

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") some fifty years ago. The shape, direction, and nature of State responses to human rights problems have dramatically altered. Non-State actors³ and transnational networks⁴ 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

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.

Various terms "world,"⁶ "global,"⁷ "international,"⁸ or "transnational" civil society, this domain is the social, cultural, and ethnic arrangements of modern industrial society considered apart from State control.⁹ 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."¹⁰

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 HUMAN GOVERNANCE: TOWARD A NEW GLOBAL POLITICS* 17 (1995); Stephen Gill, *Reflections on Global Order and Sociobiological 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. McNamara, *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) (citing 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: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613, 615 (1998).

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); Victor 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 Globalities*, 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 Conditions, 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 Picciotto, *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).

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. BASHIR, *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. HELBRONER, *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 293 (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-Ayala 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 (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.²⁵ Human rights advocates argue that civil society creates a "setting of settings"²⁶ 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 international 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 (Enk 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."³³ Additionally, globalization represents four interrelated and seemingly contradictory dimensions.³⁴

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.³⁵ For instance, human rights problems in an interdependent world increasingly cross State borders.³⁶ Similarly, products that present environmental hazards endanger the health of people in numerous States.³⁷ 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.³⁸ These associations usually form around common identity markers, such as language, culture, and kinship.³⁹ Identity groups also make new demands for their own rights to culture, language, and association.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³ 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 coordination); DAVID KNOKE, *POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE* 76-8 (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. 41-44 (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 COME NEXT?* 115-26 (1996) (discussing importance of this kind of fragmentation to 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) (examplifying 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 Rominger, *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 Latent 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. Mlmar, *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 re-active 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 SASSSEN, *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, competition, 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.⁶⁶ 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

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 unbound 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. DEBERT, *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, *Pluralizing 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).

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

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" government—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 "legitimation of government authority" using a "mechanism of periodic competitive elections," supported by "civil rights and liberties"

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-

77. James N. Roseanu, *Governance, Order and Change in World Politics, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 1, 4 (James N. Roseanu & Ernst-Otto Czempiel eds., 1997).

78. Patricia Armstrong, *Hanson 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 Chin, *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 Sovereignities: 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. Cassama, *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).

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 Zaarsky, *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: Conspicuousness 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 Tunar Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 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 specializations; 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 Cooca, *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 Cooca 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 PRINCE & 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 Legitimation 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/63/16 (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 a 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. SMITH & ASHIS NANDY, *THE MULTIVERSE OF DEMOCRACY: ESSAYS IN HOUR OF RAJINI KOTHARI* (1996).

128. Janet E. Lord, *Due Process in the International Legal Order: Beyond the State-Centered Paradigm* (untranslated 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 observer's 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

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).

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 LL.M. 1661 (1993) [hereinafter Vienna Declaration].

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

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, ever

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

149. DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE 1* (1993); see also Otto, *supra* note 144, at 3-4 (employing this same definition of transformation in her examination of human rights universals).

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 Diachronical 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.