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

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

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INTRODUCTION

Today's political and legal geography presents opportunities and challenges not faced by the drafters of the Universal Declaration of Human Rights ("Universal Declaration")[1] some fifty years ago. The shape, direction, and nature of State responses to human rights problems have dramatically altered. Non-State actors[2] and transnational networks[3] 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 participants[4] and the

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

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

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

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

emergence of transnational civil society[5] have opened a new domain within which the rights enumerated in the Universal Declaration and other international human rights documents may be realized.

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

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

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

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

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

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

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

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

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

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

Law plays a central role in civil society. Civil society cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government. Legal associations play a central role in the development of civil society by supporting rule of law mechanisms[17] that permit the independent existence of non-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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 Mliner ed., 1992) (listing dimensions of globalization).

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

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

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

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

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

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

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

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

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

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

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

Third, globalization somewhat results in the homogenization of the world[45] 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 representation[48] and democratic governance.[49] The domination of liberal norms in international politics dislocates the anarchical social construction of the world and enables emerging social construction based on a more cooperative, problem-solving civil society.[50]

ROMANIA (1991).

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

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

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

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

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

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

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

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

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

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

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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 form ideas of nationhood).

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

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

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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range of historical developments).

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

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

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

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

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

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

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