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Philosophical Foundations of International Criminal Law: Correlating Thinkers

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E-Offprint:

Hanne Sophie Greve, “*Inter Homines Esse: The Foundations of International Criminal Law and the Writings of Ambrose, Augustine, Aquinas, Vitoria and Suárez*”, in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book)). This publication was first published on 30 November 2018. This e-offprint was released with a new copyright page on 16 December 2022.

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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

Inter Homines Esse:
The Foundations of International Criminal Law
and the Writings of Ambrose, Augustine,
Aquinas, Vitoria and Suárez

Hanne Sophie Greve*

The revolutionary aspect of human rights, as agreed upon by the world community after the Second World War, is not the many different rights but the fact that these rights belong to every member of the human family in that very capacity. Recognition of human dignity and its worth is – as asserted in the Charter of the United Nations – a pre-condition for peace and security in the world. It was the one solution that the international community could identify and agree on, after two world wars in less than thirty years that brought untold human suffering and left several tens of millions dead and many more wounded.

Some see the acknowledgement of human dignity and worth almost as part of an insurance arrangement – if you do not hurt me, I shall not hurt you. Others approve of human dignity as a value that holds religious or philosophical significance or both. Either way, the undisputed recognition of human dignity was made the foundation of international relations and international law after the Second World War. It became a first principle that one does not argue in order to prove (*ad probanda*). Rather, it constitutes a first principle from which it is argued in order to prove other elements within the ambit of human rights (*ad ostendendum*).

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The acuteness and magnitude of the human suffering that still remains – in part due to previously unknown causes – has made human rights essentially a practical remedy in constant need of being amended, rather than a subject for thorough philosophical analysis as concerns its first principle – the human dignity that belongs to every member of the human race.

International criminal law is in numerous respects distinct from human rights law – beyond the first principle of human dignity, which forms the ratio for international criminal law as well.

Having worked as a judge – nationally and internationally – for more than thirty years, and with refugee law, war crimes, human trafficking, opposing the death penalty, and dealing with general human rights issues for almost forty years, I see international law as having somehow lost sight of this first principle.

There *is* behaviour and human conduct – the issue is only who is establishing the rules, *de facto* legislating by setting the standards. There is *no normative void*, that is, nowhere in the relationship between human beings there is behaviour not following any norms. Certain moral precepts are inherent by virtue of human nature. There is a link between transcendent human dignity and the laws of nature or reason.

The theory of natural law is complex. It addresses questions such as:

- whether a law is consonant with practical reason;
- whether a legal system is morally and politically legitimate; and
- the relation between a legal system and human liberty and justice.

Natural law is normative. It provides basic standards and direction for legal thinking, but regarding the essential questions of ‘being’ – what it means to be human – it cannot possibly answer every question.

European legal thought – subsequent to the introduction of Cartesian doubt and the modern sciences – seems to have sought refuge in the two other main branches of legal philosophy: (i) legal positivism, and (ii) legal realism. Both these branches are narrow enough to be able to compete with proper science. This, however, is an illusion for more reasons than one. Most importantly, law becomes irrelevant – if not even counter-productive and dangerous – if it is unwilling to address the issue of ‘being’ human.

Humanity is comprised of the singular individual and the plurality of the whole – the two being both distinct and totally intertwined. Simultaneously simple and complex. The international community must once again find the courage to face:

- the fact that regardless of the absence of law there exists no normative void; and
- that the purpose and reason for every community (State based and international) and for all legislation is the recognition of the inherent integrity of humans which is impossible to understand, protect and uphold in separation from the plurality of humankind.

Issues such as the: essence of human life, meaning of morality, function of law, significance of justice, and the purpose of organised society, are perennial. Philosophical and religious thought concerning transcendent human dignity and its implications for basic morality and law, can be explored through the writings of five enlightened thinkers – Ambrose, Augustine, Aquinas, Vitoria and Suárez – who also provide an invaluable contribution to the understanding of the foundations of international criminal law.

Ambrose was born around 339 AD and Suárez died in 1617 AD. Each of the five embraced the disciplines of philosophy, law and theology. They were all profoundly well-versed in the philosophy and the literature of antiquity. They belonged to traditions – such as seen for example in the *Corpus iuris civilis* – where compilation of – and commenting on – all relevant sources was part of an intellectual undertaking. The goal was to honour God by explaining the Truth – not to achieve personal fame. The five were eager to further the work of their predecessors within the Catholic Church, with the magnificent contributions to knowledge found in Greek and Roman thinking in general.

The sheer magnitude of the five's writings is overwhelming. Any inconsistencies and shortcomings found in this chapter are out of the author's attempt at summarising their work to meet present day needs within a limited few pages. To do them right, their enlightened works themselves should also be consulted – their clarity of thought is outstanding and they provide superb inspiration to any scholar concerned with the philosophical foundations of international criminal law.

5.1. Enlightened Thinkers of the Catholic Faith

5.1.1. Introduction

Diverse conceptual characteristics (*ratio cognoscibilis*) make for diverse sciences. For instance, the astronomer and the natural philosopher demonstrate the same conclusion, that the earth is round. But the astronomer does this through a mathematical middle term – i.e., a middle term abstracted from matter – whereas the natural philosopher does it through a middle term considered materially. Hence, nothing prevents it from being the case that the same things that the philosophical disciplines treat insofar as they are knowable by the light of natural reason should be treated by another science insofar as they are known by the light of divine revelation.

Saint Thomas Aquinas¹

This chapter focuses on elements of the thinking of five enlightened representatives of the Catholic faith. All of them were working within the field of theology, but not exclusively – philosophy and law were within their areas of inquiry. That is, their starting points were different from non-believers, but their elaborations and reflections on the basics of being human and living among fellow human beings are (save for their understanding of the absolute sanctity of each individual human life) what the philosophical discipline treats as knowable in light of human reason.

Again, in the words of Aquinas:

the philosopher and the believer consider different matters about creatures. The philosopher considers such things as belong to them by nature [...]; the believer, only such things as belong to them according as they are related to God – the fact, for instance, that they are created by God, subject to Him, and so on.²

In philosophy as such, what can be known *per se* – that is by itself upon sound and rational reflection and inquiry – concerning the public domain, are the starting points. These starting points are not the products of deductive proof.³ By distinguishing reason from faith, but associating

¹ Aquinas, *Summa Theologiae*, *Prima Pars* (First Part or part I), question 1, art. 1.

² Aquinas, *Summa contra Gentiles*, book II, chap. 4.

³ Cartesian doubt is universally applicable.

the two with one another, all of the five Catholic thinkers made remarkable philosophic inquiries into the reasons and principles of the human condition hereunder with a specific view towards human behavioural responsibility. Crime and punishment in the community of humankind were also subject to their inquiries.

Each of them has become legendary for his clear definitions and distinctions, strength of argument and keen discussions. As they sought coherence between cause and effect, they applied philosophy's own methods of inquiry.⁴

The five were all men of their times. All took advantage of and engaged with the most profound philosophical studies available to them. Each, moreover, benefited from his predecessors in this line of illustrious Catholic thinkers. Their contributions significantly advanced the philosophy of humankind to increased depths of understanding. What started with Greek philosophy was transformed, not in the least by the five, into the broad basis for Western civilisation in the field of human relations.

5.1.2. Ambrose of Milan (~339–397)

Born the son of a high-ranking Roman official in Gallia, Ambrose studied Greek, rhetoric, law and literature. He started his professional career as an advocate in the court in Sirmium (Sremska Mitrovica in Vojvodina) before he continued his work in Rome. In about 372, Emperor Valentinian appointed him governor of the Province Aemilia and Liguria, where Milan was the capital. From the early fourth century, Milan had been the administrative centre of the Western Roman Empire. Ambrose proved efficient and popular as governor.

He was raised a Christian but not baptised yet when, in the midst of Church turmoil in 374, the people of Milan elected him their bishop. Ambrose resisted, but the Emperor approved of the election. Ambrose was quickly baptised and ordained as a priest before he taking up office as a bishop.

Following riots in Thessaloniki, Greece in 390, Emperor Theodosius ordered gruesome reprisals, allegedly having some 7,000 people mur-

⁴ The art of philosophy has developed over time. The discipline has moved from the pursuit of wisdom in Antiquity – encompassing the now separate specialities of philosophy, religion, and psychology – to the largely argument-oriented academic branch of learning we know today.

dered – many innocents among them. Ambrose insisted that the Emperor should publicly denounce the punishment. As he did, both men apparently increased their reputation.

Ambrose taught mainly through his sermons, but he wrote a large number of hymns, composed and wrote many books as well. His book on ethics written for the clergy, *De Officiis Ministrorum* (*On the Duties of the Clergy*), has been particularly influential.

The Western philosophical tradition reached a decisive new stage following the pervasive merging of Greek philosophical tradition and Christian thought. Ambrose was influenced by Platonism and Stoicism, and drew on Seneca and Cicero in his philosophical inquiries.

Ambrose is known as the ‘Christian Consul’. With some other theologians of late Antiquity, he is honoured as a Father of the Church. Ambrose – like other Church Fathers – was influential in part through his original writings in complete texts (*originalia*), in part through annotations, explanations and commentaries on particular passages in the Bible and in anthologies (‘glosses’), and through extensive quotations made by later writers.

Influenced by the Stoics, the Church Fathers passed on the understanding that coercive government, slavery and property were not part of God’s original plan for humankind. Initially, human beings would have accepted the guidance of the wise, and no one would have sought to control more resources than needed to support a temperate way of life. No human being would have been treated as property. Different realities were the results of sinfulness.

On property, Gratian’s *Decretum* included a passage from Ambrose:

But he says, ‘Why is it unjust if I diligently look after my own things as long as I do not seize other people’s?’ O impudent words! ... No one should say ‘my own’ of what is common; if more than what suffices is taken, it is obtained with violence. Who is as unjust and as avaricious, as he who makes the food of the multitude not for his own use, but for his abundance and luxuries? The bread which you hold back belongs to the needy.⁵

⁵ *Decretum Gratiani*, distinction 47, 8. *Decretum Gratiani* is a collection of Canon law. It was compiled and written in the twelfth century by a canon lawyer from Bologna known as Gratian.

5.1.3. Aurelius Augustine (354–430)

The most influential of the Church Fathers in medieval Europe was Augustine. Aurelius Augustine was born in Thagaste (now Algeria, then a Roman North African province). He received a classical education primarily in rhetoric in North Africa, before he went as a professor in this subject to Rome and later, Milan. At a young age, his interest for philosophy was kindled as he read Cicero's *Hortensius*.⁶ In Milan in 387, Bishop Ambrose baptised Augustine and Augustine's son, Adeodatus.

Augustine spent four years in Italy and the rest of his life in North Africa. In 391, he was reluctantly ordained as a priest in Hippo Regius (North Africa); and in 395, was made bishop in the same city where he remained for the rest of his life.

A prime focus of Augustine's thinking was how a human being can make sense of and live within an adversarial world fraught with danger where one may easily lose everything.⁷ Evils that afflict us as human beings were also a focal point for Greek philosophers – including the Epicureans, the Stoics, the Sceptics and the Platonist and Neo-Platonist schools. Not in the least, the latter represented profound thinking – a metaphysical framework of extraordinary depth and subtlety – that Augustine combined with classical Roman thought and further developed in harmony with Christian doctrine. Augustine found much to be compatible between the traditions; on points of divergence,⁸ he advanced the Christian understanding.

Immersed in the questions of his official functions and the controversies that confronted the Church at his time, he augmented his practical understanding of human challenges. He became utterly mindful of the powerlessness of the unaided human will; that is, the moral drama that constitutes the human condition. The latter more often than not thwarted by profound ignorance. Following Greek influence, Augustine viewed reason as exerting a dominant influence over other human capacities; and he was confident of the superiority of the rational over the non-rational.

⁶ Augustine, *Confessiones*, book III, chap. iv, 7–8. *Hortensius* or *On Philosophy* is a now-lost dialogue written by Marcus Tullius Cicero. The core idea is that human happiness is to be found by using and embracing philosophy.

⁷ Cf., for example, *ibid.*, book IV, chap. x, 15.

⁸ Cf. *ibid.*, book VII, chap. xx, 26.

Augustine is a prime early thinker merging Greek philosophy and Christian thinking, adding significant contributions of his own. His influence has been widespread and enduring. He wrote extensively – authoring more than one hundred titles. For later generations, the most influential of Augustine’s writings has been the *Confessiones*, *De Libero Arbitrio* (*On Free Choice of the Will*) and *De Civitate Dei* (*On the City of God*).

The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.⁹

5.1.4. Thomas Aquinas (1225–1274)

Over the centuries after the Fathers of the Church, there was limited philosophical and political writing, the old Greek language was neglected and much of the Greek heritage with it. Significant thought was however, given to conceptions of the role of a king and the difference between a king and a tyrant. The era saw some writings in the ‘mirror of princes’ genre. The king was considered to have a duty to do justice – both to enforce and to obey the law. In part, law was based on the consent of the people. If a king failed to do justice and lost the consent of the people, he might be deposed of.

The twelfth century saw a renaissance with the re-appropriation of the culture of Antiquity. The Aristotelian *corpus* became available in Latin translation together with other Greek and Arabic philosophical and scientific writings. Simultaneously, there was a renewed interest in the Roman law as codified by Justinian (*Corpus iuris civilis*, dated 533–34 AD). As universities opened, the works of Aristotle became a main element of the arts curriculum. The question of the correlation between the faith and reason resurfaced.

Thomas Aquinas was born near Montecassino where he began his education. Furthering his studies in Naples, he became familiar with the Dominican Order¹⁰ he joined. Thence at Cologne, he studied with Albertus Magnus who had written an interpretation of the Aristotelian *corpus*. Aquinas completed his studies at the University of Paris and taught there for the following three years. For the next ten years he worked with the

⁹ Augustine, *De Civitate Dei*, book XIX, chap. 13.

¹⁰ The Order was founded in 1215 to propagate and defend the Christian faith.

mobile papal court in Italy, before a new tenure of three years in Paris. Upon return to Italy, he was assigned to Naples – still teaching.

Scholasticism is a method of learning. It utilises thorough conceptual analysis and careful drawing of distinctions; in combination with rigorous dialectical reasoning to gain knowledge by inference and to resolve contradictions. It was the method then applied to reconcile Christian doctrine with Greek philosophy, especially that of Aristotle.

Beginning with *On the Soul* in 1268, Aquinas made an immense contribution to Western thinking by creating profound commentaries on twelve of Aristotle's main works. As a philosopher, Aquinas is an Aristotelian. He referred to Aristotle as *the* philosopher and adopted his analyses in numerous fields.¹¹ In certain respects, Neo-Platonism influenced him as well, in others he broke with Neo-Platonic and, to some extent Augustinian thinking, or rather he developed it further into increased understanding.

Aquinas's *magnum opus*, *Summa Theologiae*,¹² was conceived of as a summary of theology "in a way consonant with the education of beginners". It includes nevertheless, *inter alia*, inquiries into dominion in the state of innocence; divine, natural and human law; the best form of government; and war. When Aquinas took recourse to *the* Jurist or *the* Legal Expert when writing *Summa Theologiae*, the reference is to the Roman jurist Ulpian – the single most quoted contributor to Justinian's *Digest* in the *Corpus iuris civilis*.¹³

In *Summa Theologiae*, Aquinas collected, rearranged and enhanced with important additions the philosophical and spiritual heritage from the Fathers of the Church. Aquinas referred to Augustine as *the* Theologian. Aquinas seems, it has been said, through his immense knowledge of this inheritance in a certain way to have obtained the intellect of them all. *Summa Theologicae* is the pinnacle of Scholastic, Medieval, and Christian philosophy.

¹¹ Aquinas denounced the understanding of a chief Muslim commentator on Aristotle at the time, the Andalusian philosopher Averroes.

¹² The *Summa Theologiae* was written from 1265 to Aquinas's death in 1274 – when it was not yet completed. It is a compilation of the main theological teachings of the Catholic Church. At the same time, it is one of the classics of philosophy and among the most influential works of Western literature.

¹³ Justinian's *Digest* (or *Pandects*) is the centrepiece of the *Corpus iuris civilis*. It is akin to a legal encyclopaedia. The *Digest* is considered to be by far the most significant source of Roman law.

The thinking of Aquinas established a new *modus vivendi* between faith and philosophy. Over the centuries, the Catholic Church has consistently reaffirmed the central importance of the works of Aquinas both in theology and in philosophy. *Mutatis mutandis* as to the discoveries of a later age, Aquinas still provides an immense source of the most profound understanding – the seeds of almost infinite truths.

5.1.5. Francisco de Vitoria (1486–1546)

Francisco de Vitoria was a Spaniard living at the time of the Reformation. He belonged to the Dominican Order like Aquinas before him and was professor of theology at the University of Salamanca in Spain. Vitoria was central to the revitalised philosophical and theological inquiry of the sixteenth and seventeenth centuries. It followed the methods applied by the medieval Scholastics – Aquinas first among them – adapted to the developments in theology. The era is known as Second or Early Modern Scholasticism, simultaneously representing late Scholasticism.

What ignited Vitoria's intellect more than anything else was the news of the brutality and the lawlessness of the Conquistadores following the discovery of America by Christopher Columbus:

The whole of this controversy and discussion was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world.¹⁴

Vitoria insisted that *all* human beings – irrespective of race, geography or religion – have the same rights and shall perform the same duties. Vitoria examined diligently “the titles which might be alleged, but which are not adequate or legitimate” and “the legitimate titles under which the aborigines could have come under the sway of the Spaniards”.

Vitoria did not understand the State as spontaneously generated, but as a human organisation in accordance with the law of nature. A main topic for his inquiries and analyses was the ‘State’ – its origins, its sources and its attributes in relation to the people composing it.

Vitoria's reasoning illustrates that he was fully familiar with Roman law. In matters pertaining to the State, he frequently invoked the philosophy of Aristotle and Cicero. In general, Vitoria found strong support for

¹⁴ Vitoria, *On the Indians Lately Discovered*, opening lines.

his analyses in the thinking of Augustine and Aquinas. Vitoria was keen to find authoritative support for the elements of his thinking from his predecessors and in Roman law.

Like the individual, the State can neither exist nor prosper in isolation. Vitoria thus reasoned:

International law has not only the force of a pact and agreement among men, but also the force of law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are the rules on international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, [...] it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

Vitoria considerably advanced the ‘just war’ theory. War, the ultimate remedy, being less desirable and less efficient as compared to international justice to avenge a serious wrong by a State or its people.¹⁵

Vitoria is considered as the founder of the modern law of nations. His main works are *De Indis Recenter Inventis* (*On the Indians Lately Discovered*) and *De Iure Belli Hispanorum in Barbaros* (*On the Law of War*). Vitoria belongs to ‘The Spanish School of International Law’ that evolved from his chair at the University of Salamanca – the School of Salamanca movement.

5.1.6. Francisco Suárez (1548–1617)

Francisco Suárez was born in Spain. He joined the Society of Jesus and became a Jesuit priest. Suárez was a leading figure of the School of Salamanca movement, but arrived to the University of Salamanca only after the death of Vitoria. As a philosopher and theologian, Suárez is regarded as the greatest Scholastic after Aquinas.

With Suárez, Scholasticism left its Renaissance phase for its Baroque phase. The works of Suárez were comprehensive, exhaustive and systematic – few subtleties escaped him. He addressed almost every aspect of philosophy, metaphysics in particular: ethics, law and theology. He

¹⁵ Cf. Augustine, *De Civitate Dei*, book XIX, chap. 7 on the misery of wars, even of those called just.

added profound original ideas to what was already available. Suárez was extremely creative, producing a vast amount of work, writing twice as much as Aquinas.

Suárez first taught philosophy at Salamanca. From 1574, he switched to teaching theology, first at the Jesuit College in Valladolid, thence at the University of Coimbra where he remained for the rest of his life save for a brief tenure in Rome. Suárez's most significant philosophical achievements were in metaphysics and philosophy of law. *Disputationes Metaphysicae* (*Metaphysical Disputations*) is probably his most profound work where he developed metaphysics as a systematic method of enquiry. Suárez compiled and analysed the views of the main Western philosophers on a vast range of problems, concluding with his own interpretations. His treatises on law – twenty books – *Tractatus de Legibus ac Deo Legislatore* represents an illustrious philosophical achievement.

Suárez was regarded in his time as the most eminent living philosopher and theologian, called *Doctor Eximius et Pius* (Exceptional and Pious Doctor).

The School of Salamanca movement embraced a huge number of thinkers on the Iberian Peninsula, elsewhere in Europe and in Iberian America. Jesuit missionaries also brought the thinking of Suárez to Asia and Africa. At one time, a missionary attempted to write *Disputationes Metaphysicae* with Chinese characters.

In contradistinction to Vitoria, Suárez discoursed in the abstract that is without reference to any particular event. Beyond his philosophical works, he did however write extensively on issues raised in the political upheavals of his time. Suárez' thinking was an adapted form of Aquinas'. Like Vitoria before him, Suárez was highly focused on the 'State', international relations and war:

It is impossible that the Author of nature should have left human affairs, governed as they are by conjecture more frequently than by sure reason, in such a critical condition that all controversies between sovereigns and states should be settled only by war; for such a condition would be contrary to wisdom and to the general welfare of the human race; and therefore it would be contrary to justice.

Suárez is seen as the founder of the modern philosophy of law and the law of nations.

5.2. The Actors

5.2.1. God

5.2.1.1. Genesis 1:27

So God created man in his own image, in the image of God he created him; male and female he created them.

Genesis 1:27

Here the Judeo-Christian ‘worldview’ is summarised in its extraordinary simplicity and absolute complexity:

- God the Creator, the divine Author and the First Mover.
- The individual human being as created in the image of God.
- Each and every individual human being as created in the image of God.
- The plurality of human beings – humankind – as created by God each in God’s image.

In the words of Augustine, God is the ultimate source and point of origin for all that comes below, equated with Being,¹⁶ Goodness,¹⁷ and Truth.¹⁸ God is the unchanging point that unifies all that comes after and below within an abiding and rational hierarchy that is ordained providentially.

Aquinas reasoned thus,

Even though we cannot know the real definition (*quid est*) of God, nonetheless, in the science of sacred doctrine we use His effects, whether effects of nature or effects of grace, in place of a definition in regard to the things that are considered about God in this doctrine – just as in the other philosophical sciences, too, something is demonstrated about a cause through its effect, where the effect takes the place of a definition of the cause.¹⁹

¹⁶ Augustine, *Confessiones*, book VII, chap. x, 16.

¹⁷ Cf. Augustine, *De Trinitate*, book VIII, chap. 3, 4.

¹⁸ Augustine, *Confessiones*, book X, chap. xxiii, 33; Augustine, *De Libero Arbitrio*, book III, chap. 16.

¹⁹ Aquinas, *Summa Theologiae*, part I, question 1, art. 7.

5.2.1.2. Jesus Christ the Redeemer

Jesus Christ, Son of the Eternal Father, who came on earth to bring salvation and the light of divine wisdom to the human beings, raised human beings to immortality and eternal life. The Redemption promotes mortal human life to the position of immortality – an immortality that thus far was understood to pertain to the cosmos only. In consequence, the Redemption reversed the ancient relationship between the human being and the world. Previously, human life had been appreciated but as one among several ‘goods’. The Redemption replaced the old worldview with a Christian fundamental belief in the sacredness of life – the individual human life being an absolute value.

‘Equal is not same’ as the old Roman legal maxim goes. In the Christian faith, each individual human being is unique and irreplaceable – not a mere specie of the human race.

Augustine insisted that the God of the Old Testament is the same God as the God of the New Testament. The Christian belief in Jesus Christ the Redeemer is that the Redemption is for each and every human being and not exclusively for Christians or followers of the three Abrahamic religions.

5.2.1.3. A Comprehensive Understanding of the Universe as Created by God and Inhabited by Human Beings

All the five enlightened thinkers of the Catholic faith begin their theological discourse with what God has revealed about Himself and His action in creating and redeeming the world. They understand the world in this light. Principles that are held to be true on the basis of faith – the truths that are authoritatively conveyed by Revelation, as revealed by God – are said to be known *per alia*; but the principles involved are not immune to rational inquiry and analysis.

The five illustrious thinkers commence their philosophical discourse with knowledge of the world. If it speaks of God, what it says is conditioned by what is known of the world. They observe however, extensive commonality between the properties of theology and those of philosophy. Numerous elements of what God has revealed, can be known and investigated without the precondition of faith – such elements are, formally speaking, philosophical and subject to philosophical analysis. This category includes topics such as but not limited to, the nature of the human

person; and what is necessary for a human being to be good and to fulfil her or his destiny. The common fount is the reality of human life as such.

5.2.2. The Individual Human Being

5.2.2.1. The Essence and Existence of Finite Beings

In line with Aristotelian thinking, Suárez limited metaphysics to the study of real being, its properties, division and causes.²⁰ A cause is responsible for the existence or features of some being beyond itself. An exercise of causality is the activity by which a cause imparts existence to another, by creating it, or altering its features once it exists. The question of (i) what a cause is, differs from the question of (ii) how a cause brings about its effects. To understand being both questions must be answered: what is responsible for being (*ens*); and what causes individual beings (*entia*) to come into existence, or to change their mode of existence.

Suárez resolved that the most appropriate and fundamental classification by distinction was between *ens infinitum* (God) and *ens finitum* (created beings) – having explored numerous other ways to indicate the distinction between the Supreme Author and the human being.

According to Suárez, the essence and existence of finite beings are not really distinct. It is only conceptually that essence and existence can be logically conceived of as separate. He insisted the only absolute and real unity in the world of existences is the individual. The singular is the object of direct intellectual cognition. Every single individual is both true and good. If one alleges that the universal exists separately *ex parte rei*, then individuals are reduced to mere accidents of one indivisible form.

's thinking (as I attempted to summarise in the previous paragraph) appears to be immensely important. If one tries to reformulate it in line with the reasoning of Aquinas on a slightly different issue, it may be said that the only time the immediate principle of an operation is the very essence of a thing, is when the operation itself is the things *esse*. Hence, in the case of a human being its *being* – its life – is its essence that is the same as its *esse*. Life in consequence is the essence of the human being and not just one among several human 'goods'.

²⁰ Suárez, *Disputationes Metaphysicae*, vol. I, 1.26.

5.2.2.2. ‘*Imago Dei*’ – Dignity and Worth

In Catholic doctrine, it is ascertained that only in reference to the human person in the individual’s unified totality – as a soul that expresses itself in a body, and a body informed by an immortal spirit – can the specifically human meaning of the body be understood.

According to the Greek philosophical tradition, the soul was primarily the principle that accounts for the obvious distinction between things that are living and things that are not. To be alive is to have a soul, and death involves a process leading to the absence one.

As in Neo-Platonism, Augustine understood the individual human being as a combination of body and soul. He identified the soul with neither the substance of God, nor with the body, nor with any other material entity.²¹ The soul being a spiritual entity, Augustine viewed it as superior to the body. The soul should rule the body.²² The soul is the principle of unity of the human being, whereby it exists as a whole – *corpore et anima unus* – as a person.

Augustine perceived of the human soul as open to amendment and adaptation. This he saw as a prerequisite to explain the possibility of moral change – advancement as much as deterioration.²³ Aquinas addressed the essence of the human soul having ascertained that the soul is the first principle of life,

In order to inquire into the nature of a soul, one must take for granted that what is called a ‘soul’ (*anima*) is the first principle of life in those things around us that are alive; for we say that living things are ‘ensouled’ (*animata*) and that things that lack life are ‘non ensouled’ (*inanimata*). There are two operations by which life is especially made manifest, cognition and movement.²⁴

The theological truth that God created the human being in His own image (*‘Imago Dei’*) implies that the human person cannot be understood apart from God. The human person partakes in the divine nature by the act of creation. The human person has been willed for her or his own sake in the likeness of God. The fact that God has created every human being in

²¹ Augustine, *Letters*, 166, cf. 143.

²² Cf., for example, Augustine, *De Quantitate Animae*, chap. 13.

²³ Augustine, *Letters*, 166, 3; *Confessiones*, book IV, chap. xv, 26.

²⁴ Aquinas, *Summa Theologiae*, part I, question 75, art. 1.

His own image, signifies that every human being in that very capacity has a divine origin. In this, all human beings are equals – no one is beyond creation in the image of God. The sanctity of human life belongs to every human being. This is so regardless of sex and age, physical and mental capacities, regardless of productivity and the ability to contribute to the society in which the individual lives.

The human being is a person not just an individual. When an individual dies, the species remain; when a person dies, someone unique is lost. The human person holds a unique dignity. No human beings are marked out by nature for subordination to the interests of others regardless of there being individuals naturally lacking in intelligence and in capacity to achieve virtue or happiness. Augustine taught,

Having created man a reasonable being, and after His own likeness, God wished that he should rule only over the brute creation; that he should be the master, not of men, but of beasts.²⁵

Roman law prescribed that “slaves are in the power of their masters, and this power is derived from the law of nations; for we find that among all nations masters have the power of life and death over their slaves, and whatever a slave earns belongs to his master”.²⁶ In wording attributed to Caesar, “It is for the sake of the few that humankind in general lives”.²⁷

From the beginning, Christian doctrine was in direct opposition to the institution of slavery. Treating human beings as objects wanting in reason and sense furthermore outraged the common feeling of humankind.

Ambrose emphasised that as human beings we consider ourselves to be equal as we measure all human things by the spirit – in spirit no one is a slave to us.²⁸ Slavery was viewed as opposed to religion, humanity, and

²⁵ Augustine, *De Civitate Dei*, book 19, chap. 15.

²⁶ Justinian, *Institutes*, book I, VIII-1. Justinian reorganised the legal education. The *Digest* (cf. *supra* note 13) was intended to form the core of the new curriculum. As the *Digest* was likely to be too demanding for beginners, Justinian ordered the preparation of an introductory textbook. The book was named *Institutes* and was promulgated as law. The *Institutes* drew on the elementary works of the classical era, the *Institutes* of Gaius in particular. Gaius’s exposition of the law – a textbook for students – had gained fame due to its combination of simplicity and lucidity. Gaius presented a seminal division of the law into: (i) persons; (ii) things; and (iii) actions.

²⁷ Marcus Annaeus Lucanus, *Pharsalia*, book 5, 264.

²⁸ Cf., for example, Ambrose, *De Jacob et de vita beata*, chap. 3.

justice alike.²⁹ If slavery was tolerated, there would be no form of cruelty and subjugation that could not be defended by invoking legality and justice.

In general, the sanctity of human life is a core value of civilisation as such. The world community professes its belief in the worth and dignity of the human being as ordained by God or by nature or both. As human beings, we share a common nature. The worth of the human being is inherent – not to be gained or lost. Human dignity is both a norm and an ideal.

5.2.2.3. The Human Condition

A key characteristic of the human condition is its frailty. The human being is essentially vulnerable in every respect. Physically and mentally, the individual needs to protect her- or himself to secure means of sustaining life and the relevant human habitat.

In certain periods of life (in particular, infancy and tender age; in cases of ill health; and in the infirmity of old age) the individual may not survive without the assistance of fellow human beings. Even the strongest and the brightest individual at the zenith of her or his life, is likely to be defeated if outnumbered by people of ill intent. Arms and ingenuity may be used in a devastating manner against the individual. Nature may be no more clement with its many dangers. In short, the problems are legion. The individual needs fellow human beings – their assistance and protection – to face otherwise threatening challenges.

It is ingrained in all living creatures, first of all, to preserve their own safety, to guard against what is harmful, to strive for what is advantageous.³⁰

Human life is a conditioned reality. Literally, *everything* that the individual encounters thereby becomes a condition for her or his existence – for richer or poorer for better or worse.

²⁹ Pope Paul III declared in 1559, with reference to the Indians and the Moorish slaves, that each one of them was master of his own person, that they could live together under their own laws, and that they could acquire and hold property for themselves: see Paul III, *Veritas ipsa*. In 1537, Pope Paul III promulgated the encyclical *Sublimis Deus* – the sublime God – that banned the enslavement of the indigenous peoples of the Americas and all other people.

³⁰ Ambrose, *De Officiis Ministrorum*, book I, chap. 27, 128.

The individual human being is her- or himself a party to conditioning the individual's circumstances, and a party to conditioning the circumstances of fellow human beings. Every human act and omission will have a role to play in this context. One act or omission may suffice to change every constellation.

Similarly, to achieve happiness and prosperity human life is conditioned as described.

5.2.2.4. Who is the Individual Human Being?

As far as the human being is concerned, the essential question is *who* and not *what* that individual human being is. According to Aquinas, as a finite being, the human being is participating in being her- or himself by the act of existence (*actus essendi*).³¹ Not even the total condition of an individual human being's existence can ever answer the question of *who* that individual is, as an individual is never conditioned absolutely. Throughout the millennia, this has been the understanding among philosophers.

For example, the human being always exists in a particular culture, but is not exhaustively defined by that culture. The progress of cultures shows that human nature transcends cultures. In reality, human nature is the very measure of culture.

5.2.2.5. The Different Human Faculties

As emphasised by Augustine,³² it is regularly the acquisition of language that is the instrument by which the human being is immersed in the world. The human ability to speak advances the interchange with fellow human beings and makes it feasible to pass on thoughts and experiences. Moreover, as Augustine highlights, language and the ability to speak are instrumental to transcend the world of the senses and to ascend to the realm of comprehension. The ability to speak in this latter sense is a uniquely human faculty.

Speech (*logos*) may be identified as a specific kind of action. Action is however, an immensely wide expanse, encompassing essentially every aspect of living and interacting between the individual human being and her or his fellow human beings, the outside world and the human envi-

³¹ Aquinas, *Summa Theologiae*, holds a *Treatise on Human Nature*, cf. part I, questions 75–102.

³² Augustine, *Confessiones*, book I.

ronment. It may be said that to act is any human activity – act or omission, or a combination of the two in the singular or the plural – that sets events unfolding, conditioning the life of the self and others.

No wind is good if one does not know where to sail. Similarly, any kind of action or omission regularly needs direction – not in the least as it is conditioning the lives of people, the lives of self and others. The human faculties of reason and contemplation can provide such direction. It is in the very nature of the human being to follow the guide of reason in its actions.

According to Augustine, the senses are co-ordinated by an ‘inner sense’.³³ This faculty combines and judges – in an organisational and criterial manner – information (perception) obtained by the other senses, and for this reason is superior to them.³⁴ The inner sense the human being shares with non-rational beings. Reason however, is distinctively human.

For there is nothing in which man excels all other living creatures more than in the fact that he has reason, seeks out the origin of things, thinks that the Author of his being should be searched out.³⁵

In all men, then, there lies, in accordance with human nature, a desire to search out the truth, which leads us on to have a longing for knowledge and learning, and infuses into us a wish to seek after it.³⁶

In line with Greek intellectualism, Augustine perceived reason as having dominance over other human capacities – the superiority of the rational over the non-rational. To Augustine, reason is the mind’s ability to engage in deductive reasoning, where logical necessity is the criterion of adequacy. This sets it apart from instrumental reasoning found in other species. Reason is the tool whereby the human soul can access truths that are devoid of the mutability afflicting the objects of the senses.³⁷

Humankind possesses a common heritage of natural truths being the principles of nature and whatever is derived from them immediately by

³³ Augustine, *De Libero Arbitrio*, book II, chap. 3. Cf. Aristotle’s ‘common sense’: Aristotle, *De Anima*, book II, chap. 6.

³⁴ Augustine, *De Libero Arbitrio*, book II, chap. 5.

³⁵ Ambrose, *De Officiis Ministrorum*, book I, chap. 26, 124.

³⁶ *Ibid.*, 125.

³⁷ Augustine, *De Libero Arbitrio*, book II, chap. 8.

reason. This provides a foundation for morality and justice, and acts as one of the pillars of human society. Reason, like the other human faculties, is available to the individual in that very capacity. Addressing the issue of who can give consent to a legal custom, Suárez ascertained (having excluded juveniles) that:

Some would also exclude women entirely, on the ground that they can exercise no legislative authority. Among men, they exclude everyone below the age of twenty-five years. However, I cannot find any basis in law or any justification in reason for the exclusion of these last two groups.

Augustine saw an ontological dimension in the truths of reason – an isomorphism between the necessity that governs thinking and the necessity that governs the structure of the object of the thinking. That is, a kind of isomorphism between the truths of reason and the structure of being.

Augustine saw God as playing an active role in human cognition by illuminating the mind so that it can perceive the intelligible realities that God simultaneously presents to it. The grace of divine wisdom is available to every human being and does not detract the mind from its own activity and insight.

Human reason has a role to play in discovering and applying moral law. Reason draws its own truth and authority from the eternal law, which is divine wisdom itself.³⁸ Reason teaches that the truths of divine revelation and those of nature cannot be opposed to one another.

To Aristotle, neither speech nor reason, but *nous* – the capacity for contemplation – is the primary human faculty. According to Aquinas, truth can reveal itself only in complete human stillness. Every kind of activity – thinking no less than anything else – must culminate in the absolute quiet of contemplation.³⁹ The main characteristic of contemplation is that its content cannot be represented in speech.

5.2.2.6. Moral Choice and Free Will

Every human act and omission has a role to play in conditioning the circumstances for the self and others. The human condition constitutes in

³⁸ Cf. Aquinas, *Summa Theologiae, Pars Prima Secundae* (First Part of the Second Part or part I-II), question 93, art. 3.

³⁹ *Ibid.*, *Pars Secunda-Secundae* (Second Part of the Second Part or part II-II), question 179, art. 1.

this sense a moral drama. Without freedom of the soul, there would be fatalism, as the human being would be totally controlled by outside forces. Natural liberty is distinct and separate from moral liberty, the former being the fountainhead from which every liberty flows. Liberty is the faculty of choosing means – one out of more than one – suited for the end pursued.

The human being is capable of moral choice – it has power over its actions, a power that may be termed liberty. On the use of moral liberty, the good and the evil is similarly contingent. The predicament of irreversibility is frequently linked to moral choice. Acts and omissions as soon as they belong to the past cannot be undone (even when they may be ‘repaired’ before having an effect). The person is the subject of her or his own moral acts.

Freedom of choice is a property of the will – identical with the will as far as it has the faculty of choice. The will acts informed by the knowledge possessed by the intellect. In every voluntary act, choice is subsequent to a judgment concerning the truth of the good presented, determining to which good to give preference to. Judgment is an act of reason, not of will. The object both of the rational will and of its liberty is that good which is in conformity with reason. In consequence, the human liberty is in need of guidance to direct its actions to good and to restrain them from evil.

Augustine, adhering to Greek intellectualism, understood nature as governed by patterns accessible to the human mind, and emphasised the role played by reason in a life that is in keeping with the larger order. Reason is capable of acts of theoretical representation. The application of reason is of utmost practical significance. In a disciplined life, non-rational factors of human preferences are to be constrained by reason. Natural law – as dictated by human nature – does not allow for a separation between freedom and nature. The two are intertwined, each intimately linked with the other. Augustine defined God’s eternal law as “the reason or the will of God, who commands us to respect the natural order and forbids us to disturb it”.⁴⁰ The eternal law is instilled in the human being as endowed with reason, and is inclining the person towards its right ac-

⁴⁰ Augustine, *Contra Faustum Manichaeum*, book 22, chap. 27.

tion and end. Aquinas argued that divine wisdom's conception has the character of 'law' insofar as it moves all things to their appropriate ends.⁴¹

The will is what makes an action one's own, placing the burden of responsibility on the one performing the action.⁴² Regardless of the ignorance and difficulties that attend the human condition, will serves as the pivot of moral responsibility. The human being is the source and cause of her or his own deliberate acts.

The problem that plagues the human condition, Augustine explained, is that the human being is susceptible to view everything materialistically and perceive of the sensible world as a self-contained arena within which all questions of moral concern are to be resolved, unaware that the sensible world is but a tiny portion of what is real.⁴³

To moral reflection, the issue of human freedom is crucial – there is a profound and intimate relationship between the two.

God left man in the power of his own counsel.

Sirach 15:14.

Genuine freedom is a manifestation of the divine image in the human being. The human being shares in God's dominion – dominion extending in a certain sense over the individual itself. Human nature is by its likeness to the Supreme Author of the universe made as it were a living image, partaking with the archetype both in dignity and in name. It is within the ambit of human dignity to enjoy the use of the individual's own responsible judgment and freedom, and decide on its actions on grounds of duty and conscience. All in accordance with the truth – a universal truth about the good, knowable by human reason and in keeping with the very idea of human nature.

According to Aquinas,

Now among all creatures, the rational creature is subject to divine providence in a more excellent manner, because he himself participates in providence, providing for himself and for others. Hence, in him, too, there is a participation in eter-

⁴¹ Aquinas, *Summa Theologiae*, part I-II, question 93, art. 1.

⁴² Cf. Augustine, *De Libero Arbitrio*, book I, chap. 11; book III, chaps. 18 and 22.

⁴³ Cf., for example, Augustine, *Confessiones*, book IV, chap. xv, 24.

nal reason through which he has a natural inclination to his due act and end.⁴⁴

Conscience is an act of a person's intelligence. The function of the conscience is to apply the universal knowledge of the good in concrete situations and thereupon to express a judgment about the right conduct to be chosen.

5.2.3. The Plurality – Humankind

5.2.3.1. Created 'Them' – The Social Dimension

The relational aspect of human life is introduced from the beginning. The human being was placed in the company of others like itself, so that what was wanting in its nature, and beyond its attainment if left to its own resources, it might obtain by association with others.

The human being is a social creature. Each and every one is both 'self' and 'the other'. An indelible bond unites all human beings. Already, the interchange between the singular and the plural in the quote from Genesis – 'created him' and 'created them' – emphasises the unity of the human race.

The Romans captured the situation well with the words '*inter homines esse*' ('to be among people') to signify life and to be synonymous with life, and '*inter homines esse desinere*' ('to cease to be among people') to signify death and to be synonymous with death.

Aquinas, in line with the thinking of Aristotle, ascertained that man is by nature political, that is, social (*homo est naturaliter politicus id est, socialis*).⁴⁵ The human being cannot live in solitude either for its own comfort – friendship requires plurality – or for the perpetuation of the species. Speech and other kinds of action correspond to the human condition of plurality. It is practiced and experienced in intercourse with other human beings. That is, in the presence of other human beings who can understand it and recognise the uniqueness of the actor. There is an interdependence of action among human beings. Without it, there could be no continuity under the characteristically uncertain human condition. Survival, protection, happiness and prosperity all require more than one person.

⁴⁴ Aquinas, *Summa Theologiae*, part I-II, question 91, art. 2.

⁴⁵ *Ibid.*, part I, question 96, art. 4.

While all aspects of the human condition are somehow related to politics, the human plurality is *the* condition – the *conditio per quam* – of political life.

5.2.3.2. The Fundamental Equality of the Members of Humanity

Human plurality has the dual character of equality and distinction. Human beings are all the same but in such a manner that nobody is ever the same as anybody else.

The human plurality consists of the many singular human beings, each person with an individuality and absolute uniqueness.

The human race – people from all walks of life – is strongly bound together in kinship. As every human being partakes the likeness of God, all human beings are equals – no one is superior or inferior to anyone else.

The latter idea entails a belief in *the one liberty* of all human beings – the idea that all humans are equal and that slavery (by whatever name) is contrary to human nature.⁴⁶

5.2.3.3. The State

Human beings live together in civil society. A society is recognised by: its component parts, its form implying authority, the object of its existence and the many services that it provides to the people. The human being was created for and to live in society.

The shared view of all five enlightened thinkers on the origin and nature of the State is the Aristotelian one: the human being, as a social and political animal, must live in organised society.⁴⁷ There must be government because the people would fall apart if the rights of each person were not accompanied by their corresponding duties. Nature proclaims the necessity of the State to provide means and opportunities empowering the community to live well.

Aquinas ascertained that in the state of innocence, there would exist no coercion, but there would exist government in the sense of wise leader-

⁴⁶ A belief in the one liberty of all human beings is in line with the Roman legal saying that ‘by nature, from the outset, all human beings were born free and equal’ (Justinian, *Institutes*, book I, II-2).

⁴⁷ Aristotle taught that life in political society is natural to humankind. The state exists not just for security and trade but to foster the ‘good life’ – the life according to virtue (Politics, book III, part 9). Aquinas wrote significant commentaries on Aristotle’s *Politics*.

ship voluntarily accepted by the less wise,⁴⁸ a view held for example by Seneca:

Therefore since human societies have been established for this purpose – namely, that we should bear one another’s burdens – and civil society is of all societies that which best provides for the needs of men, it follows that the community is, so to speak, an exceedingly natural form of intercommunication.

Vitoria, *De Potestate Civili (On the Civil Power)*

The members of a society may have different ultimate values, but they will have similar intermediate ends such as a desire for justice and peace. The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.⁴⁹ A minimum of justice is essential to qualify as a commonwealth. According to Aquinas, ‘justice’ is the constant and perpetual will to render to others what is due to them.⁵⁰

When Alexander the Great asked a pirate whom he had seized what he meant by infesting the sea, the pirate defiantly replied: “The same as you do when you infest the whole world; but because I do it with a little ship I am called a robber, and because you do it with a great fleet, you are an emperor”.⁵¹

The standard of human liberty in civil society, that human beings constitute when united, follows the same reasoning as for individual liberty adopted *mutatis mutandis* to the prerequisites of the plurality.

The origin, subject and purpose of all social institutions is and should be the human person. The fundamental moral rules of social life thus entail specific demands to which both public authorities and fellow human beings are required to pay heed.

‘The rule of law’ is better than ‘the rule of men’. It is better to have rules impartially applied than to leave every decision to the unfettered discretion of the rulers. The good forms of government seek ‘the common good’ that is the good of both ruler and ruled.

⁴⁸ Aquinas, *Summa Theologiae*, part I, question 96, art. 4.

⁴⁹ Augustine, *De Civitate Dei*, book XIX, chap. 13.

⁵⁰ Aquinas, *Summa Theologiae*, part II-II, question 58, art. 1.

⁵¹ Augustine, *De Civitate Dei*, book IV, chap. 4 (addressing how kingdoms without justice are like robberies).

Aristotle proposed that in good government there is a role for ordinary people. If ordinary people deliberate as a body, they may make sound decisions.⁵² Later, this was used in support of the proposition that the people are the ultimate political authority, an idea also found in Roman law.

By submitting to just law, the members of a community are simultaneously protected from the wrongdoing of others in that community. According to Aquinas, though there is a general duty to obey the law and the government, an unjust law is not a law that binds in conscience (*non obligant in foro conscientiae*).⁵³

Absolute, uncontested rule and a proper political realm is mutually exclusive. Public authority exists for the welfare of those whom it governs. It is always for a purpose that a person is entrusted with an office. In contradistinction, a tyrant is a usurper of power:

Although the aborigines in question are [...] not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful state up to the standard required by human and civilian claims. [...] It might, therefore, be maintained that in their own interests ... the sovereigns of Spain might undertake the administration of their country. [...] And surely this might be founded on the precept of charity, they being our neighbours. [...] Let this, however, [...] be put forward without dogmatism and subject to the limitation that any such interposition be for the welfare and in the interest of the Indians and not merely for the profit of the Spaniards.⁵⁴

5.2.3.4. The International Community

Vitoria held that the world is in a way akin to a single State with power to make laws and to secure their enforcement. The international community could not hold together without there being a power and authority to deter wrongdoers and prevent them from injuring the good and the innocent. International law does not only have the force of a pact and agreement among people, but also the force of law. The law of nations is made by the

⁵² Cf. Aristotle, *Politics*, book III, part 11.

⁵³ Aquinas, *Summa Theologiae*, part I-II, question 96, art. 4.

⁵⁴ Vitoria, *On the Indians Lately Discovered*, pp. 160–61.

entire world,⁵⁵ with the overarching aim of preserving peace and tranquility.

Vitoria recognised and defined the existence of the international community – a community that exists of itself irrespective of the will or the action of any person or any group. The international community exists according to Vitoria due to the law of necessity (*ex jure necessitates*).

Suárez followed suit, he explained that despite the fact that a State might appear as constituting a perfect community in itself, it is in a certain sense a member of the universal society. No State standing alone is that self-sufficient that it does not need some mutual assistance, association and intercourse – at times for its greater welfare and advantage at times because of some moral necessity or lacuna.⁵⁶

5.3. The Rules

5.3.1. Morality

5.3.1.1. The Concept of Morality

Every aspect of life has a moral connotation as conditioning the life of the self and others. Aquinas equated human behaviour as such with moral acts: “For moral acts are the same as human acts” (*Idem sunt actus morales et actus humani*).⁵⁷ The pivot of morality is the transcendent human dignity innate in everyone, and the fact that living is being among fellow human beings.

‘Morality’ is a code of conduct. Normatively speaking, morality is the code of conduct that all rational persons will endorse. The code embodies the principles of human practical rationality.

There is a primordial moral requirement of respect for the person as an end and never as a mere means. This implies respect for certain fundamental goods – for life, the person’s true good and the individual’s authentic freedom. A core concern in morality minimising harm to others. Prohibitions against killing, inflicting pain, mutilating, not to mention genocide and crimes against humanity, undoubtedly fall within this ambit.

⁵⁵ Vitoria, *On the Civil Power*, sect. 21.

⁵⁶ Suárez, *Tractatus de Legibus ac Deo Legislatore*.

⁵⁷ Aquinas, *Summa Theologiae*, part I-II, question 1, art. 3.

As far as morality is concerned, no one can legitimately rescind from the actual human condition and an objective reference to the truth about the human good.

The unconditional respect due to the personal dignity of every human being is protected by moral norms that prohibit without exception actions that are intrinsically evil. Such overarching precepts are – like the human being itself – universal and immutable. Respect for norms that prohibit such acts oblige *semper et pro semper*, that is, without any exception. When moral norms prohibit intrinsic evil, there are no privileges or exceptions for anyone. Every human being is equal before such demands of morality.

The Golden Rule – whether formulated as a positive or negative dictum (do to others, as you want them to do to you, or in the alternative, do not to others what you do not want them to do to you) – exists worldwide. Understanding of self leads to reciprocity.

Morality is for individuals, groups, communities and States. The origin, subject and purpose of all social institutions is the individual. The fundamental moral rules of social life entail specific demands that public authorities must observe. Moreover, there are objective moral demands of the functioning of States. These norms assist in preserving and strengthening the social fabric and social cohesion. They are preconditions for just and peaceful coexistence.

To obey the absolute validity of negative moral precepts is in the very dignity of the human being and a confirmation of its personal uniqueness. All things move in conformity with their nature. Human freedom is real but not unlimited. Its absolute and unconditional represents for it both a limitation and a possibility. It is an essential part of the dignity of the person. Freedom is rooted in the truth about the human being, and it is ultimately directed towards communion – in passing beyond the self to knowledge and love of the other.

5.3.1.2. Law in Contradistinction to Morality

Law is distinguished from morality by having explicit written rules, penalties, and officials who interpret laws and dispense punishment. Roman law states that the explanatory reason for law is the human persons for whose sake it is made – all members of the community regulated by the law and all other persons within the law's ambit.

According to Suárez, law is of God whether derived directly or through a human legislator. “The authority of all laws must ultimately be ascribed to Him”.⁵⁸

As to the elements of law (*lex*), Suárez explained them as follows:

1. its binding force with respect to the conscience – its directive force;
2. its coercive force – in consequence a violation of the law is punishable; and
3. the force by which a definite form is laid down for contracts and similar legal acts – for what reason an act contrary to the prescribed form is invalid.

Aquinas’s philosophy of law is strongly influenced Suárez.⁵⁹ “Law”, Aquinas explained, “is a certain rule and measure of acts in accord with which one is either induced to act or restrained from acting. For ‘law’ (*lex*) is derived from ‘to bind’ (*ligare*), since law obligates (*obligare*) one to act”.⁶⁰ Suárez argued that this definition is slightly broad, because it applies to things that are not strictly laws, such as counsels. Suárez saw counsels as clearly distinct from precepts and thus not included in ‘law’. In addition to the three aforementioned elements, Suárez added to Aquinas’ definition that ‘law’ is that which pertains to customary conduct – ‘law is a measure so to speak of moral acts’. ‘Law’ is a rule of action.

Related but distinct, ‘*ius*’, according to “is a certain moral faculty that every human being has, either over its own property or with respect to that which is due it [such as wages]”. *Lex* may justify possession – *ius* is the right itself. Where *lex* is appropriate, *ius* is also appropriate. “But the word *ius* has come to possess certain other connotations which have not been transferred to the term *lex*” – “The act of a judge is thus wont to be designated by the term *ius*. [...] so that the judge, when he exercises his office, is said to declare the law (*ius dicere*)”.⁶¹ Suárez referred to Roman jurist Ulpian, quoting with approval Celsus’s definition to the effect that: ‘*ius* is the act of the good and the equitable’.⁶² “This definition would be suited, not so much to law (*lex*) itself, as to jurispru-

⁵⁸ Cf. Suárez, *Tractatus de Legibus ac Deo Legislatore*.

⁵⁹ Aquinas, *Summa Theologiae*, holds a *Treatise on Law*, cf. part I-II, questions 90–108.

⁶⁰ *Ibid.*, part I-II, question 90, art. 1.

⁶¹ Cf. Justinian, *Digest*, book II, i.

⁶² *Ibid.*, book I, i.

dence (*juris prudentiae*)”, Suárez added. *Ius* advances from the material domain of command to enter that of ‘justice’.

‘Equity’ in one sense stands for natural equity that is identical with natural justice. To Aristotle it was the emendation of that which is legally just. Suárez’s conception is that it is rather the source or rule thereof. The Latin term ‘*aequitas*’ may however, be taken in another sense as being a prudent moderation of written law (*lex*) – transcending the exact literal interpretation of the law. In this sense, ‘*aequitas*’ is opposed to the strict meaning of *ius*. “The terms ‘equitable’ (*aequum*) and ‘good’ (*bonum*) are applied ... to that which does indeed of itself possess these qualities, even though it may appear to be at variance with the letter of the law (*lex*)”. In a judgment *ex aequo et bono* the application of the law is tempered on the basis of right reason and justice. As summarised by Suárez:

In the interpretation of the laws, the good and the equitable should always be regarded; even if it be needful at times to temper the rigor of the words, in order not to depart from what is naturally equitable and good.

thus explained that law: “is a kind of rule, establishing or pointing out, in regard to its own subject matter or the operation with which it is concerned that mean which is to be preserved for the sake of right and fitting action”. In short, “Law is a common, just [equitable and moral] and stable precept, sufficiently promulgated”.

As to Aquinas’s more formal definition of ‘law’ as “an ordering by reason directed toward the common good, made by one who is in charge of the community, and promulgated”,⁶³ Suárez emphasised that law is primarily an act of will rather than an act of reason. Orders to particular individuals are not laws.

The force of law consists in its authority to impose duties, to confer rights and to sanction certain behaviour.

5.3.2. Natural Law

5.3.2.1. The Eternal Law

In Roman law – *Corpus iuris civilis* – there is a distinction between different kinds of law:

1. natural law (*ius naturale*);

⁶³ Aquinas, *Summa Theologiae*, part I-II, question 90, art. 4.

2. law of nations (*ius gentium*); and
3. civil law (that is the law of a particular community).

The idea of natural law can be traced back to Aristotle,⁶⁴ the Stoics⁶⁵ and Cicero, and is also found in Gratian's *Decretum*. Among the medieval thinkers, Aquinas holds the prime position of having invigorated and developed the concept of natural law. In his view, there are two main characteristics of natural law:

1. God is the giver of natural law; and
2. for the human being natural law constitutes the principles of practical rationality.⁶⁶

It is a fundamental thesis that natural law is a participation in the eternal law – that rational plan by which all creation is ordered.⁶⁷ Through natural law, the human being participates in the eternal law. As a rational being, the human being is able to understand her or his part in the eternal law and freely act on it. Thus, this is 'law' – a rule of action put into place by the Supreme Author who has care of the entire community of the universe – in line with Aquinas's definition.⁶⁸ As God provides for the universe, God's choosing to bring into existence beings who can act freely and in accordance with principles of reason suffices to justify a classification of these principles of reason as law. According to Aquinas,

Now among all creatures, the rational creature is subject to divine providence in a more excellent manner, because he himself participates in providence, providing for himself and

⁶⁴ Aristotle focused on the insight of the person of practical wisdom as setting the final standard for right action.

⁶⁵ The concepts *ius naturale* and *ius gentium* saw both significant changes in their contents already as used in Roman law. Influenced by Stoic philosophy especially, Gaius in the second century wrote:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it and is called *ius civile* (civil law) as being the special law for that *civitas* (state), while the law that natural reason establishes among all mankind are followed by all peoples alike, and is called *ius gentium* (law of nations or law of the world) as being the law observed by all mankind. Thus the Roman people observe partly its own peculiar law and partly the common law of all mankind.

Here *ius gentium* is used as synonymous almost to *ius naturale*.

⁶⁶ Cf. Aquinas, *Summa Theologiae*, part I-II, question 94.

⁶⁷ *Ibid.*, part I-II, question 91, arts. 1–2.

⁶⁸ *Ibid.*, part I-II, question 90, art. 4.

for others. Hence, in him, too, there is a participation in eternal reason through which he has a natural inclination to his due act and end. And the rationale creature's mode of participation in the eternal law is called natural law.⁶⁹

Natural law is but one aspect of divine providence. According to 'the eternal law' is the source of all laws and occupies the first place on account of its dignity and excellence. In his view, "Natural law is the first system whereby the eternal law has been applied or made known to us ... in a twofold way, first through natural reason, and secondly through the law of the Decalogue written on the Mosaic tablets". The eternal law safeguards the human good.

Suárez agreed that natural law required an act of *imperium*, a command by the legislator expressing his will. Therefore, any obligation falling under natural law derives its moral force from God's legislative act.⁷⁰ Suárez described natural law as creating obligations that would otherwise not exist – the force to oblige (*vis obligandi*) can only come from an act of will.

The introduction to the commandments in the Decalogue is the basic clause: "I am the Lord your God".⁷¹ This opening impresses upon the particular prescriptions their primordial meaning, and gives the morality of the Covenant its quality of completeness, harmony and profoundness. The Covenant is seen to secure God's love for humanity and the whole of creation.

The Ten Commandments are part of God's Revelation. They are reflections of the one commandment about the good of the person, at the level of the many different goods that characterise the human being's identity as a spiritual and bodily being in relationship with God, with its neighbour and with the material world. The commandments shed light on the fundamental rights inherent in the nature of the human person. The commandments thus represent the basic condition for and the proof of the love of one's neighbour. "You shall love your neighbour as yourself".⁷² This commandment articulates the singular dignity of the human being.

⁶⁹ *Ibid.*, part I-II, question 91, art. 2.

⁷⁰ Suárez, *Tractatus de Legibus ac Deo Legislatore*, I, 5. 13.

⁷¹ *The Bible*, Exodus 20:2.

⁷² *Ibid.*, Matthew 19:19; cf. Mark 12:31.

“And who is my neighbour?”⁷³ Every single member of the human race is my neighbour.⁷⁴

Commenting on Paul’s statement that “Christ is the end of the law”,⁷⁵ Ambrose wrote:

end not in the sense of a deficiency, but in the sense of the fullness of the Law: a fullness which is achieved in Christ (*plenitudo legis in Christo est*), since he came not to abolish the Law but to bring it to fulfilment. In the same way that there is an Old Testament, but all truth is in the New Testament, so it is for the Law: what was given through Moses is a figure of the true law. Therefore, the Mosaic Law is an image of the truth.⁷⁶

God’s commandments are brought to fulfilment – particularly the commandment of love of thy neighbour – by internalising their demands and by bringing out their fullest meaning. As Aquinas pointed out, it is because divine grace comes from the Author of nature that it is so admirably adapted to be the safeguard of all natures, and to maintain the character, efficiency, and operations of each.

5.3.2.2. The Precepts of Natural Law Are Universally Identifiable by Nature

Natural law constitutes the principles of practical rationality for human beings. This is a status that natural law has by nature.⁷⁷ These are the principles by which human action is to be judged as reasonable or unreasonable. Because natural law constitutes the basic principles of practical rationality, the precepts of natural law are universally identifiable by nature.⁷⁸ With respect to the universal principles of natural law there is the same truth or correctness for everyone and it is equally well known to every human being.⁷⁹

⁷³ *Ibid.*, Luke 10:29.

⁷⁴ See Augustine, *De Doctrina Christiana*: “When it is said ‘Love your neighbour’, it is clear that every man is our neighbour”.

⁷⁵ *The Bible*, Romans 10:4.

⁷⁶ Ambrose, *Expositio in Psalmum CXVIII*.

⁷⁷ Aquinas, *Summa Theologiae*, part I-II, question 94, art. 2.

⁷⁸ *Ibid.*, part I-II, question 94, arts. 4 and 6.

⁷⁹ *Ibid.*, part I-II, question 94, art. 4.

The natural is nothing other than the light of understanding placed in us by God, whereby we understand what must be done and what must be avoided. God gave this light and this law to man at creation.⁸⁰

The human being, reflecting on and analysing the human condition, can discover by the activity of reason the truth of various fundamental moral principles that are self-evident (known *per se*) – these principles are common but cannot be proved.⁸¹

Natural law is intrinsic to human nature and is in a sense identical with human reason. Natural law is ‘the law of reason’ or ‘the requirements of reason’. Aquinas explained explicitly that in this context ‘natural’ is predicated of something (for instance law) only when and because that of which it is predicated is in line with reason or the requirements of reason.

The equation of ‘natural’ and ‘rational’ is based on a distinction between ontology and epistemology. In the order of being, what is good and reasonable is a consequence of what is foundational, given human nature. In the order of coming to know, the knowledge of human nature is in significant part a result of the understanding of what kinds of the possible objects of choice are good. The content of natural law is fixed – either wholly or in part – by human nature. A strong linkage between law and reason in Roman law, can be seen from adages such as:

- *Lex est dictamen rationis* (The law is the dictate of reason).
- *Lex est ratio summa, quae jubet quae sunt utilia et necessaria, et contraria prohibet* (The law is the highest form of reason which commands what is useful and necessary and forbids the contrary).
- *Lex spectat naturae ordinem* (The law regards the order of nature).
- *Lex semper intendit quod convenit rationi* (The law always intends what is agreeable to reason).

Aquinas imparted that morality is known to all those whose behaviour is subject to moral judgment. Thus, he ascertained that knowing what morality prohibits and requires does not involve knowing *why* this is so. Endorsement amounts to acceptance as reason endorses acting morally.

⁸⁰ Aquinas, *In Duo Praecepta Caritatis et in Decem Legis Praecepta Expositio*; cf. Aquinas, *Summa Theologiae*, part I-II, question 91, art. 2.

⁸¹ Aquinas, *Summa Theologiae*, pt. I-II, question 91, art. 3, question 94, art. 2.

This knowledge is exhibited in our inherent directedness toward the various human goods that natural law enjoins us to pursue. All human beings have a core of practical knowledge, according to Aquinas. This is true even if reason may be impeded from applying a universal principle to a particular action because of sensual desires or some other passion.⁸² Natural law thus constitutes a set of naturally binding and knowable precepts of practical reason.

Natural law theory is value based. The transcendent human dignity that is innate in every human being is axiomatic.

5.3.2.3. Intrinsic Goods – Aspects of Human Flourishing

The fundamental principle of natural law is that good is to be done and evil avoided.⁸³ There are a variety of things that human reason naturally appreciates as goods and thus as things to be pursued – such as life, procreation, knowledge, social life, and reasonable conduct.⁸⁴ Aristotle argued that every human action and pursuit is aimed at some good. That is, it is in pursuit of some end that the human being wants for its own sake, and for the sake of which it wants all the other ends.

Focusing on the good in general, Aquinas argued:

*Good and being are the same in reality and differ only conceptually. This is clear from the following line of reasoning: The nature of the good consists in something's being desirable; thus in Ethics 1 the Philosopher says, 'The good is what all things desire.' But it is obvious that each thing is desirable to the extent that it is perfect, since all things desire their own perfection. But each thing is perfect to the extent that it has actuality. Hence, it is clear that something is good to the extent that it is a being, since, as is obvious from what was said above, being (esse) is the actuality of each thing. Hence, it is clear that good and being are the same in reality, but that good expresses the nature of being desirable, whereas being does not.*⁸⁵

Furthering this line of thought, Aquinas added:

⁸² *Ibid.*, part I-II, question 94, art. 6.

⁸³ *Ibid.*, part I-II, question 94, art. 2.

⁸⁴ *Ibid.*, part I-II, question 94, arts. 2 and 3.

⁸⁵ *Ibid.*, part I, question 5, art. 1.

Since the good is that which everything desires, and since [being desired] has the character of an end, it is clear that *good* expresses the nature of an end. Still, the concept of the good presupposes the concept of an efficient cause as well as the concept of a formal cause. For we notice that what is first in causing is last in being caused. ... Now in causing, the first thing we find is the good and the end, which moves the efficient cause; next is the action of the efficient cause, moving [the patient] toward the form; and third is the appearance of the form. Thus, the converse must be the case in the thing caused: First comes the form itself, through which there is being; next we see the form's effective power, by virtue of which it has perfection in being (since, as the Philosopher says in *Meteorologia* 4, a thing is perfect when it can make something similar to itself); and third follows the nature of the good, through which the perfection is grounded in the entity.⁸⁶

There are some things that are universally and naturally good. Like Aristotle, Aquinas considered that what makes it true that something is good is not that it stands in some relation to desire, but rather that it is somehow perfective or completing of a being – with what is perfective or completing of a being depends on that being's nature. It makes sense to speak of universal goods thusly:

Acts are called human insofar as they are voluntary. But among voluntary acts there are two sorts, (a) an *interior act* of willing and (b) an *exterior act*, and each of these acts has its own object. Now the end is, properly speaking, the object of the interior voluntary act, whereas the object of the exterior action is what that action has to do with. Therefore, just as the exterior act takes its species from the object that it has to do with, so the interior act of willing takes its species from the end as from its proper object. The result is that what exists on the side of the will is like a form (*se habet ut formale*) with respect to what exists on the side of the exterior act, since the will uses the members of the body as instruments in order to act. Nor do the exterior acts have the nature of moral acts except insofar as they are voluntary. And so the species

⁸⁶ *Ibid.*, part I, question 5, art. 4.

of a human act is thought of *formally* in accord with *the end* and *materially* in accord with *the object of the exterior act*.⁸⁷

It may be said that to Aquinas, human nature is understood by understanding the human being's capacities, which are understood through understanding its acts, which are further understood via understanding its objects. The objects of chosen acts are the intelligible intrinsic goods – aspects of human flourishing – which human beings are directed to by practical reason's first principles.

The innate desirability of flourishing in life and health, in knowledge and in friendly relations with fellow human beings, is enunciated in first and original principles of practical reasoning. Such foundational principles direct the human being to actions, dispositions and arrangements that foster such comprehensible goods. In the words of Aquinas: "to choose is to desire something for the sake of attaining something else, and so, properly speaking, choice is directed toward the means to an end".⁸⁸

The understanding of the fundamental goods follows in part from the persistent pursuit of certain ends that are perceived as good, and in part from observation of human nature and its potentialities. The one approach may serve to correct and refine the other. It may nevertheless be difficult to find full agreement on a catalogue of basic goods.⁸⁹

The foundation of the duty of absolute respect for human life is to be found in inherent human dignity and not simply in the natural inclination to preserve one's own physical life. Human life acquires a moral significance in reference to the good of the person, who must always be affirmed for her or his own sake.

Most philosophers would rank human life as a primary good. Without rejecting this proposition, it may nevertheless be argued that human life is the essence of that being, and that in the case of human life there is no distinction to be made other than between the 'essence' of being human and 'being', cf. rez' definition of *ens finitum*.⁹⁰ A separation of

⁸⁷ *Ibid.*, part I-II, question 18, art. 6.

⁸⁸ *Ibid.*, part I, question 83, art. 4.

⁸⁹ Augustine reports another philosopher having ascertained that 288 sects of philosophy might be formed by the various opinions regarding the supreme good; cf. Augustine, *De Civitate Dei*, book XIX, chap. 1.

⁹⁰ Cf. Augustine, *De Civitate Dei*, book XIX, chap. 1.2.2.

corpore et anima leads to death and is distinct from an end desired for the sake merely of human flourishing. Every other good is but to give quality and perfection to the life upheld. This is no less so even if in other contexts many will reject the notion of a real essence and the derivative idea that some among the properties true of an object are essential to that object. Life is the *conditio per quam* – the condition by means of which – *inter homines esse*.

The prohibition against killing the innocent, oblige *semper et pro semper*, that is, all without any exception.

The ‘good’ is fundamental and prior to the right within natural law. One way or another the human being is able to reason from the principles about the goods to an understanding of how these goods are to be pursued. There are certain ways of acting in response to the basic human goods that are essentially defective. For an act to be reasonable and thus right it should in no way be intrinsically imperfect.⁹¹ Right action is action that responds in a flawless manner to the good.

The question is how to identify the ways in which an act can be essentially flawed. Aquinas advised that one has to look at the features that distinguish the acts – such as, but not limited to: their objects, ends and circumstances.⁹² It is not possible to exhaustively state principles of conduct that determine right course of action in every situation. There are however, some principles of right conduct that hold universally. A paramount example is that killing of the innocent is always wrong. Like Aristotle before him, Aquinas agreed that given the particulars of many concrete situations of choice, a person needs virtue and practical wisdom to act properly.⁹³ General rules concerning the appropriate response to the goods can on occasions be made out by people of special sagacity.

Reason attests that there are objects of the human act which are by their very nature ‘incapable of being ordered’ to God, because they radically contradict the good of the person made in His image. These are the acts that in the Church’s moral tradition have been termed ‘intrinsically evil’ (*intrinsece malum*) – acts that in themselves, independently of circumstances, are always seriously wrong. Sometimes, however, it is deemed lawful to tolerate a lesser moral evil in order to avoid a greater

⁹¹ Aquinas, *Summa Theologiae*, part I-II, question 18, art. 1.

⁹² *Ibid.*, part I-II, question 18, arts. 2–4.

⁹³ Aquinas, *Commentary on Nicomachean Ethics*, book II, lecture 2, 259.

evil. It is never lawful, even for the gravest reasons, to do evil that good may come of it. All distinct basic goods are not seen as having equal value.

Aquinas' natural law theory identified principles of right to be grounded in principles of good; but he rejected that the principles of the right direct the human being to maximise the good. Considerations of the greater good may not any the less have a role in practical reasoning.

The morality of human actions, Suárez held, is that by virtue of which a human action can contract the species of goodness or badness.⁹⁴ In his view, neither the nature of an act, nor its normative evaluation can be divorced from the mode of its production. He argued that the morality of human action belongs to the act itself.⁹⁵ This he saw as a precondition for ascertaining the moral goodness or badness of actions regardless of the presence of commanding or prohibiting divine law. If acts are to have pre-positive moral properties, they must also have a pre-positive aptitude to be morally good or bad.

Suárez believed that what is naturally good is necessarily commanded by God; and that what is naturally bad is necessarily prohibited. Therefore, *the content* of natural law, *unlike its binding force*, does not have a positive source. Rather, it is dictated by nature itself, to which God's commands respond.

With reference to the Decalogue, it is appreciated that the commandments shed light on the fundamental rights inherent in human nature. The commandments thus represent the basic condition for and the proof of the love of one's neighbour. It has been argued that Aquinas used: "You shall love your neighbour as yourself" as what in later theory has become known as a 'master rule'.

Such a 'superior rule approach' on the part of Aquinas would be fully in line with and a natural follow-up to the transcendent truth of the human dignity inherent in every human being, the first and correct principle of morality.

"You shall love your neighbour as yourself" is however, much more than a master rule. It is *the* commandment of the New Testament, and it

⁹⁴ Suárez, *Opera Omnia*, vol. IV, *De bonitate et malitia actuum humanorum*, disp. 1, proem.

⁹⁵ The morality of the act consists in its dependence on volition as the productive impetus behind the act and on reason as the guiding set of rules that the agent takes her or himself to be guided by in shaping the precise characteristics of the act. Cf. Suárez, *Opera Omnia*, vol. IV, *De bonitate et malitia actuum humanorum*, sect. 2, n. 15.

articulates the singular dignity of the human person. It thus contains the basic *reason for* and *purpose of* the law. At the same time, it represents an ordered complex of personal goods that serve the good of the person – the good that is the person itself and her or his perfection. These are the goods safeguarded by the commandments, which, according to Aquinas, contain the whole of natural law.⁹⁶

A master rule relates to a good in a general manner. From this general rule, numerous provisions concerning reasonable responses in specific concrete situations may be derived. The correlation has some semblance to what pertains to the relationship between a *lex generalis* and a *lex specialis*. “You shall not kill”⁹⁷ may serve as an example of a master rule.⁹⁸

5.3.2.4. Universal – Common to Humankind

As previously indicated, natural law theory is value based. The transcendent human dignity that is innate in every member of the human family, is axiomatic. This status is not relative either to community or to convention. Because natural law expresses the dignity of the human person and lays the foundation for her or his fundamental rights and duties, it is universal in its precepts and its authority extends to all humankind. Natural law unites in the same common good of all people, created for the same destiny.

This universality is not in conflict with the absolute uniqueness of each person. Natural law corresponds to things known through practical wisdom by all human beings. As natural law constitutes the basic principles of practical rationality, Aquinas reasoned that the precepts of natural

⁹⁶ Cf. Aquinas, *Summa Theologiae*, part I-II, question 100, art. 1.

⁹⁷ *The Bible*, Exodus. 20:13.

⁹⁸ Addressing the basis in reason of changes of whatsoever kind which may affect the obligation of natural law without changing the nature of the law, Suárez applied an illustration drawn from Augustine:

Just as the science of medicine lays down certain precepts for the sick, and others for the well, certain ones for the strong, and others for the weak, although the rules of medicine does not therefore undergo essential change, but merely become multiple in their number, so that some serve on one occasion, and others, on another occasion; even so, natural law, while it remains the same, lays down one precept for one occasion, another, for another occasion; and is binding at one time, and not binding previously and subsequently, and this without undergoing any change in itself because of a change in the subject-matter.

law are universally binding by nature.⁹⁹ That is, its norms are naturally authoritative over all human beings.

Augustine wondered:

Where then are these rules written, except in the book of that light which is called truth? From thence every just law is transcribed and transferred to the heart of the man who works justice, not by wandering but by being, as it were, impressed upon it, just as the image from the ring passes over to the wax, and yet does not leave the ring.¹⁰⁰

It is because of this ‘truth’ that natural law involves universality. As it is inscribed in the rational nature of the person, it makes itself felt to all human beings endowed with reason. In order to perfect itself in its specific order, the human being must do good and avoid evil, be concerned for the transmission and preservation of life, refine and develop the riches of the material world, cultivate social life, seek truth, practise good and contemplate beauty.¹⁰¹

Natural law is intended to be part of a comprehensive theory of practical reason based on a sound understanding of the human being and of the lasting characteristics of the human condition. Natural law is suitable to direct the human beings to the good for human flourishing both as individuals and as members of the plurality.

Given human nature, no human being is exempt from the precepts of natural law. This is so because these precepts direct the human being toward the good as such and various particular goods.¹⁰² The good and goods provide reasons for the rational human being to act, to pursue the good and these particular goods. As good is what is perfective of the human being given the human nature,¹⁰³ the good and these various goods have their status as such naturally. It is sufficient for certain things to be good that the human being has the nature that it has. The common human nature means that the good for the human being is what it is.

The negative precepts of natural law oblige every human being in all circumstances. It is prohibitions that forbid a given action *semper et*

⁹⁹ Aquinas, *Summa Theologiae*, part I-II, question 94, art. 4.

¹⁰⁰ Augustine, *De Trinitate*, book XIV, chap. 15, 21.

¹⁰¹ Cf. Aquinas, *Summa Theologiae*, part I-II, question 94, art. 2.

¹⁰² *Ibid.*, part I-II, question 94, art. 2.

¹⁰³ Cf. *ibid.*, part I, question 5, art. 1.

pro semper, without exception, because the choice of this kind of behaviour is in no case compatible with the goodness of the will of the acting person and with its vocation to communion with her or his neighbour.

5.3.2.5. Immutable – In Principio, Nunc et Semper

The precepts of natural law unite in the same common good not only humankind at any given time but all people of every period in history. Every human being is created for the same destiny. As long as human nature remains unchanged, natural law is unchanging.

Inasmuch as natural law expresses the dignity of the human person and lays the foundation for its fundamental rights and duties, it is universal in its precepts and its authority extends to all humankind throughout time – in the beginning, at present and in the future (*in principio, nunc et semper*). As stated by Suárez:

No human power [...] can abrogate any proper precept of natural law, nor truly and essentially restrict such a precept, nor grant a dispensation from it.

The immutability of natural law entails the existence of objective norms of morality valid for all people. This is possible as natural law not only lays down rules but also recommends ideals. Natural law embraces a distinction between commands or prohibitions, to which there are no exceptions, and ‘indications’ (*demonstrationes*) pointing out what is better but not always obligatory. The indications do not impose strict obligations. Dependent on the circumstances, human laws can for good reasons set aside indications.

As Augustine explained, the same God is the Author of the Old Law and of the New. Under changing circumstances, the same principles may require different particular rules. Said differently: whereas some principles of natural law apply everywhere and always, some apply only ‘on supposition’, unless those concerned agree on something else.

Even though the human being always exists in a particular culture, the human being is not exhaustively defined by that culture. There are permanent structural elements of the human being that are connected with her or his own bodily dimension. There are things in this that do not change.

There will nevertheless be a constant need to seek out and to discover the most adequate formulation for universal and permanent moral norms in the light of different cultural contexts. That is, formulations most

capable of ceaselessly expressing their historical relevance, of making them understood and of authentically interpreting their truth. The truth of the moral law unfolds down throughout the centuries. The norms expressing that truth remain valid in their substance, but must be specified and determined in the light of historical circumstances.

In the words of Aquinas:

As was explained above, those things to which man is naturally inclined belong to the law of nature – and, among other things, it is proper to man that he be inclined to act in accord with reason. Now as is clear from *Physics* 1, it belongs to reason to proceed from what is universal (*ex communibus*) to what is particular (*ad propria*). However, speculative reason and practical reason behave differently on this score. For since speculative reason deals principally with necessary things, which are such that it is impossible for them to be otherwise, truth is found without exception (*absque aliquo defectu*) in the particular conclusions in just the way it is found in the universal principles. By contrast, practical reason deals with contingent things, which include human actions, and so even if there is some sort of necessity in the universal principles, nonetheless, the further down one descends to particulars, the more exceptions there are. So, then, in speculative matters there is the same truth for everyone both in the principles and in the conclusions, even though the truth is known to everyone only in the principles, which are called common conceptions, and not in the conclusions. By contrast, in practical matters, there is the same practical truth or correctness (*rectitudo*) for everyone only with respect to the universal principles and not with respect to the particulars. [...]

So, then, it is clear that *with respect to the universal principles of either speculative reason or practical reason*, there is the same truth or correctness for everyone and it is equally well known to everyone.

Again, *with respect to the particular conclusions of speculative reason*, there is the same truth for everyone, though it is not equally known to all of them.

[...]

However, *with respect to the particular conclusions of practical reason*, there is not the same truth, i.e. correctness,

for everyone, and even in the case of those for whom it is the same, it is not equally known to everyone.¹⁰⁴

Suárez disagreed with Aquinas's claim that God can change or suspend some of the secondary precepts of natural law, such as the prohibitions on murder, theft, and adultery.¹⁰⁵ As long as human nature remains unchanged, Suárez argued that natural law is immutable. What may appear to be divinely-made changes in natural law are in reality alterations of subject matter.

5.3.3. Civil Law

5.3.3.1. Must Conform to the Eternal and Natural Law

[L]aw implies a certain plan that directs acts to their end. [...] Therefore, since the eternal law is the plan of governance that exists in the highest governor, all the plans of governance found in the lower governors must flow from the eternal law. Now these plans of the lower governors consist in all the kinds of law besides eternal law. Hence, all laws flow from the eternal law to the extent that they participate in right reason.¹⁰⁶

Aquinas followed the Roman law tradition of observing a distinction between natural law, the law of nations (*ius gentium*) and civil law (that is the law of a particular community).¹⁰⁷ The first issue that Aquinas raised about civil law is whether human law is beneficial. Might the communities of human beings not do better with admonitions and warnings, or with judges appointed to 'living justice', or with wise leaders rendering 'judgements' as they see appropriate?¹⁰⁸

Natural law theory has throughout understood civil law as morally challenging, but as an indispensable instrument of great good. To ensure that the very same instrument does not become an apparatus of great evil, the lawmakers are under a moral obligation to amend the civil law continuously so that it is appropriate and beneficial to the needs of its subjects. The duty pertains not only to settling the content of the rules and the principles, but relates to establishing the procedures and institutions of the

¹⁰⁴ *Ibid.*, part I-II, question 94, art. 4.

¹⁰⁵ *Ibid.*, part I-II, question 94, art. 5.

¹⁰⁶ *Ibid.*, part I-II, question 93, art. 3.

¹⁰⁷ *Ibid.*, part I-II, question 95, art. 4.

¹⁰⁸ *Ibid.*, part I-II, question 95, art. 1.

legislative power and of the administration of justice as well. Human law is the remedy against the great evils of, on the one side lawlessness (the law of the stronger), and on the other side tyranny. One characteristic element of tyranny is a sham legal system – that is, the abuse of law as a disguise for fundamentally lawless decisions cloaked in the forms of law and legality.

The individual human being is the ultimate unit of all law – being: her, him and them. Law, in according to Aquinas, has to do properly, primarily and principally with an ordering toward the common good, which belongs to all people.¹⁰⁹ All civil law precepts must be in accordance with natural law.¹¹⁰ That is, the civil law cannot altogether abolish the original commonness of things under natural law. This is pivotal for balancing between the evils of lawlessness and tyranny.

While the civil law rules should be derived from natural law, these precepts have their legal force from their part in a civil law system.¹¹¹

According to Aquinas, at any time and place a very large portion of human law could reasonably have been different. Beyond the prohibitions of natural law, it is for the peoples to decide for themselves under which laws they want to live given all relevant circumstances such as time, place and societal factors. Distinguishing right and wrong on this level, context is everything. Human law is said to permit certain things not in the sense that it approves of them, but rather in the sense that it is incapable of directing them.¹¹²

5.3.3.2. Agreed upon by Human Beings for their Entity

Suárez argued that human beings have a social nature bestowed upon them by God, and this includes the potential to make laws. “Man is a social animal, and cherishes a natural and right desire to live in a community”. In whom or in what however, does the power to make human laws reside? “The power in question exists by the sole force of nature, not in any individual man, but in men, viewed as a whole”.

¹⁰⁹ *Ibid.*, part I-II, question 90, art. 3. Roman law repeatedly emphasised that the explanatory reason for law is the human persons for whose sake it is made.

¹¹⁰ *Ibid.*, part I-II, question 95, art. 2.

¹¹¹ *Ibid.*, part I-II, question 95, art. 3.

¹¹² *Ibid.*, part I-II, question 93, art. 3.

All men are by the force of nature born free, so that no person is endowed with political jurisdiction over another person; even as no one is endowed with dominion over another, nor is there any reason why such dominion should be bestowed upon certain persons with respect to others, rather conversely.

When people form a political society, the authority of the State is of human origin. From the fact that people establish a community, the entire community becomes endowed with the power of establishing human laws – the civil law of that community. The people chose the nature of their political entity, and they opt for how to dispense their natural legislative power. Natural law does not make it obligatory that the people exercise their power to legislate directly by the community as a whole. Conversely, it would be demanding from a practical viewpoint if that were the case. Legislation to be adopted by universal vote – save for in the rare cases – would be challenging and, in particular, be costly in pecuniary terms. A delegation of the legislative power to a limited group is the sensible option.

Civil law in consequence may vary considerably not only over time, but from one community and civil society to another. If a government is imposed on people, they have the right to defend themselves by revolting against it and even killing the tyrannical ruler, Suárez reasoned.

Any kind of government should be of the people and for the people. The people are the source of power in the State. This understanding has a bearing both on the human relations within States and between States. Political authority is the remedy for anarchy, injustice and impoverishment in communities. The rule of law is as well the remedy for the dangers in having rulers. The liberty of those who are in authority does not consist in the power to enact contrary to the precepts of natural law.

Aristotle held that in almost all societies, on almost all occasions and issues, it is preferable that government be by and in accordance with law. The reasons being:

1. laws are products of reason not passion,
2. the sovereignty of a ruler or assembly tends to rule in the interests of a section and not for the common good;
3. equality demands that each mature person have some share in governing; and

4. the rotation of offices and officeholders is desirable and can hardly be managed without legal regulation.

That is, government by law and legally regulated rulers are usually desirable.

To Aquinas, the ideal is the self-government of a free people by the rulers and institutions that that people has appointed for that purpose. Law ideally fosters the co-ordination of willing subjects. Each individual left to strive exclusively for its personal good, is unlikely to be conducive to the accomplishment of the common good. A precondition for its harmonising effect is that the law by its public promulgation, clarity, generality, stability and practicability, treats its subjects as partners in public reason.¹¹³ Laws are practical propositions conceived by the legislative power and communicated to the reason of the people so that they, as subjects of the law, will treat these propositions as reasons for action. That is – ideally speaking – as reasons decisive for each of them as if each had conceived and adopted the reasons by personal judgment and choice. The standard and rule of human liberty in the community should as far as possible be in line with that of the individual, so that through the injunctions of the civil law all may more easily conform to the prescriptions of natural law.

Civil law is positive law enacted by a proper designated legislature. As long as the binding precepts of natural law are not violated, legislation in civil law may well be, and normally is, adopted by a majority decision. In the words of Vitoria: “for the state has the power of self-government, and the act of the greater part is the act of the whole”.

For if two parties disagree, it must necessarily result that the sentiment of one party should prevail; and inasmuch as their desires conflict, the sentiment of the party which is in the minority ought not to prevail; therefore, it is the sentiment of the majority which should dominate.

5.3.3.3. Interpretation, Equity and Mutability

Fairness – a core element of the rule of law – demands that equal situations are handled in a similar manner regardless of the persons involved. The law is the main equaliser – no one shall be above or beyond the law, and everyone shall have equal standing before the law. Even-handedness

¹¹³ Cf. *ibid.*, part I-II, question 90, art. 4; question 95, art. 3; question 96, art. 1; question 97, art. 2.

in law in contradistinction to arbitrariness was recognised in ancient times as a property of a well-organised legal system. Some of the old Roman law adages illustrate this:

- The first part of equity is equality.
- Reason in law is perfect equality.
- Laws should bind their own author.
- To adhere to precedents and not to leave established principles.

It is appreciated that ‘such is not the same, for nothing similar is the same thing’. This, however, does not imply that it is impossible to have some agreed and more objective standards for identifying similarity and differences between cases – to avoid arbitrariness and discrimination.

Due to its general character, law cannot however regulate every situation with all its particularities in every detail. To some extent, legal precepts must be subject to interpretation. This is captured in the Roman maxim, “The law does not define exactly, but trusts in the judgment of a good man” (*Lex non exacte definit, sed arbitrio boni viri permittit.*) As for the interpretation as such – and fully in line with the subsequent natural law theory as well, Roman law advised: “The law always intends what is agreeable to reason” (*Lex semper intendit quod convenit rationi*).

Moreover, all things subject to change never remain constant, but continually pass from one State to another. Human life itself is always subject to change. Since no legislator can foresee every case that may arise, it will not always suffice with interpretation of the law. The rule of law entails that the law is tempered by ‘equity’ (*epieikeia*). When exceptional cases arise, there must be room for the making of exceptions to general rules.¹¹⁴ This is different from, and goes beyond, interpretation.

Most importantly, civil law is subject to change – it is mutable following the legislative procedure of the actual community. This is an absolute requirement for the law to appropriately address changing circumstances. A civil law system should be stable and predictable, but never stagnant. The law is there to provide for the needs of the human beings – for protecting and preserving mortals. Least the laws are aimed at regulating the actual conditions of life, their value will be limited and the laws may lead to injustice if not to lawlessness or tyranny.

¹¹⁴ Cf. Aristotle, *Politics*, book III, part 16; *Nicomachean Ethics*, book V, part 10 and *supra* Section 5.3.1.2.

5.3.3.4. Territorial Jurisdiction

Where there is law, there must be a remedy. Unless the laws are enforceable, they may have no chastening and regulating force and thus fail in providing for the common good of the subjects. In the single State there are laws prescribing rights and their correlative duties, and a means of protecting these rights and enforcing the performance of these duties. No society could hold together unless there exists a power and authority to deter wrongdoers and prevent them from injuring the good and the innocent. Thus, Vitoria ascertained:

Everything needed for the government and preservation of society exists by natural law, and in no other way can we show that a state has by natural law authority to inflict pains and penalties on its citizens who are dangerous to it.¹¹⁵

A government has a general power to exercise authority over all the members of the community regulated by the law and all other persons within that law's ambit. That is, the individual State's jurisdiction is, in general, limited to its territory. This corresponds to the area for which the people have legislated and for which the civil laws have been adopted. The courts of the State take charge of violations of the law committed within their jurisdiction by offenders on their territory or available to be returned to their territory.

The civil law of one State is neither valid nor enforceable in another.

5.3.4. *Ius Gentium*

5.3.4.1. Character and Rationale

Vitoria, supported by a reference to *Institutes*, asserted that *ius gentium* is either natural law or derived from natural law, "What natural reason has established among all nations is called the *ius gentium*" (*Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium*).

The full text in *Institutes* reads: "*Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*" (The law that natural reason has established among all persons, that law is observed uniformly among all, and is called the *ius gentium*).¹¹⁶

¹¹⁵ Vitoria, *On the Law of War*, p. 172.

¹¹⁶ Justinian, *Institutes*, book I, II-1.

Vitoria adapted his quote from Roman law by equating the words *gentes* and *nationes* – that is making them synonymous. Thereby he identified the *ius gentium* as law applicable to nations and not only to individuals.¹¹⁷ The reason is that the State, like the individual, cannot exist and prosper in isolation.

Vitoria acknowledged the international community that had come into being of itself, irrespective of the will or the action of any man or group. The international community is comprised of each and every State and exists, according to Vitoria, *ex jure necessitates*.

International law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

Suárez also considered the existence of States as isolated and unrelated entities as impossible.

The rational basis for this branch of law, indeed, consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity not only as a species, but also, as it were, a moral and political unity called for by the natural precept of mutual love and mercy, which applies to all even to strangers of any nation.

Therefore, although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for never are these states when standing alone, so self-sufficient that they do not require some mutual assistance,

¹¹⁷ *Ius gentium* initially having been rules and principles found in similar or identical forms in most legal systems. These were precepts necessary, according to reason, for individuals, families and other groups to live together in some kind of harmony.

association and intercourse, at times for their greater welfare and advantage, but at other times because also of some moral necessity or lack, as is clear from experience.

Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although this law is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner, with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations.

For just as in one state or province law is introduced by custom; so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations, and all the more because the matters comprised within this latter system of law are few, and very closely related to the natural law, and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself, that while this derivation may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature, and universally accepted for its own sake.

Suárez saw international law as largely based on custom.

5.3.4.2. Sources

Aquinas, Vitoria and Suárez all saw the relationship among States as ordered in part by natural law. To them it was self-evident that any regulation in this sphere – be it custom or human law – would have to conform to binding precepts of natural law. Beyond that, *ius gentium* would have the same mutability as civil law in order to provide for the common good of the peoples of the whole world.

In the context of international criminal law, it is important to note that Aquinas, with basis in natural law, drew conclusions (entailments) of the very highest level concerning the most general moral principles. These wrongs are referred to as *mala in se* (things wrong in themselves), as distinct from *mala prohibita* (wrong only because prohibited by law). Aquinas recognised *mala in se* (such as but not limited to the crime now identified as genocide) as norms that prohibit such acts *semper et pro semper*, that is, without any exception. This may be described as *ius cogens erga*

omnes – law that is compelling in relation to everyone without agreement or enactment or other forms of adoption.

Suárez saw international law as having developed rather slowly through customs and somehow followed among the inorganic community of States.

Vitoria, recognised the commonwealth of nations, as a legislature – having the power to create laws and to enforce them. As he saw the law of nations: “even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all”. Vitoria acknowledged that a majority of humankind possess the right to incorporate in the law of nations as it exists at any one time, any further rules and principles to adapt to changing circumstances. The world community (by some significant majority) has not only the authority to make laws, but also to secure their enforcement.

5.3.4.3. Jurisdiction in Relation to Transnational and International Wrongs

Where there is law, there must be a remedy – whether international or national arenas.¹¹⁸ There is an absolute need for jurisdiction in relation to transnational and international wrongs. It no more suffices that avenging a serious wrong that is not redressed by the State of the culprits, is an accepted reason for a just war.

Unless laws are enforceable, they have no regulating force and thus fail in providing for the common good of their beneficiaries. Where there are laws prescribing rights and their respective duties, there is a practical need for means of protecting these rights and enforcing the performance of these duties. The harmonious and peaceful relation among nations presupposes that wrongs can be rectified according to law and not merely by force. Therefore, according to Vitoria, in disputes among States, jurisdiction may be said to be conferred by international law.

As for the *mala in se*, it may be questioned whether Aquinas’ reasoning according to natural law has not already made such crimes as genocide, crimes against humanity and major breaches of the law of war into

¹¹⁸ Cf. Hanne Sophie Greve, “*Ubi Ius Ibi Remedium*”, FICHL Policy Brief Series No. 80 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 (www.toaep.org/pbs-pdf/80-greve/).

ius cogens erga omnes. This understanding can be seen as endorsed by the adoption of the Charter of the United Nations – whereby this part of the law *ipso facto* was made an integrated part of international law as such.

Jurisdiction in relation to transnational and international wrongs may today be had by individual States with some relation to the wrong to be judged, or it can be administered by international courts.

5.4. Concluding Remarks

Certain moral precepts are inherent by virtue of human nature. There is a link between transcendent human dignity and the law of nature or the law of reason. This law by no means settles all questions. But it testifies to the crucial truth that humankind has, in a sense, a common patrimony in terms of an understanding of the basics of human life – that of *the singular human being* and that of *the plurality*.

There *is* behaviour and human conduct – the issue is only who is establishing the rules, *de facto* legislating by setting the standards. There is *no normative void*, that is, nowhere in the relationship between human beings there are behaviour not following any norms.

The world community may continue to accept serious disagreements on a transnational or international level settled by ‘fire and fury’ – by force suit and not lawsuit, that is. In the alternative, the world may opt to promote the common good of people everywhere by settling also the most severe differences by the rule of law. Political leaders may feel inhibited by the rule of law – as any local tyrant would be – but it does not change the basic fact that for the common good the rule of law is preferable also in the international arena. There is, furthermore, no reason for political power beyond that in the service of the well-being of the people.

Although the members of a society may have different ultimate values, they will have intermediate ends in common such as a desire for justice and peace. The peace of all things lies in the tranquillity of order, and order is the disposition of equal and unequal things in such a way as to give to each its proper place.¹¹⁹

¹¹⁹ Augustine, *De Civitate Dei*, book XIX, chap. 13.

Publication Series No. 34 (2018):

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ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book).



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