

TWILIGHT OF SOVEREIGNTY OR THE EMERGENCE OF COSMOPOLITAN NORMS?

Rethinking Citizenship in Volatile Times

Transformations of Citizenship

In several works in the last decade, I have documented the disaggregation of citizenships rights, the emergence of an international human rights regime, and the spread of cosmopolitan norms.¹ National citizenship is a legal and social status, which combines some form of collectively shared identity with the entitlement to social and economic benefits, and the privileges of political membership through the exercise of democratic rights. I have argued that in today's world the civil and social rights of migrants, aliens, and denizens are increasingly protected by international human rights practices. The establishment of the European Union has been accompanied by a Charter of Fundamental Rights and Freedoms and by the formation of a European Court of Justice.² The European Convention for the Protection of Human Rights and Fundamental Freedoms, which encompasses states which are not members of the EU as well, permits the claims of citizens of adhering states to be heard by a European Court of Human Rights. Parallel developments can be seen on the American continent, through the establishment of the Inter-American System for the Protection of Human Rights and the Inter-American Court of

This chapter was published in *Citizenship Studies* 11/1 (February 2007): 19–36. It has been revised for inclusion in this volume. It has also been reprinted in *Democracy, States, and the Struggle for Global Justice*, Heather Gautney, Omar Dahbour, Ashley Dawson, and Neil Smith (New York and London: Routledge, 2009), pp. 79–99.

TWILIGHT OF SOVEREIGNTY?

Human Rights. African states have accepted the 1981 African Charter on Human and Peoples' Rights through the Organization of African Unity, and to date it has been ratified by 49 states.³

Despite these developments, the link between national citizenship and the core entitlement of democratic participation, such as voting rights, are retained by permitting only nationals to exercise them in most cases; but in this domain too changes are visible throughout the European Union: a recent article by Kees Groenendijk of the Council on Migration, concludes that:

Of the 29 European States covered in this paper, 17 allow some categories of resident non-nationals to participate in local elections . . . These states are Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Norway [which is not an EU member SB], Portugal, Slovakia, Slovenia, Spain, Sweden, six cantons in Switzerland [which is not an EU member SB], and the United Kingdom. Eight of these states (Denmark, Hungary, Norway, Portugal, Slovakia, Sweden, six cantons in Switzerland and the United Kingdom) allow non-nationals (EU nationals and third-country nationals) to vote in elections for regional or national representative bodies. Five of these 17 states (Belgium, Estonia, Hungary, Luxembourg, and Slovenia) do not allow third-country nationals to stand as candidates in municipal elections.⁴

These trends are not limited to Europe. Increasingly, Mexico, and Central American governments such as El Salvador and Guatemala as well, are permitting those who are born to citizen parents in foreign countries to retain voting rights at home and even to run for office; the practice of recognizing dual citizenship is becoming widespread. In South Asia, particularly among economic elites who carry three or more passports and navigate three or more national economies, the institution of "flexible citizenship" is taking hold.⁵

Yet these changes in modalities of political belonging have been accompanied by other, more ominous, forms of exclusion: first, the condition of refugees and asylum seekers has not benefited equally from the spread of cosmopolitan norms. While their numbers the world over have increased as a result of the global state of violence,⁶ most liberal democracies since September 11, 2001, and even before then, had already shifted toward criminalizing refugee and asylum seekers, either on the grounds that they were lying to gain access to economic advantages in more affluent countries or that they were potential security threats. The politics of refuge and asylum have become sites of some of the world's most intense global distributional,

as well as racialized, confrontations. Even within the European Union, the establishment of refugee-processing transit camps (RPTCs) outside the borders of the EU, to catch refugees and illegal migrants before they land on European soil, have been advocated by the UK and Denmark, and are in operation in Spanish-held territories in North Africa and, until the outbreak of civil war there in the spring of 2011, in transit camps in Libya.

Furthermore, as Hannah Arendt observed more than half a century ago, "the right to have rights" remains an aporetic longing.⁷ For who is to grant the right to be a member, the right to belong to a community in which one's right to have rights is to be protected by all? Within a permanently divided humanity, it is first and foremost membership in a polity in which one's right to have rights is defended through the solidarity of all, that the aporias of statelessness may be resolved. Our defense of the right to have rights must combine then the liberal vision of citizenship as entitlement to rights, with the republican-democratic vision of membership to be attained through full democratic participation.

The disaggregation of citizenship rights through the extension of cosmopolitan norms, the continuing liminality of refugees and asylum seekers, and the increasing criminalization of migrants as a consequence of the global state of confrontation between the forces of political Islam and the USA, in particular, have led a number of scholars to interpret these recent trends in quite a different light from the views I express here. For some, the spread of an international human rights regime and of cosmopolitan norms sounds like a Pollyannaish narrative which does not account for the growing condition of global civil war (Giorgio Agamben; Michael Hardt and Antonio Negri).⁸ For others, while these trends toward a cosmopolitan order are real, one needs to consider the more radical political potentials of the present as well (Etienne Balibar; David Held).⁹

The very great disparity among these diagnoses of our contemporary condition, which extend from predictions of global civil war and a permanent state of exception, to the utopia of citizenship beyond the state and to transnational and global democracy, may itself be an indication of the volatile and obscure moment we are traversing. What has become crystal clear is that the changing world security situation since September 11, 2001, has destabilized the principle of formal sovereign equality of states. The spread of cosmopolitan norms and transformations of sovereignty inevitably accompany one another. The rise of an international human rights regime, which is one of the hallmarks of post-Westphalian transformations in sover-

eignty, also heralds alterations in the jurisdictional prerogative of nation-states. Jean L. Cohen has thus observed:

Talk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by "humanitarian intervention," and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes. The general claim is that the world is witnessing a move to cosmopolitan law . . . But . . . if one shifts the political perspective, the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire.¹⁰

So, which is it: the rise of cosmopolitan norms or the spread of empire? Indeed, it is crucial to unravel this ambivalent potential: while the emergence of cosmopolitan norms are intended to protect individuals' status as rights-bearing persons in a global civil society, there are dangers as well as opportunities created by the weakening of state sovereignty. The fact that the internationalization of human rights norms and the weakening of state sovereignty are developing in tandem with each other, decidedly does not mean that the one can be reduced to the other; the genesis of these trends as well as their normative logics are distinct.¹¹ Nor should concerns about the weakening of state sovereignty, some of which I share, lead one to reject the spread of human rights norms for fear that they can be used to justify humanitarian interventions.

The Changing Shape of Sovereignty

Since these transformations are altering norms of state sovereignty, as well as impacting the actual capacity of states to exercise sovereignty, it is important at the outset to distinguish between *state sovereignty* and *popular sovereignty*. The concept of "sovereignty" ambiguously refers to two moments in the foundation of the modern state, and the history of modern political thought in the West since Thomas Hobbes can plausibly be told as a contentious struggle between these poles: first, sovereignty means the capacity of a public body, in this case the modern nation-state, to act as the *final* and *indivisible* seat of authority with the jurisdiction to wield not only "monopoly over the means of violence," to recall Max Weber's famous phrase, but also to distribute socio-economic justice and manage the economy.

Sovereignty also means, particularly since the French Revolution, *popular sovereignty*, that is, the idea that the people are subjects and objects of the law, or the makers as well as obeyers of the law. Popular sovereignty involves representative institutions, the separation of powers, and the guarantee not only of liberty and equality, but of the "equal value of the liberty of each." Etienne Balibar has expressed the interdependence between state sovereignty and popular sovereignty thus:

state sovereignty has simultaneously "protected" itself from and "founded" itself upon popular sovereignty to the extent that the political state has been transformed into a "social-state" . . . passing through the progressive institution of a "representation of social forces" by the mechanism of universal suffrage and the institutions of social citizenship.¹²

My question is: how does the new configuration of state sovereignty influence popular sovereignty? Which political options are becoming possible? Which are blocked? Today we are caught not only in the reconfiguration of sovereignty but also in the *restitutions of citizenship*. We are moving away from citizenship, understood exclusively as national membership, toward a *citizenship of residency* which strengthens the multiple ties to locality, to the region, and to transnational institutions.

I will argue that cosmopolitan norms enhance the project of popular sovereignty while prying open the black box of state sovereignty.¹³ They challenge the prerogative of the state to be the highest authority dispensing justice over all that is living and dead within certain territorial boundaries. In becoming party to human rights treaties, states themselves limit their own prerogatives. Very often this can lead to conflicts between the will of majorities and international norms, as we can observe with regard to women's rights, the rights of cultural, ethnic and linguistic minorities, and environmental standards, among other examples. But such contentions have become all too frequent precisely because the world is moving toward new forms of post-Westphalian politics of global interdependence.

Separate from the influence of cosmopolitan human rights norms, and to be distinguished from it, is the undermining of state sovereignty through the demands of global capitalism. Global capitalism is indeed creating its own form of "global law without a state" (Günther Teubner), as well as sabotaging the efforts of legislators to conduct open and public deliberations on legislation that impacts the

global movements of capital and of other resources. Furthermore, many states are privatizing their own activities by disbursing authority over prisons and schools to private enterprises and companies.¹⁴ My thesis is that, whereas cosmopolitan norms lead to the emergence of *generalizable human interests and the articulation of public standards of norm justification*, global capitalism is leading to the *privatization and segmentation of interest communities* and the *weakening of standards of public justification through the rise of private logics of norm generation*. The result is the deterioration of the capacity of states to protect and provide for their citizens.

This chapter first documents in broad strokes three kinds of transformations taking place in the relationship of territoriality and jurisdiction: transnational migrations, the emergence of global law, and the rise of fast-track legislation. The two latter trends are leading to the undermining of popular sovereignty and the privatization of state sovereignty, while transnational migrations are both enabled by and contribute to the spread of cosmopolitan norms. I then conclude with normative considerations on democratic iterations, through which cosmopolitan norms and the will of democratic majorities interact via public argumentation and deliberation.

Deterritorialization and Law: Colonialism vs Transnational Migrations

The modern state formation in the West begins with the "territorialization" of space. The enclosure of a particular portion of the earth and its demarcation from others through the creation of protected boundaries, and the presumption that all that lies within these boundaries, whether animate or inanimate, belongs under the dominion of the sovereign is central to the territorially bounded system of states in Western modernity. In this Westphalian model, territorial integrity and a unified jurisdictional authority are two sides of the same coin; protecting territorial integrity is the obverse side of the power of the state to assert its jurisdictional authority (*dominium*).

The modern absolutist states of Western Europe were governed, in Carl Schmitt's terms, by the "Jus Publicum Europaeum" as their international law.¹⁵ However, this model was unstable from its inception, or, in Stephen Krasner's famous phrase, "sovereignty is hypocrisy."¹⁶ Already the discovery of the Americas in the fifteenth century, the imperialist ventures into India and China, the struggle for domination over the Indian Ocean, and the nineteenth-century

colonization of Africa destroyed this form of state sovereignty and international law by chipping at the peripheries.¹⁷ Not only the West's confrontation with other continents, but also the question of whether the non-Christian Ottoman Empire belonged to the "Jus Publicum Europaeum," showed the limitations of this order. Though Schmitt himself is not far from idealizing this moment in the evolution of "the law of the earth," his own account documents its inherent limits and eventual dissolution.¹⁸ The "deterritorialization" of the modern state goes hand in hand with its transformation from early bourgeois republics into European empires, whether they be those of England, France, Spain, Portugal, Belgium, the Netherlands, or Italy.

The evolution of bourgeois republics into empires destroys the overlap of territorial control with jurisdictional authority that governs, at least in principle, the motherland. Europe's colonies become the sites of usurpation and conquest in which *extra-juridical spaces*, removed from the purview of liberal principles of consent, are created. As Edmund Burke was to express it pithily with respect to "administrative massacres" in India, and during the impeachment by the British House of Commons of Warren Hastings, who was responsible for them, this needed to be done so that "breakers of the law in India might [not] become 'the makers of law for England.'"¹⁹

With the rise of bourgeois and democratic republics, the "subject" of the absolutist state is transformed into the "citizen." As the Westphalian paradigm of sovereignty meets its limits outside Europe, it is constitutionalized at home by social struggles for increased accountability, universal suffrage, expanded representation, democratic freedoms, and social rights. These struggles are the sites of popular sovereignty, and of demands to make the state apparatus responsive and transparent to its citizens. In ways that much scholarship has not even begun to fathom, popular sovereignty struggles at home, the spread of modern citizenship, and imperialist ventures abroad go hand in hand.²⁰

This legacy of empire has come back today to haunt the resource-rich countries of the northern hemisphere through the rise of transnational migrations. Transnational migrations also produce an uncoupling of territoriality, sovereignty, and citizenship, but in ways quite different from colonialism. Whereas in the nineteenth and twentieth centuries, European imperialism spread forms of jurisdiction into colonial territories, and shielded them against democratic consent and control, contemporary migratory movements give rise to *overlapping jurisdictions* which are often protected by international norms.

In 1910, roughly 33 million migrants lived in countries other than their own; by the year 2000, their number had reached 175 million;²¹ In 2010, that number was estimated to be 214 million (Cf. <http://www.migrationinformation.org/datahub/comparative.cfm>). From 1910 to 2000, the population of the world grew from 1.6 to 5.3 billion, roughly threefold; at the end of 2011 it is estimated to reach 7 billion. Migrations, by contrast, increased almost sixfold over the course of the same 90 years. Strikingly, more than half of this increase occurred in the last three decades of the twentieth century, between 1965 and 2000. In this period, 75 million people undertook cross-border movements to settle in countries other than those of their origin. It is noteworthy that from 2000 to 2010 alone, world migration grew by 40 million.²²

Transformations in patterns of migration are leading more and more individuals to retain ties with their home countries and not to undertake total immersion in their countries of immigration. The ease provided by globalized networks of transportation, communication, electronic media, banking, and financial services are producing guest workers, seasonal workers, dual nationals, and diasporic commuters. Migrations no longer bring with them total immersion and socialization in the culture of the host country – a process poignantly symbolized by the assignment to immigrants to the USA of new family names in Ellis Island.

Today nation-states encourage diasporic politics among their migrants and ex-citizens, seeing in the diaspora not only a source of political support for projects at home, but also a resource of networks, skills, and competencies that can be used to enhance a state's own standing in an increasingly global world. Notable examples of such diasporas are the large Indian, Chinese, and Jewish communities across the globe. Their continuing allegiance to the so-called "home country" is carefully cultivated.

Migrations thus lead to a pluralization of allegiances and commitments and to the growing complexity of the identity of nationals who, more often than not, in today's world, are also ex-, post- and neo-colonials. We are witnessing the increasing migration from periphery to center, encouraged by wide differentials in standards of living between regions of the world, and facilitated by the large presence of family and kin already at the center of what was once the Empire. Indians, Pakistanis, Kashmiris, and Sri Lankans in the UK; Algerians and Moroccans in France; Surinamese and Moluccans in the Netherlands; Latin Americans in Spain; Libyans in Italy are all population groups whose history is deeply bound up with European empires.

The Westphalian state which extended toward the rest of the world now finds that its borders are porous in both directions, and that not only does the center flow to the periphery, but the periphery flows toward the center.

State sovereignty, which has always meant some capacity and prerogative to protect borders, now more than ever depends upon skillful negotiations, transactions, agreements, and controlling flows in cooperation with other states. Of course, states and regions differ widely in their ability to assert their sovereignty and to throw their weight around. The poorer economies of Central America, South Asia, and Africa are less able to police their borders; the world's largest refugee populations are also settled in some of the world's poorest regions such as Chad, Pakistan, and Ingushia.²³

Migrations are the site of intense conflicts over resources as well as identities. In the contemporary world, strong states militarize and increasingly criminalize migratory movements. The poor migrant becomes the symbol of the continuing assertion of sovereignty. Migrants' bodies, both dead and alive, strew the path of states' power.

Transnational migrations reveal the pluralization of sites of sovereignty in that, with changing patterns of acculturation and socialization, migrants begin to live in multiple jurisdictions. Although they are increasingly protected by cosmopolitan norms in the form of various human-rights treaties, they are still vulnerable to a system of state sovereignty which privileges national citizenship while restricting dual and multiple citizenship regimes.

Militarization and criminalization are defensive responses which states use to reassert their sovereignty in the face of transnational migrations. But is it possible to think about sovereignty in terms other than those suggested by the model of autochthonous impermeability? Is it conceivable to think of sovereignty in relational terms? Is it possible to disaggregate sovereignty's functions and yet create modalities of cooperation?²⁴ Can we still maintain the ideal of popular sovereignty and democratic rule if the state-centered model of sovereignty is itself becoming dysfunctional?

Deterritorialization of Law: Global Capitalism

Transnational migrations reveal the dependence of states upon the worldwide movement of peoples as well as each other's policies. Since every inch of the face of the world, with the exception of the North

and South Poles, are now controlled and governed by a state which has territorial jurisdiction, cross-border movements initiated by migrants as well as by refuge and asylum seekers, bring to light the fragility as well as the frequent irrationality of the state system. Vis-à-vis people's cross-border movements, the state remains sovereign, albeit in much reduced fashion. Vis-à-vis the movement of capital and commodities, and information and technology, across borders, the state today is more hostage than sovereign.

A great deal has been written in recent years about globalization as a worldwide phenomenon and the corresponding diminished capacity of states. I am persuaded by the argument that to understand this phenomenon it is analytically more useful to use the term "stateness," that is, the dynamic capacity of states to react to and control their environments in multiple ways.²⁵ There is tremendous variation across the globe in the capacity of "stateness." The affluent democracies of North America, Europe, Australia, and New Zealand, to some extent can manipulate, tame, and channel the forces of global capitalism as well as the worldwide flow of information, communication, and transportation technologies — although the worldwide economic crises since 2008 reveal that their capacities to do so are limited too. Viewed comparatively, this is obviously much less true for many states in North Africa, the Middle East, Latin America, and Asia. The rise to global prominence of China, India, and Brazil, as well as the Asian "tiger" economies, is in large measure due to the capacity of these states to channel economic globalization to their own advantage.

In her analysis of Southeast Asian economies, Aihwa Ong gives a compelling example of the ways in which global capitalism is creating jurisdictional spaces that escape democratic controls. New forms of "multinational zones of sovereignty" in the form of growth triangles (GTs) are spreading throughout South Asia and Central America. These "straddle borders between neighboring states such as to maximize the locational advantage and attract global capital."²⁶ The three GTs formed by linking neighboring countries are Indonesia-Malaysia-Singapore (Sijori), Indonesia-Malaysia-Thailand, and Brunei-Indonesia-Malaysia-Philippines. Transnational corporations such as Nike, Reebok, and the Gap now employ millions of women who work 12 hours a day and make less than \$2.00 a day. Ong observes that these

growth triangles are zones of special sovereignty that are arranged through a multinational network of smart partnerships and that

exploit the cheap labor that exists within the orbit of a global hub such as Singapore. It appears that GT workers are less subject to the rules of their home country and more to the rules of companies and to the competitive conditions set by other growth triangles in the region.²⁷

A parallel account is provided by Carolin-Emcke of the workings of the *maquiladoras* in Central America. These are established by foreign capital in El Salvador, Guatemala, and Costa Rica under the protection of respective governments, often as tax-free zones to attract foreign investment. They protect the zones they occupy through the use of private security guards and forces, crush any attempt to organize the labor force, and fiercely defend themselves against international and even national control and supervision. They resemble medieval warlords who have taken the native populations hostage.²⁸

Whether it is the Growth Triangles of Southeast Asia or the *maquiladoras* of Central America, this form of economic globalization results in the disaggregation of states' sovereignty, with their own complicity. As in the case of colonization and imperialism, there is an uncoupling of *jurisdiction and territory* in that the state transfers its own powers of jurisdiction, whether in full knowledge or by unintended consequence, to non-statal private and corporate bodies. The losers in this process are the citizens from whom state protection is withdrawn or, more likely, who never had strong state protection in the first place, and who become dependent upon the power and mercy of transnational corporations and other forms of venture capitalists.

Despite the great variation across countries with respect to the interactions of the global economy and states, one generalization can be safely made: economic globalization is leading to a fundamental transformation of legal institutions and of the paradigm of the rule of law. Increasingly, globalization is engendering a body of law that is self-generating and self-regulating and that does not originate solely, or maybe even primarily, through the legislative or deliberative activity of national legislators.

Law Without a State?

In his influential article, "Global Bukowina: Legal Pluralism in the World Society," Günther Teubner has argued that, "Today's global-

ization is not a gradual emergence of a world society under the leadership of interstate politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role."²⁹ As examples of global law without a state, Teubner cites *lex mercatoria*, the transnational law of economic transactions; labor law, in the formulation of which enterprises and labor unions, acting as private actors, become law-makers; and the technical standardization and professional self-regulation as engaged in worldwide by the relevant parties without the intervention of official politics.

This emergent body of law is "a legal order," even if it has no specific point of origination in the form of law-producing institutions, and, even less, a single and visible law-enforcing agency. The boundaries of global law are not set by national borders but by "invisible colleges," "invisible markets and branches," "invisible professional communities," "invisible social networks."³⁰ Territorial boundaries and jurisdictional powers are once more uncoupled.

As Teubner acknowledges, this form of law has serious democratic deficits. "It is a law that grows and changes according to the exigencies of global economic transactions and organizations." This makes it extremely vulnerable to interest and power pressures from economic processes, because it is "indeterminate" and can change in its application from case to case."³¹ Soft law is law without the characteristics traditionally associated with the rule of law, namely, transparency, predictability, and uniformity of application. These features of the rule of law, however, are not merely procedural characteristics; they act as guarantees of the equality of persons and citizens before the law. Global law, by contrast, is not equality-guaranteeing and equality-protecting; rather, it is law which enables global corporations and other bodies to carry out their transactions speedily in an increasingly complex environment, by generating self-binding and self-regulating norms in contrast to what is regarded as the slower, clumsier, and often unpredictable actions of national legislatures.

There are important clashes and tensions between these features of *lex mercatoria* and human rights law or cosmopolitan norms: both the Growth Triangles and the *maquiladoras* are characterized by a *suspension* of human rights norms in such zones of special economic and business privilege. Furthermore, individuals working in these zones are not only, or even primarily, the citizens of the countries in which such zones operate; very often they are themselves transnational migrants from neighboring countries, whose human rights are regularly trampled upon. Thus Malaysians, Thai, Burmese, and

others work in Indonesia, and illegal Chinese laborers abound in the *maquiladoras* of Central America. While, without a doubt, the flow of global capital is responsible for encouraging the flow of transnational migrations, we see that the norms which ought to protect migrants and the laws which enable global capitalism are not compatible; in fact, often, they are antagonistic. *Lex mercatoria*, the law of international commercial transactions, and human rights law often collide and conflict.³²

That economic globalization threatens core features of the rule of law and thereby also challenges the prospects for liberal democracy is emphatically argued by William E. Scheuerman in *Liberal Democracy and the Social Acceleration of Time*:

Contemporary capitalism is different in many ways from its historical predecessors: economies driven by huge transnational corporations that make effective use of high-speed communication, information, and transportation technologies represent a relatively novel development. The relationship of capitalism to the rule of law is thereby transformed as well. . . . As high-speed social action "compresses" distance, the separation between domestic and foreign affairs erodes, and the traditional vision of the executive as best suited to the dictates of rapid-fire foreign policy making undermines basic standards of legality in the domestic sphere as well.³³

The transformation of the rule of law gives rise to fast-track legislation, pushed through by national legislators without adequate debate and deliberation; the power of deliberative bodies is eclipsed and that of the executive increases:

The main problem posed by globalization is less that transnational business can only preserve its autonomy by limiting state power to exercise the rule of law than that the democratic nation-state can only hope to maintain its independence in relation to global business by counteracting the virtually universal competitive rush to provide transnational firms with special rights and privileges.³⁴

States are pushed into the "race to the bottom," to embrace neoliberal reforms, cutting back on the welfare state, and relaxing labor and environmental legislations.

Law without a state? Or race to the bottom? In the first part of this chapter I asked: the spread of cosmopolitan norms or imperialism? Again, we seem confronted by alternatives and disjunction. Surely, these are not the only alternatives which globalization pro-

cesses confront us with, but, in either case, the model of liberal sovereignty—based upon the unity of jurisdiction administered over a defined territory, assuring citizen's equality through the administration of the rule of law and guaranteeing social welfare through economic redistribution—increasingly appears as if it were the memory of a quaint past. It is important to emphasize that sovereign states are players with considerable power in this process; they themselves often nurture and guide the very transformations that curtail and undermine their own powers.³⁵

Whether it be through changing patterns of transnational migrations, or through the emergence of Growth Triangles and new forms of global law without the state in the accelerated and fluid global marketplace, or through the pressure to adapt state bureaucracies to the new capitalism, an epochal change is under way, in which aspects of state sovereignty are being dismantled chip by chip. State jurisdiction and territoriality are uncoupled and new agents of jurisdictional authority are emerging in the form of multinational corporations. In some cases, the state disburses its own jurisdiction to private agencies in order to escape the territorial control of popular legislators—take the activities of the private security agency called Blackwater during the Iraq War, and now named 'Xe'. The social contract is increasingly frayed.

If the analysis presented above is partially accurate, does the "twilight of state sovereignty" mean the end of citizenship and of democratic politics, the displacement of the political, or maybe even its eventual disappearance in the evolution of world societies? What are the normative consequences of these transformations?³⁶ What light does this social-theoretic analysis shed on the political philosophies of the present period?

Twilight of Sovereignty and Global Civil Society

Just as the capacity of nation-states to exercise their "stateness" varies considerably, so do their reactions to the shrinking sphere of state autonomy and activity. Vis-à-vis the economic, ecological, legal challenges, and the growing fluidity of worldwide migrations, the states of Europe have chosen *the cooperative restructuring of sovereignty*. To be juxtaposed to this cooperative restructuring of sovereignty is the *unilateral reassertion of sovereignty*. At the present time not only the United States, but China, Iran, and India are going down this route, not to mention Russia, North Korea, and Israel. The

strategy here is to strengthen the state via attempts to gather all the markers of sovereignty in the public authority, with the consequence of increased militarization, frequent disregard for international law and human rights, regressive and hostile relations with neighbors, and criminalization of migration. The third alternative is the *weakening* of the already fragile institutions of *state sovereignty* in vast regions of Africa, Central and Latin America, and South Asia. In these cases, global market forces further destabilize fragile economies; they break up the bonds between the large armies of the poor and the downtrodden and their local elites. The latter now are engaged in networking with their global counterparts, thus leaving the masses of their own countries to the mercy of *maquiladoras*, paramilitaries, drug lords, and criminal gangs. The state withdraws into a shell, as has happened in the Ivory Coast, in the Congo, in the Sudan, in El Salvador, in some parts of Mexico, in Burma, and so on. Under such conditions, popular sovereignty takes the form, at best, of guerilla warfare and, at worst, of equally criminal groups fighting to gain a piece of the pie. Neither the contraction of "stateness" nor its militarized reassertion re-enhance popular sovereignty.

The volatile and often ambivalent configurations of institutions such as citizenship and sovereignty, which have defined our understanding of modern politics for the last 360 odd years since the Treaty of Westphalia (1648), have understandably given rise to conflicting commentaries and interpretations in contemporary political thought. These can be characterized as theories of empire, theories of transnational governance, and theories of post-national citizenship.

Empire, according to Michael Hardt and Antonio Negri, is the ever-expanding power of global capital to bring farther and farther reaches of the world into its grip. Unlike the extractive and exploitative empires of the past, however, the new empire encourages the spread of human rights norms; it pushes the new technologies of networking throughout the world, thus destroying the walls of separation and generating a new global connectivity consonant with this new age.³⁷

Since the webs of empire are so ubiquitous, sites of resistance to it are diffuse, decentered, and multiple. The "multitude" resists the total penetration of life-worlds by empire in organizing demonstrations against the G-7, the World Bank, the Gulf War, the Iraq War, and the violation of international law. The multitude focuses on power as a global phenomenon and attempts to generate a counterforce to empire.³⁸

The metaphors of networking, entanglement, binding, spread of communicative forms, and the like which underlie this social-theoretical analysis are one-sided precisely because they present a world without institutional actors and without structured centers of resistance.³⁹ Relatedly, the multitude – Hardt's and Negri's revolutionary subject – is not representative of the citizen. The multitude is not even the carrier of popular sovereignty since it lacks the drive toward the constitutionalization of power, which has been the desiderata of all popular movements since the American and French Revolutions. The multitude gives expression to the rage of those who have lost their republics: the multitude smashes institutions and resists power. It does not engage in what Hannah Arendt has called *constitutio libertatis*.⁴⁰ By contrast, popular sovereignty aims at widening the circle of representation among all members of the demos into an enduring form; popular sovereignty aims at the control of state power via the separation of powers between the judiciary, the legislative, and the executive; popular sovereignty means creating structures of accountability and transparency in the public exercise of power. This is a far cry from the politics of the multitude.

This aspect of the legitimate exercise of power is well emphasized in contemporary debates by theorists of *transnational governance* such as Anne-Marie Slaughter and David Held. At the roots of empire's extension, argue advocates of transnational democracy, lies a problem of legitimation. We are in the grips of forces and processes that resemble the galloping horseman without a head. Decisions are made in exclusive board meetings of the IMF, WTO, and the World Bank, affecting the lives of millions, while nation-states refuse to sign multilateral treaties such as the Kyoto Convention, as in the case of the USA, or the Rome Treaty that has led to the establishment of the International Criminal Court. Theorists of the multitude seem to confuse politics with carnival. Only transnational institutions can build permanent structures to counteract the forces of empire.

According to advocates of global governance, by contrast, we need transparent and accountable structures of world regulation and coordination. Some of these structures are already in place through the networking of experts working on economic, judicial, military, immigration, health, and communication issues, they observe. These form horizontally networked sites of information, coordination, and regulation. The future of global citizenship depends on becoming actively involved in such transnational organizations and working toward global governance. Whether this implies world government or not is

at this stage beside the point: what matters is to increase structures of global accountability and regulation.⁴¹

In the version of the global governance thesis advocated by Anne-Marie Slaughter, who focuses less on the normative possibilities for democratic governance beyond borders but more on the horizontal networks linking government officials in judicial, regulatory, and administrative organizations across state boundaries, a realm of law "beyond the state" has already been created and the reach of global law is extended through the power of regulatory organizations which are themselves part of national institutions.

Whereas followers of the late Niklas Luhmann, such as Günther Teubner, see structures of global governance resulting *per impossibile* through the self-regulating interlocking of anonymous systems of norm-generation that act as each other's environment, Anne-Marie Slaughter places her faith in the networking of actual elites in the judiciaries across the world, in administrative bureaucracies, regulatory agencies, and the like. The hope is that new norms and standards for public behavior will result through such interlockings.

Defenders of global governance have a point: the current state of global interdependence requires new modalities of cooperation and regulation. Arms control, ecology, combating disease and epidemics, and fighting the spread of poverty must be global joint ventures that require the cooperation of all people of good will and good faith in all nations of the world. As David Held in particular has argued powerfully, the goal is not only to form new institutions of transnational governance but to render existing ones such as the WTO, IMF, and AID more transparent, accountable, and responsive to their constituencies' needs. This in turn can only happen if popular movements within donor and member countries force the elites who govern these institutions toward democratic accountability. It is naive to assume, as Günther Teubner and Anne-Marie Slaughter at times seem to, that the good faith of elites or the miraculous sociological signals of anonymous systems alone will move such structures toward democratization and accountability. They won't. Transnational structures need to be propelled toward a dynamic where they can be controlled by public law.

Here, however, we reach a dilemma: precisely because state-centered politics have become so reduced in effectiveness today, new theoretizations of the political have emerged. Yet my critique of the models of empire and transnational governance seems to presuppose a form of popular sovereignty; a *global demos*, which is

nowhere in existence. Where is the popular sovereign who can counter empire or who can be the bearer of new institutions of transnational governance?

Today we are caught not only in the reconfiguration of sovereignty but also in the *reconstitutions of citizenship*. We are moving away from citizenship, understood as national membership, increasingly toward a *citizenship of residency*, which strengthens the multiple ties to locality, to the region, and to transnational institutions. In this respect defenders of post-national citizenship are correct. The universalistic extension of civil and social rights, and, in some cases, of political participation rights as well, to immigrants and denizens within the context of the European Union is heralding a new institution of citizenship. This new modality decouples citizenship from national belonging and rootedness in a particular cultural community. Not only in Europe, but all around the globe, we see the rise of political activism on the part of non-nationals, post-nationals, and ex-colonials. They live in multicultural neighborhoods, they come together around women's rights, secondary language education for their children, environmental concerns, jobs for migrants, representation on school boards and city councils, and legalizing the status of undocumented workers. This new urban activism, which includes citizens as well as non-citizens, shows that political agency is possible beyond the member/non-member divide. The paradoxes of the "right to have rights" are ameliorated by those who exercise their democratic-republican participation rights with or without possessing the correct papers.

Nor is the local alone the site of post-national citizenship. New modalities of citizenship and a nascent public sphere are also emerging at the global level through the meetings of the World Social Forum in which activists from all nations, representing women's, ecology, ethnic rights, cultural self-determination, and economic democracy groups, as well as NGOs and INGOs, gather together to plan strategy and policy. They are, in many cases, the ones who articulate and bring to global awareness problems to which transnational structures of governance have to respond. These citizens' groups and social activists are the transmitters of local and global knowledge and know-how; they generate new needs and demands that democracies have to respond to. They are members of the new global civil society. This new global civil society is not only inhabited by multinational and transnationals, whether public and private, but also by citizens, movement activists, and constituents of various kinds. This emergent global civil society is quite complementary to republican federalism,

which in my opinion constitutes the only viable response to the contemporary crisis of sovereignty.⁴²

Republican Federalism and Democratic Sovereignty

I will define "republican federalism" as the constitutionally structured reaggregation of the markers of sovereignty, in a set of interlocking institutions each responsible and accountable to the other. There is, as there must be in any structuring of sovereignty, a moment of *finality*, in the sense of decisional closure, but not a moment of *ultimacy*, in the sense of being beyond questioning, challenge, and accountability. As Judith Resnik notes, the development of international law and of cosmopolitan human rights treaties are creating new modalities for the exercise of federalism:

federalism is also a path for the movement of international rights across borders, as it can be seen from the adoption by mayors, local city councils, state legislatures, and state judges of transnational rights including the United Nations Charter and the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW) and the Kyoto Protocol on global warming. Such actions are often trans-local – with municipalities and states joining together to shape rules that cross borders.⁴³

I call such processes of "law's migration" (Resnik) across state boundaries and institutional jurisdictions, whether institutionalized or popular; "democratic iterations." Democratic iterations can take place in the "strong" public bodies of legislatures, the judiciary and the executive, as well as in the informal and "weak" publics of civil society associations and the media.

Democratic iterations are processes of linguistic, legal, cultural, and political repetitions-in-transformation = invocations that are also revocations.⁴⁴ Through such iterative acts a democratic people, considering itself bound by certain guiding norms and principles, reappropriates and reinterprets these, thus showing itself to be not only *subject* to the laws but also their *author*. *Popular sovereignty no longer refers to the physical presence of a people gathered in a delimited territory, but rather to the interlocking in global, local and national public spheres of the many processes of democratic iteration in which peoples learn from one another.*⁴⁵

There will be an inevitable tension between the border- and boundary-transcending discourses of democratic iterations and state

sovereignty. In fact, democracy is the process through which the popular sovereign tries to tame state sovereignty by making it responsive, transparent, and accountable to the people. The spreading cosmopolitan norms, which aim to protect human beings as such, not only in virtue of their national membership status but as citizens of a global civil society, and claims to popular sovereignty, mutually reinforce one another. Whereas, in the case of the decline of state sovereignty, it is the receding of the public exercise of state power that is of concern, in the case of the augmentation of popular sovereignty, international and cosmopolitan norms subject the public agencies that exercise power to increasing scrutiny. First and foremost, state institutions are submitted to heightened public and juridical scrutiny, thus aiding the assertion of popular sovereignty. The supposed conflict between the spread of cosmopolitan norms and popular sovereignty is based upon a mistaken equation of state with popular sovereignty.

Cosmopolitan norms give rise to the cross-border interlocking and coordination of democratic iterations among those who are organized in human rights, women's rights, ecology, and indigenous rights movements. By contrast, *lex mercatoria* and other forms of law without the state, preferred by the agents of global capitalism, strengthen private corporations vis-à-vis public bodies. Thus, in the case of the North American Free Trade Agreement, firms are granted rights hitherto generally limited to nation-states alone. Chapter II (B) of the Treaty allows private businesses to submit complaints against member-states to a three-member tribunal. One of the members is chosen by the affected state, another by the firm, and the third jointly by the parties. As Scheuerman observes, "NAFTA thereby effectively grants states and corporations equal authority in some crucial decision-making matters." And he adds, "In a revealing contrast the procedures making up NAFTA's labor 'side agreement' deny similar rights to organized labor."⁴⁶

There is an interesting parallel here to the growing power of individuals to bring charges for human rights violations against states that are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms in front of the European Court of Human Rights. In this case, as well, states are defendants and no longer immune from legal prosecution. In both cases, the "black box" of state sovereignty has been pried open, but with very different normative presuppositions: in the case of NAFTA and other forms of global commercial law, states become liable to prosecution by corporate bodies which do not represent *generalizable*

interests; but only their particular interests and those of their constituents. Interestingly, they also disempower organized labor and environmental groups from enjoying similar jurisdictional privileges in bringing charges against various corporate parties.

In the case of charges brought against states for human rights violations, by contrast, there is a potential *generalizable interest* shared by all citizens and residents of a state alike; namely, to prevent the use of torture and other forms of the widespread violation of human rights. Human rights trials against sovereign states even go beyond the generalizable interest of the national citizens involved and establish universalizable norms of human rights that would protect individuals everywhere and in any part of the world. There is a context-transcending power to these human rights iterations that feeds into the normative power of cosmopolitan norms.

The boundaries of the political have shifted today beyond the republic housed in the nation-state. The deterritorialization of law brings in its wake a displacement of the political. It is clear that only multiple strategies and forms of struggle can reassert the ruptured link between popular consent and the public exercise of power, which is the essence of democratic sovereignty. Transnational structures of governance are fundamental in order to tame the forces of global capitalism; but the accountability of transnational elites can only be demanded by their own constituencies when they mobilize for post- and trans-national citizenship projects. The interlocking networks of local and global activists form an emergent global civil society, in which new needs are articulated for a worldwide public, new forms of knowledge are communicated to a world public opinion, and new forms of solidarity across borders are crafted.

Popular sovereignty cannot be regained today by returning to the era of the "black box" of state sovereignty: the formal equality of sovereign states must mean the universalization of human rights norms across state boundaries, respect for the rule of law, and the spread of democratic forms of government all over the globe. It is an insult to the dignity and freedom of individuals everywhere to assume, as so many today are tempted to do, that human rights and cosmopolitan norms, such as the prohibition of crimes against humanity, are products of Western cultures alone whose validity cannot be extended to other peoples and other cultures throughout the world. Not only is this a very inadequate view of the spread of modernity as a global project, but it is also a philosophical conflation of genesis and validity, that is to say, of the conditions of origin of a norm with the conditions of its validity. Global human rights and cosmopolitan

norms establish new thresholds of public justification for a humanity that is increasingly united and interdependent.⁴⁷ New modalities of citizenship, not only in the sense of the privileges of membership but also in the sense of the power of democratic agency, can only flourish in the transnational, local as well as global spaces, created by this new institutional framework. The multiplying sites of the political herald transformations of citizenship and new configurations of popular sovereignty.

For some, the increasing tensions between the state sovereignty and a cosmopolitan vision of human rights are harbingers of ominous developments: first, there is the argument, advocated by many on the left, that any denial of the principle of the sovereign equality of states provides a green light for increasing interventionism; others, more mindful of the contradictions inherent to the world society of states, plead for reform of the United Nations.⁴⁸

Among those who take the need for building new institutions of global governance to heart, there are also distinctions among cosmopolitans and regionalists. While cosmopolitans are more open toward the project of a world federation of states, and dispute the degree and form of federalism or federalism needed, regionalists advocate a multi-layered system of governance. In some of his recent essays, Jürgen Habermas, for example, has pleaded for a centralized authority – a reformed UN to have jurisdiction over matters of world war and peace and the implementation of human rights, while pleading for regional organizations (such as the EU) to repool sovereignty for the sake of socio-economic, ecological, and immunological cooperation.⁴⁹

I welcome the resurgence of institutional imagination in contemporary discussions and consider my contribution in this essay to be a humble one of analytical and normative clarification: we need to differentiate between state and popular sovereignty, while exploring their interdependence. The nation-state, until recently, has been a very successful host to the project of popular sovereignty. But economic, military, immunological, and climate-related forces, as well as the explosion of new means of electronic communication and worldwide migrations, have weakened the institutions of the nation-state to such a point that without a "repooling of the markers of sovereignty" in new institutional forms, popular sovereignty cannot be actualized. Far from considering themselves authors as well as subject of their own laws, more and more people are becoming prey to the forces of global capitalism that rob them increasingly of their citizens' as well as human rights. The old regime of state sovereignty, which already

in the very construction of the UN was poised between the conflicting demands of sovereign state equality and the realization of the universal principles of human rights, today has been further destabilized by global forces. We need not reject the principle of popular sovereignty, but we need to reconfigure a new regime of global state sovereignties. Despite all its problems, the European Union remains the most impressive example of such a reconfiguration of the markers of sovereignty in the spirit of republican federalism.⁵⁰ Hopefully, there will be others too:

CLAIMING RIGHTS ACROSS BORDERS

International Human Rights and Democratic Sovereignty

For Jürgen Habermas, on his eightieth birthday

The New Legal Landscape

The status of international law and of transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue.¹ In his highly controversial decision that struck down the death penalty for juvenile delinquents, Justice Kennedy cited the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, among other documents.² In his dissenting opinion, Justice Scalia thundered: "The basic premise of the court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand." Seeing this as an all-or-nothing equation, Justice Scalia drove to a *reductio ad absurdum*:

The Court should either profess its willingness to reconsider all these matters in the light of views of foreigners, or else it should cease putting

An earlier version of this article has appeared in the *American Political Science Review* 103/4 (November 2009): 691–704. I am grateful to the Wissenschaftskolleg in Berlin for awarding me a fellowship from January to July 2009, during which time I completed this essay, and to Axel Wödrich, a visiting student at Yale University, for his meticulous comments on an earlier draft.

- Force: A Cosmopolitan Institutional Perspective," *Ethics and International Affairs* 18/1 (2004): 1-22. I find the suggestion that the Security Council can be sidelined, without the creation of proper institutional alternatives and in the name of a democratic coalition, a bit too vague and cavalier and uncomfortably reminiscent of George Bush's call for a "coalition of the willing" during the lead-up to the Iraq War. See pp. 18 ff.
38. The distinction between NGOs, INGOs, and other aid and development organizations and combat forces is becoming, admittedly, one of the most difficult to maintain in situations of actual armed conflict. It is also a distinction that irregular armed forces disregard, thus putting the lives of many civilian aid workers in jeopardy. Unfortunately, there are far too many cases of such civilians – including many journalists – who have been killed in the course of recent conflicts in Iraq, Pakistan, Afghanistan, Rwanda, the Ivory Coast, and the Congo. For a reflective account of what may be at stake in making these distinctions collapse, see Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt, 1997).
 39. See Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform," in *Ethics* 111/4 (July 2001): 673-705.
 40. Immanuel Kant [1795], "Perpetual Peace: A Philosophical Sketch," pp. 116-19; also I. Kant, Appendix II, "On the Agreement between Politics and Morality According to the Transcendental Concept of Public Right," pp. 125-30.

CHAPTER 6 TWILIGHT OF SOVEREIGNTY OR THE EMERGENCE OF COSMOPOLITAN NORMS? RETHINKING CITIZENSHIP IN VOLATILE TIMES

1. See *Transformation of Citizenship: Dilemmas of the Nation-State in an Era of Globalization*, The Spinoza Lectures (Amsterdam: Van Gorcum, 2001); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*; *The Rights of Others: Aliens, Citizens and Residents*, the John Seeley Memorial Lectures.
2. In 1957 the Treaty Establishing the European Community, officially referred to as the "Treaty of Rome"/"EC Treaty," was accepted. With the entry into force of the Lisbon Treaty, it has been renamed "Treaty of Lisbon Amending the Treaty on Euro-

- pean Union and the Treaty establishing the European Community," the TFEU. See: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF>>; accessed on August 31, 2010.
3. See "The International Human Rights Movement," in Louis Henkin, D. W. Leeborn, G. L. Neuman, and D. Orentlicher, eds, *Human Rights* (New York: Foundation Press, 2003), pp. 147 ff.
 4. Kees Groenendijk, "Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn," Publication of the Transatlantic Council on Migration (2008); accessed on 31 August, 2010, at: <<http://www.migrationpolicy.org/transatlantic/docs/Groenendijk-FINAL.pdf>>.
 5. Cf. Aihwa Ong, *Flexible Citizenship: The Cultural Logic of Transnationality* (Durham, NC; and London: Duke University Press, 1999).
 6. See Aristide Zolberg and Peter Benda, *Global Migrants. Global Refugees: Problems and Solutions* (New York and Oxford: Berghahn Books, 2001).
 7. For a more extensive treatment of Arendt's concept see Benhabib, "Kantian Questions, Arendtian Answers," in Seyla Benhabib and Nancy Fraser, eds, *Pragmatism, Critique and Judgment: Festschrift for Richard J. Bernstein* (Cambridge, MA: MIT Press, 2004), pp. 171-97. See also Hauke Brunkhorst, *Hannah Arendt* (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1999), pp. 52-84.
 8. Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL, and London: University of Chicago Press, 2005); Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2001).
 9. Etienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, trans. James Swenson (Princeton, NJ, and Oxford: Princeton University Press, 2004); David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity, 2004).
 10. Jean L. Cohen, "Whose Sovereignty? Empire versus International Law," *Ethics and International Affairs* 18/3 (2004): 2.
 11. The genesis of cosmopolitan norms goes back to the experiences of two world wars, anti-colonial struggles, the Armenian genocide in the late stages of the Ottoman Empire, and the Holocaust. For an account of the development of international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The*

- Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002). See also the accounts of trials against members of the “Union and Progress Party” in the Ottoman Empire, who were responsible for the Armenian genocide, by Taner Akcam, *Armenien und der Völkermord: Die Istanbuler Prozesse und die türkische Nationalbewegung* (Hamburg: Hamburger Edition, 1996); for the Nuremberg trials, cf. Michael Marrus, *The Nuremberg War Crimes Trial 1945–46: A Documentary History* (New York: Bedford/St Martin’s, 1997); for Ralph Lemkin’s efforts to pass the Genocide Convention, see chapter 2 of this volume. Cf. also Bürkhorst’s impassioned defense of “strong human rights,” in *Solidarität: Von den Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt: Suhrkamp, 2002).
- 12 Etienne Balibar, “Prolegomena to Sovereignty,” in Balibar, *We, The People of Europe? Reflections on Transnational Citizenship*, p. 152.
 - 13 In a rather deferential but terse review of Anne-Marie Slaughter’s, *A New World Order* (Princeton, NJ, and Oxford: Princeton University Press, 2004), Kenneth Anderson distinguishes state sovereignty, democratic sovereignty, sovereign state multilateralism, and multilateralism pooled sovereignty. But he does not explore the implications of distinguishing between state and democratic sovereignty when the latter is understood as popular-sovereignty. This is because for him a non-nation-state based conception of sovereignty is unimaginable. See Kenneth Anderson, “Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks,” *Harvard Law Review* 118 (2005): 1255–1312; here 1261–3. Anderson defines state sovereignty in terms of Lincoln’s classic phrase as “a political community, without a political superior.” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (1953), pp. 421, 434, as cited by Anderson, *ibid.*, p. 1299. The question is whether “political superiority” is to be understood as *finality of decision-making or as some ultimacy of power*. No state possesses such power in the international domain, and within the domestic realm; such a conception of sovereignty has been repudiated with the rise of cosmopolitan norms; ultimate sovereign power is a non-sensical concept but sovereignty understood as “possessing final authority in decision-making” remains – even if it itself is contested.

- 14 See David Apter, “Globalization, Marginality, and the Specter of Superfluous Man,” in *Journal of Social Affairs* 18/71 (fall, 2001): 73–94.
- 15 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th edn. (Berlin: Duncker and Humblot, 1997), p. 99; English trans. Gary L. Ulmen, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, (New York: Telos Press, 2003), pp. 128–9.
- 16 Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).
- 17 For a masterful account, which is also a sustained critique of Schmitt, see Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, pp. 98–179. Cf. the statement of the Belgian legal historian Ernest Nys: “A state uses the territories that constitute its private domain as it wishes; it sells them, it rents them out; it attaches such conditions to the concessions it grants as it sees warranted . . . in none of this does it owe an explanation to other States.” (from “L’État Indépendent du Congo et les dispositions de l’acte generale,” quoted in Koskenniemi, *ibid.*, p. 161).
- 18 Schmitt’s elegy to the *Jus Publicum Europaeum* (the public law of Europe) emphasizes that this system “neutralizes” war by moving away from the medieval notion of “just war.” In this transformation, the enemy is no longer viewed as *inimicus* but as *justi hostes* (categories which also return in Schmitt’s concept of the “political”). This “neutralized” concept of war is also called “the non-discriminatory concept of war” (*der nicht-diskriminierende Kriegsbegriff*). “All inter-state wars upon European soil, which are carried out through the militarily organized armies of states recognized by European law of nations (Völkerrecht), are just in the sense of the European law of nations of this inter-statal period” (Schmitt, *Der Nomos der Erde*, p. 115 (emphasis in the text); in the English translation, *Nomos of the Earth*, see p. 143). Schmitt here conflates “justice” and “legality,” not out of some logical error, but because he rejects all normative standards that go beyond state interests in judging wars.
- 19 Burke, cited in Arendt, *The Origins of Totalitarianism*, p. 183. See also Hannah Arendt’s powerful statement, “The only grandeur of imperialism lies in the nation’s losing battle against it,” *ibid.*, p. 132.
- 20 See Janine Brodie, “Introduction: Globalization and Citizenship Beyond the National State,” and Satoshi Ikeda, “Imperial

- Subjects, National Citizenship, and Corporate Subjects: Cycles of Political Participation/Exclusion in the Modern World System," both in *Citizenship Studies* 8/4 (December 2004): 323-33 and 333-49 respectively.
- 21 Hañia Zlotnik, "Past Trends in International Migration and Their Implications for Future Prospects," in M. A. B. Siddique, ed., *International Migration into the Twenty-First Century: Essays in Honor of Reginald Appleyard* (Boston, MA: Edward Elgar, 2001), p. 227.
 - 22 United Nations, Department of Economic and Social Affairs, *International Migration Report ST/ESA/SER.A/220*, 2002. According to the International Organization for Migration, "There are far more international migrants in the world today than ever previously recorded, and their number has increased rapidly in the last few decades: ... While the global reach of international migration had already begun to extend after 1945, it has expanded sharply only since the 1980s to include all regions of the world today ... This globalization of international migration involves a wider diversity of ethnic and cultural groups than ever before; there is a growing proportion of women as primary migrants; more or less permanent or settlement migration has increasingly been replaced by temporary and circular migration; and, although the economic crisis may have temporarily slowed the growth of migration outflows, the underlying causes of this globalization of migration, such as demographic, labour market and environmental factors, remain." At: <<http://www.iom.int/jahia/Jahia/policy-research/migration-research/world-migration-report-2010/cache/offoince/>>; accessed on September 1, 2010.
 - 23 See Benhabib, *The Rights of Others*, pp. 5 ff.
 - 24 See Dieter Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin: Berlin University Press, 2009).
 - 25 Peter Evans, "The Eclipse of the State? Reflections on Stateness in an Era of Globalization," *World Politics* 50/1 (1997): 62-87. The original term is from J. P. Nettl, "The State as a Conceptual Variable," *World Politics* 20 (July 1968): 559-92.
 - 26 Ong, *Flexible Citizenship*, p. 221.
 - 27 Ibid., p. 222.
 - 28 Carolin Emcke, *Echoes of Violence: Letters from a War Reporter* (Princeton, NJ: Princeton University Press, 2007), p. 77 and in general pp. 71-97.

- 29 In Günther Teubner, ed., *Global Law Without a State: Studies in Modern Law and Policy* (Aldershot and Brookfield, Vermont: Dartmouth Publishing Company, 1997), pp. 3-28; here p. 5.
- 30 Teubner, *ibid.*, p. 8.
- 31 Ibid., p. 21. For a more optimistic assessment of the human rights obligations of international organizations and what they can do to realize them, see Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," *European Journal of International Law* 13/3 (2002): 621-50.
- 32 Andreas Fischer-Lescano and Günther Teubner discuss this extensively in their article, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," trans. by Michelle Everson, in *Michigan Journal of International Law* 25 (summer 2004): 999-1046. Particularly interesting is the conflict between the economic interests of patent holders, such as big pharmaceuticals Merck, Pfizer, Roche, etc., and nation-states. These pharma-companies in 2001 asked the WTO to investigate Brazil for permitting the domestic production of generic drugs via copying patented medicines. Brazil defended itself by pointing out that the AIDS epidemic had taken 150,000 lives since 1981 and that with preventive measures annual infections could be reduced to less than 5,000. This case, entailing a clear human rights claim to health and public protection from epidemic disease, in turn led to a major renegotiation of the terms of TRIPS (Trade Related Intellectual Property Rights) and to further negotiations between WHO and WTO about the preventive and non-commercial use of patented drugs, and led all the way to a resolution of the UN Commission on Human Rights in 2003, reiterated in 2005, protecting the preventive use of generic drugs whenever possible to help combat the spread of disease and epidemics. See Resolution 2003/47 of the United Nations Human Rights Commission (E/CN.4/RES/2003/47), retrievable through: <<http://data.unaids.org/Media/Information-No>>. At the Doha meetings in 2002, a Declaration on the TRIPS agreement and Public Health was issued, which affirmed the safeguards provided in TRIPS with regards to rights of states to issue measures such as compulsory licensing to cope with health crises in their respective countries. Company representatives in general preferred methods of differential pricing, but conceded that they

must accept the decision of states to deal with their own health problems. Since the DOHA round in 2002, however, trends have apparently gone in the direction of bilateral rather than multi-lateral agreements. See the publication "Intellectual Property Rights," Results of a Stakeholder Dialogue between the World Business Council for Sustainable Development and the Wissenschaftszentrum Berlin für Sozialforschung (reprint April 2004). Contact: <wbcsd@earthprint.com>. See also Thomas Pogge's pioneering work in this area, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2002).

- 33 William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore, MD, and London: Johns Hopkins University Press, 2004), p. 145.
- 34 Scheuerman, *ibid.*, p. 169.
- 35 Saskia Sassen, *Territoriality, Authority and Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).
- 36 I disagree with Anderson's critique of Slaughter's work that global governance inevitably erodes respect for democracy over time. See: "the system of global governance through global government networks, as it grows and develops in ways that Slaughter outlines, *over time* tends to erode the respect for democracy and democratic accountability with which it began and may finally lead to a form of liberal internationalism, a world of de facto federalized global governance" (K. Anderson, "Squaring the Circle? Reconciling Sovereignty and Global Governance," p. 1301). Anderson does not explore the increase in accountability and transparency that results by giving up the "black box" view of sovereignty; nor how such increase can contribute to the democratic power of the people.
- 37 Although first translated into English in 2001, the Italian version of *Empire* was written in the period between the Persian Gulf War of 1991 and the Yugoslav Civil War of 1994. Its view of USA power is more benevolent than the subsequent work by Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin Press, 2004).
- 38 The last chapter of Hardt and Negri's *Multitude* is called "May the Force be With You." See pp. 341-8; on carnival, cf. "The various forms of carnival and mimicry that are so common today at globalization protests might be considered another form of weaponry. Simply having millions of people in the streets

for a demonstration is a kind of weapon, as is also, in a rather different way, the pressure of illegal migrations . . . A one-week global biopolitical strike would block any war" (Hardt and Negri, *ibid.*, p. 347).

- 39 Just as, in Michel Foucault's theory of power, the subjects of power are interpellated by it, that is, constituted in part through the network of power rather than preceding it, in Hardt and Negri's analysis too, states and other world institutions disappear as agents and sites of resistance that have prior constitution. I disagree with this theory of power. One can stipulate the existence of very distinct and structured institutions and patterns of resistance to power without presupposing a metaphysical primordality of either the state or of the subject. The reach of empire is neither as ubiquitous nor as omniscient as Hardt and Negri would like us to think.
- 40 Hannah Arendt, *On Revolution* (New York: Viking Press, 1963). See also Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, pp. 130-72.
- 41 See David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus*; and Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford University Press: Oxford, 2004); Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004). There is something all too optimistic and cheery in some of these proposals which downplay the danger of dissociating constitutionalism from democracy and from citizens' will and reason, by transferring it to an expertocracy, even if an expertocracy with as much goodwill as the judges and practitioners of international law. While I share this concern with Kenneth Anderson, I think that such concerns can be met within a framework of liberal internationalist governance. Such mechanisms can be democracy-enhancing rather than democracy-diminishing. See n.36 of this chapter, above.
- 42 Global civil society, as defended here, should not be confused with the appeal to voluntarism and private associations, so characteristic of neo-liberal positions that aim at curtailing state power. I endorse the public provision of public goods in a system of nested interdependencies among public authorities. Global civil society is a space of global civic activism and the counterpart to the model of republican federalism that I develop below. Nancy Fraser is one of the few contemporary social theorists

who focuses on new global social movements; cf. Fraser, *Scales of Justice*, pp. 21-7; 58-67; see also Heather Gautney, "Is Another State Possible?" and Michael Meuser, "Disarticulate the State! Maximizing Democracy in 'New' Autonomous Movements in the Americas," both in Heather Gautney, Omar Dahbour, Ashley Dawson, and Neil Smith, eds, *Democracy, States, and the Struggle for Global Justice* (New York and London: Routledge, 2009), pp. 205-35 and 251-73 respectively.

- 43 Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," in *The Yale Law Journal* 115 (2006): 1564-1670.
- 44 Since I have introduced the concept of democratic iterations in *The Rights of Others*, pp. 179 ff., I have been asked to clarify (a) the relationship between practical discourses of justification and democratic iterations, and (b) whether democratic iterations can also be regressive and non-meaning enhancing. Democratic iterations are processes of *legitimation* not of *justification*. They stand in the same relationship to normative discourses of justification as theories of democracy stand to John Rawls's *Theory of Justice*; that is, theories of democracy are concerned with legitimacy as distinguished from theories which consider justice. Second, "jurispathic" democratic iterations, which block the enhancement of meaning and the augmentation of rights claims are possible. See "Reply to My Critics," in *Another Cosmopolitanism*, pp. 158-65, and chapter 8 of this volume.
- 45 See Jürgen Habermas's early formulation, "Ist der Herzschlag der Revolution zum Stillstand gekommen? Völkssouveränität als Verfahren. Ein normativer Begriff der Öffentlichkeit," in *Die Ideen von 1789 in der deutschen Rezeption*, ed. Forum für Philosophie-Bad Homburg (Frankfurt am Main: Suhrkamp, 1989), pp. 7-36.
- 46 Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, pp. 268-9, fn 52.
- 47 On the idea of a threshold of justification, see Seyla Benhabib, *The Rights of Others*, pp. 15-21.
- 48 For the first position, see Andrew Arato and Jean Cohen, "Banishing the Sovereign? Internal and External Sovereignty in Arendt," in Seyla Benhabib, ed., *Politics in Dark Times: Encounters with Hannah Arendt*, pp. 137-72; J. L. Cohen (2004),

"Whose Sovereignty? Empire Versus International Law," *Ethics and International Affairs* 18/3: 1-24; J. L. Cohen (2006), "Sovereign Equality vs. Imperial Right: The Battle over the 'New World Order'," *Constellations* 13/4: 485-505.

For the second position, Carol C. Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004), pp. 162 ff.; Michael Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton, NJ: Princeton University Press, 2006).

- 49 For a cosmopolitan/world federalist position, see Eric Cavallero, "Federative Global Democracy," in Ronald Tinnevelt and Helder de Schutter, eds, Special Issue, "Global Democracy and Exclusion," *Metaphilosophy* 40/1 (January 2009): 42-64; Rafaele Marchetti, *Global Democracy. For and Against* (London: Routledge, 2008); for an early and powerful statement of the problem, see Thomas Pogge, "Cosmopolitanism and Sovereignty," in Chris Brown, ed., *Political Restructuring in Europe* (London: Routledge, 1994), pp. 89-122; Cf. also Jürgen Habermas, *The Divided West*, ed. and trans. Ciaran Cronin (Cambridge: Polity, 2006); also Jürgen Habermas, "A Political Constitution for the Pluralist World Society," in *Between Naturalism and Religion*, trans. Ciaran Cronin (Cambridge: Polity, 2006), pp. 312-52; for regionalist visions, see Carol C. Gould, "Envisioning Transnational Democracy: Cross-Border Communities and Regional Human Rights Frameworks," in Heather Gautney, Omar Dahbour, Ashley Dawson, and Neil Smith, eds, *Democracy, States, and the Struggle for Global Justice*, pp. 63-79.
- 50 The economic crises of member countries of the EU such as Greece, Ireland, Portugal, and possibly Spain and Italy, and the reaction of governing forces in Brussels as well as of the German government to these crises, since the summer of 2010, make one question the project of Europe. While I do not believe that the Euro-zone will collapse, it is clear that the worldwide economic downturn is being used by conservative forces such as Germany's Chancellor, Angela Merkel, and the French President, Nicolas Sarkozy, to cut back the social-welfare state and the rights of wage-earners to social entitlements. It is an open question whether the considerable political achievements of the EU will be powerful enough to generate popular and democratic reassertions of sovereignty to resist this neo-conservative onslaught.

To the Memories of John E. Smith
and David E. Apter

DIGNITY IN ADVERSITY
Human Rights in Troubled Times

Seyla Benhabib

polity

Copyright © Seyla Benhabib 2011

The right of Seyla Benhabib to be identified as Author of this Work has been asserted in accordance with the UK Copyright, Designs and Patents Act 1988.

First published in 2011 by Polity Press

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Polity Press
350 Main Street
Malden, MA 02148, USA

All rights reserved. Except for the quotation of short passages for the purpose of criticism and review, no part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

ISBN-13: 978-0-7456-5442-3
ISBN-13: 978-0-7456-5443-0(pb)

A catalogue record for this book is available from the British Library.

Typeset in 10.5 on 12 pt Sabon
by Toppan Best-set Premedia Limited
Printed and bound in Great Britain by the MPG Books Group

The publisher has used its best endeavours to ensure that the URLs for external websites referred to in this book are correct and active at the time of going to press. However, the publisher has no responsibility for the websites and can make no guarantee that a site will remain live or that the content is or will remain appropriate.

Every effort has been made to trace all copyright holders, but if any have been inadvertently overlooked the publisher will be pleased to include any necessary credits in any subsequent reprint or edition.

For further information on Polity, visit our website: www.politybooks.com

CONTENTS

<i>Preface</i>	vii
<i>Acknowledgments</i>	x
1. Introduction: Cosmopolitanism without Illusions	1
2. From <i>The Dialectic of Enlightenment</i> to <i>The Origins of Totalitarianism</i> : Theodor Adorno and Max Horkheimer in the Company of Hannah Arendt	20
3. International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin	41
4. Another Universalism: On the Unity and Diversity of Human Rights	57
5. Is There a Human Right to Democracy? Beyond Interventionism and Indifference	77
6. Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times	94

CONTENTS

7. Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty	117
8. Democratic Exclusions and Democratic Iterations: Dilemmas of Just Membership and Prospects of Cosmopolitan Federalism	138
9. The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey	166
10. Utopia and Dystopia in Our Times	184
<i>Notes and References</i>	196
<i>Index</i>	285

PREFACE

Around September 18, 2001, almost a decade ago, I crossed Whitney Avenue in New Haven, Connecticut, with my 14-year-old daughter, traveling from our house to a Red Cross center to give blood for the victims and rescuers of the Twin World Towers 90 miles away. As I gave my name, Seyla Benhabib, to the nurse in attendance, she froze for a moment: "Ben-Habib" – wasn't Habib an Arabic name? "Who was this lady with a foreign accent," she seemed to be thinking, "coming in to give blood?"

My daughter, who noted the nurse's hesitation, immediately understood that I was being assessed as an Arab or a Muslim, and she squeezed my hand in solidarity. I could not help feeling, that early evening in Connecticut, that my gesture of solidarity with the victims of 9/11, and the fire-fighters and policemen of New York City was not wanted and, as it turned out, not needed: students of Yale University and other schools had already rushed to the Red Cross banks across New Haven, and actually, the blood banks were well stocked.

Nevertheless, something in me ached. The moral of this story is not about discrimination against Middle Easterners, Muslims, or Arab Americans, real though it is. Rather, it is about the complexity and multiplicity of identities to which my name testifies, but which bureaucratic administration shorthands in an increasingly securitized world, political environment reduced to unequivocal signals of danger during the so-called "war on terror." The lady at the Red Cross station could not have known that I was a Sephardic Jew born in Istanbul, whose earliest known ancestor was called "Jacob Ibn-Habib," from the city of Zamora in Spain, and whose descendants were Rabbis and prominent members of a Jewish community first in