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PAOLO G. CAROZZA

# THE UNIVERSAL COMMON GOOD AND THE AUTHORITY OF INTERNATIONAL LAW

I. The Basic Theoretical Dilemma of Modern International Law. — II. The Universal Common Good. — III. International Legal Authority Today. — IV. The Responsibilities of States for International Law and Institutions.

« If we are to avoid descending into chaos ... we must rediscover within States and between States the paramount value of the natural law, which was the source of inspiration for the rights of nations and for the first formulations of international law » (1). These words, which John Paul II addressed to the diplomatic corps accredited to the Holy See, provide the starting point for serious reflection on and renewal of Catholic thought regarding international law at the beginning of the 21st century. Modern international law did indeed first take root in the fertile soil of natural law thinking, and from its firm stand on that ground the Catholic Church has consistently provided international law with strong intellectual and moral foundations. Yet, despite that constant tradition, the Holy Father rightly spoke of need to *rediscover* of the value of the natural law between States, for it is undoubtedly the case that the dominant currents of juridical thinking today at least ignore and often reject theories of natural law as viable bases for judging the value and authority of international law in the contemporary world. To reinvigorate and reassert the distinctive contribution of the Church to international law for the 21st century thus coincides with a return to some the first principles of natural law.

(1) Address of John Paul II to the Diplomatic Corps, 13 January 2003.

I propose here, therefore, to begin by raising some basic questions about the foundations and ends of modern international law from the perspective of the Catholic intellectual tradition. What is «authoritative» about international law and international legal institutions in the contemporary world, seen in the light of natural law reasoning and in the light of the concrete global realities of the beginning of the 21st century? In particular, I would like to examine carefully the proposition that international law and international legal institutions should be considered to have a special moral status in the contemporary global order in virtue of the existence and requirements of the universal common good.

## I. *The Basic Theoretical Dilemma of Modern International Law.*

To begin to ask about Catholic thought and international law requires first setting aside some of the basis premises of legal positivism that prevail in legal theory today. If we are to consider international law to be «law» in any significant sense at all, we must be able to claim reasonably that it provides grounds for constraining and directing the behavior of states, the principal subjects of that law. Yet, contemporary theories of the modern international legal system have consistently had difficulty articulating and defending the basis for that authority. How can a system of norms that emerges exclusively from the will and narrowly-conceived self-interest of states also stand outside those states as an objective reason for limiting and controlling them? To the extent that the ultimate source of authority of international law is regarded merely as the actual behavior and the consent of states, every attempt to ground the authority of international law has become an exercise in obscuring the circularity of the argument. That prevailing positivism of modern international legal theory is typically sustained either by an intellectual sleight-of-hand and deliberate truncation of the question of the ultimate authority of law (as in Kelsen), or else by reducing the phenomenon of law to a sociological reality without real *normative* force (as in Hart). It is no wonder that in this intellectual and moral vacuum, the most theoretically attractive post-positivist accounts of international law today, both in Europe and in the United States, consistently conclude that it is nothing other than a linguistic game, a discursive construct to clothe the reality of raw willfulness and self-interest with the illusion of ne-

cessity and legitimacy. If the state, considered as a purely sociological reality, is all that there is at the foundations of international law, then there is ultimately no real reason or truth to it, and what passes for law becomes a form of violence toward what is truly human. As John Paul II has observed,

> Human values, moral values, are at the basis of everything. Law cannot set them aside, neither in its objectives nor in its means... [T]he whole history of law shows that law loses its stability and its moral authority, that it is then tempted to make an increasing appeal to constraint and physical force, or on the other hand to renounce its responsibility — in favor of the unborn or the stability of marriage, or, on the international plane, in favor of entire populations abandoned to oppression — whenever it ceases to search for the truth concerning man (2).

As these words imply, the reductive positivist account of law has never characterized the Catholic intellectual tradition. Instead, Catholic thinking about law has consistently pointed to another way of understanding law, including international law, as part of a more comprehensive moral enterprise that fully engages the meaning and end of the human person. In particular, the classical natural law account characteristic of Catholic thought has consistently understood the paradigmatic definition of law to be tied to the good of the human person through its necessary orientation to the *common good.* Aquinas considered law to be «nothing else than a rational ordering of things which concern the common good» (3), and that insight has formed part of the constant core of classical natural law thinking to the present day — John Finnis, for instance, regards the word «law» in its focal meaning to refer primarily to «rules made ... for the common good of [a] community» (4). Catholic magisterial teaching is no less clear on this point. The Catechism of the Catholic Church, drawing on the *Pastoral Constitution on the Church in the Modern World* and on John XXIII's *Pacem in Terris*, affirms

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(2) Address of John Paul II to the Participants in the 9th World Congress on Law, 24 September 1979.

(3) *Summa Theologiae* I-II, qu. 90, a. 4.

(4) J. FINNIS, *Natural Law and Natural Rights* (1980), p. 276.

that all civil and political authority is exercised legitimately only when it seeks the common good of the community, and that laws contrary to that moral order are not binding in conscience (5).

With respect to contemporary international law, however, this lucid connection between the authority of law and the common good raises at least two broad and important questions. First, how are we to understand the scope and content of the common good when we are speaking of the whole of the global order? And second, what exactly is the relationship of that common good which grounds the authority of law to the existing rules and institutions of international law? Both are critical to any effort to judge the authority of international law in the contemporary world from within the tradition of Catholic thought.

## II. *The Universal Common Good.*

The common good, generally, is understood in Catholic teaching to comprise « the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more easily » (6). Finnis provides a definition — widely accepted among other theorists of natural law — which is more nuanced but substantially similar: « a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s) for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community » (7). The latter definition usefully highlights the need for us to determine what is the relevant « community » referred to whenever we speak of the common good. In connection with international law, we need to ask whether there is in fact *any* meaningful community about which one can speak of a common good.

At a basic level, the answer to that question within the Catholic intellectual tradition is clear. According to Aquinas, « the whole multitude of human beings is to be considered as like one community » (8) — by implication, therefore, having a unified common

(5) Catechism of the Catholic Church, 1897-1912.

(6) *Gaudium et Spes* 26.

(7) J. FINNIS, *Natural Law and Natural Rights* (1980), p. 155.

(8) See J. FINNIS, *Aquinas: Moral, Political and Legal Theory* (1998 ), p. 115 n. 60.

good. And since Francisco de Vitoria, Catholic thinking about the common good has had an even more explicitly global dimension, in recognition of the common destiny of all of humanity. Out of his deep reflections on the Spanish encounter with the peoples of the New World, Vitoria expanded the Thomistic notion of the common good to incorporate explicitly into it the *ius gentium*, the law of nations. In his *relecciones* Vitoria repeatedly analogized the whole world to a single commonwealth, in which all of humanity shares in a single common good (9).

The most forceful modern expression of that idea comes from *Pacem in Terris*, the touchstone for all subsequent references to the «universal common good». In his encyclical, John XXIII was in some senses prophetic — or, more accurately, he showed the wisdom that allows a great truth to be grasped through the presence of small signs. For from the perspective of the 21st century, where even the word «globalization» is an inadequate label for the ever-growing material interconnectedness of the world, the prevailing international order of 1963 seems rather quaintly traditional. Yet, John saw clearly that in light of increasing economic interdependence, travel, information exchange and the growing collaboration and association among human communities generally, «no state can fittingly pursue its own interests in isolation from the rest» (10). He went on to observe that:

> No era will ever succeed in destroying the unity of the human family, for it consists of men who are all equal by virtue of their natural dignity. Hence there will always be an imperative need — born of man's very nature — to promote in sufficient measure the universal common good; the good, that is, of the whole human family (11).

In this powerful combination of a deeply rooted, unchanging truth about human nature, together with an acute diagnosis of the contingent realities of the modern world, John's notion of the «universal common good» proved to be like seed scattered on rich fields:

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(9) See J. Morris, *The Contribution of Francisco de Vitoria to the Scholastic Understanding fo the Principle of the Common Good*, 78 *The Modern Schoolman* 9 (November 2000).

(10) *Pacem in Terris* 131.

(11) *Pacem in Terris* 132.

it has sprouted up in many places and contexts, and especially in much Catholic thinking and writing about the world economy in this era of globalization. In the fortieth year of *Pacem in Terris*, John Paul II reminded us on numerous occasions of the basic idea of the universal common good — that is, that the common good of humanity today has to be worked out in significant respects on an international plane (12).

Nothing in this essay is aimed at denying the centrality of that «common good of humanity»; indeed, its existence and importance is a basic premise of the rest of the discussion here. It is helpful, however, to look more carefully and critically at the varying uses of the concept of a universal common good in Catholic, especially magisterial, thought from *Pacem in Terris* onwards (13). Doing so, one perceives immediately some important ambiguities or internal tensions in the idea. Let me identify briefly four of them that would benefit from significant further thought and elaboration.

First, we may note that in *Pacem in Terris* itself, including the passages quoted earlier, the universal common good is presented as *both* a function of a material, historically contingent interdependence of human beings through the expansion of social and economic interactions, *and also* as an expression of the ontological unity of the human family, an «imperative need born of man's very nature» (14). These two are not in conflict: it is because of the antecedent, ontological unity of the human family and a common human nature that interaction and interdependence are capable of generating that affective bond characteristic of the common good as a concrete reality. The important point is that the universal common good is not reducible merely to one or the other source. It requires material interaction and exchange that generates a heightened recognition of what we share as members of a common human family and that in turn leads to an increased acceptance of our moral responsibilities toward one another as we strive for a

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(12) E.g., *Pacem in Terris: A Permanent Commitment*, Message of His Holiness Pope John Paul II for the Celebration of the World Day of Peace, 1 January 2003.

(13) Hereinafter I take the idea of the «universal common good» to include those conceptions of the common good which, even if not explicitly denominated «universal», are in any event considered to have significant international dimensions.

(14) *Pacem in Terris* 130-132.

common goal. Merely empirical observation of increased contact among human associations is not sufficient, nor is a bare abstract assertion of a universal human nature that does not become in fact a shared *experience* of our humanity.

Second, focusing only on one side of that initial duality — the ontological unity of the human family — we can find our understanding of it enriched greatly by the profoundly intriguing and innovative treatment of the idea of the common good in *Sollicitudo Rei Socialis*. There, John Paul II exhorts all believers to dedicate themselves to the common good, or (borrowing from Paul VI) to «the full development of the whole individual and "of all people"» (15). But he describes that commitment as an exercise of *solidarity*, understood as a virtue leading members of a common society to recognize and respond to one another as persons. In other words, in John Paul II's thought, the affective aspects of the universal common good described earlier, which are the expression of the fundamental unity of human nature, must be acquired as the fruits of conversion away from sin, including «structures of sin», and toward «a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are really responsible for all». The ontological reality of the human family must therefore be made into a real commitment to the good of our neighbor by the transformation of our hearts, with the help of divine grace. «The same criterion is applied by analogy in international relationships», continues the Holy Father. «Interdependence must be transformed into solidarity» (16).

Returning now to the other side of the initial duality identified earlier, the material interdependence of individuals and communities in the contemporary world, a third question about the universal common good arises: whether the national community or the international community is the paradigmatic one for purposes of determining the common good. In the hope and anticipation of the perfect community — that is, heaven, in which all the aspects of human flourishing are ultimately fulfilled — we naturally desire and seek to realize on earth a community capable of securing the

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(15) *Sollicitudo Rei Socialis* 38.
(16) *Sollicitudo Rei Socialis* 38-39.

whole ensemble of conditions that favor the flourishing of each individual in it. Such a «complete community» is the paradigm for the common good. In recent centuries, natural law theory has considered the national community to be paradigmatic in this sense [17]. The basic point of *Pacem in Terris*, however, which is shared by subsequent Catholic teaching and by virtually every observer of global realities today, is that in crucial ways the nation-state is incomplete as a political community [18]. It cannot secure certain of the basic goods of the individuals within it, except by collaboration with other states in the international community. Whether we point to the threat of lawless violence such as terrorism, environmental degradation or financial stability and security, it is obvious that nation-states are not capable of realizing the common good of their people in isolation from coordinated activity with other states.

What John XXIII and subsequent observers of these basic facts do not explicitly address is whether such a reality today therefore shifts the locus of the paradigmatic community to the international plane rather than the national one. In other words, given the increasingly apparent «incompleteness» of national or statal political communities, must we regard the global community as now representing the central political instantiation of our tangible aspirations to completeness, and look to is as the principal association responsible for all aspects of individuals' flourishing? That seems implausible, at least in the present state of the world, for several reasons. First, it would contradict the clear teaching of the Church elsewhere, including in *Pacem in Terris* itself, that whatever international public authority that may exist or be created should not be some sort of super-state [19]. If the global community were to be considered the paradigm of the complete community, an aspiration to something very much like a «super-state» would seem to be a natural corollary. Second, even if even if international cooperation is a necessary supplement to the capacity of

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(17) See R. GEORGE, *Natural Law and the International Order*, in D. MAPEL & T. NARDIN eds., *International Society: Diverse Ethical Perspectives* (1998), p. 54, 60-61.

(18) See, e.g., D. HOLLENBACH, S.J., *The Common Good and Christian Ethics* (2002).

(19) See *Pacem in Terris* 141.

nations to realize the common good of their people, nevertheless the international «community» simply does not exist at present as a real, affective community of *persons* — it is so only tenuously and indirectly, through states (and increasingly through other non-statal transnational associations and activities). That is in part a contingent assessment of current realities, one that could to a certain extent be overcome with time and the education of our humanity, with the cultivation of the virtue of solidarity referred to earlier. But in some important sense even a more mature and virtuous dedication to the common good of the global community would not be likely to displace fundamentally our primary association with smaller and more local communities as the principal locus in which we seek completeness and happiness, because of the specific historical, familial, linguistic and other cultural constituents of concrete, real, human lives. Even when we seek and become conscious of the universal good, it is through the particular — just as we know the ultimate Good, Christ himself, not first through an abstract universal ideal but rather through the human encounter with a person who ate and drank and had friends in a specific time and place.

In short, then, even though the idea of a universal common good does imply that the capacity of the nation-state to secure the common good is conditioned and made relative by its increased interdependence with other communities, more local communities have not been supplanted, nor are they likely to likely to be in the foreseeable future, as the paradigmatic «complete» community in the modern world.

An additional basis for that conclusion has to do with a fourth and final question about the universal common good. As other Catholic thinkers have also pointed out, *Pacem in Terris* is somewhat ambiguous regarding the principal subjects of the universal common good. On the one hand, John XXIII seems to point to equal and autonomous states as the relevant agencies involved. On the other hand, he articulates in a significant way — indeed in an unprecedented way up to that point in papal teaching — a comprehensive understanding of individual human rights as the specification of the content of the universal common good. There is, in short, a certain tension between the rights of individuals and the rights of nations within the idea of the universal common good. Which has priority? Although *Pacem in Terris*

does not make this clear, both sides of that divide receive greater attention and development in the thought of John Paul II. More than any other pope, he has embraced the language of human rights as a way to articulate the fundamental requirements of justice and dignity (20). Equally, he has developed and proposed a deep appreciation for the value of nations and cultures, and emphasizes the necessity to take into account « the cultural and national dimension » in seeking an adequate understanding of the human person. « At the heart of every culture lies the attitude a person takes to the greatest mystery: the mystery of God », he says in *Centesimus Annus* (21). « Different cultures are basically different ways of facing the question of the meaning of personal existence ». For this reason, the Pope defends what he calls « the struggle for culture and for national rights ». More clearly than in *Pacem in Terris*, then, we can see that the Catholic understanding of the universal common good needs to be oriented both toward the good of persons as expressed through the recognition and protection of their individual rights and also toward the good of persons as embodied in the integrity of their cultures and nations.

Although I have necessarily brushed over these complex questions with barely a few broad strokes, we should be able to draw a few general conclusions. First, as one scholar of Catholic conceptions of the common good recently pointed out:

> The official teachings [regarding the universal common good] are, indeed, remarkable for their endorsement of ideas which, if not contradictory, at least stand in tension with one another. Thus the community in question is portrayed as both a society of nations and a single global polity; the common good appears to be at once an affective reality and a structural task; it is presented as a distinctively Christian concept and as a matter of reason accessible to all; and

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(20) See generally G. FILIBECK ed., *I diritti dell'uomo nell'insegnamento della chiesa, da Giovanni XXIII a Giovanni Paolo II* (2001).

(21) *Centesimus Annus* 24. See also Address of His Holiness Pope John Paul II to the 50th General Assembly of the United Nations Organization, 5 October 1995.

as a principle it appears to function both in a spiritual and a social scientific context (22).

We must conclude, at a minimum, that the renewal of Catholic thinking about the authority of international law will require considerably more and careful thought about the exact nature and effect of the «universal common good». In the interim, we will need to be careful not to assert the existence or consequences of the universal common good in too facile and mechanical a way, but instead with some modesty about its possible implications.

Even exercising such prudence, however, certain additional conclusions also suggest themselves, given that the principal object of law is to help attain the common good, and the object of international law is to secure the universal common good, or the transnational aspects of the common good. To begin with, we should limit the scope of international law to those aspects of the good of human communities that are truly shared — both in the sense of addressing needs and desires arising out of our common nature as members of the human family and also in the sense of addressing the tangible ways that life among more local communities is materially interrelated and interdependent. Put another way, international law must not be allowed to advance an abstract ideology but must instead serve a real human experience.

Moreover, given the continued priority of local communities as the paradigmatic locus of our concrete human experience of the common good, international law should be regarded as strictly subsidiary — that is, its aim is to assist the realization of the common good in national and other smaller communities by addressing those common coordination problems that cannot reasonably be fulfilled by the several states acting separately. That is to say, in other words, that the principle of subsidiarity should strictly allocate the responsibility for seeking the common good among national law and international law (23). The presumption of a subsidiarity-oriented perspective is that national and other more local associations should be allowed the greatest possible freedom to

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(22) W.A. BARBIERI Jr., *Beyond the Nations: The Expansion of the Common Good in Catholic Social Thought*, *The Review of Politics*, Vol. 63 (2001), p. 723, 737.

(23) See P. CAROZZA, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *American Journal of International Law* 38 (2003).

realize their ends for themselves, while international law intervenes only to assist the smaller entities, not to replace or supplant their roles. Even while making one of the most strenuous pleas for international law anywhere in magisterial Catholic teaching, John XXIII recognized the critical way that the principle of subsidiarity must dictate limits on international authority (24).

Thirdly, John Paul II's development of the idea that the common good, including the international aspects of the common good, is a consequence of the exercise of the virtue of solidarity should make us more sensitive to the role that international law might play as a pedagogical tool, and might conversely in some circumstances make us more skeptical of, or at least cautious about, the more coercive manifestations of international law. Consider, for example, the Universal Declaration of Human Rights. Both in the process of its formulation and in its aspiration as a «common standard for humanity» it has contributed significantly to the transformation of hearts and minds in the service of a universal common good. Not without cause has John Paul II referred to it as «one of the highest expressions of the human conscience of our time» (25). But in 1948 it was deliberately kept as a non-binding, educative instrument, without formal juridical authority. Had it been presumed to be a fully binding legal instrument, one can only imagine how quickly it would have failed — unless backed by massive coercive force, in which case one can only imagine how surely it would have contributed to imperialism and oppression. The point is that attentiveness to the need to cultivate the affective dimensions of the universal common good may well lead us to value a more restrained and expressive role for international law, including perhaps with respect to such basic matters as, for example, the use by nation states of the death penalty. Let me stress emphatically that this is not merely a way of saying that international law ought not to «matter». The great value that some Catholic legal scholars have traditionally placed on pedagogically expressive law has in recent years been validated by serious empirical study of its effects as well (26).

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(24) *Pacem in Terris* 140-141.

(25) Address of His Holiness Pope John Paul II to the 50th General Assembly of the United Nations Organization, 5 october 1995.

(26) See M.A. GLENDON, *Abortion and Divorce in Western Law* (1987); R.

Finally, our brief reflection on the content of the universal common good should serve as a reminder that the authority of international law must be measured against its orientation toward the good of persons situated in their social and cultural contexts. Where it is not substantively directed toward both human rights and the integrity of cultures and nations, it cannot bind in conscience.

As general as these principles may be, they already have some capacity to guide our reflections on international law. In light of an adequately differentiated understanding of the universal common good, is it within the proper authority of international law to address and seek to control the problems of nuclear non-proliferation, the destruction of the ozone layer, or the freedom of navigation on the high seas? Undoubtedly. What about corruption in national political-economic systems and spoliation of national wealth? Here the principles of subsidiarity and solidarity suggest that corruption and spoliation might legitimately come within the proper scope of international law in some cases, but not always, and may better do so as part of an educational process of «soft law» as much as through «harder» measures. With respect to contemporary human rights law, the question can be even more delicate. There would seem to be no question that the universal common good would require international intervention where human rights violations are massive, systematic, or threatening to international order. But by contrast, some of the recent interventions of the United Nations Human Rights Committee, the supervisory organ created by the International Covenant on Civil and Political Rights, far exceed the bounds of the universal common good: for instance, in Poland, the Committee has claimed, human rights requires the state to provide more adequate sexual education to schoolchildren; with respect to the United States, the Committee has charged that the political tradition of many states that require judges to be elected rather than appointed violates human rights; in Chile, the state's special relationship with the Roman Catholic and Orthodox Christian churches is said by the Committee to violate human rights; in Australia, according to the Committee, the

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COOTER, *Expressive Law and Economics*, Berkeley Olin Program in *Law & Economics*, Working Paper 38 (1998), available at <http://repositories.cdlib.org/blewp/38>.

criminalization of homosexual conduct violates the Convention's human rights standards; and in multiple countries, the Committee has taken aim at restrictions on abortion and divorce as violations of the rights of women under the Covenant. These examples are inconsistent with international law's proper orientation toward the universal common good for either one or both of two reasons. In some cases, they represent interpretations and understandings of «human rights» that are contrary to basic moral truths about the human person. In others, they disregard the freedom and integrity of local communities to make certain fundamental choices about the way that they understand proper relationships of political morality — that is, they do not respect seriously the diversity and authenticity of human culture.

## III. *International Legal Authority Today.*

The latter example shows us, more generally, that in addition to thinking hard about the contours and content of the universal common good, we must also ask the second question with which we began our analysis: what is the relationship of the universal common good to the existing rules and institutions of international law? In particular, to the extent that international law is a good and necessary instrument in the service of a universal common good, who has authority over its creation, development and enforcement?

Classical international law is a system of diffuse, horizontal authority. The law is created by the interaction of states with one another. In the case of customary law, the legal rule emerges as the behavior of states coalesces around a practice that works to address the actors' mutual need to coordinate their behavior (including through the «negative coordination» of mutual restraint). This presents each state with a rational reason to adhere to the rule: the reasonable belief that the whole community of states (including onés own) will be better off if all respect the shared norm directing their action. Treaty law can essentially be said to be an extension of this pattern of rule-creation, with the addition to it of the institutionalized practice of making and adhering to promises.

Even such a highly compressed summary of the emergence of international legal rules is sufficient to permit two important observations about classical international law. First, because the rules

of law emerge in important part out of the accepted practices of states, there is a significant lack of clarity between state behavior that constitutes a violation of international law and state behavior that implicitly amends the existing rule and proposes a new rule of action for the community. Many clear examples of this dynamic can be identified. For instance, the assertion by some states (notably the United States) of territorial sovereignty over the continental shelf in the 1950s was in some sense a violation of the previously-existing rule of international law, but by doing so the United States also proposed to amend the rule by offering an alternative norm reasonably capable of universal application; and in fact the behavior and intent of other states quickly coalesced around that practice, establishing a new rule of international law. The second observation is that in this system of horizontal authority, when there are actors who do not behave in accordance with the rules established for the mutual benefit of the community — as there are with respect to every rule of law in the world as it is — the coercive force needed to maintain and restore order is also diffusely distributed among all the states that constitute the legal system.

Both of these observations share a common element: they show that the international legal system has traditionally regarded the responsible exercise of state power to be an integral part of the system. In generating norms that direct the actions of states to mutually beneficial practices, in successfully adapting them to new conditions and needs, and in making them effective, the power of states makes the international rule of law possible. Of course, the power of states can also be used to disrupt or destroy the rule of law where it is directed against the common good. But the point here is that there is traditionally no *necessary* structural opposition between force — the projection of power — and law in the international system. The issue is whether force is being used with moral responsibility, and thus in the service of the ongoing viability of the rule of international law, or against it.

Since up to this point I have been describing the classical Westphalian model of international society, it is reasonable to ask whether such observations are still apt today. Surveying the landscape of international law at the outset of the twenty-first century, the most decisively significant difference between the structure of the contemporary international legal system and that of the classi-

cal Westphalian order is the pervasive presence and role of international institutions. Starting in 1918, the international community began to turn consistently to institutions to try to address some of the structural weaknesses of international law and politics. Why? A system that relies on individual states interacting with one another to create law and to maintain it is clearly not a very efficient one. Especially as the requirements of global order grew increasingly complex in the twentieth century, and as the number of significant actors participating in the international legal order expanded, it became increasingly difficult for states operating in the classical model to coordinate their behavior for the mutual benefit of all. In part, then, the turn to institutions was to provide fora for sustained interaction and to establish processes by which the subjects of international law can more effectively coordinate their actions for the benefit of their common good. For our purposes here, however, that is a relatively uninteresting reason, because it does not, on its own, do anything in principle to alter the primary authority of states over international law, including the way that they may legitimately exercise responsibility through the reasonable uses of their power.

A more difficult and provocative question, and one much more relevant to our goal of judging international law from the perspective of Catholic thought, is whether the creation and existence of international legal institutions fundamentally alters or even replaces the primary authority of states in the international legal system. Put more simply, should international legal institutions be presumptively deemed to have greater authority over the creation, application and enforcement of international law than states interacting acting severally do? Of course, merely as a matter of positive law states could bind themselves to follow the formal authority of an international institution in some way. But on what basis might it be said that international institutions, merely by their existence in and incidence on the international order, ought to be regarded as *authoritative* makers, interpreters and enforcers of international law? (By «authoritative» here I mean, specifically, regarded as having authority such that a subject of the law — typically a state and its leaders, and indirectly their constituencies — ought at least *prima facie* to accept the source of the law as itself providing a rational reason for the subject to conform its behavior to the rule established by that institution, and to accept enact-

ments of those international institutions as presumptively binding in conscience?) This, arguably, would be one way of understanding John XXIII's well-known endorsement, in *Pacem in Terris*, of a «general authority equipped with world-wide power and adequate means for achieving the common good» ([27]).

To address that question, at this point we can return more explicitly to the natural law premises of the Catholic intellectual tradition, including those in our prior discussion of the universal common good. In the context of natural law reasoning, for international institutions to have such presumptive legal authority would require satisfying two conditions: that such institutions can reasonably be relied upon to seek the common good; and that they can reasonably be expected to achieve it effectively. The first of these conditions is more obviously within the tradition of natural law reasoning — it merely expresses a corollary of the principles articulated by St. Thomas and referred to earlier, which have been consistently affirmed in natural law theory and in Catholic teaching to his day: that the sole purpose of civil authorities is to serve the common good, and that «laws and decrees passed in contravention of the moral order ... can have no binding force in conscience» (to use the specific formulation of *Pacem in Terris*) ([28]). The second condition perhaps is slightly less self-evident but no less certain. John Finnis summarizes it well, drawing together both classical natural law principles and modern insights about law and political authority, and so is it worth quoting him at some length:

> Authority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community. This principle is not the last word on the requirements of practical reasonableness in locating authority; but it is the first and most fundamental.
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> The fact that the say-so of a particular person or body or configuration of persons will in fact be, by and large, complied with and acted upon, has normative consequences for practical reasonableness; it affects the responsibilities of both ruler and ruled, by creating certain exclusionary rea-

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([27]) *Pacem in Terris* 137-138.

([28]) *Pacem in Terris* 51.

> sons for action. These normative consequences derive from a normative principle — that authority is good (because required for the realization of the common good) — when that principle is taken in conjunction with the fact that a particular person, body, or configuration of persons can, for a given community at a given time, do what authority is to do (i.e., secure and advance the common good) (29).

Are these conditions satisfied by international legal and political institutions in the world today? Given the functional differentiation and specialization of international institutions, and the resulting limitations on the scope of any putative authority they may have, it is of course necessary to ask that question in specific contexts, and the answer may differ substantially if we are considering, say, the Universal Postal Union or the Organization for Security and Cooperation in Europe or the World Trade Organization. In the case of at least some important international institutions, however, we would have good reason to question whether the two conditions are satisfied in any substantial way. Consider, for instance, the most central and comprehensive institution of the contemporary international legal order: the United Nations Organization.

The words of the Preamble to the U.N. Charter provide an eloquent articulation of certain fundamental aspects of the universal common good and of reasons for cooperating through this international institution for the advancement of that common good:

> We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite

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(29) J. FINNIS, *Natural Law and Natural Rights* (1980), p. 246.

> our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims (30).

It is evident from this that the stated goals of the 50 states that established the U.N. in 1945 were intimately related to the common good of all nations. This is also the fundamental reason for the Holy See's consistent support in principle for the United Nations (31).

Has the United Nations in fact been faithful to its responsibility for seeking the universal common good? We do not have the space here for a comprehensive assessment of all the multitude of United Nations activities over the past sixty years, but we are all familiar enough with the basic outlines of its history know that its record is mixed. There certainly have been occasions where it has acted clearly and decisively in harmony with the requirements of the universal common good — in conflict prevention and peacekeeping throughout the world, in fostering economic development and the judicious use of the world's finite resources, in facilitating more peaceful and just political transitions in countries such as El Salvador or South Africa. No less clearly, however, we are forced to recognize the ways in which the instrumentalities of the United Nations, both through action and omission, consistently fail to serve the universal common good and in fact frequently act in direct contravention of the moral law. Its agencies systematically undermine the right to life of the unborn and the integrity of the family, including through the promotion of coercive population control. Its committees and subsidiary organs accommodate and indeed at times privilege manifestly evil political regimes. At all levels, it is sometimes prone to silence and inaction in the face of massive oppression in significant parts of the world. Even some of the United Nations' more notable «successes» are laced with ac-

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(30) Charter of the United Nations Organization, Preamble.

(31) See, e.g., *Centesimus Annus* 21, Address of His Holiness Pope John Paul II to the 50th General Assembly of the United Nations Organization, 5 October 1995.

tions and omissions evidencing positive harm to the common good — the example of East Timor is a case in point, where the ultimate good of U.N. assistance and intervention only followed many years of neglect as well as a positively harmful impact on the situation.

The very ambiguous factual record of the United Nations' service of the common good is buttressed by an assessment of the motivations of its members in many cases. In other words, aside from whether they have in fact succeeded in serving substantive justice, could we conclude that the states acting through the United Nations are at least *seeking* the universal common good? Again, a single judgment to cover all the actors and all their situations is not possible. But is it irrefutable that many of the actors in the institution are governments that massively violate the fundamental rights of their people — the same human rights that (as we saw earlier) contemporary Catholic thought regards to constitute the principal specifications of the universal common good. It simply is not reasonable to presume that those actors will act in furtherance of the universal common good internationally while engaged in large-scale denials of justice and the common good at home. Moreover, in a period where the Popes from John XXIII to John Paul II, and Catholic thought generally, has consistently increased its appreciation for the value of democracy and citizen participation in the political order [32], we must recognize that the U.N. (like international institutions generally) is seriously deficient in this respect. It tends to radically separate international law and politics from the participatory democratic processes of internal constitutional orders [33]. Can such a system be reasonably and consistently expected to desire the universal common good — « something that cannot be determined without reference to the human person » [34] — or will it instead be more prone to turning into what John Paul II referred to as « a burdensome system of bureaucratic control which dries up the wellsprings of initiative and creativity » [35]?

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(32) See, e.g., *Centesimus Annus* 46-47.

(33) Cf. J.H.H. WEILER, *Governance without Government: The Normative Challenge to the Global Legal Order*, paper presented to the IX$^{th}$ Plenary Session of the Pontifical Academy of Social Sciences, May 2003.

(34) *Pacem in Terris* 139.

(35) *Centesimus Annus* 25.

Recognizing nevertheless that the original inspiration of the United Nations and many of its current goals and activities are indeed motivated by a broad intention to seek and to realize the universal common good, the second question also comes into play. Is the institution reasonably regarded as effective in its exercise of authority, such that the rules it established will in fact be complied with and acted upon? The most central norm of the U.N. Charter was intended to be the Security Council's control of the use of armed force in the international arena, and the limitation of unilateral force to instances of self-defense, so that « armed force shall not be used, save in the common interest », to quote the Charter again. Several hundred international conflicts later — almost every one neither in self-defense nor authorized by the Security Council — the evidence is clear that the organization is not effective in restraining the use of force. Has it been any more effective in affirmatively *authorizing* the use of force where necessary to protect and preserve the universal common good with which it was entrusted? Perhaps it would be too controversial to cite the paralysis of the Security Council in the Iraq case in this regard, so let us turn to a less contested example. The world recently marked the tenth anniversary of the Rwandan genocide. The prevention or limitation of genocidal violence surely is a paradigmatic example of what it means to exercise responsibility for the universal common good. Yet, not only was the Security Council incapable of authorizing force to prevent the violence in Rwanda that its members were fully aware of, but we now also know that the U.N. even affirmatively ordered its officers in Rwanda *not* to intervene to do anything about the killing that was going on before their eyes. Nor does it seem that lessons learned from the Rwandan failure are providing any basis for confidence in the ability and willingness of the U.N. to address, for example, the horrific violence and abuse going in Sudan at present.

Such failures are incontrovertible. Among other observers, the popes from John XXIII to John Paul II have consistently acknowledged that « [t]he United Nations ... has not yet succeeded in establishing, as alternatives to war, effective means for the resolution of international conflicts » (36). Where an institution such as the

(36) *Centesimus Annus* 21.

United Nations, or more specifically the Security Council, manifestly is ineffective in acting to further the most basic responsibilities which it has been in some way entrusted by the subjects of its putative authority, then basic principles of natural law suggest that its rules are not authoritative. To be precise, this is not to deny that some acts of the Security Council are not formally valid purely as a matter of posited law. Nor am I arguing that the U.N. is incapable, in certain specific circumstances, of arriving at decisions that ought to be regarded as generating moral obligations for states. Moreover, there may often be extra-legal reasons of prudence and diplomacy that favor compliance with U.N. decisions. The claim here is narrow but important: by «not authoritative» I mean that the mere *fact* of its decisions does not provide an exclusionary *moral* reason for the subjects of that «law» to be bound in conscience to comply with and act upon it.

In the case of the Security Council, specifically, this conclusion is implicitly acknowledged by those scholars of international law who have argued that the Charter of the U.N. should not be deemed to preclude the unilateral use of military force in those circumstances where the Security Council has had the opportunity to act but has failed to do so, and where the use of force is in fact necessary to secure the common good of the international community. Put another way, the failure of international institutions to satisfy the basic conditions necessary for the exercise of legitimate political and legal authority means that the preexisting authority of the several states in the classical international legal system is essentially preserved.

## IV. *The Responsibilities of States for International Law and Institutions.*

That point in turn brings us to one final inquiry: in light of these observations about the relationship of international institutions and the universal common good, what are the responsibilities of states with respect to those institutions today? Given that existing institutions of international law do in certain significant cases serve to realize the universal common good, but are at the same time not necessarily authoritative in the sense that we have been discussing, then I believe we can draw three interrelated conclusions.

First, where international institutions are intended to secure (some aspect of) the universal common good and are in fact oriented toward that common good, and where they can reasonably be expected to be effective in achieving that aim, then the individual states as subjects of international law have a clear moral duty to cooperate with those institutions. Second, where the institutions and the rules emerging from them are generally intended to serve the common good but are incapable of doing so either because of the limitations of the normative content of the law or because of the functional shortcomings in the operation of the institution, then states have a responsibility to seek the reform of that institution to help accomplish more effectively its basic purposes. That conclusion presupposes that the positive reasons for the institutions — the human aspirations for peace, development, justice, etc. which generated them to begin with — are still present and capable of generating the unity and cooperation necessary to pursue the common aim in question. The words of the Preamble of the Charter of the United Nations, quoted earlier, provide a lucid example of such conditions, where the deep desires of the human heart that inspired the initiative remain alive even when the institution has fallen far short of the ideal. Finally, where the institutions do fail to secure the universal common good but individual states of the international order have the effective power to advance it independently of the coordination functions of the international institution, then those states have a duty to act on behalf of the common good of the human family (conditioned, of course, by their other moral obligations, such as the recognized requirements of the moral law for the just use of military force).

We can return to the example of genocide and humanitarian intervention to illustrate this dynamic. Several times in recent decades the community of nations has been presented with acute humanitarian crises in which genocide has been threatened or carried out. What is the respective duty of states and international organizations to intervene in the territory of sovereign states, including by military force if necessary, to prevent or bring to an end such grave violations of the basic requirements of human dignity? Such humanitarian intervention could in principle be authorized by the Security Council, provided that it finds the violations at issue to constitute threats to or breaches of peace within the meaning of the U.N. Charter. If it were to do so, then the member states of

the international community would have not only a positive legal obligation but also a moral obligation to cooperate with the U.N. to bring an end to the humanitarian crisis. This would be consistent with the aspiration of the states constituting the U.N. «to unite our strength to maintain international peace and security, and to ensure ... that armed force shall ... be used ... in the common interest». In fact, however, on several occasions the Security Council proved to be incapable of so acting, despite that lofty goal. In some cases it has been argued that the positive law prohibits it (for instance, if «threats to peace» were considered to exclude humanitarian problems with only domestic dimensions); more often, the practical functioning of the institution rendered it ineffective (for example, the voting arrangements of the Security Council paralyzed it, or it did not have the financial and logistical means to respond). In such cases, those states who have the material possibility to effect a change of the institution to overcome its limitations and thereby help secure the common good have an obligation to seek such reforms. Failing such reforms, however, or pending their realization, the genocide remains and the universal common good is thus objectively and gravely harmed. In such situations, where a state or group of states has the power to act effectively, we would have to conclude that rather than allow the humanitarian crisis to persist, to the harm of our common humanity, those states not only may but indeed must act. Arguably, this described the situation justifying NATO intervention in Kosovo without U.N Security Council authoriation. Borrowing from a statement of the Holy See Secretariat of State, we can say that the more powerful countries of the world «must assume their particular responsibility for the universal common good and that of all humanity opening to a worldwide horizon» ([37]).

As in the classical model of international law described earlier, we may recognize that in each of these examples, the responsible and moral use of state power is thus consistent with the rule of law. It is, in fact, *necessary* to the realization of the fundamental end of law in the international arena, whether exercised in coop-

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([37]) Ethical Guidelines for International Trade, September 2003. That this statement was made in the context of international trade does not in any way limit its relevance to other contexts.

eration with international institutions, or in the reform of such institutions, or in the absence of effective institutions.

That conclusion may make us somewhat uncomfortable as well. Especially in viewing the problem of the universal common good from the perspective of Catholic thought and experience, we will be acutely aware of the implications of our human weakness and sin, i.e., the risk of abusing power and of seeking our self-interest at the expense of the good of the other. We rightly should be conscious of our capacity for evil, for the mature Christian judgment is not a utopian one, not an ideological one, but one intensely concerned with the real, in the totality of its factors. But this is not, in the Christian experience, a definitive obstacle to our efforts to construct a civilization based on the universal common good. It does imply, instead, that our action in law and politics needs to be founded on a true education, an education of the human heart to recognize and act with constant regard for the mystery, meaning and truth of the human person. That is what John Paul II has been teaching us in characterizing the universal common good as the fruit of a transformation of our hearts and minds. And that *is* in our experience a truly realistic position, because we have encountered in the flesh the One who makes that transformation possible.