

The Emergence of Democratic Participation in Global Governance (Paris, 1919)

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The theme of this Tenth Anniversary issue, “Globalization and Governance: The Prospects for Democracy,” is a fitting and timely topic. By way of introduction, this article will begin by discussing each of these concepts briefly.

“Globalization” has become a buzzword in recent years, in part because it has so many important dimensions.¹ Culture is globalizing as the ideas, styles, and technologies from each society infiltrate others on a continuous basis. The economy is globalizing as money moves without hindrance across borders, and goods, services, and workers seek to overcome protectionist barriers. Environmental globalization occurs as scientists and policymakers increasingly understand the planet’s ecosystems and the ways in which environmental mismanagement in one region affects other regions. Politics is globalizing as governments and societies make greater efforts to influence each other and as internal tensions in one country spread to neighbors.

“Governance” is an apt term for describing decisionmaking processes that are less formal than a government.² Although no international government exists in a world of notionally sovereign nation states, global governance certainly does exist, and these processes have grown deeper in recent decades.

One of the key challenges of governance is siting authoritative decisions at the proper level to coincide with the scope of the problem being addressed.³

The proper level in economic or environmental terms might not match the governmental units available for making and implementing decisions.

The “prospects for democracy” is a broad topic that scholars are addressing in distinct ways. A central concern is the viability of democracy in changing configurations of world politics. Free elections are essential to democracy; yet

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1. *See generally* GEORGE SOROS, *GEORGE SOROS ON GLOBALIZATION* (2002); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

2. *See generally* *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (discussing governance and politics in a global context); *GLOBAL TRENDS AND GLOBAL GOVERNANCE* (Paul Kennedy et al. eds., 2002).

3. *See* Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 360-66 (2000).

democracy requires more than that. In his monumental analysis of *Democracy in America* in 1848, Alexis de Tocqueville discovered the vital role of political and civil associations in informing and sustaining democracy.⁴

The importance of such participation to national democracy is now recognized and promoted by international organizations. For example, the World Bank reports that “[i]ncreasing opportunities for voice and participation can improve state capability. . . .”⁵ The U.N. Commission on Human Rights states that at the national level, “the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions. . . .”⁶ The Organization for Economic Co-operation and Development has extolled the value of “active participation” at the national level in which there is “a role for citizens in proposing policy options and shaping the policy dialogue—although the responsibility for the final decision or policy formulation rests with government.”⁷

Although the democratic value of a contestation of ideas at the national level is an accepted nostrum today, the extension of that principle to the international level remains controversial, even in an era of globalization. The debate is not about freedom of speech; few would deny that an individual should be able to advocate ideas outside of his country, or to engage in discourse with foreign government officials and private individuals. Rather, the debate is about whether there is a democratic imperative in giving individuals opportunities to participate in global governance. Such opportunities can be justified for their contribution to national democracy. As Susan Marks has explained, “democracy cannot flourish in nation-states unless efforts are made to democratize the processes of transnational and global decision-making as well.”⁸ Unbounded participation can also be justified for its contribution to multilateral decisionmaking. Boutros Boutros-Ghali has observed that nongovernmental organizations (NGOs), parliamentarians, and international

4. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 189-95, 513-17, 520-24 (J.P. Mayer ed., 1988) (1848).

5. WORLD BANK, *THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT* 116 (1997).

6. Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMP. L.Q. 225, 246 (2002) (quoting E/CN.4/RES/1995/60, pmb.).

7. OECD, PUMA POLICY BRIEF NO. 10: ENGAGING CITIZENS IN POLICY-MAKING: INFORMATION, CONSULTATION AND PUBLIC PARTICIPATION, 2 (2001), available at <http://www.oecd.org/pdf/M00007000/M00007815.pdf>.

8. Susan Marks, *Democracy and International Governance*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 47, 66 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); see also Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *id.* at 355, 362 (stating that international civil society may underpin deliberative democracy at the global level).

lawyers act at various levels of the international system as “mechanisms of democracy.”⁹ A recent U.N. Human Development Report stated that “[o]ne big development in opening opportunities for people to participate in global governance has been the growing strength and influence of NGOs—in both the North and the South.”¹⁰

Opening opportunities for people is the theme of this article, which is divided into four parts. Part I examines the concept of democracy at the international level, and finds that some democratization already ensues. Part II looks for the roots of this phenomenon, and postulates that it originated in 1919 at the Paris Peace Conference. Part III suggests that this key event should be called a global constitutional moment. A brief Part IV concludes.

I. THE CONCEPT OF INTERNATIONAL DEMOCRACY

The concept of democracy at the international level needs elaboration. Although a world government does not exist, there are treaties, international organizations, and negotiations that can be described as being on the “international plane.”¹¹ At issue is whether these intergovernmental activities are carried out democratically.

Questions abound: Is it clear that an international level or plane exists? Perhaps treaties and international organizations are just extensions of the nation-state on the same horizontal level. Viewed in this way, it may be that nothing international exists to be benchmarked against democratic norms. On the other hand, if one accepts that the United Nations (U.N.), the World Trade Organization (WTO), and other organizations are tangible enough to be evaluated distinctly from the governments that comprise them, the evaluation needs to identify the relevant public with which the international organization should be in democratic counterpoise. It is often averred that international organizations have no demos of their own. In national law, the United Nations has no citizens, as citizenship is obtained from states. But is a grant of citizenship a necessary precondition for individuals to pursue a democratic relationship with a governance structure?

9. Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 GLOB. GOVERNANCE 1, 10 (1995).

10. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999, at 35.

11. The term “international plane” was in use by the early twentieth century. See Editorial Comment, *The International Opium Conference*, 5 AM. J. INT’L L. 466 (1911); Tor Hugo Wistrand, *The Principle of Equilibrium and the Present Period*, 15 AM. J. INT’L L. 523 (1921).

To give a brief answer to these difficult questions, this article takes the position that the international-level decisionmaking has sufficient substance that sentient beings can rationally seek to influence it. This is especially so when international institutions can directly affect individuals. For example, the U.N. Security Council may require governments to impose sanctions that can directly harm innocent individuals. From the perspective of the individual collaterally damaged, the Council is more than just an appendage of the individual's home government.

In recent years, the democratic bona fides of international organizations have come under attack.¹² The charge of a "democratic deficit" is frequently leveled at the WTO, the World Bank, and the International Monetary Fund (IMF), and somewhat less so at the United Nations and the International Court of Justice. At outdoor rallies held at intergovernmental meetings, some protestors have chanted the slogan: "No globalization without representation."

A. Meaning of Democratic Deficit

What does it mean to say that there is a democratic deficit at the international level? Consider three possibilities: First, international organizations are not run in a democratic manner vis-à-vis participating states. Second, international law and treaties do not sufficiently mandate democracy within each state. Third, international organizations are not run in a democratic manner vis-à-vis the public. These propositions are discussed below.

It is easy to point to examples of how the nation-state members of international organizations lack equal rights in the governance process. The permanent seats in the U.N. Security Council and the weighted voting in the IMF are two obvious ones.¹³ The fact that other states have consented to these arrangements in joining the organization should not be forgotten, yet consent alone could not legitimize a normatively flawed form of delegation.

12. *Citizens in the International Realm: The New Participatory Demands*, 95 ASIL PROC. 162 (2001).

13. See Kofi A. Annan, *Democracy as an International Issue*, in 8 GLOBAL GOVERNANCE 135, 140 (2002) (observing that most states believe that the U.N. would be more democratic if the Security Council were more representative).

The proposition that international democracy requires equal status of states is questionable, however.¹⁴ Democracy is a commitment to popular rule by the people based on equal rights under law. But what is true for individuals in a community is not necessarily true for states in a community of nations.

“One state one vote” does not follow logically from “one man one vote.” On the contrary, giving China and San Tome and Principe an equal say would seem to contradict the principle of “one man one vote,” in view of the huge population disparity between the two countries. It is interesting to note that the U.N. Charter states that the Organization is based on “the principle of the sovereign equality of all its Members.”¹⁵ This principle does not seem to mean that governments have a sovereign right to equal participation in U.N. processes. Rather, it means that governments are equally sovereign vis-à-vis each other.

In some instances, the inconsistent treatment of governments within an international organization is more properly addressed as a concern about rule of law than about democracy. For example, there is often criticism of “green room” practices in the WTO wherein the officials leading a negotiation will invite selected governments into a room to hammer out a deal that is later presented to the entire membership as a *fait accompli*.¹⁶ Because the results reached in the green room must be consented to by the entire WTO membership, the charge that the green room is antidemocratic is not exactly true. Perhaps a better criticism of the green room is that the legal procedures that could be used to delegate a task to an elected committee are not being used, and instead informal arrangements are undertaken that favor the governments with the most clout. Green room abuses are not confined to the WTO. For example, at a preparatory meeting held in Bali in June 2002 for the World Summit on Sustainable Development, the delegates of Australia, Canada, Norway, and Switzerland were frozen out of ad hoc drafting discussions.¹⁷

14. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596, 613-14 (1999).

15. U.N. CHARTER art. 2, ¶ 1.

16. See Supachai Panitchpakdi, *Remarks, in THE FUTURE OF THE WTO AND THE INTERNATIONAL TRADING SYSTEM* 4, 7 (Columbia Business School APEC Study Center, 2002) (criticizing WTO green room meetings); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 368 (2002) (noting that at the WTO Seattle Ministerial, some delegates from developing countries tried to crash the green room discussions).

17. Earth Negotiations Bulletin, June 10, 2002, at <http://www.iisd.ca/linkages/2002/vol22/enb2241e.html>.

A second view of the democratic deficit is that multilateral organizations fail to require democratic government as a condition for membership. As a result, the United Nations and the WTO (to name just two organizations) consist of numerous governments that are not democracies and cannot make any serious claim to be representing the volitions of their people. This disinterest in the type of government used in a country can also be seen in the customary law norms on the recognition of states.¹⁸ One of the criteria is whether the government has “effective control” over the population.¹⁹ This stance seems to be backward from where it should be; the utmost concern of the world community should be whether the population has effective control over the territorial government. In recent years, international organizations have taken a greater interest in the existence of democracy at the national level.²⁰

A third view of the democratic deficit is that multilateral organizations (such as the WTO) and international agenda-setting bodies (such as the Group of Eight) operate too remotely from the public that is ostensibly being served. Many international organizations have legal personality, a headquarters, a director and staff, and a mandate to draft treaties or make nonbinding recommendations to governments. Such organizations go well beyond traditional bilateral diplomatic bargaining among governments, and therefore, one can demand democratic qualities supplemental to those at the governmental level. Concerns about the lack of democracy are especially salient when international organizations act to sanction governments or to restrict their autonomy. The public may also have concern when an international organization (like the World Bank) provides loans for a project that may have deleterious environmental impact on recipient and surrounding countries.

At issue, however, is what implication such concerns have. If there is no recognition of individual agency by an international organization, then how can a democratic deficit be said to exist? While the possibility of a democratic

18. See James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 91, 95 (Gregory H. Fox & Brad R. Roth eds., 2000) (explaining that under classical international law, there was no requirement that the government of a state should have been democratically elected).

19. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 77 (7th ed. 1997).

20. See, e.g., *Promoting and Consolidating Democracy*, U.N. GAOR, 55th Sess., Agenda Item 114(b), U.N. Doc. A/res/55/96 (2001).

deficit could be denied as a matter of definition, other claims in the globalization debate are harder to shake off.

In recent years, analysts have asked whether international organizations are legitimate and whether they are accountable to the public.²¹ Democracy can confer legitimacy on a government, and therefore any inquiry into legitimacy may look at democratic underpinnings as one factor. Accountability raises the obvious question of accountability to whom. Yet those who deny that an international organization can be democratic (because there is no demos) may find it uncomfortable to argue that international organizations need not be accountable to the affected public.

B. Participation in International Organizations

This article is concerned with the third view of a democratic deficit. The key question is whether international organizations should limit themselves to input exclusively from the states, or should also invite participation by a broader array of actors. The appropriateness of participation is acknowledged to some extent in Article 71 of the U.N. Charter, which states 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.”²² Today, over 2,140 NGOs have been granted consultative status with the United Nations.²³

We have increasingly come to recognize the ways in which the expansion of democracy and public participation at the national level has influenced the nature of the international organization. Doctrinally, the international organization has a membership of sovereign states, yet this sovereignty has eroded in two significant ways. One is that, because of globalization and interdependence, most states are under the constant influence of other states. The other way is that the elites who determine and implement so-called foreign policy are far more micromanaged by the political process than they were one or two generations ago. Thus, the democratic process within the state has an increasing influence on both home and foreign governments.

This changing character of member state politics constantly reshapes the international organization. From the organizational center, each state appears

21. THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 8; EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM (Roger B. Porter et al. eds., 2001).

22. U.N. CHARTER art. 71.

23. E-mail from NGO Section of United Nations (June 17, 2002) (on file with author).

to be a vector of the political forces within it, and as a result, the international organization has an incentive to respond by seeking to engage those domestic forces in dialogue. It little behooves the international organization to maintain the fiction that it is only a contract between states and to ignore the third party beneficiaries²⁴ of the contract (namely, the people) when those individuals collectively elect the governments that supervise the international organizations.

Recognition that the roots of international organizations go deeper than the state's perimeter can be seen in recent publications of international organizations. In 2000, U.N. Secretary-General Kofi Annan presided over the preparation of a report entitled, "We the Peoples. The Role of the United Nations in the 21st Century."²⁵ Annan declared that "the international public domain . . . must be opened up further to the participation of the many actors whose contributions are essential to managing the path of globalization."²⁶ In 2002, the WTO issued a brochure on its new Doha Agenda. The brochure states that "[w]ith the accession of China and nine other members from 1999-2001, the WTO has added another 1.5 billion people and now covers 97% of the world's population."²⁷ Although this statement itself is unexceptional, it is at variance with the trading system's self-image as a contract among Members with no connection at all to the public. It is interesting, then, that the WTO Secretariat writes advertising material that portrays the organization as being composed of people.

It is possible to address the relationship of the public to international organizations without using the language of democratic theory. After all, the opportunity to petition preceded democracy. Opportunities to submit suggestions exist in many organizations that are not democratically run, such as corporations or schools.

But if the term "democracy" is dodged, one misses the possibilities for purposefully adding more democratic process into the international level to make up for democratic loss at the national level through international organizations and treaty-making. Executive officials in governments generally

24. See Steven R. Ratner, *Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 18, at 449, 451 (stating that in the positivist school of international law, individuals were at best third-party beneficiaries).

25. KOFI A. ANNAN, "WE THE PEOPLES": THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY (2000).

26. *Id.* at 13.

27. WTO, THE ROAD TO DOHA AND BEYOND—A ROAD MAP FOR SUCCESSFULLY CONCLUDING THE DOHA DEVELOPMENT AGENDA 4 (2002).

have far greater license to take actions in international organizations than they do in domestic processes. Although some international agreements may require approval by national parliaments, this decision will not be based solely on the merits of the proposed action, but also on the costs of failing to acquiesce in a broad agreement. In other words, because parliamentary approval is not sought until after a deal is made, and because the parliaments act separately to consider the agreement, each parliament may be reluctant to singularly abandon the deal. Furthermore, for many actions, parliamentary approval is not even required. For example, as Oxfam has noted, “most governments can enter into agreements at the WTO without sufficient reference to public opinion or parliamentary scrutiny. . . .”²⁸

In suggesting the need for international pluralist processes, this article does not mean to devalue the importance of improving control of foreign policy at the national level through parliamentary oversight and advisory committee action. Indeed, because treaties may commit governments to take prescribed actions in the future and to refrain from taking prohibited actions, treaties are akin to constitutional rules which are often adopted only after receiving supermajority approval.

The democratic problem is more difficult when it comes to undoing a treaty commitment. While a national constitution can typically be changed by domestic supermajorities in the future, it is not so easy to escape from treaty obligations.²⁹ Abrogating a treaty may be formally possible, but could be very costly for a country. By making the cost high, a government negotiating a treaty may seek to lock in its desired rule for its successors.

When governments meet to negotiate or to administer a treaty, the legitimacy of such a congress of nations springs from the delegated authority of each government’s delegate. In embodying the government, that delegate should be as open to public opinion as the remainder of the government would be at home. Or to put it another way, just as stakeholders seek to influence national lawmakers, it is equally legitimate for stakeholders to seek to influence a national plenipotentiary sent to an international conference.

The internationality of such conferences changes the relationship of a citizen to her government. Since the decisions are being made by a group of

28. OXFAM, RIGGED RULES AND DOUBLE STANDARDS, TRADE, GLOBALIZATION, AND THE FIGHT AGAINST POVERTY 255 (2002).

29. See Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 107 (2002) (suggesting that WTO commitments can amount to a higher degree of irreversibility than even for constitutional amendments).

countries, why should a citizen in Country A limit her lobbying to just the delegate from Country A? This citizen may lack privity with the delegates from Country B and C, but on the other hand, they are making decisions that will affect her. Furthermore, citizens from A, B, and C may find that they have a common interest. Shouldn't this A-B-C stakeholder coalition be able to promote its common interest at the intergovernmental conference? As this article will show, interest groups answered these questions affirmatively many decades ago when NGOs began espousing transnational causes.

In calling for more democratic process to be available at the international level, this article is not suggesting that elections be held for a global parliament or for U.N. officials. Instead, the thesis here is that international organizations should be transparent in their activities and should provide more opportunities for policy discourse and contestation of ideas among NGOs and governments.

Today, NGOs have expectations that they will be able to participate to some extent in the activities and decisionmaking of international organizations. Of course, these expectations are not new. The U.N. Non-Governmental Liaison Service has facilitated dialogue and cooperation between NGOs and the U.N. system for twenty-seven years. The Service puts out a periodic newsletter with the title "Go Between" that evokes the mission of the NGOs going between the states and the United Nations.

Thinking about the NGO role is important for explaining and predicting the outputs of international organizations. The treaty on landmines is perhaps the clearest example of NGO influence,³⁰ yet one can see shades of the same phenomenon in just about every international lawmaking process. For example, an explanation of the negotiation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that failed to consider the role of business groups would be inadequate.

One school of international law has always recognized pluralist processes of decisionmaking—the so-called "New Haven School" pioneered by Myres McDougal.³¹ For example, in a study published in 1980 on "Human Rights and

30. See Daniel W. Drezner, *On the Balance Between International Law and Domestic Sovereignty*, 2 CHI. J. INT'L L. 321, 328 (2001) (noting that the origin of the land mines treaty clearly lies with NGOs, not sovereign states who were relative latecomers).

31. Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 333, 337-38 (1997) (noting that the New Haven approach encourages a far wider understanding of the legal process including the participants from civil society).

World Public Order,” McDougal, Harold D. Lasswell, and Lung-chu Chen explained that

[t]he choice in features of world constitutive process is not one of simple dichotomy: either a world controlled solely by “sovereign” nation-states or of a world government supplanting all the existing nation-states. Ours is a world of pluralism and diversity . . . nation-states, international governmental organizations, political parties, pressure groups, and private associations—are forms of associations through which individuals cooperate to achieve fulfillment of their demands.³²

While acknowledging authority structures denoted as legislative, executive, judicial, and administrative, the New Haven School focuses instead on the key authority functions (intelligence, promotion, prescription, invoking, application, termination, and appraisal) that apply at all levels of public order.³³

The authority functions of international organizations are now receiving considerable attention. Borrowing the idea of checks and balances within a national constitution, analysts are looking for checks and balances at the international level, and are seeing the role of NGOs as an important part of the needed matrix.³⁴ For example, Michael Edwards writes:

The future lies in a better distribution of power through the international system, expressed in a wider variety of channels, with more checks and balances. That requires the exercise of ‘*multiple citizenship*’, as sociologists call it, realising our rights and exercising our responsibilities as members of communities and local pressure groups, citizens of our national polity,

32. MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 179 (1980) (internal footnote omitted).

33. HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY 28-29 (1997).

34. John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?*, 31 LAW & POL’Y INT’L BUS. 221, 226 (2000) (asking whether NGOs can be a check against non-democratic, unaccountable, and aloof intergovernmental institutions).

consumers in the global marketplace, and—for the future—constituents of international regimes.³⁵

Daniel Esty calls for the WTO “to build new connections to the publics around the world in whose name trade policy is advanced as well as to strengthen the broader institutional structure of checks and balances within which the WTO operates.”³⁶

This article comes at a time when NGO influence may be on the wane.³⁷ Al Qaeda is, after all, an NGO, and civilized society does not accept its tactics and demands, or its use of charitable organizations as conduits for financing terror. In response to the attacks of September 11, the American public probably now views governmental action relatively more favorably as compared to nongovernmental action than it did before that date. The idea of a cosmopolitan community in a borderless world has receded from national consciousness. Instead, the focus in the United States is on “homeland” security, thus reaffirming the link between the state and the citizens it should protect. Furthermore, even before September 11, the reputation of activist groups was already tarnished from the disruptive actions taken by NGOs at intergovernmental conferences such as Seattle, Quebec City, Milan, and Washington. Although it is important to acknowledge these developments vis-à-vis the timing of this article, the underlying need for more effective global governance remains, and so the trends discussed in this article will continue.

C. Overview of the Debate

The problem of democracy in global governance has received considerable commentary in recent years. In this article, let me point to three perspectives—the state centrists, the pessimists, and the reformists. Each is discussed briefly below.

The state centrists argue that democracy is a state-centered concept and has no meaning at the international level. As Susan Marks explains in critiquing this viewpoint, the nation-state is viewed as democracy’s

35. MICHAEL EDWARDS, *FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY* 178 (2000) (internal citations omitted).

36. Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 *WORLD TRADE REV.* 7, 10 (2002).

37. If a waning is occurring, that should not be surprising: there is evidence that NGO influence is cyclical. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT’L L.* 183, 268-70 (1997).

“container” and therefore democratic politics is bounded within the state.³⁸

Martin Wolf has adopted this position with respect to the WTO in his observation that “[a]s an agreement among states, the WTO cannot itself be democratic.”³⁹

In a variant of the state-centric viewpoint, analysts will agree with the claim that the international organization has to be democratic, but then counter that it achieves democracy through a two-step derivative process.⁴⁰

In the first step, international organizations are accountable to governments, and in the second step, each government is accountable to its own public. This reasoning is especially salient for the WTO because its decisions need the consent of all of the member governments.⁴¹

The pessimists do not dispute the relevance of democracy for an international organization, but contend that it cannot be accomplished for practical reasons. Robert Dahl espouses this position. Distinguishing his approach from what he calls the “optimistic” view that international institutions can be democratized, Dahl argues that the extent of delegation involved in international organizations goes well beyond any acceptable threshold of democracy.⁴² As a result, he concludes that he “see[s] no reason to clothe international organizations in the mantle of democracy simply in order to provide them with greater legitimacy.”⁴³ Furthermore, he accepts a “democratic deficit” as “a likely cost of all international governments.”⁴⁴

The reformists contend that international organizations need a democratic transformation. David Held, for example, has written that “[t]he establishment of an international assembly of democratic peoples, directly elected by them and accountable to them, is an unavoidable institutional

38. Marks, *supra* note 8, at 50. Marks attributes the container metaphor to Anthony McGrew.

39. Martin Wolf, *Of Tuna, Turtles and Red Herrings*, FIN. TIMES, Nov. 17, 1999, at 27.

40. See Mike Moore, Trade, Development and Democracy: The Need for Reform of the WTO, Speech Before the European Parliament Seminar (Apr. 10, 2001), at http://www.wto.org/english/news_e/spmm_e/spmm57_e.htm (“The WTO is above all an intergovernmental organization. So it is mainly accountable to the people through their governments.”); Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 18, at 25, 31 (“In the legitimacy of national regimes resides the legitimacy of the international regime.”)

41. WTO, 10 Common Misunderstandings About the WTO: 10, at www.wto.org/english/thewto_e/whatis_e/10mis_e/10m10_e.htm (stating that decisions at the WTO are more democratic than majority rule because everyone has to agree).

42. Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in DEMOCRACY'S EDGES 19, 22, 52 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

43. *Id.* at 32.

44. *Id.* at 34.

requirement” for a cosmopolitan democracy.⁴⁵ Richard Falk and Andrew Strauss have proposed a “Global Peoples Assembly.”⁴⁶ The reformist proposals typically are centered on introducing voting into global governance.

In contrast to these three perspectives, this article adopts a fourth view.

The reformists are right that the international level needs democratic processes, but the fixation on elections as a litmus test (even if holding them were doable) overlooks the greater value of open, continuous participatory decisionmaking processes. Elections are hardly the container of democratic aspirations. In his last major public address, delivered in 1919, Woodrow Wilson explained that the important thing about “opinion” in democracy was not the number of people who hold it, but rather the process of weighing the opinion so “that every voice can be heard, every voice can have its effect, every voice can contribute to the general judgment that is finally arrived at.”⁴⁷

While reformists focus too heavily on elections as a means of adding democracy to global governance, the pessimists go too far in contending that the public must accept the non-democratic character of international organizations. The NGO protests of the past few years have shown how easy it is to question the legitimacy of international organizations and to support the alternative vision of localization as being more democratic. While the state centrists are wrong to dismiss the democratic critique of the WTO and other organizations, they are right to underline the state centricity of the current system because that character must be respected in finding solutions to the democratic deficit internationally. Furthermore, finding such solutions is requisite for avoiding the inefficiencies of localized governance in an interdependent world.

This fourth view might be called “functional” because it considers openness to nongovernmental input as part of the normal function of an international organization. The term functional is used because it links David Mitrany’s views on international cooperation along functional lines with his insight about the democratic role of NGOs. Mitrany was one of the first political scientists to grasp the connection between NGOs and the challenge of international democracy. In his 1954 essay, “An Advance in Democratic Representation,”

45. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 273 (1995). Held has also suggested the possibility of general referenda cutting across nations. *Id.*

46. Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 *STAN. J. INT’L L.* 191 (2000).

47. WOODROW WILSON, *Address at Pueblo, Colorado (Sept. 25, 1919)*, in *ADDRESSES OF PRESIDENT WILSON*, S.Doc.No. 66-120, at 359, 364 (1st Sess. 1919).

Mitrany postulated that Article 71 of the U.N. Charter was an “important step toward a possible modern solution of the problem of democratic representation.”⁴⁸ Greater NGO participation in the functional agencies of the United Nations, Mitrany explained, would reestablish and canalize democratic initiative and control.⁴⁹ Viewing as unrealistic the idea of a “world parliament,” Mitrany suggested that NGOs could be made into “instruments of really informed democratic representation.”⁵⁰ Just as informed private groups are needed within the state to help shape policy, the greater the development of joint international activities, “the greater will obviously be the need and scope for the relevant non-governmental organizations to be associated with those activities.”⁵¹ The democratic function of NGOs was two-way, according to Mitrany. It was as important for NGOs to inform the general public on what “their particular specialized agency is doing, and make clear the reasons for it, as to act as the voice of that public opinion at the seat of power.”⁵²

Mitrany’s analysis was influenced by Lyman Cromwell White, a political scientist who studied NGOs.⁵³ In 1949, White wrote that

[i]t is an expression of democracy when groups from various nations work together in solving their common problems; this is particularly true when they try to influence intergovernmental organizations. . . . Thus the influence and the future of international nongovernmental organization is connected with the growth of democratic attitudes within states and also within intergovernmental organizations.⁵⁴

The dating of the emergence of democratic participation has an importance beyond historical accuracy. Typically, NGO participation is said to be a recent

48. David Mitrany, *An Advance in Democratic Representation*, in A WORKING PEACE SYSTEM 121, 124 (1966) [hereinafter Mitrany, *Advance in Democratic Representation*]. The article on democratic representation had been originally published in *International Associations*, the journal of the Union of International Associations. For Mitrany’s views on the role of functional cooperation in achieving peace, see generally A WORKING PEACE SYSTEM (collection of essays by Mitrany).

49. Mitrany, *Advance in Democratic Representation*, *supra* note 48, at 125.

50. *Id.* at 126.

51. *Id.*

52. *Id.* at 128.

53. *Id.* (citing LYMAN C. WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS: THEIR PURPOSES, METHODS AND ACCOMPLISHMENTS 12 (1951)).

54. Lyman C. White, *Peace by Pieces—The Role of Nongovernmental Organizations* 264 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 91 (1949).

phenomenon that cannot fully be reconciled with state-centric theories of international law and organization.⁵⁵ The deeper NGO participation is thought to have started after the end of the Cold War or perhaps earlier in the U.N. global conferences of the 1970s.⁵⁶ But by portraying NGO participation as a fairly recent phenomenon, pro-NGO analysts devalue the significance of the longtime constructive role that civic society groups have played in helping governments solve economic and social challenges.

While Mitrany was correct to call attention to the drafting of Article 71 of the U.N. Charter in 1945 as a key legislative development, this article suggests the more important year came a generation earlier. In my view, the Peace Conference in Paris in 1919 should be recognized as the fount for the idea that state practice would accept NGO participation in international organizations. Part II of this article will discuss this important moment in international governance.

II. NGO PARTICIPATION AT THE PARIS PEACE CONFERENCE OF 1919

Following World War I, the victorious allies and associated powers held a preliminary conference which began in January 1919 in Paris and concluded five months later with the full Peace Conference held in Versailles. Thirty-three governments participated in the negotiations and signed the Treaty of Versailles (including Germany).⁵⁷ It was not just a North Atlantic treaty; the signatories also included China, Japan, Siam, Liberia, South Africa, Bolivia, Brazil, Ecuador, Peru, and Uruguay. In addition, many delegations came from non-self governing territories and colonies, and these delegations were sometimes afforded the opportunity to provide formal or informal input into the negotiations.⁵⁸ Besides setting the terms of the peace, the Treaty of Versailles also established the League of Nations. The conference's broad participation and agenda justify giving the five-month negotiation the moniker of a global conference.

55. See, e.g., Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997).

56. See Daniel C. Thomas, *International NGOs, State Sovereignty, and Democratic Values*, 2 CHI. J. INT'L L. 389 (2001) (explaining that in the mid to late twentieth century, a new set of actors, NGOs, began to assert their voice in international diplomacy).

57. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 225 Consol. T.S. 188 [hereinafter Treaty of Versailles].

58. See generally STEPHEN BONSAI, *SUITORS AND SUPPLIANTS: THE LITTLE NATIONS AT VERSAILLES* (1946).

The conference was self-consciously viewed as a pivotal moment in global governance in which an international community would be formed through the legal and moral principles enunciated in the treaty and through the establishment of the League of Nations. The leading figure at the conference, Woodrow Wilson, sensed that democracy was in the air. Reporting on the mood of the conference a few months later, Wilson said:

There was not a single statesman at Paris who did not know that he was the servant, and not the master, of his people. There was not one of them who did not know that the whole spirit of the times had changed and that they were there to see that people were liberated, not dominated; that people were put in charge of their own territories and their own affairs.⁵⁹

It was clear that Wilson saw the Paris negotiations as different from the ones before it, and recognized that this had implications for the future of democracy. He said:

Every previous international conference was based upon the authority of governments. This, for the first time, was based on the authority of peoples. It is, therefore, the triumphant establishment of the principles of democracy throughout the world. . . .⁶⁰

In other speeches, Wilson referred to the Treaty of Versailles as “a people’s treaty” and “a people’s and not a statesmen’s peace.”⁶¹

Five years after the Paris conference, Albert Thomas recalled the “mental attitude” of that period as being a “general feeling that the old world must be regenerated.”⁶² Noting that “there are moments in history when the human spirit seems to rise for an instant above all the controversies of the day,” and recalling the 1789 Declaration of the Rights of Man and of the Citizen,

59. WOODROW WILSON, *Address at Reno, Nevada (Sept. 22, 1919)*, in ADDRESSES OF PRESIDENT WILSON, *supra* note 47, at 307, 310.

60. WOODROW WILSON, *Address at Tabernacle, Salt Lake City, Utah (Sept. 23, 1919)*, in ADDRESSES OF PRESIDENT WILSON, *supra* note 47, at 321, 334.

61. WOODROW WILSON, *Address at Auditorium, Los Angeles, California (Sept. 20, 1919)*, in ADDRESSES OF PRESIDENT WILSON, *supra* note 47, at 291; WILSON, *supra* note 47, at 360.

62. ALBERT THOMAS, INTERNATIONAL SOCIAL POLICY 141 (1948). Thomas, a French moderate socialist, was the first Director of the International Labor Organization.

Thomas suggested the occurrence of “a similar moment in 1919,” although he admitted that this international episode of liberty and equality “was not so clear-cut.”⁶³

When the conference convened in Paris in 1919, many private groups sent representatives to press their views.⁶⁴ Building on unofficial lobbying going back over a century, and most recently at the Hague Peace Conferences, concerned individuals perceived that they would make more progress on their cause by influencing the many governments meeting in Paris than by influencing their own government at home. Writing a few years after the Paris Conference, Jane Addams explained that because the official delegates to the peace conference would be diplomats who were “seldom representative of modern social thought,” the idea crystallized that “other groups should convene in order to urge the importance of certain interests which have hitherto been inarticulate in international affairs.”⁶⁵ The convening groups issued a frisson of communications to the assembled government officials.

The governments manifested some openness from the start. The official rules for the Paris Conference provided that the secretariat would compile a list of petitions from private groups and individuals and distribute it to the government delegations.⁶⁶ On at least one topic, the governments requested technical assistance from NGOs. The Anti-Slavery and Aborigines’ Protection Society was asked to come to Paris to provide assistance on the Treaty’s provisions regarding mandates.⁶⁷ Nevertheless, in many other ways, the governments made it hard for NGOs to influence the proceedings. Little transparency existed in the day-to-day deliberations of the governments. All of the working sessions were closed to the public.

The Paris Conference became an important moment in global governance for many reasons, but this article will focus on only one—the way that private individuals and NGOs played roles alongside the conference, and in some instances, inside it. The article will look at four groups and how they

63. *Id.* at 142.

64. WARREN F. KUEHL, *SEEKING WORLD ORDER* 267 (1969); PAUL GORDON LAUREN, *THE EVOLUTION OF HUMAN RIGHTS: VISIONS SEEN* 93 (1998) (discussing the representatives from national independence movements); *PROCEEDINGS OF THE CONFERENCES OF DELEGATES OF ALLIED SOCIETIES FOR A LEAGUE OF NATIONS* 19 (League to Enforce Peace, 1919) (urging that private societies establish a bureau in Paris to sit during the Peace Conference).

65. JANE ADDAMS, *PEACE AND BREAD IN TIME OF WAR* 152-53 (G.K. Hall & Co. 1960) (1922). Addams notes that private conferences were held by women, labor, Zionists and similar groups.

66. Nathan Feinberg, *La Pétition en Droit International*, 40 *RECUEIL DES COURS* 529, 556-58 (1932).

67. C.W.W. GREENIDGE, *SLAVERY* 166 (1958).

participated. The groups are: labor unions, Jewish and Zionist organizations, women's groups, and the American Red Cross. The activism of the women is particularly notable because in many countries at the time, females did not have a right to vote.

A. Labor Unions

International labor legislation was on the agenda at the opening meeting of the preliminary peace conference.⁶⁸ At that session, the governments established a Commission to draft labor provisions for the treaty.⁶⁹ To represent the United States, President Wilson appointed Samuel Gompers, President of the American Federation of Labor, and A.N. Hurley, President of the American Shipping Board.⁷⁰ France named Léon Jouhaux, the leader of the French labor federation, to its delegation.⁷¹ The other Commission members were government officials. Gompers was elected chairman of the Labor Commission.⁷²

The world's labor leaders would have gone to Paris, but France would not give all of them visas. Instead, a labor conference was held in Berne, Switzerland. The International Trade Union Conference drafted two resolutions: one regarding the proposed labor provisions in the Peace Treaty and the other regarding the League of Nations.⁷³ These resolutions were officially presented to French President Georges Clemenceau, in his role as president of the peace conference, and to the official Labor Commission.⁷⁴ In parallel with the labor meeting, the Socialists also held a conference in Berne, with some crossover participation. This NGO conference caused great

68. JAMES T. SHOTWELL, AT THE PARIS PEACE CONFERENCE 128 (1919). See also EDWARD C. LORENZ, DEFINING GLOBAL JUSTICE: THE HISTORY OF U.S. INTERNATIONAL LABOR STANDARDS POLICY 70-72 (2001).

69. THE INTERNATIONAL LABOR ORGANIZATION OF THE LEAGUE OF NATIONS, RESEARCH REPORT NO. 48, at 20-22 (1922).

70. Edward J. Phelan, *The Commission on International Labor Legislation*, in 1 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 127, 128-29 (James Brown Scott et al. eds., 1937).

71. AUSTIN VAN DER SLICE, INTERNATIONAL LABOR, DIPLOMACY, AND PEACE 1914-1919, at 350 (1941). Jouhaux, a legendary labor leader, won the Nobel Peace Prize in 1951.

72. See JOHN MAINWARING, THE INTERNATIONAL LABOUR ORGANIZATION: A CANADIAN VIEW 14-15 (1986); PAUL PÉRIGORD, THE INTERNATIONAL LABOR ORGANIZATION 86 (1926); see also Carol Riegelman, *War-Time Trade-Union and Socialist Proposals*, in 1 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION, *supra* note 70, at 55, 77; VAN DER SLICE, *supra* note 71, at 217.

73. VAN DER SLICE, *supra* note 71, at 329-30.

74. See *id.* at 329; Manifesto of the International Trade Union Conference at Berne, February 10, 1919, on International Labor Legislation, in 2 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION, *supra* note 70, at 336.

consternation among the official delegates in Paris. An observer of both the official Paris Conference and the socialist meetings in Berne commented that the former was surrounded by 200 journalists and the latter by 200 detectives.⁷⁵

In assessing labor's influence on the peace conference, one has to distinguish between the Treaty of Versailles' labor provisions and its political and economic provisions. The plan for Part XIII of the Treaty, which established the International Labour Organization (ILO), was influenced to a considerable extent by the resolutions passed by labor federations during the war and reiterated at Berne. By contrast, the International Trade Union Conference's advice on the provisions of the Treaty regarding Germany did not have any restraining impact on the decision of the governments to extract retribution. In a book chapter on "Labor's Lobbying at Paris," Austin Van der Slice notes the asymmetry in the trade unions' impact and observes that labor, "more than any other politically organized section of the public, had approached the peace with a truly international outlook."⁷⁶

The ILO is the most daring of all international organizations in its approach to NGO participation. "[F]or the first time in history," wrote Manley O. Hudson, international cooperation "was organized with some reference to other than national interests. . . ."⁷⁷ Under the ILO's Constitution, each member State sends four delegates—two from government, one from employers, and one from workers.⁷⁸ Within the ILO, there is formal equality between government and non-government representatives. No effort is made to segregate the government and non-government delegates into separate chambers. The ILO does not view states only as hierarchies, and so delegates from each country vote individually, not as a unit.⁷⁹ Thus, the drafters of the ILO contemplated that an NGO delegate might vote in opposition to its government.

In summary, the high points of labor participation in Paris are as follows. Trade union groups from many countries held a parallel meeting to draft

75. VAN DER SLICE, *supra* note 71, at 321.

76. *Id.* at 343, 375.

77. MANLEY O. HUDSON, *PROGRESS IN INTERNATIONAL ORGANIZATION* 48 (1932).

78. Treaty of Versailles, *supra* note 57, art. 389; for the current version, see INTERNATIONAL LABOUR ORGANISATION CONST., art. 3.1 [hereinafter ILO CONST.], available at <http://www.ilo.org/public/english/about/iloconst.htm>.

79. Treaty of Versailles, *supra* note 57, art. 390, para. 1; ILO CONST., *supra* note 78, art. 4.1. Delegates representing a government assuredly vote according to the government's instructions.

recommendations for the preliminary peace conference, and these were officially communicated. At the commencement of the conference, the governments set up a Commission on Labor Legislation, and its members selected the President of the American Federation of Labor to chair that body.

The Commission produced draft language for Part XIII of the Treaty of Versailles. When it was initiated in 1919, the ILO was the only international organization to provide full participation rights for NGO delegates. Today, it remains unique in that respect.

B. Jewish and Zionist Organizations

The most organized minority NGOs in Paris were the Jewish groups and Zionists.⁸⁰ While they were united on the issue of allowing Jewish settlement in Palestine, they were at loggerheads over whether Jews in Eastern and Central Europe should be allowed to establish their own entities.⁸¹ The American Jewish Congress, the Alliance Israélite Universelle (French Jews), and the Joint Delegation (British Empire Jews) did not want to push for “group rights,” but compromised with the Russian and Eastern European Jewish groups.⁸² All of the groups assembled regularly in the Committee of Jewish Delegations at the Peace Conference.⁸³ Committee members met frequently with governments and submitted draft language for the treaty regarding minority rights and for the administration of Palestine.⁸⁴ They also asked for an opportunity to make a presentation to the official commission dealing with minority questions, but this was not granted.⁸⁵

It is unclear what impact the Jewish groups’ participation had on the drafting of the Minorities Treaty with Poland and the agreement to place

80. On the Zionists, see generally HORACE MEYER KALLEN, *ZIONISM AND WORLD POLITICS* (1921). See also generally NAHUM SOKOLOV, *HISTORY OF ZIONISM, 1600-1918* (Ktav Publ’g House 1969) (1919).

81. OSCAR I. JANOWSKY, *THE JEWS AND MINORITY RIGHTS (1898-1919)*, 264, 287, 386 (1933). This proposal of separate entities was not accepted by the governments. *Id.* at 388.

82. *Id.* at 264, 268-69, 387.

83. *Id.* at 287. During the Conference, the Committee issued a *Bulletin* covering the peace negotiations and sent it to journalists and political leaders. *Id.* at 357-59 n.19.

84. See 2 DAVID LLOYD GEORGE, *MEMOIRS OF THE PEACE CONFERENCE 747-48* (1939); JANOWSKY, *supra* note 81, at 331, 335, 339-40; see also FELIX FRANKFURTER REMINISCES 155 (Harlan B. Phillips ed., 1960); MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* 141 (1982); *Memorandum of the Committee of Jewish Delegations at the Peace Conference*, in JACOB ROBINSON ET AL., *WERE THE MINORITIES TREATIES A FAILURE?* 319 app. II (1943); *Proposals for Protection of Minorities*, in 8 MY DIARY AT THE CONFERENCE OF PARIS 422 (David Hunter Miller ed., 1924).

85. Feinberg, *supra* note 66, at 560.

similar provisions in forthcoming bilateral accords.⁸⁶ Certainly, the Jewish groups were not the only ones pushing for such language. The Minorities Treaty provided that Polish nationals would have the right to establish, manage, and control “charitable, religious, and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.”⁸⁷

Among the many meetings the Jewish and Zionist groups had in Paris, one stands out. The Zionist Mission to the Peace Conference (including Chaim Weizmann) was allowed to address the Council of Five.⁸⁸ Although only one head of delegation was present (Italy), that the meeting even occurred was significant, because the Zionists were speaking for a transnational cause, not claiming to be a state. The Zionists submitted a draft resolution concerning the status of Palestine.⁸⁹

It is interesting to note that Zionists were opposed by other non-governmental groups, including fundamentalist Christians and the American Missionary Association.⁹⁰ Two Christian representatives in Paris persuaded President Wilson to send them to survey local attitudes in Palestine where they found widespread opposition to the Zionist program.⁹¹ The Young Palestinians of Mexico did not travel to Paris, but did send a telegram to the Conference asking that the integrity of Syria be respected.⁹²

The high points of Jewish and Zionist participation are that the groups held regular meetings to harmonize group positions and to plan how to lobby governments with draft treaty language. The opportunity given to the Zionist Mission to address the Council of Five was a significant milestone in

86. See Treaty of Versailles, *supra* note 57, art. 93; JANOWSKY, *supra* note 81, at 335, 339, 341; Minorities Treaty between the Principal Allied and Associated Powers and Poland, June 28, 1919, 225 Consol. T.S. 412 [hereinafter *Minorities Treaty*]; LEAGUE OF NATIONS, PROTECTION OF LINGUISTIC, RACIAL AND RELIGIOUS MINORITIES BY THE LEAGUE OF NATIONS: PROVISIONS CONTAINED IN THE VARIOUS INTERNATIONAL INSTRUMENTS AT PRESENT IN FORCE (1927). There were six minorities treaties concluded in 1919.

87. *Minorities Treaty*, *supra* note 86, art. 8.

88. See BARNET LITVINOFF, WEIZMANN: LAST OF THE PATRIARCHS 128-30 (1976); 15 MY DIARY AT THE CONFERENCE OF PARIS, *supra* note 84, at 104-17; see generally 4 FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE 1919 159-72 (1943) [hereinafter *FOREIGN RELATIONS OF THE UNITED STATES*]. The Council of Five included the Principal Powers—that is, the United States, the British Empire, France, Italy, and Japan.

89. GEORGE, *supra* note 84, at 747.

90. See PARRISH, *supra* note 84, at 143.

91. *Id.*

92. 17 MY DIARY AT THE CONFERENCE OF PARIS, *supra* note 84, at 96.

transnational participation. The Jewish groups probably had some influence on the provisions in the minorities treaties.

C. *Women's Groups*

The Second International Congress of Women, organized by the Women's International League for Peace and Freedom, did not meet in Paris because the women from Germany could not get visas.⁹³ The Congress was instead held in Zurich and included women from sixteen countries. The Congress sent recommendations to the preliminary peace conference—for example, proposing that treaties be ratified only after approval of an elected legislative body.⁹⁴

Several leaders of the women's movement came to Paris. As Nitza Berkovitch has observed, the women sought to “carve out a space for themselves within the emerging agenda” and to “constitute themselves as a group with distinct interests that should be represented in the new world arena.”⁹⁵

In February 1919, President Wilson reported to the Supreme Council of Five that he had been visited by women's suffrage organizations who had asked the conference to address the conditions of women and children throughout the world.⁹⁶ Wilson proposed the appointment of an official Commission to which women's organizations would be permitted to send some representatives to participate in a consultative capacity. The Commission was to inquire into the conditions in Europe and the United States and report to the conference whether any international regulations should be issued. This proposal was debated but was withdrawn by Wilson after receiving insufficient support from the other governments.⁹⁷ During the debate, French President Clemenceau suggested that the women's recommendations could simply be referred to the Commission on Labor that had already been created. Wilson responded that

93. LINDA K. SCHOTT, *RECONSTRUCTING WOMEN'S THOUGHTS: THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM BEFORE WORLD WAR II*, 78 (1997); LEILA J. RUPP, *WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN'S MOVEMENT* 29, 211 (1997).

94. See GERTRUDE BUSSEY & MARGARET TIMS, *WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, 1915-1965*, at 29-31 (1965); *WOMEN'S INT'L LEAGUE FOR PEACE AND FREEDOM, REPORT OF THE 15TH INTERNATIONAL CONGRESS* 245 (1919).

95. NITZA BERKOVITCH, *FROM MOTHERHOOD TO CITIZENSHIP: WOMEN'S RIGHTS AND INTERNATIONAL ORGANIZATIONS* 73 (1999).

96. *FOREIGN RELATIONS OF THE UNITED STATES*, *supra* note 88, at 1022-23; JAMES T. SHOTWELL, *THE AUTOBIOGRAPHY OF JAMES T. SHOTWELL* 115 (1961).

97. Feinberg, *supra* note 66, at 559.

this would not satisfy the women who had “asked for recognition.”⁹⁸ A few weeks later, Clemenceau reported to the Council of Ten that he too had been visited by the women’s groups who were seeking the opportunity to take part in the Peace Conference.⁹⁹ Clemenceau explained that he had told the women that they should ask to be heard by the official Commissions on the League of Nations and on Labor. Following a discussion, the Council of Five agreed that the women’s groups could send a deputation to both commissions.¹⁰⁰ During the discussion, Italian Foreign Minister Barone Sidney Sonnino reported that he had also been visited by the women’s groups.

The first opportunity to testify came at the Commission on Labor, which was about to complete its work. In mid-March, the Inter-Allied Conference of Women Suffragists made a presentation, mainly on issues concerning the working conditions for women in industry.¹⁰¹ On the next day, the Commission made slight changes in wording in response to the recommendations of the women.¹⁰²

In April 1919, a joint delegation of the International Council of Women and the Inter-Allied Conference of Women Suffragists made a presentation to the Commission on the League of Nations.¹⁰³ Their key recommendations were: an agreement to suppress traffic in women, the eligibility of females for League positions, the recognition of the principle of women’s suffrage in the Treaty, the right of women to vote in plebiscites deciding questions of nationality, the creation of an international bureau of public health, the creation of an international bureau of education, and a statement in favor of arms control.¹⁰⁴ Language reflective of some of these proposals appeared in the Treaty of Versailles.¹⁰⁵

98. FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 88, at 1022.

99. *Id.* at 326.

100. See ARNOLD WHITTICK, WOMAN INTO CITIZEN 70 (1979).

101. See SHOTWELL, *supra* note 68, at 216 n.1.

102. *Id.* at 219.

103. INTERNATIONAL COUNCIL OF WOMEN, WOMEN IN A CHANGING WORLD 45, 344-45 (1966); David Hunter Miller, *The Making of the League of Nations*, in WHAT REALLY HAPPENED AT PARIS 421 (Edward Mandell House & Charles Seymour eds., 1921); 2 DAVID HUNTER MILLER, THE DRAFTING OF THE COVENANT 344, 361-62 (photo. reprint 1998) (1928) [hereinafter DRAFTING OF THE COVENANT]; WHITTICK, *supra* note 100, at 71; P. ROSSELLO, LES PRÉCURSEURS DU BUREAU INTERNATIONAL D'ÉDUCATION 132-37 (1943).

104. EGON F. RANSHOFEN-WERTHEIMER, THE INTERNATIONAL SECRETARIAT 365-67 (1945); see also CLASINA A. KLUYVER, DOCUMENTS ON THE LEAGUE OF NATIONS 298, 317-20 (1920).

105. Treaty of Versailles, *supra* note 57, arts. 7 (employment), 23(c) (traffic), art. 50, Annex, paras. 28 (voting in local assemblies in Saar) & 34 (plebiscitary voting in Saar), 88, Annex paras. 4 (plebiscitary voting in Silesia), 95 (plebiscitary voting in East Prussia), 109 (plebiscitary voting in Schleswig). Female suffrage was

These episodes show very skillful participation by the women's groups. When Wilson's support for their proposal proved insufficient, the women moved to lobby the blocking governments. What makes this episode especially noteworthy is that not only were the women heard, but they seem to have been successful in influencing the content of the Treaty. The activities of these women's groups did not go unnoticed by other NGOs that opposed feminism. For example in the United States, the National Association Against Women's Suffrage sent a letter to Paris asking that the Peace Conference set aside the issue of women's suffrage because it was a domestic issue.¹⁰⁶

The high points of the efforts by the women's NGOs are a parallel conference in Zurich, and direct lobbying in Paris that led to opportunities to make presentations to two key commissions. In both instances, some of the recommendations from the women were incorporated into the Treaty.

D. Red Cross

Following the Armistice, the challenges of combating famine and disease led to the idea of expanding the role of Red Cross societies to peacetime service.¹⁰⁷ Such service was not alien to the Red Cross idea (particularly the American Red Cross), but it would require changes in Red Cross operations. The champion of this new mission was Henry P. Davison, the chairman of the war council of the American Red Cross. Davison concluded that, because this mission would necessitate more international cooperation, a new "virile" international League of Red Cross Societies should be created.¹⁰⁸ Not surprisingly, this led to resistance by the International Committee of the Red Cross (ICRC), by then a 55-year old NGO, which worried that its control of the Red Cross movement would be undermined.

After receiving a go-ahead from President Wilson, Davison went to Europe in early 1919 to set up the new League of Red Cross Societies of Allied

not included. International legislation was not enacted until 1953 with the Convention on the Political Rights of Women.

106. Feinberg, *supra* note 66, at 558.

107. JOHN F. HUTCHINSON, CHAMPIONS OF CHARITY: WAR AND THE RISE OF THE RED CROSS 279 (1996); CLYDE E. BUCKINGHAM, FOR HUMANITY'S SAKE: THE STORY OF THE EARLY DEVELOPMENT OF THE LEAGUE OF RED CROSS SOCIETIES 27 (1964).

108. HUTCHINSON, *supra* note 107, at 285-87.

countries.¹⁰⁹ When he met resistance from the ICRC, Davison saw that it would be very difficult to achieve recognition of his new League through revision of the Red Cross Convention of 1906.¹¹⁰ Therefore, Davison switched tactics and sought to gain official recognition by the League of Nations for the new relief work of the Red Cross.¹¹¹ He gained an ally in Colonel Edward House of the U.S. delegation, and House then championed what became Article 25 of the Covenant of the League of Nations.¹¹² This Article states that governments “agree to encourage and promote the establishment and co-operation of duly authorized voluntary national Red Cross organizations having as purposes the improvement of health, the prevention of disease, and the mitigation of suffering throughout the world.”¹¹³

This language fell short of Davison’s goal—which was an explicit link between the League of Red Cross Societies and the League of Nations—but simply by being in the Treaty, it facilitated future cooperation between the Red Cross and the League. An early draft of Article 25 had authorized the creation of a “non-political and non-governmental” International Red Cross League, but this was shortened by David Hunter Miller of the American delegation.¹¹⁴

In April 1919, the new League of Red Cross societies convened a meeting in Cannes to discuss measures to address the outbreak of disease in Central Europe. In addition to some Red Cross societies and the ICRC, the meeting included eminent authorities in public health, sanitary science, hygiene, nursing, and child welfare.¹¹⁵ The League of Red Cross Societies then sent a communication to the Council of Five offering to implement relief efforts if the governments would agree to support these efforts. The communication

109. *Id.* at 287-89; GEORGE WILLEMIN & ROGER HEACOCK, *THE INTERNATIONAL COMMITTEE OF THE RED CROSS 26* (International Organization and The Evolution of World Society Series Vol. 2, 1984).

110. HUTCHINSON, *supra* note 107, at 289-95.

111. BUCKINGHAM, *supra* note 107, at 62-63; HUTCHINSON, *supra* note 107, at 295-96.

112. 4 *THE INTIMATE PAPERS OF COLONEL HOUSE* 257-59 (Charles Seymour ed., 1928) (providing a memorandum by Colonel House suggesting that governments give moral endorsement to Red Cross); H.R.G. GREAVES, *THE LEAGUE COMMITTEES AND WORLD ORDER* 88-89 (1931); David Kennedy, *The Move to Institutions*, 8 *CARDOZO L. REV.* 841, 922-23 (1987). During the drafting of this provision, the French delegate expressed concern about singling out the Red Cross to the exclusion of other associations, such as the International Society for the Prevention of Tuberculosis. *DRAFTING OF THE COVENANT*, *supra* note 103, at 386.

113. Treaty of Versailles, *supra* note 57, art. 25.

114. BUCKINGHAM, *supra* note 107, at 64-65; Chandler P. Anderson, *The International Red Cross Organization*, 14 *AM. J. INT’L L.* 210, 213-14 (1920) (stating that Article 25 was inserted at the suggestion of the organizers of the League of Red Cross Societies in order to give the League “an international status and sanction”).

115. HUTCHINSON, *supra* note 107, at 299.

noted that the new League of Red Cross Societies was “the natural and at present only agency available to undertake this work. . . .”¹¹⁶

Two high points for NGO influence can be seen in this episode. One is that a national NGO working through its home government was able to get an article added to the Covenant. More noteworthy is that this new article committed governments to support and utilize the NGOs involved in health and relief work.

E. Emerging State Practice on Participation

Paris in 1919 was not the first time that NGOs had held side events alongside intergovernmental conferences. That had occurred at the Hague Peace Conferences.¹¹⁷ Yet Paris was the first time that individuals from NGOs were accorded an opportunity to participate in a major lawmaking conference.

It is unclear to what extent the diplomats at the time perceived the NGOs as exercising democratic rights in a global community. More likely, the diplomats saw the NGO engagement in functional terms; that is, the NGOs had expertise that was useful for the particular decisions being made by the governments.

While any one of the four episodes described above can be explained in traditional, state-centric terms (after all, Gompers was appointed by the U.S. government to the Labor Commission), a look at the patterns of NGO activity shows that something new was afoot. When governments from around the world met in Paris to write rules for the postwar world, their gathering became a magnet drawing in NGOs. The minimal presence of business groups in Paris reflected their lack of institutional cohesion. Lessons were learned, however, and by the next year, the International Chamber of Commerce and the International Organization of Industrial Employers were launched.

State practice towards NGOs matured at the Paris conference. Before 1919, no customary norm existed on NGO participation. After 1919, the developing norm (or at least best practice) was that governments would recognize the legitimacy of the NGO activities alongside international conferences, and would give consideration to requests by NGOs to make presentations on topics of NGO expertise.

116. 10 FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 88, at 285-89 (1947).

117. Chamovitz, *supra* note 37, at 196-97; ARTHUR EYFFINGER, THE 1899 HAGUE PEACE CONFERENCE 348-51 (1999).

The driving force of this new norm was the important change taking place in the character of world governance. Well before 1919, governments had cooperated along functional lines, and these concerts had attracted attention by NGOs.¹¹⁸ Yet 1919 brought the creation of a central organization that would sponsor extensive cooperation in many fields and set up specialized agencies. Such an ongoing organization would develop footholds for NGOs to step into. As José Alvarez has noted, “international organizations are often the conduit for the growing clout of NGOs.”¹¹⁹

The fact that the Covenant of the League of Nations did not contain an NGO consultation provision did not deter NGOs from seeking involvement in the League. In my view, the experience of participation at Paris raised the expectations of NGOs as to their opportunity to be involved in the future. Thus, the peace conference empowered NGOs. It made them feel a regular part of the constitutive process. Paris also changed the expectations of governments about a closed negotiating process and left precedent-minded diplomats with experiences that made it harder to dismiss NGO requests to be heard. With the benefit of hindsight, it seems clear that the opportunities given to NGOs at Paris, in that special moment in history, galvanized the continuation of NGO participation which then gave global governance a more democratic marrow.

III. THE GLOBAL CONSTITUTIONAL MOMENT

Bruce Ackerman has originated the theory of a “constitutional moment.” Such a moment of political renewal eventuates when “normal politics” gives way to “higher lawmaking.”¹²⁰ This can occur after war, economic catastrophe, or urgent appeals to the national conscience.¹²¹ For Ackerman, the essence of higher lawmaking is not the legal procedure used—for example, a formal constitutional amendment—but rather whether a mobilized citizenry is able to “take the law into its own hands and give governors new marching orders.”¹²²

118. See generally CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., 1999); AKIRA IRIYE, GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD (2002).

119. José Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 227 (2002) (footnote omitted).

120. 1 BRUCE ACKERMAN, WE THE PEOPLE 266-67, 302 (1991).

121. 2 BRUCE ACKERMAN, WE THE PEOPLE 6 (1998).

122. ACKERMAN, *supra* note 120, at 280.

A constitutional moment will have four phases, according to Ackerman. The first is a signaling phase, when a “movement” is able to place its agenda at the center of sustained public scrutiny.¹²³ The signaling phase can be tested by looking at the depth, breadth, and decisiveness of public involvement.¹²⁴ Second, there is the proposal phase, where the higher lawmaking system encourages the movement to focus its rhetoric into operational proposals for constitutional reform.¹²⁵ The third phase is mobilized popular deliberation, where the movement’s transformative proposals are tested time and again with the higher lawmaking system.¹²⁶ The final phase is legal codification of the new constitutional solution.¹²⁷ The leading officials of government must pledge to remain faithful to this new solution even when “the People” turn their minds to other public and private pursuits.¹²⁸

Ackerman writes about the United States experience, but his theory might also have validity for other nations and for international governance. Of course, when applied to the international level, adjustments will have to be made because there is no world court playing the same interpretive role as the U.S. Supreme Court in Ackerman’s analysis. In addition, the peoples in the world community do not have worldwide elections.

For the community of nations, the drafting of the Treaty of Versailles was the broadest attempt up to that point to promote international cooperation and to manage conflicts. The creation of the League of Nations was certainly an episode of lawmaking. Whether it can be properly described as “constitutional” is debatable, yet recall Wilson’s observation that this was the first conference based on the authority of peoples. Although the term “constitutional” has been applied to international law processes for many decades,¹²⁹ scholarly attention to international constitutionalism has increased in recent years. For example, Bardo Fassbender contends that “[t]he fundamental rules of a system of governance concerning the scope and nature

123. *Id.* at 266.

124. *Id.* at 272-75.

125. *Id.*

126. *Id.*

127. *Id.* at 288.

128. *Id.* at 288-89.

129. Bruno Simma notes that the term “constitution” was applied to international law in 1926 by Alfred Verdross. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 259-60 (1994). In 1920, Charlemagne Tower used the term “international constitution” in discussing the fundamental law of international government. Charlemagne Tower, Book Review, 14 AM. J. INT’L L. 464, 466 (1920).

of its authority, the allocation of power to specific organs, and the ways these powers are to be exercised can be referred to as a constitution, even if that system is an international or supranational organization.”¹³⁰ Benedict Kingsbury points to the need for a “richer international constitutionalism” to address issues of “accountability, mandate, representation, and participation in relation to” NGOs.¹³¹

My hypothesis is that the Paris conference of 1919 was a global constitutional moment. By that, I mean that it was a transformational moment in world politics in which states recognized the legitimacy of opening up some diplomatic conferences to nongovernmental participation, and began to follow a practice to do so in appropriate circumstances. Those circumstances were when governments thought that private actors might make a useful contribution. To test the validity of the constitutional moment, one can look for the four phases identified by Ackerman.

Long before 1919, NGOs began signaling that they wanted to be involved in international decisions.¹³² These signals were intensified by the pent up demands and sacrifices of the war. As noted in Part II, groups representing women, workers, and Jews and Zionists traveled toward Paris to influence the outcome of the peace negotiations. These movements had different substantive agendas, yet they shared the same belief that the time had come for governments to take their views seriously. The group leaders had made a considered judgment about the rights of citizens and the permanent interests of the community.¹³³ Whether these special interest groups (as well as other groups in Paris) had enough breadth to show signaling on the issue of public participation remains unclear.

In the proposal phase, the higher lawmaking system encourages the movement to focus its rhetoric into operational proposals for constitutional reform. This happened at Paris when the governments invited the detailed proposals of the Zionist and women’s groups, and when the governments set up the Labor Commission and named Gompers the chairman. In agreeing to hear the substance of the NGO proposals, the governments also implicitly

130. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 558 (1998).

131. Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Descriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT’L L. 183 (2002).

132. Charnovitz, *supra* note 37, at 195-212; Steve Charnovitz, *Learning from Early NGO Activity*, 92 ASIL PROC. 338 (1998).

133. See ACKERMAN, *supra* note 120, at 272.

agreed to the innovation of providing space at a diplomatic conference for transnational, unofficial voices. No previous international conference had directed its secretariat to compile a list of petitions from private groups and individuals, and then to distribute it to government delegations.

A deliberative phase is not a significant part of the history as related here.

The change in expectations of participation in international lawmaking was not debated much among the general public. One way that debate did occur was that each government made a choice about joining the ILO, knowing that this would require that its state be represented by worker and employer delegates in addition to government officials. ILO tripartism was tested over the years and found to be worth the dilution of state authority.

The last phase is codification. One can look at the inclusion of Article 71 of the U.N. Charter in 1945 as the eventual codification of the unwritten constitutional change of 1919. Yet codification also occurred through the customary practices of government delegates at the League of Nations (and international civil servants) who approved the observer and participant status of international NGOs in some League activities.¹³⁴ Furthermore, two of the movements in 1919 got immediate legislative codification. The Red Cross movement was successful in securing Article 25 of the League of Nations Covenant and organized labor was successful in getting the ILO. Perhaps the reason why the ILO today is the only international organization with full NGO participation is that no constitutional moment with the depth of what transpired in 1919 has occurred since then.

The constitutional moment of 1919 also received a confirming international judicial endorsement. The first case to come before the Permanent Court of International Justice was a request for an advisory opinion on the method that the Government of The Netherlands had used to select its worker delegate to the ILO.¹³⁵ The four major labor federations could not agree on a delegate and so the government had made the selection. The Court concluded that the government had acted in accordance with the Treaty of Versailles. The decision on the merits was unsurprising treaty interpretation.

Yet the procedure used by the Court is especially noteworthy. The Court agreed to hear oral statements from two international labor union federations

134. Charnovitz, *supra* note 37, at 220-37.

135. Advisory Opinion No. 1, Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labor Conference, 1 *WORLD COURT REPORTS* 113 (Manley O. Hudson ed., July 31, 1922).

allied with the contending Dutch federations.¹³⁶ The Court agreed to do this even though states were *de jure* the only entities that could be parties in cases.¹³⁷ Thus, the Court was willing to open its doors to relevant NGO input, just as the governments had done in Paris and were continuing to do to a small extent in Geneva (at the League of Nations). I point to this episode not as a validation of the constitutional moment (as the Court lacked the authority to do that), but rather to suggest that the judges may have been influenced by the new participatory norms of that era, and may have acted to reinforce them.

CONCLUSION

This article presents a thesis that 1919 was a global constitutional moment in which governments initiated new “rules of action”¹³⁸ to permit some NGO participation in international treaty-making. Whether or not one accepts the reality of a global constitutional moment, the peace conference was certainly an important milestone in the emergence of nongovernmental participation.

Thereafter, many NGOs re-imagined themselves as actors in global governance. By the 1990s, NGOs had become more comfortable with their proactive role. In a recent article, Leila Nadya Sadat and S. Richard Carden suggest that the Rome conference of 1998 (which drafted the statute of the new International Criminal Court) was “a constitutional moment of sorts—in which the peoples of the world, as well as, or in spite of, their governments, constructed a new constitutional conception of the international legal order.”¹³⁹

In the tradition of Mitrany, this article makes the further point that issue-oriented nongovernmental participation is an important step in solving the modern problem of democratic representation. The problem is that, being so

136. *Id.* at 115-16. The International Labour Office (ILO Secretariat) also provided an oral statement in the public hearing.

137. Statute of the Permanent Court of International Justice, art. 34 (1922), reprinted in INT'L INTERMEDIARY INST., THE PERMANENT COURT OF INTERNATIONAL JUSTICE: STATUTE AND RULES 56 (1922).

138. See Crawford, *supra* note 18, at 113 (recalling how John Westlake's definition of international law emphasized the “rules of action” which develop and change). Westlake defined international law as dealing with all human action not internal to a political body. This included action between one political body and one or more members of another. JOHN WESTLAKE, *Introductory Lecture on International Law*, in THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 373, 412 (L. Oppenheim ed., 1914).

139. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 391 n.37 (2000). The authors point out that the success in Rome “can be credited, at least in part, to the enormous lobbying and informational efforts of NGOs, which conducted a tireless campaign in support of the Court.” *Id.* at 386.

distant from national electoral processes, intergovernmental decisionmaking can erode internal democratic control. Responding to that problem is essential if global governance is to keep pace with the challenges of interdependence.¹⁴⁰ By helping to link the public with international organizations, NGOs will continue to strengthen the democratic foundations of global governance.

140. In a new book, J.F. Rischard on the World Bank calls attention to the growing importance of “global issues networks” in addressing urgent planetary issues. J.F. RISCHARD, *HIGH NOON: TWENTY GLOBAL PROBLEMS, TWENTY YEARS TO SOLVE THEM* 182-83 (2002). Rischard suggests that such technocratic networks bring *horizontal* legitimacy to complement the *vertical* legitimacy of the electoral process in nation states. *Id.* The democratic legitimacy of such a network does not spring from its representativeness, but rather from the adoption of its ideas by governments and societies. *Id.* at 188-89.