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Kenneth Anderson

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# “ACCOUNTABILITY” AS “LEGITIMACY”: GLOBAL GOVERNANCE, GLOBAL CIVIL SOCIETY AND THE UNITED NATIONS

*Kenneth Anderson* \*

## INTRODUCTION: THREE VARIETIES OF NGO ACCOUNTABILITY UNDER GLOBALIZATION

A contested issue of globalization is the question of whether, how, and to what extent an economically integrating world requires a politically integrated planet—a world that has a global law, regulation, and enforcement that transcends all lesser political authority and to which all other political entities must cede their sovereignty.<sup>1</sup> A federal world, a world under a global constitution—loosely configured of necessity, naturally, but nonetheless one in which international law establishes a distinct hierarchy under which the sovereignty of individual states must necessarily give way.

For many, such a politically integrated world is morally and politically desirable on its own terms. It is moral progress as such. For others, the justification for political integration is because it is presumably a necessary corollary of global economic integration—a matter of global welfare and justice, but also of global economic efficiency on its own terms. This amounts to a descriptive causal claim that political integration is driven by material economic factors of economic integration and conducive to them, the necessary political economy of an integrated global market.

The fact of a world in which economies are coming together among economic actors, such as multinational business enterprises that are able

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\* Professor of Law, Washington College of Law, American University; Visiting Fellow, The Hoover Institution; and Non-resident Senior Fellow, The Brookings Institution. Parts of this draft are taken from the forthcoming book, *Living with the UN: American Responsibilities and International Order* (2011), as well as a book chapter in *GIVING WELL: THE ETHICS OF GLOBAL PHILANTHROPY* (Patricia Illingworth, Thomas Pogge, & Leif Wenar eds., 2010). I am grateful for comments from participants in the Brooklyn Law School Symposium, *Governing Civil Society: NGO Accountability, Legitimacy, and Influence*; the Hoover Task Force on National Security and Law, whose members offered comments on an early draft; University of Virginia Law School, which offered a visiting professor a congenial place to complete this Essay; and my law school dean, Claudio Grossman, for the support of Washington College of Law in my scholarly research. Finally, thanks particularly to Steve Krasner for conversations on the concept of legitimacy.

1. See, e.g., Dani Rodrik, *Governance of Economic Globalization*, in *GOVERNANCE IN A GLOBALIZING WORLD* 347 (Joseph S. Nye & John D. Donahue eds., 2000) (discussing a global federalism to enable the formation of a fully integrated international economy).

to act across national political borders, gives, according to many, ever greater urgency to building what has been called “global governance.”<sup>2</sup> An economically integrating world requires mechanisms of accountability for those economic actors, which must perforce be regulating political institutions—but which themselves stand in need of mechanisms of accountability.

That is on the side of the ledger of public international law and institutions under globalization. At the same time, since the end of the Cold War in 1990, there has been unprecedented growth of international non-governmental organizations (“NGOs”) and transborder social movements, drawing in large numbers of people around the world.<sup>3</sup> The place of NGOs in this globalizing world also poses questions, particularly as they take up political activities at the global, and not merely national, level. To take up global political activities presupposes global actors with which to have political intercourse. The influence, reach, presence, and power of these international NGOs have grown fantastically in the past two decades, and they pose questions about for whom they speak—on anyone’s behalf rather than their own? To whom are they accountable for the positions they advocate, and does it matter? Do they represent anyone other than themselves? Should states and international organizations pay particular attention to them, and if so, why and how? Who, if anyone, should be accountable to them, and in what ways?

The Brooklyn Symposium to which this Essay is a contribution made particular note of two different meanings of the “accountability” of NGOs. Each meaning is important, indispensable even, but they are not the same thing. To those two, I add a third, by way of introduction.

First, NGOs are institutions that offer greater or lesser degrees of accountability in an “internal” sense—an internal “governance” sense. In other words, the accountability that would be relevant to any organization in its fiduciary governance, but particularly fiduciary institutions of a nonprofit nature that also owe obligations of public trust. These obligations of accountability include, to start with, mechanisms to account for the stewardship of funds, fidelity to the mission for which those funds were conveyed, and the range of often quite technical accountability issues that go along with the classic fiduciary duties of care and loyalty, as well as (in the case of a charitable organization) some duty of transparency.

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2. See generally Hakan Altinay, *Global Governance: A Work in Progress*, YALE GLOBAL ONLINE (Jan. 26, 2010), <http://yaleglobal.yale.edu/about/altinay.jsp>.

3. For the best-known account from the 1990s, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

These “internal” forms of accountability ensure stewardship of resources toward a mission, and they can be satisfied—indeed, really can only be satisfied—through expert and technical ministrations by auditors, accountants, lawyers, and others. There is a further important question, as papers in the Brooklyn Symposium note in detail,<sup>4</sup> as to whom those “internal accountability” monitors should themselves be accountable. For example, in the transborder NGO arena, to which country’s regulators must monitors answer? Those giving aid assistance, or those receiving it, or both? Since presumably no one favors embezzlement of NGO funds, and more broadly everyone favors accountability in the sense of stewardship toward a declared mission, this form of accountability is largely instrumental and not contested, even if the role of the government regulator raises important questions of political governance in a world in which NGOs cross borders.

A second form of accountability, however, might be thought of as “external” accountability. It is explicitly about the relationship of NGOs to the globalized world in a political sense—the accountability of their role as political actors, both to whom they ought to be accountable, and who ought to be accountable to them—in each instance an open and contested question. This is the question of whether NGOs claim, and by some actor are conveyed, a role in political governance of a kind that hitherto might have thought to attach to governments and their governed peoples. If, as has often been claimed during the last twenty or so years, NGOs act as “stand in” representatives of the “peoples” of the world before international organizations, in what sense and to whom are they accountable, if they now stand alongside or supplant states in this role? And in what sense are these international organizations to account to NGOs, why, on what basis, and what principle of justification, if at all?

This Essay addresses itself to this second, “external,” sense of accountability. As a consequence, it does not focus very much on the first sense of accountability, in large part because it is in agreement that the first sense of accountability is crucial and indisputable as a proposition, even if there is much useful discussion to be had as to forms. Mechanisms to enforce the basic rules of internal fiduciary accountability are essential for any organization, for profit, non-profit, or governmental alike. Whereas the most contested issues for cross-border NGOs and accountability at this moment arise from this second sense, the political, external sense of accountability, without in any way slighting the enormous importance

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4. Symposium, *Governing Civil Society: NGO Accountability, Legitimacy, and Influence*, 36 BROOK. J. INT’L L. 813 (2011).

of the often highly technical work around the standards, rules, regulations, laws, and best practices for internal accountability.

Yet at least in passing, note that there is a third question of accountability that has not received sufficient attention. It particularly attaches to those NGOs taking human rights and such “values” issues as their subject matter—those NGOs devoted to questions of international morality, whether framed as human rights law, politics, or some other way. This third question of accountability asks whether (and if so under what circumstances) an NGO actor making pronouncements and offering judgments of law and morality (judgments, for example, on the law of war applied to terrorism situations, or calls for forcible humanitarian intervention by states or international governmental organizations) should be called to “account” for its judgments, given that it has no “skin in the game.” One way in which human rights NGOs, in particular—though it can be seen to extend to other issues and NGOs as well—might be described as “unaccountable” is the relative ease with which entities with no direct stake may call for others to act.<sup>5</sup> It is natural, irresistible even, to ask to whom “accountability” is owed by the NGO that is responsible for the safety of no population, no territory, has no governance responsibilities and yet freely calls for many sweeping things, including the expenditure of blood and treasure. God? Kant? The Categorical Imperative?

Yet, with respect to this third question of accountability, *when* the failure to have a stake in the outcome should be regarded as an accountability liability is a vexed question in jurisprudence and ethics. After all, there

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5. I raised this third issue of accountability while drafting a blog post at *Opinio Juris* and received a comment to the effect that human rights organizations sometimes do have “skin in the game”—monitors at risk in various situations and countries who might be attacked, etc. Kenneth Anderson, *Conceptualizing Accountability in International Law and Institutions*, OPINIO JURIS (Feb. 25, 2011, 10:42 PM), <http://opiniojuris.org/2011/02/25/conceptualizing-accountability-in-international-law-and-institutions/>; BH, Response, Kenneth Anderson, *Conceptualizing Accountability in International Law and Institutions*, OPINIO JURIS, (Feb. 26, 2011, 8:44 PM) <http://opiniojuris.org/2011/02/25/conceptualizing-accountability-in-international-law-and-institutions/>. That is of course sometimes true, but it is not quite what I mean by “skin in the game” here. To be clear, the kind of skin in the game that matters for the kinds of sweeping things sometimes urged, seemingly quite cavalierly, by human rights organizations is not simply having personnel at risk; it is having whole populations and societies at stake, the commonweal as such, the kinds of stakes that force one to weigh one’s moral seriousness in concrete relation to one’s fiduciary obligations to those one governs as a state and its leaders. This is a much larger topic than either this Essay or this footnote can address, but it seems to me important, in laying out the varieties of accountability at issue for NGOs, to put it squarely on the table, even if it is not here pursued further.

seems to be something rather too easy about a human rights NGO solemnly instructing governments in their duties while sitting in the comfortable position of the "kibitzer" who has nothing at stake. At the same time, however, in many situations, for equally compelling instincts about morality and the rule of law, we do *not* want the actors who pronounce duties to have anything directly at stake—judges, for example, for whom having no skin in the game is a *sine qua non* of the rule of law.

There are important observations one could make about why judges are not to have stakes in the matters they judge, while still being critical of the too-easy claims of NGOs—starting with the way in which judges are connected directly to the second question of accountability raised above, a connection with the state, the impartial judiciary as an embedded part of a state that does have the commonweal as its moral and political obligation. But this Essay leaves aside this important and difficult issue, and limits itself to a consideration of the second, which is to say the "external": the connection between legitimacy and global governance, NGOs and public international organizations.

What follows suggests that these two actors and issues—global governance, through institutions of the United Nations, and international NGOs and their global role—are deeply interlinked. What links them is the question of *legitimacy*, which is to say, the quality of a political order to be able to act with the broad and largely unquestioning support of its members. At stake in this debate over legitimacy, the UN, and international NGOs is the question of whether global governance—one overarching lawgiver for the planet, a constitution for the world, the liberal internationalist dream of replacing interstate power politics with the rule of international law and institutions—is a desirable or even possible thing.<sup>6</sup> And whether, in this account of global governance, international NGOs, and transborder social movements more generally, have any special governance role to play.

The conclusion of this Essay is a skeptical one. The skepticism is more than just the customary realist skepticism that this governance role is easy to achieve or is in fact coming to pass. The most important skepticism offered by this Essay is one grounded in idealism, not realism. That is to say, it is skeptical, on the one hand, of the desirability of global governance as conceived by global elites, including those in international NGOs as well as in public international organizations. And it is especially skeptical, on the other hand, of the proposed role for international

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6. Drawing on Francis Fukuyama's useful characterization of liberal internationalism. FRANCIS FUKUYAMA, *AFTER THE NEOCONS: AMERICA AT THE CROSSROADS* 7 (2006).

NGOs on the global stage in promoting and legitimating global governance.

This Essay argues that international NGOs lack the capacity in accountability, representativeness, and political intermediation to carry out the legitimation functions that one prevailing, prominent account of global governance gives them, whether forthrightly or, on account of criticism such as that of this Essay, *sotto voce*. The argument of this Essay is that public international organizations and international NGOs engage in a mutually congenial but quite circular act of “auto-legitimation,” each to the other. Each believes itself importantly “legitimated” in this process—so enhancing, each in its view, its authority in the international community.

The sense of this Essay is that this circle of auto-legitimation, each for the other, is rather too small to increase *actual* legitimacy or authority in the world, and that it has a deeply unfortunate consequence for the accountability of each. In other words, each of these institutions treats these acts of mutual legitimation as forms of accountability, accounting to each other in what each sees as a check-and-balance on the other, but which appears to the skeptical outsider as a positive feedback cycle upwards of mutually bestowed “legitimacy” and ever more imaginary “accountability.”

#### I. UNFREEZING THE NGOS AND TRANSNATIONAL SOCIAL MOVEMENTS IN THE FOUNDING OF THE UNITED NATIONS

To understand the gradual evolution of the relationship between public international institutions and international NGOs and transnational social movements, let us go back a little—not very much, for these purposes—in the history of each. The post-WWII period saw the founding of the United Nations in 1945<sup>7</sup> and with it the reemergence of transnational nongovernmental organizations and social movements that had been largely frozen, dissipated, or destroyed by the war and attendant changes. These organizations played a part in the San Francisco meetings that led to the UN Charter. Indeed, the Charter makes explicit, if passing, reference to them as consulting organizations.<sup>8</sup> Yet the tensions and ideological divisions of the Cold War meant that the role of transnational NGOs was subordinated to the struggle between the two superpowers as well as

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7. BASIC FACTS ABOUT THE UNITED NATIONS 3 (2004).

8. The Charter of the United Nations, Article 71, provides that “[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” U.N. Charter art. 71.

the gradually emerging non-aligned movement at the UN, anti-colonialist and post-colonialist coalitions within the UN General Assembly and its attendant agencies.<sup>9</sup> During the 1950s through the 1980s, large-scale social movements developed; to some degree, these social movements transcended borders, and likewise the organizations supporting them.<sup>10</sup> Many of these movements had to do with peace and disarmament and anti-nuclear weapons campaigns; by the 1970s, these had started seriously to develop into the genuinely transnational movement for human rights, the environment, women's rights and issues, and the other social movements that are most familiar to us today and which, to some degree, have supplanted the most traditional and oldest concern of transnational social movements—international peace.<sup>11</sup> This account notably runs together transnational NGOs with social movements; the latter are by their nature larger movements of people who might or might not express themselves through NGOs, while the former are actual organizations, although organized and run in a wide variety of institutional ways.<sup>12</sup>

The social and cultural shifts that led to a redefinition of NGOs in the 1990s actually began in the 1970s, in part with the development of new social movements, but in large part with the growth of the institutional human rights movement and the international environmental movement. The emergence of the Helsinki Accords in 1975, with their nearly off-hand reference to human rights, in retrospect turned out to have given birth to many of the human rights monitoring and advocacy NGOs that today are taken almost for granted.<sup>13</sup> What the Helsinki reference to human rights did, in the context of a mid-Cold War document, was give NGOs an implied legitimacy in matters of politics, power, diplomacy, and basic existence and voice. The Chernobyl nuclear disaster of 1986 created tragic and dangerous circumstances that allowed ordinary people to take advantage of the new-found legitimacy of citizens' groups, even

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9. I am pleased to see that this account largely agrees with the new and outstanding history of the human rights movement found in SAMUEL MOYN, *THE LAST UTOPIA* (2010).

10. See, e.g., *History of Organization*: NOBELPRIZE.ORG, [http://nobelprize.org/nobel\\_prizes/peace/laureates/1963/red-cross-history.html](http://nobelprize.org/nobel_prizes/peace/laureates/1963/red-cross-history.html) (last visited May 17, 2011).

11. See, e.g., *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* (Enrique Larana, Hank Johnston & Joseph R. Gusfield eds., 1994); David Plotke, *What's So New About New Social Movements?*, in *SOCIAL MOVEMENTS: CRITIQUES, CONCEPTS, CASE STUDIES* 113 (Stanford M. Lyman ed., 1995) [hereinafter *SOCIAL MOVEMENTS*].

12. See Stanford M. Lyman, *Social Theory and Social Movements: Sociology as Sociodicy*, in *SOCIAL MOVEMENTS*, *supra* note 11, at 397.

13. For the U.S. Department of State's explanation of the Helsinki Final Act (1975), see *Office of the Historian, Helsinki Final Act, 1975*, U.S. DEP'T OF STATE, <http://history.state.gov/milestones/1969-1976/Helsinki> (last visited May 16, 2011).



within a communist regime and internationally among their global counterparts. And it accelerated the movement toward the legitimacy of international NGOs, not just in human rights matters, but in environmental issues, as well.<sup>14</sup> The spillover radiation effects upon Western and Eastern Europe of a nuclear reactor disaster in communist Russia<sup>15</sup> focused much attention on the cross-border effects of environmental problems, further empowering the idea of cross-border NGOs.

The recursive legitimacy of transborder NGOs that arose from these historical events has gradually turned into a genie that authoritarian regimes have been seeking to keep bottled up ever since, as attest the massive efforts of China, for example, to police the ability of NGOs inside and outside China to utilize the Internet.<sup>16</sup> The UN Charter makes reference to transnational NGOs as a source of advice and expertise,<sup>17</sup> but the Helsinki Accords implies a *political* legitimacy that hints, however obliquely and, really, only in historical retrospect, at a seat at the table of governance. The fact that this legitimacy arose in the context of human rights rather than other leading values of the UN—peace and security, or economic development and relief of global poverty, for example—gave an absolutist moral tenor to the NGO movement. Human rights, after all, are matters of rights, at least in principle, not matters of social tradeoffs; and those who advocate for them, according to the narrative, thus have a similar absolute right to be heard and take part. It was a short ideological step to add that this meant a right to participate in governance concerning these issues, which is to say, participation in governance about everything, because what does not have a connection to human rights?

The human rights advocates that emerged as global players in that era—Human Rights Watch and Amnesty International, in particular—saw themselves as accountable to no government or, really, any other authority.<sup>18</sup> On the contrary, governments in moral theory if not political

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14. See, e.g., ZHORES A. MEDVEDEV, *THE LEGACY OF CHERNOBYL* (1992) (retelling the story of the Chernobyl accident to shed light on the facts and misinformation that have been used to serve state and institutional interests).

15. 3 CHERNOBYL ACCIDENT, *THE NEW ENCYCLOPEDIA BRITANNICA* 170–71 (15th ed. 2005).

16. See, e.g., HUMAN RIGHTS WATCH, *RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP* (2006), available at <http://www.hrw.org/reports/2006/china0806/>.

17. See *supra* note 8 and accompanying text.

18. One relatively neutral journalistic account of the rise of the modern human rights movement—meaning, an account not merely hagiographic—is KIRSTEN SELLARS, *THE RISE AND RISE OF HUMAN RIGHTS* (2002). For a semi-anthropological account—a social scientist observing from the inside—of the interior culture of Amnesty International, including its many tensions and conflicts, see STEPHEN HOPGOOD, *KEEPERS OF THE*

fact, ought to account for their behavior to *them*. At the same time, they saw themselves as having global moral authority, as it were, derived as guardians and trustees of Kant's categorical moral imperative.<sup>19</sup> In this they exhibited a certain peculiar echo reaching clear back to the ancient moral claims of the Church in early Europe, as the voice of God against "mere" temporal authority.<sup>20</sup>

Yet the 1980s was also a highly contradictory political period. On the one hand, human rights advocates made common cause with the US government in opposition to communist oppression in the Soviet empire (without, however, actually denouncing socialism as an economic system). On the other hand, they sharply attacked the US government for its Central American policies and proxy wars that were, after all (and as the rising American neoconservatives pointed out), fundamentally aimed at rolling back communist expansionism. From the standpoint of human rights advocates, this was moral consistency in an exemplary fashion—the application of common human rights standards without exception. From the standpoint of American conservatives of the day, such as the Reagan administration UN ambassador, Jeane Kirkpatrick, this amounted to application of a purely formal and sterile consistency that resulted, in fact, in an insidious double standard.<sup>21</sup> The double standard consisted in the appearance of formal, equal treatment of all regimes, but with the objective result of undermining admittedly authoritarian but pro-Western dictators (who might, in theory at least, eventually be reformable) in favor of totalitarian dictators and Communist regimes (which, in theory as well as fact, would not be reformed, at least not as totalitarian, Communist regimes).<sup>22</sup>

Throughout all of this, however, the UN was still *not* the focal point of the rising human rights NGOs. The UN was still caught in the paralysis of the Cold War and ideals of the self-determination of peoples, not "individual" human rights. The idea of global structures to govern the world through international law seemed madly utopian, given two superpowers were locked in global struggle. The UN mattered, principally, to the in-

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FLAME: UNDERSTANDING AMNESTY INTERNATIONAL (2006). For a brief review of it, from the standpoint of someone who has worked inside Human Rights Watch, a similarly situated organization, see Kenneth Anderson, Book Review, 30 INT'L HIST. REV. 911 (2008).

19. See generally, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 19–51 (Mary Gregor, ed. & trans., 1998).

20. For a critical take on this tendency, see Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 107, 110, 113 (Peter Juviler & Carrie Gustafson eds., 1998).

21. JEANE J. KIRKPATRICK, DICTATORSHIPS & DOUBLE STANDARDS (1982).

22. *Id.*

creasingly vocal nations of the third world and the post-colonial world as an expression of post-colonialism, not to the first or second worlds, save on occasions of high drama at the Security Council as a matter of great power politics, not human rights.

However, transnational NGOs and new social movements *were* rising throughout the 1980s in the first and second worlds. They were rising in places ranging from the Western democratic networks supporting the Polish Solidarity movement and the Charter 77 advocates in Czechoslovakia,<sup>23</sup> to peace networks with aspirations to banish nuclear weapons from Western Europe in the Reagan years,<sup>24</sup> to global human rights monitoring, and the rise of global feminism and women's rights advocacy, and the global environmental movement.<sup>25</sup> These were movements primarily within the industrialized world, within the first and second worlds, the world of industrialized democracies, and the world of socialist and communist states (at least those in the West, though certainly not China). The UN and global governance were not directly the focus of these efforts, because this would have constituted a massive diversion of resources at that point into organizations that carried no great weight with the Cold War still underway.<sup>26</sup> There was also a growing, parallel network of developing world organizations that were focused on the United Nations as a source of influence and legitimacy, but they were to a large extent not visible to the organizations dealing with East-West issues in the 1980s. The groundwork was yet being laid at the intellectual and ideological level for the entry of NGOs into a far more direct dialo-

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23. Nick Young, *NGOs and Civil Society in China*, NICK YOUNG WRITES (Feb. 16, 9:00 AM), [http://www.nickyoungrwrites.com/?q=civil\\_society](http://www.nickyoungrwrites.com/?q=civil_society).

24. Lawrence S. Wittner, Professor of History, State Univ. of N.Y. at Albany, Address at NGO Committee on Disarmament, Peace & Security (Nov. 18, 2004) (transcript available at <http://disarm.igc.org> (follow "events" hyperlink; then search "Wittner" and click follow "The Role of NGOs in Achieving Disarmament" hyperlink)).

25. The critical theory journal *Telos*, with its close attention to the intellectual and political currents of dissident movements in Eastern Europe and the Soviet Union, perhaps best captured the theory and practice of these movements over the 1970s, 1980s, and 1990s. The intellectual evolution of these movements is found in English language sources in the *Telos* archives. See *About TELOS*, TELOS PRESS, <http://www.telospress.com/> (follow "About TELOS" hyperlink) (last visited Mar. 16, 2011).

26. The general thrust of this observation is, I entirely grant, highly first world-centric. There was a proliferation of more nonstate actors arising from the politics of, and ideological struggles of, the third world, but they were still not so very important in the Cold War and still not so very important to the UN, except to gradually effect a takeover of many of its—still not very important—institutions. For a strong exception to this point, see AKIRA IRIYE, *GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD* 96–125 (2002).

gue with both state actors and international organizations such as the United Nations—primarily, but not exclusively, through the lever of international human rights—about no less a question than who should have the legitimacy to run the world.

## II. RE-THINKING GLOBAL GOVERNANCE IN THE POST-COLD WAR

The opening provided by the end of the Cold War caused many people to believe that the world might enter a new period of global political coordination to match the economic globalization that was emerging during the time. It was a period of heady liberal internationalism—the belief was popular that sovereign power politics could be overcome through a liberal version of international law, resulting in a benevolent and liberal global governance under a loose, but still federal, global law.<sup>27</sup> Leading international law scholars offered pronouncements that the era of truly sovereign states was over, hope offered as description.<sup>28</sup>

These hopes and dreams were fostered, somewhat perversely, by the remarkably united front offered by countries around the world, through the UN and the Security Council, to the invasion, occupation, and sack of Kuwait by Saddam Hussein's Iraq. For once, it seemed, leading countries came together—including Russia and the United States—to take concerted military action against Iraq.<sup>29</sup> Even if the United States overwhelmingly took the military lead, it was supported by a very broad coalition of states and the Security Council.<sup>30</sup> President George H.W. Bush excited a great many globally when, in the wake of this action, he described a "new world order" that apparently seemed to foreshadow global governance through the UN and genuine collective security.<sup>31</sup>

In retrospect, it is clear that different actors supported the collective military action against Iraq in Kuwait for very different reasons. Some did so because they were genuinely worried about Saddam's naked use

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27. I borrow Francis Fukuyama's useful definition. See FUKUYAMA, *supra* note 6, at 7.

28. Perhaps most famously, Columbia Law School international law scholar, Louis Henkin, said, "Sovereignty . . . is not a necessary or appropriate external attribute for the abstraction called a state . . . For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9–10 (1995).

29. See *Background Note: Kuwait*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/35876.htm#history> (last visited May 17, 2011).

30. *Id.*

31. President George H. W. Bush, *Toward a New World Order*, Address Before A Joint Session of Congress (Sept. 11, 1990) (transcript available at <http://www.sweetliberty.org/issues/war/bushsr.htm>); see also GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* (1998).

of force to acquire an entire country as territory. Others joined because of Saddam's genocidal (as Human Rights Watch concluded) human rights abuses within Iraq against the Kurds and others; their concern was fundamentally the internal political order under Saddam.<sup>32</sup> Still other states, particularly Middle Eastern states such as Saudi Arabia, looked at the conflict through the geopolitical aim of weakening Iraq. And still others supported the First Gulf War from the idealistic belief that this essentially unprecedented military exercise in collective security would lead to long-term global governance through the United Nations.

That was with respect to sovereign states and international organizations. Within a few years, however, those idealistic hopes for collective security were dashed—in large part by the outbreak of the Yugoslavia wars and, still later, the genocide in Rwanda. The international community proved unable to respond to provide collective security; Europe proved unable to provide security even within Europe, and the Yugoslavia wars came to a halt only when the United States, under the Clinton administration, decided finally that it had to intervene.<sup>33</sup> In lieu of collective security as such, the UN Security Council implemented a series of war crimes tribunals that aimed to provide after-the-fact justice, first for Yugoslavia and later for Rwanda. These were widely celebrated as the beginnings of an international criminal justice system but, critics noted, their origins were as an *alternative* to actual intervention before or during the fact.<sup>34</sup> At the same time, however, in the early 1990s, international

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32. See HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993), available at <http://www.hrw.org/reports/1993/iraqanfal/>. My own contribution to this research, as a field researcher for Human Rights Watch in Iraq in 1991, was published as HUMAN RIGHTS WATCH, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME (1992), available at <http://www.hrw.org/en/reports/1992/12/01/anfal-campaign-iraqi-kurdistan>. For the definitive account of the use of chemical weapons in Iraq, see JOOST R. HILTMANN, A POISONOUS AFFAIR: AMERICA, IRAQ, AND THE GASSING OF HALABJA (2007). My review can be found as Kenneth Anderson, *America, Iraq, and Poison Gas*, TIMES LITERARY SUPP., Jul. 9, 2008.

33. Derek Chollet and James Goldgeier provide a superb account of the Clinton administration's foreign policy in all these matters. DEREK CHOLLET & JAMES GOLDGEIER, AMERICA BETWEEN THE WARS: 11/9 TO 9/11 (2008).

34. *About the ICTY*, U.N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Mar. 16, 2011); *About ICTR*, U.N. INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Mar. 16, 2011); see also Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT'L L. 385, 405 n.56 (1993). The suggestion that post hoc tribunals were being offered as an alternative to actual action was not a message anyone wanted to hear at that time, as I

NGOs became ever more active in these causes—human rights, international tribunals, agitation for sovereign states to act in the former Yugoslavia, and many more. Their activities at the United Nations became more active as well.

The cause that transformed the self-understanding of international NGOs during the 1990s was the international campaign to ban antipersonnel landmines.<sup>35</sup> By the late 1980s, humanitarian groups, particularly the International Committee of the Red Cross ("ICRC"), had begun to raise awareness of the damage being caused by the heavy and increasing use of landmines in conflicts around the world. The issue appealed to a wide variety of international NGOs from a surprising range of perspectives—human rights groups, environmentalists, humanitarian relief organizations, development NGOs, and more—and in the early 1990s, they came together to form a loose network, the International Campaign to Ban Landmines.<sup>36</sup> Taking advantage of the emerging technologies of the Internet—the cutting edge communications technologies of the day, email and listservs—they forged an international campaign for a treaty that would ban use, production, stockpiling, and transfer of landmines.<sup>37</sup> Initially rejected and, indeed, laughed off by leading states, the movement succeeded in forcing powerful states, including the United States and others, to take account of the movement.<sup>38</sup> The campaign eventually

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discovered whenever I raised this among human rights groups, funding foundations, academics, or government officials.

35. I speak in this section from my personal experience as director of the Human Rights Watch Arms Division during the inception of the landmines ban campaign and the formation of the International Campaign to Ban Landmines.

36. For one of the early manifestos of the movement, see THE ARMS PROJECT OF HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* (1993). The book was an encyclopedic volume in the beginning days of the campaign. It laid out the basic propositions behind a ban treaty as well as the role of a wide range of international NGOs in pursuing it.

37. For a discussion in particular on the role of then-new Internet technologies in the globally networked world of international NGOs, see Charlotte Ku & John King Gamble, *International Law—New Actors and New Technologies: Center Stage for NGOs?*, 31 *LAW & POL'Y INT'L BUS.* 221 (2000).

38. The U.S. military's approach to landmines and the campaign—sympathetic to the general humanitarian goal, but convinced both that new technologies would solve the problem and that, in any case, the situation of international border-guarding landmines were indispensable to the peace and security of the Korean peninsula—is discussed in Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 *CHI. J. INT'L L.* 445 (2003).

succeeded in enlisting Canada and several other important states and eventually produced the Ottawa Convention banning landmines.<sup>39</sup>

The success of the NGO campaign against landmines did not go unnoticed by the United Nations, including the eventual Secretary General, Kofi Annan, and his senior advisors. They had been looking for political mechanisms to strengthen the UN as an instrument, not merely of the Member States of the UN or as a kind of negotiating table between sovereign states, but of independent global governance.<sup>40</sup> Global governance that was to be conducted by the UN in its own name and as its own source of legitimacy and authority, beyond and indeed above that of individual nation-states, no matter how powerful. One question of deep and abiding importance, however, was the fact that the UN lacked legitimacy as a democratic actor.<sup>41</sup> It had connections to Member States, but the UN itself lacked any direct connection, in the sense of democratic legitimacy, with the "peoples" of the world, as stated in the preamble of the Char-

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39. For an account of the landmines campaign that argues both for the special role of NGOs, but also for the special role of Canada as facilitating the special role of NGOs, see WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES (Maxwell A. Cameron, Robert J. Lawson & Brian W. Tomlin eds., 1998). In particular, look to Michel Dolan & Chris Hunt, *Negotiating in the Ottawa Process: The New Multilateralism*, in WALK WITHOUT FEAR, *id.* at 392, 399, 408; Maxwell A. Cameron, *Democratization of Foreign Policy: The Ottawa Process as a Model*, in WALK WITHOUT FEAR, *id.* at 424, 434, 440; Lloyd Axworthy, *Towards a New Multilateralism*, in WALK WITHOUT FEAR, *id.* at 448, 456.

40. This was the view of what came eventually to be known by political scientist and senior UN advisor John Ruggie's terminology: the "traditionalists" within the Secretariat who saw the legitimacy and authority of the UN as a function of the Member States, and the "modernizers" who saw the need to go beyond, or indeed around, the Member States and reach directly to legitimacy with global populations, including through and intermediated by, the international NGOs. This internal argument within the Secretariat is discussed in JAMES TRAUB, *THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER* 383 (2006).

41. The notion of legitimacy used in this Essay is not intended to be a highly technical one, as the subject is too complicated on its own. It is used here in the loosely Weberian sense that "action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order." 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (Geunther Roth & Claus Wittich eds., 1978). I do not commit myself here to any deeply technical sense of the term, and broadly speaking this Essay subscribes to the generally understood idea of legitimacy as "widespread belief in a system of governing institutions . . . . Legitimacy denotes the positive valuation and acceptance enjoyed by a system of power and its bearers . . . ." JOHN KEANE, *PUBLIC LIFE AND LATE CAPITALISM: TOWARD A SOCIALIST THEORY OF DEMOCRACY* 224 (1984). Specifically with regard to legitimacy and law in the contemporary United States, see the fine article by Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983).

ter.<sup>42</sup> The lack of a connection to people as such meant, by implication, that the legitimacy of the UN was merely through the Member States and, by further implication, that its legitimate activities and scope of authority were merely what the Member States granted. The highest goal of global governance, as far as the senior leadership of the UN General Secretariat was concerned, however, was to transcend the reliance for authority and legitimacy upon the Member States, to govern, at least in some important matters, directly in the name of the UN and by appeal to the "peoples" of the world.

And yet, there is no direct election to the UN; it is structured as an association of Member States. It is not a global parliament that is elected by its people(s); it is a meeting ground of states. The ideological problem—the legitimacy problem—for the United Nations leadership, in pursuit of the authority of genuinely global governance, was to find a source of legitimacy that did not run through the Member States and yet did not require something that seemed—and seems—quite implausible if not fantastic: global parliamentary elections.<sup>43</sup> The lesson of the NGO landmines campaign, to the UN leadership under Annan, was that international NGOs, which could be perhaps plausibly understood as groups of global citizens, could be asserted as 'representatives' of the world's peoples for purposes of providing the UN with a form of quasi-democratic legitimacy, or at least a plausible connection to a global constituency that did not run through the Member States.<sup>44</sup>

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42. Indeed, the very term "peoples" as used in the Charter preamble raises questions all its own, as distinguished from what might have been used instead. For example, "We the *people* of the world." U.N. Charter pmb1.

43. There was indeed a movement, partly among academics and partly among activists, for a global parliament; proposals for its composition were sometimes modeled on the European parliament and sometimes expressed the view that its membership should consist of representatives of international NGOs. It was an idea that was given a veneer of public international respectability in the 1990s by appearing in a report of global "big names." OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE (1995). Most theorists, however, even those of impeccable liberal internationalist persuasion, found this a bridge too far. But this conceptual position had the salutary quality of forcing liberal internationalists to articulate what they believed would be plausible for the legitimate governance in the way of representation and consent—plausible both as a matter of being "doable" and as a matter of normatively satisfying the requirement of consent, if it was not to be democracy in the ordinary sense of the term. The global parliamentarians were refreshingly direct in their assertion that governance would *not* be legitimate if it was not democratic in the ordinary way—no obfuscation, no elision.

44. Annan's rhetoric on this theme became more rhapsodic and ever more attuned to adulation of the international NGOs to a crescendo in 1999 to 2000. The Seattle riots and collapse of the trade talks in 1999 created what might best be described as great cognitive



For their part, the NGOs were happy to see themselves in this role. Besides confirming their own auto-vision as the citizens of the world forcing themselves into the closed negotiating sessions of states, being treated by the institutional UN as the legitimate representatives of the world's peoples who, in turn, conferred legitimacy upon the UN and its claims to governance over the Member States, gave considerable status and power institutionally. International NGOs were no longer merely unofficial players standing outside the doors of power, outside the rooms in which states made their agreements—they had, in effect, the backing of the UN leadership at a minimum to seek a place at the negotiating tables themselves, armed with the claim that they had a special role as representatives of the world's peoples.<sup>45</sup> States overall were not pleased with this claim, but some—Canada, for example—tended to go along, particularly insofar as it might serve other state purposes, usually to diminish the power of the world's remaining superpower, in the traditional geopolitical habit of middling states.<sup>46</sup> And the precedent for NGOs join-

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dissonance for Annan in relation to the international NGOs and new transborder social movements, and 9/11, as the text discusses, was a game changer, as it were, in Annan's attentions.

45. This is explicitly Maxwell A. Cameron's argument in his essay, which appeared at the high water mark of theorizing of international NGOs as the interlocutors of states and international organizations in a new form of "democratized" global governance in 1998. Cameron, *Democratization*, *supra* note 39, at 437, 444.

46. As Eric Posner notes in his book, the final results of the landmines movement might be as explainable by the traditional realist hypothesis that medium sized and middle power states, such as Canada, in effect supported and brought the Ottawa treaty about because, as with many other initiatives in international law, it supported their power positions by using rhetorical tools to bind the superpower. The NGOs were not irrelevant in this process, but it is mostly explainable by state-centric mechanisms, not some grand theory of international politics. ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* 62–64 (2009).

I do not share Posner's skepticism, at least nowhere to that extent. My misgivings about NGOs, on the contrary, largely stem from the view that they are only too able to leverage their voices into debates above their level of legitimacy. I think that is true with respect to issues with which I disagree with the progressive NGO view *and* ones with which I agree, such as the landmines ban. On the factual question of the effectiveness of NGOs in doing something that governments would not otherwise have (eventually) done, my view, as an insider and academic of that process, is that the international campaign to ban landmines would not have achieved a widely accepted treaty—certainly not as quickly—had the NGO movement not been so visible and so vocal, but also had the government of Canada not decided to make it Canada's foreign policy objective of the later 1990s. I do not slight the NGO campaign in saying that Canada's decision essentially to turn its entire worldwide diplomatic apparatus over to the NGO campaign gave access and lines of communication that otherwise would have made the campaign perhaps one of those unending but never quite "closing" campaigns. Canada's actions, however, while

ing in treaty negotiations was already on the table after the landmines campaign—although, quite distinct from most other treaty negotiations, it was in the first place sponsored as much by the NGOs themselves.

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compatible with its own vision of itself as the “moral” internationalist, are also compatible with what, in those years, was widely seen as the interests of middling powers, to constrain the United States.

Moreover, the personal ambitions of Canada’s foreign minister in those years, Lloyd Axworthy, to win the Nobel Peace Prize, cannot be ruled out as a factor, and for that matter, ambitions among the NGOs and their leaders, as well. The ugly competitions among the various ‘virtuecrats’ for the Prize were, at least to me, astonishing—not least because they were conducted in the way that Angels of Mercy conduct their internecine competitions: the passive-aggression worthy of middle-school girls. The level of distraction they caused within the broader ban campaign was enough to persuade me that the merest hint of awarding some worthy cause the Prize suffices to derail that cause from its mission of goodness. As applied to Posner’s thesis, it bears noting that the NGOs are not the only “private” activities in such a campaign; personal ambitions, honor, glory, and a host of other factors are also at play. I doubt that Posner would deny that they have a place subsumed within larger state interests—but put that way, I think it underplays the sheer personal ambitions of Axworthy, Williams, and several others. Western realists persistently underestimate *gloire* as an individual motive—something Machiavelli, Hobbes, and Thucydides never did (and thanks to Philip Bobbitt for recalling this historical point to me).

In any case, we must be clear on what the campaign achieved and did not achieve: a ban treaty that has received adherence from a vast number of the world’s States, in some cases almost certainly insincerely, but with surprisingly plain rejection by precisely those States that must contemplate fighting a serious war in which losing is a serious possibility, which is to say, among others, the United States, India, Pakistan, China, Taiwan, and all the Middle East. Or countries with international borders, such as the Korean peninsula, in which unilateral removal of landmines could be as profoundly destabilizing as the introduction of nuclear weapons. Presumably the strategic calculus in favor of clarity lies in signaling to one’s likely enemies that all weapons, at least conventional ones, are on the table, and that breaking the status quo will be costly in materiel.

It does not detract from the achievement of the landmines ban treaty to note that it has received almost precisely the adherence that power theories would predict, but not more. In treaty matters, as the economists teach us, what matters is behavior on the margin. The fact that Germany adheres to the treaty does not really matter because, as Afghanistan demonstrates, Germany does not intend ever to fight (although it does write quite outstanding laws of war manuals which receive remarkable numbers of citations for documents never really used in practice), while the fact that India does not adhere *does* matter, because one of these days, it might. Yet for all that, finally, the NGO movement was an indispensable catalyst on the front end, and scourge to see it through on the back end. See Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT’L L. 445, 452–53 (2003).

### III. LEGITIMATION CRISIS: GLOBAL GOVERNANCE AND DEMOCRATIC SOVEREIGNTY

The institutional UN sought to elevate the UN's own intellectual and ideological claims to governance by treating NGOs as the locus of the legitimacy of the world's 'peoples'. The NGOs, for their part, elevated their own intellectual and ideological self-conception by treating themselves (and inviting the UN and the rest of the world to treat them), not merely as international NGOs, but as something mysteriously called 'global civil society'. Why this special term and what was its special significance? Why shift from calling international NGOs by a plain, practical, descriptive term—nongovernmental organizations—to calling them by a term far more laden with ideological significance in social and political theory, the far more intellectually portentous, but also ideologically fraught—'global civil society'?<sup>47</sup>

The origins of the terminological shift lie in the effort by intellectuals and theorists of the landmines ban campaign to draw larger lessons—with respect to both future NGO activity in very different fields as well as the very conception of globalization and global governance—from the leading role played by NGOs themselves. The increasingly fawning overtures made to the NGO community in this period by their counterpart intellectuals and theorists within international organizations, the UN Secretariat and its so-called "modernizers"—those UN strategists who saw the transformation of the organization as dependent upon finding a source of legitimacy that would 'go around' the Member-States directly to global populations and constituencies—also played a role.<sup>48</sup> This was also the period, after all, in which the International Campaign to Ban Landmines and its coordinator, Jody Williams, won the 1997 Nobel Peace Prize over state officials, such as then-Canadian foreign minister Lloyd Axworthy, who had thrown all the weight of Canada's worldwide

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47. Among the voluminous literature on "global civil society," the source that stands out is the yearbook series, *GLOBAL CIVIL SOCIETY* (Helmut Anheier, Marlies Glasius & Mary Kaldor, eds.). The series features empirical as well as conceptual articles on global civil society.

48. The whole proposition linking this newly described phenomenon of "global civil society" and the institutional UN was laid out in U.N. Secretary-General, *We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations–Civil Society Relations*, ¶¶ 68–72, U.N. Doc. A/58/817 (June 11, 2004).

diplomatic service behind the ban campaign and who might have thought that their efforts deserved equal recognition.<sup>49</sup>

As a theoretical matter, however, NGOs, merely as such, are what they are—simply organizations consisting of interested individuals. Their motivations might be noble, altruistic, cosmopolitan, and so on, but they are, as a matter of political role, simply organizations that attempt to persuade international organizations, states, or others in authority, to act—sometimes on the basis of NGO expertise and sometimes simply on the basis of their enthusiasm and ability to influence the national governments where they hold some level of political capital. Unsurprisingly, NGOs are most active in the world's democratic states in which citizens' groups can make themselves heard and their influence felt.<sup>50</sup>

Expertise, even when genuine, and enthusiasm are not ordinarily considered sufficient to give one authority, however.<sup>51</sup> The moral authority

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49. See Jody Williams, Nobel Laureate for Peace, Nobel Lecture at Nobel Peace Prize Ceremony (Dec. 10, 1997) (transcript available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/1997/williams-lecture.html](http://nobelprize.org/nobel_prizes/peace/laureates/1997/williams-lecture.html)).

50. John Bolton provides a telling practical example of the way in which international NGOs operate in the quasi-alliance among international NGOs, sympathetic middling states, and UN bureaucrats in his description of the fights surrounding the UN's attempts to create a small arms and light weapons control treaty—an effort that, in the hands of gun control NGOs, quickly morphed from a useful attempt to control the rampant spread of light weapons from the arsenals of the former Soviet Union across Africa into a campaign to create an international treaty that would effectively seek an end run around handgun laws in individual states, and the United States in particular. JOHN BOLTON, *SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND ABROAD* 87–92 (2007). That long term campaign, and counter-campaign, is ongoing, but Bolton, in his memoir of his time in the State Department and as U.S. ambassador to the UN, offers a revealing view of how NGOs pursued influence in the endless rounds of meetings—“wear the United States down until only its key issues are unresolved, declare it isolated, and then use the sleeplessness and frayed tempers of many late-night sessions to press us to ‘join consensus’ and avoid ‘isolation.’” *Id.* at 91.

51. Martin Shapiro astutely observes however, that the shift from government to governance marks a “significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 9 (2004) (quoting Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 *IND. J. GLOBAL LEGAL STUD.* 369, 374 (2001)). One result is “to advantage ‘experts and enthusiasts,’ the two groups outside government that have the greatest incentive and desire to participate in governance processes; however ‘while the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us. Few of us would actually enjoy living in a Frank Lloyd Wright house.’” *Id.* at 9–10 (quoting Martin Shapiro).

Shapiro makes a crucial point. Indeed, my text above comes close to saying that expertise is enough, so long as “representativeness” by NGOs is not proclaimed. But that is actually too much of a concession on my part, in consideration of Shapiro's observa-

of NGOs in the international arena had traditionally rested upon recognized expertise and effectiveness in their particular missions—the relief group, for example, whose acknowledged record in wartime humanitarian aid gave a certain practical as well moral authority to its views before international bodies in areas of its subject matter. The ICRC was always the model—careful, precise, never flamboyant, typically self-effacing, and above all *competent* in its areas of expertise. But the ICRC, and international NGOs seeking to model their efforts at global public policy on its example, never sought to claim a role in governance as such.<sup>52</sup>

Indeed, the contrast between the ICRC and everyone else is instructive. The nature of the ICRC's mission is far more automatically self-limiting than that of the human rights and other “values” based international NGOs. The ICRC's ostensible mission is the narrow conditions of humanitarian relief in the most dire conditions in which the baseline moral theory is that no one—no side—can rationally, let alone morally, object to the provision of humanitarian relief to the suffering noncombatants.<sup>53</sup>

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tion about experts and enthusiasts under regimes of “governance” rather than “government.” Were I giving a full statement of my view, it would be far closer to Shapiro's on this essential matter. For that matter, we ought not to leave this without noting how much the debate owes to two scholarly works: MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); ALBERT O. HIRSCHMAN, *EXIT, LOYALTY, AND VOICE* (1970). Experts and enthusiasts are able to gain their special traction through Olson's collective action problem. OLSON, *supra* note 51. And the problem of the “governed” in this case is that there is no obvious mechanism, faced with the passions of experts and enthusiasts (and those for whom they are the same thing), for the governed to make an “exit” from their regimes of governance. See HIRSCHMAN, *supra* note 51, at 60–61.

52. The ICRC stands, however, in a position slightly different from that of any other international NGO. Indeed, in an important sense, the ICRC *does* have a limited, recognized, treaty-based role in governance in the laws of war. The 1949 Geneva Conventions give juridical recognition to the unique role of the ICRC in conveying neutral humanitarian aid and relief; in convening conferences and treaty negotiations in international humanitarian law; and in acting as the repository of sovereign accessions to the Geneva Conventions. In other words, when it comes to drafting international humanitarian law treaties, the ICRC *does* have a juridical seat at the table, and might well chair it. This privilege has been far from irrelevant to the ICRC; unsurprisingly, it has been not entirely enthused about the barbarians at the gates, as it were, the hoi polloi of the NGO movement seeking to join negotiations on roughly the same terms. But the ICRC claims to a role in the “governance” of international humanitarian law have always been based on the assertion of its unique neutrality, not, as the text elaborates with respect to the general international NGO movement, representativeness and intermediation.

53. The ICRC's stated mission is as follows: “The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.” *The ICRC's Mis-*

The rationale of what one's mission, legitimacy, reach can be when constrained by the notion of "bare rationality" to which no one could object can, and has been, stretched in practice. It has been most stretched in practice at the ICRC in its efforts to shepherd along the trends of international humanitarian law—the temptation to extend is harder to resist than it is when confined by bare humanitarian necessity as a justification.

Nevertheless, despite some temptation to inflate a bubble of idealism, the nature of the ICRC's work contains a large amount of automatic deflators. That is not so with the rest of the human rights NGOs, for whom the tendencies point overwhelmingly to inflate one's sense of self-importance, reach of mission, and definition of that upon which one should both opine and be heard. The tendency starts from the fundamental problem that anything can, if one likes, be formulated as a human right; the rhetoric starts from an inflated bubble and carries on from there. But these tendencies to inflate are independent of the claims of expertise and competence; they raise their own problems, quite separately, that we all understand that the line between "neutral" expertise and expertise that somehow magically drives without fail to a given policy end, interested and disinterested technocracy, is far more of an artifact than reality, at least in these inevitably values-driven matters of human rights. When one's expertise lies in "human rights"—even when it is the "law" of human rights—to take the simplest example, expertise is itself a set of ideological commitments, good or bad. In Martin Shapiro's terms, in these matters, at least, the "experts" are inevitably also "enthusiasts."<sup>54</sup>

The success of the landmines ban campaign, however, including the resulting attention from senior leadership of international organizations, convinced theorists of the international NGO movement that it was something more than merely a collection of organizations speaking for themselves.<sup>55</sup> The intellectuals and theorists of the international NGO movement developed an ambitious political and social theory that reconceptualized international NGOs into something politically and ideologically suitable to serve as a partner to public international organizations—the UN—in the service of global governance. This reconceptualization drew upon an old political and social theory in Western intellectual tradition, the theory of civil society, and asserted it as a

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*sion Statement*, INT'L COMM. OF THE RED CROSS (June 19, 2008), <http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm>.

54. Shapiro, *supra* note 51.

55. See Kenneth Anderson & Monica Schurtman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 HARV. INT'L L. J. 359, 359 (1995).

paradigm at the global level, as 'global civil society'.<sup>56</sup> The conventional account of global civil society—but also its unconventional, skeptical critique—runs approximately as follows; it begins again where this Essay began.<sup>57</sup>

Economic globalization has taken place through innovations that have brought down the cost of transportation and, even more dramatically, communications across borders and over long distances.<sup>58</sup> That implies, in the view of many, a corresponding need for political globalization to address the many issues of coordination that arise when economic activities (in the broadest sense of movement of goods, services, capital, and labor) can shift increasingly freely around the world.<sup>59</sup> Political globalization can take either of two main forms, however, a minimalist form or a maximalist form. The minimalist form says that globalization can be given such regulation as it requires by coordination of sovereign jurisdictions without, however, giving up the essential attribute of sovereignty<sup>60</sup>—a political community, without a political superior.<sup>61</sup> Cooperation

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56. The leading statement was given by the left wing British political theorist John Keane, in his influential and impressive book published in 2003 which drew upon his theoretical work over the previous decade. JOHN KEANE, *GLOBAL CIVIL SOCIETY* (2003).

57. This is a version of the critical argument offered in Kenneth Anderson & David Rieff, *Global Civil Society: A Sceptical View*, in *GLOBAL CIVIL SOCIETY 2004/5*, at 26 (Helmut Anheier, Marlies Glasius & Mary Kaldor eds., 2005).

58. Although the specific facts are now out of date, the argument is as relevant as ever. See ALAN RUGMAN, *THE END OF GLOBALIZATION* (2000) (arguing that much of what is understood as globalization is really the lowering of communications costs and anything digitized that can be transmitted relying upon such technologies. Things that weigh, and hence have transportation costs associated with them, still have transaction costs of movement, and hence there is a noticeable tendency to regionalization of such goods).

59. For an excellent introduction to the social theory of globalization, see MALCOLM WATERS, *GLOBALIZATION* (2d ed. 2001). Waters sets out the sociology relevant to the argument that economic globalization implies some form of political globalization.

60. The argument for coordination among sovereigns as the proper form of political globalization is laid out in Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1259–66 (2005) [hereinafter Anderson, *Squaring the Circle*]. It is also what Francis Fukuyama calls for as the position of the United States after neoconservatism, in FUKUYAMA, *supra* note 6, at 155–80; likewise, JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004). Yet this position is not that far, in principle, from the global government networks approach offered by SLAUGHTER, *supra* note 51. Much of the difference has to do with where you think the process should, over the long run, wind up—as permanent multilateralism among sovereigns or some sort of gradually emerging, genuinely global governance.

61. Borrowing Lincoln's classic formulation. Abraham Lincoln, Message to Congress in Special Session (Jul. 4, 1861).

and coordination among sovereigns, even entering various political arrangements that would provide for arbitration and rule-making in matters as diverse as the environment or public health, can be robust, yet without ever conceding the fundamental attributes of sovereignty: call this 'robust multilateralism.'

The maximalist form says, on the contrary, that globalization requires an ultimately federal system in which sovereignty of individual nation-states is given up in favor of a central locus of governance that can enforce behavior in the collective interest, rather than a situation of individual countries forever breaking the rules in their immediate self-interest, whether the matter at issue is economic, security, or something else.<sup>62</sup> Maximalists ordinarily point to the UN as the forum that should gradually evolve from a forum for multilateral discussion and, sometimes, cooperation and coordination, into a true global government. The term 'global governance' is currently favored over the more plain 'global government' because, as it became clear in the course of the 1990s that nation-states were not interested in giving up their sovereignty as such to a global government, theorists of political globalization invented a new theory by which the UN would exercise "governance" without (somehow) actually being the "government."<sup>63</sup>

What speaks in favor of the maximalist model? The practical argument is that no effective global coordination or cooperation will last over the long term except by a single global governor, able to enforce law and regulation in the classic definition of law as command backed by the effective threat of coercion. That argument appeals to realists, for whom the test of law really is a command backed by an effective threat.<sup>64</sup> Equally important, however, is the idealistic argument—indeed, this is the one that has always appealed to the global bourgeoisie, the emerging middle classes from the dawn of the modern era onwards—that the world and history are gradually progressing toward a unified world, in which individually sovereign states must gradually give way to a global government for the cooperative good of all. Particularly given that nation-

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62. The literature on this proposition is nearly endless. See, e.g., Antonio F. Perez, *Who Killed Sovereignty: Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L. J. 463 (1996). Perez, like many (including me) who started out enthusiastic about global governance and the supposed erosion of sovereignty, over the years has become much, much more cautious.

63. The conceptual machinery behind the terminological shift was given by WOLFGANG H. REINICKE, *GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT?* (1998).

64. See generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2090–94 (1995).



states are established precisely on the principle of the ability to exercise ultimate control over activities within their territory—why should a global political system not require precisely such reach? It is an argument from idealism that takes the successful nation-state as the model for what a global order ought to look like, even though that means supplanting the nation-state itself. Indeed, it is a form of constitutionalism—global constitutionalism—and is often represented as such.<sup>65</sup>

The minimalist position—the defender of national sovereignty, even if committed to robust multilateralism—usually comes off in this comparison as the retrograde stance: defender of crude sovereignty and the privileges, justified or not, of states simply because they are states. But there is both a realist and idealist argument to be made for the ‘sovereigntist’ position. First, the necessary regulation of the global economy *can* take place among sovereigns; the range of things that can be undertaken will almost certainly be shorter and narrower and regulation less satisfyingly global than it would be under a genuinely federal constitutional system for the planet as a whole. Regulation of trade, in which the benefits of adhering to a common system even when one loses sometimes in rulings and arbitration vastly outweigh the costs of staying out, is likely to gain in solidity over time.<sup>66</sup>

Security, on the other hand, is likely to remain fragmented; the costs of adhering to a system that might pose to important players, if not existential threats, then very serious ones, makes it a matter of adherence that is discontinuous with an activity such as trade. But the idealist argument explains why, in any case, this should be: the idealist argument for sovereignty, for robust multilateralism without giving up sovereignty, asserts the intrinsic value of a self-governing political community, a democratic political community, one that obtains its legitimacy from the consent of its members.<sup>67</sup>

If that ideal argument has merit, then a certain amount of departure from maximalist efficiency in running the world is merited in the interests of self-government. It will be observed, however, that this idealist argument in favor of sovereignty is most particularly an argument in fa-

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65. See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51 (2006) (de Wet's footnotes are especially helpful in tracing through the full impact of this thought in contemporary European public international law).

66. Unsurprisingly, therefore, the most successful of the international governance organizations has been the World Trade Organization; the least successful have been those related to collective security.

67. This is not always a “conservative” position. In particular, see, Jed Rubenfeld, *The Two World Orders*, WILSON Q., Fall 2003. Rubenfeld, a leading constitutional law scholar at Yale Law School, is very, very far from being a conservative.

vor of *democratic* sovereignty, in which sovereignty is genuinely an expression of the consent of the governed.<sup>68</sup> Not all the idealistic arguments are on the side of global governance, with merely a crabbed realism counseling against—although one would scarcely know it, to survey the literature, which frankly soars into a limitless Platonism over the future possibilities of a unified, globally governed world.<sup>69</sup>

#### IV. THE INVENTION OF 'GLOBAL CIVIL SOCIETY'

If, however, one is persuaded by the global governance position, whether on realist or idealist grounds, or both, then one must confront the question of legitimacy that the UN's own theorists of global governance confronted. For them, the international NGO movement could provide that legitimacy, the will of the peoples of the world, that otherwise seemed lacking. But this role also corresponded nicely, in the view of other theorists of international NGOs and global social movements, with the concept of civil society in a domestic society.<sup>70</sup> By the 1980s, 'civil society' (which has a very long and, importantly, shifting lineage in Western political and social theory<sup>71</sup>) had come to mean the "independent sector,"<sup>72</sup> as theorized especially by intellectuals of the new social movements and dissident writers in such movements as Poland's Solidarity. That is to say, social institutions that were neither the market nor the state, the NGOs, the social movements, citizens groups, religious organizations, some political but many not, which gave meaning and social texture to individuals' lives.<sup>73</sup>

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68. I make this argument at greater length in Anderson, *Squaring the Circle*, *supra* note 60, at 1266. As expressed in that article, "we are all idealists now." *Id.*

69. Platonism about global governance and the United Nations reaches its fullest flower in PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* (2006). "UN Platonism" is a term that I have borrowed from Michael Glennon. See Michael J. Glennon, *Platonism, Adaptivism and Illusion in UN Reform*, 6 CHI. J. INT'L L. 613 (2006).

70. A useful introduction to the historical and contemporary uses of the term is found in *CIVIL SOCIETY: THEORY, HISTORY, COMPARISON* (John A. Hall ed., 1995).

71. See MARVIN B. BECKER, *THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY: A PRIVILEGED MOMENT IN THE HISTORY OF ENGLAND, SCOTLAND, AND FRANCE* (1994) (an outstanding study of the role of civil society in a certain place and time in history).

72. The archives of the critical theory journal, *Telos*, with its emphasis on critical European thought and social theory, especially from Eastern Europe, are vital sources in understanding the evolution of thinking around the concept of civil society as it emerged in the 1980s and 1990s.

73. See, e.g., JEAN L. COHEN AND ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992).

In democratic societies, the civil society organizations were a mechanism by which citizens could organize to express and press and advocate for their views. In undemocratic authoritarian and totalitarian societies, civil society organizations were sometimes swept up by or co-opted by the state—the union of the Church and fascist political authority by Franco's Spain,<sup>74</sup> for example. In the 1970s and 1980s, as civil society organizations began to thrive as the forbidden, and later half-forbidden— forbidden but tolerated within certain bounds—in the Soviet empire, they served as a means of pressing authorities with an implicit claim to represent the 'true' interests and desires of the people. The difference in the role of civil society organizations in the two types of society is crucial.<sup>75</sup>

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74. See, e.g., VÍCTOR PÉREZ DÍAZ, *THE RETURN OF CIVIL SOCIETY: THE EMERGENCY OF DEMOCRATIC SPAIN* (1993).

75. In identifying the contrasting roles of civil society in settled domestic democratic societies bearing democratic legitimacy with undemocratic societies lacking fundamental legitimacy domestically, I am leaving aside two otherwise crucial points about legitimacy.

First, legitimacy is not an on-off switch; a society or a regime of governance either has it or it does not. It is not that simple. Indeed, it is so far from being that simple that legitimacy is not well explained as a matter of "degree" along a sliding continuum, either. The legitimacy of a governing regime, for example, is not confined to having "more" or "less" legitimacy. Rather, the crucial question with regards to legitimacy is instead, "Legitimacy for what?" Maintaining basic law and order on the streets, or essential public services, even in a repressive, undemocratic regime? Collecting taxes? Undertaking war?

Regimes of governance can and often do have "general" legitimacy, a legitimacy of general "status," because the fullest form of legitimacy is a sort of latency, a residual propensity to adhere among the governed. That is what we ordinarily associate, in Weber's terms, with the general status-legitimacy of settled domestic societies and their governance. See Weber, *supra* note 41.

But on the margins, the question is not status-legitimacy, nor is it possessing "more" legitimacy or "less," but instead legitimacy to what particular ends. In Fujimori's Peru, the regime's ordinary police officers had the legitimacy to stop speeders in cars on the highway; its investigators had the legitimacy to pursue Sendero's leader, Abimael Guzman; and to be clear, this otherwise most illegitimate of regimes nonetheless *had* the legitimacy to fight Sendero Luminoso and the Tupac Amaru urban guerrillas. See Peter Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, 44 *AUSTL. J. POL. & HIST.* 373, 382–84 (1998). The law of occupation offers another example of this sense of "legitimate" order amidst what might well be regarded by many people internally as the essential "illegitimacy" of the occupier. (I am grateful to conversations with Stephen D. Krasner on exactly this matter of particularized points of legitimacy even amidst a broader regime of illegitimacy, and its flip-side, particularized points of illegitimacy amidst a broader regime of legitimacy. Interview with Stephen D. Krasner, Professor, Stanford Univ. (Jan. 13, 2011)).

In a genuinely democratic society, civil society organizations are free to advocate, organize, argue, debate, and cajole. Ultimately, however, political authorities are accountable *not* to civil society organizations, but instead to citizens who vote in the privacy of the voting booth. The legitimacy of the democratic system depends, ultimately, upon the free and

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The second is that the world is filled with many states that are both non-democratic and legitimate. Not necessarily good—but still broadly legitimate. Some of them correspond to what Weber described as “traditional” bases of legitimacy in genuinely traditional societies—although those bases, as well as those regimes, come under increasing pressure in the modern world. Bases of social legitimacy abound even in the modern world, ranging from (still) the divine right of kings to “he who prevents the tribes from slaughtering each other” and many bizarre and frankly bad rationales of legitimacy. Moreover, legitimacy in the modern world as Weber himself conceived it was not about democracy or consent, but rather was about the rise of the bureaucratic and administrative state, replacing traditional and charismatic sources of legitimacy with those of administrative efficiency, the “rational-legal” authority of the state—not consent of the governed as such, for Weber, after all, was a product not of America but Germany. *See* Weber, *supra* note 41.

At this moment, the rising notion of legitimacy in the world is not democracy and consent, but the legitimacy of an authoritarian government that leverages the “coherence” given by its authoritarianism, command-and-control, to create rapid economic growth: China and its would-be imitators. In that sense, legitimacy is, as Weber suggests, simply a matter of fact about what a people and a society will accept as “legitimate.” *See* Weber, *supra* note 41. (For purposes of this Essay, I leave aside saying more either about genuinely “traditional” societies, or conceptual views of legitimacy that introduce genuine normativity, beyond simply the fact of what populations accept.)

In societies whose governance is undemocratic and yet broadly legitimate, however, the notion of civil society is quite different—or quite possibly, largely nonexistent. It is a profound mistake to assume that all associations of private life should be construed as “their” form of civil society—civil society is a commitment that arises in a specific social and political history and is not in that sense ‘universal private life.’ Far from it. Even if it arises prior to the rise of genuine universal democracy—late-arriving, after all—it is deeply associated with private association *in public life*. It is in this meaning contrasted with the withdrawal into private life—the consolations of private life and family away from the public square. They have different social functions and correspond to different human values.

Civil society, even if it historically antedates universal democratic states, is utterly historically intertwined with notions of governance by some form of *public consent*. That is not the case with many forms of legitimate, but not democratic, society, and with the notion of private life as such, which may or may not be civil society. The discussion above does not address these kinds of societies. One might say, speaking normatively, that they ought to develop both mechanisms of genuine public consent at the level of the state, and concomitantly civil society as well. That they are broadly legitimate is not at issue—although recent events in the Arab world serve to point out that “legitimacy” can be real, and yet vanish quickly—but what they can teach us about civil society, including global civil society, is really very little, because, structurally speaking, they don’t possess it.

unconstrained vote of the citizens. Civil society organizations are important to the free flow of information and debate and policy in society—but they are not the guarantor of its legitimacy. In particular, in a domestic, democratic society, civil society is immensely important to the robust and intelligent functioning of democracy, especially representative democracy, but civil society is conceived as neither ‘representative’ nor as a necessary political ‘intermediary’ between government and the governed. The ballot box plays that role instead.<sup>76</sup> Legitimacy in a democracy is given by people raising their hands and voting—not by the presence of citizens or activist groups as civil society, however important they may be to articulating versions of a society’s politics.

In an undemocratic society that nonetheless tolerates *some* level of civil society organizations, however, matters are quite different. There is no ballot box to convey legitimacy and, if democracy in fact matters, then in an important sense the society’s governance is not (fully) legitimate. Legitimacy is not always conveyed by democracy, to be sure; historically, democracy is a rather special idea, in a historical world in which legitimacy was conveyed by kingship, by blood, by kinship, by religious sanction—by mechanisms in which the consent of the governed was scarcely at issue and certainly not by specifically democratic mechanisms and voting.<sup>77</sup> In the world that has emerged since 1945, however, the secular trend has been toward a world in which democratic consent in some fashion, and most usually by the ballot box, has been understood as a *sine qua non* of legitimate government.<sup>78</sup> But what happens to civil society, what is its role in an otherwise modern society that lacks democracy or

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76. For a fascinating account of the rise of the ballot box and the secret ballot, see Jill Lepore, *Rock, Scissors, Paper: How We Used to Vote*, THE NEW YORKER, Oct. 13, 2008, at 90.

77. The notes have earlier stipulated that this discussion utilizes only a crude, non-technical, broadly Weberian notion of legitimacy. However, the legitimacy for the purposes sought in genuinely federal global governance requires more than a *politics*—it requires a *society*, in Weber’s sense and for Weberian reasons. The kind of legitimacy that now exists in the UN is essentially political in nature and derivation, because there is no international society in the sense of actual people. The international society of states offers an analogue, a homologue, of legitimacy within domestic social orders, but that is a political construct taken by analogy to the social legitimacy found within actual societies. The political legitimacy of the international order is limited and analogical, as Thomas Franck acknowledged in his influential book, THOMAS FRANK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990).

78. A point argued by some even as a matter of international law. See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992) (international legal scholar Thomas Franck, writing in 1992, that democracy “is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes”).

democratic legitimacy? Either civil society is repressed, often brutally, as in a truly totalitarian society. Or else tolerated—precisely because it serves as a political safety valve for the broader democratic aspirations of the population. Either way, however, what it cannot do is *actually* offer democratic legitimacy, because it is not the ballot or the ballot box.

Indeed, in fascist regimes, such as Mussolini or Franco's, the "officially" accepted organizations of what we might call 'faux civil society' were explicitly treated as representative, intermediary organizations between the people and the state, in a corporatist sense.<sup>79</sup> The Communist dictatorships did something similar.<sup>80</sup> The ruling elites of these undemocratic societies knew perfectly well that they lacked ballot box legitimacy—or at least were unwilling to test it, over and over again, in the way of a long term, stable democracy—and so substituted organizations of 'faux civil society' as the supposed legitimating intermediaries between state and people. This is political "corporatism," not democracy or republicanism.<sup>81</sup> Organizations of genuine civil society, such as Solidarity in Poland, constantly wrestled with what its role should be in an *undemocratic* society.<sup>82</sup>

In the conventional account, global civil society is offered as the global homologue of civil society in a settled domestic society. For several years, this analogy seemed unimpeachable; global civil society would act as civil society does in an ordinary domestic society. It would agitate, advocate, cajole, demand, organize, lobby, and do all the functions of organizations and social movements in a settled domestic society. But gradually, the question arose as to what *kind* of domestic society and what *kind* of civil society. The civil society of a domestic democratic

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79. See, e.g., DÍAZ, *supra* note 74.

80. See, e.g., C.J. Albertie, *Survey and Critique of Russian Law and Its Effect on NGOs*, 2 INT'L J. CIV. SOC'Y L. 12 (2004); Marcia A. Weigle, *On the Road to the Civil Forum: State and Civil Society from Yeltsin to Putin*, 10 DEMOKRATIZACIYA 117 (2002); ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, & LEGITIMACY (2000).

81. I am here adapting an argument against global civil society as bearer of democratic legitimacy offered by John Bolton who was, so far as I know, the first person to articulate it in the current debate. "It is," Bolton writes, "precisely the detachment from governments that makes international civil society so troubling, at least for democracies . . . the civil society idea actually suggests a 'corporatist' approach to international decision-making that is dramatically troubling for democratic theory because it posits 'interests' (whether NGOs or businesses) as legitimate actors along with popularly elected governments . . . Mussolini would smile on the Forum of Civil Society." John Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 217–18 (2000). But it is noteworthy that a serious, reflective, liberal internationalist such as Anne-Marie Slaughter has taken the essence of the criticism on-board in her own call for governance via global government networks, not NGO networks. See SLAUGHTER, *supra* note 51.

82. See, e.g., POLAND: A COUNTRY STUDY (Glenn E. Curtis ed., 1992)

society, in which legitimacy ultimately flowed from votes of citizens, and in which the function of political civil society was to organize and channel—but not pretending to stand, because of the independent existence of the ballot box, as corporatist intermediaries or representatives between the people and their government? Or the civil society of an undemocratic society, in which, precisely because of the state's undemocratic character, civil society was—by necessity, by opposition, by coalition, by whatever mechanism—treated as a representative and intermediary?

Given that the international system—the UN system—the system of global governance, to the extent it existed or could be, among international idealists, imagined into being, was palpably *not* democratic, then these international NGOs, recast as a matter of ideology as 'global civil society,' were likewise palpably not the organizations of civil society of a democratic society. This did not matter much, so long as the aspirations of the players in the system—the governance ideologists of the UN system and their confreres among the international NGOs—did not extend to matters of global importance. The fact that the international system lacked specifically *democratic* legitimacy did not so much matter when the issues presented to the system were either narrowly technocratic or else matters of mere multilateral negotiation among states, not claims for the UN to govern in its own name.<sup>83</sup>

But by the mid-1990s, the aspirations of this global system were reaching beyond the legitimacy that could be said to attach to the earlier system. The UN was seeking to take on governance tasks that quite apparently required much greater legitimacy than the existing system had or could claim to possess, given the available sources of legitimacy—effectively delegation from the member-states.<sup>84</sup> It was doing so as a strategy of a virtuous circle—leveraging up its legitimacy by leveraging

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83. There is, of course, another possibility altogether, the customary radical move—that democratic legitimacy is a red herring that does not matter. On the contrary, it is merely a front argument from reactionary defenders of sovereignty. Legitimacy does not require democratic participation as such. This is approximately the radical left view offered by global civil society activist and scholar Alison Van Roy in ALISON VAN ROOY, *THE GLOBAL LEGITIMACY GAME: CIVIL SOCIETY, GLOBALIZATION, AND PROTEST* (2004). It is a form of radical argument distinct from the "redefinition" of participation, representation, and democracy response, however, found in David Held and others, and critiqued separately below. See *infra* note 90; DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995).

84. See, e.g., Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605 (2008). For a representative list of the tasks the UN undertook, see *Honouring 60 Years of United Nations Peace Keeping*, UNITED NATIONS, <http://www.un.org/events/peacekeeping60/1990s.shtml> (last visited May 16, 2011).

up its governance activities, so to acquire more legitimacy, and so on round and round. Moreover, it was *also* being assigned such tasks by powerful nation-states (not infrequently including the United States) seeking to offload global obligations from their own shoulders.<sup>85</sup>

Peacekeeping, peace enforcement, weapons of mass destruction anti-proliferation, human rights in an ever expanding array with reach into individual sovereign states, the security problems of failed and failing states—these issues, especially as they reached inside states, were understood to require greater legitimacy than offered by the multilateral system of Member States of the UN. That legitimacy, in order to legitimate such governance, required overcoming the so-called “democratic deficit”—a deficit also identified and much debated in the context of the European Union. Indeed, for numbers of global constitutionalists—global federalists of global governance located in European academic and policy centers—the European Union offered the way forward for the world. It had achieved, in the minds of its architects and civil servants, at any rate, democratic legitimacy without all the ordinary trappings of nation-state democracy—and the same model could, with sufficient attention, be ramped up to the world as a whole.<sup>86</sup>

In that case, however, legitimacy that was close to democratic legitimacy—ballot box legitimacy—was required and, yet, at the planetary level, not really imaginable. Some dreamers dreamed—and still do—of a planetary parliament directly elected by populations around the world.<sup>87</sup> Most others—even many who are otherwise deeply committed to the political ideals of global governance in a globally federal system—accept that planetary democracy in that sense is meaningless and unachievable.<sup>88</sup> Among its many difficulties, it confuses the limits in space and

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85. For example, see CHOLLET & GOLDGEIER, *supra* note 33, at 272–75, on the U.S. seeking to find ways to utilize the UN against terrorism and other issues in the Clinton years.

86. See, e.g., de Wet, *supra* note 62 (describing an international system, and annotated with compelling footnotes). Much of this is challenged, with an equally engrossing set of footnotes, in Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 532–38 (2003).

87. See, e.g., Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212, 216–20 (2001).

88. Anne-Marie Slaughter, for example:

Yet world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty. Further, the diversity of the peoples to be governed makes it almost impossible to conceive of a global demos. No form of democracy within the current global repertoire seems capable of overcoming these obstacles.



population upon what can be genuinely called a 'democracy' with the unlimited, potentially infinitely upwardly scalable, networks of a common market.<sup>89</sup> The latter becomes more efficient the larger it becomes; the former breaks down. The world's great democratic societies are tradeoffs, sometimes uneasy ones, between the political requirements of democracy, which counsels limits on size, and the economic blessings of an ever larger common market. But, in the search for legitimacy in a system that, imagined for the planet as a whole, is too large for ballot box legitimacy, but which proposes tasks for which the legitimacy is greater than that which can be conveyed 'upwards' by Member States to the UN as a multilateral exercise—what is available?

The NGOs, of course, are available. But in that case, the form of analogy with domestic civil society is *not* that of a democratic society, but instead one in which necessarily the NGOs act in the absence of the ballot box. They are therefore treated as a kind of ideological stand in for democratic institutions and in that sense resemble civil society in an undemocratic state. Why does it matter? It matters because under these conditions, this global civil society is treated by the international system, by the UN and its administrators and governors and ideologists, as representative and intermediaries of the 'peoples of the world' who do not otherwise have a direct vehicle for their expression.<sup>90</sup> The conventional

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SLAUGHTER, *supra* note 51, at 8.

89. Researchers who study global democracy have noted the size and population constraints—smaller along both dimensions makes democracy easier and more likely. See Larry Diamond & Svetlana Tsalik, *Size and Democracy: The Case for Decentralization*, in LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 117–60 (1999).

90. For many, to be sure, and the NGOs not least among them, this is a feature, not a bug. It is the argument laid out by, for example, David Held and his co-authors in many books and articles—that legitimacy does not require democracy in the ballot box sense, and that legitimacy in the sense of consent can be got by many different mechanisms, including through intermediaries such as global civil society. (Held's is a very peculiar body of work—by turns technocratic, predictive, rhapsodic, hortatory, and, well, *scheming*, but always toward the proper ends of history, or something very like that.) See, e.g., HELD, *supra* note 83; see also Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 127–29 (1996). One would caution those seeking to make this move because they (a) want to declare global civil society as "representative" and (b) recognize that democracy won't be possible, make it rather easy on themselves; this practically defines ad hoc, not to say self-serving, political theory. But it is a move urged not merely by those advocating for civil society organizations over the ballot box; it is a move quite consistent with a certain form of law-and-economics reductivism—the reductivism of dismissing the ballot box not as the means to "consent" in the deep sense of civic republicanism, but merely as one means among many by which to find "revealed preferences." This bland

account of global civil society, as the wholesome homologue of civil society in a settled domestic society—particularly in an era in which civil society and its virtues had been extensively theorized, discussed, and praised as a necessary pillar of liberal democratic society—attained tremendous influence. It figured in many speeches at the UN, by UN senior leaders such as Kofi Annan and his chief aides. Kofi Annan, after all, could not have been more explicit when in 1999 he said that if the “global agenda is to be properly addressed, a partnership with civil society is not an option; it is a necessity. I see a United Nations that recognizes . . . the non-governmental organizations['] revolution.”<sup>91</sup> And NGOs, he added, will give “global civil society its rightful place as one of the pillars of the international community in the twenty-first century.”<sup>92</sup>

Likewise, the sentiment of a “partnership” between global civil society and the United Nations figured in many speeches and activities of the world’s leading international NGOs, as they celebrated the undeniable achievements of the landmines ban campaign and took from that experience the conviction that they were indeed representatives and intermediaries for the peoples of the world.<sup>93</sup> They would democratize foreign policy and international relations and bring the peoples of the world into the rarified chambers of the United Nations. And they would contribute to the erosion of sovereignty in favor of a progressive form of global governance that would have at its core a partnership between the institutional UN, as the seat of global governance, and global civil society, which would intermediate on behalf of and represent the world’s peoples.

#### V. AFTER SEATTLE: THE REACTION AGAINST GLOBAL CIVIL SOCIETY

The critique was always implied in the conventional account: democratic legitimacy matters, and corporatist forms of intermediation and representation, even if actually true (a questionable assumption, as it turns out), are insufficient to yield the kind of legitimacy for global governance that it claims. Put another way, the UN and the international NGOs were locked in a sort-of ‘lovers’ embrace’—eyes only upon each other, each in pursuit of its own ideological goal, but finding in the other

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and anodyne characterization is, let us be clear, an ideological move of the first order, albeit by elision.

91. Kofi Annan, Sec’y Gen. U.N., Address to World Civil Society Conference (Dec. 8, 1999).

92. *Id.* One example among a great many, was Kofi Annan saying “global people-power . . . is the best thing that has happened to [the United Nations] in a long time.” *Id.*

93. See, e.g., Maxwell Kerley, *Achieving Zero New Victims of Landmines*, U.N. CHRONICAL (2009).

the confirmation of its special status. The UN sought to be the seat of global governance—and international NGOs, recast as global civil society, appeared to be able to give it the measure of legitimacy needed. The international NGOs, recast and confirmed by the UN as being intermediaries and representatives of the peoples of the world, thereby had an unquestioned seat at the table of power. Moreover, the NGOs had a place at the table that required less *actual* expertise and competence at some *actual* activity or mission than before, because, after all, the *representatives* of the world's peoples have a place at the table *because* they are representatives, not because of their technical skills or competences. It really was as though these two were lovers, each gratifying and confirming the other, eyes for each other and no one else—because, so far as each was concerned, each confirmed the worth of the other, without regard for the world beyond.

This love affair went on more or less unchallenged until an event that today (having now experienced 9/11, the Iraq war, the emergence of Al Qaeda and transnational jihadist terrorism, and much else besides) seems rather quaint. The event was rioting by anti-globalization protestors that brought to a crashing halt WTO trade talks in Seattle, December 1999. Anti-globalization protestors (with the active, profound assistance and coordination, and moral and material support of global civil society) took to the streets and forced the trade talks to shutdown.<sup>94</sup> Very quickly, global business interests that had looked upon the global civil society movement with a sort of benign interest (seeing it in precisely the terms offered by it, as a sign of the maturation of a global society, a global demos) began to question precisely those aspects that made the claim of global civil society special: its representativeness and its claims to intermediate. But it was not merely global business interests that looked with profound dismay at what the rioters and their supporters had wrought—the senior leadership of the UN, including Annan, saw this as a disastrous development because, indeed, they genuinely saw free trade, if properly managed, as deeply in the interests of the world's poor.

Hitherto, supporters of the idea of global civil society and global governance—so long as it included free trade—such as the *Economist*, began to raise serious questions about the elevated political and ideological claims that intellectually transformed international NGOs into global

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94. Anup Shah, *WTO Protests in Seattle, 1999*, GLOBAL ISSUES (Feb. 18, 2001), available at <http://www.globalissues.org/article/46/wto-protests-in-seattle-1999>; *WTO Meeting and Protests in Seattle (1999)—Part 2*, HISTORYLINK.ORG, [http://www.historylink.org/\\_content/printer\\_friendly/pf\\_output.cfm?file\\_id=9213](http://www.historylink.org/_content/printer_friendly/pf_output.cfm?file_id=9213) (last visited May 16, 2011).

civil society.<sup>95</sup> The skepticism was easy enough to develop—all one had to ask was, who do these groups actually speak for, anyway?<sup>96</sup> As David Rieff baldly put it, “So who elected the NGOs?”<sup>97</sup> Governments in the developing world—the democratic among them desperate for free trade—acidly noted that these groups purported to speak for peoples but denied the legitimacy of their governments, even ones that had been democratically elected.<sup>98</sup> The journalist Sebastian Mallaby conducted a celebrated—and reviled—study of the membership of one such NGO in Uganda that claimed to have the legitimacy to prevent a dam project with the capacity to bring electricity to vast numbers of people; the NGO in Uganda turned out to have twenty-five inscribed members.<sup>99</sup>

The international NGOs, under attack and subjected to a wave of unfamiliar skepticism from the long supportive Western elite press, began to back away from the most extravagant claims to represent peoples and populations—at least when dealing with journalists. The head of Greenpeace UK, for example, gave interviews in which he denied claiming

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95. See, e.g., *The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?*, THE ECONOMIST, Dec. 11, 1999; *Sins of the Secular Missionaries*, THE ECONOMIST, Jan. 29, 2000.

96. For example, the highly regarded policy scholar and former State Department official, Thomas Carothers, wrote an article imploring us to reevaluate what civil society means. He was not even referring to global civil society, but to the limitations of what one could expect from civil society in newly emerging democracies in such places as Eastern Europe. Thomas Carothers, *Think Again: Civil Society*, FOREIGN POL’Y MAG., Winter 1999–2000, at 18.

97. Rieff raised this charge at a conference on child-soldiers and then followed it up in a widely circulated article that was quickly picked up as a talking point by many critics of NGOs. David Rieff, Address at the Conference on the Landmines Campaign and International Civil Society, Washington Coll. of Law, American Univ. (Feb. 27, 1998) [hereinafter Rieff, Address] (panel moderated by Kenneth Anderson); David Rieff, *The False Dawn of Civil Society*, THE NATION, Feb. 22, 1999 [hereinafter Rieff, *False Dawn*].

98. Fareed Zakaria, then Managing Editor of *Foreign Affairs*, found after contacting ten NGOs after the Seattle riots, that “most consisted of ‘three people and a fax,’” and expressed the concern that rich world “governments will listen too much to the loud minority” of first world activists and “neglect the fears of the silent majority” in the developing world who would benefit from activities not considered virtuous by the NGOs of the developed world. Justin Marozzi, *Whose World is it, Anyway?*, THE SPECTATOR, Aug. 5, 2000.

99. SEBASTIAN MALLABY, *THE WORLD’S BANKER: A STORY OF FAILED STATES, FINANCIAL CRISES, AND THE WEALTH AND POVERTY OF NATIONS* 7–8 (2004). There is practically a cottage industry among NGO activists responding to Mallaby’s charges regarding the situation of this Ugandan dam. For a discussion of this debate, see, e.g., Kenneth Anderson, *What NGO Accountability Means—And Does Not Mean*, 103 AM. J. INT’L L. 170, 170–71 (2009) (reviewing NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS (Lisa Jordan & Peter van Tuijl eds., 2006)).

legitimacy to represent anyone except the members of the group itself.<sup>100</sup> Many other organizations adopted the same tack.<sup>101</sup> Yet, outside the venues of the press, when it came to demanding privileges based on the exalted status of global civil society—places in the negotiations of treaties and agreements and so on—the demands remained fundamentally unchanged.

The institutional UN, for its part, reacted with uncertainty. On the one hand, the legitimating role envisioned for global civil society remained unchanged: who else was there to play it? On the other hand, Annan and his senior advisors, in the weeks and months following the Seattle debacle, remonstrated openly with global civil society.<sup>102</sup> Annan, in particular, rather bravely—given that he had declared these groups to be his constituency—gave multiple speeches directly to NGO conferences and congresses in 2000, telling them flatly that they were wrong about economic globalization and trade.<sup>103</sup> The task before them, he said, was not to prevent globalization, but to make its fruits available to all—a plea to make globalization a positive sum, not a zero sum game.<sup>104</sup> “We swim with the currents of our time,” Annan said, in one of the most cogent speeches of his career, delivered at the 2000 Millennium Forum of global civil society meeting at and with the UN, to an audience that, if not personally hostile to him, was broadly hostile to the idea.<sup>105</sup>

Global civil society, it seemed, had overstated its claims and even politically overplayed its hand. The collapse of the Seattle WTO trade talks badly damaged the global civil society movement with otherwise broadly sympathetic corporate, business, and many, many government interests, as well as intellectuals and policy experts. It was seen as unruly, anarchic, undisciplined, and often willing to tolerate street violence and thug-

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100. Marozzi, *supra* note 98 (quoting Peter Melchett, Executive Director of Greenpeace UK: “Democratic governments are elected and have democratic legitimacy. Other organizations, such as Greenpeace, The Spectator and the Guardian, do not. We have the legitimacy of our market of who buys us or supports us. I don’t claim any greater legitimacy than that, nor do I want it.”).

101. Alison Van Rooy collects and critiques some of this reaction. See VAN ROOY, *supra* note 83, at 64–76.

102. *Riots in Seattle: The Opening NGO Salvo Demanding Global Governance*, 1 DISCERNING THE TIMES DIG. 11 (Dec. 1999), available at <http://www.discerningtoday.org/members/Digest/1999Digest/December/Riots%20in%20Seattle.htm>.

103. See Kofi Annan, Sec’y Gen. of the U. N., Address at the Millennium Forum (May 22, 2000) (transcript available at <http://www.un.org/News/Press/docs/2000/20000522.sgsm7411.doc.html>).

104. *Id.*

105. *Id.*

gish language against economic globalization. In some respects the institutional UN pulled back from global civil society, feeling pressure from Member States.

Yet to a large extent, global civil society continued to have a positive reception at the UN. This was particularly so of global civil society's most presentable, upper-middle class, bourgeoisie emissaries—not the violent anarchists of the street, having a good time throwing stones at police and ransacking the McDonald's,<sup>106</sup> but instead the high-minded, respectful, respectable faces, those of large, serious, well-funded organizations in the human rights world, development, and humanitarian communities.

Global civil society (its glamour a bit faded as the bearer of global democratic legitimacy, but the only available suitor for the role) remained a "partner" to the UN, in Annan's parlance, while nonetheless receiving a distinctly chillier reception. Because, for the UN, the underlying issue of legitimacy remained unchanged and its possible choices constrained. The institutional UN and its leadership—the "modernizers" in the Secretary General's offices among the organization's senior executives—remained convinced that the UN-destined-for-global-governance *had* to find a way around the limited and limiting legitimacy conferred narrowly and jealously by the Member States and reach directly to the populations of the world as the UN's legitimating constituency. This became especially clear in the discussions and arguments between the 'traditionalists' and the 'modernizers' in the Secretary General's offices in the policy run-up in the early 2000s to Kofi Annan's ill-starred UN Reform Summit in 2005.<sup>107</sup> The UN and global civil society—lovers, still, but no longer out of a sense of true love—each giving legitimacy and countenance to the other. The intellectual high water mark had been crossed and critical intellectuals were mounting attacks upon the history and concept of the very idea of global civil society, let alone that it might confer authority upon the UN as the representative and intermediary of the world's peoples to their global government.<sup>108</sup>

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106. Shah, *supra* note 94.

107. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of Non-Governmental Organizations, and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

108. Intellectuals including me. In particular, see *id.*

## VI. THE UN'S RETURN TO THE MEMBER STATES AND KOFI ANNAN'S RETURN TO THE SECURITY COUNCIL POST 9/11

Post 9/11, the debate over the nature and status of global civil society within the global system seemed somehow childish and silly. A form of non-state actor had made its presence known, but its claims, demands, origins, ideologies, zealotries, and fanaticisms had very little to do with the non-state actors that made up global civil society. The Seattle protests—and beyond Seattle, anywhere the IMF or World Bank, or WTO might hold meetings— all seemed like a form of recreation for bored Western young people after 9/11, throwing a few stones at policemen and burning a Macdonald's, events that were all quickly forgotten as Western adolescent games when instead the twin towers came down. But even serious, respectable NGOs found that they no longer occupied attention in the way that they had even following the Seattle debacle. International NGOs were suddenly swept off the board as political actors. Global civil society, as an intellectual construct for conveying legitimacy, was suddenly irrelevant. The nation-state was back. If the UN wanted a role to play, it would pay attention to nation-states and above all to the Security Council.<sup>109</sup>

As for the NGOs, they could be the camp-followers of the nation-states as the Western alliance went to war, or they could stay home. Or they could issue press releases and studies and reports and statements, as they preferred or not, but they were no longer at the center of attention. It was as though global civil society had been, for the UN, a lovely but temporary dalliance with a mistress; but when reality intruded, the lover rushed back to his wife, and so the attentions of the UN leadership returned to the Security Council. This was so even though some of the leading NGOs, in the human rights field especially, found their work more in the public eye than ever, as the war on terror began to unfold following 9/11. The run-up to the Iraq war that began in 2003 emphasized even more the preeminence of nation-states and the central importance of the Security Council, especially for the UN senior leadership.<sup>110</sup> When the questions of war and peace were on the table in ways that directly involved the world's great powers, then the NGOs and global civil society seemed small fry indeed. This was so despite the efforts of global civil society to

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109. See Traub, *supra* note 40, at 156–66.

110. See *id.* at 167–87.

mobilize large numbers of people in protests against the Iraq war in many countries.<sup>111</sup>

But the response to the war on terror and the Iraq war illustrated something that everyone had always known to be true, but which was always glossed over by the apparently politically neutral language of global civil society: although in principle, institutions of civil society can include a wide variety of political orientations and, in democratic societies, do, in fact, in the international community the term is reserved for politically 'progressive' organizations, defined in broad terms as a left wing politics and an orientation toward global governance over merely democratic sovereign governance.<sup>112</sup> The legion academic literature on global civil society largely assumes that it is about the left wing Human Rights Watch and Greenpeace, not the pro-life efforts of the Evangelical Christian and Catholic Churches, and that it is committed to precisely what the institutional UN sought from it—an a priori commitment to the idea of global governance, a preference for the international over the merely national.<sup>113</sup>

The covert narrowness of the received view, however, with its politically constrained but apparently neutral view, was not exposed by the presence of some dissident international NGOs that defied the consensus—the National Rifle Association and its global affiliates, for example.<sup>114</sup> It was exposed, instead, by the emergence of transnational, non-state actors of great power and, as it turned out, dismayingly wide appeal in the Muslim world, at least for a time, that owed nothing intellectually or politically to the concept of civil society in relation to the international system. Put another way, after a post-Cold War decade in which global governance was pursued by the UN and global civil society as “international law,” it turned out that there *was* a growing form of transnational law, under the radar screen of global civil society and international organizations equally, but with far greater weight, impress, and conse-

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111. The veteran peace activist, campaigner, and new social movements theorist, Mary Kaldor, makes the case for the global social movement against the Iraq war in her book. MARY KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003).

112. A point made long ago by Rieff in Rieff, *False Dawn*, *supra* note 97.

113. Rieff, *Address*, *supra* note 97; Rieff, *False Dawn*, *supra* note 97.

114. This is one of the many reasons why the intense debate (in the United States, at least) over domestic gun control efforts under the guise of a UN small arms and light weapons treaty is so important: among many other things, it is a demonstration of the essential non-neutrality of global civil society as a category in international politics. See David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43 (2008).



quence. It turned out to be not international law as such, but shari'a.<sup>115</sup> One could plausibly argue that shari'a law has a considerable claim to be *the* genuine growth industry in transborder, global law.

This should give pause, one might think, to democratic liberal progressives who somehow automatically favor the transborder over the merely national, the international and global over the merely parochial sovereignty of the nation-state. That this largely does not say something about how liberal, or not, "liberal internationalism" actually is today. Global law might indeed grow, but not necessarily in a *liberal* direction. The reason this does not appear to give concern to progressive forces of global civil society is simply that these forces, like the UN itself, have largely given up the dream of an international order based around liberal, secular, neutral principles that separate out private belief from public conduct in the public square, and have instead embraced religious and ethnic communalism and multiculturalism, rather than the neutral liberalism of individual rights and liberties, as the ideal for managing conflicts among religious and ethnic communities.<sup>116</sup> What is the actual world in which the legitimacy of democratic nation-states is systematically degraded in favor of a shallow cosmopolitanism, promoted by global civil society, embraced by de-racinated academics, the media, and international institutions, and all for the sake of the supposed abstract virtue of governance at the global level? It is a world that *in fact* empowers simultaneously sub-national and supra-national religious and ethnic groups. Is that a more *liberal* world because it is more shallowly cosmopolitan at the global level?<sup>117</sup>

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115. See, e.g., OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* (2004); MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006) (exploring the necessary and growing influence of Islam on all aspects of global society).

116. For more discussion on this point, see Kenneth Anderson, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT'L L. REV. 277, 315–19. However, from the standpoint of the social geographer, one way to understand this shallow cosmopolitanism is as a universalized version of the ancient idea of the "port city," the mingling and clash and melding of cultures and societies at the point of trade in goods, the chaotic and often relaxed mores of sailors, dock workers, merchants, importers and exporters, tax and customs authorities, bazaar traders, inn-keepers, brothel workers, and so on. The great port cities have always served a crucial social function across borders—not just an economic one, but a genuinely social one—in the mingling of societies. It is also equally true that the social life of the port city depends upon having social structures above them that are not as chaotic.

117. A better way to see this, but one that would carry us very far afield, is through the lens of New Class analysis. This shallow, uncommitted cosmopolitanism is better understood as a mechanism for allowing global elites to sell their expert services in technology, management, finance and, yes, academia, as free agents in a global market as unconstrained as possible by national, state-level forces. Much of what we are pleased to call

Much of what we are pleased to call global governance operates at the subnational level to empower forces of illiberalism over liberal democracy, while yet handing to them the keys to liberalism's forms, rhetoric, and processes in the form of trumping rights over attempts by liberalism's institutions to rein them in like any other group in society. It is as though liberalism had no substantive moral, political, legal, or historical commitments—a strange position indeed for idealists and ideologists who otherwise count themselves as “progressive” and therefore practically committed to some theory of moral progress in history. And as though “liberalism” were merely a temporary and contingent commitment to “revealed preferences” that might, for all we know, point the way to communal governance by religious authorities. It is a mistake to confuse proud liberalism with this shallow cosmopolitanism.<sup>118</sup>

Why a world of transborder, multiculturally-‘managed’ cousin loyalties, however, would be a better place—merely because it endorses ‘global’ governance—than a liberal one based around individual human rights and democratic participation in religiously and ethnically neutral states is far from self-evident. Nonetheless, it appears to be what global civil society and the institutional UN have endorsed as the new global ethic in the wake of 9/11 and the Iraq war. Anyone doubting that proposition might take the opportunity to attend the sessions of the “reformed” UN Human Rights Council in Geneva and see how much of its agenda is devoted systematically to replacing liberal concepts of free expression with impeccably multiculturalist ideals of religious communalism, beginning with the proposition that no religion, or at least Islam, shall ever be offended by contrary speech.<sup>119</sup>

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global and transnational theory of governance is best understood not as the elaboration of a theory of global governance, but as a manifesto for setting out a global market for expert elite free agents, those whose Global New Class interests are as real as any other class in history, but which are facilitated by the dismantling of barriers at the national level, because they live, work, and play in the jet stream. I have discussed the New Class theory behind all this, in the context particularly of lawyers' roles in the global economy. See Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062 (1996).

118. This being, in effect, the (very) short response to PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2007).

119. The indispensable source of information on a daily basis is UN WATCH, <http://www.unwatch.org/site/c.bdKKISnqEmG/b.1277549/k.BF70/Home.htm> (last visited Mar. 17, 2011); see also Brett D. Schaefer, *Commentary: Free Speech? Not at the U.N. Human Rights Council*, THE HERITAGE FOUND., Mar. 29, 2007.

## VII. WHAT NEXT FOR GLOBAL GOVERNANCE, THE UN, AND GLOBAL CIVIL SOCIETY?

Global governance, as a federal world under the UN, as a global constitutional order, as a political project to correspond to economic globalization of goods, capital, and increasingly labor and services, is stalled. But it is stalled in a peculiar way. The UN is immobilized in a cul-de-sac in which it can neither move forward meaningfully toward that political goal, nor give up that overarching political goal in favor of something more modest, achievable, or frankly useful. Its legitimacy is peculiarly linked to the vision of its glorious future as the seat of global governance, and it seemingly cannot get on with something more functionally important because then the limited legitimacy that it does have is *also* at stake. It is a little like the exiled queen who has lost everything, except the claim to the throne, which justifies everything else and yet which precludes her from doing anything different other than being pretender to the throne.

There are, in other words, useful, functional, greyly technocratic things the UN might be doing well—but which it finds difficult to undertake because, in a certain way, doing them would be beneath its dignity. Doing them would constitute an acknowledgment that the UN will never really be the Parliament of Man, at least not in the grand and glorious sense of global governance. And because of that commitment to the future, too, other actors are skeptical about entrusting the UN with anything they really care about—peacekeeping in some forsaken failed-state hellhole, yes; replacing ICANN with the UN to regulate the Internet, no—because they understand the deep tendencies of the organization to politicization of even apparently routine issues.<sup>120</sup>

Unsurprisingly, the global civil society movement is caught in precisely the same cul-de-sac. It turns out to be both unable to confer the legitimacy that the UN's ideas of global governance require, but also not able to act as “representatives” and “intermediaries” for the peoples of the world, at least not compared to nation-states. The more savvy among them have moved to a two-sided, uneasy strategy of publicly abandoning the intellectual pretensions of global civil society and appearing, publicly, to beat a retreat to just being NGOs again. Beat a retreat, that is, from making such grandiose claims of representativeness and have gone back to asserting—rightly or wrongly, true or false—their expertise and com-

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120. See, e.g., Jay P. Kesan & Andres J. Gallo, *Pondering the Politics of Private Procedures: The Case of ICANN*, 4 INFO. SOC'Y J. L. & POL'Y 345 (2008) (a generally sympathetic article about the idea of UN agency regulation but giving a scrupulously useful account of those who are not).

petence as reasons why anyone should pay attention to them. At the same time, however, international NGOs build on earlier success in creating an atmosphere of “partnership” among global civil society, international institutions, and like-minded states (precisely the formulation drawn out of the success of the landmines campaign) in order to demand a ‘seat at the table.’ The old, and one might have thought, discredited, corporatist claim of representativeness and intermediation continues to operate within the more limited precincts of international organizations—not at the level of deliberations of the Security Council, but in the myriad lower level issues that are the natural fodder of interest groups that have found a way to ally themselves with the UN’s institutional interests, and to call it “representativeness” when that suits and “expertise” when it does not.<sup>121</sup>

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121. Because this Essay was largely completed before the appearance of David Gartner’s exceptionally fine argument in favor of drawing the NGOs into many more things in the processes of public international organizations, I will not try to respond to it in detail. See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT’L L. 595 (2010). On this particular issue, Gartner argues that the resistance on grounds of overclaiming legitimacy by NGOs-as-Global Civil Society is alarmist and overstated; what is the harm in inviting knowledgeable NGOs to give input in some formalized way in venues, such as World Bank or UN organs for particular activities, in which they might have much expertise to offer?

Part of the response though, is that it does not actually work this way. Having sat through many NGO strategy meetings, the aim was always to use the seat at the table of negotiations in order to ratchet up legitimacy to the point of being able to assert that “our” place was no longer discretionary, because we “represented” people. As for expertise, as noted earlier—harking back to Martin Shapiro’s powerful critique of experts and enthusiasts that even Anne-Marie Slaughter, no sovereigntist defender herself, found persuasive—in many of the matters under discussion, there is no purely neutral expertise, but rather it always melds with prescriptive agendas, quite sincerely held. See *supra* note 51. The act of being able to intervene in the discussion and make statements in the course of negotiation of a statement or declaration, a treaty text, whatever it might be, is indeed a real form of influence; if it were not, the NGOs would not bother. But it is influence both in that act, but also in the process of legitimation for which, in my experience at least, international organizations and states that permit this expect a sort of broad reciprocal legitimation in return, and why not?

The other part of the response to this critique that NGOs really are not looking to make claims of representativeness that they do not bear is that they are not making them now because it is strategically imprudent to do so, but in fact they do regard themselves as representatives in some grand moral sense, and will assert it if it becomes strategically and politically plausible down the road. There is a curious bait and switch that goes on here—when the NGOs are called on their ideological pretensions of “representativeness” in the form of the claim to be global civil society and all the massive ideological connotations it brings, there is an immediate retreat back to a touchingly modest, demure, submissive mien—who, us? But as soon as the pressure is off, then the claims to legitimacy ratchet back up—the pretender to the throne never really stops being the pretender.

The ideological argument over global civil society will presumably resonate in the academic and NGO literature for years to come. The model worked out in the 1990s for global civil society has continued to operate, with some surface modifications. In order to accommodate new sensitivities, the NGOs are no longer announced as “partners” but instead as “norm entrepreneurs” and “transnational advocacy networks.”<sup>122</sup> The new terminology tends to obscure what is the same—call it by these terms, and so seek to defang the problems of representation, intermediation, and corporatism, but the moving actor is *still* an ideologically conceived global civil society. The academic literature will find itself enthralled for some years yet with analyzing how global civil society is drawing new norms in the international market in ideas and so democratizing and opening the “international community.” The academic activist-scholars have difficulty taking on board that this supposed “openness” is actually and essentially a *closed* legitimization-circle between global civil society and international organizations. Calling it “entrepreneurship” obscures as much as it illuminates what is the overarching issue of the United Nations and the ideal of global governance—the on-going, decades-long legitimization crisis.

Yet a new and intellectually powerful assortment of scholars—impeccably liberal internationalists, wedded to global governance, but not at all wedded to the sanctity of global civil society—has already moved beyond the idea that global governance can or should be sought through global civil society. They are almost certainly right in viewing the global civil society movement as an element, but not the most compelling one, in creating global governance. Anne-Marie Slaughter, Benedict Kingsbury, and Kal Raustiala, among others, are all committed to some form of global governance, but none suggests that its legitimacy would come about through global civil society.<sup>123</sup> As Slaughter said flat-

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Gartner, in my view, offers the “aw shucks, it’s just us NGOs,” but does not address the large body of material in which the “aw shucks” view is overtaken by the “we, the peoples of the world” view. What in the internal workings of the NGOs have changed their self-perception, and why should it change? Put a different way, Gartner needs to explain less why Anderson is wrong, and more why John Keane, the leading 1990s theorist of global civil society in all its legitimate glory, and the one at that point embraced by “global civil society,” is wrong and show that it has actually been repudiated as the internal ideological stance of the NGO community in its heart of hearts. All that said, Gartner’s article is an impressive work, and one of the best defenses of a certain role of NGOs in international organizations.

122. See KECK & SIKKINK, *supra* note 3.

123. See SLAUGHTER, *supra* note 51; see also Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* (Inst. Int’l L. & Just., Working Paper 2004/1, 2004); Kal Raustiala, *The Architecture of International Coopera-*

ly, global governance needs forms of legitimacy that *only* states, and their agencies, can provide; she elaborates a form of governance that goes far beyond the idea of robust multilateralism that this Essay has suggested, but one which is distinctly cool to the idea of genuine legitimacy coming from global civil society.<sup>124</sup>

Benedict Kingsbury's project of global administrative law skips over the very problem of political legitimacy altogether—a troubling jump, to be sure—in favor of purely technocratic legitimacy achieved simply by technocratic competence, whether through networked agencies among governments or networks including relevant corporate or NGO actors, what matters is competence and accomplishment, not political legitimacy in the abstract.<sup>125</sup> This essentially technocratic account is noteworthy for the fact that nowhere does it refer to international NGOs as “global civil society,” and it prefers to treat private actors as including both NGOs and corporate actors because, in the end, what matters is who has genuinely expert knowledge and who is able to prove competence.<sup>126</sup> It is an account coolly indifferent to the heated romanticism of the NGO claims, for and against, a certain shrug of the shoulders as if to say, it is nearly 2010 and those arguments are all so . . . 90s.

There are, in my estimation, serious problems with these various alternatives. In the first place, the one thing that the troubled discourse of global civil society and the UN is right about is that political legitimacy does matter, and it cannot be achieved for the purposes and activities for which the UN has declared itself fit and fitting on a purely technocratic basis. Global civil society cannot convey that legitimacy; but it was not wrong to insist that it matters and is not reducible to bureaucracy, no matter how competent. That said, *they*, the theorists of networks of bureaucrats and judges and what, in a more adequately theorized system, would come to be known as the globalized “wholly-administered society”—not global civil society, not NGO norm entrepreneurship, not transnational advocacy networks—represent the cutting edge of theory of global governance and, by extension, the emerging conceptual poverty of the role of international NGOs.<sup>127</sup>

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*tion: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002). The next move in this ongoing debate, I suppose, will be that international law theorists will begin to realize that they have possibly placed too much faith in network theory.

124. SLAUGHTER, *supra* note 51, at 8–11

125. See Kingsbury, Krisch & Stewart, *supra* note 123.

126. See generally *id.*

127. The “wholly-administered society” refers to a concept developed as part of New Class theory among the editors of *Telos* in the 1970s and 1980s. It is a discussion for

In any case, however, the world at the time of this writing appears to be moving toward a multipolarity that raises a whole different set of issues both practical and ethical with respect to international NGOs, public international institutions, and global governance. What happens when it becomes clear that the superpower, while militarily still the superpower, does not have unlimited resources and powers to be able to impose its will on China, Russia, or such “resource extraction authoritarian states” as Iran, Venezuela, Saudi Arabia, etc., at least within their own spheres of influence and local geographies? Whether that condition will continue to accelerate or not is unclear and depends on so many contingencies—shifts in oil prices, a US that loses interest in offering a global security guarantee or even a NATO one, a China that fails to continue achieving legitimacy through growth and sets off serious internal unrest, etc. Yet were this trend to continue, many will celebrate that as the advent of a more “equal,” more “just,” better world. Many will also likely come to regret it, were that truly to come to pass, however, at least if they also count themselves fans of global governance. Why?

A genuinely multipolar world is, as David Rieff has noted, not a cooperative world but, almost by definition, a competitive one.<sup>128</sup> In that kind of world, states are more important than they ever were when they were under the hegemony of the United States, and there is less room, not more, for cooperation. Competition is not limited to the issues of deep conflict—Georgia, the Taiwan straits—but spills over into seemingly unrelated matters, such as whether the authoritarians of the Security Council, Russia, and China, will begin reflexively to oppose initiatives in parts of the world—failed states, for example—in which they have no deep interests, simply for the sake of putting pressure on initiatives sponsored by the rest. In other words, there is a hold-up value on otherwise unrelated issues—countries at the UN, after all, thrive on it as a form of rent-seeking. Global governance does not have a real place in this world, at least not global governance conceived in its ‘high church’ sense as a federal world under the UN, with the Charter as its constitution. In place of governance, the UN becomes what, on a more realist view, it always was—at best, the talking shop of the nations.

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another day, but we are not so very far from the need for a globalized theory of the New Class, and the wholly-administered, professionalized-yet-marketized society that *Telos* debated several decades ago, in order to understand in a genuinely radical way the content of extant ideologies of global governance. The memory of Paul Piccone lives.

128. David Rieff, *Concerts and Silly Seasons*, OPEN DEMOCRACY (Feb. 23, 2007), [http://www.opendemocracy.net/democracy-americanpower/concerts\\_4380.jsp](http://www.opendemocracy.net/democracy-americanpower/concerts_4380.jsp). Rieff is here criticizing Michael Lind’s idea of a “concert of power.” MICHAEL LIND, THE AMERICAN WAY OF STRATEGY 171–88 (2006).

One could argue, perhaps, that NGOs in such a world become more, rather than less, influential, but frankly, the opposite argument seems far more persuasive. Global civil society and global governance achieve their maximal ideological appeal and, indeed, political influence when the basic security of much of the planet is taken care of. And that guarantee is provided not by the UN, with the great powers in much greater conflict and (even without great power conflicts as such) the free-rider problems endemic to the collective security system, but by a relatively benign hegemon that, in pursuit of its own very broadly conceived security interests, a combination of its ideals and interests, carries along much of the industrialized world's security interests in train. The cause of global governance, and partnership with global civil society, looks much less attractive when security itself is an issue; moral exhortation is a lovely but superfluous attribute when what is needed are the big battalions. The NGOs might consider prayer to Kant in the name of the categorical imperative, then, that the US not lose interest or capacity or undertake a calculation of fundamental tradeoffs as to the costs of being the hegemon: the global order that the superpower underpins is the one in which the NGOs swim as fishes in the sea.<sup>129</sup>

It is less clear whether a competitive, multipolar world favors or disfavors global governance conceived as a more limited, more technocratic project. Jettisoning the grand political project of political representativeness and intermediation and legitimacy in any grand sense cannot hurt in such a world. The attempt to bring together technocrats rather than politicians, and seek only such legitimacy as is required to solve particular problems and presume only such legitimacy as is required—only to make a limited set of global trains run on time for the sake, especially, of very poor people about whom no else really very much cares—seems like it must be less disfavored, at least, even in a competitive multipolar world. Yet the problem of hold-up value in projects and tasks globally that seem, on their own, to have little to do with competitive great powers, does not go away. Still, there is much to recommend the approach—*provided* of course that it never gets above itself and begins to believe that the legitimacy of technocrats for discrete functions can somehow be built up into some ideologically grander structure.

There is no grander structure. Coordination among democratic sovereigns in robust multilateralism is the most that can, and should, be

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129. I address these questions in blunt language in Kenneth Anderson, *Paul Kennedy's The Parliament of Man: The Past, Present, and Future of the United Nations* (Wash. Coll. of Law, Research Paper No. 2008-70, 2008) (book review), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265833).



sought in the way of political globalization. It does not satisfy the vast imaginations for those that only the grandiosity of the Parliament of Man can satisfy. It promotes the UN-of-Less-Visibility and not the UN-of-Rock-Stars. It is resolutely state-centric and sovereign. It does not give NGOs a special place in the global firmament and certainly grants them no special legitimating authority. Their ethical status does not include representation or intermediation—something that ought to be understood within and without the United Nations, because it has implications for how the UN ought to treat them: but, then, that would require that the UN take account of how it treats itself. Robust multilateralism, for its part, as a model of governance, at least has the possibility of effectiveness in particular matters for particular people and particular places: taken together, enough of them, they after all make up the globe. The ethics of global governance, in other words, ought finally to include the acknowledgment that while there are international NGOs, there is no global civil society.

#### CONCLUSION: FROM LEGITIMACY, BACK TO ACCOUNTABILITY

This conclusion is not an argument that the NGOs ought to pack up and go home. On the contrary, it is a plea for the NGOs to find ways to discipline themselves and their ideological pretensions, so as to remain useful as experts and, yes, even as enthusiasts and advocates for their causes. To that extent they can function like civil society in domestic democratic society. Concomitantly, they need to give up the claim—really give it up, not merely strategically set it aside for down the road—that they represent anyone or that they deserve attention as intermediaries for the peoples of the world. It misconceives the nature of the role but, more crucially, makes an illegitimate power play for status that is not, in fact, legitimate for the ends that they, and public international organizations, have in mind. But to do so, the NGOs have to give up the whole ideological apparatus of global civil society, and in so doing, give up the love affair with public international organizations.

That is a hard thing for the NGO community to do. It requires intentional self-discipline and self-awareness of a kind that NGOs and social movements, like any other institution, find hard to achieve—precisely because it swims against the apparently compelling and irresistible tide of strategic behavior that magically confirms one's highest ideological self-perception. Modesty is the hardest institutional virtue for NGOs. The ICRC has the right set of modesty-inducing incentives insofar as it sees itself as constrained around an institutional competence and "right to participate" of "bare rationality" in situations of dire humanitarian emergency; less so insofar as it sees itself as the forward-looking, progressive

voice of international humanitarian law.<sup>130</sup> But overall, the ICRC's rationales are self-constraining in a way that few other organizations or new social movements in the world of international NGOs are; on the contrary, they lead them to positive feedback mechanisms that in turn lead directly to the ideology of global civil society and a legitimation-affair with public international organizations.

Moreover, it is made more difficult by a set of social dynamics that have not been explored at all in this Essay—the relationship not only with public international organizations, but with the funders of these movements, the philanthropists and foundations that set the priorities, establish the incentives and disincentives, and which represent a whole other set of social and economic pressures upon NGOs and social movements. If the Global New Class elites are about global markets unfettered to allow them to sell their expert services without regard to borders, national loyalties or identities (save for China), and an account of class interest that thus far seems to have escaped much analytic notice, then the great philanthropists likewise have not been studied with any deeply critical eye.

One place to begin might be to assume that they are not like the Global New Class—those who have already won in that arena—and that their motives are no longer those of money and profit, but instead “glory,” the quality of individuals seeking something grander and longer lived than liquid capital. One might begin, then, by thinking of them within historical and social traditions that take glory seriously—does not a Soros, for example, at least on the global philanthropic stage, seem less today like a plutocrat and more like a genuine “baron,” in the formal sense of medievalism? A Gates or even a Clinton—feudal lords in a world with no clearly defined king—seeking not money and not even power exactly, but . . . *gloire*? And around whom the NGOs clump as courtiers, flatterers, or perhaps peasants and serfs? Human Rights Watch has an annual budget of some \$44 million. For those of us who have ever engaged in international NGO fundraising, it is an amount that is frankly staggering in absolute terms for the NGO world that does not benefit from government funds. Is there no “critical political economy” to be elaborated here, no sternly critical and unsentimental ‘public choice’ account to be given of funders and fundees?

This then leads us, at long last, back to the question of accountability. The foregoing, after all, said it was about accountability, but then took up a lengthy disquisition instead about legitimacy. What is the relationship?

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130. See generally David P. Forsythe, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L R. RED CROSS 63 (2007).

It is not a complicated one, and can be stated simply and by way of conclusion.

The problem of legitimacy as it has been set forth here, both for NGOs and for public international organizations, is that their mutual intertwining leads to claims of legitimacy that are inflated and premised upon claims of legitimacy—democracy, representation, intermediation—that are simply untrue. A false, or inflated, or unsustainable claim of legitimacy, however, is a dangerous thing and particularly when it involves institutional actors mutually legitimating each other. It is dangerous insofar as anyone actually relies upon it, because the claim might eventually turn out to be worthless and a bad thing for those who relied upon it as a source of strength or protection—peacekeepers who invite reliance by the local population, but then make their own decisions to withdraw, for example.

But it is particularly problematic for the idea of accountability, for either NGOs or public international organizations. This faux-legitimacy invites these institutions to believe that their presumed legitimacy—derived by assiduously consulting each other—is accountability, at least in the external sense. Whereas David Rieff's insouciant question, "So who elected the NGOs?",<sup>131</sup> remains as salient as ever, the claim of legitimacy allows the question of external accountability—to whom does one account for the positions one takes, the policies one urges, the courses of action one demands?—to be answered by saying, we represent vast, but naturally silent, populations of the world. Our accountability is to them, if anyone—and they are . . . silent. And does not silence give consent?

This is not, to say the least, accountability of civil society in a domestic democratic society, in which external legitimacy is automatically triggered by the fact that everyone will raise their hands, independent of the mediation of the civil society actors. There is no similar reality-check in the form of accountability for NGO actors who, in asserting themselves as global civil society, serve as their own gate-keepers. That is the fundamental problem of legitimacy and the accountability of international NGOs in a world of public international organizations. Modesty, it turns out, is a very hard thing.\*

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131. See *supra* note 97 and accompanying text.

\*One does not usually dedicate journal essays, but this one is to the memory of Paul Piccone, founding editor of *Telos*, who many years ago introduced me to the social theory of the *New Class*.