A Normative Theory of International Law Based on New Natural Law Theory

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A thesis submitted to the Department of Law of the London School of Economics for the Degree of Doctor of Philosophy
London, September 2014

Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work.

I declare that my thesis consists of 76, 039 words.

Abstract

This thesis articulates a normative theory of international law based on new natural law theory. New natural law theory is a theory of ethics, politics, and law that is based on the classical natural law doctrine of Thomas Aquinas. The primary reference point of the thesis in relation to new natural law theory is the work of John Finnis, who in *Natural Law and Natural Rights* and subsequent writings elaborates the theory in the consideration of fundamental concepts in political philosophy and legal theory. The thesis examines the tenets of new natural law theory regarding the common good, authority, law, justice, human rights, and legal obligation, and uses these to formulate normative claims regarding the moral purpose of international law and the moral standards that international law should satisfy in light of its purpose. The thesis posits the existence of an 'international common good', encompassing a set of supranational conditions that are instrumental to human welfare and that require international cooperation for their realisation. The thesis claims that the primary moral purpose of international authority and international law is to further the international common good through resolving the coordination problems of the international community of states. Identifying 'principles of justice' for international law, the thesis asserts that positive international law should promote and demonstrate respect for human rights, and should also promote and protect the international common good. The thesis further argues that states have a general moral obligation to obey international law, based primarily on the necessity of state compliance with international laws in order to facilitate the effectiveness of such laws in promoting the international common good. These claims are elaborated with reference to existing features of international law, and through comparison with existing normative and non-normative perspectives in international legal theory on the concepts considered.

Acknowledgements

I wish to express my gratitude to my doctoral supervisors at the London School of Economics, Dr. Emmanuel Melissaris and Dr. Stephen Humphreys, for their guidance, active engagement, and considerable patience, factors that were invaluable aids in bringing this thesis to fruition. I also wish to thank Professor Neil Duxbury and Professor Dr. Florian Hoffmann for the direction and support they provided during the early stages of my research.

I am extremely grateful to my family for their support and prayers throughout my journey of writing this thesis, and for their overall role in my formation. I dedicate this thesis to my parents: my deceased mother, Shirley Searl; my deceased father, William Searl; and my father, Neville Linton.

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Chapter 1
Introduction

I. Objective

This thesis seeks to construct a normative theory of international law that is grounded in new natural law theory. The thesis examines the tenets of new natural law theory in relation to political philosophy and jurisprudence as primarily articulated by John Finnis, and applies these to articulate a theory regarding the moral purpose of international law and the moral standards that international law should satisfy in light of its ascribed purpose.

II. Background

1. An Overview of New Natural Law Theory

'Natural law theory' is a term used to describe a particular set of theories that have been articulated since classical antiquity in the realms of ethics, moral theology, and legal theory.[1] The diversity in the content of the theories that have at various times been called 'natural law' theories is considerable, and as such it is difficult to provide a definition of the concept of natural law that is both comprehensive and accurate. Nevertheless, two broad themes may be identified for describing the characteristics of natural law theories in relation to ethical and legal theory. First, as ethical theories, natural law theories typically entail an assertion that there are objective moral norms or 'laws' governing human conduct that are in some way

[1] For accounts of the history of natural law thought, see *e.g.*, Michael Bertram Crowe, *The Changing Profile of the Natural Law* (The Hague: Martinus Nijhoff, 1977); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996); Brian Bix, "Natural Law: The Modern Tradition" in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 61.

related to the nature of persons.[2] Second, as legal theories, natural law theories are characteristically concerned with providing an account of the nature of positive law and its putative relationship to moral standards that are external to it.[3]

New natural law theory, also called the 'new classical natural law theory' or more simply the 'new classical theory' of natural law, is a restatement and development of the classical natural law theory of Thomas Aquinas.[4] The theory has its origins in the work of moral theologian Germain Grisez, who developed the theory beginning with an exegetical study of Aquinas's work on practical reason in 1965.[5] Other writers that have long been associated with the 'new natural law school' include John Finnis and Joseph Boyle, while more recent proponents of the theory include Robert George, Patrick Lee, Gerard Bradley, and Christopher Tollefsen.[6] John Finnis is a principal proponent of the new classical theory across

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[2] See Kenneth Einar Himma, "Natural Law" in Internet Encyclopedia of Philosophy, online: Internet Enclyclopedia of Philosophy <http://www.iep.utm.edu/natlaw/>, Sec. 1. Natural law theorists vary substantially in their precise expressions of this claim, diverging on questions such as how exactly moral norms are related to human nature, and how human nature itself is to be understood and described. See Bix, *ibid*. at 64-65.

[3] See Bix, *supra* note 1 at 66, 75-76; Himma, *ibid.*

[4] For Aquinas's natural law doctrine, see generally Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981), I-II, q. 94. Most of the primary proponents of the theory employ the term 'new classical natural law theory' and appear to prefer this term to 'new natural law theory', since they regard the theory as a restatement of Thomistic natural law doctrine rather than a substantively new theory of natural law. John Finnis indicates that the term 'classical' affirms the link between this theory and the thought of Plato, Aristotle, and Aquinas. See John Finnis, "Reflections and Responses" in John Keown & Robert P. George, eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford: Oxford University Press, 2013) 459 at 468-69 n. 31. At the same time, some advocates of the theory such as Christopher Tollefsen do use the term 'new natural law theory', and the term has gained currency as a label that distinguishes this theory from the work of other contemporary natural law theorists, including other interpretations of Thomistic natural law theory. See *e.g.* Christopher Tollefsen, "The New Natural Law Theory" (2008) 10(1) LYCEUM 1 [Tollefsen "New Natural Law"]; Howard P. Kainz, *Natural Law: An Introduction and Re-Examination* (Chicago: Open Court, 2004) at 45 *et seq.* In this thesis, the terms 'new natural law theory' and 'new classical theory' will be used interchangeably.

[5] See Germain Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1-2, Question 94, Article 2" (1965) 10 Natural Law Forum 168 [Grisez "First Principle"]; see also, among other works: "Towards a Consistent Natural Law Ethics of Killing" (1970) 15 Am. J. Juris. 64; Germain Grisez & Russell Shaw, *Beyond the New Morality: the Responsibilities of Freedom*, 3d ed. (Notre Dame, IN: University of Notre Dame Press, 1988); "Against Consequentialism" (1978) 23 Am. J. Juris. 21.

[6] Representative works of these authors include Germain Grisez, Joseph Boyle, & John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 Am. J. Juris. 99;.John Finnis, Joseph Boyle & Germain Grisez, *Nuclear Deterrence, Morality, and Realism* (Oxford: Clarendon Press,

the fields of ethics, political philosophy, and jurisprudence; Finnis articulated a comprehensive statement of the theory in *Natural Law and Natural Rights*, first published in 1980, and has written extensively on the theory since that time.[7]

New natural law theory has been aptly described by one of its advocates as being a theory about "basic human goods, moral norms, and the reasons for action they provide"[8] The theory provides an account of the basic dimensions of human well-being, and the principles of practical reasonableness that are to guide human conduct for the sake of ensuring human flourishing.[9] The ethical framework of new natural law theory provides the foundation for the further claims of new natural law theorists in relation to political philosophy and legal theory: the theory features a notion of a 'common good' that is characterised as a shared objective relevant to advancing the welfare of persons living in community, and it articulates conceptions of justice, human rights, authority, law, and legal obligation that are all described in varying ways in terms of their relationship to the common good.

1987); Robert George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999) [George *In Defense*]; Patrick Lee, "Human Nature and Moral Goodness" in Mark Cherry, ed., *The Normativity of the Natural* (New York: Springer, 2009); Gerard V. Bradley & Robert George, "The New Natural Law Theory: A Reply to Jean Porter" (1994) 39 Am. J. Juris. 303; Christopher Tollefsen, "Lying: The Integrity Approach" (2007) 52 Am. J. Juris. 253.

[7] See generally John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [Finnis *NLNR*]. Examples of Finnis's other works in which aspects of the new classical theory are discussed or applied include: "The Authority of Law in the Predicament of Contemporary Social Theory" (1984-1985) 1 J. Law, Ethics & Pub. Pol. 115; "Law as Coordination" (1989) 2 Ratio Juris 97; "Natural Law and Legal Reasoning" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 134; "Foundations of Practical Reason Revisited" (2005) 50 Am. J. Juris. 109 [Finnis "Foundations of Practical Reason"]. These and other writings are also contained in a recently published compendium of essays encompassing Finnis's thought over the course of five decades: see John Finnis, *Collected Essays of John Finnis*, Vols. 1-5 (Oxford: Oxford University Press, 2011).

[8] Robert George, "Natural Law and International Order" in George *In Defense*, *supra* note 6, 228 [George "Natural Law and International Order"] at 229.

[9] In this thesis, the terms 'flourishing', 'fulfilment', 'well-being', and 'welfare' will be used interchangeably as is done by proponents of the new classical theory. Of these, the term that is perhaps most particular to the vocabulary of new natural law theory is 'flourishing': see *infra* note 17 and accompanying text.

Ethical Theory

New natural law theory asserts that humans are naturally inclined towards certain ends, which they refer to as 'basic goods' or 'values'.[10] These goods are described as 'basic' since they constitute intrinsic reasons for human action: humans pursue them for their own sake and not for the sake of some further objective.[11] The term 'good' signifies the desirability of these ends, which stems from their relationship to human welfare: in Finnis's words, each basic good "is desirable for its own sake as a constitutive aspect of the well-being and flourishing of human persons in community."[12] Finnis identifies the following as basic values: knowledge of reality, including aesthetic experience; bodily life including the elements of full human vitality (namely health, vigour, and safety); friendship and harmonious association between persons in its varying forms; skillful performance in work and play; marriage; practical reasonableness; harmony with the ultimate source of all reality.[13] New natural law theorists maintain that the list of basic goods, identifying the objects of human inclination, is supported by evidence from anthropological and psychological studies into human nature and its characteristics.[14]

According to the new classical theory, the basic goods are all equally fundamental, such that no particular good can be ranked as more important than

[10] See Finnis *NLNR*, *supra* note 7 at 59ff.
[11] See *ibid* at 62.
[12] John Finnis, "Commensuration and Public Reason" in *Collected Essays of John Finnis*, Vol. 1, *supra* note 7, 233 [Finnis "Commensuration and Public Reason"] at 244; see also Finnis *NLNR*, *supra* note 7 at 61.
[13] See Finnis "Commensuration and Public Reason", *ibid* at 244 n. 25. Finnis's original list of the basic values, which appeared in the first edition of *Natural Law and Natural Rights*, essentially followed that previously provided by Germain Grisez and Russell Shaw: see Grisez & Shaw, *supra* note 5 at 79-82; *cf.* Finnis *NLNR*, *ibid.* at 86-90. Finnis's description of these values has been modified and refined over time: thus, for example, marriage has been included as a distinct basic good, while aesthetic appreciation has been characterised as an aspect of knowledge rather than a discrete basic value. See *e.g.*, Finnis "Natural Law and Legal Reasoning", *supra* note 7 at 135; see also Finnis *NLNR*, *ibid.* at 447-48.
[14] See Finnis *NLNR*, *ibid.* at 81, 83-84; Grisez, Boyle & Finnis, *supra* note 6 at 113.

another according to an objective hierarchy of value.[15] Each basic value is further described as being a general form of good that can be pursued in a virtually infinite variety of ways: thus, for example, the good of knowledge is similarly instantiated in a person's act of taking driving lessons, reading a newspaper, or studying for a university degree.[16] Pursuit of the basic goods, which new natural law theorists describe as 'participation' in these goods, is an ongoing and indefinite process and is considered an essential dimension of human 'flourishing', that is, living a full human life.[17]

New natural law theory posits that natural law principles are self-evident principles of practical reason identifying the objects of human inclination as goods to be pursued.[18] The notion of practical reason has its origins in classical thought, and may be understood as reason in its mode of directing what is to be done.[19] The new classical theory affirms that practical reason plays an integral role in apprehending the objects of human inclination as human goods and directing persons to pursue them.[20] The resulting directives, or natural law principles, are specifications of what Aquinas describes as the first principle of practical reason, namely that "good is to be done and pursued, and evil is to be avoided".[21] These principles are, as Finnis notes,

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[15] See Finnis *NLNR*, *ibid.* at 92-94.
[16] See *ibid.* at 84-85.
[17] See *ibid.* at 96, 103. Finnis indicates that the term 'participation' best corresponds to the idea that a person's enjoyment of each of basic goods is inexhaustible, whereas the terms 'pursuit' and 'realisation' may suggest that the basic goods are finite objectives: *ibid.* at 96. Finnis and other new natural law theorists do nevertheless employ the terms 'pursue' and 'realise' in relation to the basic goods, and they will be used herein interchangeably with the term 'participate'.
[18] See Finnis *NLNR*, *ibid* at 23. By 'self-evident', new natural law theorists mean that the principles of practical reason are underived, in the sense that they are not deduced or inferred from any more fundamental principles: see Robert George, "Recent Criticism of Natural Law Theory" in George *In Defense*, *supra* note 6, 31[George "Recent Criticism"] at 44-45; Grisez, Boyle & Finnis, *supra* note 6 at 106.
[19] See Aristotle, *Nicomachean Ethics*, trans. Christopher Rowe (Oxford: Oxford University Press, 2002), VI, 2, 1139a26-31; Aquinas, *supra* note 4, I, q. 79, a. 11; see also Grisez "First Principle", *supra* note 5 at 175, describing practical reason as "the mind working as a principle of action"; Finnis *NLNR*, *ibid.* at 12 and 20, notes to section I.4.
[20] See Grisez "First Principle", *ibid.* at 179-80.
[21] Aquinas, *supra* note 4, I-II, q. 94, a. 2.

"*propositions* of high generality and comprehensiveness, and… *sources* of all intelligent thinking about what to do."[22] The generality of the principles corresponds to the open-ended nature of the basic goods they identify – goods which, as already noted, can each be realised indefinitely and in countless diverse ways.

The principles of practical reason, according to new natural law theory, are not themselves moral principles: these precepts, while identifying the various ends that constitute aspects of human fulfillment and directing that these ends be pursued, do not provide guidance as to how they are to be pursued in a virtuous manner.[23] In this regard, new natural law theory advances Aquinas's natural law framework by identifying a set of 'requirements of practical reasonableness' that complement the principles of natural law and facilitate the process of moral decision-making.[24] Finnis describes practical reasonableness as "reasonableness in deciding, in adopting commitments, in choosing and executing projects, and in general in acting,"[25] The requirements of practical reasonableness cited by new natural law theorists include the principle that persons should not choose to destroy or impair a basic good, and the principle of fairness indicating that individuals should not demonstrate arbitrary preferences among persons in their conduct.[26] Just as the principles of practical

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[22] Finnis "Foundations of Practical Reason", *supra* note 7 at 118 [emphasis in original].
[23] See Finnis *NLNR* at 101; Finnis "Foundations of Practical Reason", *ibid.* at 120.
[24] These are also referred to by some new natural law theorists as 'modes of responsibility'. See generally Grisez & Shaw, *supra* note 5 at 117-39; Finnis *NLNR*, *ibid.*, Ch. 5. The term 'natural law principles' used in its broadest sense encompasses both the principles of practical reason and the requirements of practical reasonableness: see Finnis *NLNR*, *supra* note 7 at 23.
[25] Finnis *NLNR*, *ibid.* at 12. Elaborating on this, Finnis indicates that the basic good of practical reasonableness concerns seeking to bring reasonable order into one's own habits, practical attitudes and actions, entailing harmony between one's internal feelings and judgments as well as harmony between one's judgments and behaviour. See *ibid.* at 88; Finnis "Commensuration and Public Reason", *supra* note 12 at 244 n. 25.
[26] See Grisez & Shaw, *supra* note 5 at 119-120, 130; Finnis *NLNR*, *ibid.* at 106-109, 118-124. While there is overlap between the lists of requirements of practical reasonableness articulated by new natural law theorists, these lists differ in their precise formulations. Finnis's list in the first edition of *Natural Law and Natural Rights* identified the following nine requirements of practical reasonableness: adopting a coherent plan of life; having no arbitrary preferences among the basic values; having no arbitrary preferences among persons; maintaining a certain detachment from the specific and limited projects one undertakes; not abandoning one's commitments lightly; being

reason are said to specify a first principle of practical reason, the requirements of practical reasonableness are described as being specifications of a 'first principle of morality'.[27] This master moral principle, to cite Finnis's formulation, indicates that a person's choices and actions for the sake of basic human goods should be compatible with a will towards the ideal of 'integral human fulfilment', that is, the flourishing of all human persons and their communities in all the basic goods.[28]

According to the new classical theory, the requirements of practical reasonableness guide moral decision-making by indicating principles that, if not adhered to, will result in conduct that is not compatible with a will towards integral human fulfilment.[29] Such conduct is considered immoral under new natural law theory because the theory construes morality as resulting from adherence to all the requirements of practical reasonableness: it is a truism of the new classical theory that "to be morally good is precisely to be completely reasonable".[30] As Finnis further explains, conduct that respects the requirements of practical reasonableness and is thereby consistent with a will towards integral human fulfilment reflects a

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efficient in the methods one uses to achieve objectives, within reason; not choosing to damage or impede a basic good; favouring and fostering the common good of one's communities; acting in accordance with one's conscience. See Finnis *NLNR*, *ibid.* at 103-126; *cf.* Grisez & Shaw, *ibid*. at 117-139. In the Postscript to the second edition of *Natural Law and Natural Rights*, Finnis suggests that the requirements of promoting the common good and following one's conscience are essentially synonymous with the 'first principle of morality': see Finnis *NLNR*, *ibid.* at 456-57.

[27] See Grisez, Boyle & Finnis, *supra* note 6 at 127-28; Finnis *NLNR*, *ibid.* at 451.

[28] See Finnis "Commensuration and Public Reason", *supra* note 12 at 243-44; see also Grisez, Boyle & Finnis, *ibid.* at 128, 131. Grisez now refers to this ideal as 'integral communal fulfilment', encompassing the fulfilment of all persons as well as divine good: see Germain Grisez, "The True Ultimate End of Human Beings: The Kingdom, Not God Alone" (2008) 68 Theological Studies 38 at 57; see also Tollefsen "New Natural Law", *supra* note 4 at 3, 15-17 for discussion.

[29] See Finnis *NLNR*, *supra* note 7 at 451.

[30] Grisez, Boyle & Finnis, *supra* note 6 at 121. New natural law theorists maintain that immoral choices arise where fully rational thought is deflected by sub-rational motivations, namely feelings or emotions, leading persons to act in ways that satisfy particular preferences but that disregard one or more of the requirements of practical reasonableness: see *ibid.* at 123-24; see also generally Grisez & Shaw, *supra* note 5, Ch. 9.

practical appreciation of the fact that the basic goods are as good for any other human person as they are for oneself.[31]

Political Philosophy and Legal Theory: The Work of Finnis

While most of the leading proponents of the new classical theory have described and applied the theory in relation to ethics and moral theology, Finnis is one of a few new natural law theorists to use the theory as a basis for considering issues in political philosophy and jurisprudence, and is the pre-eminent scholar on new natural law theory in relation to the latter field.[32] In his seminal work on the new classical theory, *Natural Law and Natural Rights*, Finnis articulates the ethical framework of the theory and then relates this framework to analysing key concepts and issues in political philosophy and legal theory: Finnis examines the notions of the common good, justice, rights, authority, law, and obligation, and additionally considers the issue of injustice in law and its impact upon obligation.[33] As Finnis makes clear, his analysis of the abovementioned concepts is fundamentally normative in character: Finnis indicates that his objective in *Natural Law and Natural Rights* is to elaborate a theory of natural law "primarily to assist the practical reflection of those concerned to act, whether as judges or as statesmen or as citizens", and that the book's concern in discussing institutions such as political authority and law is to justify these institutions, and to identify standards that they should satisfy, by having reference to their relationship to natural law principles.[34]

[31] See Finnis *NLNR*, *supra* note 7 at 451.
[32] See the illustrative list of Finnis's works cited at *supra* note 7. Other new natural law theorists applying the theory in the domains of political and legal theory include Robert George and Gerard Bradley: see *supra* note 6 for illustrative works of these authors.
[33] See generally Finnis *NLNR*, *supra* note 7, Chs. 6-12. The Postscript to the second edition of *Natural Law and Natural Rights* provides a detailed overview of the ways in which Finnis's thought in relation to these topics has evolved in the years since the text was first published, referencing Finnis's other relevant works: see *ibid.* at 420-24, 459-76.
[34] See Finnis *NLNR*, *ibid.* at 18, 23-24, 418.

The key features of Finnis's discussion of political and legal theory in *Natural Law and Natural Rights* may be briefly summarized. Of primary significance is Finnis's articulation of the concept of the common good, a concept that is foundational to the relationship between the moral framework of the new classical theory and the theory's claims in the domains of political philosophy and jurisprudence. Finnis describes the common good as signifying a set of conditions that enables members of a community to realise the basic values for themselves, and that accordingly explains the collaboration of community members.[35] This primarily instrumental conception of the common good highlights the contingent nature of human well-being, and the corresponding importance of certain conditions for facilitating the pursuit of the basic goods by individuals and communities.[36] Finnis affirms that the need to promote the common good of one's communities, considered as a requirement of practical reasonableness, is essentially synonymous with the first principle of morality that directs persons to choose and act in a manner that favours integral human fulfilment.[37]

Finnis characterises justice and human rights as concepts that are fundamentally interrelated with the common good and that specify the content of the latter concept. According to Finnis, justice – in its simplest terms, treating people in the manner that is due to them – is a requirement of practical reasonableness that is inherently entailed by the requirement to promote the common good.[38] Human rights, meanwhile, identify the dimensions of human flourishing that correspond to the basic goods and that are to be respected and promoted in accordance with natural

[35] See *ibid.* at 155; see also discussion in Chapter 2 at 45-46 below.
[36] See discussion in Chapter 2 at 48, 55 and 60 below.
[37] See Finnis *NLNR*, *supra* note 7 at 456-57; see also discussion in Chapter 2 at 46-47 below.
[38] See discussion in Chapter 4 at 134 below.

law principles.[39] Finnis affirms that human rights give precise expression to what is due to persons as a matter of justice, and that respect for human rights is part of the set of conditions comprising the common good.[40]

Political authority and law, according to Finnis, are institutional concepts that both derive their normative significance from their relationship to furthering the common good. Finnis affirms that the exercise of authority in community is justified based on the opportunity that authority provides for stipulating definitive solutions to a community's 'coordination problems', that is, the problems that may arise as persons confront an array of reasonable possibilities for pursuing the common good in the context of community life.[41] Authority relates to promoting the common good because authority facilitates the coordination of a community that is necessary in order that members of the community can pursue the basic values. Law, as Finnis further explains, enables the stipulation of solutions to coordination problems in a manner that is particularly suited to facilitating coordination: the features of law and legal order encourage the promulgation of norms governing a community that are clear, enduring and procedurally fair.[42] Law furthers the common good because the characteristics of legal order enhance the prospects for successful and enduring coordination of a community, and contribute to maintaining ideals of justice in the process of coordination.

Finnis describes legal obligation as being fundamentally a moral obligation that is primarily based on the need for persons subject to law to accept legal stipulations as binding if law is to be effective in facilitating the coordination of a

[39] See discussion in Chapter 4 at 137-38 below.
[40] See discussion in Chapter 4 at 139-40 below.
[41] See discussion in Chapter 3 at 83-84 below.
[42] See discussion in Chapter 3 at 85-86 below.

community and thereby furthering the common good.[43] Adherence to legal obligations by members of a community is thus itself relevant to advancing the common good. As Finnis further indicates, however, the moral obligation to obey legal rules is contingent upon the consistency of such rules with the objective of promoting the common good: laws that are unjust, and thus incompatible with the goal of furthering the common good, do not generate a moral obligation to obey them.[44]

Finnis's endeavour in *Natural Law and Natural Rights* to relate new natural law theory to providing a normative interpretation of central concerns in political philosophy and legal theory forms the substantive and structural basis for the present project; accordingly, each of the concepts introduced above will be examined in greater detail in subsequent chapters. For the moment, it is instructive to underscore the conceptual significance of the common good in Finnis's exploration of political and legal theory in relation to the new classical theory. Finnis's chapter introducing the idea of the common good in *Natural Law and Natural Rights* is pivotal to both the architecture of the book and the normative project in which Finnis is engaged. Appearing roughly halfway through the book's thirteen chapters, the discussion of the common good unites the preceding three chapters setting out the ethical framework of new natural law theory with the subsequent chapters examining the political and legal concepts outlined above. By relating all of these concepts to the common good – either as specifications of the common good, as in the case of justice and human rights, or as institutions and phenomena that are justified based on their relationship to the common good, as in the case of authority, law, and legal obligation – Finnis identifies the way in which these concepts are linked to the

[43] See discussion in Chapter 5 at 179-81 below.
[44] See discussion in Chapter 5 at 185-87 below.

principles of practical reason that direct persons to pursue their own flourishing and favour integral human fulfilment. In so doing, Finnis emphasises the priority of considerations of human welfare in understanding the significance of the political and legal structures that govern human communities.

Contribution of New Natural Law Theory to Contemporary Ethical and Legal Theory

New natural law theory is mainly grounded in Aquinas's natural law doctrine and significantly echoes it in relation to its core tenets. The new natural law affirmation of the existence of basic goods as objects of natural human inclination, and the identification of natural law principles as directives of practical reason, are drawn directly from Aquinas's thought; Thomistic natural law theory is similarly the source of many of Finnis's claims pertaining to political philosophy and jurisprudence, including his assertion that law's purpose is to promote the common good, his account of the relationship between positive human laws and natural law principles, and his claims regarding the effects of injustice in law on obligation.[45] At the same time, the interpretation of Aquinas's natural law theory by new natural law theorists is novel in a number of respects, such as its claims regarding the equal value of all the basic goods and the pre-moral character of the principles of practical reason.[46] The new classical theory also introduces its own distinctive elements that represent a development of Aquinas's natural law doctrine, including its elaboration of Aquinas's list of basic goods and its postulation of a set of requirements of practical reasonableness. New natural law theorists are additionally distinguished

[45] See generally Aquinas, *supra* note 4, I-II, q. 90, a. 2; q. 94, a. 2; q. 95, a. 2; q. 96, a. 4. On Finnis's characterisation of the relationship between human laws and principles of natural law, see the discussion in Chapter 3 at 87-89 below.

[46] See Ralph McInerny, "The Principles of Natural Law" (1980) 25 Am. J. Juris. 1 at 6-11. It may be noted that new natural law theorists regard themselves as providing the correct interpretation of Aquinas's natural law doctrine and clarifying previous misconceptions: see generally *e.g.*, Grisez "First Principle", *supra* note 5.

from Aquinas in presenting natural law theory in a manner that is independent of a theological foundation.[47] Finnis's application of the ethical framework of new natural law theory to the analysis of issues of political and legal theory itself constitutes a unique contribution to natural law scholarship, particularly in relation to legal theory; Finnis has provided new insights into the tenets of classical natural law theory through dialectical engagement with the work of leading contemporary jurists such as Herbert Hart and Joseph Raz, and has drawn fresh attention to the idea that moral considerations are relevant for understanding the significance of fundamental concepts in jurisprudence.[48]

New natural law theory has been the subject of a wide array of criticisms regarding virtually all of its distinctive propositions. The new natural law characterisation of the principles of practical reason as self-evident and pre-moral, and the claim that there is no objective hierarchy among the basic values, are among the many defining aspects of the theory that have been challenged.[49] It has also been suggested that the principles of practical reason and the requirements of practical

[47] The development of natural law theory in the classical era was significantly influenced by Christianity and Catholic theology: see generally *e.g.*, Crowe, *supra* note 1, Ch. 3. Aquinas, himself a theologian, characterised natural law as a 'participation' in divine law by rational persons, and thereby affirmed an intrinsic connection between natural law and divine providence: see Aquinas, *supra* note 4, I-II, q. 91, a. 2; see also Mark Murphy, "The Natural Law Tradition in Ethics", online: Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/natural-law-ethics/>, Sec. 1.1. New natural law theorists maintain that it is not necessary to invoke consideration of the existence of God in order to provide a satisfactory account of the concept of natural law, although (as Finnis suggests) theological considerations remain available for providing an ultimate explanation of the significance of the principles of practical reason: see Finnis *NLNR*, *supra* note 7 at 48-49 and Ch. 13; see also Bix, *supra* note 1 at 66-67.

[48] See generally *e.g.*, Finnis *NLNR*, *ibid.*, Ch. 1 (discussing the issue of objective and method in descriptive social science in relation to the thought of Hart and Raz); *ibid*., Ch. 2, (discussing misconceptions voiced by Hart and Raz regarding the claims of natural law theorists). *Cf.* generally H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford University Press, 2012); H.L.A. Hart, "Positivism and the Separation of Law and Morals"(1958) 71 Harv. L. Rev. 593; Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999); Joseph Raz, *The Concept of a Legal System*, 2d ed. (Oxford: Oxford University Press, 1980).

[49] See generally *e.g.*, Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, IN; University of Notre Dame Press, 1987), Chs. 2-3; McInerny, *ibid.* at 11-15. These challenges have simultaneously involved an allegation that new natural law theory is not an accurate representation of Aquinas's natural law doctrine: see *e.g.*, McInerny, *ibid.*

reasonableness do not provide sufficiently precise guides for practical deliberation.[50] Several of Finnis's claims arising from his application of the new classical theory to political philosophy and jurisprudence have also been questioned, including his characterisation of the common good, his account of the coordinating role of authority, and his explanation of the moral foundation of legal obligation.[51] New natural law theorists have responded on a number of occasions to many of the criticisms raised, using these opportunities to clarify or reformulate the precise content of their claims.[52]

The articulation of the new classical theory has significantly contributed to a contemporary renaissance in natural law scholarship. Apart from the considerable body of work that new natural law theorists have generated over the course of several decades, other works on natural law theory have emerged that adopt many of the fundamental tenets of the new classical theory, but differ in their precise formulations of these tenets or feature their own distinctive claims.[53] Additionally, a few writers have recently applied new natural law theory to the analysis of issues outside the realms of ethics and jurisprudence, such as economic justice.[54]

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[50] See *e.g.*, Valerie Kerruish, "Philosophical Retreat: A Criticism of John Finnis' Theory of Natural Law" (1983) 15 U. W. A. L. Rev. 224 at 227-33.
[51] See *e.g.* Stephen D. Smith, "Cracks in the Coordination Account? Authority and Reasons for Action" (2005) 50 Am. J. Juris. 249; Robert M. Scavone, "Natural Law, Obligation and the Common Good: What Finnis Can't Tell Us" (1985) 43 U. Toronto. Fac. L. Rev. 90 at 111-14; see also the discussion in Chapter 2 at 51-55 below on criticisms of the new natural law description of the common good.
[52] See *e.g.*, John Finnis & Germain Grisez, "The Basic Principles of Natural Law: A Reply to Ralph McInerny" (1981) 26 Am. J. Juris. 21; Grisez, Boyle & Finnis, *supra* note 6; George "Recent Criticism", *supra* note 18; see also generally the Postscript to the second edition of *Natural Law and Natural Rights* at 414ff.
[53] See *e.g.*, Timothy Chappell, *Understanding Human Goods: A Theory of Ethics* (Edinburgh: Edinburgh University Press, 1998); Alfonso Gómez-Lobo, *Morality and the Human Goods: An Introduction to Natural Law Ethics* (Washington, D.C.: Georgetown University Press, 2002); Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006); see also Jonathan Crowe, "Natural Law Beyond Finnis" (2011) 2 Jurisprudence 293 for discussion.
[54] See Gary Chartier, *Economic Justice and Natural Law* (Cambridge: Cambridge University Press, 2009); see also the discussion and works cited at *infra* note 80.

2. Natural Law Theory and Normative Scholarship in International Legal Theory

International law, as is well known, has a significant historical link to natural law theory. The earliest writers on international law in the sixteenth and seventeenth centuries were jurists and theologians who drew upon the classical natural law thought of Aristotle and Aquinas in articulating their ideas regarding the principles of inter-state relations.[55] Hugo Grotius, often described as the founder of modern international law, identified natural law as a source of the *jus gentium*, or law of nations, alongside positive laws created through state consent.[56] Writing before Grotius, Francisco de Vitoria cited natural law principles concerning the rational nature of human persons in asserting that the 'Indian aborigines' of the New World had the right to own property and exercise control over it, contrary to the claims of the Spanish colonialists.[57] Another influential Spanish scholar, Francisco Suárez, similarly affirmed natural law as the foundation of the positive rules of the law of nations, observing that the notion of universally applicable laws arising through the habitual practices of states was possible precisely because of the close relationship between the content of the *jus gentium* and natural law.[58] Subsequent writers in the seventeenth and eighteenth centuries, including Samuel Pufendorf, Christian Wolff

[55] The historical influence of natural law theory in the early development of international law is canvassed in Alfred Verdross & Heribert F. Koeck, "Natural Law: The Tradition of Universal Reason and Authority" in Ronald St. J. Macdonald & Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague: Martinus Nijhoff, 1983) 17.

[56] See Hugo Grotius, *De jure belli ac pacis*, trans. Louise R. Loomis (Roslyn, NY: Walter J. Black, Inc., 1949), I, ch. I, para. 14; see also Verdross & Koeck, *ibid*. at 25.

[57] See Francisco de Vitoria, *De indis*, in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: The Clarendon Press, 1934), Sec. 1, no. 20, 23-24.

[58] See Francisco Suárez, S.J., *De legibus ac Deo legislatore* in Francisco Suárez , *Selections From Three Works of Francisco Suárez, S.J.*, Vol. 2: The Translation, prepared by Gwladys L. Williams, Ammi Brown & John Waldron (Oxford: The Clarendon Press, 1944), II, ch. XIX, para. 9; see also Verdross & Koeck, *ibid*. at 20-21.

and Emeric de Vattel, were also influenced by diverse natural law doctrines in developing their respective theories of international law.[59]

In the nineteenth century, the influence of natural law doctrines in international law declined significantly as natural law theory became supplanted by the emergent school of legal positivism.[60] Leading proponents of positivist thought, such as Karl Bergbohm and John Austin, rejected belief in the existence of objective norms discoverable through reason and characterised law as resulting exclusively from the exercise of sovereign will by a state.[61] Legal positivism represented a turn towards the scientific study of law, with a focus on identifying norms through reference to empirical evidence.[62] The positivist doctrine led to the advent of a dominant interpretation of international law that characterised this law as having its origin in state consent, and that recognised treaties and international custom – which were understood as having a tangible relationship to state consent – as exclusive sources of international legal norms.[63]

The earliest writers on international law influenced by classical natural law theory did not deny the juridical significance of international laws derived from the expressed will and practices of states; rather, these writers suggested that such positive rules of international law existed in addition to, and in relationship with, the

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[59] See generally Samuel Pufendorf, *De jure naturae et gentium libri octo*, Vol. 2: The Translation of the Edition of 1688, trans. Charles H. Oldfather & William A. Oldfather (Oxford: The Clarendon Press, 1934); Christian Wolff, *Jus gentium methodo scientifica pertractatum*, Vol. 2, The Translation, trans. Joseph Drake (Oxford: The Clarendon Press, 1934); Emeric de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle appliqués à la Conduite et aux Affaires des Nations et des Souverains*, Vol. 3: Translation of the Edition of 1758, trans. Charles G. Fenwick (Washington: Carnegie Institution of Washington, 1916). These writers were primarily influenced by the natural law doctrines of Enlightenment-era scholars such as Thomas Hobbes and Gottfried Leibniz. See generally Verdross & Koeck, *ibid.* at 31-39.

[60] See Wilhelm G. Grewe, *The Epochs of International Law*, trans. and rev. Michael Byers (Berlin: de Gruyter, 2000) at 503.

[61] See generally *e.g.*, Karl Bergbohm, *Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen*, Vol. 1 (Lepzig: Duncker & Humblot, 1892), cited in Grewe, *ibid.*; John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), cited in Grewe, *ibid.*; see also Roberto Ago, "Positive Law and International Law" (1957) 51 A.J.I.L. 691 at 697-98.

[62] See Grewe, *ibid.*

[63] See Verdross & Koeck, *supra* note 54 at 39; Grewe, *ibid.* at 503-04.

principles of natural law.[64] In this regard, it may be noted that the advent and eventual ascendency of positivism in international legal thought constituted a fundamental change in the approach to understanding and describing international law that had prevailed in prior centuries. Two key and interrelated aspects of this change may be highlighted. First, the positivist rejection of the idea that natural law principles had any relationship to the norms of positive international law resulted in an abandonment of conceptualisations of international law that featured a normative dimension. The positivist claim that international law consisted exclusively of laws originating in positive acts of state consent stood in stark contrast to the affirmation of earlier international law scholars that natural law principles existed in relation to the *jus gentium* as 'higher' law. This affirmation, which was grounded in classical natural law doctrine on the relationship between positive law and the principles of practical reason,[65] expressed the core idea that positive international law remained susceptible to evaluation according to principles that did not themselves derive from states. With the demise of natural law doctrines in international legal theory, this notion was largely lost.[66]

Second, positivist doctrine supplanted an earlier purposive conception of international law, that is, an interpretation of international law as furthering particular objectives. Vitoria and Suárez, in keeping with the natural law doctrine of

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[64] See *e.g.*, Suárez, *supra* note 57; Grotius, *supra* note 55, *Prolegomena*, para. 40, I, ch. I, para. 14.; see also Verdross & Koeck, *supra* note 54 at 21, 25; Stephen Neff, "A Short History of International Law" in Malcolm Evans, ed., *International Law*, 3d ed. (Oxford: Oxford University Press, 2010) 3 at 9. The thought of these writers is to be distinguished from that of Enlightenment-era natural law theorists such as Pufendorf, who denied the positive legal character of the rules governing inter-state relations and maintained that these rules were derived directly from natural law. See Pufendorf, *supra* note 58, II, ch. III, sec. 23; see also Verdross & Koeck, *ibid.* at 31-32.

[65] See Aquinas, *supra* note 4, I-II, q. 95, a. 2; see also the discussion in Chapter 3 at 87-88 below.

[66] A minority of writers continued to affirm the notion of natural law principles as principles governing and informing the content of international law, including Alfred Verdross and Sir Hersch Lauterpacht. See *e.g.*, Alfred Verdross, "*Jus dispositivum* and *jus cogens* in International Law" (1966) 60 A.J.I.L. 55; Sir Hersch Lauterpacht, "International Law – The General Part" in Sir Hersch Lauterpacht, *International Law, Being the Collected Papers of Hersch Lauterpacht*, Vol. 1, Elihu Lauterpacht ed. (Cambridge: Cambridge University Press, 1970) at 76.

Aquinas,[67] both expressed the idea that international law existed for the 'common good' of all persons; Suárez further specified that international law's purpose was to achieve particular goals, namely the maintenance of peace and justice between states, which were themselves necessary for achieving what he called the 'universal good'.[68] Significantly, these claims related international law to the promotion of human welfare, and thereby affirmed that international law did more than merely stipulate the rules of conduct applicable to states in their international relations. Positivism, on the other hand, suggested no such purposive framework for the international legal order, instead characterising international law as a merely a technical instrument for the attainment of politically-determined state objectives.[69] Furthermore, far from relating international law to considerations of human well-being, positivist doctrine reinforced the state-centric conception of international law according to which states were seen as the only entities having rights and duties in the international sphere.[70]

Contemporary international legal theory is no longer dominated by the rigidly positivist ideology that was characteristic of international legal scholarship in the nineteenth and early twentieth centuries. While international law is still understood as being primarily a product of state consent, it is generally acknowledged that modern international law cannot be entirely explained in positivist terms: for example, Article 38 of the Statute of the International Court of Justice identifies "the general principles of law recognized by civilised nations" as a source of international law alongside treaties and international custom, thereby affirming the existence of a

[67] See Aquinas, *supra* note 4, I-II, q. 90, a. 2.
[68] See Vitoria, *supra* note 56, Sec. 3, no. 4; Francisco Suárez, *De legibus ac Deo legislatore* (Madrid: Instituto F. de Vitoria, 1973), IV at 152ff, cited by Verdross & Koeck, *supra* note 54 at 22 n. 43; see also Verdross & Koeck, *ibid.* at 21-22.
[69] See Neff, *supra* note 63 at 15.
[70] See *ibid.*

source of international legal norms that is not grounded in state consent.[71] Furthermore, modern international legal theory has moved beyond the positivist focus on identifying and analysing the sources of international law. International legal theory today features a genuine diversity of perspectives, and includes theories that approach the study of international law with reference to concepts and viewpoints drawn from fields such as sociology, international relations, and various streams of modern legal thought including feminist legal theory and critical legal studies.[72] Corresponding to this plurality of conceptual approaches, contemporary international legal theory also demonstrates a variety of substantive concerns: no longer confined to the analysis of strictly legal concepts, international legal scholars have devoted their attention to examining a range of extra-legal factors that are themselves relevant to understanding the nature and functioning of international law, such as the role of power dynamics between states in shaping the content of international norms, and the significance of gender imbalances in international law-making processes in accounting for certain characteristics of international legal regimes.[73]

Until fairly recently, however, the array of conceptual approaches seen in international legal scholarship did not include any specifically normative theories of

[71] Statute of the International Court of Justice, Art. 38(1)(c). Some authors suggest that general principles of law bear a close relationship to natural law principles: see *e.g.*, Lauterpacht, *supra* note 65; see also Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2001) 12 E.J.I.L. 269 at 292-98.

[72] See generally, *e.g.*, Myers S. McDougal, Harold D. Lasswell & W. Michael Reisman, "Theories about International Law: Prologue to a Configurative Jurisprudence" (1968) 8 Va. J.I.L. 188; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda (1993) 87 A.J.I.L. 205; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) [*From Apology to Utopia*]. For an overview of various theories in contemporary international legal theory, see *e.g.*, Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008) at 54-65.

[73] See generally *e.g.*, Slaughter-Burley, *ibid.*, Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 1995); Charlesworth & Chinkin, *ibid.*

international law. In this regard, international legal theory continued to reflect the impact of the positivist rejection of natural law doctrines that occurred in the nineteenth century. As some writers have suggested, the absence of normative accounts in international legal theory has been compounded by the relative prominence of realist and postmodern perspectives in contemporary international legal thought, which cast doubt on the relevance of moral considerations in international relations and the viability of normative theorising about international law.[74]

In recent decades, nevertheless, a number of normative theories of international law have emerged.[75] These theories posit the existence of moral criteria, such as fairness, that international law should satisfy, and identify moral objectives, such as the protection of basic human rights, that international law should promote.[76] These normative theories also seek to analyse specific principles and issues in international law, justifying or criticising the existing law based on its relationship to the moral standards and objectives identified. Proponents of normative approaches in international legal theory have applied their theories to consideration of a range of topics corresponding to contemporary concerns in international law and international affairs, including the right to self-determination,

[74] Influential works in the realist and post-modernist schools include Kenneth Waltz, *Theory of International Politics* (Boston, MA: McGraw-Hill, 1979) and Koskenniemi, *From Apology to Utopia*, *supra* note 71. See Samantha Besson & John Tasioulas, "Introduction" in Samantha Besson & John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 1 at 3.
[75] Representative works in this regard include: Thomas Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995); Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998); Allen Buchanan, *Justice Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2004); Mortimer N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (Basingstoke: Palgrave Macmillan, 2006). See Besson & Tasioulas, *ibid.* at 5.
[76] See generally *e.g.*, Franck, *ibid.*; Buchanan, *ibid*.

humanitarian intervention, the prosecution of soldiers for international war crimes, and global climate change regulation.[77]

The advent of these normative theories of international law may be seen as significant in at least three ways. First, it arguably testifies to an increasing recognition of the importance of normative inquiry in relation to international law. As Samantha Besson and John Tasioulas have recently noted, the most crucial questions concerning international law that are arising in the face of contemporary global developments are fundamentally normative in character: in this regard, they highlight phenomena such as the emergence of a variety of global challenges pertaining to issues such as terrorism, the spread of weapons of mass destruction, and the threat of pandemics, that appear to require the creation of appropriate international legal mechanisms since they cannot be adequately addressed by individual states.[78] Responding to such challenges by means of international law necessarily involves contemplation of what constitutes an 'appropriate' legal solution to the problems faced, which in turn invites reflection on what criteria are involved in determining appropriateness. Second, the emphasis on human rights considerations that is a prominent theme in normative international legal scholarship is congruent with the way in which international law, since the end of the Second World War, has demonstrated increased attention to articulating the legal responsibilities of states for protecting the welfare of persons; this development is primarily manifested in the growth of international human rights law.[79] Third, the normative theories described have reintroduced a dimension of evaluative scholarship, and a consideration of the

[77] See generally, *e.g.*, Buchanan, *ibid.*; Tesón, *ibid.*; Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2004); Franck, *ibid*.
[78] See Besson & Tasioulas, *supra* note 73 at 4.
[79] On the emergence and early development of international human rights law, see generally Rhona K. M. Smith, *Textbook on International Human Rights*, 5th ed. (Oxford: Oxford University Press, 2012), Chs. 3 & 4.

ends of international law, into the domain of international legal theory; this represents a return to an approach that, as already noted, was characteristic of the earliest theories of international law that were influenced by natural law doctrines.

III. Description of the Thesis

This thesis examines the core claims of new natural law theory in relation to political philosophy and legal theory, and seeks to use the new natural law framework to articulate a normative theory of international law. Proceeding from Finnis's application of the new classical theory to interpreting fundamental concepts in political and legal theory, the thesis considers the implications of new natural law theory for describing the purpose of international law and institutions, the moral criteria that the content of international law should satisfy, and the justification of international legal obligation.

This thesis is premised upon a belief that new natural law theory, having already made an important contribution to current knowledge and discourse in the fields of ethics and jurisprudence, has the potential to similarly offer insights that are valuable for contemporary international legal theory. Finnis and other advocates of new natural law theory have themselves, on a small number of occasions, sought to relate the theory to reflection about contemporary international law and affairs; notable instances of their work in this regard include Finnis's interpretation of the emergence and significance of customary international law, and Robert George's discussion of the new classical theory in the context of considering the themes of governance and law making in the international sphere.[80] There are also signs that a growing number of writers on international law are being influenced by new natural

[80] See Finnis *NLNR*, *supra* note 7 at 238-45; George "Natural Law and International Order", *supra* note 8 at 231-42; see also generally Finnis, Boyle & Grisez, *supra* note 6.

law theory and seeking to apply it to analysing specific concepts and issues in international law.[81] Thus far, however, there has been no attempt to articulate an overall normative theory of international law based on a systematic and comprehensive examination of new natural law theory in its relationship to political and legal theory.

An exploration of the implications of the new classical theory for interpreting international law in normative terms is complementary to the contemporary growth of normative international legal scholarship. Inasmuch as new natural law theory is grounded in classical natural law doctrine, the effort to relate the theory to international legal theory implicitly reaffirms the origins of the evaluative and purposive approaches to analysing international law that are now enjoying a resurgence. Furthermore, while new natural law theory reaffirms the substance of many of the claims of classical natural law doctrine, this thesis suggests that the new classical theory also offers its own distinctive contribution to the endeavour of normative inquiry in relation to modern international law. As will be explained herein, the new classical theory provides the conceptual framework for articulating the notion of the international common good as the centrepiece of a normative theory of international law. Additionally, new natural law theory facilitates a fuller appreciation in international legal thought of the idea that human flourishing, in its myriad dimensions, itself provides the foundation for identifying normative criteria for the development and evaluation of positive international law.

This thesis adopts a conceptual approach to articulating a normative theory of natural law based on new natural law theory, taking as its starting point Finnis's examination of fundamental concepts in political philosophy and jurisprudence in

[81] See *e.g.*, Hall, *supra* note 70; Paolo Carozza, "The Universal Common Good and the Authority of International Law" (2006) 9(1) Logos 29; Dan Dubois, "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?" (2009) 78 Nordic. J. Int'l L. 133.

Natural Law and Natural Rights. The thesis features four core chapters examining the notions of the common good, authority and law, justice and human rights, and legal obligation. In relation to each concept, the thesis outlines the new natural law understanding of the concept, and then seeks to identify the significance of this concept for advancing a normative interpretation of the nature and functioning of the international community and international law. As the elements of the thesis's normative claims are articulated and applied in each chapter, reference is made to instances of positive international law; in this regard, the thesis does not use positive international law as a source for developing the content of its normative claims, but rather draws examples from this body of law to illustrate the areas and ways in which such law gives effect to natural law principles, and more broadly to facilitate an appreciation of the idea that positive international law can and should be understood as having an underlying moral significance. Each chapter also seeks to relate the normative account of international law based on the new classical theory to existing thought in international legal theory on the concept concerned, drawing upon examples of both normative and non-normative perspectives.

Chapter 2 of the thesis, the first substantive chapter, is titled 'New Natural Law Theory and the Idea of the Common Good in International Law'. This chapter introduces the new natural law conception of the common good as described by Finnis, discusses criticisms of this conception and alternative understandings of the common good, and outlines the manner in which the new classical account of the common good relates to the theory's interpretation of other core concepts in political and legal theory. Proceeding from this, the chapter relates the idea of the common good to the international sphere; in particular, the chapter introduces the notion of an 'international common good', defined as a set of supranational conditions that

facilitate human welfare and that require international cooperation in order to be realised. The chapter provides an overview of the way in which the concept of the international common good provides a foundation for making normative claims regarding international authority, international law, and international legal obligation, as a prelude to the more detailed discussion of these concepts in subsequent chapters. The chapter also considers the implications of the notion of the international common good for understanding existing usages of the term 'common good' in international law and international affairs, as well as the general significance of this concept for international legal theory.

Chapter 3, 'Authority and Law in the International Sphere', considers two foundational concepts in political and legal theory from the perspective of the new classical theory. The chapter describes the new natural law conceptions of political authority and law, and also outlines Finnis's account of the relationship between natural law principles and positive legal rules which is an elaboration of Aquinas' thought on the relationship between natural law and positive law. The chapter then considers the significance of the new classical interpretation of authority and law for understanding the concepts of international authority and international law. In this regard, the chapter advances the idea that the purpose of both international institutional authority and international law is to further the international common good through addressing the coordination problems of states in their international relations. The chapter further claims that natural law principles constitute a form of 'higher' law that informs the content of positive international laws, and that the moral authority of these laws is derived from their consistency with such principles. The chapter compares the account of international authority and international law based on new natural law theory with the traditional 'consent' theory of the source of

international law's authority, and with the more recent 'service conception' of authority used by Samantha Besson and John Tasioulas to explain the legitimacy of international law. Finally, the chapter applies the new natural law conceptions of international authority and international law to a reflection on certain issues relevant to the international legal order, discussing in this regard the need for international institutional authority and the idea of 'world government', the status of custom in international law, and the significance of peremptory norms.

Chapter 4, titled 'Justice, Human Rights, and International Law', examines the concepts that the new classical theory characterises as being fundamentally connected to the idea of the common good and as specifying its content. The chapter outlines the new natural law conceptions of justice and human rights and describes the way in which these concepts relate to the notion of the common good. Proceeding from the new natural law claims that promoting the common good entails adhering to the requirements of justice, and that these requirements themselves entail demonstrating respect for human rights, the chapter articulates principles of justice for positive international law. Two overarching principles are identified in this regard: first, that international laws should promote and respect human rights, specifically through remaining consistent with international human rights norms; second, that international laws should be consistent with the objective of promoting the international common good, given its instrumental significance for the enjoyment of human rights. These principles, it is argued, should be regarded as supreme norms of the international legal order. The final part of the chapter examines the justice-based normative theory of international law expressed by a leading international legal scholar, Allen Buchanan, and compares Buchanan's claims to a new natural

law interpretation of the relationship between international law and considerations of justice and human rights.

Chapter 5, 'International Legal Obligation', considers the final concept that forms part of Finnis's analysis of new natural theory in relation to political and legal theory. The chapter describes the new classical conception of legal obligation, which Finnis describes as having a distinct 'legal' dimension but as being fundamentally a moral obligation. Additionally, the chapter outlines the new natural law interpretation of the effect of injustice in law on legal obligation. Based on this framework, the chapter seeks to articulate a normative account of international legal obligation. The chapter claims that there is a general moral obligation to obey international law; this obligation is primarily based on the need for states to adhere to international legal stipulations in order to enable international law to be effective for its purpose of promoting the international common good, and is additionally grounded in the principle of fairness. The chapter affirms that the moral obligation to obey international law is variable according to the substantive justice of the particular law concerned, and that unjust international laws do not generate any primary moral duty of compliance for states; at the same time, the chapter suggests that states may in certain circumstances have a 'collateral' moral obligation to obey an unjust international law. The chapter discusses the theory recently advanced by Jack Goldsmith and Eric Posner that denies that states have a moral obligation to obey international law, assessing the arguments of these writers from the perspective of new natural law theory. Finally, the chapter considers the implications of the new natural law account of international legal obligation, along with other aspects of the normative theory of international law outlined earlier in the thesis, for understanding certain concepts and issues in modern international law that relate to international

legal obligation; in this regard, the chapter discusses peremptory norms, obligations *erga omnes*, and conflicting international legal obligations.

Chapter 2

New Natural Law Theory and the Idea of the Common Good in International Law

In the fall of 2008, the Secretary-General of the United Nations, Ban Ki-moon, delivered an address at Harvard University entitled 'Securing the Common Good in a Time of Global Crises'. Speaking in the initial months of the global financial crisis, Mr. Ban drew attention to what he described as 'common challenges' facing the world community: the financial crisis, climate change, global health, terrorism, and disarmament. The challenges, as Mr. Ban observed, share certain interrelated features: in Mr. Ban's words, these challenges "endanger all countries… and all their people; they cross borders freely without respecting national geographic borders and are highly contagious; and they cannot be resolved without action by us all". Mr. Ban declared that "[i]n these times of crisis… we must put pursuit of the common good to the top of the agenda." According to Mr. Ban, pursuing the common good entails addressing these common challenges, which he further characterised as "global challenges that hold the key to our common future".[1]

Mr. Ban's remarks represent a striking affirmation by the most senior official within the United Nations system of the significance of a concept that has long been a part of discourse in international affairs. Particularly within the context of intergovernmental organisations such as the United Nations and the European Union, reference to the 'common good' is, as it were, a commonplace, and it appears that the concept is receiving increased attention in the face of certain contemporary global challenges. Examination of the many invocations of the term in international fora,

[1] Ban Ki-moon, "Securing the Common Good in a Time of Global Crises" (Speech delivered at the John F. Kennedy School of Government, Harvard University, 21 October 2008), online: UN News Centre < http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=349>.

however, indicates that no single understanding of the common good is at play. It may be reasonably asked how pursuit of the common good is to be prioritised by the world community when considerable heterogeneity exists regarding the very meaning of this concept. Further, assuming that international law is to play a role in addressing the global challenges cited by Mr. Ban, what is the significance of the concept of the common good for international law? Surprisingly, although references to the term 'common good' appear in a number of international legal instruments, the concept has received little attention from contemporary international legal theorists.

This chapter seeks to articulate a definitive conception of the common good relevant to a normative understanding of the world community and its international legal and political affairs by drawing on the description of the common good contained in new natural law theory. New natural law theorists characterise the common good as a set of conditions that enables individuals to pursue basic human goods for themselves, and that accordingly justifies the collaboration of individuals in a community.[2] Applying this concept to the global sphere, this chapter makes two fundamental claims. First, it affirms that there is an 'international common good' that pertains to the international community of states; this common good is comprised of conditions that facilitate human pursuit of the basic values, and that because of their nature require international cooperation for their realisation. Second, it argues that the new natural law conception of the common good applied to the global sphere provides the foundation for positing normative claims regarding the purpose of international law and international institutional authority, the moral

[2] See discussion at 45-46 below.

requirements for the content of positive international law, and the nature of international legal obligation.

The chapter proceeds in four parts. The first part surveys the manner in which the term 'common good' is currently employed and understood in international law and international affairs. This survey reveals that there are at least three existing interpretations of the concept of the common good in international discourse; as shall be suggested in the analysis, none of these interpretations appears to fully embody the sense in which Mr. Ban refers to the common good in his address. The second part of the chapter describes the new natural law conception of the common good as articulated by John Finnis, and identifies the manner in which this concept informs the jurisprudence and political philosophy of the new classical theory. This section also considers the main objections that have been raised to Finnis's account of the common good, and compares Finnis's description to another natural law interpretation of the common good presented by Mark Murphy that is similar but also distinct in important respects. Through discussion of these criticisms and alternative conceptions of the common good, the section identifies what are considered to be the strengths of Finnis's characterisation. The third part of the chapter applies the new natural law conception of the common good in articulating a theory regarding the nature of the world community and its common good, identifying the dimensions of a putative universal community of persons and an international community of states, and introducing the concepts of the universal common good and the international common good. Proceeding from this, the section outlines the normative claims regarding international law that are thought to derive from the new natural law analysis. The final section discusses the implications of the new natural law conception of the common good in its global application for

understanding and assessing the current interpretations of the common good in international discourse, and also considers the significance of this concept for contemporary international legal theory.

I. The Common Good in Contemporary International Discourse

The idea of a 'common good' has a long history in multiple fields of scholarly inquiry including theology, ethics, and political theory. It can be traced at least as far back as the classical era, to the writings of Aristotle on political community and the good life.[3] The concept has particular resonance in the history of Catholic thought, being influential in the elaboration of Aquinas's political philosophy and also forming an important part of the later development of Catholic social teaching.[4] More recently, notions of a common good have featured prominently in the work of political theorists such as Amitai Etzioni and Michael Sandel.[5]

Given its varied pedigree, the common good has long been the subject of multiple interpretations. In the face of this conceptual diversity, it is a curiosity that the term 'common good' is often used in discourse in international law and international affairs as though a single definitive understanding of the concept exists. A recent opinion of the European Economic and Social Committee, for example, describes the European Union as "a community of 27 nations joined together for the common good"; the Committee does not elaborate on this *obiter* remark and thus

[3] See generally Aristotle, *Politics* in Ernest Barker, ed., *The Politics of Aristotle*, trans. Ernest Barker (Oxford: Oxford University Press, 1946); see also *infra* note 28 and accompanying text.
[4] For commentary, see generally, Jean Porter, "The Common Good in Thomas Aquinas" in Patrick D. Miller & Dennis P. McCann, eds., *In Search of the Common Good* (New York: T&T Clark, 2005) 94; Dennis P. McCann, "The Common Good in Catholic Social Teaching: A Case Study in Modernization" in *In Search of the Common Good*, *ibid.*, 121.
[5] See *e.g.*, Amitai Etzioni, *The Common Good* (Oxford: Polity, 2004); Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1998).

appears to assume that its meaning is understood.[6] Even Mr. Ban in his address exhorting the world community to prioritise the common good, while indicating that pursuit of the common good entails addressing certain global challenges, does not directly define the concept that is central to his message.

There is evidence that the meaning of the common good has been considered at the institutional level within the United Nations. The background materials to the first meeting of the International Forum for Social Development in 2002 included two paragraphs dedicated to discussing the concept; here, it was noted that the notion of a common good "assumes that peoples of the world share a common humanity, have common basic values, and a future in common".[7] While noting that the common good "has political, philosophical and religious connotations", the background document provides no references for the description of the concept it presents.[8] Moreover, the document's cautious use of the word 'assumes' signals that even here, the common good is not actually being defined: an affirmation that the common good assumes other concepts such as a common humanity, while insightful, still stops short of explaining what the common good itself is.

A review of the manner in which the term 'common good' is used in contemporary international law and discourse in international affairs suggests that there are at least three prevailing interpretations of the concept. All of these appear to characterise the common good as 'that which is good for everyone', but they do so by means of different conceptual emphases that render each interpretation worthy of separate description.

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[6] EC, *Opinion of the European Economic and Social Committee of 19 January 2012 on "The role of the European Union in peace building in external relations: best practice and perspectives"* [2012] O.J. C68/04 at para. 5.4.1.

[7] United Nations Department of Economic and Social Affairs, Background Notes to the International Forum for Social Development, New York, 7 February 2002, online: United Nations: <http://www.un.org/esa/socdev/documents/ifsd/backgroundpaper.pdf> at 4.

[8] *Ibid*. at 3.

A first set of usages suggests that the common good signifies *mutual benefit*. For example, the 1995 treaty between Canada and Russia concerning audio-visual relations, in establishing a Joint Commission on Audio-Visual Relations, indicates that one of the Commission's purposes is to recommend treaty modifications "intended to develop co-operation for the common good of both countries."[9] Similarly, the Preamble to the 1971 Agreement of Cooperation between the United Kingdom and Qatar affirms that the parties seek to strengthen their ties of cooperation with each other "in relation of their common good and mutual interests."[10]

A second form of usage suggests that the common good entails the *maximisation of welfare*. This usage is exemplified in a 1976 agreement between Spain and the United States, containing rules governing the medical services of the American forces based in Spain. The agreement indicates that in the event of a natural disaster in Spain affecting a large number of people, Spanish and American facilities and health services "will cooperate to the greatest extent practicable and they will be used jointly in the common good."[11] A further and more explicit example is seen in the recent decision of the European Parliament and Council of the European Union concerning a framework programme for research and technological development in the European Community; here, the European Parliament and Council comment that "[n]ow that life sciences and technologies have clearly demonstrated their societal role, a more precise vision must be developed of where

[9] *Agreement Between the Government of Canada and the Government of the Russian Federation Concerning Audio-Visual Relations*, 5 October 1995, 2026 U.N.T.S. 431, Art. XI.
[10] *Agreement on Cooperation Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Qatar*, 19 June 1976, 1032 U.N.T.S. 171, Preamble.
[11] *Agreement in Implementation of the Treaty of Friendship and Cooperation Between Spain and the United States of America of January 24, 1976*, Procedural Annex VI, 31 January 1976, 1030 U.N.T.S. 261, para. 11.

and how mankind should arrange its life for the greatest social and economic common good."[12]

The third usage of the common good witnessed in the international sphere indicates that this concept connotes a *universally shared good*, that is, a good that is not reserved for the benefit of a particular person or group. This understanding of the common good was articulated by the former President of the United Nations General Assembly, Fr. Miguel D'escoto Brockmann, at the start of a United Nations conference on the global financial crisis in 2009. Fr. Brockmann proclaimed the existence of "a community of common goods" which "cannot be appropriated privately by anyone and must serve the life of all in present and future generations"; these goods, he suggested, include the Earth itself, water, oceans and forests, and the Earth's climate.[13] A more abstract but ultimately similar signification of the common good is seen in the 1997 treaty between Bolivia and Spain for avoiding double taxation and preventing tax evasion. A provision of this treaty grants a tax exemption to residents of Spain or Bolivia on income they earn from conducting research while temporarily residing in the territory of the other party to the treaty, in circumstances where they are invited by an educational institution in that country to do research there; the provision stipulates, however, that the exemption does not apply "if the research is undertaken not for the common good, but primarily for the private benefit of a particular person or persons."[14]

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[12] EC, *Decision No 1110/94/EC of the European Parliament and of the Council of 26 April 1994, concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration*, [1994] O.J. L 126/1, Annex III, Sec. 4.
[13] H.E. Fr. Miguel D'escoto Brockmann, "Address" (Delivered at the United Nations Conference on the World Financial Crisis and its Impact on Development, New York, 24 June 2009), online: United Nations <http://www.un.org/ga/econcrisissummit/statements/pga_opening_en.pdf>.
[14] *Convention Between the Kingdom of Spain and the Republic of Bolivia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital*, 30 June 1997, 2050 U.N.T.S. 255, Art. 21(2).

Absent a defined point of reference, it is difficult to make the judgment that any of the three cited usages of the term 'common good' in international law and international affairs represents an incorrect or incomplete understanding of the concept. It may be noted, however, that none of these significations of the common good appears to adequately capture the sense in which Mr. Ban used the term in his 2008 address. The idea that the common good signifies 'mutual benefit' arguably does not approximate the depth of meaning that is conveyed by Mr. Ban's claim that pursuing the common good entails addressing global challenges that are fundamental to the common future of humanity. Furthermore, it is evident that Mr. Ban does not call for 'maximisation' but rather *prioritisation* of the common good; this, as he indicates, requires collective action to be taken in relation to a number of disparate objectives. Finally, Mr. Ban's discussion of the concerns relevant to securing the common good appears to focus not merely on the significance of certain goods as universally shared goods, but also on the nature of certain challenges as having severe actual or potential effects upon human welfare, and on the need to address these challenges for the sake of human well-being.[15]

Particularly in relation to this last point, Mr. Ban's discussion of the common good appears to share certain thematic parallels with the manner in which this term has been used in recent years by the Holy See and its representatives in relation to international affairs. For example, in a statement to the General Conference of the International Atomic Energy Agency in 2007, the Holy See representative Msgr. Dominique Mamberti declared that a sense of responsibility for the common good makes it incumbent upon all to encourage the non-proliferation of nuclear weapons

[15] Mr. Ban asserts, for example, that climate change has become "an imminent threat to all humanity", and in relation to global health, he notes that if not controlled effectively, diseases and pandemics "can have devastating impacts"; regarding the global financial crisis, he characterises the relevant objective as "ensuring global financial stability as an intentional first step toward prosperity for all people". See Ban, *supra* note 1.

and the promotion of progressive nuclear disarmament; the implementation of these objectives, he added, constitutes "one of the principal instruments… in the concrete realization of a culture of life and of peace capable of *promoting in an effective way the integral development of peoples*".[16] Meanwhile, Pope Benedict XVI, addressing the United Nations General Assembly in 2008, observed that there is a need in the context of international relations to recognise "the higher role played by rules and structures that are intrinsically ordered to promote the common good, *and therefore to safeguard human freedom*."[17]

It is suggested that the reflections on the common good expressed by Mr. Ban and by representatives of the Holy See point the way towards a 'fourth' interpretation of the common good, one that finds its fullest expression in new natural law theory. This interpretation affirms the idea that the common good is 'that which is good for everyone', but its more precise claim is that the common good is *that which furthers everyone's good*. The following section will explain how the new classical theory constructs this claim.

II. The Conception of the Common Good in New Natural Law Theory

For new natural law theorists, the common good is indeed something that is 'good', in the specific natural law sense that it contemplates the flourishing of persons through their pursuit of the basic values, and that is 'common', in that it contemplates the flourishing of members of a community on a common rather than particular

[16] H.E. Msgr. Dominique Mamberti, "Address" (Intervention by the Holy See at the 51st Session of the General Conference of the International Atomic Energy Agency, Vienna, 17 September 2007), online: The Holy See <http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070917_51-iaea_en.html#top> [emphasis added].

[17] His Holiness Benedict XVI, "Address" (Delivered at the United Nations General Assembly, New York, 18 April 2008), online: The Holy See <http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html> [emphasis added].

basis.[18] At the same time, the full manner in which the new classical theory understands the idea of the common good is not captured simply by this concept's constituent terms. This section will examine the new natural law conception of the common good as articulated by John Finnis, identifying the defining characteristics of Finnis's account and additionally outlining Finnis's interpretation of Aquinas's thought regarding the common good of the political community. The section will discuss primary criticisms of Finnis's description of the common good, and will also consider an alternative description of the common good provided by another contemporary natural law theorist, Mark Murphy; in relation to both of these endeavours, an effort will be made to justify and explain the relative merits of Finnis's account. Finally, the section will describe the manner in which the common good informs the jurisprudence and political philosophy of new natural law theory.

1. Finnis's Description of the Common Good

Finnis's account of the common good in *Natural Law and Natural Rights* begins with an explanation of the concept of community. Community, according to Finnis, is a form of unifying relationship between human beings.[19] While Finnis posits the existence of multiple dimensions of unity in human community, such as the unity among persons that is a function of their common physical and biological characteristics, his particular concern relative to the concept of the common good is with the unifying relationship between persons that arises through common action.[20] Community in this regard is said to exist wherever there is a coordination of activity

[18] See John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [Finnis *NLNR*] at 164.
[19] See *ibid.* at 136.
[20] See *ibid.* at 136-38.

by persons over time with a view to a shared aim.[21] Finnis notes that there are different forms of community of varying degrees of intensity, ranging from the community of a business relationship (in which participants have private objectives, but have a common interest in the pursuit of certain conditions that facilitate the pursuit of their respective objectives) to that of friendship (in which the collaboration of each person is at least partly for the sake of the other person, and the common objective is the mutual realisation of individual goals).[22] All such forms of community, according to Finnis, are characterised by a sharing of some objective among the members of the community that explains their ongoing collaboration.[23]

Finnis indicates that the common good denotes the shared objective of the members of a community. He describes the common good as "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."[24] Finnis notes that this signification of the common good is related to two other senses of the concept: first, the idea that the basic values are commonly good for any and all persons *qua* human beings, and second, the idea that each of the basic values is itself a form of 'common good' in that each good can be pursued in an infinite variety of ways and occasions by an unlimited number of persons.[25]

According to Finnis, promoting the common good of one's communities is a thoroughgoing requirement of practical reasonableness that is to guide individual pursuit of the basic values. Since each of the basic goods is as good for any other

[21] See *ibid.* at 152. Finnis's use of the term 'coordination' is synonymous with collaboration or co-operation, and includes circumstances of mutual non-interference ('negative co-ordination'): *ibid.* at 138-9.
[22] See *ibid.* at 139-44.
[23] See *ibid.* at 153.
[24] *Ibid.* at 155.
[25] See *ibid.*

person as it is for oneself, fully rational pursuit of the basic values by an individual cannot be done in manner that considers only one's personal well-being: rather, this pursuit must be attentive to the ideal of 'integral human fulfilment', the flourishing of all persons in all the basic goods.[26] The requirement to promote the common good is, as Finnis notes, a restatement of the 'master principle of morality' (that is, that all one's choices and other forms of willing should be open to integral human fulfilment) as this applies to one's conduct in the context of community life, and is relevant to any pursuit of the basic values that depends upon communal cooperation.[27]

In articulating this 'conditions-based' conceptualisation of the common good, Finnis draws on Aristotle's writings regarding the nature and purpose of community, and additionally has reference to Aquinas's treatises invoking the concept of the common good in the *Summa Theologiae*.[28] His definition bears clear parallels to the description of the common good found in contemporary Catholic social teaching, most notably that seen in the Vatican II document *Gaudium et Spes* issued in 1965.[29] Finnis's characterisation of the common good also shares a measure of similarity to that offered by John Rawls, who in *A Theory of Justice* describes the common good as comprising "certain general conditions that are in an appropriate sense equally to

[26] Finnis affirms that "reason undeflected by sub-rational motivations directs us to the fulfilment of all human persons in all societies": *ibid.* at 451.
[27] See *ibid.* at 456-57.
[28] See *e.g.*, Aristotle, *supra* note 3, Bk. I, Ch. I, § 1; Finnis *NLNR*, *ibid* at 154 and 160, notes to section VI.8. Finnis states that his primary description of the common good is similar to that articulated in a commentary to a French translation of Aquinas's *Summa Theologiae*: see Thomas Aquinas, *Somme théologique: La justice*, trans. M. Gillet (Paris: Société Saint Jean L'Évangéliste, 1932), Vol. 1 at 209, 242, cited in Finnis *NLNR*, *ibid.* at 160, notes to section VI.8.
[29] In *Gaudium et Spes*, the common good is described as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfilment". See Second Vatican Council, *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)* (December 7, 1965), online: The Holy See <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html>, para. 26; see also Pope John XXIII, *Mater et Magistra* (May 15, 1961), online: The Holy See <http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html>, para. 65.

everyone's advantage";[30] while Rawls's definition draws attention to the 'commonness' of the benefit conferred by the conditions concerned (without saying more about this benefit), Finnis's definition is distinguished by its claim that the conditions constituting the common good are prerequisites for the pursuit of human fulfilment.

Two aspects of Finnis's 'conditions-based' description of the common good may be noted. First, the description is distinctly instrumental in its flavour: according to this characterisation, the significance of the common good is that it facilitates the pursuit of flourishing in all its myriad forms by members of a community. Finnis underscores this point in observing that this understanding of the common good does not suggest that all members of a community must have the same objectives, only that there is some set of conditions that must be present if these persons are to be able to realise their respective objectives.[31] It should nevertheless be noted that Finnis resists an interpretation of the common good in strictly instrumental terms, and acknowledges that the common good includes the intrinsically desirable flourishing of a community as a whole and not only the particular flourishing of individuals or groups within that community.[32] Second, Finnis's description of the common good is itself an account of the significance of collaboration by members of a community. The common good, according to Finnis's definition, constitutes the rationale for the collaboration of persons comprising a community: this collaboration is required for the sake of a shared objective, that is, the realisation and maintenance of those conditions that will enable

[30] John Rawls, *A Theory of Justice*, (Cambridge, MA: Harvard University Press, 1971) at 246; see also *ibid* at 233.
[31] See Finnis *NLNR*, *supra* note 18 at 156.
[32] See *ibid.* at 459.

individuals and groups within a community to pursue the objectives relevant to their integral fulfilment.

Two additional concepts are important to Finnis' description of the common good, and should be introduced here. The first is that of 'complete community'. The notion of complete community has its origins in classical thought, having been associated by Aristotle with the Greek *polis*.[33] According to Finnis, the desirability of complete community arises due to the inability of other forms of community, including family and friendship, to adequately provide for all aspects of human flourishing.[34] For Finnis, the concept of complete community is fundamentally linked to that of the common good, since its objective is to secure "the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate and foster the realization by each individual of his or her personal development."[35] Finnis considers the common good of a complete community to be the paradigmatic description of the common good; he further affirms that the political community is, at least in principle, representative of complete community.[36]

The second important concept is the principle of subsidiarity. This principle, which received its first formal articulation in Catholic social teaching in the early twentieth century, asserts that the purpose of human association is to assist individuals within the association in realising for themselves the objectives that they can accomplish through their own effort.[37] The principle is more commonly known for its related affirmation that larger associations should not usurp functions that can

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[33] See Aristotle, *supra* note 3, Bk. I, Ch. II, § 8; Bk. III, Ch. IX, § 14; see also Finnis *NLNR*, *ibid*. at 148 and 160, notes to section VI.6.
[34] See *ibid* at 148.
[35] *Ibid*.
[36] See *ibid.* at 155-56. On Finnis's qualification of the idea that the state constitutes complete community, see discussion at 65-66 below.
[37] See Pope Pius XI, *Quadragesimo Anno* (May 15, 1931), online: The Holy See <http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html>, para. 79; see also Finnis *NLNR*, *ibid*. at 146.

be carried out by smaller associations.[38] In its characterisation of association as being fundamentally oriented towards helping individuals to achieve their objectives for themselves, the principle of subsidiarity bears an obvious parallel to Finnis's description of the common good as that which facilitates individual pursuit of the basic values. Finnis raises the subsidiarity principle in the context of describing the common good as a means of emphasising that the common good, which is ultimately the good of individuals, cannot be properly achieved where the opportunities for persons to constitute themselves through individual initiatives become supplanted entirely by common enterprises.[39] While Finnis does not elaborate on the principle's related claim regarding the need for an appropriate division of labour between larger and smaller associations, it may be suggested that this dimension of the subsidiarity principle is also important for understanding the common good, since the principle in this regard addresses the structural requirements for the proper functioning of a complete community.[40]

Since the time of first articulating his conception of the common good in *Natural Law and Natural Rights*, Finnis has subsequently developed a more extended account of the common good of the political community considered as a complete community, doing so through an exegetical discussion of Aquinas's writings on the function of state authority and law. Finnis affirms that according to Aquinas, there is a common good that is specific to the political community, known

[38] See *Quadragesimo Anno*, *ibid.*; Finnis *NLNR*, *ibid.* at 146-47.
[39] See Finnis *NLNR*, *ibid.* at 147, 168. Finnis's discussion in this regard is intended to address 'communist' notions that human welfare may be ideally secured through common enterprises and the sharing of property: see *ibid.* at 144, 168.
[40] The original articulation of the principle in *Quadragesimo Anno* indeed explicitly considers the application of the subsidiarity principle to the political community, declaring that "[t]he supreme authority of the State ought… to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly": *Quadragesimo Anno*, *supra* note 37 at para. 80.

as the 'public good'.[41] The specifically political common good, according to Finnis, is distinct from the 'private' goods of individuals and families within the political community, and is comprised of inherently interpersonal goods, namely justice and peace.[42] The significance of the public good, as Finnis further explains, lies in the fact that it provides "an indispensable context and support" for the pursuit and realisation of private goods.[43] Finnis rejects a reading of Aquinas that equates the political common good with communal virtue – that is, the complete fulfilment of all members of the political community – and that suggests that political authority and law should aim at inculcating complete virtue in community members.[44] Instead, Finnis claims, the public good is properly understood as being limited and instrumental in nature, and the proper role of government and law is to preserve justice and peace – conditions that individuals and families cannot adequately secure on their own – in order that members of the community can pursue the virtuous life themselves.[45]

2. Criticisms of Finnis's Description of the Common Good

The new classical account of the common good has been the subject of commentary and criticism on a number of fronts, the main lines of which may be considered here. Finnis's 'conditions-based' conception of the common good has been questioned for the manner in which it characterises the relationship between

[41] See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) [Finnis *Aquinas*] at 226 and generally Ch. VII; see also (as a substantially similar version of the cited chapter) John Finnis, "Public Good: The Specifically Political Common Good in Aquinas" in Robert P. George, ed., *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez* (Washington, D.C.: Georgetown University Press, 1998) 174. In discussing this concept, Finnis draws upon a number of Aquinas's texts including the *Summa Theologiae*, *Summa Contra Gentiles* and *De Regno*: see Finnis *Aquinas*, *ibid* at 223ff.
[42] See *ibid.* at 227, 231.
[43] See *ibid.* at 226, 237.
[44] See *ibid*. at 222-23 *et seq*.
[45] See *ibid*. at 231, 238-39. Other new natural law theorists have followed Finnis in characterising the political common good as instrumental and in advocating a correspondingly limited conception of the purpose of political authority: see *e.g.*, Robert P. George, "Ruling to Serve: A Fundamental Argument for Limited Government" (2013) 232 First Things 39.

individuals and community. Additionally, Finnis's account of the political common good has been challenged for its claims regarding the instrumental nature of this good, the relationship between the public good and the pursuit of virtue, and the role of state authority and law relative to this pursuit.

As already seen, Finnis affirms that the common good, construed as a set of facilitating conditions, enables members of a community to pursue for themselves the objectives that are constitutive of their fulfilment. This characterisation of the common good, however, has been criticised as advancing an impoverished view of the relationship between individuals and the communities to which they belong. Ernest Fortin, for example, argues that Finnis's conception of the common good negates the notion of persons being united in common dedication to a common end: Fortin claims that under Finnis's account, human beings are not 'parts' of a community but "atomic wholes, open to others and often in need of them, but nonetheless free to organize their lives or devise their 'life-plans' as they see fit, provided they do not interfere with the freedom of others."[46] This, Fortin suggests, is a departure from Aquinas's understanding of persons as being parts of a complete community to which individual members are ordained as imperfect to perfect.[47]

Finnis's description of the political common good has proven controversial, particularly due to Finnis's claim that his account accurately reflects Aquinas's own understanding of the concept. While Finnis argues that Aquinas's public good is instrumental, being ultimately ordered towards the private good of individuals and families, some writers affirm that for Aquinas, the political common good consists in

[46] Ernest Fortin, "The New Rights Theory and the Natural Law" (1982) 44(4) Rev. of Politics 590 at 598.

[47] See Fortin; *ibid*; for similar commentary, see Alasdair MacIntyre, "Theories of Natural Law in the Culture of Advanced Modernity" in Edward B. McLean, ed., *Common Truths: New Perspectives on Natural Law* (Wilmington, DE: ISI Books, 2000) 91 at 105. *Cf. e.g.*, Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981) [*Summa Theologiae*], Vol. 2, I-II, q. 21, a. 3 and I-II, q, 90, a. 2.

the virtuous life of the political multitude, or what Aquinas calls 'communal happiness'.[48] These writers suggest that Aquinas is clear in stating that persons have a natural inclination to life in political society and can only achieve their fulfilment through participation in political community, and they maintain in this regard that political community must be understood as being an intrinsic good rather than merely an instrumental means for persons' private pursuit of flourishing in the basic goods.[49] Furthermore, while Finnis asserts that the role of political authority and law is only to provide the justice and peace necessary for persons to pursue the good life themselves, a number of scholars claim that for Aquinas, the primary purpose of law and government is to lead persons towards virtue. John Goyette, for example, notes that Aquinas points to the significance of human law not only for restraining the unruly, but also for helping those who are well disposed to grow in virtue by making the precepts of the natural law more specific; Goyette reads Aquinas as affirming that law's ultimate end is to produce virtue in persons; with maintaining peace being an intermediate purpose.[50] Other writers similarly argue that Aquinas states in unequivocal terms that a ruler is responsible for leading his subjects to the fullness of virtue, and not simply for promoting the limited extent of virtue required in persons for the sake of preserving the public goods of justice and peace.[51]

Some remarks in response to these criticisms are appropriate. First, as noted earlier, Finnis affirms that apart from conceptualising the common good as a set of

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[48] See *e.g.*, John Goyette, "On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory" (2013) 13(1) Nat. Catholic Bioethics Q. 133 at 138-41; *cf. Summa Theologiae*, *ibid*, I-II, q. 90, a. 2.

[49] See Goyette, *ibid*; Lawrence Dewan, "St. Thomas, John Finnis, and the Political Good" (2000) 64(3) The Thomist 337 at 368-73; *cf. e.g.*, *Summa Theologiae*, *ibid*., I-II, q. 90, a. 2 and I-II, q. 94, a. 2.

[50] See Goyette, *ibid* at 141-45; *cf. e.g.*, *Summa Theologiae*, *ibid*., I-II, q. 91, a. 3, I-II, q. 95, a. 2 and I-II, q. 98, a. 6. See also Dewan, *ibid*. at 346-50.

[51] See *e.g.*, Michael Pakaluk, "Is the Common Good of Political Society Limited and Instrumental?" (2001) 55(1) Rev. of Metaphysics 57 at 77-86; *cf.* Thomas Aquinas, *On Kingship, to the King of Cyprus* (*De Regno*), trans. Gerald B. Phelan, rev. I. Eschmann (Amsterdam: Academische Pers, 1967), § 115-121.

conditions that facilitate the flourishing of members of a community, the common good may also be properly understood as signifying the flourishing of a community as a whole, encompassing the fulfilment of all of its members; Finnis describes this as the 'all-inclusive common good'.[52] Inasmuch as Finnis acknowledges that there is a sense in which integral human fulfilment is genuinely communal, and that a person's full flourishing occurs in part though instances of mutual self-realisation such as authentic friendships,[53] it is arguably incorrect to claim that Finnis's understanding of the common good is based on a characterisation of persons as 'atomic wholes'. It is nonetheless true that while Finnis regards persons as parts of a complete community, he does not regard that community as making persons whole in terms of their essential ability to participate in the basic human goods: for Finnis, individuals and families directly instantiate the basic values, and the significance of complete community as 'complete' relates to its ability to provide individuals and groups within the community with all of the conditions and resources – that is, the 'instrumental goods' – that are necessary for them to pursue the basic goods.[54]

Second, it is evident that much of the dispute over Finnis's description of the political common good stems from disagreement between Finnis and his critics over the proper construal of Aquinas's writings. As many of these same scholars have acknowledged, several of the relevant parts of Aquinas's texts are susceptible to varying interpretations, and discrete passages may be found across Aquinas's works that appear to provide support for the arguments advanced by both Finnis and his

[52] See Finnis *NLNR*, *supra* note 18 at 459; Finnis *Aquinas*, *supra* note 41 at 235.
[53] See Finnis *NLNR*, *ibid.* at 459 and the discussion of friendship at 141-44. Finnis elsewhere emphasises that a person's development "includes, as an integral element and not merely as a means or pre-condition, both individual self-direction and community with others in family, friendship, work, and play": *ibid* at 147-48.
[54] See Finnis *Aquinas*, *supra* note 41 at 244-45; Finnis *NLNR*, *ibid* at 147.

detractors.[55] Conflicts in textual interpretation aside, however, it should be noted that Finnis's approach to describing the public good coincides with his overall understanding of the autonomy and responsibility of persons in relation to the objective of human flourishing. Finnis is concerned not merely to observe that Aquinas's public good is properly understood as being instrumental in character, but also to affirm that persons enjoy a fundamental domain of both freedom and responsibility for the pursuit of virtue in the basic goods, and that in this regard neither the political community nor the organs of state government and law can substitute or override the responsibility of individuals and families for pursuing their own fulfilment.[56]

Finally, the various criticisms of Finnis's account of the common good do not detract from the compelling idea that is contained within his description, namely that there are certain *conditions* that are indispensable for human pursuit of the basic values. This insight remains cogent regardless of whether life in political community is characterised as an intrinsic or an instrumental good, or whether law and political authority are construed as having a partial or all-encompassing role in relation to the development of virtue in persons. Finnis's conditions-based characterisation of the common good is significant for the manner in which it highlights the contingency of human flourishing, and the importance of collaboration by members of a community for securing the conditions that facilitate their overall welfare.

[55] See *e.g.*, Fortin, *supra* note 46 at 599-600; Pakaluk, *supra* note 51 at 69-71 (discussing the ambiguity of the terms 'peace' and 'concord' as used by Aquinas); Finnis *Aquinas*, *ibid.* at 222-23.
[56] See Finnis *Aquinas*, *ibid.* at 236-37. In the articulation of this principle, too, Finnis regards himself as expressing a view that is consistent with Aquinas: see *ibid*. at 237; *cf. Summa Theologiae*, *supra* note 47, I-II, q. 21, a. 4, ad. 3; Thomas Aquinas, *Summa Contra Gentiles*, trans. English Dominican Fathers (London: Burns, Oates and Washbourne, 1928), III, c. 71, § 4.

3. 'Instrumentalist' versus 'Aggregative' Conceptions of the Common Good

Another contemporary natural law theorist, Mark Murphy, offers an alternative description of the common good. Murphy advances an 'aggregative conception' of the common good, which he describes as "that state of affairs in which all the members of a political community are fully flourishing."[57] The aggregative conception begins from the premise that the state of affairs in which a person is flourishing provides a fundamental reason for political action within that person's political community.[58] According to Murphy, the state of affairs in which more than one person is flourishing constitutes an even stronger reason for political action, since it includes the goods of all those persons and thereby encompasses more than the goods corresponding to the state of affairs in which only one person is flourishing.[59] The ideal of the aggregative common good, Murphy concludes, is a logical extension of this line of reasoning about the common good, and includes all the goods of all the members of a political community.[60]

In certain respects, Murphy's conception of the common good is not radically different to that of Finnis. In describing a state of affairs in which all persons are fully flourishing, the aggregative common good mirrors the ideal of integral human fulfilment that Finnis identifies as the guiding objective of the first principle of morality; the requirement to promote the common good, it will be recalled, is described by Finnis as being a specification of this master moral principle [61] It may also be noted that for both theorists, the full flourishing of persons is understood not

[57] See Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006) at 61, 63-64. Like Finnis, Murphy's reference point for describing the common good is the political community.
[58] By this, Murphy means that the effect of a law or policy on a person's welfare is a fundamentally relevant factor to be taken into account in the creation and adoption of such a law or policy: see *ibid.* at 63.
[59] *Ibid*.
[60] See *ibid.* at 63-64.
[61] See *supra* note 27 and accompanying text.

so much as an attainable objective as an ideal that is to guide human pursuit of the basic values.[62] Nevertheless, an important distinction is to be noted in Murphy's and Finnis's respective characterisations of the common good. Under Finnis's conditions-based account, the common good is a *pathway* towards integral human fulfilment: the common good is described as the set of conditions that facilitates pursuit of this ideal. Murphy accordingly characterises Finnis's description of the common good as 'instrumentalist'.[63] For Murphy, meanwhile, the aggregative common good *is* the state of affairs in which all members of a political community are fully flourishing; put another way, Murphy's conception equates the common good with the ideal of integral human fulfilment.

Murphy asserts that the aggregative conception of the common good is superior to the instrumentalist conception since, in relation to explaining both the rationale for allegiance to the common good and the sense in which this good is 'common', the instrumentalist conception ultimately depends upon the aggregative conception for its normative coherence. According to Murphy, the explanation for why persons are bound to promote the common good of their communities, which is described by Finnis as a requirement of practical reasonableness, cannot be found in the concept of the common good itself if this is nothing more than an instrumental good, since practical rationality is not reasonably governed solely by considerations of instrumental good.[64] The requirement to promote the common good, Murphy claims, only makes sense if it can be related to the intrinsic goods to which the common good is instrumental; for Murphy, this entails having regard to the full

[62] See Murphy, *supra* note 57 at 64; Germain Grisez, Joseph Boyle, & John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 Am. J. Juris. 99 at 132.
[63] See Murphy, *ibid.* at 65-66.
[64] See *ibid.* at 67-68

flourishing of persons in community as described under the aggregative conception.[65] Murphy further argues that under the instrumentalist conception, the common good is not genuinely 'common': since, according to Murphy, the instrumental common good is valued by each person as a means to the pursuit of his or her own particular objectives, it follows that persons are not actually engaged in the pursuit of a common end, but are only interested in that aspect of the common good that is good for each person individually.[66] Murphy posits that the instrumental common good can only be genuinely common if it is related to the objective of realizing the full flourishing of all persons in a community, the state of affairs described by the aggregative common good.[67]

As noted earlier, Finnis has affirmed the sense in which the common good can be understood as signifying the intrinsically desirable flourishing of a community; as such, his conception of the common good is not exclusively instrumentalist as Murphy suggests.[68] Nevertheless, to the extent that Finnis's conditions-based description of the common good is indeed instrumental in character, the substance of Murphy's critique remains pertinent. In responding to Murphy's claims, the issue of 'commonness' may be dealt with first. As already seen, Finnis describes the common good as a *shared* objective, the rationale for the collaboration of persons in a community.[69] The shared objective is a set of conditions that facilitates the flourishing of the members the community; it is a common reality for all of these persons that this set of conditions must be present in order for each of them to pursue his or her personal development. It is thus not apparent that under Finnis's characterisation of the common good, individuals are engaged in pursuit of

[65] *Ibid.* at 68.
[66] *Ibid.*
[67] *Ibid.* at 68-69.
[68] See *supra* note 32 and accompanying text; *cf.* Murphy, *ibid.* at 66.
[69] See discussion at 45-46 above.

an objective that is not genuinely common: on the contrary, the objective is common in the sense that it is shared, and it is of common significance to the members of the community relative to their respective pursuits of individual fulfilment. The aggregative conception of the common good does not appear to add anything to the authentic 'commonness' of Finnis's common good as described.

This leaves for consideration Murphy's argument regarding the normative force of the common good. In asserting the inability of the instrumentalist conception to explain why persons are required to promote the common good, Murphy emphasizes that practical reason is only governed by reference to intrinsic goods to which the instrumental goods are instrumental.[70] Murphy's claim is that the aggregative common good is capable of exerting normative influence in relation to practical reason since it is itself characterised as an intrinsic good, comprised of the flourishing of all persons in all the basic goods. It is not apparent, however, that acknowledging the fundamental status of intrinsic goods as guides to human conduct entails diminishing the significance of instrumental goods in the process of practical reasoning. As Finnis notes, practical reasoning, which is a process of responding to the directiveness of the ends that are the basic goods, crucially involves the exercise of determining the relationship of these ends to each other as well as the means for realizing them.[71] It may be thus be affirmed that instrumental goods do possess an ancillary normative significance to practical thought: instrumental goods themselves constitute reasons for acting, since they are means towards the realisation of the basic values.[72]

[70] See Murphy, *supra* note 57 at 67-68.
[71] See John Finnis, "Foundations of Practical Reason Revisited" (2005) 50 Am. J. Juris. 109 at 120-21.
[72] See the description of instrumental goods in Grisez, Boyle & Finnis, *supra* note 62 at 103.

This observation brings to light the strength of Finnis's conception of the common good, and the reason why it is here taken to be preferable to the aggregative conception. The characterisation of the common good as a set of conditions that facilitates human pursuit of the basic values, rather than as a state of affairs that itself denotes the full flourishing of persons, allows for a better appreciation of the significance of instrumental goods in relation to human fulfilment and practical reasoning. This point may be illustrated by considering the notion of security within a political community. National security is not itself a basic human good, but has obvious implications for the ability of members of a political community to carry out their various life plans. Murphy's characterisation of the common good affords little room for highlighting the significance of national security as an instrumental good: this conception describes a state of affairs in which all persons in a community are fully flourishing, without acknowledging the conditional nature of human flourishing and the factors that are necessary to realising the envisaged state of affairs. By contrast, under Finnis's conditions-based conceptualisation, the concept of safeguarding members of a political community against internal or external threats to their safety can be appreciated for its role in contributing to a community environment in which persons are able to pursue the basic values, and can thus be readily described as an important component of the community's common good to be pursued for the sake of human well-being.

4. Significance of the Common Good in New Natural Law Theory

The concept of the common good comprehensively informs new natural law jurisprudence and political philosophy. The new classical theory interprets the concepts of authority, law, and obligation in terms of their relationship to the objective of securing the common good of the political community. The theory

further characterises justice and human rights as fundamental aspects of the content of the common good, and claims that both authority and legal obligation are contingent upon the extent to which law and political authority further the common good. Each of these claims will now be briefly described.

New natural law theory explains the concept of authority as a function of the needs of a complete community for its common good. According to Finnis, life in a political community is characterised by a need for coordination of the multiple pursuits of individuals and groups within that community, and the resolution of 'coordination problems' which typically requires the selection of a particular course of action from a plurality of reasonable options.[73] Finnis claims that the basis of authority is the opportunity it provides to further the common good of a community by resolving that community's coordination problems.[74] As Finnis further explains, the principle that authority is necessary for the common good is fundamental to the ability of a ruler to be regarded by members of a political community as providing exclusionary reasons for complying with the ruler's dictates.[75]

According to the new classical theory, 'law' in its focal meaning signifies rules made by a determinate authority for a complete community, and directed to reasonably resolving the community's coordination problems for its common good.[76] As with the concept of authority, law is described in terms of its purpose, namely furthering the common good of a political community. The characteristics of legal order, according to the theory, are themselves also relevant to the aim of realising the common good. As Finnis explains, legal order and the requirements of the Rule of

[73] Finnis *NLNR*, *supra* note 18 at 232. Examples of coordination problems in a political community, according to Finnis, include matters pertaining to the management and use of natural resources, and conflicts in the exercise of rights among members of the community: see *ibid*.
[74] See *ibid.* at 244.
[75] See *ibid.* at 233-34, 246.
[76] See *ibid.* at 276-77.

Law (stipulating for example that laws should be purely prospective, clear, promulgated, and relatively stable) bring greater clarity and predictability to patterns of human interaction and protect individuals against certain forms of exploitation by those in authority in a community; these benefits in turn enhance the ability of individuals to constitute themselves as they see fit.[77]

New natural law theory affirms that legal obligation proceeds from the principle that the common good requires that members of a community comply with legal stipulations laid down as authoritative solutions to the community's coordination problems.[78] The theory's characterisation of legal obligation thus dovetails with its explanation of authority, with both concepts being explained by reference to the needs of the common good. New natural law theory further asserts that, because of its relationship to furthering the common good, legal obligation is fundamentally a form of moral obligation. According to Finnis, the complex coordination and regulation of community life for the common good that is sought through law can only be successfully achieved if members of the community take their legal obligations seriously, and afford these obligations priority over any contrary personal objectives or preferences.[79]

Finally, the new classical theory claims that the authority of rulers and that of legal rules are crucially contingent upon whether such rulers and laws promote the common good, in particular through respect for considerations of justice and human rights. Finnis describes justice as a relational concept, concerned with the specification of rights and duties between persons and with the determination and maintenance of appropriate equilibrium in interpersonal relationships.[80] According

[77] See generally *ibid.* at 270-73.
[78] See generally *ibid.* at 315-18.
[79] See *ibid.* at 319.
[80] See *ibid*. at 161-63.

to Finnis, the requirements of justice are the implications of the requirement of practical reasonableness stipulating that persons should promote the common good of their communities.[81] These requirements are principles that must be universally observed if members of a community are to be able to pursue their respective objectives without undue interference from others; they may thus be described as collectively forming part of the content of the common good, a component of the set of conditions that facilitate individual flourishing. New natural law theory further identifies human rights as giving particular expression to the requirements of justice, specifying the multiple aspects of individual well-being that are to be respected by others in the context of community life.[82] The preservation of human rights, as Finnis affirms, is an essential dimension of the common good.[83]

Since, according to new natural law theory, authority is premised upon the opportunity it provides for promoting the common good, authority is fundamentally deficient where it is exercised in a manner contrary to the common good. Focusing on legal rules, Finnis specifies that the presumptive moral authority of laws is compromised where laws are unjust: injustice arises, for example, where laws further private or partisan advantage, impose an unfair distribution of benefits and burdens among different individuals or groups within a community, or violate individual human rights.[84] The new classical theory further claims that where laws do not promote the common good, this has attendant negative consequences for the moral obligation to obey them: Finnis indicates that unjust laws do not of themselves create

[81] See *ibid.* at 164 *et seq.*
[82] See *ibid*. at 205, 210 *et seq.*
[83] See *ibid.* at 218.
[84] See *ibid.* at 352-54.

any moral duty of compliance, even though they may remain binding in formal legal terms.[85]

III. Applying the New Natural Law Conception of the Common Good to the Global Sphere

Having identified the characteristics and significance of the new natural law conception of the common good, it remains to consider the relevance of this conception for deriving a normative understanding of the world community, its objectives, and the international legal and political mechanisms pertinent to these objectives. This section begins to address this task, applying the new natural law conception in the articulation of a theory regarding the nature of the world community and the common good of this community, and outlining the putative normative implications of the new classical conception of the common good for international law.

1. Universal Human Community and International Community

As Finnis demonstrated, the notion of a common good presupposes the existence of a community. It is accordingly appropriate to begin the present discussion by considering the existence and nature of the community that is the subject of the themes addressed in this thesis, namely the world community. This community, it is suggested, has two dimensions. The first dimension is comprised of the universal community of human persons. This community, as Finnis affirms, is defined by a number of features, including the shared physical and biological

[85] See *ibid.* at 246, 359-60.

characteristics of human beings, their shared resources of knowledge and culture, and their unity in the practical pursuit of various shared objectives.[86]

Consideration of the political realities of the world community suggests the existence of a second dimension of community, namely a universal community of sovereign states. This community, which may also be called the international community of states, exists as a distinct political overlay to the universal community of persons and is the primary community that is governed by international law. Although it necessarily does not manifest all the hallmarks of unity witnessed in the universal human community, international community is notably characterised by the collaboration of states in the pursuit of shared goals.

If the idea of an international community of states is to be reconciled with new natural law theory, which does not contemplate community in non-human terms, it appears that the concept of an international community must be understood as being importantly linked to that of a universal community of persons. The latter community may be described as subsisting notionally as the community that expresses the essential unity of all human persons; in actual terms, this community is divided through circumstances of geography, culture, history and individual agency into the multiplicity of political communities that are characteristic of contemporary global life. Thus construed, the universal community of persons may be said to constitute the substratum of the international community of states.

It is relevant at this juncture to consider the relationship between the world community and the idea of 'complete community' commonly invoked by new natural law theorists. As Finnis and other new natural law theorists have observed, the state is not actually a complete community, since no state is able to independently

[86] *See ibid.* at 149-50.

secure all of the conditions for facilitating the flourishing of its inhabitants.[87] Noting the multiple ways in which human association transcends state boundaries, Finnis suggests that it now appears that individual human welfare can only be fully secured in the context of what he calls 'international community'.[88] While Finnis in using this term does not distinguish between persons and states, his later work makes clear that he is referring to human community, or what is here being called the universal community of persons.[89] Robert George likewise affirms the emerging significance of the 'international community' as a complete community, noting that the collaboration of states and the related activity of international institutions are enabling this community to function as a community "whose politics, law and common good are paradigmatic and focal".[90] Expressing a contrary view, Paolo Carozza maintains that the world community is not likely to replace more local communities as the paradigmatic complete community; among other arguments, Carozza observes that the universal community of persons exists only indirectly through states rather than being a real, effective community, and that persons regard more local communities as their primary avenue for securing their overall well-being because of their various historical, cultural and other ties to such communities.[91]

It may be suggested that a proper understanding of the manner in which the world community connects to the concept of complete community lies somewhere

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[87] *Ibid*.
[88] *Ibid*.
[89] According to Finnis, "new interdependencies, economic, environmental, and cultural, are bringing into being a world-wide human community that might in principle become a *perfecta communitas* equipped to supervise the doing of justice everywhere": John Finnis, "Natural Law: The Classical Tradition" in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) [Finnis "Classical Tradition"] 1 at 53.
[90] See Robert George, "Natural Law and International Order" in *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), 228 at 235. It is unclear that George uses the term 'international community' in the same manner as Finnis, since his discussion seems focused on the universal community of states rather than the universal human community.
[91] See Paolo Carozza, "The Universal Common Good and the Authority of International Law" (2006) 9(1) Logos 29 at 35-36.

between the accounts of Finnis and George on the one hand and Carozza on the other, and indeed requires a reinterpretation of the latter concept. Given the contemporary interconnectedness of the universal human community across national boundaries, manifested in particular by the complex collaborative activities of states within the international community, it is evident that the state cannot be regarded as a paradigmatic instance of complete community. At the same time, it must also be acknowledged that neither the universal human community nor the international community of states can be seen as meeting the definition of complete community. The existence of the universal community of persons, as already noted, is importantly mediated by the state framework; while Finnis may claim that this community is in principle capable of becoming a *perfecta communitas*, it is difficult to see (absent the dissolution of all states into a single global political community) how this would be realised in practice. The international community, meanwhile, does not in fact seek to function as a complete community: rather, this community appears to collaborate to achieve objectives that cannot be achieved by states acting individually. Its activity in this regard indeed seems consistent with the principle of subsidiarity: it is precisely the objectives that *cannot* be achieved by a lower level of association – that is, within national political communities – rather than the objectives that can be dealt with at the national level, that are sought to be addressed through international collaboration.

The seeming conclusion to be drawn from these considerations is that there is indeed no paradigmatic instance of 'complete community'. This invites reconsideration of the notion of complete community itself, which appears to involve the questionable assumption that such a community is possible – that is, that it is actually possible to have a single, all-encompassing association that can secure all

the conditions necessary for human flourishing, and that can coordinate all the activities of individuals and intermediate associations towards this end. Arguably, the notion of complete community is itself what Finnis describes as a 'central case' concept: the term in its focal meaning describes a community possessing all relevant characteristics of a complete community, but it can also be used to describe communities that display these characteristics to a lesser degree.[92] It may be further suggested that there is little apparent practical significance to resolving the debate over whether the national or universal community constitutes the paradigmatic instance of complete community. The real value of the idea of complete community, implicit in Finnis's writings, is its utility as an explanatory tool in relation to the concepts of authority and obligation: a community that is capable of realising all of the conditions necessary for our well-being is, in principle, a community which merits our full allegiance.[93]

The concept of complete community, it appears, is accordingly best understood as an ideal which existing communities approximate to a greater or lesser degree. Using this characterisation of the concept, it may be suggested that the world community does not constitute the central case of complete community, but rather contributes to pursuit of the ideal of complete community. In particular, the international community of states may be seen as complementing the activity of national political communities and contributing to the ideal of securing all aspects of human flourishing, by seeking to attend to certain dimensions of human welfare through international cooperation.

[92] *Cf.* Finnis *NLNR*, *supra* note 18 at 10-11.
[93] See *ibid.* at 148, 150; Finnis "Classical Tradition", *supra* note 89 at 53.

2. The Universal Common Good and the International Common Good

Having outlined the nature and characteristics of the world community, it is necessary to articulate a conception of the common good of this community. If the world community is considered strictly as the community of all human persons, then it seems that Finnis's general conditions-based characterisation of the common good can be taken as itself describing the common good of this community: the overall set of conditions that enables members of the universal human community to carry out their own objectives can be understood as constituting what may be called the 'universal common good'.[94] Since, however, the world community is here being posited as being both a community of persons and a community of states, it appears relevant to suggest a further, more specialised conception of the common good that is a subset of the universal common good and pertains particularly to the international community of states. Proceeding from Finnis's conditions-based description, this 'international common good' may be defined as follows: a set of supranational conditions that facilitates the ability of members of the universal human community to pursue the basic values for themselves, and that accordingly justifies the collaboration of those persons, such collaboration occurring primarily through the framework of states in the international community. This definition of the international common good reflects the new natural law affirmation that the common good is fundamentally the good of persons – namely, the individuals, families, and other groups comprising the universal human community who either singly or

[94] It may be noted that Finnis himself employs the term 'universal common good', observing that "[t]here is certainly a common good of humankind, and central to that common good is the equal dignity of all human persons and, consequently, natural human rights prior to all convention, agreement, or positive sources of obligation": Finnis *NLNR*, *ibid.* at 458. This description suggests that his use of the term 'universal common good' corresponds not to his conditions-based description of the common good, but to one of the two other significations of the 'common good' identified earlier, namely the idea that the basic goods are commonly good for all human beings: see *supra* note 25 and accompanying text. There nevertheless appears to be no conceptual obstacle to characterising the universal common good in relation to Finnis's conditions-based description, which itself proceeds from the notion that there are 'commonly good' basic values: see Finnis *NLNR*, *ibid.* at 156.

collectively seek their fulfilment in the basic human goods – while simultaneously indicating that pursuit of the conditions comprising the international common good specifically entails international collaboration, in particular the collaboration of governments as representatives of the interests of persons residing within states.

The conditions comprising the international common good, like those comprising the universal common good, are conditions that are instrumental to the pursuit of human flourishing. These conditions are however distinguished by their supranational quality and the corresponding fact that they require specific forms of international cooperation for their realisation. Certain conditions relevant to human welfare are inherently matters that are beyond the ability of any single political community to achieve and require collective action on the part of states. While non-state actors such as corporations, non-governmental organisations, and individuals in their private capacities may also contribute to the realisation of these supranational conditions, national governments have a particular responsibility in this regard due to the comprehensive authority they enjoy over their respective national communities, their responsibility for promoting the common good of these communities, and their ability to effectuate the forms of international collaboration that the pursuit of supranational conditions entails.

The international common good is certain respects analogous to the idea of the 'public good' as described by Finnis, inasmuch as it is comprised of instrumental goods that provide essential support for pursuit of the basic values by persons residing within states. These instrumental goods, however, are identified by having regard to the needs of the world community as a whole rather than those of persons within a discrete national political community; as supranational conditions, furthermore, they are goods that cannot be properly secured by any state acting in

isolation, apart from being beyond the capacity of individuals and groups within states to achieve by themselves. These conditions, it is suggested, notably include international peace, or the absence of political, military, economic or other forms of hostility between states, and international security, or the protection of national political communities against external acts of aggression by other states or non-state actors. Other important components of the international common good are a global environment that can sustain human life, entailing the preservation of the earth's natural resources and atmosphere, and the availability to all populations worldwide of the range of global resources and commodities needed for human flourishing, entailing specific forms of international collaboration such as trade. Finally, the international common good may be said to encompass the supranational mechanisms and institutions that are themselves valuable for securing these instrumental goods, in particular international authority and international law.

It should be noted that there is no hierarchy of value among the conditions cited. Just as the basic human goods are, according to new natural law theory, all equally fundamental,[95] it may be affirmed that the supranational conditions comprising the international common good are equivalent in their *instrumental* significance to the ability of persons within states to pursue the basic human values. At the same time, it may be suggested that just as persons can reasonably give priority to pursing some basic goods over others in their own lives (without thereby suggesting that the goods they choose not to pursue are less important),[96] the international community can reasonably prioritise the pursuit of certain supranational conditions over others, through specification of the manner in which these conditions

[95] See Finnis *NLNR*, *supra* note 18 at 92-93.
[96] See *ibid.* at 93-94.

are to be pursued, where such prioritisation would itself be beneficial to the objective of furthering universal human welfare.[97]

It may additionally be observed that there cannot be conflicts between the components of the international common good. All of the conditions comprising the international common good are, in their instrumental character, similarly complementary to the objective of facilitating human flourishing; as between these conditions, then, a conflict cannot arise unless one of the conditions is understood as being detrimental rather than beneficial to human welfare. Properly understood, situations involving an apparent conflict between the conditions comprising the international common good are situations in which the conflict relates to some dimension of the *pursuit* of these conditions in specific contexts. For example, there may be a conflict in the operation of two international laws that are related to distinct aspects of the international common good, if each of these laws has not been formulated in a manner that contemplates and addresses its potential impact on the functioning of the other law. Similarly, states may find themselves faced with 'conflicting obligations' relating to two international norms that concern different dimensions of the international common good, in circumstances where inadequacies in the formulation of international norms or the structural features of the international legal order entail that it is impossible for states to comply with one norm without breaching another international legal obligation.[98]

[97] For example, in the interests of preserving the global environment, states may reasonably agree to restrict certain forms of trade, such as trade in endangered plant and animal species: see *e.g.*, *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, 3 March 1973, 999 U.N.T.S. 243.

[98] On the issue of conflicting international legal obligations, see the discussion in Chapter 5 at 224-28 below.

3. The International Common Good as the Basis of Normativity in International Law

Just as the concept of the common good comprehensively informs new natural law jurisprudence and political philosophy, the idea of the international common good may be posited as the foundation for the articulation of normative propositions regarding the purpose of international authority and international law, the moral criteria for the content of positive international law, and the nature of international legal obligation. These will be briefly outlined below.

First, it may be suggested that international authority and international law have a moral purpose, namely to promote the international common good. Like any national political community, the international community of states faces a complex set of coordination problems. These problems, such as managing the appropriation by multiple states of shared earthly resources or determining the appropriate terms of international commercial trade, relate directly or indirectly to the supranational conditions affecting the welfare of persons comprising the universal human community, and require definitive resolution through international cooperation in order that they do not become obstacles to human flourishing. The moral objective of international institutional authority is to further the international common good by stipulating definitive solutions to the international community's coordination problems. International law should likewise be understood as having the moral purpose of promoting the international common good: international law is itself an instrument for the authoritative resolution of the abovementioned coordination problems, possessing specific legal characteristics that are particularly beneficial for facilitating coordination within the international community.[99]

[99] See generally the discussion in Chapter 3 at 90-97 below.

Second, in order to fulfil its purpose of promoting the international common good, the content of international law should be in accordance with the requirements of justice. In particular, this entails that positive international law should further and protect human rights, since such rights specify the basic aspects of human welfare that are to be respected as a matter of justice. This also entails that positive international law should promote and safeguard the conditions comprising the international common good, since these conditions are necessary in order for persons to be able to enjoy their human rights.[100]

Third, the obligation to obey international law should be understood as a form of moral obligation that is primarily explained by its relationship to furthering the international common good. State compliance with international legal stipulations is necessary to facilitate the effectiveness of international law in addressing the coordination problems of the international community. Thus construed, the adherence of states to their international legal obligations contributes to realising the supranational conditions that are instrumental to human flourishing.[101]

IV. Significance of the New Natural Law Conception of the Common Good as Applied to the Global Sphere

1. Relevance for Understanding Contemporary International Discourse

The new natural law conception of the common good, as employed herein in articulating a normative theory about the world community and its international legal and political structures, may be seen as providing a touchstone for understanding and assessing the usages of the term 'common good' in modern international law and international affairs. Having regard to the three usages of this term in international

[100] See generally the discussion in Chapter 4 at 142-51 below.
[101] See generally the discussion in Chapter 5 at 193-96 below.

discourse identified earlier, it may first be suggested that the common good should not be understood as signifying the 'maximisation' of human welfare. According to the new classical theory, the objective of human flourishing that the common good facilitates is a multifaceted concept that is realised through countless varied forms of human participation in the basic goods; furthermore, the basic goods themselves are regarded under new natural law theory as having equal value and being incapable of commensuration.[102] While, therefore, it is plausible to conceive of optimising the conditions that favour human flourishing – that is, to consider optimising the common good as this term is understood in new natural law theory – it is impossible from the perspective of the new classical theory to coherently specify a notion of promoting the greatest 'net welfare' of persons, whether as members of a particular state or grouping of states or as members of the universal human community.

Second, it may be observed that the new natural law conception of the common good as applied to the global sphere is compatible with the characterisation of the common good as connoting a 'mutual benefit' or a 'universally shared good', but remains distinct in its explanatory character as compared to either of these interpretations. As utilised in international discourse, the notions of mutual benefit and especially that of universal (rather than private) good tend to emphasise the 'commonness' of the good involved; the significance of the common good as 'good' is largely assumed. The interpretation of the common good based on new natural law theory affirms the 'common' dimension of this common good, inasmuch as it is premised on an understanding that the basic human goods are commonly good for all persons; at the same time, the new natural law conception provides an explicit and specific interpretation of the 'goodness' of the common good, describing the

[102] See Finnis's critique of utilitarianism in Finnis *NLNR*, *supra* note 18 at 112-18.

universal common good and international common good as denoting instrumental goods that further human flourishing.

It may be further suggested that the new natural law conception of the common good considered in its global application allows for a normative reinterpretation of the features of existing positive international law, illuminating the extent to which international law can be understood as being already framed in terms that correspond to the notion of the international common good. The *Charter of the United Nations*, for example, indicates that the United Nations serves as "a centre for harmonizing the actions of nations in the attainment of… common ends"; among the ends the *Charter* cites are maintaining international peace and security, developing friendly relations among nations, and achieving international cooperation in solving international problems and promoting human rights and freedoms.[103] The 1972 *Declaration of the United Nations Conference on the Human Environment* affirms that "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples… throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments."[104] In the *United Nations Millennium Declaration*, adopted by the United Nations General Assembly in 2000, States reaffirm their support of the "universal aspirations for peace, cooperation and development" and their determination to achieve these "common objectives".[105] These international instruments may all be seen as articulating elements of the concept of the international common good. The *Charter* and the *Millennium Declaration* highlight the themes of common ends and international cooperation, and they identify some of the shared objectives that have

[103] *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI, Art. 1.
[104] *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973) [*Stockholm Declaration*].
[105] *United Nations Millennium Declaration*, 8 September 2000, UN Doc. A/RES/55/2 (2000) [*Millennium Declaration*].

been described herein as being components of the international common good. The *Stockholm Declaration* identifies another one of these common objectives, namely the preservation of the global environment, and expressly recognises the link between this objective and human well-being.

As articulated in relation to the global sphere, the new classical conception of the common good arguably also provides the best conceptual framework for interpreting the remarks of the United Nations Secretary-General cited at the outset of this chapter. It is evident that Mr. Ban's overview of certain current global challenges identifies concerns that are directly and indirectly relevant to human life, health, and multiple other dimensions of human flourishing. In calling for collective action to be taken to address these challenges for the sake of our 'common future', Mr. Ban signals that the point of securing the common good is indeed to secure the welfare of humanity against those things that threaten it. The notion of the international common good based on new natural law theory explicitly affirms this, drawing attention to the supranational conditions that comprise this common good and highlighting their instrumental significance for pursuit of the basic values by members of the universal human community.

2. Significance for International Legal Theory

A conception of a universal common good formed part of the earliest articulations of international law doctrine in the 16th and 17th centuries. Both Francisco de Vitoria and Francisco Suárez expressed in varying terms the idea that international law exists for the sake of the common good of all persons; Suárez further specified that the common good of humanity is paramount to the particular

interests of states.[106] Today, while the common good remains a significant concept within disciplines such as political philosophy and ethics, it is largely absent from discourse in international legal theory.[107] While the bulk of scholarship in international legal theory is not explicitly normative, it may be noted that the curious neglect of the common good in this field extends even to the contemporary normative theories of international law, which affirm that international law should further moral objectives such as justice and the protection of human rights but which generally do not discuss the idea of a common good.[108]

The new natural law conception of the common good articulated in this chapter is significant for drawing attention to an idea that not only has antecedents in international legal thought, but is also clearly alive in the vocabulary of international law and international affairs and accordingly merits consideration within international legal theory. The foregoing account of the nature and importance of the common good of the world community supports an affirmation that pursuit of the international common good should be understood as a primary moral objective of international law. Such a claim, which entails an assertion that international law's proper aim is to secure the conditions that facilitate human welfare, presents a

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[106] See Francisco de Vitoria, *De indis*, in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: The Clarendon Press, 1934), Sec. 3, no. 4; Francisco Suárez, *De legibus ac Deo legislatore* (Madrid: Instituto F. De Vitoria, 1973), IV at 152ff, cited by Alfred Verdross and Heribert F. Koeck, "Natural Law: the Universal Tradition of Reason and Authority" in Ronald. St. J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague: Martinus Nijhoff, 1983) at 22 n. 43; see also Verdross & Koeck, *ibid.* at 21-22.

[107] One potential exception in this regard is John Rawls's *The Law of Peoples*, not itself a work in international legal theory but nevertheless widely regarded as a seminal text relevant to this field, in which Rawls makes reference to what he describes as a 'common good idea of justice': see John Rawls, *The Law of Peoples; with, The Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999) at 62ff. However, what Rawls means by the 'common good' in *The Law of Peoples* is not entirely clear, since the term is ensconced within the broader 'common good idea of justice' and never receives attention in its own right, and it is indeed the concept of justice rather than the common good that forms the centrepiece of Rawls's theory of international relations.

[108] See generally *e.g.*, Allen Buchanan, *Justice Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998).

counterpoint to theories of international law that characterise the significance of this law in terms of its role in furthering the interests of states.[109] At the same time, this claim introduces a new dimension to normative international law discourse regarding the ends that international law should further: while an interpretation of international law based on the new classical theory affirms that international law should promote justice and the protection of human rights, it also identifies a dynamic relationship between these goals and the objective of promoting the international common good.[110]

A final point to be made regarding the new natural law notion of the common good for international legal theory is that, consistent with the centrality of the common good in the new natural law interpretation of fundamental concepts in legal and political theory, the concept of the international common good is foundational for deriving a normative understanding of the concepts of law, authority, and obligation in the international sphere. The relationship between the international common good and these concepts has been outlined herein by way of introduction, and will be considered in further detail in subsequent chapters.

Conclusion

Contemporary global challenges have brought into sharp relief the interdependence of the universal human community and the need for international cooperation to address the threats to the welfare of present and future generations. This chapter has suggested that the new natural law conception of the common good provides the precise vocabulary for articulating the task at hand for the international community and for international law. As has been explained herein, securing the

[109] See Chapter 5 at 208-16 below for further discussion.
[110] See generally Chapter 4 for further discussion.

common good of the world community entails promoting and preserving the conditions that are essential to the ability of human beings to pursue the myriad dimensions of their self-development. The importance of the international common good for human flourishing is what makes it the defining consideration in describing the moral purpose of international law.

Chapter 3
Authority and Law in the International Sphere

In the previous chapter, it was suggested that the idea of the international common good constitutes the starting point for articulating normative claims under new natural law theory regarding international law. Building on this view, this chapter begins an exploration of the concepts that are central to new natural law theory in its political and legal dimensions and that are themselves related to the notion of the common good, with a view to identifying a normative account of the significance of the legal and institutional mechanisms of the international community. The first two concepts to be considered in this regard are authority and law, distinct yet related concepts that are both relevant under the new classical theory to advancing the common good of a community.

In relation to the notions of authority and law in the international sphere, this chapter makes three main claims. First, it affirms that the moral purpose of authority in the international sphere is to further the international common good through addressing the coordination problems faced by the international community. Second, it posits international law as a salient mechanism for addressing the coordination problems of the international community, and thus for furthering the international common good. Third, it suggests that rules of positive international law give effect to natural law principles, and that these rules derive an important dimension of their authority, namely their moral authority, from their relationship to these principles. The new natural law account of authority and law in the international sphere, as this chapter further argues, provides an illuminating reference point for considering existing thought in international legal theory regarding these concepts; this account also appears to suggest certain implications concerning the responsibility of the

international community for the development of international law and institutions, and the forms that such development should take.

The chapter begins with a description of the concepts of authority and law as these are understood in new natural law theory. Proceeding from this, the chapter attempts to articulate a new natural law conception of authority and law specifically applicable to the international sphere, focusing on the three abovementioned claims regarding the purpose of authority in the international community, the significance of international law for this community, and the manner in which natural law principles exist as 'higher' law informing the content of positive international norms. The third section of the chapter compares the putative claims of the new classical theory regarding international law and authority to two existing schools of thought within international legal theory: first, the traditional view that the authority of international law is based on state consent, and second, the 'service conception' of authority expressed by Joseph Raz and recently used by some normative international legal theorists to account for the legitimacy of international law. Finally, the chapter briefly considers some implications of the new natural law account of international law and authority. In this regard, the chapter discusses the need for international authority and the possible forms of such authority, the status of international custom in relation to the development of the international legal order, and the nature and authority of peremptory norms.

I. The New Natural Law Conception of Authority and Law

1. Authority

According to Finnis, 'authority' connotes the presence of good and sufficient reasons, among persons subject to authority, for acting in accordance with that which

authority decrees.[1] Finnis notes that authority is significant for its particular impact on practical deliberation: according to Finnis, the existence and exercise of authority gives rise to an 'exclusionary reason', that is, "a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way."[2]

The purpose of authority, according to Finnis, is to coordinate the activities of members of a community for its common good. As already seen, new natural law theory maintains that the common good – the set of conditions that facilitates human pursuit of the basic values – constitutes a shared objective for members of a political community.[3] Pursuit of the common good, however, may be reasonably done in a variety of ways, and members of a political community may arrive at divergent conclusions in this regard: there may be multiple plausible options, for example, for ensuring the security of the community against external threats, or for catering to the health needs of its ageing members. The plurality of possibilities for realising the common good gives rise to what Finnis describes as 'coordination problems' – situations in which there is more than one reasonable manner of proceeding to address a particular issue, and where one of the available options must be selected in order to achieve progress.[4] The need accordingly rises for definitive selection of a course of action that puts an end to deliberation within the community regarding other possibilities, and is recognised by the community as articulating the course of

[1] See John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [Finnis *NLNR*] at 233-34.
[2] *Ibid*. at 234 [footnote omitted, emphasis in original]. Finnis here adopts the conception of authority articulated by Joseph Raz: see Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at 35-48, 58-73.
[3] See discussion in Chapter 2 at 45-46 above.
[4] See Finnis *NLNR*, *supra* note 1 at 232. Finnis notes that his conception of a 'coordination problem' is analogous but not identical to the similarly-named concept that appears in the context of game theory: see *ibid.* at 468; John Finnis, "Law as Co-ordination" (1989) 2(1) Ratio Juris 97 [Finnis "Law as Co-ordination"] at 97-100.

action which is thenceforth to be universally followed for pursing the common good. Authority, according to Finnis, is the only means (apart from unanimity, which is practically impossible to achieve) for realising such resolution of coordination problems in a political community.[5]

The foregoing account brings to light the extent to which new natural law theory interprets the significance of authority in terms of its relationship to the common good. The common good, which is essential to furthering human fulfilment, requires that the coordination problems of a community be solved. The new classical theory accordingly locates the basis of authority in the opportunity that authority presents for promoting the common good by resolving these problems.[6] It may also be noted that by the terms of the new natural law characterisation of the common good, authority may itself be understood as being part of the common good: the resolution of a community's coordination problems, and the means for resolving such problems, are themselves components of the set of conditions that facilitate human flourishing.

Finnis, in discussing the authority of rulers, affirms that authority in a community "is to be exercised by those who can in fact effectively settle co-ordination problems for that community."[7] This affirms the significance of a ruler's capacity to govern in justifying a claim to authority.[8] According to Finnis, the principle that authority is a necessary good for the common good, and the fact that the dictates of a given person or body will be 'effective' for a particular community,

[5] See Finnis *NLNR*, *supra* note 1 at 232-33.
[6] See *ibid.* at 244.
[7] See *ibid* at 246.
[8] See Leslie Green, "The Duty to Govern" (2007) 13 Legal Theory 165 at 169.

together create the exclusionary reason that justifies a claim to and recognition of authority in relation to that person or entity.[9]

The relatively limited criteria for the emergence of authority are to be distinguished from those that are necessary for the continued existence of authority. As Finnis asserts, a claim to authority based on the fact of effectiveness is defeasible: where a ruler issues decrees contrary to the requirements of practical reasonableness, this action may itself negate the existence, among the subjects of authority, of an exclusionary reason for compliance with the ruler's dictates.[10] The manner in which new natural law theory characterises the contingency of authority itself reaffirms the extent to which the theory links the concept of authority to the objective of furthering human well-being.

2. Law

Finnis affirms that 'law' in its focal meaning refers to:

> [R]ules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-giving stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.[11]

As with the concept of authority, Finnis's description of law affirms that law's essential function is to further the common good of a community through resolution

[9] See Finnis *NLNR*, *supra* note 1 at 246.
[10] See *ibid.*
[11] *Ibid* at 276-77. In relation to this definition of law, Finnis uses the terms 'focal meaning' and 'central case' to express the idea that his definition describes the characteristics of law when all of its component elements are fully present, while simultaneously acknowledging that the term 'law' may also be used in relation to legal rules and systems that do not display these features to the fullest possible degree: see *ibid*. at 10, 277.

of the community's coordination problems. Law's particular value in relation to this objective derives from the ways in which it shapes and promotes patterns of coordination. Law, according to Finnis, possesses specific characteristics that bring clarity, certainty, and predictability into human interactions.[12] These characteristics enable a community to articulate the solutions to its coordination problems in a form that is clear and enduring, equally applicable to all members of the community, and not susceptible to change except through recognised legal procedures.

In virtue of its formal features, as Finnis points out, law plays an important role in protecting individual autonomy and ensuring the preservation of justice in the coordination of life in community. Underlying the notion of 'coordination problems' is the reality that persons' interests may not only coincide, but also come into conflict as they pursue their individual life-plans. For new natural law theorists, law is integral to upholding, in the context of community life, the requirement of practical reasonableness that forbids arbitrary self-preference in the pursuit of the basic values.[13] Law and legal order, by this account, help to create a check on both individual members of a community and those in authority who may seek to pursue their own good at the expense of the welfare of others: law, in Finnis's words, serves as "a *fair* method of relating benefits to burdens, and persons to persons" in relation to a vast and varied set of human interactions over time.[14]

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[12] Finnis in this regard cites five 'main features' of legal order: these include the stability of legal rules (*i.e.*, the fact that legal rules, once validly created, remain in force until otherwise altered by a valid act of repeal or amendment), and the enduring authoritativeness of juridical acts (*i.e.*, the fact that past acts of legal enactment, amendment *etc*., continue to be valid for governing current and future practical deliberation). See *ibid* at 267-69. According to Finnis, the criteria identified by other writers as requisites for a healthy legal system (the 'Rule of Law') – stipulating, for example, that rules should be prospective not retrospective, promulgated, and relatively stable – are themselves more detailed descriptions of qualities that instantiate the main features of legal order. See *ibid* at 270-73; *cf. e.g.*, Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), Chs. 2 & 5.

[13] Finnis thus suggests that the authority of law "depends on its justice, or at least its ability to secure justice": Finnis *NLNR*, *ibid* at 260; *cf. ibid* at 106-8, 164.

[14] Finnis "Law as Co-ordination", *supra* note 4 at 102 [emphasis added].

3. Relationship Between Natural Law and Positive Law

The new classical theory's conceptualisation of law and legal order is complemented by an account of the relationship between natural law principles and positive law. This reveals the theory's multifaceted approach to accounting for the 'force' of positive laws, bringing into play a distinction between legal and moral authority.

For Aquinas, positive law may be derived from natural law in two ways, first, "as a conclusion from premises", and second, "by way of determination of certain generalities".[15] Finnis retains Aquinas's twofold characterization of the way in which positive law can be derived from natural law principles, but offers his own more detailed interpretation of this phenomenon. First, Finnis affirms that there are some rules (such as the law of murder) that, in their content, bear close affinity to the principles of practical reason: these rules reflect conclusions derived from the combination of a principle affirming a basic good (for example, life) with one of the requirements of practical reasonableness (for example, the requirement that one is not to act directly against a basic value).[16] Finnis suggests, however, that even in situations where the content of law closely corresponds to natural law principles, the actual process of translating these principles into legal rules – conforming to the features of law, suited to a particular branch of law and integrating coherently with the set of interrelated rules in a legal system – often requires a legislator to engage in

[15] Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981), Vol. 2, I-II, q. 95, a. 2. The translation of the *Summa Theologiae* quoted by Finnis in *Natural Law and Natural Rights* states that rules are derived from natural law "like conclusions deduced from general principles" or "like implementations [*determinations*] of general directives": see *Finnis NLNR*, *supra* note 1 at 284.
[16] See *ibid.* at 282.

exercises of 'determination' of natural law principles rather than mere 'deduction' from them.[17]

This leads to consideration of the second manner of deriving positive law from natural law principles, the idea of 'determination' that is applicable to the majority of rules within a legal system. As Finnis notes, there may be multiple reasonable options for the formulation of a legal rule, and in this regard a legislator enjoys a significant measure of freedom - it is up to her to choose what the precise formulation will be.[18] Nonetheless, Finnis suggests that in settling upon the precise formulation of law, a legislator is in fact both implementing and being guided by principles of practical reason. First, even though natural law principles do not directly specify what the content of the law is to be, the content of the chosen law demonstrates a rational relationship to objectives that are themselves implications of natural law principles prescribing the pursuit and preservation of basic human goods.[19] Second, Finnis asserts that the process of formulating the law is itself governed by a range of formal and substantive principles of law that are themselves inferred from the principles of practical reason.[20]

The assertions of new natural law theory regarding the influence of natural law principles in shaping positive law are echoed in the theory's approach to interpreting the source of law's authority. Finnis, following Aquinas, affirms that a legislator's act of choosing the particular form of a law is itself significant: in an important sense, the 'force' of law does indeed derive from the fact that it has been

[17] See *ibid.* at 282-84.
[18] See *ibid.* at 285.
[19] Finnis uses the example of a speed limit: such a limit furthers the objective of traffic safety, which as an objective follows from the principle that human life and bodily integrity is a good that is to be preserved. See *ibid*.
[20] Among the examples Finnis cites in this regard are the desiderata of the Rule of Law, and general principles of law such as *pacta sunt servanda* and the principles of natural justice: see *ibid.* at 286-89.

chosen and posited by the legislator.[21] The authority of a particular legal stipulation may in this regard be seen as a subset of the broader authority of legal order, which derives from its salience as a mechanism for the resolution of a community's coordination problems.[22] In addition, however, to this formal, 'legal' authority of a given rule, Finnis indicates that there is a further relevant dimension of authority to be considered, namely authority 'in reason' or 'moral' authority. The basis of the moral authority of a given rule, according to Finnis, is its consistency with natural law principles.[23] For new natural law theory, in considering the 'authority of law' as this relates to the practical deliberation of the subjects of law, it is law's moral authority that has ultimate significance.[24]

II. A New Natural Law Account of Authority and Law in the International Sphere

The preceding description of new natural law theory's conceptualisation of authority and law provides the framework for a rearticulation of these concepts in relation to the international sphere. Three main points may be suggested in this regard. First, authority in the international sphere should be understood in terms of its role in furthering the international common good. Second, international law is a 'salient coordinator' for resolving the coordination problems of the international community, and thus for promoting the international common good. Third, the principles of practical reason inform the content of positive international law, and the authority of this law is importantly influenced by the quality of its relationship to these principles.

[21] See Aquinas, *supra* note 15; Finnis *NLNR*, *supra* note 1 at 285, 289.
[22] See Finnis "Law as Co-ordination", *supra* note 4 at 101-02.
[23] See Finnis *NLNR*, *supra* note 1 at 289.
[24] This claim is explored further in Chapter 5 in relation to legal obligation.

1. International Authority and the International Common Good

From the perspective of the new classical theory, it is suggested, the moral purpose of 'international authority' – taken here as denoting a supranational institution having authority over states in relation to their international affairs, or in relation to the implementation of international norms – is to further the international common good through resolving the coordination problems of the international community of states. States have multiple objectives pertaining to the interests of their populations that often both overlap and conflict with the equivalent or distinct objectives of other states. This may be illustrated by reference to the dynamics of international trade. The desire of a state to increase national revenue through exporting a particular natural resource may coincide with the need of several other states to import that same resource to support their respective national communities; at the same time, a state's export objectives may come into competition with those of other states that similarly seek to export the same type of product to the same global markets. Both of these scenarios give rise to a need for various forms of coordination. There may be a need, for example, to standardise the terms (such as price and frequency of supply) on which various exporting countries provide a given natural resource to other countries, in order to avoid the incidence of arbitrary variations in these terms and thereby promote stability in trading relationships.[25] There may also be a need for 'negative coordination' such as introducing rules for trade to ensure that states are not impeded in achieving their export objectives due to

[25] The mission statement of the Organization of the Petroleum Exporting Countries (OPEC) is illustrative. OPEC indicates that its role is "to coordinate and unify the petroleum policies of its Member Countries and ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital for those investing in the petroleum industry". See OPEC, "Our Mission" online: Organization of the Petroleum Exporting Countries <http://www.opec.org/opec_web/en/about_us/23.htm>; *cf.* *OPEC Statute*, online: Organization of the Petroleum Exporting Countries <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf>, Art. 2.

an unfair advantage being afforded to a particular exporting state by a particular importing country.[26]

The important contribution of new natural law theory to an understanding of international authority lies not merely in its claim that this form of authority exists to solve the coordination problems of the international community, but also in its more fundamental claim that such coordination is necessary to secure the international common good. This latter claim, it should be noted, entails an understanding of the purpose of international authority that focuses ultimately on its relationship to the welfare of persons rather than that of states: for new natural law theory, international authority serves to coordinate states' pursuits of their various objectives and resolve conflicts that may arise, and this endeavour assists in realising the supranational conditions that are favourable to the flourishing of members of the universal human community residing within states. International authority, which plays an instrumental role in furthering human fulfilment, may itself be described as a component of the international common good.

As already seen, Finnis maintains that authority uniquely influences practical deliberation among the subjects of authority by providing an exclusionary reason for acting in accordance with the content of an authoritative dictate. This claim also has relevance for understanding the impact of international authority once it is accepted that practical deliberation is regularly exercised within the international community, and that this is done not by states but by persons. The subjects of international authority, states, are governed by human rulers who possess practical reason and who themselves represent communities of practically reasonable persons within their

[26] Finnis affirms that coordination includes ensuring mutual non-interference and striving to avoid 'collisions' in the pursuit of the common good by members of a community: see Finnis *NLNR*, *supra* note 1 at 138-39, 468. An example of such negative coordination is seen in the 'Most Favoured Nation' principle in international trade law, which articulates a general rule of non-discrimination in trade. See *General Agreement on Tariffs and Trade 1994*, April 15 1994, 1867 U.N.T.S. 154, Art. I:1.

respective territorial domains. The phenomenon of 'state consent', on this account, may be described as being ultimately traceable to discernible decisions by specific persons within the governmental apparatus of national political communities, who have the authority to enter into international agreements on behalf of these communities and to implement the necessary steps within their respective countries for complying with such agreements.

In the international sphere, it is suggested, the acquiescence of states to having their activities and interactions regulated by international authority may be interpreted as indicating that the governments of these states recognise the existence of sufficient reasons for treating a given international institution as authoritative. From the perspective of new natural law theory, the fundamental moral reason that should influence a state's decision in this regard is the principle that authority in the international sphere is necessary for realising the international common good. The decision by states to submit to international authority may also be interpreted as manifesting an acknowledgement on the part of national governments that such authority has the capacity to effectively settle coordination problems in a given area for the international community. To the extent that such authority exists in the international sphere, it may be suggested that the presumption by states that a particular international authority can be effective for the international common good is at least partially explained by the fact that states themselves confer a supranational body with its power to settle coordination problems, invariably through concluding a multilateral instrument that establishes this body and defines its mandate.[27]

[27] The establishment of authority in the international sphere through conferral of capacity may be contrasted to the sheer 'taking' of power that has often characterised the initial emergence of authority in national political communities: see Finnis *NLNR*, *supra* note 1 at 251; John Finnis, "Natural Law: The Classical Tradition" in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 1 [Finnis "Natural Law: The Classical Tradition"] at 53.

2. International Law as Salient Coordinator for the International Common Good

The new classical theory affirms that law, because of its qualities, is a salient mechanism for the resolution of a community's coordination problems. This general claim regarding law has significance for deriving a normative understanding of the role of international law. The international community of states, as already discussed, has a need for coordination of the multiple interactions of its state members as each state pursues a variety of endeavours aimed ultimately at securing the welfare of its inhabitants. International law, it is suggested, both defines and fosters patterns of coordination through establishing legal frameworks and rules for the interactions of states. Through these frameworks and the specific international norms they contain, states obtain clear guidance for determining the scope of permissible conduct in their interactions with other states or in their activities that may affect other states; this clarity enhances stability and predictability in inter-state relations, and thereby contributes to realising the supranational conditions that are beneficial to the flourishing of persons residing within states.

The normative significance of international law as a salient coordinator may be illustrated by considering the emergence of the international rule regarding territorial waters, enshrined in the *United Nations Convention on the Law of the Sea*.[28] Since at least the seventeenth century, states have sought to exercise jurisdiction over an area of water adjacent to their coastlines, an area that has become known as the 'territorial sea'.[29] The state practice of claiming territorial sea, a departure from the pre-existing 'freedom of the seas' doctrine that characterised the sea as common to all and incapable of being appropriated, arose primarily due to

[28] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 396 [*Law of the Sea Convention*].
[29] See Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 4, 59.

states' need to secure their coastlines against foreign naval attacks; additionally, states became increasingly concerned with safeguarding the fish supplies in their coastal waters in the face of growing exploitation of these resources by foreign fishing vessels.[30] Prior to the *Law of the Sea Convention*, there was significant variation in state practice regarding the breadth of a state's territorial waters. A 1960 United Nations report on this issue indicated that 22 states at the time claimed a territorial sea area of three nautical miles;[31] however, a total of 29 states claimed territorial sea areas in varying sizes of between 4 and 12 nautical miles, and one state had claimed a territorial sea area of 200 nautical miles.[32]

Unsurprisingly, the great variations in states' claims to territorial sea proved to be a source of uncertainty and growing conflict, manifested in overlapping territorial sea claims and disputes among states over access to coastal fish stocks and the valuable natural resources of the seabed that were increasingly discovered and extracted in the 20th century.[33] There was evident need for states to achieve common agreement regarding the scope of territorial waters; still, although codification of various aspects of the law of the sea progressed from 1958 onwards through a series of United Nations conferences, attempts at arriving at a rule on territorial sea limits

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[30] See *ibid.* at 3-4.

[31] The practice of claiming a territorial sea of three nautical miles evolved from the so-called 'cannon-shot' rule articulated in the 18th century by the jurist Cornelius van Bynkershoek; this rule stipulated that a state was entitled to exercise sovereignty over its coastal waters up to the extreme range of a cannon shot from the shore. See generally Wyndham L. Walker, "Territorial Waters: The Cannon Shot Rule" (1945) 22 B.Y.I.L. 210; see also Rothwell & Stephens, *ibid.* at 60-61.

[32] See *Synoptical table concerning the breadth and juridical status of the territorial sea and adjacent zones*, Second United Nations Conference on the Law of the Sea, Official Records, Annex, UN Doc. A/CONF.19/4 (1960), online: United Nations Treaty Collection <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1960/docs/english/vol1/a_conf-19_4_ANNEXES.pdf>; Rothwell & Stevens, *ibid* at 67.

[33] See generally United Nations Division for Ocean Affairs and the Law of the Sea, 'The United Nations Convention on the Law of the Sea (a historical perspective), online: United Nations <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective>. An example of such disputes is the 'Cod Wars' between the United Kingdom and Iceland in the 1950s, precipitated by Iceland's progressive expansion of its territorial sea area from 3 nautical miles to 12 nautical miles: see generally Hannes Jónsson, *Friends in Conflict: The Anglo-Icelandic Cod Wars and the Law of the Sea* (London: C. Hurst & Co., 1982), Chs. 3 & 4.

for all states were repeatedly unsuccessful.[34] Finally, at the conclusion of the Third United Nations Conference on the Law of the Sea in 1982, the *Law of the Sea Convention* was adopted. This wide-ranging treaty includes a provision defining the maximum limit of territorial waters as 12 nautical miles;[35] additional provisions specify areas beyond the territorial sea over which states may exercise certain forms of jurisdiction.[36] Unofficial United Nations data indicates that as of 2011, 141 states have claimed a territorial sea of 12 nautical miles, with a further two states claiming a territorial sea of less than 12 nautical miles; overall, 143 out of 150 states with proclaimed territorial sea areas have limits that are in compliance with the treaty.[37] The articulation of a legal rule regarding the territorial sea limit is regarded as a highly important contribution to the development of the law of the sea; more broadly, it has been observed that the *Law of the Sea Convention* "has provided a considerable measure of stability and predictability in the conduct of States with regard to marine activities."[38]

The foregoing account demonstrates the relevance of international law as a salient coordinator for the international common good. Prior to the adoption of the *Law of the Sea Convention*, states asserted claims to territorial waters for the sake of achieving various objectives: foremost among these were ensuring national security, increasing national revenue, providing food and other resources for their own populations, and protecting the livelihoods of particular segments of their

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[34] See Rothwell & Stephens, *supra* note 29 at 6-9.
[35] *Law of the Sea Convention*, *supra* note 28, Art. 3. The Convention also defines the normal coastal 'baseline' from which the breadth of the territorial sea is to be measured: see *ibid.*, Art. 5.
[36] See *ibid.*, Art. 33 (specifying the 'contiguous zone') and Parts V and VI (specifying the 'exclusive economic zone' and 'continental shelf'' respectively).
[37] See generally United Nations Division for Ocean Affairs and the Law of the Sea, *Table of claims to maritime jurisdiction (as at 15 July 2011)*, online: United Nations <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf>.
[38] L. Dolliver M. Nelson, "Reflections on the 1982 Convention on the Law of the Sea" in David Freestone, Richard Barnes & David Ong, eds., *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006) 28 at 29.

populations. In the absence, however, of a universal rule governing the assertion of territorial sea claims, states' pursuits of their respective objectives came into conflict with each other. The unresolved coordination problems of states in relation to the territorial sea impaired the international common good: this impairment, reflected in the instances of inter-state aggression and the unregulated exploitation of sea resources, threatened the very objectives that states sought to achieve through their assertion of territorial sea claims, objectives that were themselves instrumental to furthering the flourishing of individuals and communities within their respective populations. The *Law of the Sea Convention* provided the necessary framework for resolving these coordination problems, establishing a rule that sets clear parameters for the assertion of territorial sea claims and the exercise of sovereignty rights beyond the territorial sea area. The rule establishing the territorial sea limit is equally applicable to all contracting parties and cannot be changed at the whim of any particular state. It is not merely the fact that the territorial sea limit has been defined, but also the fact that it has been articulated as a treaty rule – in a form that is clear, impartial, and enduring – that explains the rule's special value as a response to the coordination needs of states.

The territorial sea rule is also useful in illustrating how international law in its coordination role assists in safeguarding autonomy and justice in the international community of states. The territorial sea limit crucially satisfies a need for negative coordination: the rule affirms the full sovereignty of every state over a defined area of water beyond its territorial land mass, and thereby signals that other states have duties of non-interference in relation to this area. This rule thus ensures the ability of states to act freely in relation to their territorial waters, allowing the governments of states to use and authorise the use of these waters as they see fit to achieve their

particular objectives. At the same time, the positing of a uniform limit for all states puts an end to the arbitrariness that was once prevalent in states' territorial sea assertions, a situation that lent itself to substantial variations in the size of territorial sea claims and a corresponding inequality among states in their opportunities for enjoyment of the strategic and economic benefits provided by the assertion of territorial sea jurisdiction.[39]

It will be recalled that Finnis's 'central case' definition of law contemplates a multifaceted matrix of substantive legal rules, procedural legal rules, legislative and judicial authority, and sanctions.[40] Finnis has in this regard noted the extent to which international law lacks the features of this focal definition: in particular, he observes that there is no legislative, executive, or judicial institution having authority over the entire international community of states, due in part to the fact that "states tacitly concur in judging that no existing or envisageable authority could be relied upon to act with an effective justice sufficient to merit a general transfer or subordination of state jurisdiction to it."[41] Given the paradoxical nature of international law, which seems to operate as an authoritative legal order without any comprehensive corresponding institutional authority, Finnis concludes that international law "remains both descriptively and morally a relatively undeveloped, non-central case of law."[42]

The lack of a central political authority governing the entire international community, a general legislature for this community, and a court with jurisdiction

[39] This is not to suggest, of course, that a uniform territorial sea limit enables all states to enjoy the *same* strategic and economic benefits from their territorial waters, since the actual benefits for states will vary based on factors such as their geographic location and the particular fauna and natural resources present in their territorial waters. The treaty rule does nevertheless go some way towards mitigating the possibility of injustice that arises if, for example, substantial differences exist between the territorial sea areas enjoyed by adjacent states due simply to the differing capacities of these states to claim and defend a territorial sea area.
[40] See *supra* note 11 and accompanying text.
[41] Finnis "Natural Law: The Classical Tradition", *supra* note 27.
[42] *Ibid.*

over all states, as well as the absence of general sanctions for non-compliance with international law emanating from and enforced by a central authority, are the key respects in which international law is distinct from more conventional forms of legal order such as municipal law. In virtue of these differences, international law has at times been described as a 'primitive' legal system.[43] Some writers have of course gone further than this: John Austin famously described international law as 'positive morality' rather than law, while more recent neo-realist scholars, noting the pervasive influence of global political dynamics in the functioning of international law, have sought to characterise international law as being essentially political rather than legal.[44]

Lest the atypical character of international law be thought problematic in the context of the present discussion, a few observations may be made regarding both the characteristics of modern international law and the issue of non-focality. First, it may be noted that while Finnis affirms that international law is not a central case instance of law, he also suggests that international law should not be regarded as merely a primitive legal system, observing in this regard that international legal processes are, to an extent, "sophisticated applications" of general principles of law and legal doctrine.[45] Arguably, one manifestation of the relative sophistication of the international legal system is the way in which the functioning of international treaties compensates to some extent for the lack of international institutions enjoying comprehensive authority, such a deficiency being one of the aspects of the non-focality of international law. It is evident that once a treaty enters into force, the

[43] See *e.g.* Lassa Oppenheim, *International Law: a Treatise*, Vol. 1 (London: Longman, Green & Co., 1905) at 7; see also Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) at 405 for discussion.
[44] See John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832) at 132, 146-47; Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) at 201-02.
[45] See Finnis "Natural Law: The Classical Tradition", *supra* note 27 at 53-54.

treaty itself becomes a primary source of authority for the states parties to the treaty, since the treaty terms themselves serve to coordinate the interactions of these parties. As already illustrated earlier in this section, the formal characteristics of treaties as legal instruments entail that treaties can be particularly beneficial to facilitating coordination. It may also be noted that the *Vienna Convention on the Law of Treaties* provides states with a procedural framework for the creation, modification and termination of treaties;[46] the fact that inter-state treaties are regulated in their functioning by a formally established and widely respected set of rules itself enhances the authority of treaties as instruments for addressing the coordination needs of states. Thus, to the extent that treaties, while being laws, also function as a form of *de facto* political authority in the international community in the absence of a central institutional authority, it may be argued that this feature of the international legal order attenuates the degree of its non-focality.

It should also be noted that while international law is non-focal, not all international law is non-focal to the same extent. As is well known, the international legal system is not susceptible of simple description as a legal order: the term 'international law' in fact encompasses differing sources of law (in particular, treaties and international custom), as well as a range of distinct legal regimes governing multiple aspects of inter-state relations. Some of these 'sub-regimes' of international law themselves demonstrate a significant level of affinity to the central case of law. One field in which this is seen is international trade law, in the functioning of the World Trade Organisation ('WTO'). Established in 1995, the

[46] See generally *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S 331 [*Vienna Convention*]. While the *Vienna Convention* has not been ratified by all states, it is regularly treated as an authoritative guide to treaty creation and modification even by non-party states: see Anthony Aust, "Vienna Convention on the Law of Treaties (1969)" in Max Planck Encyclopedia of Public International Law, online: Max Planck Encyclopedia of Public International Law <http://opil.ouplaw.com/home/EPIL>, para. 14.

WTO constitutes a comprehensive institutional framework for the coordination of the multilateral trade system and implementation of the norms of trade liberalisation contained in the 1994 *General Agreement on Tariffs and Trade* and related WTO agreements.[47] The WTO system includes a defined body of treaty norms for international trade, an institutional forum for supervising international trade and promoting trade liberalisation, and a sophisticated dispute settlement mechanism for the resolution of trade disputes between WTO member states.[48] The international trade law regime of the WTO may be described as one of the sectors of international law that goes furthest in embodying the features of the focal definition of law.

Finally, notwithstanding the above considerations suggesting the need for a nuanced understanding of the idea that international law is non-focal, it is important to observe that the non-focality of international law is not an obstacle to the articulation of normative claims regarding international law. Finnis emphasises that his purpose in employing the concept of the central case in relation to law is not to expel non-central cases to another discipline as 'non-law', but to identify the features of law in its fully instantiated form and thereby allow for differentiation between more and less fully developed forms of legal order.[49] For new natural law theorists, then, the fact that international law is a non-focal instance of law does not entail that

[47] The WTO is an important advance over its predecessor, the General Agreement on Tariffs and Trade ('GATT') of 1947, which served for several decades as a regulatory framework for the liberalisation of trade among states parties but which lacked a formal institutional mechanism for implementing and enforcing its norms. See generally *General Agreement on Tariffs and Trade 1947*, 13 October 1947, 55 U.N.T.S. 194; on the history of the GATT and the emergence of the WTO, see John H. Jackson, *The World Trading System*, 2d ed. (Cambridge, MA: MIT Press, 1997) at 36-49.

[48] The WTO dispute settlement system is one of the most significant components of the WTO system. Among its characteristically 'legal' features are the compulsory and exclusive jurisdiction of the system for WTO trade disputes, and the existence of a standing Appellate Body comprised of politically independent persons and having jurisdiction to review the legal aspects of the findings and conclusions of the preliminary-level adjudication panels. See *General Agreement on Tariffs and Trade 1994*, *supra* note 26, Annex 2 (Dispute Settlement Understanding), Arts. 17.1, 17.3, 17.6, 23.1; see also Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (Cambridge: Cambridge University Press, 2005) at 187-90, 244-54.

[49] See Finnis *NLNR*, *supra* note 1 at 10-11, 277-78; see also John Finnis, "Law as Idea, Ideal and Duty" (2010) 1(2) Jurisprudence 245 at 248.

it is not to be regarded as 'law'. Nor is it the claim of new natural law theory that only focal instances of law serve moral ends: rather, the theory characterises law as a response to moral needs (specifically, the need for coordination in a community) and affirms that law serves such needs in a particularly useful way in virtue of its formal features, a claim which implies that instances of law possessing more or less of these features may serve those moral needs with greater or lesser effectiveness. It may thus be affirmed that precisely because international law is indeed 'law' from the perspective of the new classical theory, it remains a fully eligible candidate for discussion of its coordination function construed in relation to its ascribed moral purpose of promoting the international common good. While many formal features of international law, and the regular vulnerability of international law to assertions of sovereignty and state interest in the international sphere, combine to render this legal order different in several respects from the central case of law, this fact does not in itself preclude consideration of the normative importance of international law as a salient coordinator. The utility for normative purposes of the notion of the central case of law is that it can be used as a reference point for analysing the existing features of the international legal order, with a view to identifying the ways in which international law might be structured differently in order to better promote the international common good.

3. Natural Law Principles as Higher Law in the International Sphere

As seen earlier, new natural law theory not only presents its own account of the concepts of authority and law, but also claims that all positive law is to some degree linked to natural law principles and that the authoritativeness of positive law is contingent upon its consistency with the principles of practical reason. It is accordingly appropriate to consider the theory's implications for understanding the

relationship between natural law principles and the norms of positive international law. In this regard, it may be suggested that, as with positive law in the domestic context, the principles of practical reason constitute a form of 'higher' law that informs the formulation of positive international law, and that natural law principles have an important bearing upon the authoritativeness of international rules.

An example of the influence of natural law principles in the determination of positive international law is seen in the norm prohibiting the use of aggressive armed force in inter-state relations. Article 2(4) of the *Charter of the United Nations* states that all Member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[50] This prohibition is complemented by Article 2(3) of the *Charter*, which directs that Member states "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." The *Charter* does not eliminate the right of states to use force, but limits it to circumstances of individual or collective self-defence against an armed attack.[51] Outside these circumstances, as Chapter VII of the *Charter* provides, only the United Nations itself through its Security Council is entitled to authorize and implement the use of force against a state, for the purpose of maintaining or restoring international peace and security.[52]

While like most rules of positive international law, Article 2(4) of the *Charter* does not demonstrate an express relationship to the principles of practical reason, it undeniably gives effect to these principles. This rule demonstrates a rational relationship to furthering a number of objectives of the international community – in particular, the maintenance of international peace and security – that are themselves

[50] *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI [*Charter*], Art. 2(4).
[51] See *ibid.*, Art. 51.
[52] See *ibid.*, Arts. 39, 41 & 42.

implications of natural law principles requiring the pursuit and preservation of basic human goods. Repeated instances of international aggression throughout history have demonstrated that violent inter-state conflict gives rise to myriad negative consequences for human welfare, including loss of human life, physical injury and mental trauma for both combatants and civilians, separation of families, disruption of economies and livelihoods, and environmental pollution. Furthermore, since states' economic and military resources differ, their capacities for both initiating and resisting armed attacks vary considerably, increasing the likelihood that the availability of resort to force will give a significant advantage to certain states while leaving others vulnerable to exploitation. The overall impact of international aggression may be restated with reference to the international common good: it is evident that employment of aggressive armed force in the international sphere detrimentally affects the supranational conditions that enable states to achieve their respective goals for the welfare of their populations, and that enable individuals and communities within states to realise the basic values for themselves.

Article 2(4) of the *Charter* constitutes a formal determination by the international community that, among the various options available to states for resolving their coordination problems, aggressive armed force is not to be used save in certain defined and exceptional circumstances. In minimising the availability of resort to force and the various consequences for community life that follow upon the incidence of international aggression, the rule implements natural law principles which prescribe in general terms that those things that impair the possibilities for human flourishing are to be avoided.[53] By restricting the circumstances in which states may unilaterally use armed force, the rule limits the possibilities for powerful

[53] See Aquinas, *supra* note 15, I-II, q. 94, a. 2 ("whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided"); see also Finnis *NLNR*, *supra* note 1 at 23, 109.

states to pursue their own objectives at the expense of weaker states and their populations, and thereby upholds the requirement of practical reasonableness prohibiting arbitrary self-preference in the pursuit of the basic goods.[54] In enhancing the prospects for peace and stability in inter-state relations, the prohibition on the use of force gives effect to the natural law requirement that persons promote the common good of their communities, in this case the international common good. All this is done, furthermore, through a rule that is articulated within a treaty mechanism; the latter is underpinned by fundamental principles of law, most notably *pacta sunt servanda*, that themselves follow from the principles of practical reason.

It is hardly likely that the rulers and representatives of states made a conscious and explicit effort to adhere to the abovementioned natural law principles and requirements of practical reasonableness at the time of formulating Article 2(4) of the *Charter*. What can be suggested, however, is that the rule prohibiting the use of force is an outcome of what Finnis describes as the 'deep structure' of practical thinking that is informed by the principles of practical reason.[55] Article 2(4) manifests a collective affirmation by states that international aggression is *undesirable* for the international community: only a characterisation of aggression in such terms can explain the collective determination of states that resort to force should not be a primary method of international dispute resolution, that it should generally not be exercised by states outside a defined regulatory framework, and that peaceful dispute resolution is to be preferred wherever possible. The characterisation of international aggression as undesirable is itself a normative judgment that is only fully intelligible if aggression and its consequences are viewed in relationship to

[54] See Finnis *NLNR*, *ibid* at 106-08.
[55] See *ibid.* at 127.

human considerations, namely the basic aspects of human well-being and the requirements for human flourishing.

Apart from playing a guiding role in the determination of international norms, natural law principles also appear to be important to a full understanding of the basis of the authority of positive international law. The norms of positive international law may indeed be properly understood as deriving their formal legal authority from the law-determining acts of states: states confer international institutions with the capacity to issue authoritative stipulations for coordinating the international community, they define and consent to the norms that become authoritative rules in international treaties, and they establish the practices that may subsequently become recognised as authoritative international custom. Notwithstanding this, the new natural law account of law and authority suggests that there is a further dimension of authority, namely moral authority, that is integral to the overall authority of positive international law and that does not have its source in the positive acts of states. This dimension of authority, from the perspective of the new classical theory, depends on the conformity of positive international law with natural law principles.

The claim that moral authority is an essential component of the overall authority of positive international law has two aspects. First, it affirms that the conformity of a particular international rule with natural law principles is an important factor in the creation of an exclusionary reason for states to comply with that rule. This, to return to the example of the international law prohibition of the use of force, translates into a claim that the authority of this rule derives not simply from the fact that states have collectively posited it as a treaty rule in the *Charter*, but also from the fact that the rule implements the principles of practical reason directing the preservation of the basic values and the international common good. Second, it

suggests that positive international laws that are not consistent with natural law principles lack moral authority, and that as a result such laws will not of themselves provide states with an exclusionary reason for complying with them. The significance of new natural law theory for understanding the relationship between the moral authority of international norms and the obligations of states in the international sphere is a topic that will be considered further in Chapter 5.

III. New Natural Law Theory and Existing Thought in International Legal Theory Regarding Authority and Law

Contemporary international law scholarship has paid increasing attention to issues surrounding the authority of international law, with many writers demonstrating particular interest in the concept of legitimacy and in identifying the criteria for the legitimacy of international law and institutions.[56] Among the various lines of inquiry that have been pursued in recent years, particularly by normative international legal theorists, two may be highlighted. The first is the traditional 'consent' theory of international law and the manner in which this has been critiqued by some writers as providing an inadequate account of the legitimacy of international law. The second is an interpretation of the legitimate authority of international law based on Joseph Raz's 'service conception' of legal authority, which has been

[56] Representative works in this regard include: Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) [Buchanan *Justice, Legitimacy, and Self-Determination*]; Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998); Daniel Bodansky, "The Concept of Legitimacy in International Law" in Rüdiger Wolfrum & Volker Röben, eds., *Legitimacy in International Law* (Berlin: Springer-Verlag, 2008) 309; see also the list of works in Samantha Besson, "The Authority of International Law – Lifting the State Veil" (2009) 31 Sydney L. Rev. 343 at 347, n. 23. New natural law theorists such as Finnis do not generally employ the term 'legitimacy' in describing the theory's conception of authority and law. Nevertheless, insofar as new natural law theory sets out in normative terms the criteria that political authority and law should satisfy if they are to be considered authoritative, it appears that the theory's substantive concerns overlap with those of normative theorists who understand legitimacy as denoting 'legitimate authority' and are interested in identifying justifications for the authority of international law. *Cf.* Besson, *ibid.* at 344.

articulated in separate works by Samantha Besson and John Tasioulas.[57] Both of these topics will be considered below, in an effort to identify their relationship to the claims of the new classical theory regarding law and authority in the international sphere.

1. The Consent Theory of International Law

It is a longstanding principle of international law that the binding rules of international law emanate from the free will of states.[58] The theory that international law is binding because states consent to be bound by it is rooted in nineteenth century positivist doctrine, and retains potency as an affirmation of the sovereignty and autonomy of states. It has long been suggested, however, that the theory fails to provide a fully satisfactory account of the binding force of international law, due in part to its factual incongruence with various aspects of the international legal order including the functioning of international custom and the existence of general principles of law.[59]

The critiques regarding the limitations of consent theory have recently been complemented by the observations of some normative theorists who claim that consent is inadequate as a basis of the legitimacy of international law. Allen Buchanan raises three issues regarding the authenticity and integrity of state consent. First, Buchanan suggests that the consent of states may sometimes be less than fully voluntary, due to the vulnerability of weaker states to the pressures exerted on them

[57] See Besson, *ibid.*; John Tasioulas, "The Legitimacy of International Law" in Samantha Besson & John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 97.
[58] See *The Case of the S.S. "Lotus" (France v. Turkey)* (1927), P.C.I.J. Ser. A No. 10 at 18; Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff, 1995) at 27.
[59] See *e.g.*, James L. Brierly & Andrew Clapham, *Brierly's The Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th ed. (Oxford: Oxford University Press, 2012) at 49-51; see also Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2001) 12 E.J.I.L. 269 at 284-98.

by stronger states.[60] Second, he notes that international law is increasingly made by a variety of global governance institutions; although these institutions are created by states, their ongoing governance activities, including law-making, do not themselves involve the consent of states.[61] Third, Buchanan observes that many states do not represent all of their people; given this fact, he argues that state consent cannot be construed as making international law legitimate, for to do so is to treat states "as if they were moral persons in their own right, rather than merely being institutional resources for human beings."[62]

Samantha Besson echoes an aspect of Buchanan's last argument in her own comments on the manner in which states are characterised under consent theory. According to Besson, the consensualist view of international law, which affirms that states make laws as individuals enter into contracts, regards states in their international law-making activity as individuals rather than as officials.[63] This, Besson maintains, misconstrues both the nature of states and that of international law: Besson claims that international law recognises states not as being themselves the bearers of ultimate value, but as "trustees for the people committed to their care", and suggests that "[u]ltimately, international law is oriented to the well-being of human individuals, rather than to the freedom of states."[64]

It is beyond the scope of the current discussion to explore the intriguing question arising from Buchanan's last argument, namely whether democratic governance within national political communities is a necessary condition for the

[60] See Allen Buchanan, "The Legitimacy of International Law" in *The Philosophy of International Law*, *supra* note 57, 79 at 91.
[61] *Ibid.*
[62] Buchanan *Justice, Legitimacy, and Self-Determination*, *supra* note 56 at 304-5; see also *ibid*.
[63] See Besson, *supra* note 56 at 361.
[64] *Ibid.*

legitimacy of the international legal order.[65] What can be noted, however, is the way in which Buchanan's and Besson's remarks regarding the nature of states resonate with the claims of new natural law theory concerning the purpose of authority and law in the international sphere. As already considered, new natural law theory regards states as instrumental to furthering human welfare; it similarly maintains that international authority and international law exist to promote the international common good, and thereby to foster and secure the conditions that are favourable to human flourishing. A new natural law evaluation of consent theory would accordingly affirm, alongside theorists such as Buchanan and Besson, that locating the legitimacy of international law in the sheer fact of state consent perpetuates a distorted view of the significance of states.

More may be said, however, about the manner in which the new classical theory would critique consent theory, by having reference to the theory's own characterisation of the authority of international law and institutions. Viewed through the interpretive lens of the new natural law account of authority, the assertion that the authority of international law is a function of state consent is tantamount to a claim that acts of state consent themselves constitute exclusionary reasons for states to comply with these rules. As described earlier, however, new natural law theory claims that the exclusionary reasons that underpin state consent to international authority derive from the principle that authority is necessary for the international common good, combined with the fact that a given authority can be effective in furthering that common good;[66] in relation to international law, this effectiveness is said to be rooted in international law's specific qualities as 'law' that

[65] Some other normative theorists have advanced this argument even more forcefully: Fernando Tesón, for example, claims that the moral legitimacy of international law requires that only liberal democracies should be afforded membership in the international community. See generally Tesón, *supra* note 51; see also Besson, *infra* note 73 and accompanying text.
[66] See discussion at 84-85 above.

make it normatively salient for resolving the coordination problems of the international community.[67] New natural law theory would accordingly contest the hypothesis that state consent itself constitutes an exclusionary reason for states to comply with international law; instead, the theory would characterise consent as a response to the exclusionary reasons for action described above, an affirmation by states of the desirability of resolving their coordination problems and realising the international common good though cooperation with the mechanisms of international institutional authority and international law.

The foregoing claims, it should be noted, do not entail a suggestion that state consent is a juridically insignificant feature of international law. As already noted, the new classical theory affirms that laws derive an important dimension of their force from the sheer fact of having been promulgated;[68] in the case of international law, this translates into an acknowledgement that the consent of states is fundamental to the formal legal validity and *prima facie* authority of significant portions of international law, above all international treaties. At the same time, new natural law theory maintains that the ultimate basis of the authority of positive norms of international law lies in their concordance with the principles of practical reason. The theory will accordingly assert that where state consent is relevant in establishing international rules, it gives these rules only a defeasible claim to authority.

2. Razian 'Service Conception' of Legal Authority Applied to International Law

According to Raz, a person has authority over another when his directives constitute content-independent and pre-emptive reasons for action for the subject of

[67] See discussion at 93-97 above.
[68] See *supra* note 21 and accompanying text.

authority.[69] Such authority is said to be justified (that is, legitimate) if, in part, it satisfies what Raz calls the 'normal justification condition', namely that the subject of authority would likely better conform to the reasons for action that apply to her if she tries to be guided by the authority's directives than if she does not.[70] Raz describes the service conception of authority as a means of understanding the manner in which authority furthers individual autonomy, since it claims that authority is legitimate in circumstances where subjects' exercise of their own rational capacities leads them to recognise and conform to authority.[71]

Samantha Besson and John Tasioulas have both recently used Raz's service conception of authority as a basis for elaborating their own accounts of the legitimacy of international law. While the claims of Besson and Tasioulas differ in certain respects, Besson's account may be taken as illustrative. Besson observes that law's ability to facilitate coordination is one of the main content-independent reasons for action that satisfies the Razian normal justification condition.[72] According to Besson, democratic coordination, which respects the basic political equality of persons, constitutes the most legitimate manner of coordination in situations of pervasive reasonable disagreement over matters of justice.[73] Proceeding from these claims, Besson asserts that a democratic coordination-based justification of authority provides a convincing account of the legitimate authority of international law. One of the reasons for this, Besson suggests, is that this justification of authority

[69] See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) [Raz *The Morality of Freedom*] at 35ff, 57ff; see also Raz, *supra* note 2. By 'content-independent', Raz means that a person's directives are authoritative reasons for action because of the fact that that the person issues them and not because of their particular content. 'Pre-emptive' reasons are exclusionary reasons in the sense described earlier in this chapter, *i.e.*, they are reasons that exclude some countervailing reasons for acting a different way.
[70] See Raz *The Morality of Freedom*, *ibid.* at 53; Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2005-2006) 90 Minn. L. Rev. 1003 [Raz "The Problem of Authority"] at 1014.
[71] See Raz "The Problem of Authority", *ibid.* at 1015ff.
[72] See Besson, *supra* note 51 at 352.
[73] See *ibid.* at 353-54.

corresponds to the need for international regulation in circumstances involving a diversity of views and disagreement among the subjects of authority in the international sphere. Besson notes that states face both 'classic' coordination problems[74] as well as what she calls 'conflict and partial conflict' coordination cases, the latter being "cases where there is disagreement about issues of justice and common concern, and where it is better that all co-ordinate over the same set of international norms rather than acting individually (even correctly) according to their own reasons."[75] Besson maintains that given the significant variations in the beliefs and practices witnessed in the international legal order, democratic coordination provides one of the best justifications of authority "to escape irreducible substantive controversies."[76]

It is evident that the accounts of Besson and Tasioulas and the new natural law account provided in this chapter converge in their affirmation that the authority of international law is importantly related to law's role in facilitating coordination in the international community. Under the new natural law account, international law's capacity to be a salient coordinator for the international common good constitutes the primary basis of its authority; in Besson's and Tasioulas's interpretations of the service conception of authority, the effectiveness of law in enabling international coordination is one of the main reasons that satisfies the normal justification condition for determining legitimacy.

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[74] These, according to Besson, are problems that cannot be resolved by states acting individually and require coordination, *e.g.*, problems related to disease, economic instability and environmental degradation: see *ibid.* at 367.

[75] *Ibid*.

[76] *Ibid*. Tasioulas similarly argues that the legitimacy of international law derives in part from its ability to provide states with a framework for coordination, although he does not endorse a 'democratic' coordination justification since he disagrees with the idea that the democratic character of a law-making process is a fundamental criterion of its legitimacy: see Tasioulas, *supra* note 57 at 100-02.

At the same time, it may be suggested that the accounts of the legitimacy of international law based on the service conception of authority leave certain questions unanswered. Reference may again be had to Besson's analysis, beginning with her characterisation of 'conflict and partial conflict' coordination cases. In describing these cases as involving disagreement over issues of 'common concern', Besson relies on Jeremy Waldron's definition which indicates that a question is of common concern for a group of persons if "it is better for a single answer to be accepted by them than for each person to deal with the question on his own."[77] This definition, however, does not really assist in identifying the distinguishing characteristics of issues that would make them issues of 'common concern' to a group; instead, it contains an assertion regarding the appropriate response of group members when faced with a question of common concern. The normative claim that is implicit in this definition is itself question-begging: why is it 'better' for members of group to accept a common solution on issues of common concern, rather than attempting to derive and abide by their own individual solutions?

Further and more fundamental questions arise in relation to the overall explanatory force of Besson's account, considered as a version of the Razian service conception of legitimate authority. As noted earlier, the service conception of authority is ultimately concerned with demonstrating how authority facilitates individual autonomy.[78] Besson, in adapting this conception to the context of international legal order, argues that the autonomy of states is a function of the autonomy of the individuals that comprise it rather than being an independent phenomenon, and suggests that sovereign autonomy depends upon the state

[77] See Jeremy Waldron, "Authority for Officials" in Lukas H. Meyer, Stanley L. Paulson & Thomas W. Pogge, eds., *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003), as cited by Besson, *ibid.* at 353.
[78] See *supra* note 71 and accompanying text; Besson, *ibid.* at 352, 366.

respecting the autonomy of its subjects.[79] Notwithstanding Besson's insights, her discussion of the relationship between authority and autonomy in the international sphere raises the same question that might be raised in relation to the service conception of authority generally: why is autonomy important? Besson defines the concept of autonomy rather than explaining its significance, affirming that autonomy means "having and exercising the capacity to choose from a range of options"[80]; more recently, she has proposed that a person is autonomous "if his freedom is complete for the purposes of leading a good life."[81] Yet this latter definition invites its own line of inquiry, for what, indeed, does 'leading a good life' mean?

The questions raised by Besson's reinterpretation of the service conception of authority are arguably questions that can only be adequately answered by having reference to new natural law theory. The new natural law account presented herein posits human pursuit of the basic values as the ultimate objective that accounts for the authority of international law. International law, in furthering the common good of the international community of states, assists in safeguarding the autonomy of persons within this community that enables them to seek integral human fulfilment – the 'good life' – through their freely chosen pursuit of the basic goods. The coordination problems that arise among states, whether construed as pertaining to shared or disparate objectives of these states, are problems that impact upon the ability of states to achieve their objectives and, by implication, impair the ability of persons within national political communities to pursue their ends. The definitive resolution of these problems is indeed a shared objective of states in the international community, for without such resolution, *everyone's* ability to realise their particular

[79] See Besson, *ibid.* at 363-64; Samantha Besson, "Sovereignty, International Law and Democracy" (2011) 22 E.J.I.L. 373 [Besson "Sovereignty"] at 378.
[80] Besson, *supra* note 56 at 352.
[81] Besson "Sovereignty", *supra* note 79.

objectives is compromised; this is why it is appropriate to describe the subject-matter of coordination problems as being issues of common concern, and why it may be affirmed that the welfare of the international community and its populations is furthered if states agree upon common solutions to their coordination problems through international law.[82]

IV. Implications of the New Natural Law Account of International Authority and International Law

1. The Establishment and Form of International Authority

According to the new classical theory, it is a requirement of practical reasonableness that persons promote the common good of their communities. This requirement, considered in conjunction with the significance of authority in the international sphere for promoting the international common good, suggests that there are certain responsibilities incumbent upon the rulers and governments of states as caretakers of both the international community of states and of their respective national political communities. First, they should collaborate to establish authoritative international institutions to the extent necessary for addressing the coordination concerns of the international community. Second, they should recognise the authority of international institutions where these exist and comply with the dictates of such institutions, based on the presence of sufficient exclusionary reasons for doing so. State submission to international authority may itself be seen

[82] Besson indeed appears to endorse at least some aspects of this analysis, given her claim that international law is oriented to furthering human welfare; she has also asserted (although not in the context of discussing international law) that there are moral grounds for resolving coordination problems "because these problems have a severe negative impact on the wellbeing of all of us." See Besson, *supra* note 64 and accompanying text; Samantha Besson, *The Morality of Conflict* (Oxford: Hart Publishing, 2005) at 176.

as a form of cooperation within the international community that is relevant for the international common good.[83]

The array of international institutions cited throughout this chapter, exercising various legislative, executive and judicial functions affecting the entire international community or specific portions thereof, demonstrates that the need to establish international institutional authority is already recognised and realised to a significant degree in the international sphere. In this regard, it may be suggested that the new natural law account is instructive for characterising the international institutional landscape in normative terms, interpreting the existence of international institutions as not merely a response to practical necessities but also as flowing from the responsibilities of state governments for the welfare of their human populations.

It may be asked whether the new natural law account entails any more specific claims concerning international institutional authority, apart from advocating the need to establish such authority. At least one new natural law theorist, Robert George, has argued that it does, claiming that new natural law theory supports the institution of a central political authority or 'world government' for the international community.[84] According to George, such an authority "would attend to the common good of mankind through, for example, avoiding (or at least limiting) war, protecting the physical environment, preventing starvation and other forms of misery, promoting economic development, and protecting human rights."[85] George further suggests that in keeping with the principle of subsidiarity, a new natural law conception of world government would envisage this institution as complementing existing state governments rather than supplanting them, and as only exercising

[83] *Cf.* Robert George, "Natural Law and International Order" in Robert George, *In Defence of Natural Law* (Oxford: Clarendon Press, 1999) at 241; Paolo Carozza, "The Universal Common Good and the Authority of International Law" (2006) 9(1) Logos 29 at 51.
[84] See George, *ibid.* at 236.
[85] *Ibid*.

authority in relation to problems that could not be effectively addressed by regional, national or local authorities.[86]

George describes the envisaged world government as "the central authority of a complete community".[87] In this author's view, as previously noted, the notion of 'complete community' relies on the questionable idea that it is possible to have a single, all-encompassing community that can ensure all the myriad conditions that are important for human flourishing.[88] Yet even if this conceptual difficulty is set aside, George's claim that the new classical theory supports the establishment of a central political authority itself warrants scrutiny. It will be recalled that according to new natural law theory, sharing of aim is constitutive of community.[89] Based on this understanding of community, it indeed seems reasonable to speak in general terms of a single international community of states, since all states have a number of shared objectives corresponding to the international common good and engage in a range of collaborative endeavours for the sake of achieving these objectives. At the same time, it is evident that not all states share all the same objectives: circumstances of history, geography or culture, among other factors, may shape the identification of particular shared objectives among certain states to the relative exclusion of others. The existence of diverse subsets of shared objectives of certain states, within the general set of shared objectives of all states, suggests that the international community of states is perhaps best understood as a single conceptual entity and simultaneously as a 'community of state communities'.

George's assertion that the international community needs authority to secure all aspects of the universal common good that cannot be secured by authority at the

[86] See *ibid.* at 239-40.
[87] *Ibid.* at 240.
[88] See discussion in Chapter 2 at 67-68 above.
[89] See discussion in Chapter 2 at 45-46 above.

regional, national or sub-national levels is entirely consistent with the new natural law account of authority presented herein. At the same time, it is not evident that the new classical theory necessarily entails the creation of a single central political authority, since the theory is silent regarding the particular form that international authority should take. [90] The multiple dimensions of community witnessed within the international community, featuring a plurality of sets of shared objectives, has led to the emergence of multiple loci of authority in the international sphere, including regional institutions (such as the African Union and European Union) and subject-specific institutions (such as the WTO) for addressing the coordination problems of states. While George's description of a putative world government appears to conceive of this as a singular institution coordinating the affairs of the international community in diverse areas, the new natural law account of authority in the international sphere seems equally compatible with the establishment of multiple international institutions as has in fact occurred. This, it should be emphasised, is not tantamount to a rejection of the notion of world government as a plausible implication of the new natural law account; rather, it is a suggestion that the role to be filled by such an institution can conceivably be carried out by central political *authorities* in the international community, provided that these authorities can exercise comprehensive authority within their respective domains and can achieve the dimensions of coordination among themselves that may be necessary for their harmonious coexistence.

[90] George himself acknowledges that the proper constitution of the international order requires a process of 'determination', involving the selection of a constitutional scheme from a range of reasonable options: according to George, while natural law requires that a reasonable constitutional scheme be selected, "there is no scheme of international authority that is uniquely required as a matter of natural law". See George, *supra* note 83 at 238.

2. International Custom and the Development of the International Legal Order

The requirement of practical reasonableness that persons promote the common good of their communities, which entails that states should establish and submit to international authority, also suggests that states should have recourse to international law as a salient mechanism for resolving the coordination problems of the international community. States should prioritise the development of the international legal order, including the formal articulation of international norms and the establishment of adjudicative bodies for settling international disputes according to determinate legal rules. Practical reasonableness further requires that states comply with international law for the sake of advancing the international common good. As with the concept of authority, the new classical theory characterises the obligation to obey the law as having a moral dimension; this idea and its implications for understanding state obligation in relation to international law will be considered in detail in Chapter 5.

Over approximately the past seventy years, the international community has made significant advances in developing appropriate mechanisms for addressing its shared challenges, as manifested by the emergence of new international legal frameworks covering a wide spectrum of international affairs. The *Charter*, *Law of the Sea Convention*, and *General Agreement on Tariffs and Trade* are but a few prominent examples of contemporary international instruments that play an important role in furthering shared objectives of states such as the maintenance of international peace and security, the preservation of the earth's natural resources, and the realisation of fair terms of international trade. Through articulating rules providing clear guidance to states, and establishing institutions with the authority to monitor state compliance with international norms and resolve disputes, these legal

instruments serve to coordinate the activities of states in domains having considerable significance for the international common good.

While these developments in international law are to be welcomed, the new natural law account of the significance of international law presented herein also invites critical reflection on certain continuing features of the international legal order. Of particular concern in this regard is the status of international custom. As noted earlier, the formal characteristics of treaties and the existence of a procedural framework for treaty creation and change in the *Vienna Convention* render treaties particularly valuable as a means of coordination in the international sphere.[91] International law, however, features a plurality of sources of international norms, and treaties are not regarded as having a privileged status among these sources; rather, international custom exists alongside treaties as a primary source.[92]

Countless writers have analysed the phenomenon of international custom.[93] Finnis himself explores the concept at length in *Natural Law and Natural Rights*, using it as an example to demonstrate how an authoritative rule can emerge even in the absence of an authoritative legislator or an authorised law-creating framework. Finnis suggests that the international community has adopted custom-formation as an appropriate method of deriving authoritative rules because doing so enables the community to resolve its coordination problems, which is required for the sake of

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[91] See discussion at 98-99 above.

[92] See *Statute of the International Court of Justice*, Art. 38(1); Henkin, *supra* note 58 at 27. The terms of Art. 38(1) do not indicate a ranking of the three international law sources identified, *i.e.*, treaties, international custom, and general principles of law, and many writers affirm that no hierarchy of sources exists, although the issue has long been debated. See *e.g.*, Tulio Treves, "Customary International Law" in Max Planck Encyclopedia of Public International Law, online: Max Planck Encyclopedia of Public International Law <http://opil.ouplaw.com/home/EPIL>, para. 15; Pierre M. Dupuy, *Droit International Public* (Paris: Dalloz, 2002) at 17-19.

[93] See *e.g.*, Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971); Michael Akehurst, "Custom as a Source of International Law" (1975) 47(1) B.Y.I.L. 1; Karol Wolfke, *Custom in Present International Law*, 2d ed. (Dordrecht: Martinus Nijhoff, 1993); Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

this community's common good.[94] At the same time, Finnis observes that using custom-formation as a source of authority for the international community involves a number of potential difficulties, given the possibility for uncertainty and disagreement regarding the factors that will be used as evidence of the emergence of a particular custom.[95] Such difficulties have indeed repeatedly manifested themselves as jurists have attempted to identify precise norms of customary international law and to rely on the concept as a source of authority in addressing particular international disputes. While it is commonly understood that widespread and consistent state practice and *opinio juris* (the belief by a state that a particular practice is legally obligatory) are the necessary elements for demonstrating that a customary norm exists,[96] there continues to be considerable debate over questions such as how much state practice is required to qualify this practice as 'widespread' and 'consistent', what sorts of state actions will qualify as state practice, and what forms of evidence will constitute acceptable indicia of *opinio juris*.[97]

Notably, Finnis does not purport to equate custom with political authority and law as an ideal source of authority for a community; rather, his analysis of custom is a precursor to his discussion of these latter concepts. Indeed, in his comments regarding the authority of rulers, Finnis observes that political authority is needed precisely because of "[t]he clumsiness of custom-formation" as a means of

[94] See Finnis *NLNR*, *supra* note 1 at 243-44. Finnis similarly explains the component of international custom known as *opinio juris* by reference to the international common good; according to Finnis, *opinio juris* signifies not merely a state's belief that a particular practice is required by law, but more fundamentally a state's affirmation that the practice is desirable as a common rule of conduct for addressing the coordination needs of the international community in a specific domain: see *ibid.* at 239-40.
[95] See *ibid.* at 245.
[96] See *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 3 at 44, para. 77.
[97] See generally *e.g.*, D'Amato, *supra* note 93, Ch. 4; Akehurst, *supra* note 93; Byers, *supra* note 93 at 129-46.

generating authoritative solutions to coordination problems.[98] As Finnis's discussion indicates, the fundamental problem with custom as a source of authority is that it affords considerable scope for uncertainty regarding whether a *definitive* solution exists for a given coordination problem. This is particularly evident in the case of customary international law: the criteria for determining the existence of an international custom are articulated in broad terms and remain vulnerable to divergent interpretations, while the practices of states and their expressions of *opinio juris* may vary so significantly in their details that it may be difficult and require considerable time to ascertain a pattern of conduct that can be articulated in a precise way as constituting a customary norm.[99]

Customary international law is undoubtedly an integral component of the international legal order. It is a means for the development of international law outside the treaty-making framework, and offers a measure of flexibility to the process of norm creation in the international sphere that the latter context generally lacks.[100] International custom also remains significant for the international community given the universal applicability of general customary rules[101] and the corresponding fact that few treaties are ratified by all states: there is obvious value, for example, in the ability to use customary international law to enforce norms prohibiting torture and genocide against states that have not ratified the international conventions prohibiting these acts. The relative merits of international custom, however, do not obscure the fact that custom, which involves an uncertain,

[98] Finnis *NLNR*, *supra* note 1 at 245.
[99] Some writers on international law have highlighted this problem in similar terms. Jean d'Aspremont, for example, suggests that since customary international law relies fundamentally upon non-formal ascertainment criteria, rules of international custom are susceptible to being "dangerously indeterminate", and that this in turn negatively affects the normative character of these rules and the extent of their authority. See Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011) at 164.
[100] See d'Aspremont, *ibid.* at 163-64.
[101] See *North Sea Continental Shelf Cases*, *supra* note 96 at 38-39, para. 63; see also Wolfke, *supra* note 93 at 86-87.

protracted, and often controversial process of generating international norms, is less effective than treaties in facilitating the coordination of the international community's affairs. Reference may be made in this regard to the concept of the focal meaning of law: inasmuch as this concept identifies the features of law that are particularly beneficial to community coordination, it may be said that international custom is further away from the central case of law than treaties are, and is accordingly a less ideal mechanism for promoting the common good of the international community.

From a new natural law perspective, then, it is somewhat curious that international custom apparently continues to be regarded as an equivalent source of authority in international law alongside treaties. It is suggested that given their superior utility for furthering the international common good, international treaties should be affirmed in international legal doctrine as the primary source of authority in international law, with custom being treated as a subsidiary source of authority. Furthermore, states should prioritise the elaboration of international law through treaty norms in areas where such norms are still lacking, in recognition of the particular value of treaties as instruments for the development of the international legal system. There has long been a level of recognition within the international community of the benefits of codifying international custom, and within recent decades some advances have been made towards the codification of certain aspects of customary international law, most notably in the areas of international humanitarian law and the law of naval warfare.[102] Notwithstanding the value of

[102] See generally Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Law*, Vol. 1 (Cambridge: Cambridge University Press, 2005), the outcome of a study commissioned by the International Committee of the Red Cross to articulate the existing customary rules of international humanitarian law; Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995), a restatement of the contemporary law of naval warfare prepared by international lawyers and naval experts working under

these developments, it is suggested that the primary focus of efforts by states and international institutions to address the coordination problems of the international community should be on achieving the comprehensive articulation of this community's coordination norms in international conventions, and on ensuring that these treaties are ratified by all states to which they may be applicable.

3. Peremptory Norms (*jus cogens*)

As described in Article 53 of the *Vienna Convention on the Law of Treaties*, a peremptory norm of general international law is "a norm accepted and recognised by international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[103] The *Vienna Convention* affirms that an international treaty that conflicts with a peremptory norm is invalid.[104] Since the doctrine of *jus cogens* is also understood to form part of customary international law, it is applicable to treaties regardless of whether the treaty parties are also parties to the *Vienna Convention*; it has additionally been argued that as a matter of international custom, the doctrine is now also pertinent to international laws other than treaties, such as the resolutions of international organisations.[105] The doctrine of peremptory norms additionally finds expression in the law of state responsibility: as stipulated in the International Law Commission's Draft Articles on State Responsibility, a state cannot invoke any of the recognised 'circumstances precluding wrongfulness' as a means of avoiding its responsibility for breaching an

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the auspices of the International Institute for Humanitarian Law. Mention should also be made here of the ongoing work of the International Law Commission on the identification of customary international law: see International Law Commission, *Second Report on Identification of Customary International Law*, report of the Special Rapporteur, Mr. Michael Wood, UN Doc. A/CN.4/672 (2014).

[103] *Vienna Convention*, *supra* note 46, Art. 53.

[104] See *Vienna Convention*, *ibid*, Arts. 53, 64 & 71.

[105] See Antonio Cassese, *International Law*, 2d ed. (Oxford: Oxford University Press, 2005) at 204-05.

international legal obligation, if the situation described by the state as corresponding to one of these circumstances itself involves the violation of a peremptory norm of international law.[106]

The modern international law doctrine of *jus cogens* conveys divergent and seemingly contradictory messages about the nature of peremptory norms. On the one hand, *jus cogens* appears to denote a category of 'higher' norms in international law that constitute a principled limit to the contractual freedom of states in the international sphere. Thus construed, peremptory norms have often been associated with natural law doctrines.[107] At the same time, the definition of *jus cogens* enshrined in the *Vienna Convention* indicates that peremptory norms are those norms 'accepted' by the international community of states as peremptory, a description that paradoxically suggests that the peremptory status of these norms is crucially influenced by state consent. The motley character of the *jus cogens* doctrine reflects the longstanding divergence of views among jurists and within the international community generally regarding the conceptual foundation of peremptory norms; in this regard, it may be noted that the doctrine of peremptory norms has at times been characterised as involving a conflict between voluntarist and non-voluntarist conceptions of international law, with some writers seeming to interpret the doctrine using either a consensual or non-consensual framework to the exclusion of alternative perspectives.[108]

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[106] See International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) [*State Responsibility*] at 28 (Article 26).

[107] See *e.g.*, Alfred Verdross, "*Jus dispositivum* and *jus cogens* in International Law" (1966) 60 A.J.I.L. 55 at 56 (referring, in the context of discussing *jus cogens*, to the idea of 'necessary law' in the international law doctrines of Christian Wolff and Emeric de Vattel as exemplars of the "natural law school of international law"); Mark W. Janis, "The Nature of *jus cogens*" (1988) 3 Conn. J. Int'l L. 359 at 361 (suggesting that "[t]he distinctive character essence of *jus cogens* is such… as to blend the concept into traditional notions of natural law").

[108] See *e.g.*, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the

It is suggested that the new natural law account of the relationship between natural law principles and positive law has relevance for understanding the nature of peremptory norms and the sources of their authority. As was argued earlier in this chapter, rules of positive international law may be understood as determinations of natural law principles that have formal legal authority in virtue of being created though the law-determining acts of states, and that derive their moral authority from their conformity with these principles.[109] The doctrine of *jus cogens*, which exists in positive international law both through its articulation in the *Vienna Convention* and in customary international law, may itself be described as a determination of natural law principles. In furtherance of natural law principles requiring promotion of the international common good and preservation of the basic human values, the doctrine of *jus cogens* attaches specific legal significance to particular international norms that themselves implement natural law principles, and affirms that specific legal consequences will flow from the incompatibility of international laws with these norms.

The international norms that are widely recognised as peremptory include the prohibitions against genocide, slavery, and torture, the prohibition of the use of force, the right to self-determination, the prohibition of racial discrimination, and the basic rules of international humanitarian law.[110] From the perspective of new natural law

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International Law Commission, UN Doc. A/CN.4/L.682 (2006) at para. 375, in which the observation is made that "[t]he historical background of *jus cogens* lies in an anti-voluntarist, often religiously inclined natural law, the presumption of the existence of 'absolute' norms on human conduct"; Gennady M. Danilenko, "International *Jus Cogens*: Issues of Law-Making" (1991) 2 E.J.I.L. 42 at 44-48 (discussing conceptual tensions in the doctrine of peremptory norms under the heading 'Natural Law vs. Positivism'); Janis, *ibid.* at 360-62 (claiming that *jus cogens* "functions like a natural law" and contesting the view that peremptory norms may be related to customary international law); Michael Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules" (1997) 66 Nord. J. Int'l L. 211 at 220-29 (interpreting *jus cogens* as emerging from the process of international custom, and arguing that peremptory norms cannot be based on natural law principles).

[109] See the discussion at 101-06 above.

[110] See *State Responsibility*, *supra* note 106 at 85, where the Commission discusses peremptory norms in its Commentary to Article 26 of the Draft Articles on State Responsibility; see also Alexander

theory, these norms implement, in the context of international law, the principles of practical reason and requirements of practical reasonableness that affirm, for example, that life and all of its aspects (such as health and bodily integrity) is a basic human good, that there should be no intentional violation of the basic values, that persons should be treated as ends rather than means, and that the common good of one's communities should be promoted and preserved. It may be readily affirmed, then, that peremptory norms are related to natural law principles in terms of their content: natural law principles are, on this analysis, the source of the moral authority of international *jus cogens* rules.[111]

The content of peremptory norms, however, is to be distinguished from the legal status afforded to these norms in international law. In relation to this status, the new classical theory suggests that the doctrine of peremptory norms is properly understood as a *positive law* rather than natural law construct. The doctrine of *jus cogens* not only affirms natural law principles indicating that objectives pertaining to the international common good and human flourishing are to be pursued and protected: it also serves to promote and safeguard these objectives in a specific way, by endowing the norms that correspond to these objectives with peremptory legal status. In this regard, the doctrine constitutes a unique legal mechanism through which the international community may affirm the importance of the basic human values and of the supranational conditions that facilitate human well-being, as well as the importance of coordination within the international community for achieving the international common good. The creation of a hierarchy of norms in positive

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Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 50-65; Cassese, *supra* note 105 at 202-03.

[111] For a comparable interpretation of the relationship between *jus cogens* and natural law principles using the framework of new natural law theory, see Dan Dubois, "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?" (2009) 78 Nordic J. Int'l L. 133 at 159-66.

international law, with defined legal rules governing cases of normative conflict, is a determination of natural law principles within the realm of positive law – it is a selection by the international community of a particular means of addressing its coordination problems for its common good, a means that is not itself specifically prescribed by natural law principles but that indeed gives effect to them. While the moral authority of peremptory norms stems from their substantive consistency with natural law principles, the legal authority of peremptory norms *qua* peremptory derives from the fact that the international community has chosen to implement the *jus cogens* doctrine in international law, as manifested initially by the emergence of the doctrine in international custom and subsequently by its articulation in the *Vienna Convention*.

One inference that may be drawn from the above considerations is that natural law principles are indeed relevant for articulating and developing the content of the category of *jus cogens* in international law. As shall be argued in the next chapter, the doctrine of *jus cogens* can be a useful mechanism for giving practical effect to what may be described as 'principles of justice' for international law, considered as supreme principles of the international legal order.[112] Additionally, while the voluntarist flavour of the *Vienna Convention* definition of peremptory norms suggests that *jus cogens* may in principle include any international norm that states recognise as being peremptory, the new natural law interpretation of the moral authority of *jus cogens* supports the view that this category should not include norms that in their content are inconsistent with natural law principles.[113] It should also be

[112] See the discussion in Chapter 4 at 154-55 below.

[113] For example, it has been argued that *jus cogens* includes a state obligation to assassinate enemy officials in particular circumstances: see Louis René Beres, "Prosecuting Iraqi Crimes Against Israel During the Gulf War: Jerusalem's Rights Under International Law" (1991) 9 Ariz. J. Int'l & Comp. L. 337 at 358. Since new natural law theory interprets *jus cogens* as furthering natural law principles, the theory will maintain that the category of peremptory norms should not include a norm requiring states

observed, however, that given its character as a positive law construct, the doctrine of *jus cogens* can only be made fully effective for the international common good if the international community takes further steps to elaborate and implement this doctrine in international law. This would appear to entail, at a minimum, a definitive articulation of which international norms currently constitute *jus cogens*, an objective which is admittedly challenging in the absence of an all-encompassing institutional authority for the international community, but one towards which some meaningful steps may nevertheless be taken.[114]

Conclusion

This chapter has explored the new natural law conception of authority and law and has used it to interpret the normative significance of these concepts in relation to the international sphere. It has argued that international authority and international law derive their authority from their respective roles in furthering the international common good through facilitating coordination within the international community. Inasmuch as such coordination is essential to securing the conditions for human flourishing, the analysis has affirmed that the international common good is central to justifying the authority of international law and institutions. This chapter has also suggested that natural law principles inform the determination of positive

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to perform an act that involves intentional infringement of the basic human good of life, contrary to the requirements of practical reasonableness.

[114] States could, for example, agree upon a declaration of peremptory norms through the United Nations General Assembly, which could ultimately become recognised as part of customary international law in a manner similar to the *Universal Declaration of Human Rights*. With a view towards such an objective, the initial endeavour of identifying a list of existing peremptory norms could presumably be carried out by the International Law Commission. At the time of drafting of the provision on *jus cogens* in the *Vienna Convention*, the Commission opted not to specify a list of peremptory norms, leaving the content of *jus cogens* to be elaborated through state practice and in the jurisprudence of international tribunals: see International Law Commission, *Report of the International Law Commission on the Work of its Eigtheenth Session*, UN GAOR, 21st Sess., Supp. No. 9, UN Doc. A/6309/Rev.1 (1966) at 248. More recently, the Commission has provided examples of peremptory norms in its Commentary to the Draft Articles on State Responsibility: see *supra* note 110 and accompanying text.

international law, and has introduced the notion of moral authority as an integral dimension of the authority of such law. These propositions merit further explanation. In particular, the claim that the authority of international law and institutions is contingent upon their conformity with natural law principles requires a specification of what conformity with these principles precisely entails, entailing an elaboration of what the new classical theory describes as 'the requirements of justice' and consideration of how these requirements apply in the international context. A proper understanding of this claim also requires an examination of the new natural law conception of obligation, and an application of this conception to considering the dynamics of legal obligation in the international sphere. These topics shall be addressed in the following chapters.

Chapter 4
Justice, Human Rights, and International Law

The concepts of justice and human rights lie at the heart of new natural law jurisprudence. Like the concepts of authority and law, justice and human rights are concepts that bear a fundamental relationship to the idea of the common good. As seen in the preceding chapter, new natural law theory interprets the significance of authority and law as a function of their role in furthering pursuit of the common good. Justice and human rights, meanwhile, are concepts that provide insight into the content of the common good; these concepts 'pierce the veil', as it were, of the common good concept and reveal what pursuing this objective precisely entails.

This chapter examines the new natural law conceptions of justice and human rights and considers their significance for articulating a normative theory of international law. The chapter seeks to identify principles of justice for international law and, by implication, for the international community. The analysis in this chapter focuses on describing the requirements of justice for ideal norms of positive international law; in this regard, it is a discussion primarily concerned with providing an interpretation of what positive international law should be, not with outlining principles of justice for states in their international relations.[1] At the same time, inasmuch as positive international law is primarily created by states, the principles of justice identified herein have obvious normative implications for the states and other

[1] The focus of this discussion is thus to be distinguished from that found in some recent notable works that are either partly or wholly concerned with articulating principles of justice for the constitution of the international community, even though these works also feature some discussion of international law principles. See *e.g.*, John Rawls, *The Law of Peoples: with, "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press, 1999); Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998). Both of these works in different ways highlight adherence to principles of justice and respect for human rights as important criteria for the membership of states in the international community, as distinct from criteria to be applied to the analysis of positive international law.

actors within the international community that are involved in the creation of international legal norms.

It is suggested herein that there are two principles of justice for ideal international law that may be derived from the new natural law account of justice and human rights. First, respect for and promotion of human rights should be the primary principle informing the content of positive international law. In this regard, it is suggested that the norms of international human rights law constitute the primary contemporary criteria for the development and evaluation of international legal rules. Second, positive international law should be consistent with the objective of promoting and protecting the international common good, for the sake of the further objective of respecting and promoting human rights.

This chapter proceeds in three parts. The first section outlines the manner in which new natural law theory interprets the concepts of justice and human rights. This section describes the essential relationship between these concepts, the new natural law characterisation of human rights as being grounded in basic human goods, and the manner in which both justice and human rights relate to the common good. Proceeding from this outline, the second section articulates and explains the two abovementioned principles of justice for ideal international law that are based on the new natural law framework. As this section further argues, the principles of justice should be regarded as supreme norms of the international legal order, a claim that has significance for defining the content of peremptory norms but that should principally be understood as advocating a prioritisation of the principles of justice in the development and evaluation of positive international law. The final section explores the primary claims regarding justice and human rights expressed by a leading international legal theorist, Allen Buchanan, in his normative theory of

international law,[2] and considers these claims from the perspective of the new classical theory. The analysis in this section engages with Buchanan's assertion that justice is a morally obligatory goal for international law, as well as his views regarding human rights and distributive justice. In identifying areas of both similarity and divergence between Buchanan's claims and the new natural law perspective on the issues Buchanan discusses, this section reveals some of the implications of the new natural law conception of justice and human rights for understanding specific dimensions of normative international legal theory.

I. The New Natural Law Conception of Justice and Human Rights

1. Justice

The description of justice offered by new natural law theory is essentially Aristotelian in origin, and builds in particular on Aquinas's analysis and reformulation of Aristotle's conception of justice.[3] According to Finnis, the concept of justice encompasses three elements, namely other-directedness, duty, and equality or proportionality.[4] The concept of justice, Finnis explains, concerns a person's interactions with other persons (thus, it is 'other-directed'); it has as its subject the determination of what one person owes to another and what the other person is entitled to (thus, it contemplates 'duty'); finally, in its attention to what persons are owed, the concept entails acknowledgement of the equal worth of persons and their equal entitlement to be regarded as subjects of justice (thus, it involves

[2] This theory is primarily set out in Allen Buchanan, *Justice Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) [Buchanan *Justice*].
[3] For Aristotle's treatise on justice, see generally Aristotle, *Nicomachean Ethics*, trans. Christopher Rowe (Oxford: Oxford University Press, 2002), V; for Aquinas's discussion of justice, see Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981) [*Summa Theologiae*], Vol. 3, II-II, q. 57 *et seq*.
[4] See John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [Finnis *NLNR*] at 161-63.

considerations of 'equality').[5] Finnis follows Aristotle and Aquinas in describing justice as a relational concept concerning what one person owes another, and correspondingly, what that other person is entitled to as a matter of right.[6]

Finnis affirms that justice is a requirement of practical reasonableness, thereby synthesising the classical notion of justice with the vocabulary and conceptual framework of new natural law theory.[7] The requirement of justice, Finnis specifies, is an ensemble of the requirements of practical reasonableness, and is effectively equivalent to the principle that persons should promote the common good of their communities.[8] The requirement of promoting the common good, as Finnis notes, itself manifests the three abovementioned components of the concept of justice. The requirement is inherently other-directed, since it concerns the common good of the community or communities to which a person belongs; it also inherently contemplates duty, since it exists as a 'requirement' of practical reasonableness.[9] Finally, the requirement entails attention to equality, both in the sense that it is directed to the common good of a community rather than the particular good of some of its members considered in isolation, and in the sense that the common good is

[5] See Finnis *NLNR*, *ibid.* at 161-63, 460-61. Finnis notes that the notion of 'equality' as raised in this context is not to be understood as entailing an affirmation that all persons are to be treated identically in every circumstance: *ibid.* at 177, 461.
[6] See generally *ibid.* at 161-63 and 193, notes to section VII.1.
[7] See *ibid.* at 161.
[8] *Ibid*. Finnis in the second edition of *Natural Law and Natural Rights* indicates that once the 'first principle of morality' is identified and articulated – that is, that one ought to choose only those possibilities whose willing is compatible with a will towards the ideal of integral human fulfilment – there is no need to treat the requirement of promoting the common good of one's communities as a distinct requirement of practical reasonableness. Consistent with this, Finnis in this edition observes that justice is a direct implication of the master moral principle. See *ibid.* at 451, 456-57, 461. It should nevertheless be noted that in acknowledging that the content of the common good principle is effectively subsumed under the master principle of morality, Finnis does not suggest that the principle is to be discarded: the requirement of promoting the common good, according to Finnis, is simply a restatement of the master principle of morality as applied to human conduct in the context of community life. See *ibid.* at 456-57. Thus, Finnis's articulation of the master principle of morality does not affect the viability of considering justice in its relationship to the requirement of promoting the common good, as is done in the first edition of *Natural Law and Natural Rights* and in the present discussion.
[9] See *ibid.* at 164.

ultimately related to the basic dimensions of human flourishing that are equally good for all persons.[10]

In keeping with the Aristotelian conception of justice, Finnis identifies two overall senses in which the concept of justice may be considered, namely 'general' and 'particular' justice.[11] According to Finnis, justice in its general sense denotes complete virtue, a thoroughgoing adherence to all the requirements of practical reasonableness and a constant disposition towards favouring the common good.[12] Particular justice, meanwhile, encompasses the elaboration of what adhering to the requirements of practical reasonableness entails in specific contexts.[13] In the first edition of *Natural Law and Natural Rights*, Finnis further followed Aristotle's classification of the modes of justice and, consistent with Aquinas's restatement of Aristotle's framework, identified two species of particular justice, namely 'distributive' and 'commutative' justice. Finnis characterised distributive justice as involving the practically reasonable resolution of problems in which some essentially common subject-matter, such as the common resources of a community, needs to be appropriated to particular individuals for the sake of furthering the common good.[14] Commutative justice, meanwhile, was described as concerning the reasonable determination of rights and duties between persons in situations not directly involving the distribution of some common subject-matter.[15] Finnis indicated that all problems of justice could be understood in terms of this classification framework; at the same time, he observed that the distinction between the two species of justice was an "analytical convenience", and noted that many types of actions and legal rules

[10] *Ibid*.
[11] See *ibid.* at 164-66.
[12] See *ibid.* at 165. Aristotle called this sense of justice 'legal' justice: see Aristotle, *supra* note 3, V, 1 & 6.
[13] See *ibid.* at 166.
[14] See *ibid.* at 166-67.
[15] See *ibid.* at 177-78.

simultaneously invoked considerations of both distributive and commutative justice.[16]

More recently, Finnis has moved away from employing this classification of justice into different species, on the grounds that it yields "no really clear and stable analytical pattern" and does not significantly assist in highlighting the substantive issues of justice.[17] Finnis now suggests that it is preferable to focus on ranges of issues of justice rather than forms of justice.[18] While Finnis purports to abandon the distinction between distributive and commutative justice as an analytical tool, the discussion of justice in terms of these species remains commonplace in legal and political theory and it is not evident that consideration of justice by reference to these categories may be easily escaped.[19] Nor is it apparent that the classification scheme is entirely unhelpful: at a minimum, it may be affirmed that Finnis's descriptions of the characteristics of the coordination problems that he formerly distinguished using the classical framework remain relevant, as do his observations regarding the criteria to be considered in addressing these problems. It is true, for example, that promoting the common good of a community often entails attending to the distribution of common resources among individual members of the community, and that one of the fundamental criteria that is invariably relevant to making a reasonable distribution of such resources is the relative need of community members.[20] The substance of Finnis's discussion of distributive justice will be used later in this chapter as a

[16] See *ibid.* at 166, 179-80.
[17] See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) [Finnis *Aquinas*] at 188; see also Finnis *NLNR*, *supra* note 4 at 460.
[18] See Finnis *NLNR*, *ibid.* For examples of this modified approach, see generally Finnis's discussion of Aquinas's thought on the topics of property, contract, commerce, and compensation and punishment in Finnis *Aquinas*, *ibid* at 188-215.
[19] It has been argued that Finnis himself continues to make distinctions in his work that correspond to the categories of distributive and corrective justice, even though he does not describe the 'issues' of justice using these labels: see Richard W. Wright, "The Principles of Justice" (2000) 75 (5) Notre Dame L. Rev. 1859 at 1885-87.
[20] See Finnis *NLNR*, *supra* note 4 at 174.

reference point in describing and analysing the types of justice considerations that arise in the context of the international community and international law.

In presenting the new natural law conception of justice, Finnis highlights the significance of justice as a 'norm of action', that is, as a principle for discriminating among potential courses of action and making an appropriate selection from the available options.[21] It may be noted that Finnis also affirms the sense in which justice is to be understood as a virtue, a steady willingness to give persons that which is due to them.[22] While Finnis admits to giving insufficient attention to discussing this dimension of justice in *Natural Law and Natural Rights*, he also maintains that his overall approach in that text consciously focuses on elaborating the content and normative significance of principles rather than virtues; as Finnis explains, principles have "logical and rational primacy" over virtues since the latter, as aspects of a person's willingness to make good choices, manifest an affirmative response of the will to the propositional reasons for action identified in natural law principles.[23]

2. Human Rights

For new natural law theory, the idea of 'natural rights', or human rights, is fundamentally linked to the existence of basic human goods.[24] The basic values, as Finnis affirms, indicate the objects in which human capacities for fulfilment are realised.[25] According to Finnis, all persons have what he describes as "radical

[21] See *ibid*. at 459.
[22] Finnis thus observes that general justice "as a quality of character, is… a practical willingness to favour and foster the common good of one's communities": *ibid*. at 165. As Finnis observes somewhat belatedly in the second edition of *Natural Law and Natural Rights*, the notion of virtue is integral to Aquinas's definition of justice: see *ibid* at 460; *Summa Theologiae*, *supra* note 3, II-II, q. 58, a. 1 ("justice is a habit whereby a man renders to each one his due by a constant and perpetual will").
[23] See Finnis *NLNR*, *ibid.* at 420-21, 460; see also Finnis *Aquinas*, *supra* note 17 at 124.
[24] Finnis regards 'natural rights' and 'human rights' as synonymous terms, the latter being a contemporary variant of the former: see *ibid.* at 198.
[25] See John Finnis, *Collected Essays: Volume III. Human Rights and Common Good* (Oxford: Oxford University Press, 2011) at 4-5.

dynamic capacities" for flourishing in the basic goods, and the fact that persons share in these capacities is foundational to the concept of human rights.[26]

The essential connection between human rights and the basic human goods provides the starting point for understanding the relationship between human rights and justice. The concept of justice, as already noted, pertains to the determination of duties and entitlements between persons; to be concerned with justice is to be concerned with what persons are entitled to. According to the new classical theory, human rights and the duties to respect them articulate the directiveness of the principles of practical reason in their interpersonal implications: I am directed, as a matter of practical reasonableness, to pursue my own fulfilment in the basic goods, and I am simultaneously required in practical reason to respect and promote the capacity of others to do the same.[27] As Finnis notes, duties to respect human rights flow from the equality of persons and the ontological unity of the human race that is rooted in persons' shared radical capacities for freely pursuing fulfilment in the basic goods: such duties affirm the fact that the basic goods, as *human* goods, are as good for every other person as they are for oneself.[28]

The idea that human rights are importantly linked to the basic values also provides the basis for new natural law theory's understanding of the relationship between human rights and the common good. It will be recalled that the common good encompasses the set of conditions that enable members of a community to pursue the basic values for themselves; in this regard, the common good ultimately

[26] *Ibid.* at 5-6. Finnis indicates that the 'radical' capacities that persons are born with eventually become active as persons mature: see *ibid.*
[27] See *ibid.* at 6-7.
[28] See *ibid* at 7. Duties to respect and promote human rights are thus consistent with, and serve to implement, the master principle of morality requiring that one's actions should be compatible with a will towards the fulfilment of all persons in all the basic goods. *Cf.* Finnis *NLNR, supra* note 4 at 461.

concerns the flourishing of individuals and communities.[29] For new natural law theory, human rights embody and specify the dimensions of human flourishing that are the objective of promoting the common good. According to Finnis, formal articulations of a list of human rights such as those seen in national constitutions and in international human rights instruments constitute "a way of sketching *the outlines of the common good*, the various aspects of individual well-being in community."[30] The modern language of human rights, Finnis notes, complements the common good principle by providing specific indicia of what promoting the common good of a community entails, doing so in a manner that affirms that each of the dimensions of human flourishing is commonly the right of every person.[31] The new classical theory further maintains that respecting human rights is an integral component of promoting the common good.[32] Respect for human rights, both by individual members of a community and by those having authority within the community, is itself part of the set of conditions that facilitate human flourishing.

Having described the concepts of justice and rights, and identified their relationship to each other as well as their particular relationships to the common good, the interconnectedness of these three concepts may be affirmed and summarized. The requirements of justice are the implications of the principle of practical reasonableness indicating that persons should promote the common good of their communities. Human rights embody and identify the particular aspects of human flourishing that are the objective of promoting the common good; human rights and their correlative duties together provide the content for articulating the

[29] See Finnis *NLNR*, *ibid.* at 155, 459; see also the discussion in Chapter 2 at 46 above.
[30] Finnis *NLNR*, *ibid.* at 214 [emphasis in original].
[31] See *ibid.* at 214, 221. In making this point, Finnis refers extensively to the human rights norms recognised in the *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*Universal Declaration of Human Rights* or *UDHR*]. See Finnis *NLNR*, *ibid.* at 214.
[32] See *ibid.* at 214, 218; see also John Finnis, "Grounds of Law and Legal Theory: A Response" (2007) 13 Legal Theory 315 at 338.

requirements of justice in the context of community life. Respect for human rights is a general requirement of justice; simultaneously, it is an important component of the set of conditions comprising the common good.

Two other aspects of Finnis's description of human rights may be noted. The first of these is his characterisation of absolute human rights. While Finnis claims that the modern grammar of human rights "provides a way of expressing virtually all the requirements of practical reasonableness",[33] his discussion of human rights in *Natural Law and Natural Rights* does not go far in describing the links between contemporary articulations of human rights norms and the various requirements of practical reasonableness (apart from the common good principle) outlined earlier in that work. Finnis does, however, draw attention to one of these requirements – namely, the principle that persons must maintain respect for all the basic goods in their conduct, and not choose to act in a manner that directly impairs any of these goods[34] – in order to affirm the existence of absolute human rights as a distinct category of natural rights. According to Finnis, absolute human rights are corollaries of the exceptionless duties that follow from the requirement that persons refrain from acts that directly violate the basic goods; examples of such rights that Finnis cites include the right to life, the right to procreation, and the right not to be deliberately condemned on false charges.[35] Finnis maintains that since the existence of absolute human rights is a direct implication of the requirements of practical reasonableness, the plausibility of claiming that such rights exist is not affected by the consideration that the inviolability of absolute human rights is scarcely recognised or observed in practice.[36]

[33] Finnis *NLNR*, *supra* note 4 at 198.
[34] On this requirement, see *ibid.* at 118-23.
[35] See *ibid.* at 225.
[36] *Ibid*.

A second notable element of Finnis's analysis is his discussion of the concepts of 'public morality' and 'public order'. These concepts are cited in a number of international human rights instruments as grounds for limiting the exercise of human rights.[37] Finnis describes public morality and public order as "diffuse common benefits in which all participate in indistinguishable and unassignable shares"; as such, they are conceptually distinct from the individual human rights that they may limit.[38] Finnis suggests that these concepts usefully affirm the idea that the secure enjoyment of human rights depends on the existence and preservation of an environment that is itself favourable to the exercise of rights.[39] Finnis's interpretation of public order is illustrative: this concept, he claims, concerns "the maintenance... of the physical environment and structure of expectations and reliances essential to the well-being of all members of a community, especially the weak."[40] According to Finnis, violations of public order not only affect the particular persons whose rights are directly infringed, but also detrimentally affect the environment of the entire community of persons seeking to enjoy their rights.[41] The concepts of public morality and public order may thus be seen as identifying components of the common good that are not equivalent to human rights, but that nonetheless play an important enabling role in relation to the exercise of human rights.

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[37] Finnis cites as an example Art. 29 of the *Universal Declaration*, which states that the exercise of individual rights and freedoms "shall be subject only to such limitations as are determined by law solely for the purpose... of meeting the just requirements of morality, public order and the general welfare in a democratic society". See *ibid.* at 211-12; see also *e.g.*, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [*International Covenant on Civil and Political Rights* or *ICCPR*], Arts. 12(3); 19(3)(b); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [*ECHR*], Arts. 9, 10.

[38] Finnis *NLNR*, *ibid.* at 216.

[39] See *ibid*.

[40] *Ibid.* at 217.

[41] For example, Finnis suggests that incitement of hatred not only infringes the rights of the persons hated, but also "threatens everyone in the community with a future of violence and of other violations of right, and this threat is itself an injury to the common good": *ibid*.

II. Identifying Principles of Justice for International Law Based on New Natural Law Theory

The foregoing account of the new natural law conceptions of justice and human rights lays the groundwork for considering the possible implications of this conception for articulating principles of justice relevant to international law and, by implication, to the international community of states. The discussion that follows takes the approach of identifying principles of justice for ideal positive international law – law that reflects, to the greatest degree possible, adherence to the requirements of practical reasonableness.[42] These principles are addressed in the main to states, which remain primarily responsible for the creation and development of international legal norms. International treaty norms and rules of international custom do not only regulate the conduct of state entities in their international relations, but also have impacts on the welfare of individuals and communities residing within states. The discussion below considers the implications of the new natural law conception of justice for describing the duties of states towards persons in relation to the formulation and evaluation of international law: in this regard, it draws attention to the human rights of persons comprising the universal community of persons, as well as the instrumental significance of the international common good for the exercise of human rights. 'State' duties, it may be reaffirmed, is here understood as signifying the duties to be observed by those persons who possess authority within a state and are primarily responsible for determining the course of the state's conduct in international affairs: it is these persons who, in making decisions that shape the

[42] These principles are additionally relevant to international institutions inasmuch as these play an increasing role in the creation and evaluation of positive international law: *cf.* Allen Buchanan, "The Legitimacy of International Law" in Samantha Besson & John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 79 at 80. Nonetheless, this discussion will maintain an emphasis in its wording on states, in accordance with their continuing predominant role in shaping the content of the international legal order.

content of international norms, are obliged to abide by the requirements of practical reasonableness.[43]

It is suggested that there are two overarching principles of justice for international law that may be derived from the new natural law framework, and that themselves provide the basis for subsequent articulation of additional norms. These principles are set out below.

Principle 1. Respect for and promotion of human rights should be the primary principle informing the content of positive international law.

As already seen, new natural law theory characterises human rights as precise expressions of the requirements of justice: these rights identify the dimensions of human flourishing that are the object of the common good principle. The new classical theory also maintains that law in its focal meaning is directed toward furthering the common good of a community through resolving the community's coordination problems.[44] The new natural law affirmation that law should further the common good of a community, considered in conjunction with the theory's intersecting conceptions of the common good and human rights, entail a claim under new natural law theory that the content of ideal positive law should demonstrate respect for human rights. This claim may be restated with specific reference to international law: laws seeking to address the coordination problems of the international community of states should do so in a manner that prioritises the promotion and preservation of the human rights of persons comprising the universal human community.

The principle that the content of positive international law should promote and safeguard human rights is arguably an implied dimension of states' obligations

[43] *Cf.* discussion in Chapter 3 at 91-92 above.
[44] See the discussion in Chapter 3 at 85-86 above.

to the international community as identified in the *Charter of the United Nations*.[45] It may be noted that by the terms of Article 55(c) and 56 of the *Charter*, states parties are obliged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all" and to take "joint and separate action" in cooperation with the United Nations to achieve this goal.[46] These provisions, which clearly contemplate the welfare of all persons in the universal human community and expressly require international cooperation, cannot be plausibly given full effect unless positive international law – which is itself largely the product of international collaboration and which has both direct and indirect impacts on human well-being – remains consistent with the objective of respecting human rights. The obligation of states to promote and respect human rights can only be reasonably construed as a duty that applies to state conduct generally, encompassing both the domestic legislative activities of states and the law-creating acts of states in the international sphere.

Contemporary international law features a set of norms that can be interpreted as giving detailed expression to the natural law principle that positive international law should further and protect human rights. These norms are the principles of international human rights law. The International Bill of Human Rights,[47] which includes the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights*,[48] identifies the range of aspects of human flourishing that each person is entitled to pursue and that all persons and

[45] *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI [*Charter*].
[46] *Charter*, *ibid.*, Arts. 55(c), 56.
[47] See Office of the United Nations High Commissioner for Human Rights, 'The International Bill of Human Rights', Fact Sheet No. 2 (Rev. 1), online: Office of the United Nations High Commissioner for Human Rights <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.
[48] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 [*International Covenant on Economic, Social and Cultural Rights* or *ICESCR*].

states are required to respect and promote. The *Universal Declaration* affirms an extensive set of human rights over twenty-eight articles, including life, liberty, and security of the person, equal protection of the law, marriage, freedom of thought, conscience and religion, social security, work and just remuneration, and education.[49] These rights are restated and elaborated upon in the two Covenants, treaties that create legally binding obligations concerning the implementation and preservation of human rights for those states that ratify them. Several of the human rights identified in the *Universal Declaration* and the Covenants are reaffirmed and considered in greater detail in a series of treaties and declarations that focus on specific issues and themes.[50] Apart from the International Bill of Human Rights, human rights norms also find recognition in a number of regional human rights instruments, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights*.[51]

As expressed in international and regional human rights instruments, human rights norms highlight, with varying degrees of directness, the fundamental human values that are of common significance to all persons in the universal community of persons, and they identify an initial set of general affirmations and proscriptions concerning individual and state conduct that follow upon the recognition of these basic human goods. In this regard, international human rights norms may be described as bearing a close relationship to the principles of practical reason and

[49] See *UDHR*, *supra* note 31, Arts. 3, 7, 16(1), 22, 23(1) & (3), 26.
[50] See generally *e.g.*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 U.N.T.S. 3; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Annex to GA Res. 47/135, UN GAOR, 47th Sess., Supp. No. 49, UN Doc. A/RES/47/135 (1992).
[51] See generally *e.g.*, *ECHR*, *supra* note 37; *American Convention on Human Rights*; 21 November 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 [*American Convention on Human Rights* or *American Convention*]; *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217, OAU Doc. CAB/LEG/67/3 rev. 5 [*African Charter*].

requirements of practical reasonableness identified in new natural law theory. The prohibition against torture, for example, draws attention to the value of security of the person, which under new natural law theory would be understood as an aspect of the basic good of life.[52] This rule constitutes a specific application and translation into positive law of the natural law requirement that persons refrain from acts that directly infringe any of the basic goods; to the extent that torture may be employed for the sake of achieving some further objective, such as extracting information from the person tortured, the prohibition also gives effect to the requirement that persons be treated as ends rather than means.[53] The right to education, meanwhile, affirms the natural law principle that knowledge is a basic value, and gives this principle specific directive force in relation to the provision of various levels of formal education by states.[54] The non-discrimination principle, to cite a final example, gives effect to the requirement of practical reasonableness that there be no arbitrary preferences among persons; in doing so, the principle reflects the natural law affirmation that the basic goods are truly 'common' goods and that participation in the basic values is as good for any other person as it is for oneself.[55]

A further feature of international human rights law that suggests a relationship between this body of norms and natural law principles is its recognition of absolute human rights. While most human rights enshrined in international human rights instruments are susceptible to varying forms of limitation or qualification, a small number of human rights are affirmed as being inviolable under all circumstances: prominent examples of such rights in the *Universal Declaration* and

[52] See *UDHR*, *supra* note 31, Art. 5; *ICCPR*, *supra* note 37, Art. 7.
[53] See Finnis *NLNR*, *supra* note 4 at 111-12, 117, 121-22.
[54] See *UDHR*, *supra* note 31, Art. 26(1); *ICESCR*, *supra* note 48, Art. 13(1) & (2); see also Finnis *NLNR*, *ibid.* at 60ff.
[55] See *e.g. UDHR*, *ibid.*, Art. 2; *ECHR*, *supra* note 37, Art. 14; see also Finnis *NLNR*, *ibid.* at 106-08.

ICCPR include the right of persons not to be enslaved,[56] the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,[57] and the right to recognition everywhere as a person before the law.[58] Consistent with Finnis's characterisation of absolute rights considered earlier, the articulation of exceptionless human rights norms in international law may be described as giving effect to the principle of practical reasonableness prohibiting acts that are aimed at directly infringing basic human goods.

International human rights law has conventionally been understood as expressing universal standards for states to observe in their legislation, policies, and practices insofar as these affect their own citizens and other persons within their territorial domains.[59] Apart, however, from constituting common standards for domestic legislation and other forms of state activity impacting upon human welfare at the domestic level, international human rights norms should also be seen as articulating principles of justice for international law. The principle that the substance of positive international law should promote and preserve human rights entails that states, in determining and evaluating the content of international laws, should seek to ensure that these laws are consistent with respect for the basic human goods and the requirements of practical reasonableness as expressed in international human rights norms.

[56] See *UDHR*, *ibid.*, Art. 4; *ICCPR*, *supra* note 37, Art. 8.
[57] See *UDHR*, *ibid.*, Art. 5; *ICCPR*, *ibid.*, Art. 7.
[58] See *UDHR*, *ibid.*, Art. 6; *ICCPR*, *ibid.*, Art. 16.
[59] See *e.g.*, Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 14-15.

Principle 2. Positive international law should be consistent with the objective of promoting and protecting the international common good.

Finnis suggests that the requirements of justice are explained "by referring to the needs of the common good *at its various levels*".[60] It is thus appropriate, in reflecting on the principles of justice for ideal international law, to consider the relationship between these principles and the international common good, which is a distinct conceptualisation of the common good applicable to the international sphere. In this regard, the new natural law conception of justice and human rights suggests that positive international law should aim at furthering and preserving the international common good, as a corollary to the objective of promoting and respecting human rights.

The international common good has been earlier described as a set of supranational conditions that facilitates the flourishing of persons within the universal human community, and that accordingly justifies the collaboration of states within the international community of states.[61] As this definition suggests, the international common good, as an aspect of the common good that is instrumental to human flourishing, bears a tangible relationship to human rights. The conditions comprising the international common good contribute to the creation of an environment that enables individuals and communities to pursue their integral fulfilment through pursuit of the basic goods – that is, to exercise and enjoy their human rights. The instrumental significance of the international common good for the exercise of human rights is what supports the claim that promotion and preservation of the international common good is itself a principle of justice for international law.

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[60] Finnis *NLNR*, *supra* note 4 at 210 [emphasis added].
[61] See the discussion in Chapter 2 at 69 above.

The idea of the international common good bears certain parallels to the concepts of public morality and public order which, as mentioned earlier, feature in several international human rights instruments as justifications for limiting the exercise of human rights.[62] In a manner similar to these concepts, the international common good concerns the maintenance of a quality of mutual respect and cooperation between states and a supportive physical global environment, as factors that are important to the possibility of human flourishing. Drawing on Finnis's observations regarding public morality and public order, it may be further suggested that while the international common good is commonly to the advantage of all states and all persons, it is of particular significance to weaker states in the international community. Given, for example, the substantial variations in the economic and military capacities of states, it is evident that violations of international peace may contribute to a state of affairs in which more powerful states are more likely to achieve their objectives in inter-state relations through means not available to weaker states; the increased vulnerability of weaker states in this regard may impair the ability of these states to achieve their own objectives, with consequent detrimental impacts on the ability of persons within these states to enjoy their human rights. The value of maintaining peace to the international community as a whole, and especially to the less powerful states within this community, provides a compelling justification for limiting the freedom of states through, for example, introducing international rules restricting states' ability to unilaterally resort to aggression. Thus, promoting and preserving the international common good may be identified as an appropriate principle of justice for international law not only because of its instrumental relationship to the exercise of human rights, but also because of the relevance of this

[62] See *supra* note 37 and accompanying text.

principle for maintaining an environment that affirms the equality of all persons in the universal human community notwithstanding the *de facto* inequality of states.

Several elements of international human rights law already give some expression to the idea of an international common good, its relationship to human rights, and the duty of states to promote and protect it. Article 28 of the *Universal Declaration* affirms that every person is entitled to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized", thereby outlining a concept that bears clear parallels to the description of the international common good presented above; significantly, in characterising this 'social and international order' as itself being a right, Article 28 implies that there are correlative duties incumbent upon individuals and states to ensure that this right is realised and preserved.[63] The Preambles to the *ICCPR*, the *ICESCR* and the *American Convention on Human Rights* commonly acknowledge that, to cite the wording of the *ICCPR* Preamble, "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want *can only be achieved if conditions are created whereby everyone may enjoy* his civil and political rights, as well as his economic, social and cultural rights".[64] Additionally, both the *American Convention* in one of its additional protocols and the *African Charter* identify rights that, from the perspective of the new classical theory, correspond to conditions that comprise the international common good. The *African Charter* affirms that all peoples have rights to "national and international peace and security" and to "a general satisfactory environment favourable to their development".[65] The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and*

[63] *UDHR*, *supra* note 31, Art. 28.
[64] *ICCPR*, *supra* note 37, Preamble [emphasis added]; substantially similar language is used in the Preambles to the *ICESCR*, *supra* note 48, and the *American Convention*, *supra* note 51.
[65] See *African Charter*, *supra* note 51, Arts. 23- 24.

Cultural Rights similarly declares that every person has the right to live in a healthy environment and that states parties are obliged to "promote the protection, preservation and improvement of the environment".[66]

The principle that positive international law should promote and respect the international common good does not necessarily entail that the conditions comprising the international common good, such as international peace and security, should themselves be recognised as human rights. According to a new natural law analysis, the components of the international common good are instrumental rather than intrinsic goods: they are conditions that facilitate pursuit of the basic values by persons, rather than themselves constituting these basic values.[67] By the terms of this analysis, conditions such as international peace or a healthy environment cannot be properly understood as human rights since they do not identify ultimate objects in which the human capacities for fulfilment are made actual, unlike values such as life or knowledge. This observation, however, in no way diminishes the need for positive international law to be articulated in a manner that demonstrates due regard for the international common good and its significance for human flourishing. The practice of referring to particular components of the international common good using the grammar of rights may indeed be of some utility in relation to implementing this principle, inasmuch as it allows for specific identification of the supranational conditions that are essential to human welfare in a manner that engages the responsibility of states for attending to these conditions.

[66] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156, Art. 11.
[67] See the discussion in Chapter 2 at 69-70 above.

The Principles of Justice as Supreme Principles of International Law

Taken together, the two described principles of justice for ideal international law provide the foundation for an approach to assessing positive international law that is consistent with the contemporary trend, itself facilitated by the emergence and growth of international human rights law over the past seventy years, to consider current global challenges and the range of responses to these challenges in terms of their relationship to human rights principles. In relation to issues of significant global concern such as climate change and terrorism, states have come under increasing scrutiny for the impact of their domestic legislation and policies on human rights.[68] The same human rights considerations that increasingly inform the evaluation of state conduct as it relates to these global challenges should also be seen as relevant to assessing the international legal frameworks that are developed to address the coordination problems of the international community. For example, the importance of preserving the earth's climate system, as a component of the international common good that is essential to continued human flourishing, should be a primary consideration in evaluating the adequacy of climate change regulation provisions that are currently operative in international law, such as the 'emissions trading' mechanism under the *Kyoto Protocol* to the *United Nations Framework Convention on Climate Change*.[69] Likewise, respect for the human rights of all persons, including those persons accused of terrorist acts, should be a fundamental

[68] See *e.g.*, Martin Wagner & Donald M. Goldberg, "An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change", online: Center for International Environmental Law <http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf>; Paul Hoffmann, "Human Rights and Terrorism" (2004) 26 Hum. Rts. Q. 932.

[69] See *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 [*Kyoto Protocol*], Art. 6. The emissions trading mechanism allows states that may not otherwise meet their greenhouse gas emissions commitments under the *Kyoto Protocol* to purchase emissions 'credits' from other states that are within their assigned greenhouse gas emissions limits, thereby effectively enabling these states to disregard their greenhouse gas emissions limitation commitments without legal sanction.

principle informing the assessment of international legal mechanisms devised to counter international terrorism, such as targeted sanctions regimes.[70]

The claim that states should regard respect for human rights and protection of the international common good as the ultimate criteria of significance in creating and evaluating positive international law entails an assertion that the principles of justice for international law – and by implication, the international legal provisions that give them concrete expression – should be regarded as supreme norms of the international legal order. The notion of normative hierarchy in international law is not new,[71] and it may be noted that the idea that human rights norms have a special status in relation to international law has been increasingly expressed in recent years. For example, the United Nations Committee on Economic, Social and Cultural Rights and its related bodies have affirmed the priority of human rights law over other international legal regimes such as those regulating trade and investment.[72] A number of writers and international tribunals have gone further, declaring specific international human

[70] The issue of respect for the rights of terrorism suspects to due process, in accordance with international human rights norms, has arisen in relation to the Al-Qaida sanctions regime established by a resolution of the United Nations Security Council in 1999. See SC Res. 1267, UN SCOR, 4051st Mtg., UN Doc. S/RES/1267 (1999); see also Bardo Fassbender, "Targeted Sanctions and Due Process", study commissioned by the United Nations Office of Legal Affairs (2006), online: United Nations <http://www.un.org/law/counsel/Fassbender_study.pdf> .

[71] The idea of such a hierarchy has been particularly reinforced by the emergence of the concept of *jus cogens* in modern international law, although the notion of normative hierarchy remains controversial among some scholars. See generally *e.g.*, Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 A.J.I.L. 413; Juan Antonio Carillo Salcedo, "Reflections on the Existence of a Hierarchy of Norms in International Law" (1997) 8 E.J.I.L. 583; Dinah Shelton, "Normative Hierarchy in International Law" (2006) 100(2) A.J.I.L. 291.

[72] See *e.g.*, United Nations Committee on Economic, Social and Cultural Rights, Statement to the Third Ministerial Conference of the World Trade Organisation, 26 November 1999, UN Doc. E/C.12/1999/9 at paras. 2 & 6, in which the Committee declares that "[t]he end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression", and exhorts the World Trade Organization "to undertake a review of the full range of international trade and investment policies and rules in order to ensure that these are consistent with existing treaties, legislation and policies designed to protect and promote all human rights"; United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, UN Doc. E/CN.4/Sub.2/2000/13 (2000) at para. 63, affirming that "[t]he primacy of human rights law over all other regimes of international law is a basic and fundamental principle and should not be departed from"; see also Shelton, *ibid.* at 294 for discussion.

rights principles or human rights norms generally to form part of the category of peremptory norms of international law or *jus cogens*.[73]

It is submitted that the principles of justice for international law should indeed be construed as paramount norms of the international legal system, and should play a primary role in the determination and critical assessment of the content of positive international law in every field of international legal regulation. This, it should be specified, is not tantamount to a claim that the abovementioned principles of justice should be regarded as *jus cogens* norms. As noted in the previous chapter, the doctrine of *jus cogens* involves the creation of a hierarchy of norms in positive international law, in which specific international norms accepted by the international community as peremptory enjoy a superior legal status and invalidate other international laws in cases of conflict.[74] The two principles of justice for international law, which restate natural law principles in the form of general normative criteria for the development and evaluation of positive international law, are not themselves 'norms of general international law' and as such are not appropriate candidates for characterisation as peremptory norms in terms of the *Vienna Convention* definition. It may nevertheless be affirmed that the doctrine of *jus cogens* can be a useful mechanism for giving effect, within the domain of positive international law, to the idea that the principles of justice for international law should be regarded as supreme principles of the international legal order. Without

[73] See *e.g.*, Alfred Verdross, "*Jus dispositivum* and *jus cogens* in International Law" (1966) 60 A.J.I.L. 55 at 59 (asserting that "all rules of general international law created for a humanitarian purpose" are peremptory norms); Erika de Wet, "The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law" (2004) 15(1) E.J.I.L. 97; *Juridical Condition and Rights of Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18 at para. 100 (describing the principle of equality and non-discrimination as *jus cogens*); *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, [2006] I.C.J. Rep. 6 at para. 64 (declaring that the prohibition of genocide constitutes *jus cogens*); see also the survey of putative human rights-related peremptory norms in Karen Parker and Lyn Beth Neylon, "*Jus Cogens:* Compelling the Law of Human Rights" (1989) 12 Hast. Int'l & Comp. L. Rev. 411 at 427-43.

[74] See generally the discussion in Chapter 3 at 124-28 above.

embarking upon an extended discussion on the content of *jus cogens*, it may be suggested that if *jus cogens* is to play an effective role in relation to the principles of justice, then all international norms that in their substance implement the principles of justice should be understood as proper candidates for recognition as peremptory norms. This would include the set of international norms that are already widely recognised as peremptory and that bear a discernible relationship to these principles, the corpus of norms of international human rights law,[75] and norms that promote and safeguard the conditions comprising the international common good, such as international laws directed towards preservation of the global environment.

Still, even if the doctrine of *jus cogens* is construed as an appropriate mechanism for promoting the primacy of the principles of justice in positive international law, it is worth emphasising that the above argument regarding the normative supremacy of the principles of justice for international law constitutes more than a claim that the international norms corresponding to these principles should be recognised as peremptory norms. What is being advocated herein is an *approach* to the development and evaluation of positive international law that affords priority to principles mandating promotion of and respect for human rights, and promotion and protection of the international common good, regardless of whether the international norms expressing these principles are recognised as peremptory.[76]

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[75] This entails a rejection of the position taken by some writers that only a limited set of basic human rights should be characterised as *jus cogens*, or that only non-derogable rights properly fall within the category of peremptory norms: see *e.g.*, Ulrich Scheuner, "Conflict of Treaty Provisions with a Peremptory Norm of General International Law" (1969) 29 Zeitschrift für ausländisches öffenliches Recht und Völkerrecht 28 at 33-34; Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications, 1987) at 59. From the perspective of new natural law theory, there is nothing in principle that precludes any norm that identifies and safeguards the aspects of human flourishing from being classified as *jus cogens*, although the actual conferral of peremptory legal status on individual human rights norms remains dependent upon the international community.

[76] As already noted, some organs of the United Nations have in recent years called on states and international institutions to give priority to human rights norms in the development of international legal regimes, without characterising these norms as *jus cogens*: see *supra* note 72.

Understood in relation to the new natural law framework, the principles of justice for international law and the international norms that give them concrete expression may be affirmed as supreme principles of international law in sheer virtue of the human rights to which they refer and the opportunities for human flourishing that they are intended to preserve and promote.

III. New Natural Law Theory and Existing Conceptions of Justice and Human Rights in International Legal Theory: A Comparison with the Theory of Allen Buchanan

Recent years have witnessed the emergence of a number of works in international legal theory that are concerned with the articulation of normative goals for international law.[77] Allen Buchanan's *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, published in 2004, has been heralded as the most systematic and comprehensive normative theory of international law produced to date. [78] Buchanan's work is of particular interest in relation to the concepts considered in this chapter since he claims that justice should be a primary moral goal of international law, and that realising this objective entails respecting human rights.[79] Following is an outline of Buchanan's theory regarding justice and human rights and their significance for the international legal order. The discussion will then focus on three particular aspects of Buchanan's theory: Buchanan's arguments in support of his claim that justice is a morally obligatory goal for international law, his characterisation and identification of human rights, and his arguments concerning distributive justice. For each of these topics, an effort will be made to identify relevant areas of similarity or contrast between Buchanan's

[77] See generally the list of works cited in the Introduction at 27 above, note 74.
[78] See Besson & Tasioulas, *ibid*.
[79] See Buchanan *Justice*, *supra* note 2 at 73.

analysis and a consideration of these topics from the perspective of the new classical theory. This comparative exercise will assist in situating the new natural law conception of justice and human rights in relation to existing normative international legal scholarship, and in revealing some of the implications of this conception for understanding particular topics within normative international legal theory.

Buchanan claims that justice, signifying respect for basic human rights, should be a primary moral goal of the international legal system and constitutes the fundamental criterion for evaluating the international legal order.[80] Buchanan further claims that justice is a morally obligatory goal for international law; this claim is based primarily on what Buchanan calls the 'Natural Duty of Justice', the principle that everyone has a limited moral obligation to contribute to ensuring that all persons have access to institutions that protect their basic human rights.[81] The definition of the Natural Duty of Justice signals the emphasis that Buchanan's theory places on the role of institutions in safeguarding rights: for Buchanan, pursuit of the goal of justice in the international legal system not only requires an appropriate set of human rights norms, but also requires the presence of appropriate institutions for protecting human rights.[82]

At the core of Buchanan's justice-based theory of international law is his conception of basic human rights. According to Buchanan, basic human rights correspond to interests that are common to all persons, and that constitute the conditions for living a decent human life.[83] Buchanan posits a set of basic human rights that includes many of the human rights recognised in international human

[80] See *ibid*.
[81] See *ibid.* at 74.
[82] See *ibid.* at 86-88. By 'institution' Buchanan means an enduring organization and all of the procedural and structural elements that are constitutive of such an organization; in relation to international law, the term signifies the many functional organs that comprise the international legal order, along with the principles of international law themselves. See *ibid.* at 2.
[83] *Ibid*, 129.

rights law such as rights to life and liberty, freedoms of expression and association, and the right to resources for subsistence.[84] Proceeding from the premise that the violation of basic human rights constitutes the most serious threat to a person's ability to live a decent human life, Buchanan asserts that the protection of these rights should be the defining consideration in a moral theory of international law.[85]

Buchanan does not purport to ground his theory of international law in a natural law conception of justice and human rights; indeed, Buchanan expressly states that his intention is to articulate a normative theory of international law "without embracing a naturalistic view of what international law is."[86] Since new natural law theorists do not claim to ascertain the validity of positive law by reference to criteria of practical reasonableness, Buchanan's interpretation and eschewal of what he calls 'the natural law view' appears misplaced, at least in relation to new natural law theory and the classical natural law tradition from which it proceeds.[87] It may indeed be noted that while Buchanan does not draw on natural law theory in articulating his normative theory of international law, certain features of his theory display significant parallels to the new natural law principles of justice for international law outlined in these pages. Buchanan seeks to ground the international legal order in principles of justice, and he specifies the objective of justice as entailing respect for human rights; as already seen, the new classical theory similarly supports a claim that international law should demonstrate consistency with the requirements of justice, and that respecting and promoting human rights is the

[84] See *ibid*.
[85] See *ibid.* at 130.
[86] *Ibid.* at 21.
[87] It may be noted that Buchanan defines naturalism as "the denial of the positivist thesis" that whether a rule is a law does not depend on whether this rule satisfies moral criteria: *ibid.* at 20-21. This description illustrates a common misunderstanding of the classical natural law tradition to which new natural law theory relates, since classical natural law theory affirms the validity of positive law as law independently of whether this law is fully consistent with the requirements of morality. See generally Finnis *NLNR*, *supra* note 4 at 26-29, 363-65.

specific means for realising this objective. Both theories, then, reflect a conceptualisation of ideal international law that prioritises attention to safeguarding human rights. Furthermore, Buchanan's theory and new natural law theory share a broadly similar understanding of the significance of human rights, in that they both characterise human rights as identifying interests that are worthy of respect because of their relationship to human welfare.

Certain aspects of Buchanan's theory invite further consideration in light of the present chapter's discussion of the new natural law conception of justice and human rights and its implications for international law. These are examined below.

1. Justice as a Morally Obligatory Goal for International Law

Buchanan claims that it is morally imperative that the international legal system be constructed in a manner that secures respect for basic human rights.[88] His argument in support of this claim draws on what he describes as the Natural Duty of Justice, along with a premise about the role of international law in safeguarding human rights. Buchanan explains that the Natural Duty of Justice is 'natural' in the sense that everyone is subject to this duty simply in virtue of being a human person, regardless of whether persons have any form of interaction with each other that might otherwise justify ascribing the existence of obligations in justice.[89] The Natural Duty of Justice assumes that securing justice for all persons requires just institutions, and is further based on two moral premises: first, that all persons are entitled to equal respect and concern (the 'Moral Equality Principle'); second, that treating persons with equal respect requires taking positive steps to help ensure that their rights are not violated.[90] The Natural Duty of Justice, according to Buchanan,

[88] See Buchanan *Justice*, *supra* note 2 at 83.
[89] See *ibid.* at 86.
[90] See *ibid.* at 87.

entails that everyone has a limited moral obligation to help ensure that all persons have access to institutions that protect their basic human rights.[91] Buchanan claims that this duty, considered in conjunction with the premise that international law can play an important role in ensuring that everyone has access to just institutions, supports the conclusion that justice is a morally obligatory goal of international law.[92]

As will be evident from the earlier outline of the new natural law conception of justice and human rights and its implications for international law, Buchanan's normative claim that international law should be aimed at realising justice is one that new natural law theorists would endorse. It may be asked, nevertheless, whether Buchanan has provided a satisfactory justification for this claim. As noted above, Buchanan's argument that justice is a morally imperative goal for international law rests primarily on the Natural Duty of Justice, which crucially features the premise that persons have a duty not only to refrain from violating other persons' basic human rights, but also to assist others in ensuring that their basic human rights are protected. Perhaps recognising that the claim is contentious, Buchanan elaborates at length on its plausibility;[93] nevertheless, his arguments appear inadequate in certain respects. Buchanan affirms that the duty to help others to secure their basic human rights derives simply from "a proper recognition of what I owe you as a person", even in the absence of any form of unifying relationship between persons; he further suggests that acknowledging a duty of non-interference regarding other persons' basic human rights, without also affirming a positive duty of assistance to protect

[91] See *ibid.* at 86. The obligation is 'limited' in the sense that it allows for persons to make distinctions in the degree to which they provide assistance to others based on relevant factors, such as the presence of ties of nationality or kinship: see for example Buchanan's discussion of 'moderate cosmopolitanism', *ibid.* at 103.
[92] See *ibid.* at 86.
[93] See generally *ibid.* at 88-92.

those rights, would reflect "a laughably anemic conception of what it is to recognize the moral importance of persons".[94] These arguments, however, do not appear to cover the ground required in justifying the existence of a positive duty of aid: why, indeed, is it 'anemic' to do no more than avoid harming other persons' human rights – particularly persons with whom one has no relationship whatsoever – and what is the basis for claiming that actively helping to protect their rights constitutes 'proper recognition' of their moral worth? As an alternative means of arguing the point, Buchanan claims that recognising the importance of the interests that are protected by basic human rights implies that persons must not only refrain from violating others' rights, but also be willing to bear some significant costs to ensure that those persons' rights are protected.[95] Again, however, Buchanan seems here to be merely asserting that the Natural Duty of Justice entails actively assisting others, rather than providing a thoroughgoing rationale for the claim that the duty requires something beyond non-interference.

New natural law theory, it is suggested, provides a coherent justification for the basic claim that persons have a duty to assist others in securing their human rights. From the perspective of the new classical theory, this duty has its foundation in the requirement of practical reasonableness that persons are to promote the common good of their communities. The common good principle, as noted previously, is a restatement of the master principle of morality indicating that a person's acts and choices must be consistent with a will towards the ideal of integral human fulfilment, the fulfilment of all persons in all the basic human goods.[96] This ideal is itself made intelligible by the fact that the basic goods, as human goods, are as good for anyone else as they are for oneself. Since the basic human goods are

[94] *Ibid.* at 89.
[95] See *ibid.* at 90.
[96] See *supra* note 8.

'commonly' good – with the implication that all persons are tied together in the universal community of persons by their common humanity – a proper regard for others as human persons requires that just as an individual should avoid violating the aspects of human well-being as they relate to himself, he should also refrain from impairing the possibilities that other persons may have for achieving fulfilment in any of the basic values. The commonality of the basic human goods and the bond of universal human community similarly suggest that an individual should promote the fulfilment of other persons in the basic goods, and the conditions that facilitate such flourishing, just as he would seek to further his own fulfilment. The requirement to promote the common good can be implemented in myriad ways, and new natural law theory does not specify what concrete measures are required in order to foster the flourishing of other persons. Nevertheless, it can be reasonably affirmed that assisting persons to protect their human rights, inasmuch as this contributes to the ideal of integral human fulfilment, is part of what is entailed in giving effect to the common good principle.

A final point of interest regarding Buchanan's claim that international law should have justice as its primary goal concerns the manner in which the claim is articulated, and the precise relationship between international law and the Natural Duty of Justice. While Buchanan affirms that "justice is a morally obligatory goal of international law", he also acknowledges that the Natural Duty of Justice (on which the claim regarding international law is based) applies to persons, not directly to institutions.[97] Properly understood, Buchanan's claim is not that international law itself is subject to the Natural Duty of Justice; rather, it is a claim that all persons are under a duty to contribute to the development of institutions that protect basic human

[97] See Buchanan *Justice*, *supra* note 2 at 86.

rights, including the international legal system.[98] In this regard, a distinctive characteristic of new natural law theory to be noted is that it not only indicates that persons are required in reason to promote the common good (and thereby, to promote and respect human rights), but also specifically highlights the role of law in securing justice. As described in the preceding chapter, the new classical theory affirms that law's purpose is to further the common good of a community through resolution of the community's coordination problems, and the theory further notes the value of law's formal features in contributing to securing justice and safeguarding individual autonomy in the context of community life.[99] Since the theory interprets the focal meaning of law as being intrinsically linked to the objective of justice, the normative claims made under new natural law theory regarding international law are claims that directly concern the institution of international law and its positive norms, apart from addressing the actors that are involved in shaping the international legal order.

2. Characterisation of Human Rights

As noted earlier, Buchanan's conception of basic human rights grounds his moral theory of international law. Buchanan affirms that basic human rights identify fundamental interests that are shared by all persons and that are constitutive of a decent human life.[100] For Buchanan, the importance of basic human rights for the ability to live a decent human life is what animates the claim that they should receive special institutional protection through international law.[101]

Buchanan's general claim that human rights correspond to common human interests that are essential to human well-being is one that resonates with the new natural law conception of human rights. At the same time, the specific manner in

[98] See *ibid.* at 86-87, 93.
[99] See discussion in Chapter 3 at 85-86 above.
[100] See Buchanan *Justice*, *supra* note 2 at 127.
[101] See *ibid.* at 127, 130.

which Buchanan articulates this claim reveals an important point of divergence between his conception of human rights and that of new natural law theory. According to Buchanan, basic human rights identify conditions that are necessary for a "decent" or "minimally good" life.[102] While Buchanan states that what constitutes a decent life "depends on what human beings are, and more importantly, what they are capable of",[103] he also indicates that outlining the conditions for a decent human life is not to be equated with identifying the best sort of life for human beings, and further asserts that affirming the existence of universal human rights does not entail a claim that everyone is entitled to either equality of treatment or of result as regards their well-being.[104] The influence of Buchanan's minimalist conception of human rights is seen in his criticism of certain norms enshrined in the International Bill of Human Rights, in particular the right to 'the highest attainable standard of physical and mental health':[105] this, Buchanan claims, is not properly characterised as a human rights because it is not necessary for having the opportunity for a decent human life, even if it may help some people to have a better life.[106]

Like Buchanan, new natural law theorists do not endorse the idea that it is possible to identify a particular form of life that is best for human persons; for new natural law theory, the basic human goods can be pursued in an infinite number of ways, and as such 'the good life' (to the extent that this term can be appropriately

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[102] In *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Buchanan affirms that basic human rights identify conditions that are constitutive of a "decent" or " minimally decent" life, although at times he is also seen to describe these rights as identifying conditions that are necessary for "human flourishing" or for "a good human life": see *ibid.* at 127-29. In Buchanan's later work in which he sets out what he calls the 'Modest Objectivist View' of human rights, this equivocation in terminology is not present, and it is clear that he regards human rights as corresponding to interests necessary for a decent or minimally decent life. See Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010) [Buchanan *Human Rights*] at 52ff.

[103] See Buchanan *Justice*, *ibid.* at 128.

[104] See *ibid*; Buchanan *Human Rights*, *supra* note 102 at 55.

[105] See *ICESCR*, *supra* note 48, Art. 12(1).

[106] See Buchanan *Human Rights*, *supra* note 102 at 59; Buchanan *Justice*, *supra* note 2 at 129. Buchanan interprets the right to health as a right of persons to access health care without facing undue burdens in doing so: see Buchanan *Human Rights*, *ibid.* at 55-58.

used) is necessarily a pluralistic concept.[107] The new classical theory does affirm, however, that human rights are essentially concerned with human *flourishing*: the requirements of practical reasonableness, which direct persons towards the pursuit and preservation of the basic human goods, are themselves principles for realising what Finnis describes as 'fullness of well-being',[108] and human rights both identify the dimensions of human flourishing and give expression to the requirements of justice for the sake of furthering this objective.[109] Thus, new natural law theory understands the significance of human rights as relating to an objective that is more dynamic than that suggested by the idea of a 'decent' or 'minimally good' life.

From a new natural law perspective, then, it is not evident that the right to health as articulated in the International Bill of Human Rights constitutes a manifestation of 'human rights inflation' as Buchanan claims.[110] Article 12 of the *ICESCR*, in recognising the right of persons to enjoy the highest possible standard of health, characterises the right in a manner that affirms the relationship between the basic value of health and the objective of human flourishing.[111] For new natural law theory, the relationship between health and human flourishing is indeed what justifies the stipulation in Article 12 of state duties to take appropriate measures to safeguard and promote the right to health, including the creation of conditions that will ensure that all persons receive medical treatment in time of need.[112] It should be further noted that while Buchanan's minimalist theory of human rights appears particularly concerned with emphasising that a commitment to human rights does not mean that all persons are entitled to be treated the same way, it is not evident that

[107] See Finnis *NLNR*, *supra* note 4 at 101.
[108] Finnis indicates that the idea of comprehensive human flourishing is equivalent to the Aristotelian notion of *eudaimonia*: see *ibid.* at 103, 129-30.
[109] See Finnis, *ibid.* at 102-03, 221.
[110] See Buchanan *Human Rights*, *supra* note 102 at 59.
[111] The *ICESCR* characterises the right to education in similar terms, affirming that education "shall be directed to the full development of the human personality": *ICESCR*, *supra* note 48, Art. 13.
[112] See generally *ICESCR*, *ibid.*, Art. 12(2).

recognition of the right to health in the form employed in Article 12 of the *ICESCR* contributes to a misperception that all persons are entitled to enjoy the same standard of health care provisioning. Article 2 of the *ICESCR* indicates that states are required to take steps "to the maximum of... available resources" to achieve the "progressive realisation" of the rights identified in that Covenant.[113] Thus, the *ICESCR* reconciles an affirmation of the right of persons to enjoy the optimum possible state of health with an acknowledgement that the actual realisation of this right will be qualified in part by the varying institutional and economic capacities of the states that persons inhabit.

The new natural law conception of justice and human rights, it is suggested, does not support a minimalist approach to characterising human rights principles. For the new classical theory, the human rights norms identified in the International Bill of Human Rights articulate, in comprehensive fashion, the current state of understanding within the universal human community of the multiple dimensions of human flourishing and the requirements for realising the objective of integral human fulfilment. While it is evident that individuals and communities will not all participate in human flourishing in the same way, the norms of international human rights law usefully indicate the breadth of considerations entailed in giving effect to the common good principle.

3. Claims Regarding Distributive Justice

Buchanan asserts that an ideal moral theory of international law should recognise rights of distributive justice for individuals and for states.[114] By 'rights of

[113] See *ibid.*, Art. 2(1).
[114] See Buchanan *Justice*, *supra* note 2 at 193. Buchanan indicates that the objective of 'ideal theory' is "to set the most important and most distant moral targets for a better future, the ultimate standards for evaluating current international law". 'Nonideal theory', meanwhile, aims "to guide our efforts to

distributive justice' Buchanan means social and economic rights that go beyond the right to the means of subsistence.[115] According to Buchanan, an ideal moral theory of international law should include principles of 'transnational justice' (that is, principles of distributive justice that are commonly applicable to all states and concern the relations between the government of a state and the individuals governed, as well as relations between persons belonging to the same state), and principles of 'international justice' (that is, principles of distributive justice that apply to states in their international relations).[116] Buchanan further claims, however, that the existing institutional incapacity of the international legal order means that international law can at present only play a limited role in advancing distributive justice.[117] Buchanan suggests that notwithstanding current institutional incapacity, international law can and should at present play a largely indirect role in realising distributive justice; he identifies several ways in which this might occur, including the advancement of civil and political rights with socio-economic implications (such as the right against gender discrimination) and the development of the institutional resources needed for ultimately formulating and implementing principles of distributive justice for the international sphere. [118]

Buchanan's claim regarding institutional incapacity focuses on the lack of appropriate institutional structures in the international sphere for formulating, applying, and enforcing comprehensive principles of distributive justice.[119] In this

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approach those ultimate targets, both by setting intermediate moral targets... and by helping us to determine which means and processes for achieving them are morally permissible": *ibid.* at 60-61.

[115] See *ibid.* at 191. The right to the means of subsistence is already affirmed in international human rights law; for example, the *UDHR* recognises the right of every person to "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services": *UDHR*, *supra* note 31, Art. 25(1); see also *ICESCR*, *supra* note 48, Art. 11(1).

[116] See Buchanan *Justice*, *ibid.* at 191-93.

[117] See *ibid.* at 193.

[118] See *ibid.* at 193-94.

[119] See Buchanan *Justice*, *supra* note 2 at 219-22.

regard, Buchanan suggests that the lack of institutional structures may in part be explained by a lack of consensus about exactly what distributive justice requires beyond a right to the means of subsistence. As Buchanan notes, addressing questions of distributive justice entails adopting a position on various complex issues pertaining to "the roles of equality, need, merit, desert and responsibility"; furthermore, inasmuch as rights of distributive justice entail positive duties of assistance, resolving issues of distributive justice involves making difficult determinations about the extent to which persons are to incur costs to protect the human rights of others in the absence of any unifying bonds such as nationality or kinship.[120]

A first observation to be made regarding Buchanan's claims is that if the notion of distributive justice is considered using Finnis's original description of this concept in *Natural Law and Natural Rights*, then rights of distributive justice should be understood as concerning more than merely social and economic rights. It will be recalled that Finnis described distributive justice as pertaining to problems involving the allocation of some common subject-matter to particular individuals or groups within a community, for the sake of the common good; the required allocation may pertain to common resources, but can also relate to more abstract subject-matter such as responsibilities, benefits, and burdens.[121] This understanding of distributive justice suggests, for example, that giving effect to the right to a healthy environment within a particular state – which may involve measures such as allocating a portion of municipal tax revenue towards establishing and running waste recycling facilities, or providing financial incentives to individuals for participating in recycling schemes – may entail making decisions that pertain to distributive justice, even though the

[120] See *ibid.* at 222.
[121] See *supra* note 14 and accompanying text.

right to a healthy environment is not conventionally understood as a socio-economic right.[122] Buchanan does note that disputes around distributive justice often occur "in areas whose connection to standard conceptions of human rights is unclear or at least indirect", such as environmental regulation;[123] still, since Buchanan does not himself establish the connection, his discussion of rights of distributive justice does not facilitate a full appreciation of how concerns of distributive justice can be related to international human rights norms.

In his original discussion of distributive justice in *Natural Law and Natural Rights*, Finnis outlines a set of criteria of just distribution that is substantially similar to the factors Buchanan mentions as being relevant to articulating a conception of distributive justice: among the criteria Finnis cites are equality, need, function, capacity, and desert.[124] While Finnis's remarks on these criteria are brief, a notable feature of his discussion is that it clearly links the consideration of criteria of distributive justice to the objective of human flourishing. Finnis describes need, for example, as a primary criterion of distributive justice because of its relationship to persons' realisation of the basic goods: need, according to Finnis, concerns "the fundamental component of the common good."[125] Similarly, in discussing the criterion of equality, Finnis comments on the significance of economic inequality in a manner that relates such inequality to its impact on human welfare: Finnis argues that "what is unjust about large disparities of wealth in a community is not the inequality as such but the fact that... the rich have failed to redistribute that portion of their wealth which could be better used by others for the realization of basic values in

[122] The right to a healthy environment is generally considered to belong to the so-called 'third generation' of human rights, rather than the 'second generation' of human rights which includes social and economic rights. See Jarvaid Rahman, *International Human Rights Law: A Practical Approach* (Harlow: Longman, 2003) at 6-7.
[123] See Buchanan *Justice*, *supra* note 2 at 194.
[124] See Finnis *NLNR*, *supra* note 4 at 174-75.
[125] *Ibid.* at 174.

their lives."[126] Finnis's discussion of criteria of just distribution is further significant for his observation that addressing problems of distributive justice is essentially an effort to determine what practical reasonableness requires of particular persons, which depends on the particular responsibilities that those persons have; in this regard, Finnis cautions against "demanding too much precision in ascertaining the demands of practical reasonableness."[127]

Applying these considerations to the international sphere, it may be suggested that an ideal moral theory of international law does not need to include comprehensive principles of international justice as Buchanan contemplates. Even if it is conceded that the international legal order would benefit from having a more robust institutional framework for resolving questions of international justice, Buchanan's claim that appropriate international institutions are necessary to formulate comprehensive, determinate principles of distributive justice appears to suggest that international law should be equipped with the sort of "precise and unqualified directives of reason" that Finnis describes as inappropriate for addressing problems of distributive justice.[128] For new natural law theory, the requirements of practical reasonableness as conventionally expressed in the norms of international human rights law, and the principle that positive international law should respect and promote the international common good, constitute the necessary primary principles for addressing problems of distributive justice through international law. These principles provide overarching standards for the task of addressing issues of international justice through international law, an endeavour of apportioning roles, responsibilities, benefits and burdens to states, international institutions, and other relevant actors in the international sphere that is determined by having regard to the

[126] *Ibid*.
[127] *Ibid.* at 176.
[128] See *ibid.*

particular coordination problems that are to be resolved, the actual circumstances of states and their human communities, and the criteria of just distribution cited previously. While this endeavour may in some instances give rise to the development of specific principles of distributive justice, these principles are best understood as secondary-level principles for giving effect to the requirements of practical reasonableness in the international sphere, not as constituting foundational principles themselves.

The relationship between the requirements of practical reasonableness and specific principles of international justice may be illustrated by considering the principle of 'common but differentiated responsibilities' in the *United Nations Framework Convention on Climate Change*.[129] Article 3(1) of the *UNFCCC* indicates that state parties to the treaty "should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities".[130] This provision affirms the principle that states should have differing roles and degrees of responsibility in relation to the objective of protecting the earth's climate; a key implication of this principle, as the provision further stipulates, is that developed states should take a primary role in combating climate change.[131] Notably, before this principle of just distribution is articulated, Article 3(1) identifies an objective to be commonly pursued by states, namely the preservation of the earth's climate system, and it also identifies the beneficiaries of the objective, namely the 'present and future generations of humankind'. As interpreted through the lens of the new classical theory, the provision in this regard highlights a

[129] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107 [*UNFCCC*].
[130] *Ibid.*, Art. 3(1).
[131] See *ibid.*

component of the international common good that is important to human well-being, and stipulates that this aspect of the international common good is to be protected for the sake of human welfare. For new natural law theory, furthermore, underlying the provision's generalised reference to 'the benefit of present and future generations' is the fact that human flourishing is multifaceted, and that protecting the earth's climate is a means of facilitating and safeguarding the exercise of a host of human rights, including rights to life, food, and shelter. It is because these aspects of human flourishing have to be promoted and protected that it is necessary to secure the international common good through preserving the earth's climate, entailing that appropriate steps must be taken to combat climate change.

Articulation of the principle of common but differentiated responsibilities is one practically reasonable step towards realising this objective. It may be noted that the idea that states have 'differentiated' responsibilities in relation to combating climate change is not a direct implication of the principles of justice stipulating respect for human rights and promotion of the international common good; rather, it is a determination of what is practically required in order to realise the objective of preserving the climate system, taking into account a range of contextual factors such as the historical contribution of developed states to current greenhouse gas emissions levels.[132] The assertion that states have 'common' responsibilities for preserving the climate system, however, bears a manifest connection to the abovementioned principles of justice: the requirement to safeguard the international common good for the sake of human flourishing applies to the universal human community as a whole, in virtue of the common significance of the basic goods for all persons, and as such

[132] The Preamble to the *UNFCCC* notes that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries"; it further notes that "per capita emissions in developing countries are still relatively low and [that] the share of global emissions originating in developing countries will grow to meet their social and developmental needs".

specific endeavours such as combating climate change are properly understood as the common responsibility of states in the international community.

In addressing problems of international justice in and through international law, it is suggested, the international community does not need to achieve consensus on a set of comprehensive norms of distributive justice as a prerequisite to making substantial advances in addressing these problems. Rather, the key challenge for the international community is to determine practical approaches to addressing these problems, including appropriate legal frameworks, without losing sight of the ultimate objective of promoting universal human flourishing and the related goal of safeguarding the international common good. What is required, to use Finnis's words, is for members of the international community to seek to resolve complex problems of distributive justice without succumbing to "the pull of unreasonable self-preference, group bias, and lukewarmness about human good."[133]

Conclusion

This chapter has identified primary principles of justice for positive international law based on the new natural law conceptions of justice and human rights. As has been argued herein, respect for and promotion of human rights, and furtherance and protection of the conditions comprising the international common good, should be the primary considerations informing the content of positive international law. Recalling the observations made in the preceding chapter regarding the authority of international law, it may be said that the moral authority of positive international law is contingent upon its conformity with these principles of justice. The principles of justice for international law, considered in conjunction

[133] Finnis *NLNR*, *supra* note 4 at 177.

with the new classical theory's interpretation of the relationship between natural law principles and the authority of positive international law, provide the principal bases for understanding the new natural law account of the significance of legal obligation in the international sphere, which will be examined in the next chapter.

Chapter 5
International Legal Obligation

The final major jurisprudential concept of new natural law theory to be considered is legal obligation. The notion of legal obligation is a counterpart to the previously examined concepts of authority and law, signifying a categorical duty to comply with authoritative legal stipulations based on the presence of exclusionary reasons for doing so.[1] For the new classical theory, the basis of legal obligation, like the purpose of law itself, relates to the significance of such obligation for furthering the common good of a community. The new natural law conception of legal obligation is, in this regard, fundamentally normative: while the theory affirms the sense in which the obligation to obey the law can be understood and described in strictly legal terms, its essential claim is that legal obligation is an implication of the requirement of practical reasonableness that directs persons to promote and preserve the common good.

This chapter considers the new natural law conception of legal obligation and uses it as a basis for articulating a normative account of international legal obligation. This account features two main claims. First, the chapter asserts that states have a general moral obligation to obey international law. This obligation is based primarily on the need for states to comply with international norms in order to facilitate the effectiveness of such norms in addressing the coordination problems of the international community and thereby furthering the international common good; the obligation is additionally grounded in the principle of fairness. The moral basis

[1] Like the conception of authority, this description of legal obligation is based on the philosophy of Joseph Raz. See Joseph Raz, "Promises and Obligations" in Peter M. S. Hacker and Joseph Raz, eds., *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) 210 at 218-26; Leslie Green, "Legal Obligation and Authority" in Stanford Encyclopedia of Philosophy, online: Stanford Encylopedia of Philosophy <http://plato.stanford.edu/entries/legal-obligation/>, sec. 1; see also the discussion on authority in Chapter 3 at 82-83 above.

of international legal obligation, it is argued, is accentuated by the fact that international law is not an integral system of law and its effective functioning depends largely on the cooperation of the states that are subject to international legal stipulations. Second, the chapter claims that the moral obligation to obey international law is presumptive and defeasible in relation to each international rule, and is contingent upon the substantive justice of the rule concerned. In this regard, it is suggested that while injustice in a particular international law negates a state's moral obligation to comply with it, states may in some circumstances have a secondary or 'collateral' moral obligation to obey the unjust law for the sake of preserving respect for other just parts of the international legal regime to which it belongs.

The chapter begins with an overview of the new natural law conception of legal obligation. This section considers the theory's distinction between legal and moral senses of legal obligation, and the manner in which the latter is related to considerations of the common good and fairness. The discussion in this section also highlights the theory's emphasis on the role of the legal subject's practical reasoning in explaining legal obligation, and outlines the theory's interpretation of the effect of injustice in laws on legal obligation. The second section constructs a normative account of international legal obligation based on the new natural law framework, elaborating on the claims concerning international legal obligation introduced above. The third section compares the new natural law account of international legal obligation with existing thought in international legal theory by considering the anti-normative theory recently advanced by Jack Goldsmith and Eric Posner, who claim that states have no moral obligation to obey international law.[2] The section outlines

[2] See Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), Ch. 7.

the arguments provided by Goldsmith and Posner in support of their position and explains why, from the perspective of new natural law theory, these arguments do not suffice to refute the moral basis of international legal obligation. The final section considers the implications of the new classical account of international legal obligation, along with other aspects of the normative theory of international law articulated in this thesis, for understanding particular aspects of modern international law relating to international legal obligation. The section briefly discusses three topics in this regard, namely the concepts of peremptory norms and *erga omnes* obligations, and the issue of conflicting international legal obligations.

I. The New Natural Law Conception of Legal Obligation

New natural law theory's account of legal obligation may be said to have three distinguishing characteristics. First, it posits the existence of distinct 'legal' and 'moral' senses of legal obligation. The new classical theory provides an account of how legal order itself provides a basis for persons to act in conformity with the content of legal rules; the theory's more fundamental claim, however, is that legal obligation is a form of moral obligation that derives its moral significance from its relationship to advancing the common good. Second, the theory characterises legal obligation as a rational response by persons subject to obligation-imposing rules, manifesting persons' cooperation with the endeavour of legal governance based on their apprehension of a relationship between the imposition of legal stipulations and promotion of the common good. Third, new natural law theory claims that the moral obligation to obey individual laws is variable, and that injustice in particular laws may have a limiting effect on the extent of a person's obligation to obey them. Each of these aspects of the theory will be considered below.

1. The Legal and Moral Senses of Legal Obligation

Finnis, in explaining the nature of legal obligation, articulates a schema which he suggests is representative of the practical reasoning of persons subject to obligation-imposing laws. According to the schema:

I. We need, for the sake of the common good, to be law-abiding;
II. Where *x* is stipulated by law as obligatory, the only way to be law-abiding is to do *x*;
III. Therefore, it is obligatory for persons to do *x* where *x* has been stipulated by law as obligatory.[3]

There is a limited sense in which the concept of legal obligation can be described by sole reference to the third statement in the cited schema: in formal terms, a particular pattern of conduct may be understood as being legally obligatory in sheer virtue of the fact that this pattern of conduct has been stipulated as obligatory by law. Finnis however claims that the formal designation of specified conduct as being obligatory should be considered as but one element in the overall set of considerations that are important to understanding legal obligation. In this regard, Finnis claims that there are distinct 'legal' and 'moral' senses of legal obligation that are both relevant to a full appreciation of the concept.

In highlighting a 'legal' sense of legal obligation, Finnis seeks to explain how an obligation-imposing law itself provides, *qua* law, an exclusionary reason for acting in accordance with the obligation legally stipulated. Finnis notes that legal obligation in its legal sense is invariant: the obligations imposed by laws are all identical in their formal binding force regardless of the content of the laws involved, and an obligation once imposed cannot be evaded, extinguished or superseded except

[3] See John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) [Finnis *NLNR*] at 316. '*x*' may be taken as signifying a particular pattern of conduct to be followed by persons, whether this be positive action or forbearance.

on terms provided for by the law imposing the obligation or by other relevant rules or institutions within a legal system.[4] The legally invariant quality of legal obligation, Finnis suggests, relates fundamentally to the nature and purpose of law itself: law and legal order are intended to constitute a comprehensive and coherent source of authoritative coordination for a community, and towards this end a legal system functions as a 'seamless web', in principle forbidding persons from themselves determining whether and to what extent they are bound by particular legal norms.[5] According to Finnis, this characteristic of legal order entails that each individual law is to be obeyed as a component in the matrix of legal order: being a 'law-abiding citizen', on this analysis, requires adhering to the content of a legal system as a whole.[6] Finnis thus suggests that the legally invariant force of legal obligation is grounded in the second premise in the schema of the legal subject's practical reasoning: 'where *x* is stipulated by law as obligatory, the *only* way to be law-abiding is to do *x*'.[7]

The new classical theory goes further than this, however, in its account of the nature and justification of legal obligation. Even if legal obligation is to be explained by reference to the nature of law and legal systems, a claim that legal obligation entails compliance with legal stipulations in order to be a 'law-abiding citizen' itself evidently presupposes, without further explanation, that is it indeed necessary to be law-abiding. The required explanation for this claim, Finnis suggests, is provided by the putative first premise of the legal subject's train of practical reasoning: 'we need, *for the sake of the common good*, to be law-abiding'. This premise, which Finnis

[4] See Finnis *NLNR*, *ibid.* at 309-12.
[5] In Finnis's words, "each obligation-stipulating law is a member of a system of laws which cannot be weighed or played off one against the other but which constitute a set coherently applicable to all situations and which exclude all unregulated or private picking and choosing amongst the members of the set": *ibid.* at 317; see also John Finnis, "Law as Co-ordination" (1989) 2(1) Ratio Juris 97 [Finnis "Law as Co-ordination"] at 101.
[6] See Finnis *NLNR*, *ibid*.
[7] See *ibid.* at 316.

describes as a 'framework principle' underlying the legal sense of legal obligation, is central to the new natural law claim that legal obligation has a moral dimension and is indeed a form of moral obligation.[8]

For new natural law theory, the moral justification of legal obligation is correlative with that of authority: this justification, as seen in the earlier discussion of the new natural law account of authority and law, is rooted in the idea that promoting the common good of a community entails attending to the need for authoritative resolution of a community's coordination problems.[9] In the face of a plurality of reasonable ways for pursuing the common good in the context of community life, and given the possibility of reasonable disagreement among members of a community regarding which ways of pursuing the common good are to be adopted in particular circumstances, the essential role of authority is to make a definitive selection of a particular pattern of conduct for members of the community to follow. Yet this selection of particular solutions to coordination problems cannot be properly effective for its purpose of advancing the common good unless it is actually *accepted* by all members of the community as definitively settling the matter in relation to which the authoritative stipulation has been made, notwithstanding the fact that some community members may well have preferred a different decision.[10] As seen earlier, the new classical theory affirms that law complements political authority in furthering the common good by providing solutions to coordination problems in a manner that promotes clarity and stability in human interactions.[11] Nevertheless, the benefits of legal order cannot be fully realised unless persons subject to legal governance demonstrate ongoing compliance with legal precepts. As Finnis

[8] See *ibid.* at 317-18.
[9] See discussion in Chapter 3 at 83-84 above; see also John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) [Finnis *Aquinas*] at 269.
[10] See Finnis *Aquinas*, *ibid.* at 270.
[11] See generally discussion in Chapter 3 at 85-86 above.

observes, noting the range and complexity of social interactions that law is intended to regulate, law can only succeed in the complex task of maintaining order in a community "inasmuch as individuals drastically restrict the occasions on which they trade off their legal obligations against their individual convenience or conceptions of social good."[12]

The new natural law account of the relationship between legal obligation and the common good is properly understood in conjunction with the theory's claim that the common good is ultimately the good of individuals and communities. As already seen, new natural law theory's normative account of authority and law emphasises the significance of the coordination provided by authority and legal order for facilitating individual human flourishing.[13] Similarly, the theory's claim that legal obligation is necessary for the common good is essentially an affirmation that compliance with legal norms by all persons in a community is necessary in order to realise a state of affairs in which individual community members can pursue the basic values for themselves, unimpeded by the threats to their well-being that may accompany the failure of community members to abide with legal precepts.

An additional and related point to be made regarding the moral sense of legal obligation recalls the requirement of practical reasonableness stipulating that persons should not demonstrate arbitrary self-preference in their pursuit of the basic values, otherwise described as the requirement of impartiality.[14] Finnis claims that if a person is to enjoy the benefits that accrue to him from the fact that other persons comply with the law, then he must also in fairness accept the burden of complying

[12] Finnis *NLNR*, *supra* note 3 at 319.
[13] See discussion in Chapter 3 at 84-86 above.
[14] See Finnis *NLNR*, *supra* note 3 at 106-08.

with the law himself.[15] Finnis further suggests that in light of law's particular usefulness for advancing the common good of a community, law creates a special frame of reference for assessing the impartiality of persons' conduct: according to Finnis, the beneficiaries of legal obligations are the community members that are governed by law, and in this regard law "gives, at least to those responsible for superintending the common good, a right to demand compliance… as something morally owed 'to the community'."[16]

2. Legal Obligation as Rational Response and Cooperation

The new classical theory places considerable emphasis on the role of the practical reasoning of persons subject to law in explaining the concept of legal obligation. For new natural law theory, legal obligation emerges through the rational response of legal subjects to certain apprehended facts, and persons' compliance with their legal stipulations constitutes a form of cooperation with the endeavour of legal governance.

The full significance, under new natural law theory, of the legal subject's practical reasoning for understanding legal obligation comes to light in Finnis's explanation of the relationship between legal obligation and legislative will. According to Finnis, a lawmaker's decision to stipulate an obligation-imposing rule is not, of itself and independently, the source of legal obligation.[17] The legislator's

[15] See *ibid* at 473; see also Finnis's discussion of the significance of legal sanctions in maintaining fairness among the members of a community, *ibid.* at 262-63. Finnis in this regard echoes the Hartian claim that "when a number of persons restrict their liberty by certain rules in order to obtain benefits which could not otherwise be obtained, those who have gained by the submission of others to the rules are under an obligation to submit in their turn": H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) at 119; see also John Rawls, *A Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999) at 96.

[16] Finnis *NLNR*, *supra* note 3 at 319; see also *ibid.* at 304..

[17] Finnis in this regard contemplates 'purely penal law' theories that enjoyed currency in the writings of many jurists between the fifteenth and seventeenth centuries; according to these theories, legal obligation derives from the lawmaker's will and can be imposed or withheld at the legislator's discretion when he posits a legal rule. See Finnis *NLNR*, *supra* note 3 at 325-30.

decision to make a given pattern of conduct legally obligatory is indeed what accounts for the formal existence of a legal obligation in the legal sense, and the corresponding presumptive existence of a moral obligation to obey the law concerned.[18] As Finnis specifies, however, the lawmaker's stipulation of an obligation-imposing rule is effective in generating obligation not because the lawmaker wills that it be effective, but because it is apprehended by the legal subject as being in accordance with a normative framework that does not itself derive from the lawmaker.[19] The components of this normative framework are the considerations discussed earlier in describing the legal and moral senses of legal obligation – in brief, the particular value of law as an instrument for promoting the common good of a community, and the corresponding need for persons to comply with legal stipulations if a legal system is to provide effective resolution of the community's coordination problems. Legal obligation arises, Finnis claims, because the legislator's stipulation of an obligation-imposing rule fits within this normative framework and thereby has an impact on the legal subject's practical reasoning: a person responds to the intelligible need for compliance with legal obligations for the sake of the common good, and to the significance of the legislator's stipulation as a component in the matrix of legal order, by acting in accordance with that stipulation.[20]

In affirming that legal obligation entails a rational response by persons to the stipulation of an obligation-imposing rule, new natural law theory additionally claims that the character of the obligation-imposing rule – in terms, that is, of its

[18] See *ibid.* at 334.
[19] See *ibid.* at 335. As Maris Tinturé observes, the legislator's decision to stipulate an obligation-imposing rule is a 'necessary but not sufficient' condition for a legal obligation to arise: see Maris Köpcke Tinturé, "Finnis on Legal and Moral Obligation" in John Keown & Robert P. George, eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford: Oxford University Press, 2013) 379 at 383.
[20] See Finnis *NLNR*, *ibid*.

relationship to the common good principle – is an important factor underlying the response of legal subjects. Finnis suggests that legal obligation involves a virtual substitution of the lawmaker's directive for that of the persons governed by law: the lawmaker's stipulation of a particular pattern of conduct to be followed for resolving a coordination problem within the community is treated by community members as if it were their own directive, their own determined plan of action for their common good.[21] According to Finnis, a lawmaker's stipulation is capable of signifying this substitution (and thus generating compliance among legal subjects) because it is "transparent for the common good" – that is, because it manifests an intelligible relationship between the objective of furthering the common good and the means selected for doing so.[22] The fact that the lawmaker's directive bears an intelligible relationship to advancing the common good, Finnis claims, is what allows this directive to be reasonably treated by the legal subjects as if it were their own.[23]

The abovementioned considerations regarding the relevance of legal subjects' practical reasoning for understanding legal obligation also provide insight into the manner in which the new classical theory characterises legal governance. Given the new natural law claim that legal obligation involves a rational response by persons to the imposition of legal stipulations, and the further claim that the stipulation of obligation-imposing rules entails a virtual substitution of the practical reasoning of these persons, it is evident that persons subject to obligation-imposing rules are not

[21] In making this claim, Finnis draws on the classical natural law concept of *imperium*: according to Aquinas, this is an act of intelligence whereby a person makes a representation to himself of a particular course of action that he has chosen. See Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981), Vol. 2, I-II, q. 17, a. 1; see also Finnis *NLNR*, *ibid.* at 338-41. As Finnis notes, the notion of *imperium* is central to the classical natural law claim that deliberate human action is ultimately triggered by an act of reason in which a person 'sees the point' of pursuing his chosen course of action since he understands both the desirability of the objective involved and the appropriateness of the means chosen for achieving it: see *ibid.*

[22] *Ibid.* at 342.

[23] See *ibid* at 341.

merely 'subjects' but actually collaborators in the endeavour of using law as a mechanism for addressing a community's coordination problems. As Finnis observes, legal governance in community "is in some respects a joint enterprise, a kind of co-ordination of the acts of the governed amongst themselves by co-ordination of each with the directives given by their rulers."[24] By the terms of the new natural law analysis, a person's compliance with legal stipulations may be described as a form of practically reasonable cooperation with his community's efforts to promote its common good through legal order.

3. Legal Obligation and Unjust Laws

As the foregoing account of the legal and moral senses of legal obligation indicates, new natural law theory affirms that there are important moral considerations underlying the obligation to comply with legal precepts. In light of these considerations, according to Finnis, the moral obligation to obey legal stipulations is "relatively weighty".[25] New natural law theory also claims, however, that this moral obligation is not absolute; rather, it is presumptive and defeasible, and the extent of the obligation varies according to the particular law concerned and the consequences of non-compliance.[26] These assertions may be understood more fully by having reference to the theory's interpretation of the effects of injustice in law on legal obligation.

Finnis notes that injustice in law may arise in a number of ways. Laws may be enacted with an intention of conferring a private benefit upon the lawmaker or other persons she favours, instead of an intention of favouring the common good; they may be *ultra vires* the legislative authority of the lawmaker; they may be

[24] Finnis *Aquinas*, *supra* note 9 at 257.
[25] Finnis *NLNR*, *supra* note 3 at 319.
[26] See *ibid.* at 318-19.

promulgated in a manner that violates the formal requirements that are constitutive of the Rule of Law; finally, they may be unjust in their content, through failing to achieve a fair distribution of benefits and burdens among members of a community, or through violating human rights.[27] Finnis considers whether there is an obligation to obey an unjust law in situations where this law is part of a legal system that is generally just.[28] In addressing this question, Finnis again draws attention to the new natural law distinction between legal and moral senses of legal obligation. Regarding the former, Finnis observes that while legal systems are meant to function as comprehensive sources of authoritative guidance for the communities they govern, there are instances in which these systems allow for legal obligations to be nullified in virtue of principles of justice that do not have their origins in the legal systems themselves.[29] As Finnis further notes, however, legal obligation in its legal sense can only be negated if a principal institution within a legal system (specifically, a court of final resort) determines that in virtue of an extra-legal principle, an otherwise valid legal obligation is not legally obligatory.[30] As such, the possibility that injustice in a particular law may limit a person's legal obligation in the legal sense ceases to be a consideration if a principal legal institution in a community determines that the law is not unjust, or declares that the law remains legally valid and obligatory notwithstanding its injustice.[31]

The new classical theory makes a different claim regarding the moral sense of legal obligation. Proceeding from the premises that persons possessing authority in community have this authority to make laws for the sake of the common good, and

[27] See *ibid.* at 353-54.
[28] See *ibid.* at 357.
[29] Finnis cites as an example the 'golden rule' of statutory interpretation in English law, which provides that the words of a statute are to be given their plain meaning unless doing so results in absurdity or injustice. See Finnis *NLNR, ibid.* at 356.
[30] See Finnis, *ibid* at 356-57.
[31] *Ibid*.

that such laws are compelling for members of a community because of their apprehended value for furthering the common good, the theory asserts that unjust laws are not obligatory in moral terms. According to Finnis, laws that are unjust in any of the forms described above lack the presumptive moral authority that they would otherwise have simply in virtue of emanating from the lawmaker, and do not generate any moral duty of compliance for members of a community even though they may be formally valid and remain legally obligatory in the legal sense.[32]

Notwithstanding the new natural law position that injustice in law has an essentially fatal effect on the moral sense of legal obligation, the theory also recognises an additional form of obligation to obey the law, which it describes as a 'collateral' moral obligation.[33] As Finnis observes, a person's non-compliance with an unjust legal stipulation may contribute to weakening the effectiveness of other laws and overall respect for legal and political authority among members of a community, thereby causing harm to the common good.[34] According to Finnis, this collateral factor may give rise to a moral obligation to comply with the law despite its injustice, in order that law is 'seen' to be obeyed.[35] Finnis explains that collateral moral obligation is distinct from legal obligation in the moral sense since "it is not based on the good of *being* law-abiding, but only on the desirability of not rendering ineffective the just parts of the legal system."[36] Finnis suggests that a collateral moral obligation only arises in exceptional circumstances and only requires compliance with an unjust law to the extent necessary to avoid compromising the

[32] See *ibid.* at 359-61. Finnis specifies that a law that suffers from a defect of justice in its enactment due to the improper motivations of the lawmaker, but is nevertheless substantively just, retains its moral authority; he further claims that the distributive injustice of a given law does not negate the moral obligation of compliance of those persons who are not unfairly burdened by the law: see *ibid.* at 360.
[33] See *ibid.* at 354.
[34] See *ibid.* at 361.
[35] See *ibid.* at 361.
[36] *Ibid.* [emphasis in original].

legal system as a whole;[37] he further notes that a ruler has a responsibility to repeal an unjust law even if persons subject to the law have a collateral moral obligation to obey it.[38]

II. A Normative Account of International Legal Obligation Based on New Natural Law Theory

Having considered the new natural law conception of legal obligation, it remains to apply this conception to articulating an account of the significance of legal obligation in the international sphere. Proceeding from the new natural law understanding of legal obligation, two main normative theses may be identified in relation to the obligation of states to obey international law. First, there is a general obligation of states to obey international law that is essentially moral in nature; this obligation is explained primarily by the necessity of state compliance with international law for furthering the international common good, and additionally by the principle of fairness. Second, a state's moral obligation to obey a particular international rule is presumptive and defeasible; unjust international laws generate no legal obligation in the moral sense for states, although states may sometimes have a collateral moral obligation to obey such laws.

1. International Legal Obligation as a Moral Obligation

As seen above, the new classical theory posits the existence of legal and moral senses of legal obligation; while the theory affirms that the legal sense of legal obligation is useful in explaining how the nature of legal order itself affects the practical reasoning of persons subject to legal rules, it maintains that the general

[37] See *ibid.* According to Finnis, "[t]here is no reason to suppose that the bad side effects of disobedience or non-compliance will *normally* or *frequently* be so significant that the relevant moral considerations will impose the kind of collateral obligation in question": *ibid.* at 476 [emphasis in original].
[38] See *ibid.* at 362.

obligation to obey the law is moral in character. Applying this conceptual framework to the international sphere, it may be similarly affirmed that while international legal obligation has both legal and moral dimensions, the general obligation of states to obey international law is fundamentally a moral obligation, and that the unique characteristics of the international legal system are relevant to understanding the moral basis of this obligation.

To a significant extent, the obligations arising from the primary instruments of normativity in international law, namely treaty and customary rules, do possess the quality of legal invariance that Finnis describes as characteristic of legal obligation in its legal sense. For example, by the terms of the 'most-favoured-nation' principle articulated in Article 1.1 the *General Agreement on Tariffs and Trade*, a state party that affords an advantage to a particular product in its trade relations with another country must grant the same advantage for like products to all other state parties.[39] Unless a state can demonstrate that an intended act of preferential trade treatment falls into one of the categories of exceptions to the most-favoured-rule that are provided for under the *GATT*, it is bound absolutely by Article 1.1 and would have no justifiable basis, if it violated the provision, for claiming that its legal duty of non-discrimination had been overridden or diminished.[40] Similarly, the prohibition against attacks on undefended towns or buildings during armed international conflicts, as an established international customary norm, imposes an unqualified

[39] See *General Agreement on Tariffs and Trade 1994*, April 15 1994, 1867 U.N.T.S. 154 [*GATT*], Art. I:1. This Agreement is a continuation and modification of the *General Agreement on Tariffs and Trade*, October 30 1947, 55 U.N.T.S. 194.
[40] For examples of recognised exceptions to the most-favoured-nation rule, see *GATT*, *ibid.*, Arts. XX & XXIV.

obligation of compliance upon all states regardless of whether they are parties to the international treaty in which this prohibition is also recognised.[41]

Notwithstanding this, it should be noted that given certain features of international legal order, Finnis's claim that the legal sense of legal obligation is grounded in the nature of legal order as an integral and coherent framework of normativity does not appear to be entirely germane to an account of international legal obligation. First, it may be observed that the international legal 'system' is in reality an array of distinct legal regimes. Specialised international regulatory frameworks have emerged in relation to trade, criminal prosecution, environmental protection, and numerous other spheres of state activity having international dimensions, and each of these is normatively 'self-contained' and not necessarily congruent with other international legal regimes that may be simultaneously relevant to a particular issue that arises in inter-state relations.[42] Additionally, instruments that are intended to be applicable to the entire international community, such as the human rights treaties within the United Nations system, often exist alongside regional instruments that address the same subject-matter (although not necessarily in exactly the same way) for a geographically-defined subgroup of states.[43] The cumulative effect of these features of international legal order is that states may at

[41] See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 168 at 80, para. 219; see also *Hague Convention IV respecting the Laws and Customs of War on Land*, 18 October 1907, 187 Cons. T.S. 227, Art. 25.

[42] This is one aspect of the much-discussed phenomenon of the 'fragmentation' of contemporary international law. See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (2006) [*Fragmentation of International Law*] at paras. 5-8, 15.

[43] See Joost Pauwelyn, "Fragmentation of International Law" in Max Planck Encyclopedia of International Law, online: Max Planck Encyclopedia of International Law <http://opil.ouplaw.com/home/EPIL>, para. 3..

times be subject to parallel and potentially conflicting obligations under international law. [44]

Second, international law is characterised by its plurality of formal sources of legal normativity and legal obligation. In particular, both treaties and custom serve as primary sources of international law, with no hierarchy being recognised between them.[45] As noted previously, given the criteria for ascertaining the emergence of a customary norm, there is often considerable uncertainty in determining whether a particular pattern of conduct has achieved the status of international custom,[46] and this can in turn create uncertainty regarding the existence and content of international legal obligations corresponding to a putative customary norm. Apart from this, since treaty rules and customary norms governing a particular issue can exist simultaneously, it is possible for a state to be subject to identical or indeed distinct treaty and customary obligations in relation to the same issue.[47]

Third, unlike the situation in national legal systems, international law does sometimes allow the subjects of law to themselves determine whether and to what extent they will be bound by particular legal stipulations. The practice of states filing reservations to multilateral treaties is recognised in customary international law and is also expressly provided for under the *Vienna Convention on the Law of Treaties*; according to this practice, a state can modify its treaty obligations at the time that it is seeking to become a party to a treaty by formulating a reservation, provided that the treaty does not prohibit this and the reservation is not incompatible with the object

[44] See *ibid.*, para. 4.
[45] See discussion in Chapter 3 at 120 above.
[46] See discussion in Chapter 3 at 122 above.
[47] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 at 83-96, paras. 175-179.

and purpose of the treaty.[48] The ability of states to limit the extent of their international obligations also finds expression under international custom in the 'persistent objector' rule, by the terms of which a state that has made sustained objections to a rule of international custom during the course of its emergence is deemed not to be bound by that rule once it has crystallized.[49]

Taken together, these characteristics of international legal order suggest that the legal sense of international legal obligation cannot be properly explained by the idea that international law constitutes an integral legal system, such that a state's adherence to international law as a whole entails that the state must comply with each rule that is relevant to governing inter-state conduct. If international law may indeed be described as creating a 'web' of normativity for the international community, it is evidently not a seamless one, and it is far from being entirely coherent; additionally, for at least some rules of international law, states can and do exercise a measure of control over the scope of their international legal obligations.

Given that the features of international legal order tend to undermine rather than support an account of the legal sense of international legal obligation that is based on the systemic unity and coherence of international law, the moral basis of international legal obligation arguably assumes greater significance. Since new natural law theory characterises legal obligation as a form of moral obligation, the theory will affirm that moral considerations are the primary factors justifying the obligation to obey international law, and that these considerations retain their ultimate justificatory relevance even if international law does not constitute an

[48] See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S 331 [*Vienna Convention*], Arts. 2(1)(d), 19.
[49] See Tulio Treves, "Customary International Law" in Max Planck Encyclopedia of International Law, online: Planck Encyclopedia of International Law <http://opil.ouplaw.com/home/EPIL>, para. 39.

integral legal system and international legal obligation thus cannot be adequately explained in strictly legal terms.

Based on the new natural law framework, it may be suggested that the international common good and fairness are the primary moral considerations underlying the moral obligation to obey international law. These claims may now be elaborated.

International Legal Obligation and the International Common Good

As previously considered, the international community of states experiences a variety of coordination problems and has an ongoing need for definitive resolution of these problems as they arise. From the perspective of new natural law theory, international law provides a mechanism for generating definitive norms to govern inter-state conduct and resolve the coordination problems of the international community, and thereby contributes to realising the supranational conditions that enable individuals and communities residing within states to pursue the basic values for themselves.[50] International law can however only be properly effective for its purpose of furthering the international common good if international legal rules are treated by states as definitively settling the coordination problems that they address, notwithstanding the possibility that other reasonable approaches to resolving such problems may exist and that some states may prefer different solutions to the ones stipulated. The moral sense of international legal obligation describes the necessity of state compliance with international legal stipulations in order to facilitate the coordination of the international community that is beneficial to the international common good.

[50] See discussion in Chapter 3 at 93 above.

The unique characteristics of international legal order are themselves relevant to understanding the moral basis of international legal obligation. As is evident from the cited examples of state reservations to multilateral treaties and the 'persistent objector' rule in relation to the emergence of international custom, state consent plays an important role in the development of international legal norms. Given the significance of sovereignty as a principle of international law, and the fact that states are simultaneously the subjects and primary authors of international legal rules, states enjoy far greater influence in practice over the authority of international norms than do persons within national political communities who do not form part of the community's structures of authority and are 'subject' in a straightforward sense to the legal stipulations of persons in authority. Importantly related to this consideration is the fact that many areas of international law suffer from an absence or relative weakness of mechanisms for the enforcement of international rules, and the further reality that even where such mechanisms exist, they may not always be applied to render a state accountable for its violation of international norms. As a result of these factors, international legal order is inherently compromised in its ability to constrain the behaviour of states even in the presence of established international laws: there is ample scope for states to define their international legal commitments in a manner that promotes their particular interests rather than the common good of the international community, or for them to avoid their international legal obligations entirely without suffering significant negative consequences.

The essential moral reason for states to comply with their international legal obligations is the consideration that while international legal order is in many respects less than ideally capable of ensuring the international common good, the

need to secure the international common good for the sake of furthering human welfare remains a priority. It is well known, for example, that the legal regime in the *Charter of the United Nations* governing the use of force in inter-state relations has proven to be an imperfect mechanism for facilitating collective international responses to acts of inter-state aggression, and that the regime has accordingly been less than ideally effective in providing a deterrent to states contemplating such acts.[51] Still, it is evident that the need for states to adhere to the international law prohibition on the use of force persists, on the basis that an unprovoked act of international aggression disrupts international peace and security – an aspect of the international common good that is intended to be preserved by the *Charter* regime – and invariably results in unjustifiable infringements of the basic aspects of the well-being of persons living within the state attacked, if not also the welfare of persons within the attacking state.[52] Similarly, it may be observed that while the multilateral treaty banning the possession or development of biological weapons lacks a formal verification mechanism to monitor the compliance of states parties, and is accordingly structurally weaker as an international legal instrument than the equivalent treaty prohibiting the development or use of chemical weapons,[53] this fact has no bearing on the legal obligation of states parties to comply with the prohibition

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[51] See *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI [*Charter*], Art. 2(4) & Ch. VII. The operation of the *Charter's* collective security mechanism has been hindered on several occasions by political gridlock within the United Nations Security Council, and by the fact that the United Nations standing army envisaged under Art. 43 of the *Charter* never came into existence. See Christine Gray, *International Law and the Use of Force*, 3d ed. (Oxford: Oxford University Press, 2008) at 254-55; Anthony C. Arend & Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993) at 56-57.

[52] *Cf.* discussion in Chapter 3 at 103 above.

[53] See *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, 10 April 1972, 1015 U.N.T.S. 163 [*Biological Weapons Convention*]; *cf. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 13 January 1993, 1974 U.N.T.S. 45, Art. VII and Annex on Implementation and Verification. The lack of a verification mechanism within the *Biological Weapons Convention* is cited as one of the factors that has contributed to the failure of several states parties to abide with the treaty's requirements. See *e.g.*, Jack M. Beard, "The Shortcomings of Indeterminacy in Arms Control Regimes: the Case of the Biological Weapons Convention" (2007) 101 A.J.I.L. 271 at 272.

of biological weapons. The rationale for the legal obligations imposed on states by the *Biological Weapons Convention* is the same as that underlying the legal obligations stipulated in the *Chemical Weapons Convention* – namely, pursuit of the objective of eliminating weapons of mass destruction, including biological and chemical weapons, on the basis that such weapons constitute unacceptable threats to human welfare – and this rationale is what ultimately grounds the equivalent legal force of the obligations identified in these two treaties as well as the normative claim that the terms of these instruments should be respected.[54]

The considerable autonomy of states as actors in the international sphere and the limitations in international law's ability to constrain state behaviour arguably reinforce the significance of the idea that legal obligation is a form of cooperation by the subjects of law with the enterprise of legal governance. Notwithstanding the often fragile fabric of international law, its importance for furthering the international common good and thereby facilitating human flourishing suggests that states have a strong moral obligation to cooperate to make international law effective for its purpose through adhering to their international legal obligations.

International Legal Obligation and Fairness

As seen earlier, new natural law theory affirms that impartiality forms part of the considerations comprising the moral obligation to obey the law. This claim may likewise be made in relation to international legal obligation. In complying with international legal rules, states in effect voluntarily restrict the range of possible types of action that might otherwise be open to them in the international sphere and

[54] The Preambles to both the *Biological Weapons Convention and the Chemical Weapons Convention* affirm the determination of states parties to pursue "general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction"; both Preambles further affirm the resolve of states parties "for the sake of all mankind" to exclude completely the possibility of using biological and chemical weapons.

act instead in accordance with norms stipulating a 'common way' of state conduct. Fairness requires that if a particular state benefits from the fact that other states have limited their exercise of freedom through adhering to international laws, it must likewise accept the burden of complying with international legal stipulations. Where a state does not comply with its international legal obligations, it thereby enjoys a measure of freedom of action that is not enjoyed by other states that are adhering to the laws concerned; in this regard, it unfairly privileges its own interests and becomes a 'free-rider' in relation to the benefits provided by international legal order.

The notion that the duty to comply with legal requirements is morally owed to the community governed by the law is also relevant to understanding the justification of legal obligation in the international sphere. As noted earlier, Finnis suggests that given law's distinct value in promoting the common good of a community, law gives persons in authority, as those responsible for ensuring the community's common good, a right to demand that legal stipulations be followed.[55] This claim is significant not only for the observation that legal obligation corresponds to a 'right' that the law be obeyed, but also for the insight that the right contemplated belongs to the *subjects* of law, and only vicariously to the lawmaker as the authority responsible for ensuring the community's common good. The international community is of course distinguished from national political communities by its lack of an overarching institution enjoying comprehensive authority over all states. Given, however, the abovementioned consideration regarding the identity of the right-bearers in relation to legal obligations, the absence of a supreme authority in the international sphere does not appear to preclude an

[55] See *supra* note 16 and accompanying text.

affirmation that compliance with international law is morally owed to the community that is governed by and benefits from international legal order. Taking into account the decentralized structure and functioning of the international community in relation to its processes of norm-creation and enforcement, it may be suggested that international law, in virtue of its utility in furthering the international common good, itself gives states in the international community a right to demand the compliance of other states with their international legal obligations.

2. Effects of Injustice in International Law on International Legal Obligation

As indicated in the preceding section, the new natural law conception of legal obligation suggests that there is a substantial moral obligation upon states to comply with international legal norms. Given, however, that the new classical theory also affirms that the moral obligation to obey each law is presumptive and defeasible, it is appropriate to consider the relevance of this claim to a normative account of legal obligation in the international sphere. New natural law theory's claims regarding the effects of injustice in law on legal obligation in its moral sense support a conclusion that the moral obligation of states to obey international laws is not absolute; at the same time, the theory suggests that there may be a collateral moral obligation to obey international laws even in circumstances where these laws are unjust.

Of the various forms of injustice in law described by Finnis, two may be highlighted as being particularly germane to international law. First, international laws may be influenced in their formation by the improper intention of states involved in creating the laws. International legal instruments are generally the product of negotiation among states, and as a result of the significant disparities in the relative economic, political, and military power of states in the international community, certain states may enjoy a disproportionate ability to influence the

outcome of international law-making processes in a manner that advances their private interests as compared to furthering the common good of the international community. One way in which this issue manifests itself is in the 'watering-down' of the content of proposed laws during the negotiation of international instruments, as a compromise in order to secure the agreement of certain states. For example, it is known that the absence of a verification mechanism in the *Biological Weapons Convention* relates to the fact that the Soviet Union, one of the key original parties to the treaty that was itself interested in acquiring biological weapons, was opposed to the inclusion of such a mechanism in the treaty and succeeded in having the proposed verification provision removed before agreeing to became a party.[56]

Second, international laws may be substantively unjust. On the one hand, international laws may demonstrate an unfair allocation of benefits and burdens among states. This issue arguably arises, for example, in relation to the *Treaty on the Non-Proliferation of Nuclear Weapons*, which requires states parties that do not possess nuclear weapons to refrain from manufacturing or otherwise acquiring such weapons, while implicitly permitting states parties already in possession of nuclear weapons to retain these weapons, acquire additional weapons, and share nuclear weapons technologies amongst themselves.[57] Alternatively, international laws may violate human rights, in their application if not also their content. This concern arose in relation to the economic sanctions regime against Iraq imposed by the United

[56] See Beard, *supra* note 53 at 279-80. After becoming a party to the *Biological Weapons Convention*, the Soviet Union engaged in an extensive covert program of developing biological weapons over the course of several years: see *ibid.* at 282-83.

[57] See *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 161 [*Nuclear Non-Proliferation Treaty*], Arts. I-II. The *Nuclear Non-Proliferation Treaty* was designed to prevent the expansion of nuclear weapons capacity beyond the states that already possessed nuclear weapons at the time the treaty was created. While the treaty was not primarily intended to address the issue of nuclear disarmament, it includes a requirement that all states pursue good faith negotiations towards the objective of nuclear disarmament. See *Nuclear Non-Proliferation Treaty*, *ibid.*, Art. VI; see also Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009) at 3-4, 8-13.

Nations Security Council in 1990, a regime that was imposed in response to Iraq's illegal invasion of Kuwait but which ultimately became criticised for its debilitating impact on the Iraqi civilian population.[58]

In considering the effects of injustice in international laws on international legal obligation, it is useful to once again recall the new natural law distinction between legal and moral senses of legal obligation. As noted earlier, Finnis suggests that injustice in positive law can affect legal obligation in its legal sense if a principal institution within a legal system determines that the injustice in question serves to negate a legal obligation that would otherwise exist.[59] An analogous idea is seen in international law in the doctrine of peremptory norms or *jus cogens*, which affirms that an international treaty (and by implication, the obligations arising under that treaty) is invalid if it conflicts with a norm recognised by the international community as a peremptory norm.[60] The norms typically identified as *jus cogens* include principles pertaining to the protection of basic human rights.[61] The *Vienna Convention* provides that where states parties are unable to reach a solution to a dispute regarding the invalidity of a treaty because of conflict with a peremptory norm, the dispute is to be referred to the International Court of Justice unless the

[58] See SC Res. 661, UN SCOR, 2934th Mtg., UN Doc. S/RES/661 (1990). Although Security Council resolutions do not themselves constitute one of the traditional 'sources' of international law, (*i.e.*, treaties, international custom, or general principles of law), they arise in virtue of the powers afforded to the Security Council in the *Charter* for maintaining international peace and security: see *Charter*, *supra* note 51, Art. 24. Decisions of the Security Council create binding obligations for all member states of the United Nations: see *Charter*, *ibid*., Art. 25; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at 52-54, paras. 113-116. By the terms of Resolution 661, all United Nations member states were required to refrain from any trade or financial transactions with Iraq. On the impact of the sanctions regime, see *e.g.*, Marc Bossuyt, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, working paper prepared for the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN/Sub. 2/2000/33 (2000) at paras. 59-73.

[59] See *supra* note 30 and accompanying text

[60] See *Vienna Convention*, *supra* note 48, Art. 53. As Alexander Orakhelashvili observes, the concept of *jus cogens* introduces a constitutional dimension to the sphere of international law which is otherwise primarily characterised by the freedom of states to enter into international agreements based on mutual consent. See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 10.

[61] See Chapter 3 at 126-27 above.

parties agree to submit the dispute to arbitration;[62] thus, the *Vienna Convention* does contemplate a process for determining the validity of international laws and their corresponding legal obligations through the deliberation of one of the principal international legal institutions.

It may nonetheless be suggested that most of the instances of injustice in positive international laws are not ones in which the legal sense of international legal obligation is likely to be at issue. Situations such as those where international instruments are compromised in their content due to the improper motivations of states parties, or where international laws provide for an unfair distribution of burdens and benefits among states, will not necessarily amount to being circumstances in which international laws conflict with peremptory norms of international law. Given the nature of international legal order already described and the arguments presented herein in favour of understanding the obligation to obey international law as being fundamentally a moral obligation, it is arguably the moral sense of international legal obligation that is of primary interest in considering the impact of injustice in international laws on international legal obligation.

As applied to international law, the new natural law account of the effects of injustice in laws on the moral sense of legal obligation suggests that unjust international laws fail to create, of themselves, any moral duty of compliance for states, even though they may be legally valid and obligatory in formal legal terms. Since for new natural law theory, the obligation to obey international law is premised on the idea that international law is a salient coordinator for the international community and that state compliance with international rules is necessary in order to facilitate the effectiveness of international law in furthering the international

[62] See *Vienna Convention*, *supra* note 48, Art. 66.

common good, the theory will affirm that international laws that are incompatible with the objective of advancing the international common good lack the moral authority that they would otherwise have simply in virtue of their status as international *legal* norms.

This rather stark conclusion regarding the effect of injustice in international laws on the moral sense of international legal obligation admittedly presents certain difficulties as a guide to state conduct in the international sphere. If injustice in a particular international law is to be taken as denoting that this law is not obligatory in moral terms, then the injustice of the law in question should presumably be clearly established. Few international laws, however, can be readily characterised as being straightforwardly unjust. More commonly, as the example of the Security Council's economic sanctions regime against Iraq demonstrates, international laws give rise to a mixture of considerations of justice and injustice in relation to their content and the effects of their application. Apart from this, there may be reasonable disagreement among states within the international community as to whether the terms of a given international legal regime are in fact unjust. In circumstances where the injustice of an international law is unclear or contested, it may be difficult to definitively conclude that a state has no moral duty to comply with the law in question.

Even if the injustice of a particular law is beyond dispute, however, it may be argued that the notion that states may disregard their international legal obligations on moral grounds poses a threat to the stability of international legal order, and that this is a matter of concern given the importance of international law for furthering the international common good. As Finnis acknowledges, there is indeed merit in the idea that the common good may sometimes be better served through the breach of legal obligations than through conformity to them, and it may be similarly affirmed

that situations may arise in the international sphere in which the international common good may best be advanced through the decision of states to disregard particular obligations imposed on them by international law.[63] Nevertheless, this very context-specific possibility must be reconciled with the broader considerations already raised herein, namely that international legal order is fundamentally dependent for its functioning on the cooperation of states – such 'cooperation' being, in large measure, the essentially voluntary compliance of states with the content of international norms – and that international law cannot be ideally effective for its purpose of furthering the international common good unless states actually treat international legal stipulations as binding and comply with their terms.

In light of these concerns, it is relevant to recall the further claims of the new classical theory regarding the effects of injustice in law on legal obligation. As seen earlier, Finnis's treatment of this issue focuses on whether there is a moral obligation to obey an unjust law in the context of a legal system that is *generally just*; in this regard, he suggests that there may be a collateral moral obligation to obey the unjust law for the sake of preserving the effectiveness of the just parts of the legal system.[64] Applying this idea to the international sphere, it may be suggested that even where international laws are unjust and generate no legal obligation in the moral sense for states, there may be a collateral moral obligation on states to comply with such laws in order to preserve the portions of international legal regimes that are just and beneficial to the international common good.

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[63] See Finnis *NLNR*, *supra* note 3 at 316. The 1999 military intervention in Kosovo by the North Atlantic Treaty Organisation may be cited as an example of an action by states that many scholars consider to be justified on humanitarian grounds notwithstanding the fact that it was not authorised under the *Charter*. See *e.g.*, Christopher Greenwood, "Humanitarian Intervention: the Case of Kosovo" (1999) (10) Finn. Y.B. Int'l L. 141 at 170-73; for a contrary view as to the legality of the Kosovo intervention, see *e.g.*, Antonio Cassese, "*Ex inuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 E.J.I.L. 23 at 23-25.

[64] See the discussion at 187-88 above.

The notion of collateral moral obligation takes into account the potential precedential significance of a state's non-compliance with international norms for other actors in the international sphere. A state's refusal to abide by the terms of an unjust international law may not only inspire other states to follow suit in relation to *this* law, but may also encourage states to treat other, just international laws as mere propositions to be adhered to or derogated from at will as deemed appropriate by states themselves. As noted previously, the possibility that states may take an 'a la carte' approach to their international legal obligations is augmented by the significant autonomy enjoyed by states in international affairs and the lack or weakness of enforcement mechanisms in many areas of international law. Since a decline in overall state respect for the normativity of an international legal regime is likely to undermine the beneficial role played by that regime in addressing the coordination problems of the international community, there is indeed a relevant sense in which international legal obligation may be described as relating to a need for international laws to be 'seen' to be obeyed.

The same argument in favour of a collateral moral obligation may be made in slightly different terms, through reference to the institutional dimension of the international legal order. As has already been observed, a number of institutions function as authoritative entities for the international community and for particular groupings of states within this community, furthering the international common good through coordinating multiple aspects of states' international relations.[65] If a state refuses to comply with a legally obligatory yet unjust directive emanating from an international institution that is generally beneficial to the international common good, this may undermine the authority of that institution in the eyes of other states in

[65] See the discussion in Chapter 3 at 116 and 118 above.

relation to its directives and other authoritative pronouncements generally; an increase of state non-compliance with the institution's decrees may, in turn, lead to the institution becoming critically hampered in its efforts to address the coordination needs of the international community. A collateral moral obligation to obey an unjust international law may thus also be described as relating to safeguarding the effectiveness of international institutional authority, the latter being understood as part of a generally just international legal regime.

Applying the notion of collateral moral obligation to some of the scenarios of injustice in international law mentioned earlier, it may first be suggested that non-nuclear-weapons states parties to the *Nuclear Non-Proliferation Treaty* have a collateral moral obligation to comply with the treaty's rules on non-proliferation notwithstanding the asymmetrical manner in which these rules apply to non-nuclear-weapons states and nuclear-weapons states parties under that treaty. The existence of this obligation may be justified on the basis of the need to ensure the maintenance of state respect for, and thus the effectiveness of, other important parts of the treaty that are arguably just such as the 'safeguards' mechanism.[66] It should be emphasised that the acknowledgement of a collateral moral obligation in this instance does not amount to an endorsement of the unjust characteristics of the nuclear non-proliferation regime. On the contrary, it may be affirmed that as long as nuclear weapons states are effectively permitted to retain and acquire nuclear weapons to the exclusion of non-nuclear weapons states, and in the absence of any genuine efforts by nuclear weapons states to pursue comprehensive nuclear disarmament, the moral

[66] The *Nuclear Non-Proliferation Treaty* requires non-nuclear weapons states parties to accept safeguards, including periodic inspection of their nuclear facilities by the International Atomic Energy Agency, to verify that they are fulfilling their obligations under the treaty. See *Nuclear Non-Proliferation Treaty*, *supra* note 57, Art. III.

obligation of non-nuclear-weapons states parties to adhere to the non-proliferation rules remains 'diminished' even though their legal obligation persists.[67]

It can also be suggested that states may, in certain circumstances, have a collateral moral obligation to obey international laws that violate human rights. It may be plausibly argued, for example, that states may have a collateral moral obligation to adhere to the terms of United Nations Security Council resolutions even if these resolutions infringe human rights, for the sake of preserving the overall authority and effectiveness of the Security Council as an institution that is generally desirable for maintaining international peace and security. Such a claim is however subject to a number of qualifications. First, given the new natural law account of the significance of human rights and their relationship to natural law principles, the theory will maintain that there cannot be any form of moral obligation for states to obey international laws that violate absolute human rights.[68] Second, there cannot be a collateral moral obligation for states to comply with international laws that violate *jus cogens*, a category that includes a number of international human rights norms.[69] As already noted, international laws that are inconsistent with peremptory norms are legally invalid, thus even the legal sense of legal obligation does not arise in relation to unjust international laws of this character. Additionally, it now appears that international laws that violate human rights cannot give rise to binding legal obligations for member states of the European Community (EC), at least where such laws are being implemented via EC legislation, since the European Court of Justice has affirmed that fundamental rights guarantees that form part of the general principles of Community law entail limits on the types of measures that may be adopted in EC legislation even where such measures have been adopted in fulfilment

[67] *Cf.* Finnis *NLNR*, *supra* note 3 at 362.
[68] See the discussion in Chapter 4 at 140 and 146-47 above.
[69] See the discussion in Chapter 3 at 126-27 above.

of the international legal obligations of EC member states under the *Charter*.[70] This implies that in situations where an unjust international law is being given effect via EC legislation and the latter conflicts with fundamental rights recognised in Community law, the possibility of a collateral moral obligation will not arise for EC member states. Finally, it may be noted that even if a particular set of circumstances supports the existence of a collateral moral obligation to obey an international law that violates human rights, this will not obviate the need for the injustice in that law to be rectified as a matter of urgency. A collateral moral obligation, it should be stressed, is a secondary form of moral obligation, and as such is inherently limited in its moral force. Notwithstanding the relevance of a concern about safeguarding the effectiveness of international legal regimes and institutional authority, such a concern can hardly be characterised as a robust moral consideration where international laws and institutions are perpetuating injustice against persons. From the perspective of new natural law theory, the moral obligation of states to comply with international laws is most persuasive where these laws are actually suitable for furthering the international common good, through their consistency with the requirements of practical reasonableness.

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[70] See *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, C-402/05 P; C-415/05 P, [2008] E.C.R. I-6351, paras. 285, 326 and generally paras. 280-330. The case concerned, *inter alia*, the ability of EC courts to review the lawfulness of EC legislation in light of fundamental rights enshrined in Community law, where such legislation was enacted for the sake of implementing Security Council resolutions adopted under Chapter VII of the *Charter*. The contested legislation in that case was a regulation adopted by the Council of the European Union freezing the funds and economic resources of the appellants and others, this regulation having been adopted pursuant to prior Security Council resolutions adopted under Chapter VII of the *Charter* that required all states to implement such sanctions against these particular persons and entities. Notably, the Court employed the notion of 'fundamental rights' as this term is understood in Community law; in this context, fundamental rights are not limited to either absolute human rights or human rights principles identified as *jus cogens*, but instead encompass the rights guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and those rights resulting from the constitutional traditions common to EC member states. See *ibid*. at paras. 283, 326; *cf. Consolidated Version of the Treaty on European Union*, 7 February 1992, [2012] O.J. C 326/01, Art. 6(3).

III. New Natural Law Theory and Existing Thought in International Legal Theory on International Legal Obligation: The Challenge of Goldsmith and Posner

The issue of state compliance with international norms has long fascinated writers on international law and international relations. Thus far, the majority of scholarship on international legal obligation has focused on explaining why states act in accordance with international treaties and customary rules, or on identifying the factors that may foster state compliance with international law; in relation to these concerns, theorists have invoked a range of concepts including state consent, the legitimacy of international law-making processes, the substantive fairness of international rules, and the internalization of international legal norms within domestic legal systems.[71] There has been relatively little consideration of whether states have a moral duty to obey international law, and few attempts to articulate normative interpretations of international legal obligation.[72] A challenge to such normative perspectives has nonetheless recently been issued by Jack Goldsmith and Eric Posner, who in *The Limits of International Law* specifically raise and purport to

[71] Among relevant works, see *e.g.*, James L. Brierly, *The Basis of Obligation in International Law and Other Papers* (Oxford: Clarendon Press, 1959); Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d ed. (New York: Columbia University Press, 1979); Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995); Abram Chayes & Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995); Harold Koh, "Why Do Nations Obey International Law?" (1996-1997) 106 Yale L. J. 2599.

[72] A notable recent exception in this regard is David Lefkowitz, "The Principle of Fairness and States' Duty to Obey International Law" (2011) 24 Can. J.L. & Jur. 327. Lefkowitz offers a theory of the moral duty to obey international law based on the principle of fairness, focusing on the voluntarist interpretation of the fairness principle expressed by A. John Simmons. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), Ch. V; Lefkowitz, *ibid.* at 329 *et seq.* In appealing to the principle of fairness as a basis for international legal obligation, Lefkowitz's analysis dovetails with the new natural law account provided herein, although as already seen the latter account focuses primarily on the international common good in explaining states' moral obligation to obey international law.

refute the notion that there is a moral obligation to obey international law.[73] It is appropriate to consider their claims.

In *The Limits of International Law*, Goldsmith and Posner advance an interpretation of international law that is based on rational choice theory and claims that effective international law is the product of states' pursuit of self-interest in the international sphere.[74] The authors characterise international treaties and customary international norms as comprising "a special kind of politics" that bears certain formal similarities to domestic law, but is fundamentally determined in its potential scope and impact by the dynamics of state power and interests.[75] Consistent with these claims, Goldsmith and Posner argue that state compliance with international norms is itself to be understood in terms of its relationship to state interest: the authors assert that "international law can be binding and robust, but only when it is rational for states to comply with it."[76]

Goldsmith and Posner devote a chapter of their work to criticising the idea that states have a moral obligation to comply with international law. Apart from contesting the view that state consent provides a normative basis for international legal obligation,[77] Goldsmith and Posner reject the claim that states should obey international law because this will enhance human welfare.[78] According to Goldsmith and Posner, international law reflects the interests of states rather than

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[73] See Goldsmith and Posner, *supra* note 2. An earlier version of Goldsmith and Posner's discussion of this issue appears in Eric Posner, "Do States Have a Moral Obligation to Obey International Law?" (2002-2003) 55 Stan. L. Rev. 1901.
[74] See Goldsmith and Posner, *ibid.* at 3, 13.
[75] See *ibid.* at 13, 202.
[76] Goldsmith and Posner, *ibid.* at 202.
[77] Goldsmith and Posner note that many aspects of international law do not operate on the basis of state consent; they further observe that while a person's act of promising may be understood as giving rise to a moral duty to keep the promise based on the role of promising in enhancing individual autonomy, state acts of consent to international laws do not necessarily enhance the autonomy of their citizens. See *ibid.* at 189-92.
[78] Goldsmith and Posner extrapolate this thesis from Joseph Raz's claim that persons have a duty of allegiance to just institutions where these are beneficial to their interests. See generally Joseph Raz, "Government by Consent" in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 355; Goldsmith and Posner, *ibid.* at 193-94.

those of persons, and its content is further skewed in favour of the interests of powerful states.[79] The authors note that international treaties and norms of international custom often serve the interests of the states that they directly concern at the expense of third parties, and on this basis they assert that "[t]he rules of international law facilitate cooperation, but do not necessarily facilitate cooperation benefiting the world."[80] Goldsmith and Posner further observe that the predominance of state interest in shaping international law is compounded by the lack of international institutions to attend to the needs of all persons worldwide through enacting international laws and changing these laws as required.[81] Goldsmith and Posner conclude that in the context of the current global order in which states seek to further the interests of their own citizens over the interests of persons in other states, and in which more powerful states enjoy more international political influence than weaker ones, there is no basis for claiming that the international legal system is just and gives rise to moral duties of compliance for states.[82]

Goldsmith and Posner indicate at the outset of their work that they are interested in interpreting the functioning of international law in the context of "the realities of international politics."[83] Although their interpretation of international legal normativity through the lens of rational choice theory has proven controversial,[84] there can be little disagreement with their basic claim that

[79] See Goldsmith and Posner, *ibid.* at 195.
[80] *Ibid.* at 194.
[81] See *ibid.* at 199.
[82] See *ibid.* at 200.
[83] See *ibid.* at 3.
[84] Among the considerable body of responses to Goldsmith and Posner's book since its publication, see the collection of articles proceeding from a symposium on *The Limits of International Law* held at the University of Georgia in 2005 and published in (2005-2006) (34) Ga. J. Int'l & Comp. L 285-484; Oona A. Hathaway & Ariel N. Lavinbuk, "Rationalism and Revisionism in International Law" (book review), (2005-2006) 119 Harv. L Rev. 1404; Mary Ellen O'Connell, *The Power and Purpose of*

international law is significantly influenced, both in its structural features and its substantive content, by considerations of state interest. Yet even if it is acknowledged – as it has been herein – that injustice in international laws may arise as a consequence of political inequalities among states and attempts by states to privilege pursuit of their private interests over the common good of the international community, it is not apparent, at least from the perspective of new natural law theory, that Goldsmith and Posner have provided a satisfactory basis for denying the claim that states have a moral obligation to obey international law.

As already seen, the new natural law account of the moral sense of international legal obligation is grounded in an affirmation of the notion of an international common good and its significance for human flourishing, and an appreciation of the value of international law as a mechanism for furthering the international common good. In this regard, it may be observed that while Goldsmith and Posner emphasise the manner in which international law advances and reflects the private interests of states, they pay little attention to the fact that certain objectives in the international sphere have authentically *shared* significance for states; these are objectives that, according to a new natural law conception of international law, correspond to the conditions comprising the international common good.[85] Furthermore, Goldsmith and Posner arguably give insufficient recognition to the extent to which international law plays a beneficial role in actually resolving the coordination problems of the international community, and thereby contributing to the international common good. Goldsmith and Posner affirm the technical utility

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International Law: Insights from the Theory and Practice of Enforcement (New York: Oxford University Press, 2008), 103-30 *et passim*.

[85] See discussion in Chapter 2 at 70-71 above. Goldsmith and Posner refer on one occasion to "international public goods" and cite as examples "the protection of fisheries, the reduction of atmospheric pollution, and peace"; however, the notion of 'international public goods' is mentioned only briefly in the context of a discussion on the limited effectiveness of multilateral treaty regimes, and the authors do not consider this concept further. See Goldsmith and Posner, *supra* note 2 at 87.

of international treaties in fostering cooperation or coordination, noting that treaties "can play an important role in helping states achieve mutually beneficial outcomes by clarifying what counts as cooperation or coordination in interstate interactions";[86] beyond this, however, their discussion of international treaty regimes essentially focuses on demonstrating the ways in which the functioning of these regimes is determined by the dynamics of state interest. The new classical theory, meanwhile, highlights both the role of international law in facilitating coordination and the manner in which this coordination furthers pursuit and realisation of the shared objectives of the international community. This was seen, for example, in the discussion in Chapter 3 of the territorial sea rule in *The Law of the Sea Convention*, a rule that was there described as significant not only because it has facilitated clarity in international affairs regarding the permissible scope of territorial sea claims, but also because it has enhanced the prospects for maintaining peace between states in relation to their maritime boundaries.[87]

The appropriate response to Goldsmith and Posner regarding the moral obligation to obey international law may be articulated against the backdrop of the foregoing considerations. For new natural law theory, as already described, the moral sense of international legal obligation denotes the necessity of state compliance with international laws in order to facilitate the coordination of the international community that international legal order provides, and to thereby realize the shared objectives of the international community that comprise the international common good and are instrumental to human flourishing. The moral necessity of international legal obligation for the sake of the international common good cannot be negated by the factual consideration that some existing international

[86] See Goldsmith and Posner, *ibid.* at 13 and Ch. 3.
[87] See discussion in Chapter 3 at 95-96 above.

laws work to the advantage of certain states rather than favouring the common good of the international community. Where injustice in international laws exists, this can only override the moral obligation to obey those particular laws – an obligation which, according to new natural law theory, is presumptive and defeasible in relation to each international legal rule. The general moral obligation to obey international law, however, persists undiminished.

The grounds cited by Goldsmith and Posner for rejecting the idea that states have a general moral obligation to comply with international law reflect the authors' overall scepticism about the ability of international law to address significant coordination problems of the international community. In defending their claim that international law is limited in what it can achieve by the essentially political framework within which it operates, Goldsmith and Posner assert that "[g]iven the multiple conflicting interests of states on various issues, and the particular distribution of state power with respect to those issues, many global problems are unsolvable."[88] In relation to current global challenges such as climate change, if one considers the refusal of certain major states to either ratify the *Kyoto Protocol* to the *United Nations Framework Convention on Climate Change* or adhere to its greenhouse gas emissions reduction targets, and the fraught state of international negotiations to agree on future regulatory mechanisms for combating climate change, there indeed seem to be ample grounds for concluding that Goldsmith and Posner are correct.[89] Yet if climate change left unchecked poses a fundamental threat to the

[88] Jack Goldsmith & Eric Posner, "The New International Law Scholarship" (2005-2006) (34) Ga. J. Int'l & Comp. L 463 at 468.

[89] See generally *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 [*Kyoto Protocol*]. The United States, which after China is the largest producer of carbon dioxide emissions contributing to current atmospheric greenhouse gas levels, has not ratified the *Kyoto Protocol*. Canada withdrew from the *Kyoto Protocol* in 2011. At the United Nations Climate Change Conference in Copenhagen in 2009, states failed to reach an agreement on a new multilateral instrument to replace the *Kyoto Protocol*, which was set to expire at the end of 2012. In December 2012, states agreed to extend the operation of the *Kyoto*

quality of the Earth's life-sustaining environment,[90] then it is evident that the task of devising an appropriate international regulatory framework for combating climate change cannot simply be abandoned as a political impossibility. The *realpolitik* considerations that Goldsmith and Posner identify, while important for understanding the dynamics of law-making in the international sphere, have no bearing upon the need for states to actually arrive at solutions to the coordination problems of the international community. International law and the moral obligation to obey it fit into this framework of necessity, and commonly represent what is required as a matter of practical reasonableness if states are to promote the international common good and thereby facilitate human flourishing.

Goldsmith and Posner suggest that the notion that state adherence to international rules is morally needed for the sake of human well-being confuses two distinct ideas – the idea that states have an obligation to promote the welfare of all persons worldwide regardless of citizenship, and the idea that states have a moral

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Protocol until 2020, pending the development of a successor instrument to be concluded by 2015. Two further significant carbon-dioxide emitting states, Russia and Japan, refused to accept new binding emissions reduction targets under the extended period of operation of the *Kyoto Protocol.* Negotiations on the post-*Kyoto* instrument are ongoing. See Matthew J. Hoffmann, "Global Climate Change" in Robert Falkner, ed., *The Handbook of Global Climate and Environment Policy* (Chichester: Wiley-Blackwell, 2013) at 9-10; "Canada pulls out of Kyoto Protocol", The Guardian, 13 December 2011, online: The Guardian <http://www.guardian.co.uk/environment/2011/dec/13/canada-pulls-out-kyoto-protocol?intcmp=122>; Regan Doherty & Barbara Lewis, "Doha climate talks throw lifeline to Kyoto Protocol", 8 December 2012, online: Reuters <http://www.reuters.com/article/2012/12/08/us-climate-talks-idUSBRE8B60QU20121208>; "Difficult Bonn climate talks produce mixed outcome', Bridges Weekly Trade News Digest, Vol. 17, No. 22, 20 June 2013, online: International Centre for Trade and Sustainable Development <http://ictsd.org/i/news/bridgesweekly/169775/>.

[90] The 2007 report of the Intergovernmental Panel on Climate Change identifies a series of potential negative impacts of the climate changes projected over the 21st century: these include an increased risk of extinction of plant and animal species, increased coastal erosion and flooding resulting from rises in sea levels, fluctuations in crop productivity, increased deaths and injuries arising from extreme weather events, a greater incidence of diahorreal and cardio-respiratory diseases, and a decrease in freshwater resources. See Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Rajendra Pachauri & Andy Reisinger, eds.] (2007), online: Intergovernmental Panel on Climate Change <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf> at. 48-53.

obligation to obey international law.[91] The authors claim that these ideas are actually in conflict with each other, inasmuch as governments in practice prioritise advancing the interests of their own citizens.[92] For Goldsmith and Posner, a moral obligation to obey international law could only arise if states really did have an obligation to further the welfare of all persons in the world – an idea that they describe as "attractive but utopian" – and if, pursuant to that obligation, they created international legal rules that actually did reflect and promote the 'world good'.[93]

From the perspective of new natural law theory, however, there is no error in associating the ideas that Goldsmith and Posner seek to distinguish. Since the new classical theory justifies the moral obligation to obey international law by reference to the international common good, and since the theory further describes the international common good as being instrumental to the flourishing of persons comprising the universal human community,[94] it may be affirmed that for new natural law theory, the moral obligation of states to comply with international law is indeed an obligation that has as its ultimate object the welfare of all persons in the universal human community. It is precisely in the course of a state's seeking to promote the welfare of its own citizens that it becomes aware that in certain respects, it cannot achieve this objective without securing the supranational conditions that comprise the international common good; thus, the pursuit of particular interests by states inevitably leads to the consideration of *common* interests. The pursuit of these common interests by states through collaborative efforts, including the creation of international laws, draws states into a relationship with persons whose welfare is not their direct responsibility, but who are necessarily affected by any state conduct that

[91] See Goldsmith & Posner, *supra* note 2 at 197.
[92] See *ibid*.
[93] *Ibid*.
[94] See discussion in Chapter 2 at 69 above.

has an impact on those common objectives or on the mechanisms being used to realise them.

In sum, securing universal human flourishing cannot be construed as an obligation that is distinct from the moral obligation of states to obey international law; rather, the former obligation is what gives ultimate intelligibility to the latter. It is because the need to secure the common good of the universal human community is an actual, ongoing concern that the general moral obligation of states to comply with international law is of continuing relevance, notwithstanding the limitations of international legal order and the influence of state interest in shaping many international norms. While Goldsmith and Posner may consider this to be a utopian interpretation of international law, it is arguably no less incredible to imagine that in the context of an interconnected, interdependent global community of persons whose welfare depends on the realisation of certain conditions requiring international cooperation, the international community of states can function indefinitely as a series of isolated entities that only observe international legal obligations when these suit their private interests.

IV. Implications of New Natural Law Theory for Understanding Particular Aspects of International Legal Obligation

1. International Legal Obligation and Peremptory Norms

The nature and authority of peremptory norms has been considered in Chapter 3 of this thesis.[95] Based on the new natural law account of law and authority, that discussion of peremptory norms identified a distinction between the moral authority of peremptory norms, which is described as stemming from the consistency of the content of these norms with natural law principles, and the legal

[95] See the discussion in Chapter 3 at 124-28 above.

authority of these norms in their peremptory character, which is explained by the fact that the *jus cogens* doctrine has been posited in international law by the international community.[96] In light of both that discussion and the account of international legal obligation provided herein, it is appropriate to return briefly to the issue of peremptory norms. As explained below, the new natural law conception of legal obligation assists in underscoring the claim that in its legal dimension, the *jus cogens* doctrine is properly understood as a positive law concept. It may additionally be affirmed that the moral obligation of states to comply with peremptory norms is no different in character to the moral obligation of states to obey other international laws.

It was argued earlier in this thesis that while the doctrine of peremptory norms has been the subject of competing voluntarist and non-voluntarist accounts regarding its conceptual foundations, the new natural law account of law and authority entails an affirmation that there are both natural law and positive law aspects to *jus cogens*.[97] Apart from the fact that the concept of *jus cogens* has been formally incorporated into positive international law, the idea that the doctrine of peremptory norms has a distinct positive law dimension is borne out by the legal consequences for international laws that violate *jus cogens*, considered in contrast to the new classical theory's claims regarding legal obligation and unjust laws. New natural law theory does not claim that an unjust law is not a 'law': rather, the theory affirms that an unjust law is a non-focal instance of 'law', and that there is no moral obligation (except possibly a collateral moral obligation) to obey such a law *notwithstanding* its legal validity.[98] The doctrine of peremptory norms, meanwhile, indicates that conflict between a peremptory norm and a particular international law

[96] See Chapter 3 at 126-28 above.
[97] See *ibid.*
[98] See Finnis *NLNR*, *supra* note 3 at 364-65; see also the discussion at 186-87 above.

results in the legal invalidity of the latter and the nullity of any related legal obligations. As such, to the extent that *jus cogens* can be characterised as a restraint on the effects of injustice in international laws, it is evident that the doctrine goes beyond what is entailed by the new natural law conceptions of law and legal obligation. The consequence of invalidity for international laws that violate *jus cogens* is not inconsistent with natural law principles, and can indeed be complementary to the objectives of safeguarding the dimensions of human welfare and the international common good, giving specific legal weight to the moral requirements entailed by these principles. Still, the voiding of laws and legal obligations that conflict with *jus cogens* can only be understood as a legal consequence that is 'posited' under the doctrine of peremptory norms, rather than one that is specifically mandated by natural law principles.

A further point to be made, returning to the account of the moral basis of international legal obligation discussed in this chapter, is that the obligation of states to comply with peremptory norms is no different in its moral dimension to the obligation states have to comply with non-peremptory rules of international law. It may be recalled that as understood through the framework of the new classical theory, the moral sense of international legal obligation relates to the need for states to comply with international legal stipulations in order to facilitate the effectiveness of such laws in addressing the coordination problems of the international community for its common good; in this regard, international legal obligation in its moral dimension pertains to the function that international laws play precisely as *laws*, notwithstanding the structural inadequacies of the international legal order.[99] It is true that the obligations arising from peremptory norms are of a distinct legal

[99] See the discussion at 193-96 above.

character compared to other international legal obligations: consistent with the superior legal status of peremptory norms, these obligations are non-derogable and override other international legal obligations in cases of conflict. This special legal character, however, does not correspond to a special moral obligation to obey peremptory norms. While the moral obligation to obey the law can be diminished through the presence of injustice in a law, it is not intensified in sheer virtue of the fact that a particular set of laws has a superior legal status: peremptory norms, like other rules of international law, are positive laws directed towards the objective of furthering coordination in a community. As such, the account outlined herein of the moral basis of international legal obligation is similarly applicable to peremptory norms as to other rules of positive international law. In relation to *jus cogens*, then, it may be said that the moral sense of international legal obligation denotes the need for states to comply with peremptory norms in order to facilitate the effectiveness of international law and international legal mechanisms, including the mechanism of normative hierarchy, in furthering the international common good.

2. *Erga omnes* Obligations

Erga omnes obligations are international legal obligations that states have to the international community as a whole, as distinct from obligations that states have only in relation to another state or group of states.[100] In the *Barcelona Traction* case, the International Court of Justice, in articulating the concept of obligations *erga omnes*, affirmed that such obligations are "the concern of all States" and that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[101] *Erga omnes* obligations have accordingly been

[100] See *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Second Phase*, [1970] I.C.J. Rep. 3 [*Barcelona Traction*] at 32, para. 33.
[101] *Ibid.*

described as featuring two characteristics, namely universality (in reference to the scope of the obligations) and solidarity (in virtue of the collective character of the interests to which these obligations correspond).[102] The international norms that are commonly cited as involving *erga omnes* obligations include the prohibitions against international aggression, genocide, torture, slavery, and racial discrimination, and the right of peoples to self-determination.[103] The concept of *erga omnes* obligations has been formally incorporated into the law of state responsibility: the International Law Commission's Draft Articles on State Responsibility affirm the existence of obligations that are owed by a state "to the international community as a whole" and stipulate that where a state breaches such an obligation, any state other than the state affected by the breach is entitled to invoke the responsibility of the state concerned.[104]

The concept of *erga omnes* obligations is a departure from the traditional 'bilateralist' conception of legal obligation in international law, which interprets legal obligations as existing between individual states, or between one state and a

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[102] See Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Clarendon Press, 1997) at 17.

[103] See *Barcelona Traction*, *supra* note 100 at para. 34; *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90 at 102, para. 29; *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) at para. 151 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY < http://www.icty.org/case/furundzija/4>; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at 199, paras. 155-56. It may be noted that there is considerable overlap between the norms described as giving rise to *erga omnes* obligations and those are commonly identified as peremptory norms: *cf.* Chapter 3 at 126-27 above. The concept of *erga omnes* obligations is nevertheless to be distinguished from that of *jus cogens*, which addresses the legal status of the international norms concerned rather than the scope of international legal obligations.

[104] See International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) [*State Responsibility*] at 29-30 (Article 48). An 'injured state' *i.e.*, a state that has itself been affected by a state's internationally wrongful act can invoke the responsibility of that state under Article 42 of the Draft Articles. In invoking the responsibility of a state for an internationally wrongful acting involving the breach of an obligation owed to the international community as a whole, a state acting in accordance with Article 48 may demand that the responsible state cease the internationally wrongful act and make reparations.

group of states, based on the terms of a treaty or on international custom.[105] It may be noted that contemporary international law has already witnessed the emergence of other exceptions to the notion of bilateral obligations: in multilateral human rights treaties, for example, each state party assumes 'parallel' obligations to adhere to treaty terms in relation to all persons within its jurisdiction, rather than assuming obligations towards other states parties.[106] The concept of *erga omnes* obligations, however, goes beyond even this form of exception to the paradigm of bilateral international obligations, affirming that there are international legal obligations that have the entire international community as their object. Furthermore, as confirmed by the Draft Articles on State Responsibility, the *erga omnes* doctrine entails that any state in the international community is entitled under international law to invoke the responsibility of a state that has breached an obligation owed to the international community as a whole, notwithstanding the fact that it has not been itself affected by the breach: put differently, any state other than an injured state can invoke a state's responsibility for breach of an *erga omnes* obligation purely on the basis of collective community interest.

The unique characteristics of *erga omnes* obligations invite inquiry into the theoretical foundation of this concept. In this regard, it is worth noting the extent to which this concept has been justified by express reference to moral considerations. As seen in the comments of the International Court of Justice in *Barcelona Traction*, the Court related the universal character of *erga omnes* obligations to the

[105] According to Prosper Weil, "no international obligations *erga omnes*, traditionally, exist: it is up to each state to protect its own rights; it is up to none to champion the rights of others": Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 A.J.I.L. 413 at 431; see also Bruno Simma, "From Bilateralism to Community Interest in International Law" (1994) 250 Rec. des Cours 217 at 230.

[106] See *Fragmentation of International Law*, *supra* note 42 at para. 391; Bruno Simma, "Bilateralism and Community Interest in the Law of State Responsibility" in Yoram Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1988) 821 at 823-24.

significance of the rights that are protected by these obligations.[107] The Institut de Droit International, which has adopted a resolution on *erga omnes* obligations, defines these as obligations that are owed by a state to the international community as a whole "in view of its common values and its concern for compliance".[108] In relation to the law of state responsibility, the collective interest of states in *erga omnes* obligations has similarly been explained in straightforwardly moral terms. Prior to the finalisation of the Draft Articles on State Responsibility, the International Law Commission's final Special Rapporteur on State Responsibility, James Crawford, commented on the significance of the concept of obligations owed to the international community as a whole, suggesting in this regard that "[g]enocide, aggression, apartheid, forcible denial of self-determination constitute wrongs which 'shock the conscience of mankind', and it seems appropriate to reflect this in terms of the consequences attached to their breach."[109]

Considered through the framework of new natural law theory, the recognition of *erga omnes* obligations in international law may be interpreted as an affirmation of the unity of the universal human community, a community that has been postulated in this thesis as the substratum of the international community of states.[110] In this regard, it may be suggested that implicit in the notion of *erga omnes* obligations is a claim that certain international legal obligations properly correspond to the human rights of *all persons*. As discussed earlier in this thesis, duties to respect human rights are implications of the ontological unity of the human race, a

[107] See *Barcelona Traction*, *supra* note 100 and accompanying text.
[108] See Institut de Droit International, *Obligations* Erga Omnes *in International Law*, Krakow Session, 27 August 2005, online: Institut de Droit International <http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf>, Art. 1(a); see also Art. 1(b), which uses similar wording to describe obligations owed under a multilateral treaty by one state party to all other states parties.
[109] See International Law Commission, *Fourth Report on State Responsibility*, report of the Special Rapporteur, Mr. James Crawford, UN Doc. A/CN.4/517 (2001) at para. 47 [citation omitted].
[110] See the discussion in Chapter 2 at 64-65 above.

unity that entails that the basic human goods are commonly good for all persons.[111] Inasmuch as the international common good has been described herein as being instrumental to the ability of persons to enjoy their human rights,[112] it may also be said that the conditions comprising the international common good are commonly instrumentally good for all persons. Applying these considerations to the idea of *erga omnes* obligations, it may be suggested that where international legal obligations are owed to the international community as a whole, the obligations of states to respect the norms giving rise to these obligations – both the international norms that directly concern the protection of human rights, and those norms that concern the promotion and preservation of the international common good – are actually obligations that correspond to the interests of all human persons. As interpreted through the new natural law framework, *erga omnes* obligations are indeed appropriately described as arising in virtue of the 'common values' of the international community, since the norms to which these obligations relate address the common dimensions of welfare of the universal human community – a community which, in relation to the articulation and enforcement of global norms relevant to universal human flourishing, is mediated in its functioning by the international community of states.

Based on the new natural law conception of the moral dimension of international legal obligation, it may be suggested that the concept of *erga omnes* obligations is additionally grounded in the moral obligation owed by each state to the international community as a whole to obey international law. As discussed earlier in this chapter, international law, in virtue of its value in furthering the international common good, may itself be seen as giving all states in the international community

[111] See the discussion in Chapter 4 at 138 above.
[112] See the discussion in Chapter 4 at 148 above.

a right to demand the compliance of other states with their international legal obligations; correspondingly, it may be said that the moral duty of states to obey international legal stipulations is not an obligation owed to international law itself, but one owed to the community that is subject to and benefits from international legal order.[113] From the perspective of the new classical theory, then, all international legal obligations arising from norms that are applicable to the entire international community – including, for example, obligations to obey international customary rules pertaining to the freedom of the high seas,[114] and obligations to obey the terms of Security Council resolutions binding on all UN member states – are, in moral terms, obligations owed by states to the international community as a whole. The *erga omnes* doctrine invests this moral obligation with legal significance in relation to certain international norms described as identifying collective interests of the international community, with the law of state responsibility affirming that all states in the international community are legally entitled to invoke the responsibility of a state that has breached an *erga omnes* obligation.

3. Conflicting International Legal Obligations

Since, as noted earlier, the international legal order features a plurality of international legal regimes, states may at times find themselves subject to distinct international legal obligations from different sources that come into conflict with each other. For example, a state may have an obligation under an international environmental treaty, or arising from international custom, requiring that state to take appropriate measures within its own territory to further various aspects of global environmental preservation; at the same time, it may have an obligation under a

[113] See the discussion at 197-98 above.
[114] On these rules, which have now largely been codified, see Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 148-50 and 153ff .

multilateral trade agreement that requires it to remove discriminatory barriers to trade. A 'conflict' can arise for the state in relation to these obligations, in that complying with one of these obligations may give rise to a violation of the other obligation.[115] In most situations where such conflicts arise, the international norms giving rise to the conflicting obligations are not themselves in conflict with a 'superior norm' of international law,[116] and as such the limited normative hierarchy of the international legal system cannot be invoked to resolve the conflict. The question thus arises: in these types of situations where states are faced with conflicting international legal obligations, should one of these obligations have priority over the other, and if so, on what basis?

There are no evident mechanisms within international law for affording greater weight to one valid international legal obligation over another in situations such as the one described. Since international law does not admit of a hierarchy of norms based on their source, no ranking of international legal obligations may be made in virtue, for example, of the fact that an obligation originates in a treaty as

[115] See *e.g.*, *EC Measures Affecting the Approval and Marketing of Biotech Products* (2006), WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm>. This case involved a claim by the United States, Canada and Argentina that the European Communities had violated its trade obligations under the WTO Agreements by taking trade-restrictive measures in relation to agricultural biotech products, including the imposition of a moratorium on the approval of such products. The European Communities argued, *inter alia*, that its measures were justified in virtue of its environmental protection obligations under the *Convention on Biological Diversity* and the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*. Another case involving this type of normative conflict is *EC Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>. In this case, the United States and Canada alleged that the European Communities had violated its trade obligations under the WTO Agreements by imposing a ban on the importation and marketing of meat and meat products that had been treated with certain growth hormones. In its defence, the European Communities argued *inter alia* that its actions in imposing the ban were consistent with the 'precautionary principle' which, it claimed, had become recognised as a rule of international custom.

[116] This category encompasses *jus cogens* norms, as well as Article 103 of the *Charter* which affirms the supremacy of *Charter* obligations of UN Member states over obligations arising from any other international agreement: see *Fragmentation of International Law*, *supra* note 42 at paras. 328ff & 361ff.

compared to a rule of international custom.[117] While general law principles such as *lex posterior derogat lege priori* ('later law supersedes earlier law') are recognised as aids to interpretation in international law, principles establishing normative priority based on the relative time that a norm came into existence are arguably inappropriate for addressing situations in which the norms giving rise to conflicting international legal obligations are derived from thematically distinct international legal regimes.[118] In relation to treaty obligations, it may be noted that Article 31(3)(c) of the *Vienna Convention* indicates that the interpretation of treaties should occur taking into account "any relevant rules of international law applicable in the relations between the parties", thus signalling that the interpretation of a treaty's norms and obligations should occur with due reference to applicable international norms existing outside the treaty.[119] At the same time, it is not apparent that this provision can be understood as itself providing a framework for the weighing of conflicting legal obligations. In considering the significance of Article 31(3)(c), the Study Group of the International Law Commission on Fragmentation of International Law has in this regard suggested that "[t]he question of the normative weight to be given to particular rights and obligations at the moment they appear to clash with other rights and obligations can only be argued on a case-by-case basis."[120]

The new classical theory likewise cannot be seen as providing criteria for resolving such conflicts. If states are not able to achieve some reconciliation of their conflicting international legal obligations by complying with one international norm

[117] See Chapter 3 at 120 above.
[118] See *Fragmentation of International Law*, *supra* note 42 at paras. 225 & 255.
[119] See *Vienna Convention*, *supra* note 48, Art. 31(3)(c). This provision has been described as giving effect to the principle of 'systemic integration', which affirms that international treaties are part of an international legal system and are to be interpreted with reference to their wider normative environment. See generally Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 I.C.L.Q. 279; see also *Fragmentation of International Law*, *ibid.* at para. 410ff.
[120] *Fragmentation of International Law*, *ibid.* at para. 474.

in a manner and degree that is consistent with what is required of them according to the other norm, it would appear that affording 'priority' to one obligation will in effect entail disregarding the other one. In this regard, it should not be forgotten that international legal obligations are indeed *legal obligations*. If states were to consider the relative normative value of conflicting yet valid international legal obligations as providing them with a justification for disregarding one set of obligations in favour of another, this would have a significantly detrimental impact on the stability and effectiveness of international treaties, which are fundamental to the functioning of the international community. From a normative standpoint, furthermore, it has been argued herein that compliance with international legal obligations is morally required in order to facilitate the effectiveness of international law in furthering the international common good. Accordingly, it cannot be coherently suggested under the new natural law framework that in situations of normative conflict, moral considerations can provide an adequate basis for choosing to comply with one international norm and simultaneously violating another one, where both of these norms are in their respective ways beneficial to the international common good.

It may be suggested that if a state is faced with a situation of conflicting international legal obligations, it should not attempt to unilaterally give preference to one obligation over another but should instead seek to resolve the conflict through negotiation with the other states to which it bears obligations (thus, for example, with the other parties to a multilateral trade treaty where an issue of compliance with an international environmental norm has arisen). Such an approach may assist in ensuring that if a decision is made to give one obligation priority over another, this is done by means of a process that demonstrates due regard for the legal character of both sets of obligations. Beyond this, it is evident that situations of normative

conflict will be best avoided if states define treaty norms and obligations in a manner that anticipates such conflicts and provides clear guidance as to how they are to be resolved, for example through clauses stipulating the priority of certain norms or obligations over others in cases of conflict.[121]

Conclusion

This chapter has provided a normative account of international legal obligation based on new natural law theory. It has affirmed that states have a general moral obligation to comply with international law, based primarily on the significance of state adherence to international norms for facilitating the functioning of international legal order and, by implication, furthering the international common good. The chapter has additionally highlighted the contingency of the moral obligation to obey international law, describing in this regard the relationship between the moral sense of international legal obligation and the substantive justice of individual international laws. In its characterisation of the moral foundation of international legal obligation, the foregoing discussion confirms the extent to which new natural law theory supports an interpretation of international law that emphasises its significance for securing universal human flourishing rather than its utility for achieving particular state interests.

[121] Some writers have in this regard noted the inadequacy of certain existing clauses in international legal instruments intended to address conflicts between international trade and environmental regimes: see generally *e.g.*, Sabrina Safrin, "Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements" (2002) 96 A.J.I.L. 606; see also *Fragmentation of International Law*, *ibid.* at paras. 270-76.

Conclusion

This thesis has sought to articulate a normative theory of international law based on new natural law theory. It has examined the tenets of the new classical theory regarding fundamental concepts in political philosophy and legal theory, and has applied these to the consideration of key themes relevant to international law and international affairs, formulating normative propositions concerning the international common good, international authority and international law, justice and human rights and their relationship to positive international law, and international legal obligation.

At the outset of this thesis, it was observed that normative scholarship in international legal theory was traditionally characterised by two related features, namely an affirmation of the existence of objective standards for evaluating international law, and a conception of international law as serving particular purposes.[1] In concluding this thesis, these traditional traits of normative international legal scholarship will again be invoked as a means of structuring a review and restatement of the main normative claims that have been advanced in the preceding chapters.

New Natural Law Theory and the Moral Purpose of International Law

Based on the new natural law conception of the common good, this thesis has articulated a conception of an 'international common good' and has posited it as the focal consideration in a normative theory of international law. The international common good denotes a set of supranational conditions that facilitate the flourishing of persons comprising the universal human community, and that require the collaboration of states in order to be realised. This definition recalls Francisco

[1] See discussion in the Introduction at 24-25 above.

Suárez's discussion of the 'universal good' and draws out the significance of an idea that found a measure of expression in Suárez's thought, namely that there are certain objectives to be pursued that are themselves of instrumental importance to realising the universal good.[2] Although this thesis does not purport to identify an exhaustive list of the conditions comprising the international common good, a number of such conditions have been discussed throughout the course of this work: these include the absence of political, military, economic or other forms of hostility between states ('international peace'); the protection of states against external acts of aggression from other states or non-state actors ('international security'); the ability of all populations worldwide to access the range of global resources and commodities needed for human flourishing, entailing activities such as international trade; and the existence of a global environment that can sustain human life, entailing the preservation of the earth's atmosphere and natural resources.

In keeping with the new natural law conception of authority and law, this thesis has proposed that international authority and international law may both be understood in terms of their relationship to the objective of promoting the international common good. The purpose of international institutional authority and international law is to further the international common good through coordinating the activities and interactions of states comprising the international community of states, and resolving the coordination problems that arise within this community. This interpretation of the purpose of international authority and international law brings to light the relationship between the coordination of the international community afforded by such authority and law and the ability of persons residing within states to pursue the basic goods; in so doing, it also allows for an appreciation

[2] See discussion in the Introduction at 25 above.

of the sense in which international institutional authority and international law themselves form part of the conditions comprising the international common good.

This thesis has further suggested, based on the new classical conception of legal obligation, that international legal obligation is a form of moral obligation that is to be understood in terms of its significance for furthering the international common good. The general moral obligation of states to obey international law is primarily explained by the necessity of state compliance with international legal rules in order to enable international law to be effective in its function of coordinating the affairs of the international community. As with the account of the significance of international authority and law, the interpretation of the purpose of international legal obligation highlights the link between this seemingly strictly juridical concept and the objective of facilitating the flourishing of individuals and communities.

In identifying promotion of the international common good as the moral objective that describes the purpose of international law, this thesis has adopted the new natural law conception of community, and has posited the existence of both a universal human community and an international community of states. The conditions comprising the international common good, in addition to being described as supranational conditions that are of instrumental significance for human welfare, have been affirmed herein as constituting shared objectives for states. The notion that states can be conceived as being members of an international community, and as having a shared interest in pursuit of the conditions comprising the international common good, is a function of the fact that the basic human values to be realised through pursuit of the international common good are 'commonly' good for all persons comprising the universal human community. In this regard, the identification of the international common good as the moral objective to be pursued

through international law and international authority, with its accompanying affirmation of a conception of community relevant to the international sphere, is a counterpoint to theories of international law that are based on an underlying conception of states as isolated, self-regarding entities with no objectives other than the maximisation of national interest.

New Natural Law Theory and the Moral Standards for International Law

Consistent with the new classical theory's interpretation of the relationship between natural law principles and positive law, this thesis has affirmed that natural law principles constitute a form of 'higher' law that informs the creation of positive international law. As suggested herein, natural law principles serve as general normative standards that influence the practical deliberation of persons in authority within states who are involved in the formulation of positive international norms; this often implicit process of influence leads to the creation of international laws and legal regimes that, in the types of objectives that they seek to achieve and the substantive rules they articulate, are seen to give effect to the principles of practical reason and requirements of practical reasonableness. The characterisation of natural law principles as higher law is also fundamental to the claim in this thesis that the authority of positive international laws includes a dimension of moral authority that is contingent upon the conformity of such laws with natural law principles, and the further claim that unjust international laws, as lacking moral authority, generate no primary moral duty of compliance for states.

New natural law theory affirms that the requirements of justice are implications of the requirement of practical reasonableness indicating that persons should promote the common good of their communities, and that human rights, as indicia of the various aspects of human welfare, provide the content for articulating

the requirements of justice in the context of community life. Proceeding from these claims, this thesis has sought to articulate principles of justice for international law, addressed to states as the entities primarily responsible for the creation of international law. In this regard, two overarching principles of justice have been identified. First, the content of positive international law should both promote and demonstrate respect for human rights. In this regard, as suggested herein, states in determining the content of international laws should ensure that these laws are consistent with international human rights norms. Second, positive international law should be consistent with the objective of promoting and safeguarding the international common good, given the instrumental significance of the international common good for the enjoyment of human rights. It has further been suggested that the principles of justice for international law should be regarded as paramount principles of the international legal order, entailing that the international community should approach the development and evaluation of international laws in a manner that affords priority to principles requiring promotion of and respect for human rights and the promotion and protection of the international common good.

Finnis suggests that modern legal philosophy has suffered from a longstanding "inattention to the human person", a failure to appreciate that human welfare and human interests themselves identify the 'point' of law.[3] For a long time, this claim could have similarly been made in relation to international legal theory: for much of the past century, the dominant narratives in international legal scholarship related the significance of international law to the interests of states, to such an extent

[3] See John Finnis, "Natural Law: The Classical Tradition" in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 1 at 25; see also generally John Finnis, "The Priority of Persons" in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*: *Fourth Series* (Oxford: Oxford University Press, 2000) 1 at 1-6.

that some of these perspectives denied the legal quality of international law and instead characterised it as sheer politics. While some writers on international law still interpret its significance in these terms, contemporary international legal theory now also features theorists who are interested in making normative claims about international law and the conduct of states in international affairs, and who in this regard point to the relationship between international law and the protection of human interests. As suggested in the introduction to this thesis, this development constitutes a revolution rather than a distinct new direction in international legal thought, and recalls themes raised by scholars writing in the era of the emergence of modern international law.

The ideas advanced in this thesis are intended to contribute to the renaissance of normative scholarship in international legal theory, by presenting a distinctive and illuminating framework for reflecting on the moral significance of international law. The theory of international law developed in this thesis suggests that natural law principles, which direct persons to pursue the basic human goods and identify criteria for the practically reasonable pursuit of those goods, are foundational to the claim that international law should both promote and demonstrate respect for human rights. The further and broader point emerging from this thesis is that since human welfare is the proper concern of the international community and of international law, there is a need to recognise the significance of the international common good and to affirm pursuit of this objective as the primary moral goal for international law.

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