

# On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty

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## I. INTRODUCTION: THE VISION OF A GLOBAL PEOPLES ASSEMBLY

As recent street protests in Seattle and Washington, D.C. have made increasingly clear, those who are active in global civil society are committed to the promotion of global democracy.<sup>1</sup> Many have undoubtedly at some point hoped that a worldwide popularly elected legislative assembly would be established. Until recently, such a prospect reeked of utopianism. The powers that be in the world—including those leaders who champion democracy in state/society relations—seemed clearly unreceptive to such an innovation. At this historical juncture we believe that the time for the establishment of a global assembly is ripening. We believe that our circumstances and values are raising a crucial new question: If democracy is so appropriate in the nation-state setting, why should not democratic procedures and institutions be extended to the global setting?

The road to this juncture has not been an easy one. Indeed, for more than a century the state system, as initially established and formalized by the Peace of Westphalia (1648), was dominated by the absolutist state usually headed by a royal monarch.<sup>2</sup> Only with the French Revolution was the democratic idea

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<sup>1</sup> For further discussion of the Seattle and Washington protests, see *infra* text accompanying note 91.

<sup>2</sup> See RICHARD FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* 4 (1998).

launched as the foundation of legitimate government. Even the American Revolution—with its fear of the tyranny of the majority and its limitations on citizenship and voting rights—was at first only partially committed to the democratic idea. But over time, and especially during the last half of the twentieth century, the conviction grew that only a government that rests on the genuine consent of its people, as expressed through periodic, multi-party, fair elections, is legitimate. With the fall of the Soviet Union and the end of the Cold War, the idea that the only legitimate form of government is a democracy has steadily gained ground, leaving the conspicuous lack of global democratic institutions as the world's greatest political anomaly.<sup>3</sup>

That we suggest democracy should be extended to the international arena should not be taken as an unqualified endorsement of the quality of democratic governance in state/society settings.<sup>4</sup> Of course, not all states are democratically constituted in such a way as even to maintain the pretense of vesting ultimate authority in their citizenry. What is more, as in many countries where the real power lies with the military rather than with elected representatives of the people, authoritarian structures often persist behind the facade of constitutionalism.<sup>5</sup> In other countries, like the United States, monied interests vastly distort the representative process, as do national security doctrine and practice, which lend credence to broad claims of secrecy and even public deception.<sup>6</sup> Also, it is arguable that the discipline of global capital—the dynamics of economic globalization—is constraining democratic governance, and is giving rise to an era of “choicless democracy.”<sup>7</sup> Beyond all this, there are questions about the dangers of democratic governance if the underlying political culture is illiberal or militarist.<sup>8</sup>

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3 For influential depictions of the democratic idea as it has evolved in the West, see generally ROBERT DAHL, *ON DEMOCRACY* (1998); DAVID HELD, *DEMOCRACY AND GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

4 See *The Global Democratic Prospect*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 247–324 (Larry Diamond & Marc Plattner eds., 2d ed. 1996) (containing essays discussing the problems plaguing the development of democratic systems of governance); see also RONALD DWORKIN, *FREEDOM'S LAW* 1–38 (1996) (examining the problem of protecting individual rights in majoritarian systems); Robert Lipkin, *Religious Justification in the American Communitarian Republic*, 25 *CAP. U.L. REV.* 765, 783–87 (1996) (discussing the need for communitarian values to improve the political discourse in democratic societies).

5 See Fareed Zakaria, *The Rise of Illiberal Democracy*, *FOREIGN AFF.*, Nov./Dec. 1997, at 22 (describing the emergence of a new breed of regime that governs in an authoritarian manner despite electoral validation). For a discussion of how the formalities of democracies can serve to disguise the actualities of military rule, see generally Richard Falk, *Democratic Disguise: Post-Cold War Authoritarianism*, in *ALTERED STATES: A READER IN THE NEW WORLD ORDER* 17 (Phyllis Bennis & Michel Moushabeck eds., 1993).

6 For an authoritative and detailed account of the corrosive influence of money on U.S. politics, see CHARLES LEWIS & THE CENTER FOR PUBLIC INTEGRITY, *THE BUYING OF THE PRESIDENT 2000* (2000); on the impact of national security bureaucracy, see RICHARD J. BARNET, *ROOTS OF WAR* (1972).

7 For elaboration, see FALK, *supra* note 2, at 169; and RICHARD FALK, *ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS* 104–33 (1995) [hereinafter FALK, *ON HUMANE GOVERNANCE*]. See also generally David Held, *Democracy and Globalization*, in *RE-IMAGINING POLITICAL COMMUNITY* 11 (Daniele Archibugi et al. eds., 1998).

8 See FALK, *supra* note 2, at 165–66; FALK, *ON HUMANE GOVERNANCE*, *supra* note 7, at 70–74, 163. If the political culture of a country is militaristic, it sends “democratic” signals to leaders that encourage recourse to force. This is particularly serious for a country such as the United States, which occupies the role of global leader. For a general discussion of the relationship between culture and democracy, see J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 *WID. L. SYMP. J.* 167, 173 (1999) (“Democracy inheres not only in procedural mechanisms like universal suffrage but in

Despite these reservations, we join in support of the democratic idea of governance, seeking to vitalize it at all levels of social interaction, and, in particular, to extend democracy globally.<sup>9</sup> We believe that an internationally elected global assembly could eventually overcome several of the fundamental constraints that currently hinder the development of humane and effective global governance. The existence and empowerment of a Global Peoples Assembly (GPA) would, at the most general level, challenge the traditional claim of states that each has a sovereign right to act autonomously, regardless of adverse external consequences. This challenge, ensuing straight from the most fundamental democratic precept that government derives its just powers from the consent of the governed, would undermine the claim that states are bound only by state-created international law, and then only when they give their consent.<sup>10</sup>

This means that state claims of a right to opt out of collective efforts to preserve the global commons, reduce or eliminate weapons systems, safeguard human rights, or otherwise protect the global community could be authoritatively questioned. Not only might such an assembly lead over time to the establishment of beneficial and effective community law, but also its supranational lawmaking mode would itself be transformative. To the extent that citizen-elected representatives from different countries and civilizations convene formally in a climate of civility to advance mutual interests and address differences, peaceful resolution of conflict would tend to become institutionalized. Interest groups attempting to influence the GPA would quickly coalesce across national lines, eroding the strength of arbitrary and often dangerous national identities.<sup>11</sup> The normal parliamentary process of delegates working to build social consensus on issues would encourage the promotion of widely shared values over more parochial concerns and beliefs. Ultimately, such an assembly could lead the way to a global parliamentary system where social, political, and even cultural differences might come to be

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cultural modes like dress, language, manners, and behavior. Political egalitarianism must be nourished by cultural egalitarianism.”).

9 There is an important challenge to democracy, at the interface of the state and the global order, relating to the relevance of international law to the foreign policy process. The idea of the rule of law is integral to the realization of constitutional democracy internal to the state. In countries like the United States, however, evasions of the rule of law in external relations have been upheld by courts as constitutionally permissible. The political question doctrine, for example, has been validated by reference to the need for unity under the authority of the President. As a result, in the United States legal scrutiny of the President's actions in foreign policy has rarely taken place aside from “the court of public opinion,” as in the latter stages of the Vietnam War. See generally Richard Falk, *The Extension of Law to Foreign Policy: The Next Constitutional Challenge*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION 205 (Alan Rosenbaum ed., 1988).

10 See Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS D'ACADEMIE DE DROIT INT'L [COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L.] 27 (1989) (“[A] State is not subject to any external authority unless it has voluntarily consented to such authority.”).

11 Within the European Union's only popularly elected governing institution, the European Parliament, transnational coalitions among pressure groups as well as among parliamentarians have become common. See *Europe's Political Parties: The Slow March to Greater Bonding*, THE ECONOMIST, Mar. 6, 1999, at 49 (citing European Parliament voting statistics demonstrating that parliamentarians from pan-European political parties—such as the Christian Democrats and the Socialists—are increasingly voting along party lines regardless of their countries of origin, and that parliamentarians often vote along ideological rather than national lines).

settled in as peaceful and fair a way as has been the experience within some of the world's more successful democratic societies.<sup>12</sup>

Alas, despite these advantages that should be clear even to those acting purely from the perspective of enlightened self-interest, most observers still are likely to dismiss the proposal for such an assembly as utopian. From a U.S. setting one can ask, "How, in a world where U.S. Senator Jesse Helms has a veto on the sole superpower's adherence to new international institutions and agreements, could such a step beyond the confines of sovereignty ever come about?" Even putting Senator Helms aside as a political anomaly, formidable resistance to any global innovation that seemed to subordinate sovereign rights to some higher external authority would remain in the United States and in many other countries as well.

One response to such resistance, easily obscured by our state-centric presuppositions, is that a GPA need not be established by a traditional interstate treaty arrangement. Globalization has generated an emergent global civil society composed of transnational business, labor, media, religious, and issue-oriented citizen advocacy networks with an expanding independent capacity to initiate and validate a GPA.<sup>13</sup> In one of the most significant, if not yet fully appreciated, developments of the post-Cold War era, global civil society—operating in collaboration with certain like-minded states—has become a formidable political presence in international life, pushing forward several key progressive initiatives in the international arena.<sup>14</sup> While civil society has never undertaken a project of such magnitude as that of organizing a GPA, its accomplishments over the last decade have been impressive.<sup>15</sup>

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<sup>12</sup> For further elaboration on how the existence of a GPA might help overcome the dysfunctions of the present international legal system, see generally Andrew Strauss, *Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 489 (1999) (discussing how a GPA could help improve the creation of, compliance with, and enforcement of international law). See also Richard Falk & Andrew Strauss, *Globalization Needs a Dose of Democracy*, INT'L HERALD TRIB., Oct. 5, 1999, at 8.

<sup>13</sup> The concept of civil society is ambiguous and has brought about some amount of confusion. For the purposes of this Article, we accept Larry Diamond's definition:

[Civil Society] is distinct from "society" in general in that it involves citizens *acting collectively in a public sphere* to express their interests, passions, and ideas, exchange information, achieve mutual goals, make demands on the state, and hold state officials accountable. Civil society is an intermediary entity, standing between the private sphere and the state. Thus, it excludes individual and family life, inward looking group activity (e.g. recreation, entertainment, or spirituality), the for-profit-making enterprise of individual business firms, and political efforts to take control of the state.

Larry Diamond, *Toward Democratic Consolidation*, in THE GLOBAL RESURGENCE OF DEMOCRACY 227, 228 (Larry Diamond & Marc Platter eds., 2d ed. 1996). The term "civil society organization" refers to one of the many individual organizations that operate within civil society and is often used interchangeably with the term "nongovernmental organization" (NGO). The two terms will be used synonymously in this Article.

<sup>14</sup> Of course, civil society's attempts to influence international governance did not begin with the end of the Cold War. For an historical examination of civil society's international initiatives, see generally Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH J. INT'L L. 183 (1997). Those states that have joined with civil society to promote the joint projects we refer to in Part II.A have been referred to as "like-minded." In this Article, we also apply the term "like-minded" to those states that might be recruited to help promote a GPA.

<sup>15</sup> Several works of recent vintage give a more general overview of this development than does our selective discussion in Part II.A. For some of the most informative and interesting commentary, see generally Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, WASH. Q.,

In what follows, we wish to make the case that civil society is now capable of founding the Global Peoples Assembly, and that, because of its basis in popular legitimacy, the GPA would have the potential to play a major role in global governance.<sup>16</sup> A proposal of this scope of course raises other major questions: How would civil society come together to organize, overcome opposition, and bring the assembly into existence? How would it function once in existence? What effect would it have on the structure of the global political order? This Article deals with these questions only in a rough, schematic fashion. Our intention here is to take the first step in conceptualizing a new possibility, a possibility that—if it is to be seriously explored—will require tremendous future thought and development, not only by ourselves, but by many different actors from all parts of the world.<sup>17</sup>

## II. REALIZING THE VISION

### A. *The Accomplishments of Global Civil Society*

Three major achievements of civil society during the 1990s stand out as illustrations of what is sometimes called “the new diplomacy,” or “the new internationalism,” although in each instance the gains are provisional and important qualifications are in order.<sup>18</sup> The first is the role global civil society

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Winter 1995, at 45; Jessica T. Mathews, *Powershifts*, FOREIGN AFF., Jan./Feb. 1997, at 50; P.J. Simmons, *Learning to Live With NGOs*, 112 FOREIGN POL’Y 82 (Fall 1998); and ABRAM CHAYES & ANTONJA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 250–70 (1995).

<sup>16</sup> In fact, in a recent development, civil society has begun to come together to promote global democracy initiatives. While its nascent efforts are still highly protean and the emerging visions are still inchoate, something significant appears to be happening. Three initiatives we believe merit further attention. From Perugia, Italy, an organization called the Assembly of the United Nations of Peoples has attempted to bring civil society organizations together into a quasi-representative assembly. In the fall of 1999, with civil society organizations from 100 countries in attendance, it had its third assembly. Also noteworthy is the Global Peoples Assembly Movement that was launched at civil society’s highly successful Hague Appeal for Peace in the spring of 1999. This organization had its first major assembly in Samoa in April, 2000, and in the midst of a great show of organizational energy has been enjoying rapid growth in membership. Like the Perugia initiative, its purpose is to prefigure a globally democratic institutional structure that would enable the peoples of the world to have a meaningful and effective voice in global governance. Also of importance, the highly regarded civil society organization, EarthAction, is organizing an NGO coalition tentatively called, “Citizens Century: Campaign for a Democratic U.N.,” which as its name implies is looking to democratize global governance. Finally of importance, and linking these three civil society initiatives, was the Millennium NGO Forum. At the invitation of the United Nations Secretary-General, representatives of hundreds of civil society organizations convened this last May, 2000 at the United Nations Headquarters in New York. One of the primary stated goals of the forum was “to create an organizational structure whereby peoples of the world can participate effectively in global decision-making.” The Forum’s outcome will be reported on in September, 2000 by the Secretary-General to a special millennial assembly of states examining the future architecture of the global system of governance.

<sup>17</sup> In our writing we are, of course, influenced by our Western, primarily U.S., experience. With this knowledge in mind we very much invite discussion and collaboration with scholars and activists from all over the world. In particular, we invite such engagement from those in societies, most different from our own, outside of the West, who have historically been marginalized in the planning for new international institutions. It is our great hope that the force of the idea of global democracy will be such that citizens from all over the world will come to bring their personal and civilizational perspectives to a vigorous discussion about how it might best be achieved.

<sup>18</sup> Civil society plays a central role in this new diplomacy, as distinguished from the old (exclusively state-centric) diplomacy. This new brand of diplomacy is characterized by a collaborative relationship between civil society and states dedicated to similar goals.

played in establishing the global climate change framework convention. The second is its importance in bringing into force the convention outlawing anti-personnel landmines, and the third is the leadership it exercised in bringing about an agreement to establish an international criminal court.<sup>19</sup>

### 1. *The Climate Change Convention*

The 1992 U.N. Framework Convention on Climate Change (Climate Change Convention, or Convention) was adopted at the U.N. Conference on Environment and Development in Rio de Janeiro (Rio Conference).<sup>20</sup> The Climate Change Convention established nonbinding targets for reductions in greenhouse gases. The Convention's follow-up Kyoto Protocol, adopted in Kyoto, Japan in 1997, attempts to establish binding limitations on greenhouse gases.<sup>21</sup> It has thus far received only a few of the ratifications necessary for it to enter into force.<sup>22</sup> Although the commitment of many countries, including the United States, to deal seriously with the problem remains in question, civil society—specifically environmental nongovernmental organizations (NGOs)—has been indispensable to the progress that has thus far been made.

The precedent for significant NGO involvement in the negotiation of environmental treaties was set in the very successful 1980s treaty negotiations over stratospheric ozone.<sup>23</sup> That success gave civil society the confidence to

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<sup>19</sup> Other less mammoth initiatives for which global civil society has been a driving force are too numerous to mention. For a general discussion of its evolving role in the areas of human rights, environmental law, and violence against women, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). Transnational social forces played a significant part in encouraging the International Court of Justice to rule on the legality of nuclear weapons. See FALK, *supra* note 2, at 173–85.

<sup>20</sup> The U.N. Framework Convention on Climate Change was opened for signature at the U.N. Conference on Environment and Development in Rio de Janeiro, June 1992, 31 I.L.M. 814, 816 (1992) (entered into force March 1994).

More than 1400 NGOs were accredited to the Rio Conference. Some 25,000 other individuals attended the parallel Global NGO Forum. In addition to the Climate Change Convention, three other major international instruments were also concluded at the Rio Conference. The first was the Rio Declaration, a forward-looking, aspirational statement of principles for achieving an environmentally sustainable future. See generally David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599 (1995). The second was the Biodiversity Convention, a multilateral treaty whose purpose is to help protect the diversity of life forms on the planet from the harmful effects of human activity. See generally FIONA MCCONNELL, *THE BIODIVERSITY CONVENTION: A NEGOTIATING HISTORY* (1996). The third was AGENDA 21, a comprehensive work plan for achieving sustainable development. See AGENDA 21: *THE EARTH SUMMIT STRATEGY TO SAVE OUR PLANET* (Daniel Sitarz ed., 1993). For further discussion of Rio and the connection between climate change and sustainable development, see generally David Hodas, *The Climate Change Convention and Evolving Legal Models of Sustainable Development*, 13 PACE ENVTL. L. REV. 75 (1995). For a comprehensive exploration of the climate change problem by the chairman of the Inter-Governmental Conference on Global Warming, see generally SIR JOHN HOUGHTON, *GLOBAL WARMING: THE COMPLETE BRIEFING* (2d ed. 1997).

<sup>21</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/7/Add.1, reprinted at 37 I.L.M. 22–43 (1998).

<sup>22</sup> The Kyoto Protocol needs 55 parties representing at least 55% of global carbon emissions to come into force. To date only a handful of countries have ratified it. See *Kyoto Protocol Status of Ratification (as of 16 July 1999)*, available at <<http://www.unfccc.de/resource/kpstats.pdf>> (visited Aug. 13, 1999). Of particular importance, the U.S. Senate has not ratified the convention and there appears to be little short-term prospect of its doing so. See *Remember Global Warming?*, N.Y. TIMES, Nov. 11, 1998, at A26 (discussing prospects for Senate ratification).

<sup>23</sup> See Peter M. Haas, *Stratospheric Ozone: Regime Formation in Stages*, in POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES 152, 176 (Oran R. Young & Gail Osherenko

take on the politically more challenging problem of climate change.<sup>24</sup> As a first step, organizations such as the World Resources Institute and the International Union for Conservation of Nature laid the groundwork for climate change treaty discussions by supporting the conduct and dissemination of scientific studies. These studies became instrumental in helping to establish a consensus on the serious danger of global warming.<sup>25</sup> Of particular importance, in 1985, the civil society organization International Council of Scientific Unions, in cooperation with the U.N. Environment Programme and the World Meteorological Organization, sponsored an international scientific climate change conference in Villach, Austria.<sup>26</sup> This conference and its follow-up workshops played a major role in convincing the scientific community that global warming was a real and urgent problem. The conference was also instrumental in establishing the Intergovernmental Panel on Climate Change, which peer reviewed many of the later scientific and policy studies upon which the drafters of the Climate Change Convention relied.<sup>27</sup>

Promoting the science that established the climate change problem was, however, only the beginning. Largely as a result of the persistent advocacy of global civil society, states agreed to place negotiations for a global climate change treaty on the international agenda for action.<sup>28</sup> This advocacy began in earnest in Toronto in 1988 at the Canadian-sponsored World Conference on the

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eds., 1993) (describing how “a small, transnational group of scientists and policy makers” were instrumental in heightening public awareness and concern about ozone depletion, leading in turn to pressure on their governments to take further action). The influence of environmental civil society organizations on global environmental policy in the 1990s has gone far beyond affecting treaty negotiations. For a very good general discussion of the increasing importance of these organizations, see PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS (1996); THE STATE AND SOCIAL POWER IN GLOBAL ENVIRONMENTAL POLITICS (Ronnie D. Lipschutz & Ken Conca eds., 1993).

<sup>24</sup> It was clear from the outset that even a modestly effective global warming treaty would have a significant impact on powerful industries. As predicted, many industrial players have been aggressively lobbying against global efforts to create binding limitations on greenhouse gases. See, e.g., *Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the House Government Reform and Oversight Committee*, Sept. 15, 1998 (testimony of William O’Keefe, Executive Vice President and Chief Operating Officer of the American Petroleum Institute). Opposition, however, has not been uniform. European industrial concerns have on the whole been more receptive to efforts to reduce global warming than have their U.S. counterparts and, within the United States, opposition even within affected industries has been varied.

<sup>25</sup> See David Tolbert, *Global Climate Change and the Role of International Non-Governmental Organisations*, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 95, 98–101 (Robin Churchill & David Freestone eds., 1991).

<sup>26</sup> See generally Report on the Villach Conference of the World Climate Impact Studies Programme (1985), summarized in United Nations Environment Programme, 1985 Annual Report of the Executive Director, U.N. Doc. UNEP/GC.14/2, at 70–71 (1986).

<sup>27</sup> See Jack Fitzgerald, *The Intergovernmental Panel on Climate Change: Taking the First Steps Towards a Global Response*, 14 S. ILL. U. L.J. 231, 233 (1990); Tolbert, *supra* note 25, at 99.

<sup>28</sup> It is important to note that not all civil society organizations have championed a global climate change regime. Some business-oriented groups have been especially opposed to the coming into force of the Kyoto Protocol. The Cato Institute and the U.S. Chamber of Commerce, for example, have been high-profile opponents. See *Subcommittee on International Economic Policy, Export and Trade Promotion of the Senate Foreign Relations Committee*, June 26, 1997 (testimony of Patrick J. Michaels, Senior Fellow in Environmental Studies at Cato Institute); U.S. Chamber of Commerce, *Clinton Climate Treaty A ‘Lose-Lose’ All Pain and No Gain*, Dec. 11, 1997, available at <<http://www.uschamber.com/policy/climatechange/bulletin5.htm>> (visited Aug. 20, 1999).

landmines problem pursuant to the U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the only existing treaty attempting to control the use of landmines.<sup>42</sup> The treaty was vague and permissive, having had no meaningful effect on the landmines problem, but the ICBL usefully seized upon the review process contained in the treaty as a way to focus further attention on the landmines challenge.<sup>43</sup> The review ended after two and one-half years without meaningful progress having been attained. Landmines had, however, been put high on the international agenda, and the ICBL was poised to make its major impact.

The organization initiated a public relations campaign to disseminate a well-defined humanitarian message, often highlighting its message with poignant images of the suffering caused by landmines.<sup>44</sup> ICBL eventually enlisted international personalities such as Princess Diana, Archbishop Desmond Tutu, and General Norman Schwarzkopf to champion the issue and provide media salience.<sup>45</sup>

Complementing this global effort was considerable grassroots organizational energy. A member of the ICBL, Mines Action Canada, was particularly active. It organized a massive Canadian petition and letter writing campaign that succeeded in encouraging the Canadian government to take a leadership role on the issue.<sup>46</sup> Canadian officials initiated meetings between NGOs and pro-ban states. These meetings supplemented direct lobbying of national governments by ICBL members. When such lobbying was successful and brought about favorable shifts in government policy in one country, the ICBL created momentum by immediately persuading other governments of the changing political climate.<sup>47</sup> These efforts ultimately culminated in a Canadian call for a meeting in Ottawa where pro-ban states could coalesce.<sup>48</sup> With

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<sup>42</sup> United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, *opened for signature* Apr. 10, 1981, U.N. Doc. A/Conf.95/15 (1980), *reprinted in* 19 I.L.M. 1523 (1980). See Michael Matheson, *The Revision of the Mines Protocol*, 91 AM. J. INT'L L. 158, 159 (1997) (discussing the French role in initiating the review of the convention).

<sup>43</sup> Protocol II of the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons included landmines among the list of weapons it proscribed. While Protocol II established certain broad limitations on the use of landmines, it did not limit the production, sale, or possession of these weapons. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, *supra* note 42, at 1529, 1530–31. For further discussion of Protocol II, see R.J. Araujo, *Anti-Person Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT'L L. 1, 20–22 (1997).

<sup>44</sup> These included images of prosthetic limbs lining hospital walls, piles of unworn shoes, and of child amputees speaking with Princess Diana. See Maxwell Cameron et al., *To Walk Without Fear*, in *TO WALK WITHOUT FEAR*, *supra* note 41.

<sup>45</sup> Civil society's public relations efforts were not limited to atmospherics. It gained the upper hand in the substantive public policy debate by effectively countering anti-treaty pronouncements by the United States. See Ken Roth, *New Minefields for N.G.O.'s*, THE NATION, Apr. 13, 1998, at 22 (describing how civil society organizations responded to various arguments made by the U.S. government against the treaty).

<sup>46</sup> For an account of the Canadian campaign by two of its leaders, see Valerie Warrington & Celina Tuttle, *The Canadian Campaign*, in *TO WALK WITHOUT FEAR*, *supra* note 41, at 48. The success of Mines Action Canada was very much aided by the fact that its calls fell on the ears of Lloyd Axworthy, Canadian Minister of Foreign Affairs. Axworthy was unusually dedicated to global reform and seized upon the landmines issue as an opportunity to establish a new Canadian role in the global policy community. See *id.* at 56.

<sup>47</sup> See generally Cameron, *supra* note 41, at 424.

<sup>48</sup> See Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer, and Use of*



seventy-four states attending, and the ICBL playing a major diplomatic role in the conference, the 1996 Ottawa Conference was a singular success.<sup>49</sup> It began a diplomatic process that ultimately led to Oslo where, within a short period of time, participants adopted an agreement to prohibit the use, production, development, sale, and stockpiling of landmines. Originally signed by 122 countries, the agreement achieved the requisite ratifications and entered into force in March 1999, which is very quick for a controversial multilateral treaty.<sup>50</sup>

Here too, while taking comfort in the role of global civil society, we cannot report unqualified success. Major producers of landmines, including the United States and China, have not yet signed or ratified the treaty. The compliance machinery in the treaty is weak, leaving implementation on a largely voluntary basis. It is difficult, at this stage, fully to evaluate the achievement. It may be that the landmines campaign has created such a strong anti-landmines ethos as to make the treaty itself almost superfluous, or at least self-enforcing. But it may also be that its vague prohibitions will be put aside under battlefield pressures, or by governments hard-pressed to find low technology and inexpensive ways of engaging in warfare.

### 3. *The Proposed Treaty to Create a Permanent International Criminal Court*

The achievement with the most far-reaching implications for the structure of the international order is also global civil society's most recent—the realization of an agreement for an international criminal court.<sup>51</sup> In the summer of 1998, 136 NGOs under the umbrella of the NGO, Coalition for an International Criminal Court, were accredited as observers by the U.N. conference in Rome that adopted the treaty.<sup>52</sup> Upon ratification by the requisite sixty countries, for the first time in history there will be a permanent independent international court capable of trying individuals responsible for genocide, crimes against humanity, and war crimes.<sup>53</sup>

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*Anti-Personnel Mines and on Their Destruction*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 371, 379–80 (1998). For further discussion of Canada's role, see Robert Muller, *New Partnerships for a New World Order: NGOs, State Actors, and International Law in the Post-Cold War World*, 27 HOFSTRA L. REV. 21, 24–25 (1998).

<sup>49</sup> For further elaboration, see Bob Lawson, *Toward a New Multilateralism: Canada and the Landmine Ban*, BEHIND THE HEADLINES, Summer 1997, at 18, 20–21.

<sup>50</sup> See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, available at <[http://www.un.org/Depts/Landmine/UNDocs/ban\\_treaty.html](http://www.un.org/Depts/Landmine/UNDocs/ban_treaty.html)> (visited Mar. 30, 2000).

<sup>51</sup> For a description of the historical events leading up to the negotiations for the International Criminal Court, see generally ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* (1998). Neier is President of George Soros's Open Society Institute, a civil society organization. His authorship of this book is thus in itself representative of the effort by global civil society to advance the cause of a permanent international criminal court.

<sup>52</sup> While 136 NGOs were officially accredited, 238 NGOs were actually represented in Rome. See M. Cherif Bassiouni, *Historical Survey: 1919–1998*, in *STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 1, 26 n.135 (M. Cherif Bassiouni ed. 1998).

<sup>53</sup> See Rome Statute for the International Criminal Court, U.N. Doc. A/Conf.183/9 (1998), reprinted in *STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 52, at 37.

The creation of a permanent international criminal court had been discussed on and off since the end of World War II.<sup>54</sup> The gathering momentum that led to Rome was only created, however, because public opinion led by civil society pressured U.N. Security Council members to establish ad-hoc tribunals in the wake of the horrors of Bosnia and Rwanda.<sup>55</sup>

A good part of civil society's success in promoting the international criminal court is due to the skilled way in which it made itself nearly indispensable to the negotiating process.<sup>56</sup> Because civil society's representatives to the Rome Conference included respected academic experts and former government policymakers, its representatives could address the many highly technical issues with great authority.<sup>57</sup> Many governments relied on these expert assessments of specific problems, thereby giving civil society a tremendous influence on framing the overall discussion.<sup>58</sup> Emulating the largely successful model from the Rio Conference, civil society made itself the information and communications center of the negotiations. It was integrally involved in publishing a conference newspaper that delegates used to float proposals and to stay abreast of developments in the negotiations.<sup>59</sup> Another opportunity for civil society to play a strategic communications role emerged because substantive negotiations took place in many different working groups. Smaller countries were not capable of sending representatives to all the groups and were unable to remain current with respect to these multifaceted negotiations.<sup>60</sup> Civil society responded by organizing itself into various teams, each responsible for monitoring a particular working group. These teams provided regular formal and informal briefings, and many governments came to rely on these briefings to shape their positions.<sup>61</sup>

As in Rio and Ottawa, representatives of civil society played important roles on governmental delegations. Perhaps their most direct influence in this regard came as a result of the John D. and Catherine T. MacArthur Foundation funding twenty-four delegates from twenty-two small developing countries.

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<sup>54</sup> The prominence of the Nuremberg and Tokyo war crimes tribunals at the end of World War II brought the possibility of a permanent tribunal into the realm of discussion. For an extensive accounting of the Nuremberg trials by a former prosecutor at Nuremberg and a distinguished jurist, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

<sup>55</sup> For a brief discussion of the political and conceptual relationship between the tribunals for the former Yugoslavia and Rwanda and the proposed International Criminal Court, see Roger S. Clark & Madeleine Sann, *Coping with the Ultimate Evil Through the Criminal Law*, 7 *CRIM. L.F.* 1 (1996).

<sup>56</sup> In this Article, we have chosen to focus on the key role that civil society played in fashioning the treaty negotiations that took place in Rome. For a more general background discussion of the historic role that civil society played in keeping the "Nuremberg idea" alive over the last fifty years, see Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 *COLUM. J. TRANSNAT'L L.* 693, 716-21 (1999).

<sup>57</sup> See M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 *CORNELL INT'L L.J.* 443, 455 (1999) (identifying the major civil society organizations whose representatives played important roles).

<sup>58</sup> See John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21<sup>st</sup> Century*, 11 *PACE INT'L L. REV.* 361, 368-69 (1999) (explaining how NGOs enhanced the effectiveness of the like-minded states).

<sup>59</sup> See TERRAVIVA, available at Inter Press Service, <<http://www.ips.org/icc/index.htm>> (visited May 30, 2000).

<sup>60</sup> See Bassiouni, *supra* note 52, at 29 (recounting the establishment of small, informal working groups at the Rome Conference and the organizational difficulties such groups presented to the smaller delegations).

<sup>61</sup> See Washburn, *supra* note 58, at 368-69.

Cherif Bassiouni, one of the major U.S.-based academic supporters of the court, was involved in working directly with these countries.<sup>62</sup>

If civil society was helpful to governments by providing expertise, information, and resources, it also was potentially the greatest adversary of wavering governments. As several governments stung by harsh criticism during the negotiations learned, civil society had the capacity to mobilize public pressure against those who became recalcitrant. Civil society issued a daily Internet newsletter, transmitted to thousands of subscribers, that informed and coordinated the activities of constituents spread around the world who were poised to apply pressure directly in national capitals.<sup>63</sup> In addition, because the press was excluded from many of the more substantive sessions, representatives of civil society took advantage of the opportunity to become the media's primary source of unofficial information as well as a crucial check on government pronouncements.

It is true that the treaty that emerged from Rome contains concessions to geopolitical forces, including giving some control over its operation to the U.N. Security Council. Even with these compromises, however, the treaty is a momentous achievement. The expected existence of the international criminal court will finally establish that not only states but also individuals are responsible to the international community for gross violations of human rights. To make government leaders consistently accountable in this way is to modify the basic constitutional premise of a world order based on sovereign states. The struggle is, of course, far from over. States must now ratify, and then implement, the treaty. Although a big step was taken at Rome, there is a long way ahead before a functioning international criminal court comes into existence.

Without a doubt the accomplishments of global civil society indicate that it is coming of age and is capable of promoting significant global reform. In recognizing this new source of reformist influence we do not wish to essentialize or romanticize global civil society. It would be a serious misconception of the diversity of outlook in global civil society to attribute to it a single, enlightened viewpoint, as militant encounters between "right to life" and "pro-choice" groups have illustrated with high drama in the struggle over U.S. public policy on abortion. There are not only opposing orientations on a variety of global issues, but also disagreement as to tactics and substance among those who are committed to similar values. For instance, some transnational activists are focused exclusively on a given category of weaponry, say, nuclear weapons or biological weapons, while others emphasize disarmament or even the elimination of war as a social institution. For the Global Peoples Assembly to be successfully brought into existence, however,

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<sup>62</sup> M. Cherif Bassiouni, a Professor at DePaul University College of Law, was also a member of the Egyptian delegation to the conference and headed up the drafting committee. See Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 96-97 n.201 (1999).

We are indebted to Professor Michael Scharf, who formerly worked on war crimes issues in the Legal Advisor's Office of the U.S. State Department, for bringing to our attention the role played by the John D. and Catherine T. MacArthur Foundation and Professor Bassiouni.

<sup>63</sup> See generally ON THE RECORD, available at The Advocacy Project, <<http://www.advocacy.net/cgi-bin/browse.pl?id=ot>> (visited May 30, 2000).

neither unity of perspective nor even the uncommon virtue sometimes misleadingly attributed to civil society is necessary.<sup>64</sup> To bring the project to fruition, it is only necessary that enough of the diverse elements of civil society effectively unite around a common vision of a GPA.

*B. Securing the Support of Like-Minded States: The Encouraging Reality of the European Parliament*

Despite the political accomplishments of civil society, its financial and logistical resources still pale in comparison to those at the disposal of states. Therefore, even if civil society were to unite in the way suggested, its efforts would be made far easier if some states could be recruited to help in the venture. It is encouraging that, in all of the civil society led successes of the 1990s that we have discussed, civil society was able to enlist important core support from at least some like-minded states. But is it realistic to think that sovereign states—no matter what their past record on certain projects—could be convinced to work with civil society to create an institution as ultimately threatening to the principle of state autonomy as is a Global Peoples Assembly? In fact, we believe that one important basis for treating this undertaking as plausible arises from the European experience with the establishment and evolution of an analogous institution of regional scope.

Three hundred and fifty million European citizens from the fifteen European Union countries are presently represented by a popularly elected assembly called the European Parliament (Parliament). The Parliament is not a product of the post-Cold War 1990s, but goes back to the earliest days of European integration following World War II.<sup>65</sup> When European integration began in earnest with the Treaty of Rome in 1957, the Parliament was given its place alongside the European Council and the European Commission as one of the three lawmaking bodies.<sup>66</sup> The Parliament, however, was not popularly elected, but rather delegates were appointed by national parliaments.<sup>67</sup> Moreover, the Parliament was politically quite weak and was not taken seriously as an element of European architecture. It came into being very much the poor stepchild of the other two governing institutions.

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<sup>64</sup> *The Nation* recently featured a lively exchange between David Rieff and Michael Clough that brings into sharp relief much of the controversy surrounding the nature and implications of the ascent of global civil society. See generally David Rieff, *Civil Society and the Future of the Nation-State: The False Dawn of Civil Society*, *THE NATION*, Feb. 22, 1999, at 11; Michael Clough, *Civil Society and the Future of the Nation-State: Reflections on Civil Society*, *THE NATION*, Feb. 22, 1999, at 16. The debate precipitated responses from Kenneth Roth and Peter Weiss, two prominent representatives of civil society, as well as a rebuttal by Rieff. See *Letters*, *THE NATION*, March 29, 1999, at 2.

<sup>65</sup> See generally FOUNDATIONS OF DEMOCRACY IN THE EUROPEAN UNION: FROM THE GENESIS OF PARLIAMENTARY DEMOCRACY TO THE EUROPEAN PARLIAMENT (John Pinder ed., 1999) [hereinafter FOUNDATIONS OF DEMOCRACY].

<sup>66</sup> See Treaty Establishing the European Community (Treaty of Rome), Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Rome]. For an excellent reference on the overall constitutional structure of the European Union, see generally *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* (James D. Dinnage & John F. Murphy eds., 1996).

<sup>67</sup> See Richard Corbett, MEP, *The European Parliament and the Idea of European Representative Government*, in FOUNDATIONS OF DEMOCRACY, *supra* note 65, at 87, 90–93.

In 1979, citizens for the first time were given the right to elect their representatives to the Parliament.<sup>68</sup> Since that time, the Parliament has gradually gained expanded powers with successive European integration treaties. For years critics scoffed at the Parliament as a virtually meaningless body composed of incompetent and self-serving representatives with no meaningful influence. In light, however, of significant additional powers given to the body in the Maastricht Treaty and the Treaty of Amsterdam, the world is finally beginning to take notice of it.<sup>69</sup> Last year, in a watershed event, the whole of the European Commission resigned in response to pressure from the Parliament over bribery and corruption charges.<sup>70</sup> There is a newfound sense that the Parliament really does matter and will do so increasingly.<sup>71</sup>

In last year's elections to the Parliament voter turnout was disappointingly low. Nevertheless, despite the fits and starts inherent in creating the first popularly elected transnational assembly, the European experiment clearly demonstrates that at least some states would potentially be receptive to participating in creating a GPA that could gradually assume real powers. True, Europe is far more homogeneous than the world, and its legislative efforts were complemented by ambitious movement toward impressive degrees of economic integration, but still the example of Europe is encouraging with respect to the creation of a legislative institution of global scope. Certainly the existence of the Parliament challenges the view that the creation of a transnational assembly akin to a GPA is an impossible utopian dream that would never enlist the support of sovereign states.

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<sup>68</sup> Elections had actually been contemplated since the time of the Treaty of Rome, which provided that the "Assembly," as it was then called, would eventually be elected by universal suffrage. See Treaty of Rome, *supra* note 66, art. 138.

<sup>69</sup> Both the 1993 Maastricht Treaty and the later 1997 Treaty of Amsterdam significantly enhanced the formal legislative powers of the Parliament. Under the Maastricht Treaty, the Parliament was given so-called "co-decision" with the European Council (i.e., the power to amend or veto legislation in certain specified legislative areas such as education, cultural affairs, and public health). This was in addition to the right of "consultation" which the Parliament had previously gained in certain areas. Consultation, when it operates, requires that Parliament's opinion must be obtained before the European Council may adopt a legislative proposal from the Commission. Also, before Maastricht, Parliament had been able to participate in the European Union legislative process through a "co-operation procedure" which allowed it to reject the Council's draft legislation in other specified areas if its opinions were not sufficiently taken into account. (Cooperation currently only applies in certain areas of monetary union.) Predating Maastricht, Parliament had gained the power to force the resignation of the entire Commission. It has also historically had significant power over the European Union's budget. Treaty on European Union, Feb. 7, 1992, 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247, 256 (1992) (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

The Treaty of Amsterdam further expanded the powers of the Parliament. It more than doubled the substantive matters over which the Parliament has co-decision power, increasing its influence in such areas as employment policy, consumer protection, transportation, and the environment. The Parliament now has the power to approve the nominee for the European Commission presidency. It also gained the general power to approve international agreements between the European Union and third party states and the specific power to approve the accession of new member states to the European Union. See *generally* Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1, *available at* <<http://europa.eu.int/>> (visited May 30, 2000).

<sup>70</sup> See Corbett, *supra* note 67, at 106.

<sup>71</sup> We discuss in Part IV.A *infra* why the European Parliament has been given an ever-expanding role despite its difficulties gaining credibility. We suggest that its empowerment has to a large extent been a response by European elites to resistance by the people of Europe to increasingly important European Union policy being set in an anti-democratic manner solely by "faceless bureaucrats" in Brussels.

In fact, the same European Union states that have promoted the Parliament are among the most likely to lend their support to the creation of a GPA. Because of their citizens' experience with the European Union, a popular allegiance to absolute and supreme national sovereignty is becoming less and less of a living ideological tenet around which national identity is organized. Rather, this absolute allegiance is being replaced with a political culture that accepts supranational institutions as necessary to meeting world order challenges. For the citizenry of these European countries, the GPA would in many ways be a logical next step toward greater political harmony. We do not mean to suggest that gaining the support of countries in Europe or elsewhere would be easy, but only that—with the type of hard political work that went into civil society's achievements of the 1990s—it is possible and is worth the attempt.

Unlike all of the efforts of the 1990s, however, a traditional treaty-based approach is not presently a viable way to initiate a GPA. Because the near universal state support necessary to launch a worldwide assembly by treaty would most likely not be forthcoming, we argue that civil society, with the help of willing states, should itself create this assembly.<sup>72</sup> This novel approach to creating a supranational lawmaking institution presents a basic question: Even if civil society can overcome the financial and logistical difficulties of organizing a GPA, does not any institution staking a claim to transnational governance have to be validated by inter-state treaty? No one could imagine, for example, an international criminal court established by Amnesty International and other independent human rights organizations as having any claim to exercise binding authority in actual criminal cases.<sup>73</sup> Uniquely, a GPA would have a claim to authority independent of whether or not it received the formal blessings of the state system. This claim, we will now argue, rests on the degree to which popular sovereignty is becoming the foundation for

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<sup>72</sup> While it is unlikely that most states would at present be willing to adhere to a traditional treaty establishing a GPA, it may well be that the most effective strategy for bringing such an organization into existence would be by treaty created by those states enlisted to support the GPA. Such an approach might most effectively both overcome logistical and organizational barriers to the assembly's creation and authoritatively establish its initial structure. The treaty could provide that as the assembly became known and gained acceptance, future countries could allow their citizens to vote by acceding to the treaty. Alternatively, modern notions of contemporary sovereignty, discussed *infra* Part III, allow for the founding states to provide that citizens from non-party states vote for representatives to the assembly. The GPA's gradual achievement of legislative authority under either treaty-based approach to enfranchising the global citizenry would arise from the dynamics of empowerment that we discuss *infra* Part IV.

<sup>73</sup> The Lelio Basso International Foundation for the Rights and Liberation of Peoples in Rome did, in fact, establish a "Permanent Peoples Tribunal" without state sanction in 1979. It engages in trial-like proceedings to highlight great travesties and injustices in the world. For example, it has ruled on the Armenian genocide, exploitative labor practices in developing countries, and the Union Carbide disaster in Bhopal, India. Although some of its judgments have received a good deal of publicity, the international community has never regarded them as binding. See *Lelio Basso International Foundation for the Rights and Liberation of Peoples*, <<http://www.grisnet.it/filb/filbeng.html>> (visited Feb. 18, 2000). For further discussion of its role in the development of the "law of humanity," see generally FALK, *supra* note 2, at 34, 43. For representative Permanent Peoples Tribunal cases, see generally PHILIPPINES: REPRESSION AND RESISTANCE (Marlene Dixon ed., 1981); ON TRIAL: REAGAN'S WAR AGAINST NICARAGUA (Marlene Dixon ed., 1985); GUATEMALA: TYRANNY ON TRIAL (Susanne Jonas et al., eds. 1984). For a consideration of jurisprudential foundations of a judicial process not constituted by governments, see ANTONIO CASSESE & EDMOND JOUVE, *POUR UN DROIT DES PEUPLES* (1978). A comparable ad-hoc initiative on the legality of nuclear weapons was convened in London. See *THE BOMB AND THE LAW* (Geoffrey Darnton ed., 1989).

governmental legitimacy in today's world, and can be extended to institution building on a global scale.

### III. LEGITIMACY AND THE GLOBAL PEOPLES ASSEMBLY

Legitimacy helps explain why people obey.<sup>74</sup> In *The Power of Legitimacy Among Nations*, Professor Thomas Franck adapts what he regards as "a partial definition of legitimacy to . . . the international system: *a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.*"<sup>75</sup> The voluntary compliance to which Professor Franck refers arises either because the actual rules themselves are in accord with what people believe, or because people accept as valid the source of the rulemaking institution's claim to the exercise of authority.<sup>76</sup> For example, the fifteenth century English citizenry might have complied with a royal decree criminalizing the practice of witchcraft either because the citizenry believed that witchcraft was evil or because it accepted as valid the claimed source of the crown's lawmaking authority—that is, that the monarch was appointed by God.

In contemplating the legitimacy of a GPA organized and constituted by grassroots action, the question becomes: What currently accepted source or sources of authority could confer upon a transnational organization of this type the authority to create international norms binding on governments? To date, the presumed answer has been state consent. Planners contemplating transnational organizations in today's world—where a deep-seated belief in state sovereignty remains pervasive—are accustomed to assuming that the authority of transnational organizations will be accepted as legitimate only to the extent that states have consented (usually by way of treaty) to create and be bound by such organizations.<sup>77</sup> While state consent has no doubt served to confer some measure of legitimacy upon transnational institutions, the belief

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<sup>74</sup> For Professor Thomas Franck and others, legitimacy explains what, beyond a coercively enforced sovereign command, creates habitual compliance with law. See, e.g., THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 16 (1990) (referring to this understanding of legitimacy as common to both Dworkin and Habermas).

One problem that permeates the use of the term "legitimacy" is discerning whether it is meant descriptively, in the way that Max Weber used the term, to denote when people are predisposed to obey rules without reference to whether the rules or rulemaking institutions are good or bad, or whether it is meant normatively. We are using the term in the former sociological sense to demonstrate that rules promulgated by the GPA would likely be obeyed. Obviously, the impetus for this Article comes from the fact that we are strongly supportive of such an assembly.

<sup>75</sup> FRANCK, *supra* note 74, at 16. Professor Franck elaborates:

Deployed by students of national legal systems, the concept of legitimacy is often used to postulate and explain what, other than a command and its enforcement, is required to create a propensity among citizens generally to obey the rulers and the rules. The internationalist ought to feel both comfortable with, and stimulated by, this notion of legitimacy as the non-coercive factor, or bundle of factors, predisposing toward voluntary obedience.

*Id.*

<sup>76</sup> This differentiation of reasons for voluntary compliance is most closely associated with the ideas of H.L.A. Hart, which are discussed and applied to the international order at some length in Franck's book. See FRANCK, *supra* note 74, at 183–94. In the words of Hart, the distinction we are making is between the "rules of recognition," those primary rules that establish the rulemaking institutions, and the rules that those institutions create. See H.L.A. HART, *THE CONCEPT OF LAW* 97–114 (1961).

<sup>77</sup> For further observations on the continuing and pervasive emotional allegiance to the sovereign state, see FALK, *ON HUMANE GOVERNANCE*, *supra* note 7, at 79–103.

that state consent is the exclusive means of legitimizing transnational institutions is anachronistic. It assumes a belief in what we call "classic sovereignty," an assumption that is in fact at odds with what most people today actually believe and with numerous areas of international practice.

Classic sovereignty was an outgrowth of the early modern belief that the king was the exclusive source of all temporal law.<sup>78</sup> This was not a democratic belief. The king, as sovereign, was accepted as the personification of the state who ruled over his subjects below and could be subject to no higher secular authority without his consent.<sup>79</sup> Those believing in classic sovereignty would naturally consider the sovereign's consent as necessary to legitimize transnational organizations and would reject the notion that subjects of the various states could create transnational organizations by their own initiative.

Today, however, there is a growing acceptance of what we call "contemporary sovereignty," which reconciles the state system with the modern commitment to democracy and human rights.<sup>80</sup> Modern democratic beliefs hold that the ultimate source of law is the citizenry. To the extent, therefore, that one accepts states as having the sovereign power to decide whether they wish to participate in international organizations, it is because one understands them to derive this authority from the citizens in whose name they claim to act. Contemporary sovereignty's marriage of democracy and sovereignty has been increasingly accepted in the post-Cold War period. Manifesting their professed commitment to contemporary sovereignty, some states have even made democratic governance a prerequisite for their recognition of new sovereign states and to their admitting applicant states to such international institutions as the European Union.<sup>81</sup> While such emerging

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<sup>78</sup> For one of the classic works on the development of this idea, see JOHN N. FIGGIS, *THE DIVINE RIGHT OF KINGS* (Peter Smith Publisher, Inc. 1970) (1896).

<sup>79</sup> This contrasts with the premodern medieval idea that the Holy Roman Church possessed the highest normative authority. See FALK, *supra* note 2, at 26. For what is usually regarded as the seminal work of the sixteenth century evidencing this understanding of sovereignty, see JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., 1955) (1576). By the nineteenth century, the all-powerful sovereign was no longer necessarily personified in a monarch, but could be represented by the abstraction of the state. For one of the most influential nineteenth century works evidencing the concept that states as entities are the supreme lawmaking authority and correspondingly are not subordinate to the international system, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Curwen Press 1954) (1832).

<sup>80</sup> See W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (tracing the development from what he calls "the sovereign's sovereignty" to "the people's sovereignty").

It should be noted that this trend toward contemporary sovereignty is not unambiguous. As we have discussed, the quality of democratic governance in state/society settings leaves a great deal to be desired, and it is at least arguable that the demands of globalization are reversing the extent to which citizen voices are truly heard in the corridors of power.

The term "contemporary sovereignty" is similar but not identical to the term "responsible sovereignty" as previously used by Richard Falk. See FALK, *supra* note 2, at xviii. "Responsible sovereignty" denotes a notion of sovereignty in which state power is tempered and used in such a way that it promotes humane governance. We believe that contemporary sovereigns are more likely to be responsible sovereigns, but that is, of course, a subject beyond our present focus. For a discussion of a related connection that has engendered widespread support in recent years, see Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 206-09 (1983) (marshalling empirical evidence to support the proposition that democratic states do not go to war with each other).

<sup>81</sup> The Bush administration made U.S. recognition of new states explicitly dependent upon democratic governance. See Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, Oct. 17, 1991, reprinted in FOREIGN POL'Y BULL., Nov.-Dec. 1991, at 39, 42. Because of the lack of new states coming into existence since 1992, the Clinton administration



state practice indicates the increasing extent to which sovereign states need to be validated as democratic in order to be considered fully legitimate, classic sovereignty is far from extinct. There are still many nondemocratic state actors whose sovereign authority, although under some challenge, continues to be accepted.<sup>82</sup> As evidence of the growing belief in contemporary sovereignty, however, these states often justify their actions in the name of their people.

The world of contemporary sovereignty is a world where democratic action and sovereign action coexist as forces of legitimization. Because the citizenry rather than the sovereign is the fundamental source of political authority, citizens can bypass their sovereign intermediaries and act directly to create an international organization. Thus, either states, as representatives of their respective citizens, or more primarily, the global citizenry, acting through representative process, can create an international organization that could exercise lawmaking powers. Not only does this mean that citizens have the power to instigate a GPA, but also that if political authority does in fact ultimately reside in citizens, then logically it is the citizens themselves that have the right and perhaps responsibility to found their own assembly.

Of course, state support for the GPA should also be encouraged. As we have already discussed, their economic and other resources would be useful. Moreover, direct democratic initiative and sovereign state action are not mutually exclusive methods of legitimization. Any endorsement, financial assistance, or support from like-minded states would undoubtedly be helpful and would reinforce existing transnational grassroots efforts to achieve legitimacy. In fact, as we will next explore, the GPA would likely become empowered incrementally after it became operational. As part of this empowerment process, we will show that it could enhance its stature by persuading governments to accede to a treaty formally recognizing its legislative powers and agreeing to respect its decisions.

#### IV. EMPOWERING THE ASSEMBLY

If something as novel as the Global Peoples Assembly was to be introduced into this state-centric world, its democratic legitimacy would not immediately translate into formal lawmaking powers. By force of inertia, traditional power structures would remain largely intergovernmental, and the orthodox notion that international law is created only by states would pose serious conceptual and political challenges to the GPA's lawmaking powers. Given this orthodoxy, the initial legal status of the GPA would appear to be

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has not significantly revisited this policy. For the recognition policies of members of the European Union, see European Political Cooperation, *Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,"* Dec. 16, 1991, reprinted in 31 I.L.M. 1486 (1992). For a discussion of admission into the European Union, see generally Thomas Pederson, *The Common Foreign and Security Policy and the Challenge of Enlargement*, in *THE EUROPEAN COMMUNITY IN WORLD POLITICS* 31 (Ole Nørgaard et al. eds., 1993).

<sup>82</sup> At this time it is not necessary for us to discuss the question of whether elections should be considered a *sin qua non* for proper governance at the domestic level. For present purposes we need only establish that there is a general acceptance of electorally constituted assemblies in the world today that would serve to legitimize a GPA created directly by civil society. For the most prominent recent attempt to reconcile certain types of non-electoral systems with a conception of a "well ordered society," see generally John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS* 41 (Stephen Shute & Susan Hurley eds., 1993).

comparable to that of such nongovernmental organizations as Amnesty International, the Red Cross, and the International Olympic Committee, which have come to play significant adjunct roles in international life. In some respects, the GPA would also appear to be similar to the U.N. General Assembly, whose formal powers are mostly recommendatory. As with General Assembly resolutions, GPA resolutions and declarations initially would be treated as nonbinding in many quarters and even as usurpatory of legitimate authority structures by statist critics. As we will now explain, however, this conclusion would over time come to be seriously challenged.

#### *A. The Socio-Political Dynamic of Empowerment*

From the moment the GPA came into existence a socio-political dynamic of empowerment would be set in motion. If elections were successful, the fact that millions had participated in choosing their representatives would ensure that from its inception the GPA would have a high profile, a certain media theatricality. The political support of such an assembly would, therefore, be noticed, and, as the world's only directly elected body, it could become very useful to citizen groups as well as some governments, and other interests, wishing to legitimize their own policy objectives. Generally speaking, those who believed the GPA to be sympathetic to their position would likely seek its support. This would put those with opposing policy objectives in the position of either conceding the support of the assembly or competitively engaging its process. Of course, much would depend upon extraneous political factors as well as the quality of representation within the GPA, but it is likely that with continuing usage the GPA's importance as a center of legislative activity would grow. Interested parties would become accustomed to viewing the GPA as a place to resolve differences, and mechanisms for doing so would become established, familiar, and accepted. As the GPA became a center of activity, press coverage of its proceedings and pronouncements would expand, thereby deepening public awareness and reinforcing its influence.

Our fifty-year experience with the United Nations provides empirical evidence suggesting the potential for the GPA to become empowered in the way described above. A review of modern statecraft reveals that, as we foresee would happen in some form with the GPA, the practice has been for states to have recourse to the U.N. General Assembly or Security Council when it has served their strategic interests.<sup>83</sup> And, as we also anticipate would be the case

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<sup>83</sup> While almost any major international political matter of the last half-century could be used to demonstrate this practice at work, one of the most striking examples is U.S. Secretary of State Dean Acheson's novel recourse to the U.N. General Assembly during the Korean War. The U.N. Charter had quite clearly assigned matters of collective security to the Security Council, allowing the General Assembly only a limited subordinate role. Unable, because of the Soviet veto, to get the Security Council to give what he considered an essential mandate to prosecute the U.S.-led war effort into North Korean territory, Acheson circumvented the Security Council and got the authorization he sought from the General Assembly. Wanting to legitimize the General Assembly's ability to play such a role when needed in the future, he eventually secured General Assembly passage of the Uniting for Peace Resolution. Through this resolution, the General Assembly essentially proclaimed for itself a much more significant role in matters of collective security than it previously had held. For a very interesting description of the events surrounding the adoption of the Uniting for Peace Resolution, see THOMAS FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* 39-41 (1985).

with the GPA, the influence and importance of the United Nations has grown when states have chosen to employ these main political organs. Of course, the growth in its influence has not been linear. Rather it has ebbed and flowed, mostly reflecting the political will of the major governments and, above all, that of the United States.<sup>84</sup> When these governments have sought U.N. support, as President Bush prominently did in seeking Security Council authorization of the Gulf War, the tendency has been to strengthen the organization so as to undermine the legitimacy of future unauthorized actions.<sup>85</sup> Much of the controversy surrounding NATO's recent intervention against Serbia evidences a genuine post-Gulf War expectation that great power interventions should be authorized by the United Nations. We anticipate that the GPA's path to empowerment would be similarly influenced by such state behavior.

The GPA, however, has the potential to become more influential than the United Nations (operating without a popularly elected organ) has been thus far. First, since the GPA would be constituted without direct dependence on states, it would be less vulnerable than the United Nations to damage from the strategic oscillations of states. More fundamentally, the logic that would propel global policymakers to utilize the GPA is, in some respects, more powerful than the geopolitical calculations that intermittently motivate them to pursue the United Nations. This is because global policymakers would find the GPA, once constituted, an obvious way to compensate for the restrictions on democratic citizen participation imposed by existing international organizations, the so-called "democratic deficit."<sup>86</sup> At present, the sole primary constituencies to which most international organizations must respond are states, not citizens. These organizations typically afford few opportunities for citizens to participate directly through lobbying and pressure tactics. While the positions that states take in international regulatory bodies are, in varying degrees, influenced by their citizens, this influence is too attenuated and capital-driven to satisfy the conditions of a truly representative democracy. Given the strength of the northern dominated international capital forces, the people of the South are particularly unrepresented, even indirectly, in the formation of global regulatory policy.

Not only is the present international decisionmaking process tainted by a disregard for democratic principles, but the lack of direct democratic accountability to citizens has also significantly affected policy outcomes. The international regulatory framework has been driven almost exclusively by the neo-liberal (free-market) economic precepts so in vogue with the forces of international capital. Community interests, especially the interests of poor

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<sup>84</sup> For a highly personalized eyewitness account of the wavering U.S. commitment to the United Nations during his tenure as Secretary General, see BOUTROS BOUTROS GHALI, *UNVANQUISHED: A U.S.-U.N. SAGA* (1999).

<sup>85</sup> For a discussion of the effect of state commitment to the United Nations on the strengthening of the organization, see Anthony Parsons, *The UN and the National Interests of States*, in UNITED NATIONS, *DIVIDED WORLD* 104 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993); and JAVIER PÉREZ DE CUÉLLAR, *ANARCHY OR ORDER* (1991).

<sup>86</sup> See generally James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and its Limits*, in *RE-IMAGINING POLITICAL COMMUNITY* 72, 72-90 (Daniele Archibugi et al. eds., 1998) (discussing the normative requirements for democratic decisionmaking in international organizations).

people, are largely ignored. The socially sensitive regulatory framework adopted by some of the more progressive societies of the twentieth century has been cast aside in favor of nineteenth century laissez-faire models.

The problem of the democratic deficit has taken on greater urgency in a world of burgeoning transnational regulation. With the rise of globalization, states increasingly find themselves forced to rely on transnational regulation to deal with matters that were previously domestic in nature.<sup>87</sup> Subject matter directly affecting peoples lives—ranging, for example, from the extent to which banks can extend loans to residents of poor neighborhoods,<sup>88</sup> to the length of time patents run,<sup>89</sup> to food safety<sup>90</sup>—are now, at least in part,

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<sup>87</sup> For many different reasons, globalization encourages transnational regulation. Without such regulation companies are forced to manufacture to varying national product specifications, and thus cannot fully take advantage of global economies of scale. See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 66–67 (1993). In addition, states competing for investment capital are continuously forced to relax “anti-business” regulations in a “race to the [regulatory] bottom.” For a theoretical understanding of this dynamic, see DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 9–10 (1992). Environmental measures, labor standards, and the prudential regulation of capital markets are all imperiled. For a relevant discussion of environmental regulation, see generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 638 (1996). For a relevant discussion of labor regulation, see generally Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, 2 FAIR TRADE & HARMONIZATION 177, 183 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996). For a relevant discussion of banking regulation, see generally RICHARD DALE, *THE REGULATION OF INTERNATIONAL BANKING* 172–85 (1986). Even the effective enforcement of criminal law and the coordination of civil litigation demand transnational regulation. See Andrew Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision*, 67 TEMP. L. REV. 1209 (1994) (discussing the need for a globally coherent allocation of the authority to enforce criminal laws); Andrew Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995) (discussing the need to internationally coordinate rules of civil jurisdiction).

<sup>88</sup> Minimally capitalized banks have a competitive advantage in loaning money but also have a heightened risk of failure. Because of the interconnectedness of the international banking system, failures by such banks have the potential to imperil the whole of the world economy. In an attempt to ameliorate this problem, the U.S. Federal Reserve and other central banks signed an accord establishing minimum capital adequacy standards. See Basle Committee on Banking Regulations and Supervisory Practices, *International Convergence of Capital Measurement and Capital Standards*, reprinted in 51 BNA'S BANKING REP. 143 (July 25, 1988). Under this Accord, bank loans are distinguished based upon their relative risk. The riskier a bank's loan portfolio, the greater the capital the bank is required to hold to protect against potential defaults. The Accord adversely affects the availability of loans for lower income housing in the United States because, under the Federal Reserve's interpretation, loans for multi-family dwellings, common in low-income neighborhoods, are considered quite risky. See generally Duncan E. Alford, *Basle Committee International Capital Adequacy Standards: Analysis and Implications for the Banking Industry*, 10 DICK. J. INT'L L. 189 (1992). See also *Deposit Insurance Reform and Financial Modernization, 1990: Hearings on Reforming Federal Deposit Insurance, Modernizing the Regulation of Financial Services, and Maintaining the International Competitiveness of U.S. Financial Institutions Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 157 (1990) (testimony of Jane Uebelhoer, Legislative Director, ACORN).

<sup>89</sup> The Trade Related Intellectual Property Rights Agreement that came out of the Uruguay Round of international trade negotiations requires that the term of patent protection granted by state parties be at least twenty years. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II, §5, art. 33. This was three years beyond the prior level of patent protection in the United States.

<sup>90</sup> Under the Agreement on the Application of Sanitary and Phytosanitary Measures, World Trade Organization members have the right to take sanitary and phytosanitary measures that are “necessary” for the protection of human and animal health. See Agreement on the Application of Sanitary and Phytosanitary Measures, reprinted in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 69, at 70 art. 1 (1994). Crucially, however, such measures must, under the language of the agreement, be based on “scientific principles” and “sufficient scientific evidence.” *Id.* at art. 2.2. Recently, the WTO Appellate Body found that a European Union regulation banning (for health reasons) the domestic selling of hormone-fed beef was not based on scientific evidence. See *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/S26/R/USA (Aug. 18, 1997). For further discussion of the Sanitary and Phytosanitary Agreement,

transnationally regulated. Such regulation is likely to continue to grow for the simple reason that, even at present, the degree of regulation is not nearly sufficient to address the instabilities associated with the activities of global capitalism.

Governing elites within both national governments and international organizations have begun to worry that the democratic deficit is undermining the legitimacy of the present international system. Their concern is that growing popular resistance to a system that denies citizen participation will make it increasingly difficult to implement effective transnational regulation. These concerns were heightened recently when noisy street protests devoted in part to challenging the anti-democratic nature of international economic decisionmaking broke out at the December, 1999 World Trade Organization ministerial conference in Seattle, and at the April, 2000 annual meeting of the International Monetary Fund and World Bank in Washington D.C.<sup>91</sup> Even before Seattle, this problem was beginning, for example, to be taken more seriously within the World Trade Organization (WTO), where those concerned with promoting the organization<sup>92</sup> have recognized that some type of democratic process is needed to counter growing popular opposition to many of its initiatives.<sup>93</sup>

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see John J. Barcelo, *Product Standards to Protect the Local Environment—the Gatt and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755 (1994). International food safety standards are also heavily influenced by Codex, an intergovernmental organization whose mission is to harmonize food safety standards. For a discussion of Codex's role in the setting of international food safety standards, see generally Lewis Rosman, *Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?*, 12 VA. ENVTL. L. J. 329 (1993). The trend is in the direction of increased international regulation in the food safety area. See Jim Hoagland, *Europe's Food Fright*, WASH. POST, June 24, 1999, at A27 (reporting on proposal by French President Jacques Chirac for a world scientific authority that would certify food safety).

<sup>91</sup> For a very good discussion of the social concerns and political alliances behind the Seattle protests, see David Moberg, *For Unions, Green's Not Easy*, THE NATION, Feb. 21, 2000, at 17. For a discussion of the new activism generally, see Barry Came et al., *People Power*, MACLEAN'S, Jan. 1, 2000, at 220.

<sup>92</sup> U.S. President William Clinton has declared that "we must modernize the WTO by opening its doors to the scrutiny and participation of the public." President William Clinton, Remarks at the World Trade Organization in Geneva, Switzerland, 1 PUB. PAPERS PRESIDENT 807, 810 (May 18, 1998). See also E.J. Dionne, Jr., *Clinton Seeks Leveling Up Instead of Down*, INT'L HERALD TRIB., June 4, 1998, at 10 (discussing the policy pressures that brought Clinton to make the address).

Similarly, former WTO Director General Renato Ruggiero has stated that "[c]onsensus does not just mean agreement among governments. Consensus also means dialogue with our citizens" and that he "intend[s] to devote a great deal of [his] time to improving this dialogue—a dialogue including the widest possible representation and transparency in all the activities of the WTO." Director General Renato Ruggiero, Address at the Friedrich-Ebert-Foundation Hamburg, Germany (June 11, 1998), in ABI/INFORM. While Ruggiero's comments on the subject of democratizing the WTO were more cautious than President Clinton's, they make clear that he felt it necessary to address the organization's democratic deficit. Ruggiero followed up shortly after making these comments by beginning a program of regular briefings for NGOs on the work of WTO committees and working groups, and by disseminating documents, position papers, and newsletters submitted by NGOs to the organization's member states. See World Trade Organization, Press Release 10, *Ruggiero Announces Enhanced WTO Plan for Cooperation with NGOs*, July 17, 1998.

<sup>93</sup> Popular opposition to the organization can be seen in many corners. In the United States, for example, presidential candidates as different as Ralph Nader, Pat Buchanan, and Ross Perot have made opposition to the WTO central to their message. Nader has heavily criticized what he calls "the GATT and NAFTA systems of autocratic governance." RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 338 (1996). For further elaboration on Nader's views on the WTO and international trade generally, see Andrew Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 771–72 (1998). Patrick Buchanan, criticizing from the right-wing of the ideological spectrum as he does, argues that the United States should leave the

But what to do? The ad-hoc response has been gradually to open international regulatory bodies to participation by NGOs and citizens' associations. Even if implemented in a way that includes voices from the South, which is unlikely, such an approach cannot solve the problem of the democratic deficit. As industrial and other narrow private interests, as well as eccentric fringe groups, increasingly acquire NGO identities, international organizations like the WTO will show themselves institutionally incapable of impartially overseeing the process of representation. They are unlikely to be perceived as fair in deciding which organizations should be allowed to represent the global citizenry in decisionmaking and which should not.<sup>94</sup> To date, this problem has been avoided only because NGOs and citizens' associations have had either very little, or informal and episodic, influence. There is currently no viable strategy for overcoming the democratic deficit.

Imagine, therefore, what could happen if the GPA were to appear upon the global stage. Governing elites would be offered an attractive vehicle to help overcome popular resistance—an offer that would likely be very difficult to disregard. After all, civil society organizations promoting global regulations of an equitable character would themselves most likely see the GPA as a promising tool to help overcome resistance by states and private sector interests to regulation on behalf of the public good. In a specific application of the theme we have already suggested, if governing elites passed up the offer to enter the GPA's arena to find legislative common ground and allowed their challengers to go unanswered, their democratic deficit problem would be compounded. Not only would their approach to global public policy derive from a non-democratic process, but in addition their attempt to regulate would actually appear to defy the one body capable of genuinely speaking on behalf of the people of the world.

When the full dynamic is understood, not only would the GPA be a forum specifically created to give citizens legislative standing, but it is also hard to imagine that those involved with the established international regulatory institutions could afford to disregard the GPA.<sup>95</sup> In fact, in a likely portent of a future with the GPA, European Union policymakers, as discussed, have begun

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organization so as to preserve the country's national sovereignty, but the appeal of his argument is clearly aided by the fact that the WTO is run without democratic accountability by what he refers to as "nameless, faceless foreign bureaucrats." PATRICK J. BUCHANAN, *THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY* 313 (1998). See also ROSS PEROT WITH PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED—NOW* (1993) (focusing on the then-impending congressional debate on NAFTA but criticizing the GATT (soon to become the WTO) as well). Similar opposition to the organization and its initiatives is present in many other countries.

<sup>94</sup> David Rieff has articulated some of the difficulty inherent in discriminating between civil society organizations:

Why, for example, is the International Campaign to Ban Landmines viewed as an exemplar of civil society instead of, say, the National Rifle Association, which whatever one thinks of its politics, has at least as good a claim to being an authentic grassroots movement? The UN bitterly resisted having to recognize the NRA as a legitimate NGO. And yet if we think of NGO as a description and not a political position, the NRA obviously qualifies.

Rieff, *supra* note 64, at 15.

<sup>95</sup> Perhaps Professor Franck best summarized the political calculus that is likely to bring the global regulators into the realm of the GPA when he pragmatically concluded that "consent benefits the governing as much as the governed," in that it helps to secure the "habitual *voluntary* compliance of its subjects." Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 48 (1992).

to seek legislative legitimacy by attempting to secure the imprimatur of a democratically elected assembly. Having become acutely aware that the democratic deficit is undermining the legitimacy of directives promulgated by the unelected and “faceless” European Commission, successive European Union treaties have strengthened the powers of the popularly elected European Parliament.<sup>96</sup> Like their European counterparts, global policymakers would likely find a popularly elected assembly a very helpful way to shrink the democratic deficit, or at least such hopeful evolution should not be dismissed in advance.

### *B. The Ideological Dynamic of Empowerment*

To the extent that this socio-political dynamic occurs, ideological doctrine proclaiming the GPA’s authority to create binding law would correspondingly gain gradual acceptance. What we call an ideological dynamic of empowerment would likely be set in motion as observers sympathetic to global democracy, as well as those with political or economic interests in promoting the GPA, began to fashion formal legal arguments as to why its resolutions should be considered binding

In a world that largely subscribes to principles of contemporary sovereignty, the argument that the GPA—the only body to represent the peoples of the world—has the power to create binding transnational law presumably would have a wide acceptance at grassroots levels. Law professors would write law review articles. Private litigants would (when helpful to their cause) invoke the authority of the GPA before domestic tribunals. Even some state parties arguing in international fora would do likewise when they found it useful in making their own legal cases. Over time, it is probable that independent-minded judges would be inclined to accept such

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<sup>96</sup> See *supra* notes 65-71 and accompanying text; see also Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 11-14 (1999) (discussing how certain of the European Union treaties and particularly the Treaty of Amsterdam have strengthened the European Parliament).

International elites have been very concerned about the implications of the democratic deficit for governance within the European Union and about how to remedy it. For example, George Soros, one of the most high-profile advocates for global financial regulation, has observed that “[w]hat the people see is a top-heavy bureaucratic organization that works in convoluted ways shrouded in secrecy and not responsible to the public,” and that “[t]o change this perception, the administration ought to be made more directly responsible to the people, either through the national parliaments or the European Parliament.” GEORGE SOROS, *THE CRISIS OF GLOBAL CAPITALISM: OPEN SOCIETY ENDANGERED* 228 (1998).

Likewise, in explaining the increased power given to the European Parliament in the Treaty of Amsterdam, Michel Petite, Director of the Secretariat General of the European Commission has commented:

The call for . . . a more democratic functioning of the [European Union] institutions, could be heard from many sources. This demand came not only from the European Parliament, but also from almost all Member States. From the Constitutional Court in Germany, various non-governmental organizations, and simply good natural sense. Naturally, the Commission also sought a more democratic system of institutional structures and operations. It was absolutely clear that any extension of the Community order would require a more proper and classically democratic system. Failing this, we would undoubtedly face major constitutional problems in Member States and eventually bring the European Construction to a halt.

Michel Petite, Essay, *The Commission’s Role in the IGC’s Drafting of the Treaty of Amsterdam*, 22 FORDHAM INT’L L.J. 72, 76 (1999). It should also be noted that during European Union treaty negotiations the Parliament has been very skilled at winning expanded powers by using its existing powers for negotiating leverage.

arguments.<sup>97</sup> Such acceptance would, of course, have a powerful spiraling effect leading more such arguments to be made. Some progressive governments might even come to assert that the GPA's resolutions should be considered binding law both internationally and within their countries. These multifaceted developments would help erode adherence to the orthodox legal doctrine that binding international norms can be created only by states.<sup>98</sup>

Again, our experience with the United Nations can give us some confidence in the ultimate ideological empowerment of the GPA. Under the U.N. Charter, the powers of the General Assembly (which gives each state one vote) are largely precatory.<sup>99</sup> Despite this fact, in the 1960s and 70s, developing countries (that constituted and still constitute a majority of the Assembly) and their academic supporters developed a variety of legal theories to advance the argument that the resolutions of that organ should be considered binding.<sup>100</sup> Powerful geopolitical forces led by the United States kept these theories from ever gaining primacy, although they did gain a measure of

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<sup>97</sup> In fact, in the classic case of *McCulloch v. Maryland*, the U.S. Supreme Court used the argument that a popularly elected assembly has the inherent power to impose binding law on "sovereign" states to justify its expansive understanding of federal power. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, U.S. states claimed that the U.S. Constitution emanated from their independent sovereignties, and that the exercise of federal power could not predominate over the states' claims to power. Writing for the Court, Chief Justice Marshall rejected this theory, asserting that the federal government's democratically constituted legislative powers came directly from the people, not the states and, therefore, that the states could not themselves limit the grant of power to Congress. *McCulloch*, 17 U.S. (4 Wheat.) at 403-07.

Even in the absence of the GPA, the World Court is cautiously beginning to recognize the legal relevance of the international citizenry. In particular, Judge Weeramantry in his dissent to the *Nuclear Weapons Advisory Opinion* provides a broad jurisprudential argument in support of the role of the people in reshaping international law on matters of security and survival. See Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEM. PROBS. 333, 345-47 (1997) (discussing Judge Weeramantry's dissent).

<sup>98</sup> Of course, statist- and capital-driven resistance to such developments could also be anticipated.

<sup>99</sup> See U.N. CHARTER arts. 10-15. *But see* U.N. CHARTER arts. 17, 85.

<sup>100</sup> This is an area that has engendered a great amount of scholarly discussion. For some of the major works, see Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 531 (R. St. J. Macdonald & Douglas M. Johnston eds., 1986) (arguing that general international law is formed when "[t]he state[s] concerned accept[ ] that the norm in question is of a legal character . . . and, therefore as such, carries legal rights and duties *erga omnes*"); THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 87-88 (1989) (suggesting that, "[t]he passage of norms agreed upon in international conferences into customary law through the practice, including the acquiescence, of states constitutes a common, generally accepted method of building customary international law."); Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 110, 111 (1982) (arguing that the "formative influence" held by General Assembly resolutions "in developing international law is a "natural consequence" of the General Assembly's being "the central global forum for the international community"); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981) (discussing the influence of the General Assembly on general international law); Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 21, 28 (William E. Butler ed., 1987) (arguing that the norm creating ability of resolutions depends on a number of factors, such as "the majorities supporting their adoption"); Remarks of Judge Jimenez de Arechaga, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 48, 48 (Antonio Cassese & Joseph H. Weiler eds., 1988) (arguing that the General Assembly, where all states are represented, is a forum wherein rules of international law are generated by consensus). Cf. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544 (1993) (noting that developments in international law "often get their start or substantial support from . . . resolutions . . . debated in [ ] forums [like the General Assembly]"); Richard Falk, *On the Quasi Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 785 (1966) (observing "a discernible trend from consent to consensus as the basis of international legal obligations").



acceptance.<sup>101</sup> Though it is difficult to predict, arguments supporting the authority of a popularly elected assembly to create binding international law should be significantly more persuasive to democratic ears than have been arguments supporting the legal powers of the General Assembly. In fact, such arguments could become particularly compelling if the GPA chose to put the question of whether it should have binding powers to a vote of the global citizenry in an international referendum. If approved pursuant to a credible procedure, the fact that the GPA's authority to create binding law was granted explicitly by those representing the global citizenry would be a powerful argument in favor of its prerogatives.

### C. State Acceptance of the Global Peoples Assembly

These empowering socio-political and ideological dynamics would in themselves be unlikely to settle the issue within the international community of whether the GPA had the authority to create binding law. Rather, their most significant role would be to help create a political climate that might engender a definitive empowering event. Such an event could occur if states were to validate the GPA in a formal way, such as by treaty accepting and specifying the importance of its role within the overall constitutional structure of the U.N. system of global governance. In the wake of such a validating process, the GPA's legal authority would be solidified, and the controversial character of its lawmaking claims would be overcome.<sup>102</sup>

Is it reasonable to expect states to give their blessings to the GPA? We realize, of course, that most states are not yet ready to accept any such lawmaking entity and that civil society must necessarily take the lead in creating the GPA. Over time, however, the twin dynamics of socio-political and ideological empowerment would likely enlarge the realm of the possible,

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<sup>101</sup> See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (citing with approval the observation that the General Assembly's Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement', but is rather an authoritative statement of the international community"). See also Louis Henkin, *Resolutions of International Organizations in American Courts*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 199, 205 (Frits Kalshoven et al. eds., 1980) (arguing that General Assembly resolutions "might be given effect by [U.S.] courts without any intervening legislative or executive implementation" as elaborations of what could be considered to be self-executing U.N. Charter provisions). National courts in countries other than the United States have also relied on U.N. General Assembly resolutions for their legal significance. See generally CHRISTOPH C. SCHREUER, *DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS* (1981).

International tribunals have been more inclined than national courts to ascribe some measure of lawmaking authority to General Assembly resolutions. In the Nicaragua case, for example, the International Court of Justice referred to General Assembly resolutions as evidence of the international law on use of force and nonintervention. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98-107 (June 27). In the South West Africa and the Western Sahara cases, the International Court of Justice gave legal effect to General Assembly declarations on self-determination and independence of peoples in territories that have not yet attained independence. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21); see also *Western Sahara*, 1975 I.C.J. 12 (Oct. 16). For a reference to the influence of General Assembly resolutions relating to sovereign immunity and economic development on the decisions of international arbitrators, see Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985).

<sup>102</sup> Of course, new dangers of co-optation by certain states or private interests attempting to distort the democratic process might have to be confronted.

especially as the dynamics of globalization create more and more of a one-world awareness among peoples everywhere.

As the GPA grew in informal influence and increasingly came to act as a *de facto* legislature, the global structure of power would gradually reconfigure, and corresponding attitudes among state actors (with some possible exceptions) would tend to become more accepting. States would only be called upon to recognize legally a transformation that was already occurring. Along with this, the assembly's high profile and democratic legitimacy would give it a powerful ability to lobby governments effectively on its own behalf. Finally, in determining whether states would eventually come formally to concede power to such an assembly, it is important not to exaggerate the depth of present resistance of many states to such a move. After all, as we have discussed, the European Union countries through the European Parliament have been experimenting with a popularly elected transnational assembly for some time, and have consistently acted to strengthen its role, despite the consequent weakening of traditional sovereign prerogatives.

## V. CONCLUSION: ASSESSING THE ORGANIZATIONAL CHALLENGE

We do not mean in any way to minimize the logistical difficulties that would be involved in creating a Global Peoples Assembly that would have a major impact on world order. The establishment of electoral districts throughout the world would be necessary; global voter rolls would have to be generated; a system of campaign finance and other election rules would need to be established; and attempts to manipulate or undermine elections would have to be effectively guarded against.<sup>103</sup> Initially, some governments would not allow elections to occur in their countries, or at least not on acceptable terms. Until sufficient pressure could be brought to bear by transnational democratic forces, citizens of these countries would have to go unrepresented, or possibly be represented by delegates selected in some other way. Once the GPA was constituted, meeting facilities, translation services, and staff and other support services would have to be arranged. Undertaking arrangements on this scale would be organizationally daunting, not to mention very expensive.<sup>104</sup>

Sufficient commitment, however, can overcome logistical difficulties. If enough individuals, advocacy groups, foundations, churches, labor unions, and other organizations with resources were to get behind the GPA, the task could

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<sup>103</sup> Actually, global civil society has a good deal of experience in the area of election monitoring. Organizations such as the Inter-Parliamentary Union, the Carter Center, and the Swedish Organization. International Democratic Elections Assistance—to name but a few of the more prominent ones—have been heavily involved in this endeavor for a number of years. See generally GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS: INTERNATIONAL LAW AND PRACTICE* (1994) (providing on behalf of the Inter-Parliamentary Union a practical guide for assessing what constitutes free and fair elections); W. Michael Reisman, *International Election Observation*, 4 PACE U. L. SCH. Y.B. INT'L L. 1, 6–7 (1992) (discussing the role that NGO observers have played in international election monitoring).

<sup>104</sup> There is reason to believe, however, that emerging technologies could help overcome certain logistical barriers. See *Casting Ballots Through the Internet*, N.Y. TIMES, May 3, 1999, at C4 (reporting on start-up companies that are developing systems to enable voters to cast ballots over the Internet).

be accomplished—especially with the help of supportive governments.<sup>105</sup> What is remarkable, given the tremendous potential for such an assembly truly to transform global governance, is that in certain ways it is politically less challenging than what global civil society already accomplished in the 1990s. Unlike those previous projects, which relied upon inter-state treaty arrangements, there is little (at least within the more democratic societies) that opponents can do to thwart the GPA's development if popular support is forthcoming. The tremendous clout that many opponents of progressive international reform enjoy within national governments, and that can be used to block adherence to treaty regimes, will be of little use to them. They will have little option other than to criticize the project and refrain from participating in it.

How tremendously energizing it will be when people of democratic spirit and ethos in the world realize the full promise of this venture. After the great suffering of the last century, it would provide an auspicious beginning of this new millennium to have a vision as bold as the GPA put forth in a serious manner that captured the imagination of many people. Even before the ultimate goal of a GPA could be achieved, its very emergence on the international agenda would give a concrete and positive vision around which those who have voiced their objections to the anti-democratic nature of global institutions such as the WTO, the IMF, and the World Bank could organize. Independent of the specific merits of a global popularly elected assembly as the ultimate solution to the democratic deficit, the general cause of furthering the democratization of the global order could only be aided by the advancement of a concrete proposal around which media and public attention could be focused.

The analysis we have presented explaining why a citizen-organized assembly would be viable has looked backward at the dynamics of empowerment from the world as it exists. What we have left out of consideration is the tremendous transformative energy that could be unleashed when those people who have found their deep-seated aspirations for a better world so difficult to realize are presented with a viable vision of a GPA around which they can unite. Once unleashed, this energy for innovation and change could be as infectious as the negative energy of despair and hate that have so often acted to constrain our future. If this energy of innovation were to spread, the political terrain that has previously commanded adherence beneath the banner of "realism" would shift in supportive ways. If this political awakening occurs, the establishment of the Global Peoples Assembly might come to be seen as but one of several giant steps down the path leading to the emergence of humane governance for all the peoples of the world, thereby also fulfilling the quest for a form of world order that incorporates the ideas and practices of global democracy.

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<sup>105</sup> See Andrew Strauss & Richard Falk, *For a Global Peoples Assembly*, INT'L HERALD TRIB., Nov. 14, 1997, at 8 (suggesting that individuals with the resources and inclinations of George Soros and Ted Turner have the capacity to help make a Global Peoples Assembly a reality).