

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 actors' 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

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-

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-

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*

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