

DEMOS, NOMOS AND GLOBALISATION

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It is a great privilege to comment on a paper which, like so much of Professor Weiler's work, is brilliant not only in its intellectual scope but also in the underlying humanity of its vision. His basic thesis is indisputable. International law is indeed an exercise in governance that increasingly generates problems of legitimacy, especially because it governs without the ontological premises of democracy – it has no government and no *demos*. In the face of this problem, Weiler urges us to seek 'alternative legitimating devices'. I would like to offer a modest comment on this thesis by making three observations about some of the basic principles that could inspire any such 'alternative legitimating devices' for international law, using a few examples of developments in international law as points of departure.

First, Weiler shows us how the international legal order has increasingly undermined the classical Westphalian foundations of the sovereign state. International law replaces the governance functions of the state, 'unpacks' it and makes sovereign consent a fiction by foreclosing any real possibility of exit or of resistance to assimilation. In many respects, this may not be a bad thing, for the reasons that Weiler describes in the first part of his paper. The international legal system has in many ways served as a means to avoid the revolutionary social changes of democracy and constitutionalism and to use external sovereignty as a shield for maintaining internal oppression. The cooptation and corruption by sovereign states of the otherwise powerful idea of universal human rights is a prime example of this phenomenon.

But certainly something is lost also in bypassing the sovereignty of the state. Among them is the protection of weaker, smaller and poorer states. Weiler points out several examples of how 'governance without government' exacerbates inequalities on the global stage. For those states, sovereignty has represented their peoples' desire for freedom and the possibility of self-gov-

ernance. Even if the fulfillment of those aspirations has often been mythical in practice, still it has been the smaller and poorer states (in Latin America and Africa, in particular) that in the post-World War II era most assiduously clung to 'sovereignty' and have had the most to lose by its erosion.¹

Thus, one of the normative challenges of alternative legitimating devices is to arrive at rules and structures that protect and assist the integrity of smaller units to seek their own ends in freedom. This is not, in a globalized world, the protection of sovereignty as such, but rather the protection of that which sovereignty had the possibility of serving in a positive way. This is, of course, just another way of saying that alternatives to classical international legal norms must be consistent with the idea of subsidiarity.² They must help smaller units govern themselves in a way that respects their freedom yet integrates them into the larger family of nations. There are some signs that this can, in fact, happen. For instance, the recent development of international norms against corruption³ or international law's recent attention to processes of transitional justice,⁴ such as truth and reconciliation commissions, can be understood as means of assisting local societies to govern themselves.

Even if such mechanisms were to flourish, however, protecting local knowledge and freedom will necessitate transnational norm-generation and enforcement in the global order, too. As Weiler points out, this will no longer occur through traditional sources (including from the United Nations, one might add in these days when that institution's credibility has been shaken severely). In fact, a look at recent international law will in fact show us that there *are* sources operating already now that generate norms in ways outside of positivist orthodoxy. For example, private actors are heavily involved in creating law or law-like norms in areas as diverse as banking regulation, labor rights and commercial contracts.⁵ Non-governmental organizations now play a critical role in the genera-

¹ See, e.g., Symposium, 'International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration', 19 *Houston Journal of International Law* (1997).

² See Paolo G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* 38-79 (2003).

³ See, e.g., International Legal Developments in Review, 2001: Anti-Corruption International Legal Developments, 36 *International Lawyer* 589 (2002).

⁴ See, e.g., Neil J. Kritz, ed., *Transitional Justice*, Vols. I-III (United States Institute of Peace Press 1995).

⁵ See, e.g., Gunther Teubner, ed., *Global Law Without a State* (Aldershot Publishing 1997).

tion of international norms; to cite only one of many examples, the recent international convention on land mines would never have come into existence without the intense involvement of NGOs.⁶ A third example of new sources of norms comes from the role of judiciaries in constitutional democracies. Increasingly, judges are engaged in transnational normative dialogue with one another, drawing upon ideas and practices from abroad even where traditional sources of positive international law might not apply; this is especially (though not exclusively) true in the area of human rights.⁷ All of these examples point to ways in which the actors and sources of international norms in a globalized order are changing and expanding beyond the boundaries of sovereign states operating through traditional consent-based international law.

Such developments will continue, if for no other reason than to fill the normative gap that Professor Weiler has acutely identified for us. In light of Professor Weiler's analysis, the question cannot be whether such new actors and processes are needed or whether they are to be resisted in favor of returning legal authority to more traditional sovereign sources. Rather, we must begin by recognizing that the new mechanisms for norm generation give rise to a further, common problem: all of them *either* are capable of becoming ways to privilege certain powerful political and economic elites transnationally, thus intensifying the legitimacy problems of global governance, *or* they can become vehicles for recapturing governance and enhancing the possibility of democratic legitimacy to at least a small degree. The difference between these two paths can, I believe, be understood to turn on the question of *solidarity*. That is, do the new processes and actors in international law genuinely aim at promoting the good of the other, or do they instead seek to project and impose self-interested schemes? Are they acting principally in the service of ideology (whether one of profit or of politics), or in the service of the 'human face' (as Archbishop Martino, echoing John Paul II, put it this morning)? There is at least some reason to hope that the latter can be true; the great success of such international NGOs as the Association of Volunteers in

⁶ See Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society', 11 *European Journal of International Law* 92 (2000).

⁷ See Paolo G. Carozza, "'My Friend Is a Stranger': The Death Penalty and the Global Ius Commune of Human Rights', 81 *Texas Law Review*, 1031-1089 (2003).

International Service (AVSI)⁸ or the World Youth Alliance⁹ suggests that the peoples of the world are thirsting for ways to engage the politics and economics of globalization by placing the good of the human person, in the fullest sense, at the center of their work.

This brings me to my third and last observation. Subsidiarity and solidarity can only be intelligible principles if we can posit, and identify, the existence of some universal *common good* among the peoples of the world. Regarding this point, I believe, Professor Weiler gives us his most significant contribution. In his analysis, we can see very clearly that the birth of such a common polity is fundamentally a question of the existence of a people, a *demos*. To put it another way, the root of the problem of governance that we are discussing here is that there can be no law without a people, no *nomos* without *demos*. One might say that Weiler's work suggests to us the priority of Abraham over Moses, father of a people (indeed of the nations, in the plural) over the lawgiver.

The implications of this simple, yet profound, insight are multiple. Where will the unity of the nations, the *demos*, come from? First, like Abraham, we must first allow ourselves to be generated by an awareness of dependence, of belonging on Another, not just in the sense of the unity of humankind but also in the sense of a transcendent good that is the source of all our common humanity. Second, that in turn suggests that the role of religion is vital. Rather than being pushed to the margins of dialogue about globalization, because it is deemed either irrelevant or divisive, religion must be brought to the center.¹⁰ And third, the problem of governance, understood as the problem of being generated as a people and of belonging, must be understood to be a question of education – the education of the human heart to be open to the mystery of the human person.¹¹ This is the potential value of the transnational language of human rights, for example: it can be a source (though of course not the only one) of education about the basic dignity of the human person. Like Bartolomé de Las Casas did in the 16th century,¹² we can confront the problem of globalization and

⁸ See <http://avsi.org/avsi/en/>.

⁹ See <http://worldyouthalliance.org/>

¹⁰ Cf. Michael A. Casey, 'How to Think About Globalization', 126 *First Things* 47-56 (October 2002).

¹¹ Cf. Luigi Giussani, *The Risk of Education* (Crossroad Publishing 2001).

¹² See Paolo G. Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', 25 *Human Rights Quarterly* 281-313 (2003).

its discontents today by reminding one another of the question that the life of every person poses anew for all of us, perhaps especially the lives of those who may seem most radically Other.¹³

In conclusion, I would like to add a short word here about the place of the United States in this adventure. Obviously, today that role is deeply contested, both in our conversation here and even more in the world outside these walls. Yet, seeing the problem of globalization as one of recognizing the transcendent dimensions of the human person, I think we should acknowledge that the United States can play a distinctively important part. It is a country founded fundamentally on the ideal of the human desire for freedom; it is almost alone in the developed world in the breadth of its openness to religious belief; its ideals and its laws are rooted in the priority of the individual person over the state. That is not to say that the United States is without fault, that its role is exclusive, or that these values are not present in other places and cultures as well. But it does mean that we should not be as dismissive of the ideals that America represents as has been fashionable these days, here and elsewhere. Addressing the formidable challenge of 'governance without government' will depend on it.

¹³ Cf. Emmanuel Levinas, *Entre Nous: Thinking-of-the-Other* (Columbia University Press 2000).