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From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society

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FROM LEGAL TRANSPLANTS TO TRANSFORMATIVE JUSTICE: HUMAN RIGHTS AND THE PROMISE OF TRANSNATIONAL CIVIL SOCIETY

JULIE MERTUS^{*}

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INTRODUCTION

Today's political and legal geography presents opportunities and challenges not faced by the drafters of the Universal Declaration of Human Rights ("Universal Declaration")¹ some fifty years ago. The shape, direction, and nature of State responses to human rights problems have dramatically altered. Non-State actors² and transnational networks³ now play a greater role in the promotion and protection of human rights in local, regional, and international arenas. Concurrently, the challenges faced by the international community have shifted from localized national security concerns to matters of a more global nature, such as the environment, mass migration, and the human rights of women. The increase in non-State participants⁴ and the

1. G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

2. See generally John Spanier, *Who are the 'Non-State Actors?'*, in THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS 43 (William C. Olson ed., 8th ed. 1991) (defining the term 'non-State actor'); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (1994) (defining "participants" to refer to all to whom international law is applicable). See generally Benedict Kingsbury, *Whose International Law? Sovereignty and Non-state Groups*, in Amir Pasic, *Theoretical Perspectives on the Transformation of Sovereignty*, 88 AM. SOC'Y INT'L L. PROC. 1 (1994).

3. See, e.g., RONALD INGLEHART, MODERNIZATION AND POST-MODERNIZATION: CULTURE, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES 188-190 (1997) (stressing the importance of organizational networks); Víctor Pérez-Díaz, *The Possibility of Civil Society: Transitions, Character and Challenges*, in CIVIL SOCIETY: THEORY, HISTORY, COMPARISON 80, 90 (John A. Hall ed., 1995) (noting the emergence of economic, social, and informational networks); Timothy W. Luke, *New World Order or Neo-World Orders: Power, Politics and Ideology in Informationalizing Glocalities*, in GLOBAL MODERNITIES 91 (Mike Featherstone et al. eds., 1995) (discussing the emergence of local/global "webs"); Patricia Chilton, *Mechanics of Change: Social Movements, Transnational Coalitions, and the Transformation Process in Eastern Europe*, in BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 225 (Thomas Risse-Kappen ed., 1995) (explaining how "transnationalism takes account of coalitions of non-state actors across national borders"). See generally Sol Piciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014 (1996); COALITIONS & POLITICAL MOVEMENTS: THE LESSONS OF THE NUCLEAR FREEZE (Thomas R. Rochon & David S. Meyer eds., 1997) (providing an excellent case study of the impact of international networks on global politics).

4. See HIGGINS, *supra* note 2, at 94 (noting that the use of the term 'participant' avoids the subject-object distinction in international law).

emergence of transnational civil society⁵ have opened a new domain within which the rights enumerated in the Universal Declaration and other international human rights documents may be realized.

Variably termed “world,”⁶ “global,”⁷ “international,”⁸ or “transnational”⁹ civil society, this domain is the social, cultural, and ethnical arrangements of modern industrial society considered apart from State control.¹⁰ Transnational civil society refers to “a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of States.”¹¹

5. See, e.g., JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY & POLITICAL THEORY* (1992); Victor Pérez-Díaz, *The Possibility of Civil Society: Transitions, Character and Challenges*, in *CIVIL SOCIETY: THEORY, HISTORY, COMPARISON* 90 (John A. Hall ed., 1995). See generally Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 378 (1998); Benedict Kingsbury, “Indigenous Peoples” In *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414 (1998).

6. See, e.g., RALF DAHRENDORF, *THE MODERN SOCIAL CONFLICT* 181 (1988).

7. See, e.g., RICHARD A. FALK, *ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS* 17 (1995); Stephen Gill, *Reflections on Global Order and Sociohistorical Time*, 16 *ALTERNATIVES* 311 (1991).

8. See, e.g., Dianne Otto, *Non-governmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 *HUM. RTS. Q.* 107 (1996).

9. See Timothy P. Terrell & Bernard L. McNamee, *Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice*, 17 *FORDHAM INT’L L.J.* 459, 460 (1994) (naming as examples of transovereigns “the Catholic Church, the environmental ‘Green’ movement, fundamentalist Islam, international communism, and in many ways the United Nations.”).

This article uses the term “transnational” throughout instead of “world” or “global” because civil society is much more uneven and issue-specific than those terms imply. The term “international” is avoided because it could too easily be conflated with international regimes or States. “Transovereign” emphasizes a lack of obedience to any particular sovereign and not merely the crossing of national borders. Some commentators, however, have narrowed “transnational” to include only structures that embody a moral commitment that requires “a more fundamental commitment to an organization’s values and agenda than the ordinary NGO would involve.” *Id.* at 460 n.3.

10. See Ronnie Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 *MILLENNIUM J. INT’L STUDIES* 389, 398 (1992).

11. Richard Price, *Reversing the Gun Sights: Transactional Civil Society Targets Land Mines*, 52 *INT’L ORG.* 613, 615 (1998).

This is an appropriate description as no single map exists of transnational civil society, but rather a “network of strategizing and powers and their articulation.”¹² The voluntary associations of transnational civil society include such entities as non-governmental advocacy organizations, humanitarian service organizations, unions, religious groups, civic and neighborhood associations, political and social movements, information and news media, educational associations, and certain forms of economic organization.¹³ These entities link themselves together in networks for particular political, social, and cultural purposes.¹⁴ The State boundary-crossing aspect of such associations makes them transnational;¹⁵ their voluntary, non-State aspects make them part of “civil society.”¹⁶

Law plays a central role in civil society. Civil society cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government. Legal associations play a central role in the development of civil society by supporting rule of law mechanisms¹⁷ that permit the independent existence of non-

12. Stuart Hill, *Brave New World*, 21 SOCIALIST REV. 57, 63 (1991) (describing difficulties of adequately defining and describing civil society).

13. See BENJAMIN R. BARBER, JIHAD VS. MCWORLD 285 (1995) (noting that while Hegel and his followers define civil society as that which is apart from the State, many modern theorists see civil society as the space “mediating between private markets and . . . government.”); Michael Walzer, *A Better Vision: The Idea of Civil Society: A Path to Social Reconstruction*, DISSENT 293, 300 (1996) (presenting the more nuanced view that civil society may encompass certain economic institutions, such as worker organizations and consumer cooperatives, that function in private markets but have their origins outside the market). See also ROBERT L. HEILBRONER, BEYOND THE VEIL OF ECONOMICS: ESSAYS IN WORLDLY PHILOSOPHY 32 (1988) (proposing that economic processes are a prerequisite for civil society); DAVID HELD, MODELS OF DEMOCRACY 341 (2d ed. 1996) (arguing that democratic civil society is incompatible with unrestricted private ownership).

14. See Lipschutz, *supra* note 10, at 393 (emphasizing that the concept of civil society refers to something broader than social networks).

15. Cf. Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 412 (1997) (discussing the interaction of transnational individuals and groups apart from State systems).

16. See generally ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS (1994) (discussing the origin and development of thinking about civil society).

17. See *infra* notes 80-81 and accompanying text (defining “rule of law”). See generally Richard H. Fallon, Jr., *The “Rule of Law” as a Concept in Constitutional*

governmental entities and by encouraging the development of institutions that foster their growth.¹⁸ A strong civil society also demands and oversees legal constraints on State power and the accountability of State actors.¹⁹ Associational life provides an important medium for the development of ideas about the role of law in society, such as the parameters of civil freedoms and entitlements, the shape of legal constraints on the exercise of public authority, and the definition of public commitments.²⁰

It is possible to view the idea of civil society through various political and philosophical lenses.²¹ For the purpose of examining the promise of transnational civil society for human rights, a definitional focus on relational networks helps to sharpen the inquiry. One proponent of this focus, Michael Walzer, writes that “[t]he words ‘civil society’ name the space of uncoerced human association and also the set of relational networks—formed for the sake of family, faith, interest and ideology—that fill this space.”²² Ideally, the associational life of civil society is pluralistic and encouraging of diverse participation.²³ A primary measure of the strength of civil society is its ca-

Discourse, 97 COLUM. L. REV. 1 (1997) (discussing the various definitions of “rule of law”).

18. See, e.g., John Reitz, *Constitutionalism and the Rule of Law: Theoretical Perspectives*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 111 (Robert D. Grey ed., 1997).

19. See generally HELD, *supra* note 13 (discussing the accountability of State actors in civil society).

20. See generally Luis Roniger, *The Comparative Study of Clientelism and the Changing Nature of Civil Society in the Contemporary World*, in DEMOCRACY, CLIENTELISM, AND CIVIL SOCIETY 6 (Luis Roniger & Ayse Gunes-Ayata eds., 1994).

21. See generally THOMAS JANOSKI, *CITIZENSHIP AND CIVIL SOCIETY* (1998); PAUL BARRY CLARKE, *DEEP CITIZENSHIP* (1996); JUSTINE ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY* (1994); Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491 (1993); COHEN & ARATO, *supra* note 5; ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992); Charles Taylor, *Modes of Civil Society*, 3 PUB. CULTURE 95 (1990); Daniel Bell, “*American Exceptionalism*” Revisited: *The Role of Civil Society*, PUB. INTEREST 38 (1989); JOHN KEANE, *DEMOCRACY AND CIVIL SOCIETY* (1988).

22. Michael Walzer, *The Civil Society Argument*, in DIMENSIONS OF RADICAL DEMOCRACY 89, 89 (C. Mouffe ed., 1992); see also COHEN & ARATO, *supra* note 5, at 38.

23. See, e.g., ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIL*

capacity simultaneously to *resist* subordination to State authority and to *demand inclusion* into State political structures.²⁴ Human rights advocates argue that civil society creates a “setting of settings”²⁵ in which the human rights norms embodied in the Universal Declaration and its progeny are worked out, tested, and applied. Hence, the importance of relational networks.

The rise of civil society presents a paradox to human rights advocates. On the one hand, civil society can promote human rights norms and raise the concerns of unheard voices, including those of people oppressed through violations of core principles of international human rights.²⁶ The inclusive and pluralistic nature of associational groups promotes what is seen as the “emerging right to democratic governance.”²⁷ Some view the very existence of a robust civil society as a precondition to democratic governance and to the realization of human rights.²⁸ On the other hand, transnational civil society may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign and, thus, may act in a manner contrary to democratic principles. This article examines this paradox by analyzing the ways in which non-State participants may work in conjunction with States to promote these norms.

TRADITIONS IN MODERN ITALY (1993); Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in 1 ASSOCIATIONS AND DEMOCRACY: THE REAL UTOPIAS PROJECT 1, 7 (Erik O. Wright ed., 1995). *But see, e.g.*, MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1982) (underscoring the difficulties and contradictions associated with collective action).

24. *See, e.g.*, Philip Oxhorn, *From Controlled Inclusion to Coerced Marginalization: The Struggle for Civil Society in Latin America*, in CIVIL SOCIETY: THEORY, HISTORY, COMPARISON 250, 252 (John A. Hall ed., 1995). *But see* ZBIGNIEW RAU, *THE REEMERGENCE OF CIVIL SOCIETY IN EASTERN EUROPE AND THE SOVIET UNION* 43 (1991) (describing civil societies as arenas of resistance to a totalitarian State).

25. *See* RAU, *supra* note 24, at 98.

26. *See, e.g.*, Pérez-Díaz, *supra* note 3.

27. *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (discussing the emergence of democracy as a global normative entitlement); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992) (discussing enfranchisement of participants in international law).

28. *See* GELLNER, *supra* note 16, at 188. *See also* COHEN & ARATO, *supra* note 5, at 80 (identifying civil society as a “locus of democratization”).

First, this article outlines the transformations pertaining to space, namely, globalization and the roles of State and non-State participants. A discussion of these changes reveals the increasing importance of transnational civil societies. Second, this article analyzes transformations pertaining to methodology and idea, analyzing the concepts of "governance" and the right to "democratic governance." This article also examines the change in focus from government to governance and explains the connection of these concepts to the promotion of human rights. Finally, this article details the role of non-governmental organizations ("NGOs") in transnational civil societies, and explains how their actions may run contrary to democratic norms, and how their participation in transnational civil societies can improve. A discussion of the effects of NGOs on "legal transplants"²⁹ in Central and Eastern Europe illustrates the problems of NGOs attempting to foster positive social change. Ultimately, this discussion provides insight into the evolution of the system of international human rights law and practice and the challenges that lie ahead.

I. TRANSFORMED SPACE: GLOBALIZATION AND THE ROLES OF STATE AND NON-STATE PARTICIPANTS

The rise of non-State participants and networks is a product of the complex phenomenon known as globalization. Richard Falk has drawn a distinction between globalization from above and globalization from below to identify "two interrelated tendencies: the restructuring of the world economy on a regional and global scale through the agency of the transnational corporation and financial markets from above, and the rise of transnational social forces concerned with environmental protection, human rights, and peace and human security from below."³⁰ The impact of globalization from below is

29. See *infra* notes 225-235 and accompanying text.

30. Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 333, 335 (1997) [hereinafter Falk, *New Jurisprudence of Global Civil Society*]; see also Richard Falk, *The Right to Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in *SELF-DETERMINATION AND SELF-ADMINISTRATION: A SOURCEBOOK* 47, 50-51 (Wolf-

created by transnational civil societies, "the thin and uneven public sphere that can coalesce at the global level where individuals interact for common purposes and shape collective life."³¹ Additionally, globalization represents four interrelated and seemingly contradictory dimensions.³²

First, globalization recognizes an increasing interdependence at the world level, where the activities of people in a specific area have repercussions that go beyond local, regional, or national borders.³³ For instance, human rights problems in an interdependent world increasingly cross State borders.³⁴ Similarly, products that present environmental hazards endanger the health of people in numerous States.³⁵ This interdependence of markets causes reverberating cross-border explosions when markets go bad, subsequently resulting in mass migration and widespread threats to economic and social rights. Therefore, in order to remedy these situations, human rights advocates must find new ways to gather information and conduct trans-border advocacy.

gang Danspeckgruber ed., 1997) [hereinafter Falk, *The Right to Self-Determination Under International Law*].

31. Price, *supra* note 11, at 627.

32. See Zdravko Mlinar, *Individuation and Globalization: The Transformation of Territories Social Organization*, in GLOBALIZATION AND TERRITORIAL IDENTITIES 15, 20-22 (Zdravko Mlinar ed., 1992) (listing dimensions of globalization).

33. See TRANSNATIONAL RELATIONS AND WORLD POLITICS 42 (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972) (noting the growing interdependence among industrialized nations and subsequent changes in decision making).

34. See *id.* (discussing early articulations of the interdependence theory).

35. See Alexandre Kiss, *The International Protection of the Environment*, in INTERNATIONAL LAW: CLASSIC & CONTEMPORARY READINGS 391, 393 (Charlotte Ku & Paul F. Diehl eds., 1998) (emphasizing need for international environmental law); Edith Brown Weiss, *Planetary Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES & ACTION 187, 191 (Richard Claude & Burns Weston eds., 1992) (listing various environmental activities that inhibit planetary rights); Pérez-Díaz, *supra* note 3, at 90 (affirming need to establish an international public authority to implement international legislation for dealing with such issues as the environment and human rights). See generally Hugh J. Marbury, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251, 260 (1995) (discussing global effects of transporting hazardous wastes).

Second, globalization results in the fragmentation of States and peoples into autonomous groups and areas. Consequently, as a survival tactic in the increasingly interconnected world, economic, social, and cultural networks form to promote their own collective interests.³⁶ These associations usually form around common identity markers, such as language, culture, and kinship.³⁷ Identity groups also make new demands for their own rights to culture, language, and association.³⁸ Unfortunately, the formation of identity groups may, by design or as an unintentional byproduct, threaten the human rights of other identity groups. For example, the formation of ethnic Hungarian groups in Romania may be perceived as threatening by ethnic Romanians.³⁹ While the markers chosen by identity groups cross State boundaries, they nonetheless remain within a demarcated territory or population—e.g., Romania or the community of Romanians.⁴⁰ The rise of the identity groups is considered as fragmentary because it emphasizes the division of an imagined larger identity—e.g., the people of Romania—into smaller pieces—e.g., ethnic Romanian versus all other minority ethnicity. As a result, human rights advocates become concerned with protecting and promoting the human rights of ethno-national minorities.⁴¹ When tensions between identity

36. See, e.g., Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1045 (1996-7) (emphasizing need for greater international coordinating); DAVID KNOKE, POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE 76-81 (1990) (exemplifying black civil rights movement to illustrate organizations that attempt to achieve their own goals).

37. See generally Benedict Kingsbury, *Indigenous Peoples, in International Law: A Constructivist Approach to The Asian Controversy*, 92 AM. J. INT'L L. 414 (1998); MUSLIM IDENTITY AND THE BALKAN STATE 4 (Hugh Poulton & Suha Taji-Tarouki eds., 1997).

38. See David S. Meyer and Sidney Tarrow, *A Movement Society: Contentious Politics for a New Century*, in THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 1, 18 (David S. Meyer & Sidney Tarrow eds., 1998).

39. See KATHERINE VERDERY, WHAT WAS SOCIALISM, AND WHAT COMES NEXT? 115-26 (1996) (discussing importance of this kind of fragmentation for construction of civil society in Romania).

40. See generally TONE BRIGA, BEING MUSLIM THE BOSNIAN WAY: IDENTITY AND COMMUNITY IN A CENTRAL BOSNIAN VILLAGE (1995) (describing Muslim identity in Bosnia and providing another good illustration of this phenomenon).

41. See, e.g., HELSINKI WATCH, SINCE THE REVOLUTION: HUMAN RIGHTS IN

groups are further manipulated by local power brokers,⁴² the situation may erupt into an intrastate conflict, raising a whole host of human rights concerns.⁴³ In the words of John Keane, a combative, pluralistic civil society may “hemorrhage to death.”⁴⁴

Third, globalization somewhat results in the homogenization of the world⁴⁵ wherein “instead of differences among territorial units which were mutually exclusive, there is now a *uniformity*.”⁴⁶ This process of unification has two branches. The first, which has tremendous implications for human rights advocates, was described as “a growing element of global consciousness in the way the members of global civil society act.”⁴⁷ Participants in civil societies are progressively agreeing on such norms as diplomatic languages and systems of representation⁴⁸ and democratic governance.⁴⁹ The domination of liberal norms in international politics dislocates the anarchical social construction of the world and enables emerging social construction based on a more cooperative, problem-solving civil society.⁵⁰

ROMANIA (1991).

42. See generally JULIE MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999).

43. See generally Ted Robert Gurr, *Minorities, Nationalities and Ethnic Conflict*, in CHESTER A. CROCKER ET AL., *MANAGING GLOBAL CHAOS: SOURCES AND RESPONSES TO INTERNATIONAL CONFLICT* 53 (1996) (exemplifying genocidal campaign against Kurds as result of Iran-Iraq war); KUMAR RUPESINGHE, *ETHNIC CONFLICT AND HUMAN RIGHTS* (1988); CYNTHIA H. ENLOE, *ETHNIC CONFLICT AND POLITICAL DEVELOPMENT* (1986); ALEXANDRA STIGLMAYER, *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 82, 85 (1993) (providing discussion of gender-based implications of ethnic conflict).

44. See Roninger, *supra* note 20, at 7.

45. See Kingsbury, *supra* note 37, at 421 (commenting on some common elements shared by indigenous people). See also Ileana M. Porras, *A Latcrit Sensibility Approaches the International: Reflections on Environmental Rights as Third Generation Solidarity Rights*, 28 U. MIAMI INTER-AM. L. REV. 413, 424 (1997) (arguing for a reassessment of the implications of globalism).

46. Mlinar, *supra* note 32, at 21 (emphasis added).

47. Lipschutz, *supra* note 10, at 399.

48. See Albert Bergesen, *Turning World System Theory on Its head*, in *GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY* 76 (Mike Featherstone ed., 1990).

49. See *infra* notes 97-100 and accompanying text.

50. See Lipschutz, *supra* note 10, at 407.

The second branch of unification, which has limited utility for human rights advocates, is the so-called "McDonaldization" of the world.⁵¹ This form of outside, consumer-oriented homogenization does not necessarily minimize the competing cultural perspectives that threaten "to diminish the prospects for developing truly universal standards of human rights and more effective mechanisms for achieving them."⁵² On the contrary, forced impositions of outside ideas on local matters may result in retrenchment and reactive nationalism that can lead to human rights disaster for minority groups. Applying the broader trend toward trans-border connections, new reactive nationalism may become "transnationalism" if connected to politicized national entities located in more than one territory.⁵³ Furthermore, the view of globalization as homogenization minimizes the complex way in that the local interacts with the international.⁵⁴ Much of what is described as "local culture" as opposed to "outside ideas" is in fact already a reflection of the global. Conversely, the "local" influences, and is reflected in, the global.⁵⁵ Aggressive forms of contemporary nationalism are made within global terms of identity and shaped by local particularities.⁵⁶ It is essential that human rights advocates are sensitive to the local conditions that give rise to human

51. See generally BARBER, *supra* note 13.

52. Abdulahi A. An-Na'im, *Introduction*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 1, 1 (Abdulahi A. An-Na'im ed., 1992).

53. See Luis Eduardo Guarnizo & Michael Peter Smith, *The Location of Transnationalism*, in TRANSNATIONALISM FROM BELOW 3, 11 (Luis Eduardo Guarnizo & Michael Peter Smith eds., 1998).

54. See Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY 295, 304 (Michael Featherstone ed., 1990) (discussing complexity of globalization and the international implications stemming from ideas of nationhood).

55. Roland Robertson calls this phenomenon "glocalization." See Roland Robertson, *Glocalization: Time—Space and Homogeneity—Heterogeneity*, in GLOBAL MODERNITIES 25, 26 (Mike Featherstone et. al. eds., 1995). See generally SAKIA SASSEN, *THE MOBILITY OF LABOUR AND CAPITAL: A STUDY OF INTERNATIONAL INVESTMENT AND LABOUR FLOW* (1988).

56. See generally Janice Gross Stein, *Image, Identity, and Conflict Resolution*, in MANAGING GLOBAL CHAOS: SOURCES AND RESPONSES TO INTERNATIONAL CONFLICT 93, 95 (Chester A. Crocker et. al. eds., 1996) (discussing creation of enemy identities).

rights abuses and the ways in which local societies adapt and apply human rights norms.⁵⁷

A fourth phenomenon of globalization also undercuts homogeneity by producing diversification within territorial communities. As Marshall Berman explains:

Modern environments and experiences cut across all boundaries of geography and ethnicity, of class and nationality, of religion and ideology: in this sense, modernity can be said to unite all mankind. But it is a paradoxical unity, a unity of disunity: it pours us all into a maelstrom of perpetual disintegration and renewal, of struggle and contradiction, of ambiguity and anguish.⁵⁸

The easing of border controls in previously restrictive States results in an inward flow of goods, information, ideas, and people—including people with new and challenging ideas on human rights. Exposure to outside beliefs increases the variety of ideas in local spaces. With restrictions on travel relaxed, “[p]eople travel to teach, to learn, to buy, to sell, to kill and to heal. In doing so, they learn new ways of doing things, including new forms of social organization, and they come to see the costs of old ways of doing things.”⁵⁹ This can have a positive impact for human rights as it may result in increased willingness to accept human rights norms within a local context. At the same time, new human rights concerns may arise where local power structures perceive a threat and fortify themselves against outside influences. In short, a politics of collective identity and participation is emerging amidst diversification and “[in] some places such politics are expressed via nationalism; in others through identities based on civil society.”⁶⁰

57. See, e.g., Stephen P. Marks, *Human Rights Education in U.N. Peace Building: From Theory to Practice*, in HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY 35 (George J. Andreopolous & Richard Pierre Claude eds., 1997) (detailing a United Nations effort to improve human rights norms in Cambodia through education of the Cambodian people, government, and NGOs).

58. MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY 15 (1982).

59. Lipschutz, *supra* note 10, at 413.

60. *Id.* at 398.

Where is the State in this new global geography? Some commentators would like to dispense with the State as the principle unit of analysis in international relations and international law.⁶¹ Ken Booth exemplifies this thinking when he warns:

Sovereignty is disintegrating. States are less able to perform their traditional functions. Global factors increasingly impinge on all decision made by governments. Identity patterns are becoming more complex, as people assert their local loyalties but want to share in global values and lifestyles. . . . The [metaphor for the] international system which is now developing . . . is of an egg-box containing the shells of sovereignty; but alongside it a global community omelet is cooking.⁶²

Although the global omelet exists, the move away from the State should not be overstated. The State still is active in human rights norm formation and enforcement and interstate activities pertaining to human rights issues still hold great importance.⁶³ Only the shape, direction, nature and scope of interstate politics have changed.⁶⁴ All of these changes have an impact on the ways in which human rights problems are handled and how the progressive realization of international human rights is approached.

The global omelet includes numerous non-State actors, some of which are partially the creation of States, some of which are wholly independent. As Benedict Kingsbury has noted, the State is now operating within an increasingly dense matrix of transnational interactions involving other States, inter-governmental institutions, corporations, and a whole range of cross-border groups and networks that

61. See, e.g., JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY?: THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992); KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERNATIONAL ECONOMY* (1990) (emphasizing that in a globalized world, consumption, not State sovereignty, is key).

62. Ken Booth, *Security in Anarchy: Utopian Realism, in Theory and Practice*, 67 INT'L AFF. 530, 542 (1991).

63. See generally EVAN LUARD, *THE GLOBALIZATION OF POLITICS: THE CHANGED FOCUS OF POLITICAL ACTION IN THE MODERN WORLD* (1990).

64. See, e.g., John G. Ruggie, *International Structure and International Transformation: Time, Space and Method*, in *GLOBAL CHANGES AND THEORETICAL CHANGES* 21 (Ernst-Otto Czempiel & James N. Rosenau eds., 1989) (discussing international structural theory).

are slowly evolving into a transnational civil society.⁶⁵ Participants in the human rights decision-making process include not only individual States but also individual participants, NGOs, intergovernmental organizations (“IGOs”), and other voluntary associational groups.⁶⁶ This means that the formulation and implementation of human rights standards now involves more than the State; they involve many non-State interests as well.⁶⁷

The direction of interstate interaction was altered by an increased emphasis on cross-boundary linkages. For example, non-State actors in State *A* may interact directly with State and non-State actors in States *B* and *C* regardless of the attitude of State *A*, or whether or not State *A* actually has relationships with States *B* and *C*. In the past, the most important decisions were made with States directly connecting with other States on a one-to-one basis. Today, non-State participants interact directly with each other and with States. In this sense, it is possible to characterize them as “sovereignty free” actors.⁶⁸ Their lines of communication may “cross” in unusual and unexpected ways.⁶⁹

The direction of interstate interaction was further altered by an increasing growth of international and regional networks operating at the sub-State level.⁷⁰ Importantly, there was a rise in direct contacts

65. See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 357 (1994) (discussing new “liberal” theories of international law).

66. See generally HENRY J. STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT* (1991) (providing an overview of non-governmental organizations with respect to the human rights movement).

67. See Spanier, *supra* note 2, at 43-46 (stating that international organizations may be comprised of representatives of States and, thus, their “non-State” nature may be of a different quality than that of non-governmental organizations).

68. See JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY* 36 (1990) (providing examples of “sovereign free” actors as “multinational corporations, ethnic groups, bureaucratic agencies, political parties, subnational governments, transnational societies [and] international organizations”).

69. See Julie Mertus, *The Liberal State and the National Soul*, SOC. & LEGAL THEORY (forthcoming 1999).

70. See generally RICHARD W. MANSBACH ET AL., *THE WEB OF WORLD POLITICS: NONSTATE ACTORS IN THE GLOBAL SYSTEM* 9 (1976) (providing wide

between national regulators with similar functional responsibilities, such as between environmental regulatory groups in States *A*, *B*, and *C*. Similarly, there was a rise in direct contacts between non-governmental organizations with similar human rights concerns, such as between women's human rights groups in States *A*, *B*, and *C*.⁷¹

Technological changes were instrumental in promoting the kinds of cross-boundary linkages that foster burgeoning transnational social movements. Today, many participants in transnational civil society depend on public communication and discourse. In addition, the realms of public communication and discourse are also a site of transnational civil society.⁷² Internet user groups, bulletin boards, and websites have constructed a new arena wherein political and social norms are proposed, debated, and determined.⁷³ Communication on the Internet creates a community of informed activists who are unbounded by hierarchy or territory—anyone, anywhere can be an activist on the Internet. As Leon Gordenker and Thomas Weiss note, “[e]lectronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogative of nationalism.”⁷⁴

range of historical developments).

71. See generally MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (describing emergence of transnational advocacy networks in international politics); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993) (describing these organizations as being linked by shared values or principled ideas).

72. See generally JOHN KEANE, *THE MEDIA AND DEMOCRACY* (1991) (addressing role of media in civil society).

73. See RONALD J. DEIBERT, *PARCHMENT, PRINTING, AND HYPERMEDIA: COMMUNICATION IN WORLD ORDER TRANSFORMATION* 159-63 (1997) (discussing transnational social movements in hypermedia environment). See generally Jennifer Myers, *Human Rights and Development: Using Advanced Technology to Promote Human Rights in Sub-Saharan Africa*, 30 CASE W. RES. J. INT'L L. 343 (1998) (examining recent technological advancements that have accelerated global economic and social development).

74. Leon Gordenker & Thomas G. Weiss, *Pluralising Global Governance: Analytical Approaches and Dimensions*, 16 THIRD WORLD Q. 357, 365 (1995). See, e.g., Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231, 235 (1998).

The reaction of transnational participants to the war in Bosnia-Herzegovina illustrates the mobilization of transnational civil society in response to human rights and humanitarian crises. A global network of State and non-State participants watched the crises develop; slowly, they decided whether to take action. The network included transnational professionalized bodies designed to manage, control and respond to such crises, such as the Organization for Security and Cooperation in Europe ("OSCE") and the North Atlantic Treaty Organization ("NATO"). Media and information sources, including the Internet, publicized information about human rights abuses and humanitarian conditions, drawing attention to the widespread use of rape as a strategic weapon of war and to the deliberate targeting of civilian groups based on their ethno-national background. NGOs monitored abuses and suggested action to professionalized international bodies, including the State-based Helsinki Committees and Amnesty International, as well as trans-State and sub-State service organizations such as the United Nations High Commissioner for Refugees ("UNHCR"), the Croatian Red Cross, or Save the Children. Also, NGOs successfully pushed for the issuance of various United Nations Security Council resolutions authorizing various forms of humanitarian and/or military intervention and for the establishment of international war crimes tribunals. States were involved in this response, both as members or supporters of the various types of bodies named above, and as actors responding in their own names. The States that were most effective in addressing human rights questions were the ones that adjusted to the shifting global landscape and, in particular, worked constructively with a range of non-State participants.⁷⁵

This simplified rendition of the actors responding to the crisis in the former Yugoslavia serves to illustrate the changing role of the State and the importance of non-State actors. A primary lesson of the new global geography is that transnational civil society has become an increasingly important space in which human rights norms may be given the force of law. Another key lesson, well illustrated by the former Yugoslavia, is that State and non-State participants must work together to promote and protect human rights. In doing so, the

75. In making this observation, the author draws from her two years in Yugoslavia during the war.

methodologies and ideas they have at their disposal were transformed as well. This Article will now address this aspect of the new global geography.

II. TRANSFORMED METHODOLOGIES AND IDEAS: GOVERNANCE AND THE EMERGING RIGHT TO DEMOCRACY

Within the new global geography, State and non-State participants have at their disposal methodologies and ideas for addressing human rights issues that were not at the forefront fifty years ago. This section examines the possibilities and limitations for one central set of ideas and methodologies, namely, those related to governance and the right to democracy. It begins by examining the scope and nature of these concepts, examining both possibilities and limitations, and then redirections for the application of the concepts in line with human rights norms.

A. NATURE AND SCOPE OF GOVERNANCE AND THE RIGHT TO DEMOCRACY

The rise of non-State actors and the changed role of the State are intertwined with a move from “government” to “governance.” There is now a shift from the building of international organizations that generate and administer rules—e.g., a “world” government⁷⁶—to governing relationships that transcend national frontiers without sovereign authority. James Rosenau distinguishes governance from government as follows:

[G]overnment suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. . . . [Governance] embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby

76. See COMMON RESPONSIBILITY IN THE 1990S: THE STOCKHOLM INITIATIVE ON GLOBAL SECURITY AND GOVERNANCE 35-42 (1991) (discussing a reformist call for global governance that still embodies an institutional focus).

those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.⁷⁷

Achieving governance thus necessitates more complex and far reaching methods than the mere establishment of government.

Establishing a distinction between “good” and “bad” governance can extend this vision. According to the World Bank:

Good governance is epitomized by predictable, open and enlightened policy making, a bureaucracy imbued with a professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs. Poor governance is characterized by arbitrary policy making, unaccountable bureaucracies, unenforced or unjust legal systems, the abuse of executive power, a civil society unengaged in public life, and widespread corruption.⁷⁸

Another descriptive term for “good governance” is “democratic governance.” More often, however, the term “democratic governance” is used to invoke an electoral focus.⁷⁹ In other words, the “legitimization of government authority” using a “mechanism of periodic competitive elections,” supported by “civil rights and liberties”

77. James N. Rosenau, *Governance, Order and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

78. Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. SOC'Y INT'L L. PROC. 271, 280 (1994) (citing WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE 1 (OPERATIONS POLICY DEPARTMENT, FINAL DRAFT) (Nov. 23, 1993)); see William Chia, *Quality of Government Outweighs Political System: Prof. Koh*, BUS. TIMES, Apr. 29, 1993, at 2 (presenting the view of Professor Tommy Koh of Singapore that economic development occurs largely because of governance skills and not because of a country's political structure); see also Bill Maurer, *Cyberspatial Sovereignties: Offshore Finance, Digital Cash, and the Limits of Liberalism*, 5 IND. J. GLOBAL LEGAL STUD. 493, 497 (1998) (presenting differing views of the State by “liberals” and “realists”). The author critiques the World Bank's inconsistency in applying this norm of “good governance” and its inability to apply the norm itself. See Julie Mertus, *Doing Democracy Differently*, in THIRD WORLD STUDIES (Diane Otto guest ed., forthcoming 1999).

79. See, e.g., Ibrahim J. Gassama, *Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT'L L.J. 287, 293-94 (1997) (arguing that a United Nations policy of democratic guardianship would bring added attention to human rights abuses).

as well as a “constitutional order dedicated to the rule of law.”⁸⁰ The “rule of law” in this context differs substantially from “rule by law.” Neil Kritz draws out the distinction as follows:

[T]he rule of law does not simply provide yet one more vehicle by which government can wield and abuse its awesome power; to the contrary, it establishes principles that constrain the power of government, oblige it to conduct itself according to a series of prescribed and publicly known rules. . . . Adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it involves an evolutionary search for those institutions and processes that will best facilitate authentic stability through justice.⁸¹

Institution building in the name of fostering the rule of law includes such tactics as programs for improving the competency and independence of the judiciary, designing curricula for the building of a professional and human-rights respecting police force, improving legal education for the preparation of new legal practitioners in a democratic system, and the creation of mechanisms to secure the independence of the bar.⁸²

NGOs have actively promoted the establishment of institutions that foster good governance. For instance, some environmental activists have argued in favor of good environmental governance,⁸³ while at the same time not pushing for the creation of a uniform gov-

80. *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L L. PROC. 356, 372 (1997) (panel discussion remarks of Susan Marks) (discussing role of international organizations in relation to democratization).

81. Neil J. Kritz, *The Rule of Law in the Postconflict Phase: Building a Stable Peace*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT* 587, 588 (Chester A. Crocker et. al. eds., 1996).

82. *See id.* at 590-92 (discussing the emerging international standards that define the “rule of law”).

83. *See* ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 140-60 (1994) (discussing effectiveness of international governance systems); *see also* Lyuba Zarsky, *The Asia-Pacific Economic Cooperation Forum and the Environment: Regional Environmental Governance in the Age of Economic Globalization*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 323, 347 (1997) (discussing environmental governance approach taken by the Asia-Pacific Economic Cooperation forum).

ernment on the environment.⁸⁴ Good environmental governance would reflect such values as transparency, accountability, and accessibility in a “more or less formalized bundle of rules, roles, and relationships that define the social practice of states and non-state actors interacting in various issue areas [such as the environment], rather than formal interstate organizations with budgets and buildings and authority to apply rules and impose sanctions.”⁸⁵ Good governance in the environmental arena need not promote uniformity. On the contrary, it may leave room for the existence of diverse networks addressing specific issues organized around concepts of geography, nationality, and culture.⁸⁶

As it has evolved from idea into practice, governance has come to embrace two distinct components. The first component is characterized by an increase in the delegation of public functions to particularized bodies operating on the basis of professional technique and with stated goals of greater transparency, accountability, and more inclusive participation.⁸⁷ Environmental regulatory bodies, formed on either an interstate or sub-State level, provide one illustration of groups composed of professionals who open their day-to-day policy deliberations and operations to public comment and scrutiny.⁸⁸ The

84. See, e.g., Daniel C. Esty, *Stepping up to the Global Environment Challenge*, 8 FORDHAM ENVTL. L.J. 103 (1996) (stating that without an overarching sovereign to respond to cross-jurisdictional pollution, optimal solutions to environmental concerns are unlikely to be met).

85. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 197 UTAH L. REV. 545, 549 n.4 (1997) (adding that “governance has emerged as a distinctive international motto and is consciously distinguished from ‘government’”). See also Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL L. 1, 27-28 (1994).

86. See GARETH PORTER & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS 15-33 (1991) (exploring the diversity of issues and tactics in the environmental arena).

87. Ronnie Lipschutz has used the term “heteronomous” to describe these actors: “[they] are differentiated from each other in terms of specialisations: there is not a single network, but many, each fulfilling a different function.” Lipschutz, *supra* note 10, at 391 n.9.

88. See generally Ken Conca, *Greening the UN: Environmental Organizations and the UN System*, in NGOS, THE UN & GLOBAL GOVERNANCE 105 (Thomas G. Weiss & Leon Gordenker eds., 1996); THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS (Ronnie D. Lipschutz & Ken Cocca eds., 1993) (as-

second component is characterized by an increasing growth of non-governmental norm-promoting and norm-monitoring organizations, and reflects a reaction to the danger posed by the delegation of public functions to particularized bodies that may not easily be held accountable.⁸⁹ Operating on both transnational and sub-State levels, these NGOs act as “watch” organizations and push for the realization of human rights norms.⁹⁰

In addition to regulating who gets what, when, and how, governance has a constitutive function.⁹¹ In this sense, global governance is conceptualized as multiple and overlapping processes of decision for defining and distributing authority and power worldwide.⁹² Global governance structures our world by determining what constitutes relevant political behavior and which dimensions of collective life are most significant. By creating the very terrain in which authority and power are exercised, the constitutive function of governance has great importance for States and non-State participants who try to ex-

sembling a series of essays concerning global environmental politics); Harold K. Jacobson & Edith Brown-Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations From a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311 (1995).

89. See generally THOMAS PRINCEN & MATTHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 218 (1994) (discussing the role of international environmental NGOs); JULIE FISHER, THE ROAD FROM RIO: SUSTAINABLE DEVELOPMENT AND THE NON-GOVERNMENTAL MOVEMENT IN THE THIRD WORLD (1993) (discussing emergence of non-governmental organizations as factors in the implementation of sustainable development).

90. See generally Felice D. Gaer, *Reality Check: Human Rights NGOs Confront Governments at the UN*, in NGOS, THE UN & GLOBAL GOVERNANCE 51 (Thomas G. Weiss & Leon Gordenker eds., 1996) (discussing the most visible groups, which are Amnesty International, Human Rights Watch, and the International League for Human Rights). There has been, however, a proliferation of human rights NGOs since the 1970s. See generally *id.*

91. See Keith Krause, Address at the 1997 ACUNS/ASIL Meeting on Global Governance at Brown University (July 29, 1997).

92. See PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 210 (1990) (explaining the constitutive nature of this kind of power as “a power over consciousness itself, through its control of society’s reality-forming, as well as the power to embody the values derived from such reality-forming in legal relations and to interpret and apply those legal relationships authoritatively.”).

ert some influence or control over human rights issues.⁹³ It is the constitutive function of “governance” that provides a source and marker for the legitimacy of State governments and international organizations.⁹⁴ Legitimacy is central to the enforcement of human rights.⁹⁵ Only human rights processes and bodies perceived as legitimate are taken seriously; only States perceived as legitimate can enforce human rights norms successfully.⁹⁶

A key idea arising out of the connection between legitimacy and governance is the right to democratic governance, an emerging right that finds its grounding in the words of Article 21 of the Universal Declaration: “the will of the people shall be the basis of the authority of government.”⁹⁷ As Thomas Franck argues, “the radical vision [that governments should rule with the consent of the governed and that those governments that act in such a manner will be perceived as legitimate] is rapidly becoming, in our time, a normative rule of the international system.”⁹⁸ Franck terms this right as one of “democratic governance” or a “democratic entitlement,” and its supporters variously argue that this vision of democracy is essential for the legitimacy of States, for peace, and for the enforcement of human rights.⁹⁹

93. See Franck, *supra* note 27, at 50-52.

94. See *id.* at 50 (discussing the constitutive function of governance and noting “[l]egitimacy . . . is the quality of the rule, or a system of rules, or a process for making or interpreting rules that pulls both the rule makers and those addressed by the rules towards voluntary compliance”). See also David Caron, *Governance and Collective Legitimization in the New World Order*, 6 HAGUE Y.B. INT'L L. 29 (1993) (considering fundamental principles of governance). See generally THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter FRANCK, *FAIRNESS IN INTERNATIONAL LAW*]; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

95. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 81-84 (1992) (asserting the notion that human rights protections are elementary to the legitimacy of States).

96. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

97. Universal Declaration of Human Rights, *supra* note 1, art. 21.

98. Franck, *supra* note 27, at 46.

99. See generally *DEBATING THE DEMOCRATIC PEACE* (Michael E. Brown et al. eds., 1996) (presenting both sides of the “democratic peace” argument); IMMANUEL KANT, *PERPETUAL PEACE* 107-39 (Ted Humphrey trans., 1983) (predicting that democracies are not prone to aggression). *But see generally* Edward D.

Although the elements of the right to democratic governance are not clearly defined, they appear to encompass both procedural and participation-oriented theories about what constitutes the rule of law in a democracy.¹⁰⁰ The 1990 Copenhagen Document of the OSCE—then “CSCE”¹⁰¹—underscores the importance of the rule of law for the operation of just societies, declaring that “societies based . . . on the rule of law are prerequisites for . . . the lasting order of peace, security, justice, and cooperation.”¹⁰² The OSCE also recognizes the underlying substantive nature of rule of law institutions:

[T]he rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.¹⁰³

The OSCE includes in its requirements for the rule of law the following: the duty of government to act in compliance with the constitution and the law, accountability of the military and the police to civilian authorities, consideration and adoption of legislation by public procedure, publication of administrative regulations as the condition for their validity, effective means of redress against administrative decisions and the provision of information to the person affected on the remedies available, an independent judiciary, protec-

Mansfield & Jack Snyder, *Democratization and War*, 74 FOREIGN AFF., May/June 1995, at 79 (arguing that as democratic States evolve, wars erupt that involve these democracies).

100. See COHEN & ARATO, *supra* note 5, at 4-8; see also John Norton Moore, *The Rule of Law and Foreign Policy*, 2 HARV. J. WORLD AFF. 92 (1993).

101. The name of the organization changed from the Conference on Security and Cooperation in Europe to the Organization on Security and Cooperation in Europe in 1974, reflecting its move from a series of periodic meetings with a loose institutional structure to a more permanent organization with a more defined structure. See generally Peter Leuprecht, *Innovation in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998) (providing complete historical background).

102. Conference on Security and Cooperation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, reprinted in 29 I.L.M. 1305, 1307 (1990) [hereinafter Copenhagen Document].

103. *Id.* para. 2, at 1307.

tion of the independence of legal practitioners, and detailed guarantees in the area of criminal procedure.¹⁰⁴

A related component of the right to democratic governance, which is specifically more process-oriented, concerns the electoral process. One wave of collective democratic institution-building focusing on elections began with United Nations supervision of elections in Namibia upon its independence in 1989.¹⁰⁵ The 1990 Paris Charter of the OSCE illustrates this focus, recognizing the right of every individual, without discrimination, "to participate in free and fair elections."¹⁰⁶ The Copenhagen Document of the OSCE spells out the substantive elements of the "right to elections," stating "free elections . . . will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives."¹⁰⁷

Another process-based component of the right to democratic governance is the bundle of rights that help to ensure free and open elections, such as association¹⁰⁸ and speech rights.¹⁰⁹ Participation-oriented theorists value these rights as they enable more individuals and groups to take part in political life.¹¹⁰ Democratic civil society

104. See *id.* paras. 5.3, 5.6, 5.8, 5.10-5.12, 5.14-5.19, at 1308-09; see also Kritz, *supra* note 81, at 590.

105. See Karl J. Irving, *The United Nations and Democratic Intervention: Is 'Swords Into Ballot Boxes' Enough?*, 25 DENV. J. INT'L L. & POL'Y 41, 42 (1996).

106. Conference on Security and Cooperation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, No. 21, 1990, reprinted in 30 I.L.M. 190, 194 (1991). See also International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 25, U.N. Doc. A/6316 (1966).

107. Copenhagen Document, *supra* note 102, para. 5.1, at 1308.

108. See ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VERSUS CONTROL* 10-11 (1982) (identifying seven "ideal democratic criteria," some of which exist in modern democratic regimes).

109. See Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1700 (1998) (determining whether free speech exists as a democratic non-controversial precondition to democratic governance in terms of whether people actually have the ability to meaningfully express themselves on political issues affecting the polity).

110. See, e.g., Julie A. Mertus, *Beyond the Solitary Self: Voice, Community, and Reproductive Freedom*, 3 COLUM. J. GEN. & L. 247 (1992) (discussing "enabling

“fosters the citizenship skills and opportunities required for the explicit assertion of popular sovereignty over the apparatus of the representative democratic state.”¹¹¹ It is through participation in voluntary associations that individuals can gain the political competency and skills needed to influence political agendas.¹¹²

Process-oriented theorists argue for recognition and enforcement of an independent norm of participation. As Eric Dannenmaier observes:

A true democracy . . . must . . . feature transparent and participatory decision-making and a government that is in constant dialogue with its citizens to shape and direct fundamental policies. It is pluralistic decision-making that is at the heart of democracy. . . .¹¹³

The provisions of the Universal Declaration and its progeny can be read as “embody[ing] rights of free and equal participation in governance.”¹¹⁴ In conjunction with recognizing the importance of fair and open elections, the OSCE has recognized “the importance of pluralism with regard to political organizations.”¹¹⁵

In any event, whether conceived as a right unto itself or as a bundle of rights, the notion of democratic entitlement has at its core one coherent purpose: to create the opportunity for all persons to assume responsibility for shaping the kind of world in which they live and work.¹¹⁶ In practice, governance norms reflect values such as change and progress over tradition, growth over distribution, and so forth.¹¹⁷ These values establish the parameters of our choices as individuals and as members of communities.

rights” essential for participation in society).

111. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 343 (1996).

112. See, e.g., PUTNAM, *supra* note 23; see also Michael Walzer, *The Civil Society Argument*, in THEORIZING CITIZENSHIP 153, 168 (Ronald Beiner ed., 1995).

113. Eric Dannenmaier, *Democracy in Development: Toward a Legal Framework for the Americas*, 11 TUL. ENVTL. L.J. 1, 3 (1997).

114. Franck, *supra* note 27, at 79.

115. Copenhagen Document, *supra* note 102, para. 3, at 1308.

116. See Franck, *supra* note 27, at 79.

117. See Krause, *supra* note 91.

All participants in international human rights discourse—weak States, strong States, and non-State participants—have had to answer to these ideas of governance and democratic entitlement.¹¹⁸ Small and weak States in particular are said to have much to gain from the right to democratic governance. Ideally, norms of democratic participation provide an important role for small and weak States so that they can participate in international society on their own terms, cooperate with each other, and in doing so, modify the conflictual role of socially constructed anarchy.¹¹⁹ Democratic rights are also said to facilitate order in “anarchical societies”¹²⁰ by providing legal norms and mechanisms that prevent powerful States from forcing less powerful States to acquiesce with their interests and values.¹²¹ Rules about democratic participation in transnational civil society, however, are intended to apply to strong as well as weak States. For strong States there exist at least four types of incentives to adhere to norms of democratic governance.¹²² First and foremost, the substance of such norms may benefit both strong and weak States, and thus adherence to such norms may serve all States self-interest. Second, following norms of participation may cause a State to avoid transaction costs, reducing the costs of doing business. Third, acquiescing to participatory rules, even if the State does not benefit from those rules, can facilitate international agreements concerning other issues, such as trade, security, and the environment.¹²³ Finally, assuming that democratic norms have the force of law, the States that comply can avoid

118. See, e.g., JOEL S. MIGDAL, *STRONG SOCIETIES & WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPACITY IN THE THIRD WORLD* (1988).

119. See, e.g., BARRY BUZAN, *PEOPLE, STATES AND FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA* (2d. ed. 1991).

120. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF WORLD ORDER IN POLITICS* (2d ed. 1977).

121. See Interview with Jack Donnelly in Hanoi, Vietnam (Apr. 9, 1998).

122. See *id.*

123. See, e.g., Thomas Buergenthal, *CSCE Human Dimension: The Birth of System*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 1990, No. 2, at 163 (Andrew Clapham & Frank Emmert eds., 1992) (noting benefits derived from adhering to or participating in various norms of democratic governance). Buergenthal concludes that those States that participate in norms of democratic governance are thereby able to “to condition their bilateral and multilateral relations in general upon progress in the human dimension sphere.” *Id.* at 207.

developing reputations as lawbreakers.¹²⁴ For all of these reasons, “democratic governance” has become a force that State and non-State actors must reckon with as they participate in the global community.¹²⁵

B. LIMITATIONS AND REDIRECTIONS

Despite the purported advantages for all participants adhering to norms of democratic governance, the idea of global democratic governance is not yet fully defined and realized.¹²⁶ Many commentators critique the ways in which the right to democracy is implemented on the State as well as the transnational level.¹²⁷ Somewhat paradoxically Janet Lord notes, “it is by now characteristic for discussions concerning the democratic entitlement to refer also to the democratic deficit evident in some international institutions, the very ones which are responsible for advancing democratic principles and for promoting the establishment of democracy within States.”¹²⁸ As the former Secretary-General of the United Nations has argued, “norms of democratic participation should be extended to the international arena.”¹²⁹ He added: “[I]f the international community encourages democratic movements within States, it must also attempt to practice democracy itself. Within the international system, all nations—large and small, powerful and weak—should be able to make their voices heard and to participate in decision-making.”¹³⁰

124. See generally STEINER AND ALSTON, *INTERNATIONAL HUMAN RIGHTS* (1996).

125. For a critique of inequities in the application of this norm of “democratic governance, see Mertus, *supra* note 78.

126. See generally Franck, *supra* note 27, at 46 (recognizing that democracy is on the way to becoming a global entitlement).

127. See, e.g., D.L. SHETH & ASHIS NANDY, *THE MULTIVERSE OF DEMOCRACY: ESSAYS IN HOUR OF RAJNI KOTHARI* (1996).

128. Janet E. Lord, *Due Process in the International Legal Order: Beyond the State-Centered Paradigm* (undated paper for the U.S. Institute for Peace, on file with author).

129. Boutros-Boutros Ghali, *Democracy: A Newly Recognized Imperative*, 1 *GLOBAL GOVERNANCE* 1, 9 (1995).

130. *Id.*

Problems are presented, however, as to how to accomplish international democratization. Exports of democratic governance could backfire. Some observers fear that the notion of democratic entitlement could "create new opportunities for Western imperialism"¹³¹ and "a continuation of humiliating intervention by States bent on 'civilizing' missions."¹³² Richard Falk has long seen great promise in a new jurisprudence of transnational civil society, yet worries that "liberal North American scholars have been, in effect, proclaiming the universal applicability of the U.S. political and legal system, its commitment to constitutionalism, electoral politics, and civil and political rights."¹³³ Falk suggests that serious questions arise as to whether it is possible to transplant western-style, market-oriented democracy to other countries and international institutions without violating international human rights norms.¹³⁴ The idea of democracy in international human rights law, as stated in the Declaration from the 1993 World Conference on Human Rights, is "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems."¹³⁵ Whenever States or non-State participants coerce weak governments to accept democratic norms, such actions could run contrary to this notion of democracy.

Both the process of legal transplants by which politically strong States such as the United States persuade weaker States to adopt United States-style laws and institutions and the processes of international law-making, through which transnational bodies determine

131. Dianne Otto, *Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 371, 383 (1993) (surveying implications of imposing protective western democratic forms as a condition of State recognition in the international arena).

132. Franck, *supra* note 27, at 80 (remarking that States with a long history of "civilizing missions" may not take too kindly to pro-democracy imports).

133. See Falk, *New Jurisprudence of Global Civil Society*, *supra* note 30, at 334 (describing ethnocentricity and lack of normative authority in the trend toward democratization).

134. See generally Falk, *The Right to Self-Determination Under International Law*, *supra* note 30 (examining the right to self-determination under international law: the coherence of doctrine versus the incoherence of experience).

135. Vienna Declaration and Programme for Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., pt. II, para. 5, U.N. Doc. A/CONF. 157/124, *reprinted in* 32 *I.L.M.* 1661 (1993) [*hereinafter* Vienna Declaration].

the content and impact of international law, run the danger of violating democratic norms.¹³⁶ Weaker States may feel forced to adopt United States-style laws. The process, however, by which those laws are adopted may not be open to public scrutiny. For example, in Bosnia-Herzegovina, American advisors have played an incredibly forceful “behind the scenes” role in the formulation and adoption by Bosnian entities of United States-style criminal and civil laws.¹³⁷ The democratic norms of participation, accountability, and transparency may be violated when smaller and politically marginalized voices are kept out of the decision making process.¹³⁸

Imposing democracy on States through outside force may unsuccessfully affect positive social change.¹³⁹ Human rights norms generally only work when they are internalized and not forced on a local body politic by some outside power.¹⁴⁰ One of the most basic lessons

136. See generally THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* (1993) (providing a case study illustrating this phenomenon).

137. See, e.g., Draft Bosnian Criminal Law (June 1998) (on file with author) (incorporating provisions from California law).

138. See, e.g., FRANCK, *FAIRNESS IN INTERNATIONAL LAW*, *supra* note 94, at 480-82. To use one illustration with respect to Bosnia, despite the good intentions of foreign law experts, local women's groups are rarely consulted with respect to changes in criminal law. When they are approached for comments on criminal law, local women's groups often find the tactics of the foreign experts to be inappropriate and alienating. Misreading of cultural cues compounds these difficulties. For example, an American lawyer faxed women's groups draft provisions of the proposed criminal law pertaining to domestic violence. When no one responded from the women's groups, the American lawyer assumed a lack of interest. In reality, however, the women's groups were highly interested and extremely well informed on the subject of domestic violence. They did not respond because they were offended by the American lawyer's failure to approach them in person. “He sent a fax and expected us to respond immediately! Can you believe it!” one woman exclaimed, “And we don't even know him!” In the United States, the faxing of messages to strangers and the expectation of immediate responses is the norm, but in Bosnia a face-to-face meeting is required and, ideally, the stranger would make an effort to visit the local office. See Interviews with NGOs, in Bosnia (June-July 1998) [*hereinafter* Bosnian NGOs Interviews].

139. See Yoshikazu Sakamoto, *Introduction: The Global Context of Democratization*, 16 *ALTERNATIVES* 119, 120 (1991) (describing this phenomena as “democracy from above”).

140. See, e.g., *HUMAN RIGHTS IN AFRICA: CROSS CULTURAL PERSPECTIVES* (Abdullahi An-Na'im & Francis M. Deng eds., 1990).

of the foreign development world that is applicable to human rights is that any transplants "must support domestically rooted processes of change, not attempt to artificially reproduce pre-selected results."¹⁴¹ This corresponds with Franck's argument that States and processes are unlikely to gain respect and affect compliance if they are not viewed as legitimate.¹⁴² The same reasoning is applicable to non-State entities; in particular, NGOs promoting democratic norms are unlikely to gain local respect unless viewed as legitimate.

Does the above reasoning support abandoning the norms of democracy altogether? No, as long as the norm of democratic entitlement is refined to make it relevant to all societies and not merely as a transplant of outside—e.g., western—values.¹⁴³ Dianne Otto suggests a useful way to conceptualize the universality of human rights that could avoid relativist paralysis. Human rights, she argues, should be framed as "a dialogue, in the sense of struggle, rather than a civilizing mission."¹⁴⁴ In other words, the intersections between global ideas of democracy and local practices and adaptations could be viewed as a process of constant "transformative dialogue,"¹⁴⁵ with neither universalism nor democracy being rejected but particularized.¹⁴⁶ The values of democracy and its meaning for structuring relationships are learned by paying attention "to the ongoing evolution of democratic discourses"¹⁴⁷ in civil society.

Otto's approach to human rights emphasizes both the relational as well as constitutive aspects of human rights. Rights matter because

141. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., Mar./Apr. 1998, at 95, 104 (examining foreign aid in the global picture).

142. See generally Franck, *supra* note 27, at 46 (examining notion of democracy as validating governance).

143. Cf. Martti Koskeniemi, *The Police in the Temple, Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325, 343 (1995) (attesting to the failure of the European States to transplant their political ideologies to Africa).

144. Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 3 (1997).

145. *Id.* at 35.

146. See Chantal Mouffe, *Radical Democracy: Modern or Postmodern?*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 31, 36 (Andrew Ross ed., 1988).

147. Otto, *supra* note 131, at 400.

they define relationships. Also, the process of defining and enforcing rights is done in the context of relationships. The process of rights definition and enforcement demonstrates how power is distributed and how relationships are regulated. Focusing on relationships makes particular sense in a globalized world marked by an emerging transnational civil society where the varieties of relationships, the kinds of actors, and the direction of dialogue are complex and changing. It also makes sense in a world transformed by the idea of democratic governance because these concepts have key relational and constitutive components. As explained below, a redirected application of these concepts holds promise for transformed participation in human rights processes.

III. TRANSFORMED PARTICIPATION IN HUMAN RIGHTS DISCOURSE

The net result of the transformed political geography and the transformed ideas and methodology described above is the creation of new opportunities and challenges for realizing human rights. The shift from government to governance, and from a local to transnational civil society is well underway, driven and influenced by non-State actors, non-territorial social and economic forces, and the information technology revolution. The *transformations* do indeed have the potential to be *transformative* for human rights advocates. Full application of democratic norms in transnational civil society could result in two sets of structural changes. First, it could open a space for restructuring the international human rights system so that the identity of the system itself is altered by democratic norms in a manner receptive to human rights.¹⁴⁸ Second, through ethical engagement in this process, human rights advocates themselves may change as if forced to question “what kind of individuals [they] would have to become in order to open ourselves to new worlds.”¹⁴⁹

In explaining the potential for positive social transformation, this section uses as an illustration the work of human rights NGOs, even

148. See Otto, *supra* note 144, at 4.

149. DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE I (1993); see also Otto, *supra* note 144, at 3-4 (employing this same definition of transformation in her examination of human rights universals).

though the lessons are also applicable to other actors participating in transnational civil society. Some of the roles played and activities undertaken by human rights NGOs in transnational civil society are outlined, with an emphasis on NGOs engaged in "legal transplant" projects. The section explains how NGOs may threaten democratic norms even while their existence may promote democratic governance. Finally, the section suggests how NGOs could apply a refined version of Franck's "democratic entitlement," which will improve the ability of NGOs to realize the norms of the Universal Declaration.

A. THE POSITIVE ROLE OF HUMAN RIGHTS NGOS

Transnational civil society is a highly political space for all participants, and human rights NGOs are no exception.¹⁵⁰ As Burns Weston noted, "[t]he debate about the nature and content of human rights reflects, after all, a struggle for power and for favored conceptions of the 'good society.'" ¹⁵¹ Human rights NGOs act within the space of transnational civil society to push for their visions of a good society. In doing so, they "constitute themselves in an assemble of arrangements so that they can express themselves and their interests."¹⁵² NGOs disagree about the nature and scope of human rights and advance contending approaches to public order and scarcity among resources. Nonetheless, "an increasingly interdependent and interpenetrating global community, any human rights orientation that is not genuinely in support of the widest possible shaping and sharing of all values among all human beings is likely to provoke widespread skepticism."¹⁵³ Thus, the trends toward globalization have pushed legitimacy-seeking human rights NGOs to agreement on central issues.

150. See generally Chiara Giorgetti, *The Role of Non-governmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 115 (1998).

151. Burns Weston, *Human Rights* (visited Apr. 29, 1999) <<http://www.uiowa.edu/~hr98/resources/basics/weston2.html>>.

152. ALFRED STEPHEN, *RETHINKING MILITARY POLITICS: BRAZIL AND THE SOUTHERN CONE* 3-4 (1988).

153. Weston, *supra* note 151, pg. unavail. online.

To illustrate, the 1993 World Conference on Human Rights brought an array of human rights NGOs to Vienna where many advanced their own specific human rights claims based on their own particularistic visions of a good society. Despite divergence among the tactics and substantive arguments of NGO leadership, the Vienna participants managed to work together to push State leaders to adopt a strong statement reaffirming their commitment to universal human rights. These efforts culminated in the *Declaration and Platform for Action*, which was signed by the representatives of 171 States. The Vienna Declaration proclaimed:

All human rights are universal, indivisible, interdependent and interrelated . . . [and that] . . . [w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁵⁴

The Vienna Declaration illustrates agreement on central conceptual issues, however NGOs, like States, continue to disagree with each other, and with many States, about how these concepts should be realized.

NGOs participate in debates about the nature of human rights through a variety of tactics that allow them to play vital roles in international human rights lawmaking and law implementing at both the domestic and international levels.¹⁵⁵ Local NGOs learn strategies and gain substantive information through their participation in international networks and the teachings of international law, which is then employed in efforts to shape the form and operation of domestic

154. Vienna Declaration, *supra* note 135, para. 5.

155. See David Weissbrodt, *The Contribution of International Non-governmental Organizations to the Protection of Human Rights*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 403, 406-08 (Theodor Meron ed., 1984) (examining the contribution of international non-governmental organizations in protecting human rights). See also Steve Harnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997) (looking at NGOs role in international governance); Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role of Non-governmental Actors*, 46 J. INT'L AFF. 391 (1993).

law.¹⁵⁶ At times, key individuals act as transnational entrepreneurs by playing a key and persistent role in pushing for normative change on human rights issues.¹⁵⁷ In other cases, domestic and international groups mobilize around key concerns to put pressure on State and international bodies to adopt and enforce a norm.¹⁵⁸ Increasingly, it is "from the NGOs that new ideas, approaches, and solutions are springing forth"¹⁵⁹ at the local, national, regional, and international levels.

The techniques of human rights NGOs include: the monitoring and surveillance of human rights problems, notification of emergency situations, the dissemination of information about human rights norms and violations to the general public, the exchange of such information with other non-State participants in transnational civil society, the reporting of human rights problems to State and international bodies, and ongoing or ad hoc consultation with governments or international human rights bodies.¹⁶⁰ The prime weapon of human

156. See generally Nira Bruner Worcman, *Local Groups Think Globally*, 95 TECH. REV., Oct. 1992, at 36.

157. See, e.g., DAVID LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS* (1993).

158. See generally LAURA MACDONALD, *SUPPORTING CIVIL SOCIETY: THE POLITICAL ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN CENTRAL AMERICA* (1997) (providing examples of this process in Latin America).

159. Patricia Waak, *Shaping a Sustainable Planet: The Role of Non-governmental Organizations*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 345, 346 (1995); cf. Kal Raustiala, *The 'Participatory Revolution' in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997) (recognizing NGOs as major actors in the formulation, implementation and enforcement of international environmental law). See generally A. Dan Tarlock, *The Role of Non-governmental Organizations in the Development of International Environmental Law*, 68 CHI-KENT L. REV. 61 (1992) (exploring role of NGOs in the establishment and enforcement of global environmental priorities).

160. See Peter J. Spiro, *New Global Communities: Non-governmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45 (1995) (providing general description of methods used by NGOs to monitor human rights problems, violations and the exchange of information between NGOs and other non-State entities). See generally Laurie S. Wiseberg, *Human Rights Non-governmental Organizations*, in *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* 372 (Richard Pierre Clause & Burns Weston eds., 2d. ed. 1992); *PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS* (Peter Willetts ed., 1982).

rights NGOs is the mobilization of shame, that is, the shaming of governments to abide by human rights norms.¹⁶¹ By investigating and publicizing human rights norms, NGOs are extremely influential in shaping domestic and international agendas on such matters as the environment,¹⁶² landmines,¹⁶³ women's human rights,¹⁶⁴ and human rights in general.¹⁶⁵

NGOs also contribute to the development of international law through the submission of complaints and through international litigation, instituting or intervening in cases as parties, serving as court—or party—appointed experts, testifying as witnesses, or participating in proceedings as amici.¹⁶⁶ The United Nations human rights system offers three treaty-based procedures that provide possibilities for individuals and NGOs to submit petitions directly to the respective committees.¹⁶⁷ International organizations contemplated

161. See James Avery Joynce, *Mobilization of Shame*, in *THE NEW POLITICS OF HUMAN RIGHTS* 79 (1978). See, e.g., Phillippe J. Sands, *The Environment, Community and International Law*, 30 *HARV. INT'L L. J.* 393, 394 (1989) (“[NGOs] have been active for many years in identifying threats to the environment, in attempting to force governments to take measures to protect the environment, and in signaling breaches of existing international environmental regulations.”).

162. See Kal Raustiala, *States NGOs, and International Environmental Institutions*, 41 *INT'L STUDIES Q.* 710 (1997) (explaining that NGOs have become influential in the international realm because of their ability to investigate and publicize human rights violations throughout the world); see also PRINCEN & FINGER, *supra* note 89.

163. See, e.g., Price, *supra* note 11, at 615 (discussing role of NGOs in the transnational dispute over landmines).

164. See, e.g., Martha Alter Chen, *Engendering World Conferences: The International Women's Movement and the UN*, in *NGOS, THE UN & GLOBAL GOVERNANCE* 139 (Thomas G. Weiss & Leon Gordenker eds., 1996) (reviewing the World Conference on Women and the growth of women's rights issues for NGOs).

165. See Felice D. Gaer, *Reality Check: Human Rights NGOs Confront Governments at the UN*, in *NGOS, THE UN & GLOBAL GOVERNANCE* 51, 51-66 (Thomas G. Weiss & Leon Gordenker eds., 1996) (considering global recognition of NGOs and their role in international and transnational disputes).

166. See, e.g., Diane Shelton, *The Participation of Non-governmental Organizations in International Judicial Proceedings*, 88 *AM. J. INT'L L.* 611 (1994) (providing study of the increasingly important role played by NGOs in international litigation).

167. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 59, U.N. Doc.

the participation of non-State entities in human rights issues.¹⁶⁸ Examples of these include the constitutional mandates of UNESCO,¹⁶⁹ the measures developed by the International Labor Organisation to protect freedom of association,¹⁷⁰ and the International Tribunal for the former Yugoslavia's rules of procedure and evidence.¹⁷¹ The regional systems for the protection of human rights also provide mechanisms for non-State participation, recognizing in limited cases the ability of non-State participants to raise claims against States.¹⁷²

A/6316 (1966), 999 U.N.T.S. 302, (entered into force March 23, 1976); Optional Article 14 of the International Covenant on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 A(XX), 20 U.N. GAOR Supp. No. 14, at 47, U.N. Doc. A/6014 (1965), (entered into force Jan. 4, 1969), 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966); Optional Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39-46, 39 U.N. GAOR, 10th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

168. See Lord, *supra* note 128, at 23-24 (describing the role of non-governmental organizations as constitutionally mandated in the charters and constitutions of certain international organizations).

169. See generally Stephen P. Marks, *The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 86 (Hurst Hannum 2d ed., 1992) (providing description of the constitutional provisions of UNESCO).

170. See Lee Sweptson, *Human Rights Complaint Procedures of the International Labour Organization*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 169, at 99 (discussing constitutional provisions of the ILO and the role of non-governmental organizations).

171. See generally Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 508-11 (1994) (examining general rules of procedure and evidence in the conduct of an investigation and trial as well as discussion of the role of non-State participants in the process).

172. See Protocol 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, 30 I.L.M. 693 (1991), *reprinted in* 12 HUM. RTS. L.J. 51 (1991); American Convention on Human Rights, OAS TREATY SERIES NO. 36, arts. 44-47, at 1, OAS OFF. REC. OEA/SER.L/II.23 DOC REV. 2 (Nov. 22, 1969); Regulations of the Inter-American Commission on Human Rights, April 8, 1980 (modified on June 29, 1987), arts. 26, 32-41, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, 48 OAS/ser.L/V/II.71, doc. 6 rev. 1 (1988); African [Banjul] Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 59 (1982). See also generally Martin A. Ölz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307 (1997).

A separate development within the human rights system concerns extending access to human rights treaty-monitoring bodies for individual non-State participants. Article 71 of the United Nations Charter grants NGOs consultative status with the Economic and Social Council.¹⁷³ In recent years, NGOs have read this provision broadly and an increasing number of NGOs are involved in the work of the United Nations.¹⁷⁴ The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the Committee Against Torture all permit NGOs to make formal interventions on human rights matters.¹⁷⁵ Women's human rights groups also earned a role for themselves in the monitoring procedure before the Committee on the Elimination of All Forms of Discrimination Against Women, irrespective of any formal grant of permission.¹⁷⁶

NGOs have made a substantial impact on the development of international human rights laws and policies. This is achieved by channeling proposals to States through the consultative and observer status of NGOs in treaty bodies and international organizations, multilateral conferences, and international meetings such as preparatory conferences for international conferences.¹⁷⁷ One sign of the impact of human rights NGOs is the reaction of States and international

173. See U.N. CHARTER art. 71.

174. See Peter Willetts, *Consultative Status for NGOs at the United Nations, in THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE UN SYSTEM* 31 (Peter Willetts ed., 1996).

175. See generally Sandra Colliver, *International Reporting Procedures, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 173 (Hurst Hannum ed., 2d ed. 1992) (providing description of process by which NGOs are included in the reporting procedures before human rights bodies).

176. See generally WOMEN, LAW AND DEVELOPMENT, WOMEN'S HUMAN RIGHTS STEP-BY-STEP (Julie Mertus et al. eds., 1996).

177. See Christopher Tracy, *The Growing Role of Non-governmental Organization*, 89 AM. SOC'Y INT'L L. PROC. 413 (1995) (remarks of Donna Sullivan) (distinguishing different types of NGOs working on human rights that fall into the following overlapping categories: the "old timers" who have long enjoyed consultative status with the United Nations, NGOs that participate largely through regional networks, NGOs that act as coordinators for international conferences, and NGOs that view themselves as playing the role of technical advisors to other NGOs and movements). See also Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard Setting: A prerequisite of Democracy*, 20 CAL. W. INT'L L. J. 207 (1990) (describing general role of NGOs in the international setting).

bodies to their work.¹⁷⁸ As Donna Sullivan has observed, “[a]s more NGOs have come into the decision-making settings, we have seen greater resort to less formal decision-making processes, in other words, we now see that negotiating [on human rights issues] is occurring in informal sessions to which NGOs have no access. . . .”¹⁷⁹

To overcome these problems, human rights NGOs actively monitor the workings of State, regional, and international bodies established to address human rights abuses. With respect to the World Conference on Women in Beijing in 1995, NGOs were instrumental in exposing the lack of transparency and accountability in the accreditation process. By checking the norms of democratic participation and ensuring some representation by non-State actors, these transnational NGOs “make democracy safe for the world.”¹⁸⁰

Who, however, will make the work safe for transnational NGOs? Without democratic safeguards, there is no guarantee that any participants in transnational civil society will be democratic. In fact, NGOs often violate democratic norms and these transgressions become particularly troublesome when undemocratic NGOs participate in transnational civil society to affect the enforcement of laws and policies.¹⁸¹ The undemocratic behavior of NGOs result in many dangers to the conduct of transnational civil law and society.

B. DANGERS OF NGOS THAT VIOLATE DEMOCRATIC NORMS

The operations of NGOs are at times decidedly opaque. NGOs, acting individually and in networks, often wield influence on decision-making “behind closed doors” and without pluralistic participa-

178. See Tracy, *supra* note 177, at 422-23 (providing description of State reaction to NGOs in various settings).

179. See *id.* at 423.

180. See Leslie Paul Thiele, *Making Democracy Safe for the World: Social Movements in Global Politics*, 18 ALTERNATIVES 273, 275 (1993) (discussing role of NGOs and the process by which they monitor the decision making process of international bodies).

181. See *id.* at 276 (explaining that a faith-based NGO is run by an authoritarian figure in a non-transparent and non-participatory manner becomes troubling when that NGO becomes a force in transnational civil society where it continues to act in an undemocratic manner and, through such transnational work, begins to bring about changes in human rights law and policy).

tion.¹⁸² For example, an insider group of women developed the agenda of women's human rights groups for the World Conference on Human Rights in Vienna in 1993.¹⁸³ These leaders sought to promote inclusion and transparency by operating on a "caucus basis" through which they performed their agenda-setting work while simultaneously trying to educate individuals from other NGOs to participate in that process.¹⁸⁴ Nonetheless, the agenda emerging from this process did not include many minority voices on rights issues, and the selection procedure of both participants and agenda items was not transparent to outsiders.¹⁸⁵ Moreover, the deals struck between individual representatives of NGOs and State leaders were neither the result of quiet lobbying, nor the product of a visible and accessible process.¹⁸⁶

Considerable power is exercised by institutions of and participants in civil society, but there is neither a parliament of civil society, nor a cross-border multiparty electoral process. Accordingly, the institutions of civil society may run against the most basic rule of democracy, namely, to govern with the consent of the governed. For example, international NGOs that have worked over the past ten to twenty years in consultative status with the United Nations are among the NGOs least likely to base their policies on the concerns of a well-defined constituency.¹⁸⁷ Studies have found that the closer a NGO is to the grassroots, the greater its chances at promoting positive social change because it is more likely to represent a highly motivated and engaged constituency.¹⁸⁸ Some NGOs in Bosnia, for example, are

182. See Tracy, *supra* note 177, at 421 (discussing the extent of NGOs influence on world conferences).

183. See *id.* at 422-23 (explaining that in the World Conference on Human Rights in Vienna in 1993, NGOs greatly influenced and affected the agenda of the Conference and the focus on particular issues).

184. See *id.*

185. See Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201, 201-02 (1994).

186. See *id.* at 203-04 (continuing the discussion of the effect of NGO participation and the hidden process that resulted in the ensuing agreement).

187. See Tracy, *supra* note 177, at 422-23 (discussing agenda and policies of NGOs that continually participate on a consultative basis with the United Nations).

188. See, e.g., M. CASTELLS, *THE CITY AND THE GRASSROOTS* (1983); Oxhorn,

driven more by opportunism than the goal of working toward an ethnic vision and serving a constituency. Such organizations have only a temporary and superficial impact on social structures.¹⁸⁹

In another manner, civil society groups may run afoul of democracy by violating with impunity specific human rights closely connected with democracy promotion.¹⁹⁰ One of the most popular roles for non-governmental actors in democracy promotion in the 1990s is the monitoring of elections.¹⁹¹ Michael Reisman has observed that the "results of such elections serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government."¹⁹² Few checks exist, however, on the conduct of election monitors. In many cases, untrained volunteers monitor elections and are not equipped to certify elections as fair and free.¹⁹³ Despite their best attempts at operating in a fair manner, local NGOs may be funded beyond their capacity for good management.¹⁹⁴ Common

supra note 24, at 267-269 (arguing NGOs that are closely related to its constituency is more likely to have a constructive role in affecting social and political change). See generally Conference: International Human Rights at the Grassroots: Putting International Standards to Work for Our Children, University of Iowa School of Law, Iowa City, IA (Mar. 14-15, 1997) (on file with author).

189. See Ian Smillie, *Service Delivery or Civil Society: Non-governmental Organizations in Bosnia-Herzegovina* (Dec. 1996) [hereinafter Smillie Memorandum] (copy of the manuscript of memorandum sent to non-governmental organizations and donors in Bosnia-Herzegovina, on file with author).

190. Cf. Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L. J. 443, 469 (1997) (asserting that international institutions, arguably one component of civil society, have advocated undemocratic means of achieving liberalization).

191. See Donna E. Arzt, *Bridge Over troubled Water: Law and the Emergence of New Democracies*, 22 SYRACUSE J. INT'L L. & COM. 81, 98 n.83 (1996) (describing election-monitoring missions as the "dance craze of the decade"). See generally David Stoelting, *The Challenge of UN-Monitored Elections in Independent Nations*, 28 STAN. J. INT'L L. 371 (1992) (discussing a number of elections and plebiscites monitored by the United Nations as well as other non-governmental organizations between 1956 and 1990).

192. See Reisman, *supra* note 96, at 868-69 (stating that there are very few checks available for election monitoring process).

193. See Christopher A. Riley, *Neither Free nor Fair: The 1996 Bosnian Elections and The Failure of the U.N. Election-Monitoring Mission*, 30 VAND. J. TRANSNAT'L L. 1173, 1192-97, 1211 (1997) (listing purposes and process by which election monitoring groups conduct the monitoring process).

194. See *id.* at 1211 (discussing the ability of NGOs to properly monitor and

problems include NGOs censuring their own members, attacking other NGOs viewed as competitors, and blocking all but a few privileged elites from participating in their operations.

Applying Franck's theory of legitimacy,¹⁹⁵ the actions of civil society groups in such cases are likely to be perceived as undemocratic and illegitimate. As explained above, specific provisions of the United Nations Charter, the Universal Declaration, and other human rights instruments can create a normative canon that embodies "the rights of free and equal participation in governance."¹⁹⁶ Such rights as freedom of opinion and expression¹⁹⁷ and peaceful assembly and association¹⁹⁸ create, in Franck's words, a "net of participatory entitlements."¹⁹⁹ Nonetheless, the specific entitlements enumerated in the Universal Declaration and its progeny pertain generally to the rights of persons vis-à-vis their governments, not to the rights of persons vis-à-vis non-State or transnational participants.²⁰⁰ As long as international law fails to articulate a clear and consistent position as to the responsibility of non-State actors, such actors will continue to neglect these rights. Although there is growing international jurispru-

certify the validity of elections).

195. See Franck, *supra* note 27, at 77 (stating that legitimating power of the community of nations has as its source governments that derive "their just powers from the consent of the governed" and by demonstrating "a decent respect to the opinions of mankind").

196. See *id.* at 79 (positing that each of these instruments recognizes related specific entitlements as accruing to individual citizens that constitute internationally mandated restraints on governments).

197. See Universal Declaration, *supra* note 1, art. 19.

198. See *id.* art. 21.

199. Franck, *supra* note 27, at 79.

200. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 22 (1993) (arguing that an international legal process that does not allow full participation of non-State actors cannot develop norms that are fully responsive to the needs of the international community); Benedict Kingsbury, *Claims By Nonstate Groups in International Law*, 25 CORNELL INT'L L.J. 481, 484 (1992) (examining the norms developed in the international legal system to address issues arising in relations between States and non-State groups); P.K. Menon, *Individuals as Subjects of International Law*, 70 INT'L L. REV. 295, 297 (1992) (discussing broadening of traditional international law doctrine to include individuals as subjects of international law and to confer on them legal personality even if limited to certain purposes).

dence and commentary on non-State actors as subjects of international law,²⁰¹ the message to non-State actors in transnational civil society is far from clear. The potential for mischief thus is great.

Another problem with transnational civil society as represented by NGOs is that it is often not strong enough to resist subordination by the State.²⁰² This problem becomes acute when NGOs assume functions that were once the province of States. Social service delivery and humanitarian relief are examples.²⁰³ "Ultimately," Ian Smillie writes, "there is a question as to how much the 'civil society' discourse and donor infatuation has to do with democracy and human rights, and how much it has to do with finding cheaper and more efficient alternatives to faltering government delivery systems."²⁰⁴ Once they become a sort of "public service sub-contractor,"²⁰⁵ NGOs "are in continual danger of having their local accountabilities and ethical principles compromised by the financial and discursive capacity of states to shape their agendas."²⁰⁶ When NGOs are dependent on States, they no longer fulfill their role as non-State counterparts in

201. See, e.g., CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 2-3 (1993) (undertaking an analysis of the position of third parties in international law through an examination of third party claims); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 76 (1986); Janet E. Lord, *Taiwan's Right to be Heard by the Security Council*, in *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS* 133 (Jean-Marie Henckaerts ed., 1996) (arguing that the exclusion of entities other than States from procedural standing before international bodies is an outdated vestige of the traditional doctrine of international law that only States are subjects of international law).

202. See Oxhorn, *supra* note 24, at 251-52 (contrasting domestic and transnational civil society and stating that the strength of the former lies in its collective capacity to resist subordination to the State).

203. See generally Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation In the Relationship Between the UN and NGOs*, in *NGOS, THE U.N. AND GLOBAL GOVERNANCE* 67 (Thomas G. Weiss & Leon Gordenker eds., 1996) (analyzing the changing institutional relationship between the rapidly evolving NGO world and the more stagnant United Nations).

204. See IAN SMILLIE, *THE ALMS BAZAR: ALTRUISM UNDER FIRE—NON-PROFIT ORGANIZATIONS AND INTERNATIONAL DEVELOPMENT* 237 (1995).

205. See generally *BEYOND UN SUBCONTRACTING: TASK SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOS* (Thomas G. Weiss ed., 1998)

206. See Otto, *supra* note 144, at 41.

transnational civil society. Instead, they form patron-client relationships to improve their positions, thus repeating the old tradition of strong-State/weak-State clientelism.²⁰⁷

For example, the local NGO sector in Bosnia developed “in a distorted way with great attention [by the international community] to service delivery and with very little attention [by the international community] to sustainability beyond the promise of completion dates.”²⁰⁸ International donors created a dependency situation through which local NGOs in Bosnia relied upon them for their very existence. These NGOs must actively promote, or at least not contravene, the agendas of their donors: individual States or international bodies composed of States—particularly the United Nations. In the early stages of the donor process in Bosnia, local NGOs were a cheap source of service delivery for foreign donors desiring to provide emergency assistance and psychosocial services. The shift away from emergency and psycho-social projects to income generating projects in the mid-1990s left many Bosnian NGOs in despair as they simply could not continue their programs.²⁰⁹ This focus on inexpensive service delivery via local NGOs was at odds with the creation of a strong, pluralistic civil society.²¹⁰ Although the donor process in Bosnia advances the goals of foreigners, it stretches the imagination to claim that it meaningfully advances Bosnian civil society as very little is left behind when donors pull out. Time will tell whether and which foreign promoters of civil society achieved their intended goals in Bosnia. Those likely to be most successful are those that worked with grassroots groups on cultivation of their own agenda.

C. LEGAL TRANSPLANT PROJECTS

Problems with transnational civil society are further illustrated by NGOs at work on “legal transplant” projects. These projects, com-

207. See generally NGOs, STATES AND DONORS: TOO CLOSE FOR COMFORT? (David Hulme & Michael Edwards eds., 1997); Roniger, *supra* note 20, at 11-14.

208. Memorandum from CARE/CRS/DELPHI to Brenda Cupper (March 19, 1997) (on file with author).

209. See Smillie Memorandum, *supra* note 189, at iv; Bosnian NGO Interviews, *supra* note 138.

210. See Smillie Memorandum, *supra* note 189, at iv.

monly termed “rule of law” endeavors,²¹¹ attempt to transplant laws and, in some cases, entire legal systems from one place to another, usually from a country perceived as “working properly” to one deemed in great need.²¹² The first wave of such projects occurred after World War II when the victorious allies rewrote the constitutions of the vanquished to conform to their own ideology.²¹³ The second wave occurred in the 1960s, a time optimistically labeled the Decade for Development by the United Nations.²¹⁴ During this period of decolonialism, “departing colonial powers hastily imposed carbon copies of their own documents [and laws], which evolved from different cultural and historical backgrounds.”²¹⁵ At the same time, the “law and development” movement, crafted by American academics and private foundations, sent threes of American lawyers abroad, mainly to Latin America and Africa, to train problem-solving legal engineers²¹⁶ and promote a modern vision of law as an instrument of

211. See John Reitz, *Constitutionalism and the Rule of Law: Theoretical Approaches*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE 111, 113 (Robert D. Grey eds., 1997). The “hallmark of the rule of law is the claim most commonly made for it, namely that under the rule of law, the exercise of all power, both public and private, is limited by law.” *Id.* The independence of the judiciary is an important aspect of the rule of law. See, e.g., Ralf Dahrendorf, *A Confusion of Powers: Politics and the Rule of Law*, 40 MOD. L. REV. 1 (1977) (arguing that the independence of the judiciary may be regarded as the very definition of the rule of law).

212. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974) (providing the classic examination of legal transplants).

213. See, e.g., J. Maki, *The Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 9 (Dan Henderson ed., 1968).

214. See SMILLIE, *supra* note 204, at 7.

215. See Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES, Feb. 2, 1990, at B3 (reporting how countries are turning to United States scholars in part to win foreign aid, but also for their experience in democracy).

216. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 14 (1980) (characterizing the American lawyers sent abroad as micro-level problem solvers to macro-level social engineers). Gardner further states that:

Law professor Karl Llewellyn’s immodest description was most frequently cited by the law and development movement: “The essence of our craftsmanship lies in skills and wisdom’s; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field. . .

development policy along capitalist and democratic lines.²¹⁷ The primary goals of these programs were to attempt “to promote U.S.-style legal education and the use of law as a positive instrument of socio-political change. . . .”²¹⁸ Within this context, American legal assistance also involved the transfer of American models of the lawyer and the law. The various models for transfer included:

(1) direct transfer of legal institutions and instruments, (2) indirect transfer of legal concepts and models, (3) invited legal transfer, where the initiative and encouragement for the legal transfer process comes from the recipient legal culture, and (4) imposed or uninvited legal transfer at the initiative of the “exporting” legal culture . . . (5) infused—“premeditated” or “planned”—processes of legal transfer, direct or indirect, wherein the initiative comes from the exporting legal culture, [and] (6) more occasional ad hoc borrowing. . . .²¹⁹

A proliferation of expert-laden think tanks debated, deployed, and dissected these models. Ultimately, it was not an orchestrated political campaign to export any particular western model that influenced local and world politics, but individual experts ability “to employ, articulate, direct and interpret [the models], whatever their [political] attitudes might be.”²²⁰ None of these models worked well at fostering positive social change in Latin America, and, in short, James Gardner concludes, “the history of the law and development movement is rather sad.”²²¹ It is a history of an attempt to transfer the American legal models that were themselves flawed.

The professional model of the lawyer as pragmatic problem-solver and legal engineer is flawed by its technocratic character and its lack of any coherent ethical or conceptual content. Underlying models of legal thought are in crisis: the prevalent legal instrumentalism is particularly

. We are the trouble shooters.”

Id.

217. See generally *id.*

218. THOMAS CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA* 52 (1996).

219. See GARDNER, *supra* note 216, at 21-22.

220. ROSENAU, *supra* note 68, at 334 (describing these traveling experts as “powerful people,” thus emphasizing their inordinate ability to use their own talents of persuasion to change local and global politics).

221. GARDNER, *supra* note 216, at 22.

narrow in its perceptions of law and change interactions, and is vulnerable to authoritarian abuse.²²²

One of the major shortcomings of the law and development movement was its failure to understand that multiple kinds of law can exist in society and locals act according to their own self-interest. Local people are actors and not mere subjects and they generally turn "American legal assistance to their own ends."²²³ Moreover, the law and development movement in Latin America ultimately served to strengthen the hold of anti-democratic elites.²²⁴

Whether the lessons of the law and development movement were heard is questionable. The fall of Soviet-dominated States in the late 1980s and early 1990s has ushered in a new wave of legal transplants²²⁵ that duplicates wholesale the techniques of earlier times: sending in American lawyers in an attempt to reconstruct the local legal system in a manner more compatible with United States interests.²²⁶ The earlier focus on transporting United States methods of legal education was retained, and a new and bolder emphasis on the wholesale rewriting of local law was added.

222. ROSENAU, *supra* note 68, at 280.

223. *Id.* at 287.

224. See generally Jose E. Alvarez, *Promoting the 'Rule of Law' in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT'L L. & ECON. 281 (1991); David M. Trubeck & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1975).

225. See Gianmaria Ajani, *By Chance and By Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995) (providing discussion of the history of borrowing of Western legal models in Central and Eastern Europe).

226. See generally Sherri Kimmel, *For Export Abroad: American Legal Know-How*, 20 PA. LAW. 10 (1998); James Podgers, *Helping to Keep a Peace: CEELI Volunteers Have Quite Impact on Truce in Former Yugoslavia*, A.B.A. J., Sept. 1997, at 94; Molly Stephenson, *Real Property Lawyers Promote Reform in Central Europe*, 11 PROB. & PROP. 12 (1997); Joan Davidson, *America's Impact on Constitutional Change in Eastern Europe*, 55 ALB. L. REV. 793 (1992); Charles E. Anderson, *Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions*, A.B.A. J., June 1990, at 18.

The Central and East European Law Initiative ("CEELI") plays a central role in such efforts.²²⁷ Funded by the United States Agency for International Development ("USAID"), the American Bar Association ("ABA") and other public and private organizations, CEELI supports law reform by sending volunteer lawyers to work with local parliamentarians, judges, law schools, and law offices on-site; organizing workshops, trainings, and exchanges of judges²²⁸ and lawyers in-country and in the United States; providing legal assessments of draft legislation and of proposed structural changes in the legal system, with a focus on privatization and commercial law. In Bosnia-Herzegovina, a coalition of foreign lawyers, from CEELI, the European Union, OSCE, the United Nations, and the United States Information Agency ("USIA"), have focused on plans for structural changes in the criminal legal field.²²⁹

Some commentators contend that these new efforts differ considerably from those employed in the law and development days because the recipient legal culture invites them to enter.²³⁰ This claim cannot apply to Bosnia-Herzegovina, which is presently run like an undeclared protectorate under the mandate of the Dayton Peace Accord, and volition is negligible in this context. Other Eastern European States also have little choice but to accept an army of foreign legal experts, because international financial institutions and security groups de facto condition preferential treatment based on their presence.²³¹ Regardless of inducements by international financiers, local

227. See CAROTHERS, *supra* note 218, at 52-57 (outlining a case study of CEELI efforts in Romania). Other players include the United States funded National Endowment for Democracy ("NDI"), visiting legal experts sent by the United States Information Agency ("USIA"), and the Soros sponsored Open Society Institute ("OSI").

228. See *id.* at 53 (pointing out that programs directed at judges are designed to foster greater judicial independence).

229. See, e.g., AMERICAN BAR ASSOCIATION'S CENTRAL AND EAST EUROPEAN LAW INITIATIVE (CEELI), ANNUAL REPORT 1996 (1997); see also Interviews with CEELI representatives in Bosnia-Herzegovina, Romania, Poland, Russia, and Washington D.C. (1996-1998) [*hereinafter* Interviews with CEELI Representatives].

230. See Interviews with CEELI Representatives, *supra* note 229 (finding CEELI has a policy of not commenting on draft legislation unless it is at the request of the local government and/or other local organizations).

231. See *id.*

actors often believe that they must at least listen to the local American legal experts and adapt what they can to suit local needs. Such needs include: better resources for the legal system, better training for lawyers, a move from out-of-date legal doctrines, and a spring-board into the international economy.²³²

Many legal transplant efforts do not take root in Eastern Europe because “[v]ariations in the political, social and economic values which exist between the two societies make it hard to believe that many legal problems are the same for both except for on a technical level.”²³³ The targets of legal training programs, in particular local judges, are often “either unable or uninterested in making use of external technical assistance.”²³⁴ Problems faced by judges and lawyers in Eastern Europe are rooted in structural flaws that outside legal experts cannot or do not address: low salaries, especially for judges; inadequate classrooms, courtrooms, and record keeping equipment; “dead wood,” that is, legal officers that simply refuse to change their ways; a lack of tenure for judges, and the inability to get rid of judges that are not able or willing to perform their jobs according to professional standards; a culture of high-level political interference in judicial matters, widespread corruption, and distrust of law; and weak political will regarding implementation of legal reforms.²³⁵

While some of today’s sojourners are better trained in the local languages and culture than their counterparts in the 1960s and 1970s, many are not, and their efforts are at best “a rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and a simple lack of understanding.”²³⁶ Energetic traveling American law-

232. See Interview with Minister of Justice, Judges, and Lawyers in Bosnia-Herzegovina (July 2, 1998).

233. WATSON, *supra* note 212, at 4.

234. See CAROTHERS, *supra* note 218, at 54 (describing legal training programs in Romania); Interviews with Lawyers and Judges in Bosnia-Herzegovina, Poland, Romania and Russia (1996-1998) (confirming the general applicability of this remark to other parts of Eastern Europe) [*hereinafter* Interviews with Lawyers & Judges].

235. See Interviews with Lawyers & Judges, *supra* note 234; CAROTHERS, *supra* note 218, at 55; Monica Macovei, *Legal Culture in Romania*, 7 E. EUR. CONST. REV. 79 (1998).

236. See GARDNER, *supra* note 216, at 4 (describing the law and development movement in Latin America).

yers today, just as in the days of the law and development movement, often fail to see how their good faith efforts can easily serve to legitimate the interests of a regressive status quo. According to Thomas Carothers, “[e]xternal assistance cannot create a will to reform on the part of the relevant authorities; nor can it substitute for a lack of will to reform.”²³⁷ Even the more self-aware traveling legal experts—and there are many—are likely to find themselves in the position of providing assistance for legal reform in a State where responsible legal authorities are not genuinely committed to reform.²³⁸

Another problem with today’s legal transplant projects is unrealistic desires to accomplish too much. Many of today’s projects foster the development of civil society. While commercial legal transplants may find fertile ground for local adaptation, the civil society rule of law projects are likely to miss their mark. Laws that create the structural underpinnings for civil society—for example, by providing access to the legal process and mechanisms for voting—are necessary for the development of civil society, but they alone do not guarantee the existence of a functioning civil society. Rather, for civil society to work, the community in question must value and view it as legitimate. Rob Atkinson underscores this problem by stating that “[c]reating a civil society by legal fiat is an impossible bootstrap operation, both practically and conceptually. In both liberal political theory and the history of liberal politics, the rule of law is the product of a prior, prelegal commitment to civil society.”²³⁹ The transplant of legal institutions designed to promote such values as participation and voluntary association will not work in the absence of a prior commitment to such values.²⁴⁰ On the contrary, the local power

237. CAROTHERS, *supra* note 218, at 56.

238. U.S.A.I.D., *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS*, ASSESSMENT REPORT NO. 7 (Feb. 1994).

239. Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 *TEX. L. REV.* 259, 297 (1995).

240. See Roniger, *supra* note 20, at 8.

Historically, both the idea and the reality of civil society have preceded the development of democracy. There are points of convergence around pluralism and dispersion of interests and social forces, yet the pluralistic character of civil society neither ensures democracy nor implies a strengthening of the open domain of public life.

Id. Roniger points out that there are societies “that defy the logic of constitutional

structure will reject such a forced imposition as illegitimate and/or misused to serve its own needs.²⁴¹ This problem is endemic to the nature of social change and legal transplantation, and the most knowledgeable legal experts will be unable to solve it on their own.

D. CHALLENGES AHEAD

The implications of an undemocratic transnational civil society are far reaching. Undemocratic civil society not only undermines the legitimacy of non-State participants, but also threatens the legitimacy of States and all transnational relationships. Democracy is a "double-sided process" in which the State and civil society "become the condition for each other's democratic development."²⁴² Democracy on the transnational level is good for democracy on the State level and vice versa. Undemocratic civil society at any level of relationship can act as a contagion-squelching participation and legitimacy and thus undermine the potential for positive social change.

The challenge for human rights advocates lies in making transnational civil society democratic in a manner that could lead to positive social change. The answer lies in giving content to Franck's "democratic entitlement," shaping it so that it can become transformative democracy. Human rights advocates should take steps to ensure more accountability and transparency for non-State participants, especially when they take on State functions. As a first step, the value of participation requires better articulation. Civil society is underdeveloped

democratic legality and exhibit a gap between the formal aspects of public life and the 'real' workings of the socio-political arena. . . ." *Id.* Roniger contends Mediterranean cultures and societies provide good illustrations. *See id.*

241. *See, e.g.,* Yael Yishai, *Civil Society in Transition: Interest Politics in Israel*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 147, 155 (1998).

[T]he second phase in Israel's history was characterized by institutional changes: the growing importance of the market and its material products, and the gradual waning of political parties. These processes formed the setting for the fledgling public interest movement, challenging state authorities. The reaction of these authorities, however, was exclusionary. Legal means were taken, and public statements were made, to delegitimize public associations. The state excluded its challengers if not from the political game, then at least from the centers of power. By denying recognition and legitimacy to the challenging components of civil society, the state consolidated its power vis-a-vis civil society.

Id.

242. HELD, *supra* note 13, at 286.

where small, participatory, and democratically structured organizations independent of the State are uncommon.²⁴³ Further, human rights dialogue in transnational civil society provides a good illustration of underdevelopment when it is dominated by large, exclusive, undemocratic organizations.²⁴⁴

Is it possible to refine the understanding of participation to realize transformative democratic goals? One of the main roadblocks to transformative democracy lies in the reality that transnational civil society reflects disparities in power that are not recognized. Quite simply, well-financed western NGOs are likely to have more power than their poorer and non-western counterparts, and the lack of transparency and accountability in transnational civil society is likely to keep this power unchecked. There is little incentive for powerful NGOs to recognize this misbalance, and less powerful groups can be so marginalized that their protests are not heard. Abdullahi An-Na'im recognizes that "[i]deally participants should feel on an equal footing but, given existing power relations, those in a position to do so might seek ways of redressing the imbalance."²⁴⁵ Diane Otto goes further in insisting that "transparency of the operations of global networks of power, of exploitation and domination, is a vitally important component of transformative dialogue."²⁴⁶ Application of democratic principles to transnational civil society would do more than add a dose of pluralism. In addition to opening civil society to more diverse participation, transformative democracy would insist that all actors behave ethically by questioning any privileges they enjoy as a result of structural power imbalances. The most powerful participants of civil society themselves would accept responsibility for developing mechanisms that can enable them to address inequalities in power.

A related element of a transformative strategy is for the more powerful agents of transnational civil society to listen to, value, and incorporate the experiences and wisdom of their less powerful coun-

243. See Price, *supra* note 11, at 614-16.

244. See *id.*

245. Abdullahi An-Na'im, *What Do We Mean By Universal?*, 23 INDEX ON CENSORSHIP, Sept./Oct. 1994, at 120, 122.

246. Otto, *supra* note 144, at 33.

terparts. Although this is the goal of many human rights advocates, it is rarely carried out in practice. An understanding of a participatory norm of democracy would provide guidance in shaping procedures that would bring non-elites into the debate on human rights on their own terms. As a practical matter, at international meetings discussing human rights norms, non-elite groups "might be empowered to have control of agenda-setting, determine the questions of importance, and run meetings according to procedures they understand."²⁴⁷ These and similar measures would add meaningful context to the norm of participation.²⁴⁸

To be transformative, actors in transnational civil society must commit to exposing the global economic issues that undermine the ability of some voluntary associations to participate in civil society.²⁴⁹ Many studies indicate that globalization exacerbates economic disparities.²⁵⁰ For example, globalization has encouraged, and in some cases demanded, privatization of social services. Researchers have demonstrated, for instance, how privatization of key social services in Latin America, such as social security, health care, and housing, has exacerbated exclusion of citizens from community life.²⁵¹ For the most part, critiques of such changes in the space of transnational civil society are left to organizations identified as "development" or "economic" groups, and most human rights NGOs have little say in the matter.²⁵² To fully realize all the goals of the Universal Declaration, however, this circumstance needs to change. Not only does the failure of human rights NGOs to engage in global economic justice issues result in less attention to such matters, but it also exacerbates

247. *Id.* at 38.

248. For further exposition on these ideas, see Mertus, *supra* note 78.

249. *See id.* at 34.

250. *See, e.g., id.* at 44 ("[T]he egalitarianism of modernity has supported the globalization of capital, which has sponsored reduced state obligations with respect to economic and social rights and deepened the economic disparities between North and South.")

251. *See* Oxhorn, *supra* note 24, at 253 (asserting that the concentration of power resources in Latin America has stifled the emergence of healthy civil societies).

252. *See* Michael Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 272-76 (1994) (discussing non-involvement of human rights NGOs in societal changes).

the conditions that weaken the ability of individuals and NGOs to participate in *any* human rights dialogue at all. Without access to health care, housing, or a living wage, individuals and groups are hampered in their ability to associate and voice their concerns.²⁵³ As such, neglect of global justice issues contributes to the democratic deficit in transnational civil society.

A transnational human rights movement is better poised to demand that States behave democratically in promoting and protecting human rights if it strives to act in line with transformative democratic norms. NGOs that are democratic in the sense described in this Article will be perceived as more legitimate when they call for full realization of the goals of international human rights documents and when they act in accordance with such norms. This will provide NGOs with more credible ground on which to demand that international bodies grant them consultative status on all treaty monitoring bodies²⁵⁴ and that States provide them with a consultative, or at least information-sharing role, on domestic human rights bodies. NGOs need not and cannot take on the role of States in promoting human rights worldwide. Nonetheless, NGOs could do much more in the future if they are perceived as legitimate and, indeed, if they *are* legitimate. Defining and realizing the elements of a transformative democracy would go a long way toward addressing these concerns.

CONCLUSION

The human rights concerns that motivated the creation of the Universal Declaration are still present. The good news is that the world has changed in ways that can help to give content and effect to the Universal Declaration's principles. As Stephen Gill has suggested, globalization and the development of a transnational civil society:

open[s] up new potential for counter hegemonic and progressive forces to begin to make transnational links, and thereby to insert themselves in a

253. See generally Mertus, *supra* note 110 (expanding on thesis).

254. Human rights NGOs may want to follow the model of NGO participation in environmental treaties. See generally Phillippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 392 (1989) (examining role of NGOs with respect to international environmental law); PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* (1992) (describing NGOs contribution to international environmental law).

more differentiated, multilateral world order. This would be a way to advance the process of democratization of an emerging global civil society. . . This might then provide the political space and social possibility to begin to mobilize for the solution to deep-seated problems of social inequality, intolerance, environmental degradation and the militarization of the planet.²⁵⁵

The new space created by globalization, the rise of transnational civil society, and the ideas and methodologies represented by governance and the right to democratic entitlement, provide new opportunities for non-State participation in human rights standard setting and enforcement. Non-State actors, in particular human rights NGOs, have made tremendous advances in their ability to influence the building of a human rights culture. If they take advantage of the transformations of space and ideas described above, they can help restructure the international human rights system. By doing so, the identity of the system itself is altered by democratic governance norms in a manner receptive to human rights.

Saul Mendlovitz and Merav Datan have noted that whether the emerging transnational norms of governance will be "human rights-oriented or capital-oriented depends greatly on the nature of participation of transnational civil society and on our ability to discern emergent structures and to reinforce those we view as humane."²⁵⁶ Humane governance, in Richard Falk's terms, "emphasizes the achievement of comprehensive rights for all peoples on earth."²⁵⁷ Shaping the structures and practices of humane governance "involves not only the deepening of democracy in State/society settings, but the outward extensions of democracy to transnational arenas fashioned by States, corporations, and banks, and the inward extensions of human rights to villages, rural areas, as well as to schools, homes, the workplace."²⁵⁸ The exact texture of democratic governance has yet to be defined, but non-State actors are at work on definitions and practices that could be applied to themselves and to States as well.

255. Gill, *supra* note 7, at 311.

256. Saul Mendlovitz & Merav Datan, *Judge Weeramantry's Grotian Quest*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 401, 413 (1997).

257. FALK, *supra* note 7, at 9.

258. *Id.* at 17.

Therein lies the promise of transnational civil society for the future of human rights.