de l'éthique et de la politique", *Studien zur Geschichte des Völkerrechts*, 36, Baden-Baden, Nomos, 2017.

⁷⁵ This can be illustrated for example by the conflict between the *encomenderos* and the Spanish intellectuals. The profits derived from the slavery of the Indians by the *encomenderos* gave them a strong hold on the Spanish government, illustrated by the obtaining of the revocation, in 1534, of the royal decree of 1530 prohibiting any future slavery of the Indians. This decision, however, provoked an outcry among the academics of Salamanca and Alcalá, which forced the emperor to promulgate in 1542 the *Nuevas Leyes* condemning the *encomienda*.