

# IS INTERNATIONAL LAW A THREAT TO DEMOCRACY: FRAMING THE QUESTION

*Andrew Strauss\**

I'm Andrew Strauss and welcome to our panel: "Is International Law a Threat to Democracy?" We are lucky this afternoon to have with us a very esteemed and ideologically diverse panel. First I'd like to introduce them and then give some context to the discussion that will follow.

Our first speaker will be Jeremy Rabkin. He is a professor of government at Cornell University, and a very prolific author of both popular and academic works. He is on the Board of Directors of the Center for Individual Rights, the Board of Academic Advisors of the *Harvard Journal of Public Policy* and the Board of Academic Advisors of the American Enterprise Institute. He is also on the Executive Committee of the International Law Section of the Federalist Society.

Our next speaker will be Carol Gould. Among our prolific panelists Professor Gould has written many articles in social and political philosophy, philosophy of law, feminist theory and applied ethics. She directs the Center for Global Ethics at George Mason University. She edits the *Journal of Social Philosophy* and is the Vice-President and President Elect of the American Section of the International Society for Philosophy of Law and Social Philosophy.

She will be followed by Peter Spiro. Professor Spiro is the Dean and Virginia Rusk Professor of International Law at the University of Georgia. He is a former Supreme Court law clerk to Justice Souter. He has also served as director for democracy on the staff of the National Security Council, as an attorney in the State Department's Legal Adviser's office and as a resident associate at the Carnegie Endowment for International Peace.

Our final speaker, Richard Falk, is the Albert G. Milbank Professor Emeritus of International Law at Princeton and currently Visiting Distinguished Professor of Global and International Studies at the University of California, Santa Barbara. Richard Falk has been extremely prolific as a scholar and during his extraordinary career has been at the helm of movements as diverse as championing the rights of indigenous people to promoting the successful

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campaign that led the International Court of Justice to rule on the legality of nuclear weapons. Professor Falk serves as Chair of the Nuclear Age Peace Foundation's Board of Directors, as honorary Vice President of the American Society of International Law, and as a member of the editorial board of *The Nation*.

Our topic this afternoon is whether the growth of the international legal system threatens democracy and, if so, what can be done about it. Our speakers are all public figures and are generally perceived as coming from very different places on the ideological spectrum. But all have in common a significant preoccupation in their writings with the extent to which international law is consistent with democracy.

And, I would add that all of them would see themselves as being promoters of democratic values. All in their writings profess support for pluralism, human rights (at least as limited to civil and political rights) and democratic approaches to decision-making. Where there does appear to be significant disagreement is over the extent to which international law is, or can become, a force consistent with democracy. More specifically, from their writings it would appear our panelists disagree over whether, on the one hand, our democratic future can be secured by the democratic evolution and empowerment of the global system. Or whether, on the other hand, democratic values can be best secured through the maintenance of an international system which ensures that sovereign states do not lose their prerogative to act as they choose.

Jeremy Rabkin in his recently published book, *Law Without Nations? Why Constitutional Government Requires Sovereign States*,<sup>1</sup> argues that international law threatens democracy in at least two ways. First, it runs the risk of replacing clear, enforceable sovereign authority with ill-defined, unenforceable international authority. This potential for a new medievalism, Rabkin argues, could cause a breakdown of the constitutional systems upon which basic rights are secured.<sup>2</sup> Second, he suggests that "increasing disorder . . . might not be the greatest danger of this trend,"<sup>3</sup> but the greater danger might lie in the authoritarian potential for people to begin to follow an international system that is not backed by a democratic constitutional structure.<sup>4</sup>

Carol Gould in her Cambridge University Press book published last year, *Globalizing Democracy and Human Rights*<sup>5</sup> does not necessarily disagree, at

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1. JEREMY RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005).

2. *Id.* at 45–70

3. *Id.* at 69.

4. *Id.* at 69–70.

5. CAROL GOULD, *GLOBALIZING DEMOCRACY AND HUMAN RIGHTS* (2004).

least to the extent to which she identifies certain ways in which the international system is inconsistent with the promotion of democratic values.<sup>6</sup> Gould, unlike Rabkin, however, does not wish to make a case against the empowerment of the international system. Rather, she focuses her efforts on exploring the extent to which there are contradictions between the growth of international law and democracy and human rights.<sup>7</sup> It will be interesting to see whether there is any possibility that she and Jeremy Rabkin can find common ground on democratic reforms of the international system that might allow for its increasing growth.

Peter Spiro has contributed to this discussion with a quite distinct third perspective. In articles such as his 2002, "Accounting for NGOs" in *The Chicago Journal of International Law*<sup>8</sup> he sees the international system, if enhanced by increasingly empowered NGOs, as becoming more democratic. And, in articles like his 2003 *Stanford Law Review* piece "Treaties, International Law and Constitutional Rights,"<sup>9</sup> he argues that human rights can, at least some times, be best protected when treaty based rights are regarded as supreme to the Constitution. This is in clear contrast to Jeremy Rabkin, who he refers to critically as one of the "New Sovereignists" in his well-known *Foreign Affairs* article by the same title.<sup>10</sup> If Spiro and Rabin disagree fundamentally about whether international law is a bulwark for, rather than threat to basic democratic rights, what is it about their differing understanding of the interrelationship between the international and the domestic systems that causes them to disagree so? And, does Carol Gould, with her concerns about international law's democratic problems find herself more in line with Spiro or Rabkin?

Finally, Richard Falk shares concerns with our other speakers about the international system's democratic deficiencies. But his diagnosis of the problem includes the threat to global democracy that can come from powerful sovereign states including, perhaps especially, the world's only super power. And, in works such as his 1999 book, "Predatory Globalization"<sup>11</sup> he adds to our discussion a concern with the implications for global democracy of the neoliberal global economic system. Finally, Richard Falk and I have in *Foreign*

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6. See, e.g., *id.* at 190–96.

7. *Id.*

8. Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161 (2002).

9. Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003).

10. Peter J. Spiro, *The New Sovereignists—American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000.

11. RICHARD FALK, PREDATORY GLOBALIZATION (1999)

*Affairs*<sup>12</sup> and elsewhere<sup>13</sup> added another element to the discussion, and that is whether the concerns about the international systems democratic deficit can be, at least to some extent, ameliorated by the creation of a popularly elected global parliament modeled on the European Parliament. What impact do Richard Falk's contributions have on the thinking of our other panelists?

Well, all of this is certainly enough to keep us occupied for the next hour and twenty minutes. To encourage maximum interaction I will ask each panelist to speak first for ten minutes and then to respond to the other panelist with a shorter five minute presentation. With the remainder of the time we will bring you, the audience, into the discussion.

One caution before we begin, as I have said, we have an ideologically diverse panel, and I would ask us all to try to avoid the dysfunctional family at Thanksgiving dinner scenario where we act out our predefined role in our political family by pushing the same predictable buttons designed to elicit the same predictable responses. Our public discourse has gotten rather uninteresting with liberals and conservatives professing the same scripted outrage at each other night after night on cable television. Our time here will be more creatively spent if we can see whether on a topic that has not been much discussed in forums such as this, it is possible to move the ball forward by finding common ground, or in case of our inability to do that, to approach our endeavor in the spirit of inquiry as to why it is we disagree.

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12. Richard Falk and Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF., Jan.–Feb. 2001.

13. See, e.g., Richard Falk and Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000); Richard Falk and Andrew Strauss, *Toward A Global Parliament*, THE NATION, Sept. 22, 2003.