

# ON THE UNEASY RELATION BETWEEN INTERNATIONAL LAW AND DEMOCRACY

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The question we are asked to address is as follows: “Is international law a threat to democracy?” As a political philosopher, my inclination is to suggest that the answer requires clarifying at the outset the sense in which we are using each of the main terms here. Thus, whether international law is or is not a threat to democracy depends on which aspect of international law is our focus and whether we are restricting our discussion to international law as it is or as it might come to be further developed. In like fashion, our judgment on this issue would vary with how “thin” a notion of democracy we are working with and in particular, whether we limit our conception to the very partial democracies characteristic of many “advanced liberal democracies.” In addition, the answer will depend in part on whether we properly distinguish democracy from sovereignty and whether we are willing to extend our conception to include transnational democratic arrangements.

International law has been roundly criticized by certain United States theorists who seek to defend older ideas of state sovereignty, for example, Jeremy Rabkin.<sup>1</sup> Such critiques from the standpoint of sovereignty are somewhat surprising, however, since international law in its modern forms is rooted in relations among sovereign nation-states, whether defined by treaties or by customary rules and practices. But the critics’ objection can be seen as more consistent when we appreciate that their aim is often not to defend sovereignty per se but rather American sovereignty. Thus when they criticize the International Criminal Court, for example, or even the various Human Rights conventions, what such critics are most concerned with is the impact of these institutions or agreements on the United States. To the degree that this is the case, they have been characterized as defending what has been called American exceptionalism to international law.

Alternatively, a claim to the illegitimacy of such law may arise from a more universalistic and less narrow perspective that locates the problem not with sovereignty but in a deficit in regard to democracy itself. This standpoint

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1. See, e.g., Jeremy Rabkin, *Human Rights Agenda versus National Sovereignty*, in *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL LIBERTIES* (2000).

(perhaps involved in the recent French rejection of the European Union Constitution) objects to the idea that political and legal elites should be able to draft international laws and agreements that are not fully based on national democratic decision making. Here, what comes into play is the recognition that the institutions of global governance, whether the EU or NAFTA or even more fully multilateral organizations like the WTO or the UN itself, do not have a sufficient grounding in the democratic decisions of the people affected by their laws, regulations, or policies. A complication here is introduced by the fact that the people affected are often situated at some distance and may live in other nation-states. So this version of the critique may emphasize either the lack of accountability of these transnational institutions to national democratic decision making or more fundamentally may stress that the decisions are taken by elites, unaccountable to the people affected, wherever these people may be located.

Yet another avenue of criticism of international law turns the first objection on its head and argues that international law may be illegitimate in certain aspects precisely insofar as it is still based on sovereign nation-states. This critique has several dimensions: It may point to the fact that such states are most often not very democratic inasmuch as they have reduced democracy to periodic elections, themselves sometimes usurped by the power of big money; or else it may be observed that states include ones that are not democratic at all, even in this thin, liberal mode. On these grounds it could be concluded that international law is illegitimate to the degree that it is made by, or seeks to protect, sovereign nondemocratic states of those sorts. Even apart from this critique, it is widely agreed that nation-states are no longer as exclusively dominant as before (including in international law) because of the importance of cross-border and transnational relations established through globalization, whether economic, technological, social, cultural, and political. The salience of these new transnational relationships also contributes to the lack of effectiveness of some aspects of international law itself. In this sense, it can be argued that to the degree that international law is tied to state sovereignty, it can hamper the development of new forms of transnational democracy. Further, because of its source in nation-states and their interests, international law currently lacks the means of dealing with crucial issues of global justice that are posed by the strengthening of economic globalization, led by transnational corporations, with their important economic and ecological effects.

In order to analyze these complex issues here, it may be helpful to begin by briefly comparing two different cases (or sorts of cases) of international law. The first set consists of various decisions under NAFTA regarding toxic waste dumping. In one, a NAFTA tribunal ruled that the Canadian government owed up to fifty million dollars in compensation to an Ohio toxic waste disposal company (*S. D. Myers, Inc.*). Since Canada bans the export of PCBs, this company was able to claim that it was denied the right to import hazardous PCB

waste from Canada. Canada argued that to permit such export would require it to violate the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, a UN treaty to which it is a Party.<sup>2</sup> A related case was the NAFTA dispute tribunal's finding (arrived at in secret) in favor of Metalclad Corp., which had sought compensation for not being able to open a hazardous waste landfill in Mexico near the border because of protests from the surrounding community members.<sup>3</sup> Although both of these cases raise issues of the overriding of state sovereignty, they speak more strongly to the capacity of such rulings to overcome regulations that protect health and other human security factors, with consequences for people's human rights. They also demonstrate a lack of democratic accountability of these tribunals to the people affected by their decisions, not only within a given nation-state but across borders. Instead, the multilateral organizations involved seem to function here almost exclusively to advance corporate interests, apparently at the expense of human rights.

We can contrast with these cases the important developments in international law designed to hold wrongdoers accountable for crimes against humanity and for war crimes, in the UN tribunals and now the International Criminal Court. Of great significance too are other efforts to strengthen and give teeth to protection of human rights across borders and to provide appeals for the protection of these rights even against the decisions of nation-states in regard to their own citizens.<sup>4</sup> This is most evident in the European jurisprudence regarding human rights and the two European Courts that serve to protect these rights regionally. A weaker but not insignificant version of this is also found in the Interamerican Court of Human Rights. Nonetheless, this jurisprudence has not gone very far in interpreting the economic and social rights, or in assuring not only the protection of human rights but also enhancing people's opportunities to fulfill them. Of course, it is clear that much of this effort would belong more within the domain of democratic decision-making by people and legislatures. So, it remains to consider how this sort of democratic provision of the opportunities for rights fulfillment can be made more effective and how to conceive the relation of democratic participation to international law more generally.

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2. Press Release, Basel Action Network (BAN), NAFTA Flouts Global Toxic Waste Dumping Treaty (Nov. 15, 2000), available at <http://www.mindfully.org/WTO/NAFTA-Flouts-Dumping-Treaty.htm> (Feb. 10, 2006).

3. Veena Dubal et al., *Why are some Trade Agreements Greener Than Others?*, 16 EARTH ISLAND J. 44 (2002).

4. DAVID HELD, GLOBAL COVENANT: THE SOCIAL DEMOCRATIC ALTERNATIVE TO THE WASHINGTON CONSENSUS 119-36 (2004).

While I can only begin to address the difficult conceptual and practical issues involved here, I will make a few suggestions, starting from the account I give of the relation of human rights and democracy in my recent book *Globalizing Democracy and Human Rights*.<sup>5</sup> Since human rights specify the basic conditions that everyone needs for their freedom and dignity, we can say that although these rights are subject to somewhat varying cultural and social interpretations, they ought to have priority within international law. In addition, they can rightly constrain democratic decisions that violate them in the same way that a national constitution, and especially a bill of rights, can serve to protect important rights of minorities if majorities seek to violate them.<sup>6</sup> For human rights to be effective in this way, they need further institutionalization or even constitutionalization at regional levels, and regional courts of human rights would appear as a positive development in this perspective. One can speculate that if the EU constitution had remained with a specification and further institutionalization of rights, it could have gained wider assent. Needless to say, care must be taken not to overly narrow the scope of national or local democratic decision through such rights.

But the relation between democracy and human rights is more complex than this. Thus I argue that impact on the basic human rights of people at a distance serves as a criterion for giving these people some input into the decisions of international organizations.<sup>7</sup> Without proposing that everyone ought to have input into every decision that affects them, which would be impossible, we can say that wider transnational participation and representation are required given the intensive interrelations and significant human rights impacts that follow on contemporary forms of globalization. Clearly, this implies opening up the decisions of organizations like the WTO not only by making them more transparent, but by enabling participation in them (including in the epistemic communities so important to their functioning) on the part of representatives of people affected by their policies. In the absence of new modes of such participation and representation, NGOs may serve in the near term to represent those seriously affected. But the NGOs would themselves have to be sure to operate by principles of democratic accountability to their members, which some, though not all already do. I also propose that the transnational organizations (including global corporations as well) should be required to prepare what I would call “human rights assessments,” to consider and respond to the impact of their rules, policies, and activities on the opportunities for human rights fulfillment by those affected.

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

6. Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 *STAN. L. REV.* 1999, 1999–2028 (2003).

7. GOULD, *supra* note 5, at 201–16.

Beyond this, we can say more generally that international law should regard itself as the handmaiden of democracy, where by democracy we mean democratic associations at all levels. This suggests that rules and laws need to be structured with the principle of subsidiary in view, so that decision-making can occur at the lowest level relevant, and should also show deference to the diversity of democratic forms of participation and representation at all levels. It is likewise important to leave room for some diversity in the cultural and social interpretations of norms.<sup>8</sup> Inclusion of a wider sphere of interpreters, somewhat similar to what is happening in the sphere of human rights law, would be important, as would be opportunities for public deliberation about these norms and laws.

Other forms of transnational representation are also imaginable beyond simply opening up existing forums to NGOs. There are proposals like those of Philippe Schmitter for reciprocal representation in legislatures or Michael Saward's promotion of cross-border referenda or forums.<sup>9</sup> Preferably within the context of regional human rights protections, closer connections between national legislatures would be possible (including joint legislation by subcommittees within them), as would the development of democratic decision-making within new cross-border communities. More generally, the introduction of such democratic modes of decision making in transnational communities, whether economic, ecological, or simply communicative, as through the Internet, should be encouraged and facilitated by law (but only if regulations and laws are in fact necessary).

Proposals for a more representative global democratic assembly (Held<sup>10</sup>) or a global parliament (Falk and Strauss<sup>11</sup>) are useful additions to a system currently limited to representatives of states. But these very large scale institutions would have a hard time being fully representative on my view, and would need to avoid replicating the lack of real democratic participation so evident at national levels. They cannot replace the work of expanding democratic modes within the variety of associations at lower levels, increasingly of a transnational sort, and including not only political associations but economic and social ones as well.<sup>12</sup> Such an expansion of democracy (in

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8. See also Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 *IND. J. OF GLOBAL LEGAL STUD.* 25 (2003).

9. *GLOBAL DEMOCRACY: KEY DEBATES* 39–43 (Barry Holden Ed. 2000).

10. HELD, *supra* note 4, at 110–11.

11. Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 *STAN. J. INT'L L.* 191, 191–220 (2000).

12. See, BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003); CAROL C. GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY* 31–90; 247–61 (1988).

both procedural and more substantive senses) in this wide range of institutional contexts provides the greatest hope, in my view, for eventually instituting what has been called international law from below.