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The Law of Humanity and the Law of Nations

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edented degree. Neither pessimism nor optimism can be validated given existing levels of knowledge, making the pursuit of the vision that corresponds to our values the most sensible course of action. And who is to say that its realization is less likely than the emancipation of Eastern Europe seemed a decade ago?!

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The nineteenth-century doctrines known as "international law" developed out of the seventeenth-century "*jus gentium*" and eighteenth-century "law of nations." Now we see that twentieth-century scholars such as Richard Falk would like to speak of the "law of humanity". What is the value of such semantic shifts? Proponents of "international law" sought to promote a positivist doctrine, which would minimize the natural law elements of the old law of nations to privilege the views of governments and states. Advocates of the "law of humanity" presumably seek to diminish the role of states in international law by eliminating "nations" as the basis of world institutions. I will argue that this would be a profound mistake, which confuses the purposes of law, nations, peoples and the state.

I. The Law of Nature

Early scholars of the law of nations such as Grotius, Pufendorf and Vattel applied the law of nature to nations to discover public obligations and rights among peoples. They began with the assumption that all persons are naturally free and equal. Free and equal persons properly relinquish certain rights and powers to states or nations in the interests of justice and the common good of all citizens. But nations, on this theory, remain in a state of nature with regard to each other. Without a legislature to define common justice they must look directly to natural law. So the best evidence of natural law is the general agreement of humanity, as reflected in the opinions and practices of all nations.

Notice that this made the law of nations in a sense a "law of humanity" from the very beginning. Early proponents of the *jus gentium* considered the best evidence of the law of nature and of nations to be human consensus, as reflected primarily through the laws and governments of states, acting on the international stage. But this reasoning contained two central fallacies. First, not all nations are states, at least in the original sense of the term. "Nation" implies common birth and first referred to prepolitical divisions within and around the (international) Roman empire. Nations can exist without political autonomy. Second, not all states speak for nations. Nearly all governments in Vattel's time were self-interested tyrannies. Grotius and Pufendorf suffered pointless persecution by the most enlightened rulers of Europe. The voice or consensus of humanity is not always best or most clearly expressed by the governments of the day.

This observation must be the basis of the claims for "civil society" advanced by proponents of the "law of humanity". Governments will not always seek justice and the common good. Governmental interests may diverge from those of the people. Governments often oppress the people, or disagree amongst themselves. "Civil society" offers an alternative source of authority. To accept with Grotius and Vattel that the best expression of international law is the deliberate voice of humanity still leaves the very difficult problem of where that voice may be heard.

II. Interstate Law

Critics of the existing world order stigmatize international law as mere "interstate law" among consenting tyrants. They have a point. During the nineteenth century positivist followers of Jeremy Bentham and John Austin denied the very idea of a "natural law", dis-

cernible in the law of nations, as "nonsense on stilts". They coined the phrase "international law" to reflect their view that law among nations exists (to the extent that it exists at all) only between nations, when nations agree upon firm laws by treaty or other positive act. This view gained legitimacy from Vattel's old conception of states as free and equal actors, able to proceed without external restraint in their own internal affairs, just as free individuals or citizens properly act without restraint in their own personal ("private") affairs. Liberals embraced a theory that protected each "nation" against outside interference by the others.

Here again, as in the old "law of nations," the positivists' new "international law" lost moral force to the extent that it relied on self-serving, tyrannical governments. Some positivists freely admitted the moral vacancy of law as they conceived it. Austin, for example, and latterly Hart claimed to gain in clarity what they lost in justice. To make law clear by limiting its sources means that there will be less law — no international law at all, according to Austin. But perhaps clarity prevents quarrels. There is a certain intuitive appeal to the claim that each "nation" should pursue self-determination without foreign interference in its own internal affairs.

The Charter of the United Nations reflects the mixed origins of international law (and the analogy between states and free persons) when it echoes the United States Declaration of Independence in declaring that "We the Peoples of the United Nations" propose to (1) maintain international peace and security; (2) respect the equal rights and self-determination of peoples; (3) encourage respect for human rights; and (4) harmonize the actions of nations to achieve these common ends. The actors here are "nations", but also self-determining states, committed to universal human rights. This commitment to rights (and its basis in nations) was reaffirmed in 1948 by the United Nations General Assembly's Universal Declaration of Human Rights.

III. Human Rights

Proponents of the "law of humanity" attribute its origins and early history to the international law of human rights. Certainly human rights have always put limits on the sovereignty of states. Even so great an advocate of absolute government as Jean Bodin admitted in his chapters on sovereignty that foreign states may intervene to protect oppressed peoples against despots. So it was nothing new, after the Second World War, when the United States imposed the concept of individual human rights onto post-war international instruments. But this tended to undermine the more extreme state-centered theories of international law. Why defer to unelected governments in determining the content of the rights of humanity?

The concept of rights grew up and flourished in tandem with the popular sovereignty. The earliest rights claimed in the modern world were political rights. First, peoples sought national self-determination against German or Spanish overlords, as in Switzerland and the Netherlands; then citizens sought internal self-determination against local monarchs, as in the English Commonwealth and Glorious Revolution; finally, developed the full and self-conscious union of popular sovereignty with determinate limits on government, in the United States Constitution. Political rights and protections guaranteed the integrity of public deliberation, which yielded as law the best available approximation of justice and the common good.

The collapse of the French revolution into Bonaparte's empire tended to discredit popular sovereignty in Europe. This led to Benjamin Constant's famous (false) distinction between the liberty of the moderns and the liberty of the ancients. Modern Europeans inevitably abuse political freedom, Constant argued, but still deserve personal liberty in their private affairs. So public and private liberty became separated, "liberalism" was born, and with it the question of how "liberty" and "justice" will be

defined, in the absence of a valid democratic technique for discovering the deliberate consensus of the people.

IV. Civil Society

Some now offer "civil society" as the new authority for a "law of humanity". There exists no clear definition of what this might mean, but "civil society" seems to imply (to those who embrace it) an energized citizenry of the world, acting outside of normal governmental channels, to express the deliberate consensus of the people, while treating, as Richard Falk puts it, "each person on earth a sacred subject". Falk situates this general will in transnational non-governmental institutions such as Amnesty International, or internal social movements such as Solidarity in Poland, or Charter 77 in the former Czechoslovakia.

If the "law of humanity" is to mean a "law that is enacted by and for the peoples of the world" it cannot rest on such self-appointed tribunals as these, or the regional Watch groups, or Lelio Basso's Permanent Peoples Tribunals, or even the Algiers Declaration of the Rights of Peoples. Such groups do not speak for the peoples of the world any more than most governments do. States exist to create and apply laws. Groups that claim to do so are appropriating the attributes of states, and like states gain legitimacy only to the extent that they properly reflect the deliberate consensus of the peoples of the world, or the region they presume to speak for.

Civil society, properly understood, is a precondition of national statehood, just as statehood is a precondition of civil society. Nations cannot fully express their deliberate consensus without the structures of a state. Justice and the common good cannot emerge outside the shared purpose of national institutions. Without guarantees of participation, free speech, and political checks and balances, "peoples" cannot enjoy the "self-determination" guaranteed by Article 1 of the Human Rights Covenants. "Peoples" only fully exist, and exercise self-determination, in the context of nation-states.

V. Republicanism

I would like to be clear about the sort of civil society that I am endorsing with this argument. It is a republican society. By "republican" I mean a society committed to the common good, as discovered through public deliberation, under popular sovereignty structured to prevent domination by any single section of society. (See M. Sellers, *American Republicanism,* Macmillan and NYU Press, 1994). The republican test of political legitimacy is service to the *res publica,* or common good of the people. (See also, Sellers "*Republican Liberty*" in Gabriel Moens and Suri Ratnapala (eds.), *The Jurisprudence of Liberty,* Butterworths, 1996). Immanuel Kant endorsed a federation of such republics as the best basis for a just law of nations. (Kant, Zum ewigen Frieden, Knigsberg, 1796).

The republican argument for popular sovereignty runs as follows. People have different talents and life plans with differing perceptions of the common good. Private interests color human attitudes. Decent humility requires that citizens defer to a reasonable system for resolving conflicting perceptions of justice. Republicanism proposes that everyone is capable of perceiving moral truths. This makes popular sovereignty the best source of justice. If justice and the common good exist and all people have the capacity to perceive them, then the best route to a just society will be through public deliberation. To exclude any voices from the public debate would deprive society of their insights, and subject some private interests to the domination of others. (See Sellers, *Republican Impartiality,* in 11 Oxford Journal of Legal Studies 273, 1991.)

Republicanism proposes a technique for creating and enforcing laws generally, including the laws of humanity. The persons affected, properly constituted into a civil society, become a "people" for the purposes of the relevant legislation, creating their own com-

mon good and common sense of justice. When popular sovereignty does not prevail, voices are excluded, the population cannot exercise its deliberative function, and the "people" no longer exist for the purposes of legislation. "*Res publica res est populi*", as Cicero first put it. The lessons of the French and American revolutions demonstrate that for the purposes of republican government "the people" must embrace all permanent inhabitants of the territory in question.

VI. Peoples

"Peoples" in customary international law are the citizens of existing states — no more, and no less. The history of decolonization, the Human Rights Covenants, and usage going back to Cicero demonstrate that the "populus" embraces all citizens. Modern republicanism and fundamental justice insist that the citizens should include all permanent residents of the state. So it is nonsense to maintain (as some self-styled "postmodern" scholars now do) that the Covenants' endorsement of self-determination for all "peoples" has "exploded once and for all" the notion of the nation-state. Such statements imply a confusion of "peoples", "minorities" and "nations". Stable peoples will evolve into nations. But not all minorities are peoples (or nations).

The driving force exploding the "modern" interstate system owes less to the definition of a "people" (which has not changed) than to the concept of "self-determination". What is it for a people to enjoy its "right" to self-determination, or "freely" to determine its "political status" or "economic, social and cultural development" pursuant to United Nations Covenants? Plain English, and the history of the concept of self-determination going back to past Woodrow Wilson to the American and other modern revolutions imply republican popular sovereignty, with all the rights to fair procedure and universal suffrage that entails. To deny any segment or minority of the population basic rights and a voice in public affairs denies the people of that state their self-determination, in violation of accepted international law.

Self-determination has long been recognized to embrace both "internal" and "external" popular sovereignty. (See e.g. Antonio Cassese, *Political Self-Determination — Old concepts and New Developments* in Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law*, Alphen aan den Rijn, 1979.) It requires that the people be free both of external interference and internal usurpation of government. Contemporary advocates of "democratically constituted geogovernance" (the phrase is Richard Falk's) would do well to recognize the most democratic of all systems —democracy, as a useful vehicle for providing a "government representing the whole people belonging to the territory without distinction as to race, creed or color", pursuant to the United Nations General Assembly's 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations".

VII. Nations

Nations were essential to the law of nations, and public international law. But both categories (and particularly the latter) rested on a false equivalence between nations and states. The proposed new "law of humanity" would avoid this mistake, at the cost of disregarding nations altogether. Instead "postmodern" lawyers would frankly rely on the United Nations General Assembly, or on Nobel Peace Prize winners, or the International Court of Justice, or the media, or on other undemocratic or non-democratic forces in the best position to resist globalizing initiatives such as GATT and NAFTA. But why resist globalization if not in aid of local autonomy and national independence? The phrase "law of humanity" implies universal values and a world republic. The rhetoric of its advocates implies local interests and national particularity.

Both are desirable. Universal human rights provide the basic framework for local self-de-

termination, and self-determination leads to local self-expression. Differences in climates, cultures, customs and history divide humanity into natural units. War, poverty and pestilence may force migrations and social discontinuity. But stable societies develop national attributes from the cultural capital of their constituent minorities. Stable states become nations. A world nation or world republic would not be desirable even if it were possible because people properly savor the particularity of local circumstance. Nations benefit from the models they provide each other. World government would risk universal tyranny through the single usurpation of an ambitious despot or self-important Caesar. National independence protects reservoirs of justice when the rest of the world becomes foolish or unlucky.

States properly follow the boundaries of existing nations. So should nations grow out of existing states. Every people is a prospective nation. Given republican government each people will become a nation. But in the absence of self-determination, minorities suffer, or majorities suffer, and secession may provide the best basis for developing the sense of justice and pursuit of the common good that leads to national identity and stable social institutions. As the United Nations General Assembly's 1970 Declaration on Friendly Relations strongly and correctly implies, the right to "territorial integrity" and "political unity" of "sovereign and independent states" depends on the representative nature of their governments, and absence of discrimination on the basis of race, creed, or color.

Conclusion

To speak of the "law of humanity" rather than the "law of nations" would be a mistake, because it understates the proper role of nations in human well-being. Speaking of "nations" rather than "states" usefully distinguishes "international" from "interstate" law. The law of nations is the law of humanity, discovered through the mediation of nations, or rather of peoples, treated as nations, even before they become so. The so-called "law of humanity" is not "post-modern" but pre-modern, harking back to when the Roman praetor's edict settled legal relations for all the Mediterranean world. The European Reformation put an end to such pretensions of universal authority. Worldwide "civil society" does not exist, should not exist, and has not existed since Alaric sacked Rome. The Secretary-General and United Nations General Assembly do not provide deserving replacements.

Let me repeat my argument. Natural law was the basis of the old "law of nations". The United Nations confirmed the preeminence of the new "international" law. But both recognized the central importance of fundamental human rights. Civil society develops within nations, not between them. Every state should be a republic. This would make its people a nation, and self-determining nations still provide the best foundation for public international law. Self-appointed "Watch" groups, "People's" tribunals, and scholarly gatherings may pontificate about the law of humanity. But they cannot discover it without the mediation of self-governing national republics, based on human rights, popular sovereignty, and respect for the rule of law.

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Some Reflections on the Law of Humanity

Had he his way, Richard Falk would reground international law on a principle of justice for the least. Now, according to Richard Falk, his way is history's way—and history inevitably has its way. But Falk's vision of universal justice is so grand that it is often difficult to make out the details in what he sees. Falk does not explain how the poor can arrive at effective representation in international