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Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora

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ARTICLES

Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora

*Adeno Addis**

ABSTRACT

Diasporas—understood as groups of individuals or communities who carry an image of a homeland that is separate from the host land in which they reside—have always been with us. As long as there have been large movements of people across boundaries, be it voluntary or involuntary, there have been diasporas. The image of the homeland that diasporas carry could be real (an existing country) or imagined (a future country). In whatever way diasporas imagine the homeland, they have often attempted to act as if they belong to “we the people” of the homeland. They imagine themselves to be “outside the state but inside the people.” Homeland governments have often welcomed (or encouraged) diasporas’ interventions in homeland affairs, but not always. Whether diasporas are indeed “inside the people” although “outside the state” becomes an issue both when the interests of diasporas and governments of the homelands converge and when they diverge. This Article explores how and for what purpose diasporas could be considered to be part of the people of the homeland and when

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not. This requires a theory of “peoplehood” that this Article develops and defends. Using the notion of “community of stakeholders,” the Article indicates when and how those who are outside the state and yet consider themselves to be inside the people can participate in the life of the homeland. The Article also advances and defends the claim that the relationship between diasporas and homelands enables bridging the claims of cosmopolitans and unreconstructed territorialists, for the version of community that is worked out of the relationship between diasporas and homelands mediates the two aspects of people’s existence in this globalized world—national attachment and cosmopolitan sentiment. The homeland–diaspora relationship offers a point of departure for understanding how communities are formed and transformed; how legal obligations and allegiances develop and are altered; and generally, how a people constitutes itself both within and across territorial boundaries.¹

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1. See JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 7–8 (2007) (“There’s a diffuse notion that globalization has reinforced the need for what is often referred to as a ‘sense of belonging,’ a reconfiguration of collective identities, politically, legally, and, not least, emotionally.”); see also Riva Kastoryano, *Settlement, Transnational Communities and Citizenship*, 52 INT’L SOC. SCI. J. 307, 308 (2000) (positing that international communities such as the diaspora may be considered “the institutional expression of multiple belonging”).

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I. INTRODUCTION

A number of countries have set up departments, either within their foreign ministries² or as independent cabinet-level offices,³ with the task of defining and managing the relationship between the homeland and its diaspora.⁴ This trend is likely to grow, and at a faster speed. A number of facts inform the increasing interest shown by states and their governments in their diasporas. First, because of globalization and the increasing ease with which people circulate across national boundaries, there are many more citizens and former citizens of states living outside the homeland. The sheer size of the diaspora has caused many states to take note and to develop an interest in their citizens or former citizens residing abroad.

Second, and even more importantly, the communication revolution has made it easier for those citizens or former citizens to maintain interest in and contact with their former homeland. This interest from the diaspora triggers a corresponding interest from the

2. For example, Brazil, Chile, El Salvador, Ethiopia, Romania, and Uruguay have diaspora or expatriate affairs departments within their foreign affairs ministries. See CLOSING THE DISTANCE: HOW GOVERNMENTS STRENGTHEN TIES WITH THEIR DIASPORAS 7 (Dovelyn Rannveig Agunias ed., 2009), cited in Migration Policy Inst., *Taxonomy of the Diaspora-Engaging Institutions in 30 Developing Countries*, MIGRATIONINFORMATION.ORG, http://www.migrationinformation.org/datahub/migration_development/taxonomy.pdf (last visited Sept. 22, 2012).

3. See, e.g., *id.* (Armenia (Ministry of Diaspora), Bangladesh (Ministry of Expatriates' Welfare), Georgia (State Ministry for Diaspora Issues), India (Ministry of Overseas Indian Affairs), Serbia (Ministry of Diaspora), Yemen (Ministry of Expatriate Affairs)). Other countries have other national institutions whose task is to deal with diaspora affairs. *Id.* at 9. Thus, China has a state council for overseas Chinese affairs. See *id.*

4. For a fascinating account of the role of the Ministry of Overseas Indian Affairs, see Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60, 77 (2006). See also THE INDIAN DIASPORA, <http://indiandiaspora.nic.in> (last visited Sept. 22, 2012) (promulgating information to and in support of the Indian diaspora); MINISTRY OF OVERSEAS INDIAN AFFAIRS, <http://moia.gov.in/> (last visited Sept. 22, 2012) (seeking to unite the Indian diaspora with its motherland). The Ethiopian office of expatriate affairs was established within the Ministry of Foreign Affairs in 2002 and is called the General Directorate in charge of Ethiopian Expatriate Affairs (GDEEA). A blurb from the Foreign Ministry says this: "Recognizing the roles of the Ethiopian Diaspora with respect to their country of origin, the Government of Ethiopia has through its Ministry of Foreign Affairs, created the General Directorate in charge of Ethiopian Expatriate Affairs in January 2002." *Community Services*, EMBASSY OF ETHIOPIA, <http://www.ethiopianembassy.org/Community/Community.php> (last visited Oct. 5, 2012); see also Aaron Matteo Terrazas, *Country Profiles: Beyond Regional Circularity: The Emergence of an Ethiopian Diaspora*, MIGRATIONINFORMATION.ORG (June 2007), <http://www.migrationinformation.org/Profiles/display.cfm?ID=604> (discussing how the General Directorate in Charge of Expatriate Affairs was created to "(1) serve as a liaison between the government and the diaspora; (2) encourage the active involvement of the diaspora in socioeconomic activities in Ethiopia; (3) safeguard the rights and privileges of Ethiopians abroad; (4) mobilize the diaspora to improve the public image of Ethiopia"). For a description of the missions of the diaspora affairs of the various countries, see generally Migration Policy Inst., *supra* note 2.

homeland—whether to reinforce or preserve cultural identity, facilitate repatriation, or tap the economic potential of the diaspora. Third, in relation to many countries, especially developing countries, their diasporas, often residing in developed western countries, have considerable financial and political clout. Home governments seek to define and manage the relationship between the diaspora and homeland in a manner intended to minimize the possibility of organized challenge to the regime in power from, or with the help of, the diaspora, while at the same time enhancing the vital financial contribution of the diaspora to the economies of those countries. The strategy may include positive incentives, as well as political intimidation of vocal opponents residing abroad.⁵

But this mutual interest among diasporas and homelands has raised a number of significant issues about membership and belonging. What precisely is the nature of diasporic membership that is desired or cultivated, and how does it fit in with (or undermine) the idea of belonging that has been a hallmark of the state system—the primary defining feature of which is citizenship? Does the diaspora–homeland relationship open up new forms of community and peoplehood worth cultivating, or does it undermine the possibility of developing any community of character and depth?

Processes of globalization, especially the impact of new communication technologies and the large movement of people across national boundaries, have required rethinking a number of concepts that have played a central role in political and legal thought for a considerable length of time—concepts such as community, the nature and sources of legal and political rights and obligations, the sources of jurisdictional and enforcement authority, and the like. In the age of cyber-communication, when one can instantaneously link to and commune with others across territorial boundaries, should the notion of physical space (geography) continue to be seen as central to the formation and cultivation of political communities? To the extent that political communities are to be sources of legal and political obligations, what counts as the relevant community in this globalized cyber-world?

The frame of reference for these questions has been either the international community (cosmopolitanism) or national territorial communities (nationalism). For cosmopolitans, the international community provides the point of reference and a source of allegiance

5. See, for example, a policy paper the Ethiopian government circulated in relation to its diaspora. MINISTRY OF FOREIGN AFFAIRS OF ETHIOPIA, http://www.mfa.gov.et/Ethiopians_Origin_Abroad/Ethiopia_Origin.php (last visited Jan. 29, 2011). For the Amharic (Ethiopian national language) version of the document, see ETHIOMEDIA.COM, <http://www.ethiomed.com/carepress/document.pdf> (last visited Sept. 22, 2012).

and obligation. Cosmopolitans view the obligation to humankind as one's highest obligation.⁶ Thus, for example, the push for universal jurisdiction of certain crimes is premised on the proposition that those crimes injure all members of the international community, not simply the immediate victims who happen to be citizens of this or that country or within the jurisdiction of this or that nation.⁷ For the nationalists, allegiances are owed to the people who are comembers of political communities, almost always constituted as territorial states.⁸ Thus, for the nationalist, universal jurisdiction is inconsistent with the notion of a world of territorial communities. The nation-state is the highest point of legal and political obligation.⁹ International legal theorizing has essentially mapped the two poles, although nationalists still dominate the field.

This Article argues that the diaspora–homeland relationship offers another point of departure for understanding how communities are formed and transformed, how legal obligation and allegiances develop and are altered, and generally, how a people constitutes itself both within and across territorial borders. Indeed, the relationship between diasporas and homelands may suggest how to bridge between the claims of cosmopolitans (that all humans are members and citizens of one human community) and the territorialist approach of nationalists (the state is the most relevant actor in the international realm).

Diasporas are “outside the state but inside the people.”¹⁰ Thus, the diaspora–homeland relationship affirms part of the cosmopolitan intuition that the territorial state is no longer, if ever, the only relevant source of peoplehood. But the relationship also counsels that meaningful allegiances and obligations will have to be worked out in the context of narratives of specific history of common sympathy and origin.

This Article is organized in a manner that facilitates a systematic and orderly inquiry into the issues raised in Part I—the relationship between diasporas and homelands, and what that relationship suggests about the nature of communities and peoplehood in the era of globalization and the communication

6. See David Held, *Principles of Cosmopolitanism*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 10, 12 (Gillian Brock & Harry Brighouse eds., 2005) (“[T]he ultimate units of moral concern are individual human beings, not states or other particular forms of human association.”).

7. See Adeno Addis, *Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction*, 31 *HUM. RTS. Q.* 129, 142–44 (2009) (arguing that certain crimes are subject to universal jurisdiction because they violate “fundamental norms” that create “obligations . . . that extend to all people”).

8. See *infra* notes 61–62 and accompanying text.

9. See *infra* notes 61–62 and accompanying text.

10. YOSSI SHAIN, *KINSHIP AND DIASPORAS IN INTERNATIONAL AFFAIRS* 124 (2007) (emphasis omitted).

revolution. Part II explores the general issue of membership in a community. The distinctiveness of communities and peoples depends on some form of closure and on their ability to control and distribute the social good of membership. It briefly explores how membership is or should be allocated. Part II also makes a preliminary observation as to what that mode of allocation would mean for the diaspora–homeland relationships.

Part III explores in some detail the nature of peoplehood—the various understandings of what it means to be a people. “We the people” is a phrase that serves as the opening words of two of the most famous constitutive documents currently in force—the U.S. Constitution and the UN Charter. This Part examines the multiple understandings of what it means to be a people so as to prepare the ground for an assessment of what version of peoplehood describes more fully and accurately the relationships and connections between diasporas and homelands. Part IV then gives a short account of how diasporas can be seen as part of we the people of the homeland and, yet, do not comfortably fit the two reigning notions of peoplehood described in Part III: national (political) peoplehood and ethno-cultural peoplehood. Diasporas, on the one hand, exemplify the transitional movement—the paradigmatic “Other” of the nation-state—while paradoxically also assuming the nation-state for their very existence and coherence. The Part then argues that there is a need for a new theory of peoplehood that is capable of capturing this paradox.

Part V explores the struggles and contests between diasporas and homeland governments to define who is a member of “the people” of the homeland. While governments often see diasporas as the Other of the nation-state, diasporas see themselves as inside the people, though outside the territory. Although the relationship between diasporas and homelands has been by and large outside the concern of traditional international law, there was a period (the interwar period) when international law briefly turned its attention to that relationship. This Part turns to that era to see what it teaches about the relationship between modern-day diasporas and homelands.

Part VI develops a theory of peoplehood based on the notion of a community of stakeholders. The idea of stakeholders, this Article argues, gives a descriptively and normatively defensible evaluation of the relationship between modern diasporas and homelands. The Part then puzzles through the institutional implications of the notion of peoplehood developed and defended therein. Institutional arrangements are evaluated from two angles: their openness to allow all stakeholders (including those that reside in a host state) to *participate* in the life of the community, and their capacity to provide *protection* to all stakeholders (including those outside the territorial limit of the homeland) when they are in need of such protection. As

an example of the latter, the value of what this Article calls “diasporic jurisdiction” is explored. Finally, the Part briefly examines the role of diasporas in constitutional settlement in severely fractured societies. The battle in these societies is often nothing less than how to define and redefine the people. And the role of the diaspora in that process has been crucial, for good or for ill.

Part VII concludes by noting that the version of community that can be worked out of the relationship between diasporas and homelands can act as a bridge between two aspects of people’s existence in this globalized world—national attachment and cosmopolitan sentiment.

II. THE ISSUE OF MEMBERSHIP: PRELIMINARY COMMENT

Membership in a political community, or any other community is, as Michael Walzer argues, “a social good.”¹¹ By “social good,” Walzer simply means that the good has “shared meanings” because its “conception and creation are social processes.”¹² Its meaning is understood within groups and its value is fixed “by our work and conversation.”¹³ And like any other social good, membership is distributed and may be the concern of distributive justice.¹⁴ The distinctiveness of communities depends on some form of closure and the members’ ability to have a say in how this social good—one that may be considered to be a primary social good¹⁵—is distributed to

11. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 32 (1983). Walzer suggests that perhaps there are no other kinds of goods (other than social goods), although he meant to leave the question open. *Id.* at 7.

12. *Id.* at 7.

13. *Id.* at 32.

14. See *id.* at 7 (“All the goods with which distributive justice is concerned are social goods.”); see also SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 3 (2004) (arguing that “a cosmopolitan theory of justice cannot be restricted to schemes of *just distribution* on a global scale, but must also incorporate a vision of *just membership*”). Walzer also famously argued that given that social goods are understood by the meaning of the goods in question, goods should be distributed in “autonomous” fashion, within the particular “sphere of justice.” WALZER, *supra* note 11, at 10, 42–94.

15. I say “primary” because in many cases membership determines whether one is entitled to a share of other social goods and whether he would have a say in how those goods shall be allocated. It is, to paraphrase Hannah Arendt, a good that paves the way to have the right to other goods:

Something much more fundamental than freedom and justice . . . is at stake when belonging to a community [is denied a human being] . . . We become aware of the existence of a right to have rights . . . and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.

potential or would-be members. Generally, membership in political communities has been premised on the existence of geography that can be closed off.¹⁶ In terms of the nation-state, the link between land and people has been taken to be a crucial feature of community and identity.¹⁷ Indeed, the social good of membership is so linked to territory and the nation-state that people “consider it a great misfortune to be ‘stateless.’”¹⁸

How membership in national political communities should be allocated has been a subject of intense debate and scholarly investigation.¹⁹ But the discussion has often been limited to the relationship between a host country and its immigrant residents

BENHABIB, *supra* note 14, at 51 (emphasis added by Benhabib) (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM: IMPERIALISM* 177 (1968); *see also* WALZER, *supra* note 11, at 31 (“The primary good that we distribute to one another is membership in some human community.”)).

16. *See* WALZER, *supra* note 11, at 39 (“The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life.”); *see also* JOHN RAWLS, *THE LAW OF PEOPLES* 38–39 (1999) (arguing that boundaries are necessary even if they seem arbitrary, and that a government, as the people’s agent and representative, should be responsible for the people’s territory, environmental integrity, and population size); JOHN RAWLS, *POLITICAL LIBERALISM* 40–41 (1993) (noting that a society is a completely closed social system).

17. *See* WALZER, *supra* note 11, at 44 (“Nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity.”). *See generally* GEOGRAPHY AND LAW: LANDSCAPE, IDENTITY AND REGULATION (William Taylor ed., 2006) (presenting a collection of essays that “relate notions of space and representations of landscape to concerns for individual identity and autonomy”).

18. Stephen Macedo, *The Law of Peoples: What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*, 72 *FORDHAM L. REV.* 1721, 1730 (2004). Article 15 of the Universal Declaration of Human Rights seems to endorse the importance of not being stateless when it proclaims that “everyone has a right to a nationality.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

19. *See, e.g.*, WALZER, *supra* note 11, at 31–63 (arguing that a theory of justice must account for both the right of closure and “the political inclusiveness of the existing communities”); *see also* T. ALEXANDER ALEINIKOFF, *BETWEEN PRINCIPLES AND POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY* 49–64 (1998) (discussing different models of membership and trends in how membership is determined); BENHABIB, *supra* note 14, at 213–21 (arguing that the notion that democratic self-governance requires closure to establish accountability to a specific people can be reconciled with cosmopolitanism about membership); Arash Abizadeh, *Democratic Theory and Border Coercion: No Right To Unilaterally Control Your Own Borders*, 36 *POL. THEORY* 37, 37–38 (2008) (arguing that acceptance of democratic theory of political legitimation commits one “to rejecting the unilateral domestic right to control and close the state’s boundaries” with respect to both membership and movement). *See generally* OWEN M. FISS, *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* (Joshua Cohen & Joel Rogers eds., 1999) (collecting essays by Fiss and others on how membership should be allocated); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENS WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 116–40 (1985) (arguing that a consensual principle of political membership is both more legitimate and more practical). International law has, of course, left the issue to the discretion of states.

(noncitizen permanent or temporary residents, or undocumented aliens²⁰) or would-be immigrants (those seeking to enter into that territorial community).²¹ In relation to the first, the issue has often been whether citizenship should be required for full membership in a political community. What does a theory of just political membership suggest as to what a state ought to allow noncitizen residents to participate in? That is, what sorts of membership are implied by theories of justice (just membership) and democracy (democratic sovereignty)? While some commentators have argued that citizenship is the basis of full membership and that the territorial community decides the conditions under which full membership is granted,²² others have claimed that what is consistent with a theory of

20. The current public debate about immigration in the United States revolves around the issue of undocumented aliens, whose number is not exactly known but is estimated to be around 11 million:

In the first half of the decade, an average of 850,000 people a year entered the United States without authorization, according to the report, released Wednesday. As the economy plunged into recession between 2007 and 2009, that number fell to 300,000. The drop has contributed to an 8 percent decrease in the estimated number of illegal immigrants living in the United States, from a peak of 12 million in 2007 to 11.1 million in 2009, the report said. Of the 11.1 million, 60 percent came from Mexico, 20 percent from other parts of Latin America, 11 percent from Asia, and 8 percent from Africa, Europe, Canada and elsewhere.

Tara Bahrapour, *Number of Illegal Immigrants in U.S. Drops, Report Says*, WASH. POST, Sept. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/01/AR2010090106940.html>.

21. See Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 *FORDHAM L. REV.* 1761, 1762 (2004) ("By political membership, I mean the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers into existing polities."); see also Abizadeh, *supra* note 19, at 44 ("My thesis is that, according to democratic theory, the democratic justification for a regime of border control is ultimately owed to both members and nonmembers.").

22. See SCHUCK & SMITH, *supra* note 19 (arguing that determinations of citizenship should be left to public choice); see also Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 *FORDHAM L. REV.* 2393, 2393 (2007) ("[P]olitical participation and representation rights are the core of republican conceptions of citizenship."). The Supreme Court of the United States has, on many occasions, expressed the view that citizenship is the core of full membership. See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) ("Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry."). For example, the court in *Cabell v. Chavez-Salido* stated:

The exclusion of aliens from basic governmental processes is not a deficiency but a necessary consequence of a community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition outside this community.

democracy and justice is not citizenship, but “the principle that those who are subject to the law should also be its authors.”²³ A theory of just membership, according to this view, will imply full participation by noncitizens (residents) in the origination of rules and regulations to which they are subject.²⁴

With regard to the second issue, the question has been whether there are any moral or legal duties that would require territorial units to admit those in need of shelter and sustenance or whether every territorial community has the unfettered right to refuse admission to anyone outside its territory for any reason at all. Again, some commentators argue that theories of democracy and justice would grant territorial units an unfettered right to accept or reject outsiders on any ground whatsoever,²⁵ while others suggest that a

23. BENHABIB, *supra* note 14, at 217; see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975); ROBERT A. DAHL, *ON DEMOCRACY* 79–80 (1998) (“The citizen body in a democratically governed state must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves.”); Owen Fiss, *The Immigrant as Pariah*, in FISS, *supra* note 19, at 19–21 (arguing that immigrants subject to U.S. laws should benefit from its protections, even if they are not accorded full political rights and privileges of citizens). Bickel indicates why “persons” rather than “citizens” is the basic unit of American constitutional law by noting that “[a] relationship between government and the governed that turns on citizenship can always be dissolved or denied. . . . It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a non-person” *Id.* Hauke Brunkhorst makes a similar argument defending an ideal of peoplehood that is “an inclusive community of the affected.” See HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* 169–71 (Jeffrey Flynn trans., 2005). In a sustained and very interesting critique of what they call “citizenship as inherited property,” Ayelele Shachar and Ran Hirschl analogize birthright citizenship to intergenerational transfer of property and recommend taxing that transfer to aid people who are destined to live in less desirable parts of the world. See generally Ayelele Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 *POL. THEORY* 253 (2007).

24. This is what Alexander Aleinikoff refers to as “lawful settlement as membership.” ALEINIKOFF, *supra* note 19, at 50–54. This, of course, excludes illegal immigrants.

25. The claim that the idea of sovereignty entitles governments to exclude any outsider from entering the political community has considerable support both in political theory and international law. In a case decided toward the end of the nineteenth century, the U.S. Supreme Court made this observation:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as part of those sovereign delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889). At the turn of the last century, the Privy Council (of the United Kingdom) made a similar observation. See *Att’y-Gen. for Can. v. Cain*, C.R. [1906] A.C. 542 (P.C.) (appeal taken from Ont.) (“One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State”). Emer de Vattel’s *The Law of Nations* presents an early statement of the principle of international law:

theory of justice would require territorial units to admit at least certain of the people that seek to join the political community.²⁶ The issue of which ones among the many that seek admission ought to be allowed in is often a moving target.²⁷

[N]o nation can, without good reasons, refuse even a perpetual residence to a man driven from his country. But, if particular and substantial reasons prevent her from affording him an asylum, this man has no longer any right to demand it [I]f the country inhabited by this nation is scarcely sufficient for herself, she is under no obligation to allow a band of foreigners to settle in it for ever

EMER DE VATTEL, *THE LAW OF NATIONS* bk. 1, § 231, at 108–09, bk 2., § 125, at 180 (Joseph Chitty Esq. ed., 1883). For a similar view in political theory, see WALZER, *supra* note 11, at 39 (“At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.”).

26. Here one thinks about political refugees and asylum seekers. Even Michael Walzer, perhaps one of the most ardent advocates of the right of communities to police their borders to ensure the uniqueness of their character, agrees that “victims of political or religious persecution . . . make the most forceful claims for admission.” WALZER, *supra* note 11, at 49. Indeed, there are international obligations. See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (outlining rights guaranteed to refugees). The Convention defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” *Id.* art. 1, ¶ A(2). See generally JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005) (presenting an analysis of human rights of refugees). Using Kant’s notion of the right to universal hospitality, Seyla Benhabib notes that “if it means anything at all, [it] imposes an obligation on the political sovereign, by prohibiting states from denying refuge and asylum to those whose intentions are peaceful and if refusing them sojourn would result in their demise.” SEYLA BENHABIB ET AL., *ANOTHER COSMOPOLITANISM* 25 (Robert Post ed., 2006). By “hospitality” Benhabib “mean[s] to refer to all human rights claims which are cross-border in scope.” *Id.* at 31; see also Abizadeh, *supra* note 19, at 48 (arguing that “closed border entry policy could be democratically legitimate only if its justification is addressed to both members and nonmembers or is addressed to members whose unilateral right to control entry policy itself receives a justification addressed to all”).

27. There are still others who view the morality of immigration to go beyond the admission of a certain number of distressed people. Mathias Risse, for example, argues immigration should be “a moral problem that must be considered in the context of global justice” starting from the proposition “that the earth belongs to humanity in common and that this matters for assessing immigration policy.” Mathias Risse, *On the Morality of Immigration*, 22 *ETHICS & INT’L AFF.* 25, 25 (2008). He states:

The point of thinking about the earth as collectively *owned* is not to establish human despotism over the rest of the earth, organic or inorganic, but to emphasize that all human beings, no matter when and where they were born, are in some sense symmetrically located with regard to the earth’s resources and cannot be arbitrarily excluded from them by accidents of space and time.

Id. at 28.

At any rate, the two issues just outlined deal only with the rights of immigrants or would-be immigrants in relation to host countries or countries of destination. So, to the extent that scholars explore the question of we the people, they often do so in relation to the host land or would-be host land.

As noted earlier, this Article goes in the opposite direction, exploring a relationship that has been almost totally neglected (at least by legal scholars), but one that would shed light on the nature of political communities and the sources of legal and political obligations in the era of globalization: the relationship between diasporas and homelands or countries of origin.²⁸ The issue becomes more interesting and more difficult when there is deep disagreement between the diaspora and the government of the homeland about the identity and future of the homeland. The relationship between diaspora and homeland in this sense is often similar to the relationship between universities and their alumni. In both cases, the dispute is often about the identity of a former home that has played and continues to play a central role in the lives of people.²⁹

While the relationship between host land and immigrants (or would-be immigrants) is different from the relationship between homeland and diaspora in a number of ways, the two raise the same fundamental question: how a primary social good (membership) is distributed, and thus how communities constitute and reconstitute themselves to remain “communities of character.”³⁰

Perhaps it could be argued that the notion of protecting communities of character cannot be raised with the same intensity in the relationship between diasporas and homelands as it would be between host lands and immigrants or would-be immigrants. This is so, it might be argued, because immigrants or would-be immigrants are more likely to be strangers to the culture and value system of the host land, such that it would be reasonable for existing members of the host land to fear that their uncontrolled membership would transform the character of the community. Diasporas, on the other hand, are no strangers to the values and cultures of their homelands, and thus the fear of strangers transforming the community cannot have the same saliency. Although true to some degree, this observation does not capture fully the nature of the relationship between diasporas and homelands. First, to some extent, diasporas

28. An exception to this almost total silence is Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001). Indeed, it is this article that triggered most of the questions that this essay has pursued.

29. See Ed Haldeman & John H. Mathias Jr., Letter to the Editor, *Dartmouth: Let's Avoid Divisive Politics*, WALL ST. J., Sept. 21, 2007, at A13; Editorial, *Dartmouth Diminished*, WALL ST. J., Sept. 11, 2007, at A18; Editorial, *The Illiberal College*, WALL ST. J., Sept. 1, 2007, at A6.

30. The phrase is Michael Walzer's. See WALZER, *supra* note 11, at 62.

are estranged from their homeland. Some members of the diaspora might have left because of dissatisfaction with the political or cultural life of the homeland. Their departure indicates an estrangement of sorts. Second, even if such estrangement was not the source of their emigration, they are likely to have developed cultural, political, and economic belief systems rooted in their new homes, belief systems that may be at odds with the belief systems in the homeland. Third, many of the diasporas might have lived outside the homeland for a long time, and the homeland may have changed significantly during that period. Their image of the homeland might therefore be at odds with the reality prevailing in their old country.³¹ Fourth, in some circumstances, individuals within diasporas might not even have lived in the homeland at all, either because they were born outside the country or the new homeland was established after their departure.

The point is not to argue that diasporas are, therefore, strangers to the homeland in the full sense of the term, but rather to note that the issue of membership raised in regard to the relationship between diasporas and homelands is not qualitatively different from that raised by the relationship between host land and would-be immigrants. They are both about communal self-determination and the circumstances that threaten to undermine the capacity to achieve it.³²

III. "WE THE PEOPLE"

At bottom, the relationship between diasporas and homelands, whether in the course of agreement or disagreement between the former and governmental authorities of the latter, raises the issue of who constitutes we the people—whether for this or that purpose we the people of the homeland ought to include diasporas. And if so, in relation to what activities or arenas of action would that be appropriate? And what are the consequences of thinking of diasporas as members of the homeland for this or that purpose?

As noted earlier, we the people is the opening phrase of two of the most famous constitutive documents currently in force. The UN Charter, the founding document of the world body that was established in 1945, begins with "We the Peoples of the United

31. Diasporas "often preserve an image of the national culture that is frozen in time and does not reflect contemporary changes in the homeland society." Bauböck, *supra* note 22, at 2416. Benedict Anderson refers to diaspora mobilization as "long-distance nationalism." See BENEDICT ANDERSON, *THE SPECTRE OF COMPARISONS: NATIONALISM, SOUTHEAST ASIA, AND THE WORLD* 58–74 (1998).

32. See discussion on the Hungarian diaspora *infra* note 109.

Nations.”³³ In this, the Charter was invoking the words of another constitutive document adopted more than 150 years earlier, the Constitution of the United States, which begins, “We the People of the United States.”³⁴ Each document announces that we the people have come to “establish” certain things (constitutional order in the case of the U.S. Constitution, the United Nations in the case of the UN Charter), even as it simultaneously constitutes the very “we” that is meant to act in a particular way. In that sense, the two political/legal documents are performative in nature. They constitute that which they declare already exists.³⁵ Writing about the invocation of we the people to establish the U.S. constitutional order, Edmund Morgan observes, “[t]he very existence of such a thing as *the* people, capable of acting to empower, define, and limit a previously non-existent government required a suspension of disbelief. History recorded no such action.”³⁶

33. U.N. Charter pmbi.

34. See U.S. CONST. pmbi. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”). It is not just the Constitution but the Declaration of Independence as well that appropriates the notion of peoplehood. The Declaration begins: “When in the Course of human events, it becomes necessary for *one people* to dissolve the political bands which have connected them with another.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

35. This simultaneous action of declaration and constitution was referred to as “performative” by the late great French social theorist—Pierre Bourdieu. PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 223 (John B. Thompson ed., Matthew Adamson trans., 1991). Performative discourse attempts “to bring about what it asserts in the very act of asserting it.” *Id.* The notion of performative discourse had its popular entry in J.L. Austin’s work. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975). Austin famously argued that language can not only describe things but actually *do* things. *Id.* at 94. Thus, for example, when the President swings a bottle of champagne at a ship and says “I christen this ship the ‘USS New Orleans,’” the President is not merely describing a christening, but performing one. See *id.* at 5–6 (“In these examples it seems clear that to utter the sentence . . . is not to *describe* my doing . . . it is to do it.”). Not surprisingly, Austin called these sorts of verbal acts “performatives.” *Id.* at 6.

36. EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 58 (1988). Robert Dahl makes a similar point when he observes: “[H]ow to decide who legitimately make up ‘the people’ . . . is a problem almost totally neglected by all the great political philosophers who write about democracy.” ROBERT A. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY 60 (1970). The incompatible demands that are put on the notion of the people goes back to the social contract of Hobbes who wished the original contract to serve as the foundation of all shared and common standards and rules while also wishing it to be a contract that assumes an already existing shared and common standards of the kind, an assumption that apparently cannot exist prior to the contract. The notion of the people therefore seems to suffer from a similar internal contradiction as the original contract. See generally THOMAS HOBBS, LEVIATHAN (Michael Oakeshott ed., 1962). For a more recent and direct expression of the performative nature of the notion of “the people,” see CARL SCHMITT, CONSTITUTIONAL THEORY 268 (Jeffrey Seitzer ed. & trans., 2008) (“The people are *anterior to* and *above* the constitution Every democratic constitution presupposes such a people capable of action.”).

What is designated by the notion we the people? As a conceptual matter, the phrase is ambiguous, but at a minimum it suggests the existence of an entity that is more than the aggregation of individuals. It indicates the existence of institutions and historical narratives that link these individuals into a corporate body capable of agency.³⁷ But this does not resolve the ambiguity altogether, for there may be different institutional links and hence different arrangements and different levels of agency. The notion of people in the American Declaration of Independence³⁸ is surely different from that in the preamble of the U.S. Constitution,³⁹ for the institutional links and historical narratives that tied individuals into an entity called the people differed. Phrases such as “the Jewish people,” “the Armenian people,” or “Indigenous people” demonstrate a still more radically different understanding of the people.

There are at least four different senses in which the phrase the people seems to have been invoked. The first and the most common use is as a substitute for a territorial political unit. Thus, we the people in the preamble of the U.S. Constitution might be understood to refer to the various confederated states (“we the states”) that were coming together to form a “more perfect union.”⁴⁰ The same phrase in the UN Charter clearly refers to the various nation-states assembled in San Francisco to found the United Nations, rather than the undifferentiated people of the world. Indeed, the plural, “peoples,” indicates that the phrase is a substitute for “we the nation-states.”⁴¹

37. By “agency” I mean to refer to circumstances where the relevant entity (community, people, etc.) “has attitudes on the issues it faces and acts so as to pursue those attitudes.” Christian List & Mathias Koenig-Archibugi, *Can There Be a Global Demos? An Agency-Based Approach*, 38 PHIL. & PUB. AFF. 76, 91 (2010). To pursue these attitudes (e.g. preferences), the collectivity needs to have in place “organizational structure[s].” *Id.* Thus, for there to be agency, two conditions must be met: it must be possible to ascribe coherent attitudes to the entity (group), and there must be organizational structure (rules, procedures, conventions, etc.) through which these attitudes are pursued. But, of course, “a certain degree of diversity within a group is entirely consistent with” the idea of agency. *Id.* at 95.

38. The Declaration begins: “When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

39. See Benjamin Lee, *Peoples and Publics*, 10 PUB. CULTURE 371, 378 (1998) (“Despite the apparent continuity between the ‘we’ of the Declaration of Independence and the Constitution, it is immediately evident that this relationship is a historically constructed one that links two different subjects.”).

40. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.”).

41. The Charter makes this sensibility clear in its list of purposes and principles to which the organization was to be committed. One of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*.” U.N. Charter art. 1, para. 2 (emphasis added). It is clear that the word “peoples” is meant to refer to political entities, and the self-determination that is envisaged here is the freedom of

The concluding paragraph of the preamble makes that clear.⁴² John Rawls uses the term peoples in his book *The Law of Peoples* in a way that is similar to the Charter, to refer to the various political communities in the world.⁴³ Rawls's peoples are politically organized societies and their form of organization is essentially statehood. Peoplehood in this first sense is a marker of a political entity that is territorially delimited, not so much a nation (for there may be many nations within that political unit), but a political "community of character," as Walzer would say.⁴⁴

A second use of the phrase refers to the citizens of a particular political community. Thus, when an American politician invokes the phrase "the American people," he or she means to emphasize the institutions and narratives that link citizen inhabitants as one entity. It is never clear what size of the inhabitants (majority, supermajority, a few thousand?) the speakers have in mind when they invoke the authority of the American people. But whatever size is thought to justify the invocation, the constitutive narrative of the notion of the American people is American citizenship, as would be French citizenship when the phrase "the French people" is invoked.⁴⁵ The People in this second sense is not a mere collection of individuals that happen to occupy the territorial unit we call the United States or France, but citizens as a corporate entity. This is peoplehood inscribed by *citizenship*.⁴⁶

territorial entities from imperial and colonial interference. See ANDREW KUPER, *DEMOCRACY BEYOND BORDERS: JUSTICE AND REPRESENTATION IN GLOBAL INSTITUTIONS* 159 n.310 (2006) (remarking 'We the peoples' at the beginning of the UN Charter was introduced to replace the original 'the high contracting parties [i.e. states]', avowedly as a public relations exercise by Eleanor Roosevelt to appeal to the many members of the American Public who previously spurned the League of Nations' (alteration in original)).

42. "Accordingly, our [the peoples] respective Governments, through representatives assembled in the city of San Francisco . . . have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." U.N. Charter pmbl.

43. RAWLS, *THE LAW OF PEOPLES*, *supra* note 16, at 23–30. To be sure, Rawls attempts to make a distinction between peoples and political states, but for our purpose here those distinctions do not matter.

44. See WALZER, *supra* note 11, at 62.

45. The French Declaration of the Rights of Man and of the Citizen opens with the following: "The representatives of the French people." *DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN* pmbl. (Fr. 1789).

46. A rather interesting notion of peoplehood is the Marxist version, at least Mao Tse-tung's version. Here is how Mao defined the Chinese people:

Workers, peasants, urban petit-bourgeois elements, patriotic intellectuals, patriotic capitalists and other patriots together comprise more than ninety-five per cent of the whole country's population. Under our people's democratic dictatorship, all of these come within the classification of the people. And among the people we must practise democracy. Those whom the people's democratic dictatorship should repress are: landlords, rich peasants, counter-

A third notion of peoplehood refers to all inhabitants of a political community. What organizes and inscribes individuals as a people here is not citizenship, but the fact of sharing a specific territorial unit and being subject to the jurisdiction of that unit. Thus, the reference to "people" in the Bill of Rights of the U.S. Constitution has been understood and interpreted to include all residents (and certainly includes permanent residents) within the territorial limit of the United States, and are thus subject to its jurisdiction.⁴⁷ The notion of people here is *jurisdictional*.⁴⁸

The above three senses in which the phrase *the people* is invoked are tied to territorial (geographic) political communities. This may be referred to as political peoplehood defined by territorial limits. Although the compositional criterion may vary from one to the other, defined territory is constant in all.

There is a fourth sense of peoplehood which appears not to be tied to the notion of territorial political community. Thus, "the Jewish people" refers to a cultural or religious peoplehood rather than to a territorial political community (at least until the establishment of Israel). One could say the same thing about the Armenian people, at least until the establishment of the Armenian state. Here, ethnic, racial, or religious narratives constitute the people. This notion of

revolutionary elements, bad elements and anti-communist rightists. . . . These are the people we must compel to reform. They are the people whom the people's democratic dictatorship is directed against.

MAO TSE-TUNG, CHAIRMAN MAO TALKS TO THE PEOPLE: TALKS AND LETTERS: 1956-1971, at 169-70 (Stuart Schram ed., John Chinnery & Tiejun trans., 1974), *quoted in* Lee, *supra* note 39, at 384.

47. See, e.g., U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances."); see also *id.* amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated . . ."); *id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). The U.S. Supreme Court understood the notion of the phrase *the people* in the Amendments to mean "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259-60 (1990). The jurisdictional view of the people is also reflected in international human rights documents such as the International Covenant on Civil and Political Rights, where a state is required to provide the rights set out in the covenant to all people under its jurisdiction. International Covenant on Civil and Political Rights, art. 2, ¶ 1, *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

48. Robert Dahl seems to hold such a view. DAHL, *supra* note 23, at 78-80 ("The citizen body in a democratically governed state must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves.").

people may be referred to as ethno-cultural peoplehood, in which “the affectivity criterion” determines membership.⁴⁹

As discussed later, the two categories—ethno-cultural and political peoplehood—are not totally distinct. They sometimes overlap. Perhaps the policy of the government of Germany, until relatively recently, showed that overlap. The official policy of the German government was that we the people provisionally included citizens and residents of other countries that possessed German “blood.”⁵⁰ Individuals were entitled to claim German citizenship and join the territorial community called Germany. One could also view the policy of Israel that allows (and encourages) Jews from all over the world to immigrate to the State of Israel as an example of the overlap between political and ethno-cultural peoplehoods.⁵¹ Perhaps Walzer was thinking of Israel when he claimed that “nations look for countries because in some deep sense they already have countries.”⁵²

But as a general matter, the relationship between modern diasporas and homelands does not fit either category clearly or cleanly. On the one hand, diasporas’ links to homelands appear more cultural than political, somewhat similar to what Arthur Isak Applbaum calls the “*anthropological sense* of peoplehood.”⁵³ On the

49. List & Koenig-Archibugi, *supra* note 37, at 81.

50. German citizenship legislation is traditionally strongly based on *jus sanguinis*, which previously meant that it was easier for people of German ethnicity with very limited ties to Germany to acquire German citizenship than for foreigners who had lived in Germany for decades. In 1992 legislation was changed to increase possibilities for second-generation immigrants to obtain citizenship

Tanja Brøndsted Sejersen, “*I Vow to Thee My Countries*”: *The Expansion of Dual Citizenship in the 21st Century*, 42 INT’L MIGRATION REV. 523, 541 (2008); *see also* David Abraham, *Constitutional Patriotism, Citizenship, and Belonging*, 6 INT’L J. CONST. L. 137, 146–52 (2008) (“[D]espite the rapid growth of the foreigner population, until 2000 a child acquired German citizenship only by descent from a German parent.”); Enikő Horváth & Ruth Rubio-Marín, “*Alles oder Nichts?*” *The Outer Boundaries of the German Citizenship Debate*, 8 INT’L J. CONST. L. 72, 72–85 (2010) (examining the evolution of access to German citizenship); Christian Joppke, *Citizenship Between De- and Re-Ethnicization*, 44 EUR. J. SOCIO. 429, 430–32 (2003) (arguing based on an examination of French and German citizenship models that a tension between de- and re-ethnicization of membership is inherent in the nature of a state and structurally rooted in *immigration and emigration*).

51. *See* Law of Return, 5710–1950, 4 LSI 114 (1950) (Isr.), *available at* http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law+of+Return+5710-1950.htm; *see also* Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT’L J. CONST. L. 184, 184–86, 191–92 (2008) (discussing the Law of Return in the context of amendments to Israel’s citizenship law prohibiting entry of Palestinians from occupied territories for residence and naturalization purposes).

52. WALZER, *supra* note 11, at 44.

53. *See* Arthur Isak Applbaum, *Forcing a People To Be Free*, 35 PHIL. & PUB. AFF. 359, 374 (2007).

other hand, many diasporas often seem to view themselves as part of the people in the political sense, at times encouraged by homeland governments.⁵⁴ They seek not only to affirm cultural, ethnic, or religious affiliations with the homeland (an affirmation of identity), but also to participate in the shaping of the economic and political life of the homeland, sometimes positively but other times negatively.⁵⁵ Here peoplehood is not just a matter of common sentiment and shared cultural outlook; it is also a matter of “the capacity for shared agency,”⁵⁶ which Arthur Isak Applbaum refers to as “normative peoplehood.”⁵⁷

In the era of communication technologies that allow wide and instant contact across the globe, the power of diasporas to intervene in and shape the political and economic life of the homeland is increasing in significance. The narratives of political and ethno-cultural peoplehoods seem inadequate to describe the character of the community imagined by the relationship between diasporas and homeland. Diasporas are not members of the political community of the homeland in the traditional territorial sense, but neither are they strangers to it. The categories of members and strangers in the traditional sense do not seem to capture the complicated relationship between diasporas and homelands.⁵⁸ They are not simply part of an anthropological people, but neither do they seem to manifest a full capacity of agency in relation to the homeland. That is, the link between the diaspora and the people of the homeland is not simply anthropological, nor does it seem fully normative. It occupies the ambiguous middle that some have referred to as “the diasporic space.”⁵⁹ It is to capture this ambiguous space that some have referred to diasporas as “outside the state but inside the people.”⁶⁰

54. See *infra* notes 55–57 and accompanying text.

55. The role of the Haitian diaspora in financing and fomenting coups is perhaps one well-known example. See Michel S. Laguerre, *Homeland Political Crisis, The Virtual Diasporic Public Sphere, and Diasporic Politics*, 10 J. LATIN AM. ANTHROPOLOGY 206, 207 (2005) (recounting the coups led by Haitian diaspora rebels).

56. Applbaum, *supra* note 53, at 374 (“[W]hat makes for normative peoplehood is the capacity for shared agency. A people in the *normative sense* must be capable of willing as a people.”).

57. *Id.*

58. The inadequacy of some of the current categories we employ was beautifully captured by Cornel West when he was asked whether he was “optimistic about the future.” His reply was, “The categories of optimism and pessimism don’t exist for me. I’m a blues man. A blues man is a prisoner of hope, and hope is a qualitatively different category than optimism.” Robert S. Boynton, *Cornel West*, ROLLING STONE, Nov. 15, 2007, at 116.

59. See James Clifford, *Diasporas*, 9 CULTURAL ANTHROPOLOGY 302, 314 (1994) (discussing “common experiences of postcolonial displacement, racialization, and political struggle”); see also AVTAR BRAH, CARTOGRAPHIES OF DIASPORA: CONTESTING IDENTITIES 208–10 (1996) (“Diaspora space is the intersectionality of diaspora, border, and dis/location as a point of confluence of economic, political, cultural, and psychic processes.”); Jacqueline Nassy Brown, *Black Liverpool, Black America and the*

The diaspora–homeland relationship also defies another very popular category often employed to classify disputes and relationships in international legal and political discourse—nationalist (localist) versus cosmopolitan (universalist). A nationalist or localist takes local or national communities as the proper venues for allegiances and commitments, while a universalist believes that the highest allegiance ought to be to the community of humankind.⁶¹ But diasporas seem neither members of the homeland (owed special allegiances and commitments) nor strangers to it (with no allegiance or commitment). And to the extent that universalism and localism are meant to exhaust the nature of commitments and relationships people owe one another, they do not capture the diaspora–homeland relationship.⁶² However, it is complex relationships like this that will increasingly define international relations and international law itself.

This suggests that there is a need for a theory that captures the notion of peoplehood in both its anthropological and normative sense—a theory that is sensitive to the complex relationship not fully captured by the accounts offered by nationalists and universalists. Such a theory must also suggest the institutional and practical implications of adopting the notion of peoplehood implied by the complex relationship between diasporas and homelands. It is the ambiguous middle ground—neither strangers nor members, neither local nor cosmopolitan, neither political nor ethno-cultural—that is increasingly defining our world. Finding the language to capture it and to respond institutionally to it is going to be the challenge of legal and political theory in the twenty-first century.

Gendering of Diasporic Space, 13 *CULTURAL ANTHROPOLOGY* 291, 298 (1998) (“[D]espite invitations to universal identification, not everyone partakes in the privileges of membership to the diasporic community with impunity.”).

60. SHAIN, *supra* note 10, at 124 (emphasis omitted).

61. See Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY* 2, 4–5 (Joshua Cohen ed., 1996). Some of the worthy goals that

patriotism sets out to serve—for example, the goal of national unity in devotion to worthy moral ideals of justice and equality . . . would be better served by an ideal that is in any case more adequate to our situation in the contemporary world, namely the very old ideal of the cosmopolitan, the person whose allegiance is to the worldwide community of human beings.

Id.

62. For an exploration of the various boundaries of allegiances, see generally SAMUEL SCHEFFLER, *BOUNDARIES OF ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* (2004) (collecting eleven essays discussing social arrangements and individual responses to those arrangements).

IV. DIASPORAS AS PART OF WE THE PEOPLE?

A. *Understanding the Notion of the Diaspora*

Diasporas have existed throughout human history.⁶³ The notion of diaspora⁶⁴ refers to groups of individuals or communities who carry an image of a homeland that is separate from the host land in which they reside.⁶⁵ The image of the homeland could be real (an existing country) or imagined (e.g. homelands for Sikhs, Kurds, Chechens, and Sri Lankan Tamils⁶⁶). The fellow-feeling or common origin that members of the diaspora believe they have is often reinforced by others' perception of them—diasporas perceive themselves and are perceived by others as belonging to a national community.⁶⁷

Diasporas come in many forms. Some members of the diaspora are forced out of their homeland for religious, cultural, or political reasons, while others may have simply left to seek a better life for themselves and their descendants. Some may not even have moved at all, but the border shifted either through imperial and colonial

63. See THE NEW EUROPEAN DIASPORAS: NATIONAL MINORITIES AND CONFLICT IN EASTERN EUROPE 2 (Michael Mandelbaum ed., 2000) (stating that “[d]iasporas . . . are ancient features of human history” and discussing the first recorded diaspora when the kingdom of Judea was conquered by the Assyrians and Jews were forced into “the Babylonian captivity”); see also Robin Cohen, *Diasporas and the Nation-State: From Victims to Challengers*, 72 INT’L AFF. 507, 513 (1996) (giving examples of diasporas that transcend millennia).

64. The term “diaspora” is derived from the Greek term *diaspeirein*, which means to sow or scatter about (*dia* means apart and *speirein* means to sow or scatter). *Diaspora*, THE AMERICAN HERITAGE DICTIONARY 502 (4th ed. 2006); see also Cohen, *supra* note 63, at 507 (“For the Greeks, the expression was used to describe the colonization of Asia Minor and the Mediterranean in the Archaic period (800–600 BC).”).

65. Yossi Shain and Aharon Barth define diaspora thus: “[A] people with common origin who reside, more or less on a permanent basis, outside the borders of their ethnic or religious homeland—whether that homeland is real or symbolic, independent or under foreign control.” Yossi Shain & Aharon Barth, *Diasporas and International Relations Theory*, 57 INT’L ORG. 449, 452 (2003); see also Chander, *Diaspora Bonds*, *supra* note 28, at 1020 (defining diaspora as “that part of a people, dispersed in one or more countries other than its homeland, that maintains a feeling of transnational community among a people and its homeland”); Cohen, *supra* note 63, at 515. Cohen lists what he considers to be the common features of a diaspora. The list is adapted from an earlier list drawn by William Safran. See William Safran, *Comparing Diasporas: A Review Essay*, 8 DIASPORAS 255, 257 (1999); William Safran, *Diasporas in Modern Societies: Myths of Homeland and Return*, 1 DIASPORAS 83–84 (1991) (listing a “continuum” of features of diasporas).

66. The Sikhs dream of Khalistan, the Kurds often talk about a Kurdistan that embraces all of the Kurds that are scattered in the various Middle Eastern countries (Iraq, Iran, Syria, and Turkey), Sri Lankan Tamils sought to establish Tamil Elam, and the Chechens have been fighting for an independent Chechnya.

67. SHAIN, *supra* note 10, at 11. Diasporas “regard themselves, or are regarded by others, as members or potential members of the national community of their homeland.” *Id.*

conquest or the break-up of nation-states.⁶⁸ Some consider the host land a temporary stopping place, while others may be permanent residents and even citizens of the host country. In whichever way they are constituted, diasporas possess one common feature: although they have made the host land their place of residence (temporarily or permanently), they carry an image of a homeland to which they believe they belong and in which they consider to have a legitimate stake. Imagining is an important defining feature of all diasporas. Diasporas imagine a homeland that is separate from the host land, even as they imagine the homeland–host land space as one and continuous. One author sought to capture the diasporic space this way: “[W]here the country of origin becomes a source of identity, the country of residence a source of rights, and the emerging transnational space, a space of political action combining the two or more countries.”⁶⁹

Not only do diasporas carry an image of a homeland (imagined or otherwise), they often also seek to play a role in the economic, cultural, and political life of that homeland. When the interests of the diaspora and that of the government of the homeland converge, there is often very little to worry about. Each party finds the other useful. Diasporas use the homeland as a source of cultural sustenance and pride, a kind of cultural refueling depot.⁷⁰ They may also find a favorable investment climate within their homeland. The government of the homeland may use the diaspora as a powerful lobby group in the host land, facilitating its economic and foreign policies vis-à-vis

68. The collapse of the USSR and the resulting Russian diaspora found in the various republics that made up the Soviet Union is a good example of a diaspora that emerged as a result of the disintegration of a nation-state or an empire, depending on one's point of view. For an account of the Russian diaspora, see Graham Smith, *Transnational Politics and the Politics of the Russian Diaspora*, 22 *ETHNIC & RACIAL STUD.* 500 (1999) (providing a “conceptual framework for exploring the diasporic politics of the Russians in the post-Soviet borderlands”). See also *NATIONS ABROAD: DIASPORA POLITICS AND INTERNATIONAL RELATIONS IN THE FORMER SOVIET UNION* (Charles King & Neil J. Melvin eds., 1998) (focusing on “trans-border ethnic populations for the domestic politics and international relations of the Soviet successor states”). And to some extent this is what many Latinos say about their presence in the southwestern part of the United States. The division of the Afar people between Ethiopia and Eritrea is another example of a moving border.

69. Kastoryano, *supra* note 1, at 311.

70. I must note here that in some circumstances the reverse might be true. Some diasporas—the Armenian diaspora is a good example—have their own elaborate cultural institutions, structures, and hierarchies that dwarf those in the homeland. This may be so for a couple of reasons: the relative size and wealth of the diaspora. Under such circumstances, it may be the homeland that depends on the diaspora for cultural sustenance rather than the reverse. But these are very rare circumstances. See, e.g., Susan P. Pattie, *Armenians in Diaspora*, in *THE ARMENIANS: PAST AND PRESENT IN THE MAKING OF NATIONAL IDENTITY* 126, 131–39 (Edmund Herzig & Marina Kurkchyan eds., 2005) (discussing Armenian diasporas in a variety of countries).

the host land or any other part of the world over which the host land has influence.⁷¹ The diaspora may also be useful as a direct source of economic assistance, both in terms of remittance⁷² and investment.⁷³ This is especially true in relation to poor developing countries whose diasporas live in rich, developed countries. It is, for example, reported that the Eritrean economy would be in more serious difficulty were it not for the remittance and other forms of economic assistance it receives from the Eritrean diaspora.⁷⁴

71. See generally Terrazas, *supra* note 4 (discussing how the Ethiopian government set up diaspora affairs within its foreign ministry partly to “mobilize the diaspora to improve the public image of Ethiopia”).

72. “[M]igrants from poor countries send home about \$300 billion a year. That is more than three times the global total in foreign aid, making ‘remittances’ the main source of outside money flowing to the developing world.” Jason DeParle, *Migrant Money Flow: A \$300 Billion Current*, N.Y. TIMES, Nov. 18, 2007, at WK3, available at <http://www.nytimes.com/2007/11/18/weekinreview/18deparle.html>; see also Ngozi Okonj-Iweala & Dilip Ratha, *A Bond for the Homeland*, FOREIGN POLICY (May 24, 2011), http://www.foreignpolicy.com/articles/2011/05/24/a_bond_for_the_homeland (“Migrants from developing countries sent more than \$325 billion in remittances last year.”). It is estimated that a third of that amount comes from the United States. DeParle, *supra*; see also WORLD BANK, GLOBAL DEVELOPMENT FINANCE: STRIVING FOR STABILITY IN DEVELOPMENT FINANCE 157–172 (2003) (discussing how remittances have become a “prominent source of external funding for many developing countries”); Terrence Lyons, *Diasporas and Homeland Conflict*, in TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 111, 112–13 (Miles Kahler & Barbara F. Walter eds., 2006) (“According to the [2004] report of the Inter-American Dialogue Task Force on Remittances . . . remittances accounted for nearly 30 percent of Nicaragua’s GDP, 25 percent of Haiti’s, 17 percent of Guyana’s, 15 percent of El Salvador’s, and 12 percent each for Honduras and Jamaica.”). Remittance from the diaspora is not a new phenomenon. It is reported that in 1901 “the Italian government passed a law empowering the nonprofit Banco di Napoli to open branches or contract with banks in the United States to enable migrants to send remittances reliably and cheaply.” Nancy Foner, *Engagements Across National Borders, Then and Now*, 75 FORDHAM L. REV. 2483, 2485 (2007).⁴

73. See *infra* note 117 and accompanying text.

74. [T]he diaspora’s financial contributions have always been critical. . . . Remittances were critical during the 1998–2000 war and have become ever more important. In order to maintain their full rights as citizens—particularly valuable if at some later date they wish to return and claim property or open a business—Eritreans abroad are expected to ‘voluntarily’ pay 2 per cent of their monthly salaries to the government.

Int’l Crisis Group, *Eritrea: The Siege State*, Africa Report No. 163, 18 (Sept. 21, 2010), available at [http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/163%20Eritrea%20The%20Siege%20State](http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/ethiopia-eritrea/163%20Eritrea%20The%20Siege%20State). It is reported that remittance from the diaspora constitutes 38 percent of the country’s gross domestic product. Mohammed Ali & Alain Hutchinson, *Contribution from CTA to the Report on “Food Security Issues in ACP countries and the Role of ACP-EU Cooperation,”* ACP-EU TECHNICAL CENTRE FOR AGRIC. & RURAL DEV., 3 (Nov. 17, 2007), http://www.europarl.europa.eu/intcoop/acp/91_01/pdf/cta.pdf (referencing investment as a form of direct economic assistance). Another example of a country receiving substantial remittances is Ethiopia: Ethiopia “receives a significant amount of remittances from its migrants.” Kenneth A. Reinert, *Ethiopia in the World Economy:*

Put simply, when diasporas and homeland governments see eye to eye on many issues, or when each is happy to use the other for its own purposes, the ambiguous diaspora–homeland relationship (the issue of membership) remains unexplored. However, when tensions exist between the two in terms of the image each has of the homeland and the future each envisions for it, then the appropriate level of involvement of the diaspora in the life of the country becomes an issue. Membership—who exactly we the people are and who speaks for the people—arises as a serious issue. Are members of the diaspora legitimate members of the political community of the homeland? Do they have rights in relation to the homeland that are not within the power of the government of the homeland “to give or deny?”⁷⁵ And what might those rights be?

B. *Diaspora as the “Paradigmatic Other” of the Nation-State: Identity and Otherness*

In many ways the diaspora is the “paradigmatic Other of the nation-state.”⁷⁶ Diasporas define themselves in contrast to the nation-state. While the nation-state conceives of peoplehood (the notion of “we”) in territorial terms, the idea of the diaspora enacts a nonterritorial, traveling notion of peoplehood. While the nation-state

Trade, Private Capital Flows, and Migration, 53 AFRICA TODAY 65, 78 (2007). It is reported that in 2000 remittances made up 40 percent of all foreign direct investment in Ethiopia, while in 2002 they constituted 45 percent and in 2001 a staggering 90 percent. See *id.* at 79.

75. See Sewenet Kenennie, *TPLF—The Control Freak and Diaspora Ethiopians*, ETHIOMEDIA.COM (June 18, 2006), http://ethiomediamedia.com/carepress/tplf_the_control_freak.html. A member of the Ethiopian diaspora who apparently lived in the United States and is presumably a citizen of the United States responded to a memorandum that the Ethiopian government had apparently sent out to its embassies in countries where there is a substantial Ethiopian diaspora. MINISTRY OF FOREIGN AFFAIRS OF ETHIOPIA, http://www.mfa.gov.et/Ethiopians_Origin_Abroad/Ethiopia_Origin.php (last visited Jan. 29, 2011). The memorandum suggested intimidating tactics against those members of the diaspora who are perceived as being hostile to the regime. The online commentary from this individual goes this way: “I am also an Ethiopian, not only by blood but sentiment, character and the deep love I have for my family, friends and by extension the people of that country—which by the way is not up to [the Ethiopian government] to give or deny.” The commentator apparently believes that the diaspora are part of the people of the homeland and that right cannot be denied by any government. It is of course not quite clear why it is so and whether “blood” and “sentiment” are sufficient grounds for full membership to a political community even if formal citizenship has been renounced. And what does it mean to say that one is tied to a country by “blood”?

76. Khachig Tölölyan, *The Nation-State and Its Others: In Lieu of a Preference*, 1 DIASPORA 3, 3 (1991); see also DANIEL J. ELAZAR, CONSTITUTIONALIZING GLOBALIZATION: THE POSTMODERN REVIVAL OF CONFEDERATE ARRANGEMENTS 181 (1998) (“A common phenomenon during the Hellenistic and Roman periods, [state-diaspora] remained real, if lower key, with the rise of the modern nation-state, whose exclusivism militated against formal diaspora political expression.”).

conceives of legitimate political participation in essentially territorial terms, the notion of the diaspora tends to complicate that assumption by claiming a continuing and active stake in the homeland for those who have left the homeland either voluntarily or involuntarily. The diasporic phenomenon seriously challenges and renders ambiguous the specific notions of peoplehood, community, and belonging that have defined the nation-state. Diasporic interest in the homeland attempts to delink the tight relationship that peoplehood and community are thought to have with territory.

However, there is a paradox. While the notion of diaspora appears to be the paradigmatic Other of the nation-state, its existence and coherence is, in fact, premised on the existence of the nation-state. There are diasporas because there is a homeland or an imagined homeland, which often manifests itself in the form of a territorial state. In some sense, this paradox is a necessary feature of all identities. One defines oneself often in opposition to the Other.⁷⁷ The existence of the Other is a necessary condition for defining the boundary of the self. This is the case whether the identity in question is individual, communal, or institutional. All identities are defined relationally.⁷⁸

To summarize, the diaspora is viewed simultaneously as the negation of the nation-state and one that must assume the existence of the nation-state for its coherence.⁷⁹ But the narratives of political

77. See generally WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1st ed. 1991) (exploring the relation of identity to difference); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (noting individuals' tendency to define "difference" as something inherent in others); MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* (1997) (discussing efforts to strike a balance between the paradoxes of individual and group identities); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990) (urging that normative theory and public policy should undermine group-based oppression by affirming rather than suppressing social group difference); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 *NOTRE DAME L. REV.* 615, 619 (1992) ("The dominant cultural understanding and experience of a society tends to universalize itself as the inevitable norm for social life, marking the culture of the marginal as the 'Other,' either to be excluded or 'normalized.'").

78. See Addis, *supra* note 77, at 622 ("Group identities are contingent in the sense that differences (identities) are established relationally. This means that what sorts of relationships establish differences, and who gets to define those relationships, matters.").

79. Here again the analogy between the relationship between diasporas and homelands on the one hand, and alumni and colleges on the other hand, is instructive. The notion of alumni assumes the existence of a college as the notion of diaspora assumes the existence of a state. Often, the discord between alumni and college administrators is a result of a differing view of the institution each group holds in the same way that disputes between diasporas and governments are primarily a consequence of the different image of the nation and its future that each group has of the homeland. In addition, in the same way that college administrators often charge unhappy alumni of having an outdated image of their alma mater, so do governments

peoplehood that anchor themselves in physical geography are not adequate models to describe the notion of peoplehood that the diasporic narrative seeks to constitute. A narrative that anchors itself in and is circumscribed by the idea of physical geography will be unable to capture the travelling nature of communities represented by diasporas, whether ancient or modern.

C. The Diaspora and Ethno-cultural Peoplehood

While the notion of ethno-cultural peoplehood captures the nonterritorial and traveling nature of communities, it is no better than the notion of political peoplehood as a means of explaining the relationship between diasporas and their homelands. The narratives that constitute ethno-cultural peoplehood often center on religion or ethnicity, and thus do not offer a full account of the relationship between modern diasporas and homelands. This is so for a number of reasons. First, for many modern diasporas the link to homeland is not primarily based on any specific ethnic or religious affiliation, but rather on a relationship to a land, its political history, and its societal culture. Take the Ethiopian diaspora as an example. The members of the diaspora belong to different ethnic and religious groups. The constitutive narrative is a narrative of a land of many faiths and ethnic and linguistic groups, and each religious, ethnic, and linguistic group links itself to the land and its history (though the history may be contested among those groups). Put simply, the constitutive narrative of the Ethiopian diaspora is a narrative of multiplicity.

Second, contrary to what ethno-cultural peoplehood would suggest, some diasporas (the Ethiopian diaspora, for example) seek not only a communion over cultural and religious symbols and rituals, but a desire to participate in the political affairs of the political community they call homeland. Individuals within the Ethiopian diaspora have organized political parties; supported political parties which were organized within (and are based in) the homeland; and campaigned before the legislative and executive bodies of their respective host lands so as to isolate and put pressure on the governments in power that they view as illegitimate, or at least dictatorial, or to support initiatives that they believe are in the interest of the nation. Put simply, the Ethiopian diaspora seeks to expand the notion of political membership beyond the territorial boundaries and, in the process, to affirm its belonging to we the

of the homeland often allege that diasporas carry an image of a country that has long ago changed. See *supra* note 29 and accompanying text.

people of Ethiopia. In this, the Ethiopian diaspora is not very different from many other modern diasporas.⁸⁰

*D. The Significance of the Diaspora for a New
Theory of Peoplehood and Membership*

Even though neither the traditional notion of political peoplehood nor the idea of ethno-cultural peoplehood fully captures the complex relationship between modern diasporas and homelands, it is clear that the issue will increasingly be an important one. In the age of globalization and the communication revolution—when physical space is becoming less crucial as a definer of communities and the contours of participation, but, on the other hand, where the notion of communities and local allegiances are viewed as antidotes to the dislocating effects of globalization—the relationship between diasporas and homelands is increasingly moving from the periphery to the center. Perhaps that relationship holds the key to understanding and building institutions that can link and hold in equilibrium the universalizing (homogenizing) and localizing (fragmenting) tendencies of globalization.

There are, of course, other more specific reasons for the increasing attractiveness of the diaspora–homeland relationship for scholars, as well as policymakers. First, in relation to developing countries, many of which tend to be politically and economically weak or unstable, the sheer size of the diaspora and its economic and political clout have often made it a central player in the life of the homeland.⁸¹ That role is unlikely to diminish in the near future, for good or for ill. This, of course, raises the rather important question as to who we the people are for the purpose of authoring laws and establishing institutions of the homeland. Democracy, we are often reminded, requires that the people be the originators of the laws and institutions that govern their lives.⁸² In what sense would it be legitimate to think of members of a diaspora as being part of the “we” of the homeland for purposes of authoring or originating the laws and institutions that are to govern the homeland and for the purpose of devising policies affecting the homeland?

80. For a detailed account of how the Jewish diaspora attempts to intervene in the political, cultural, and economic lives of Israel, see SHAIN, *supra* note 10, at 65–100.

81. That is the case in countries such as Ethiopia, Eritrea, Haiti, and Sri Lanka. See, e.g., COLLIER & HOEFFLER, *infra* note 209 and accompanying text.

82. There are numerous international documents that could be read as standing for that proposition. See, e.g., ICCPR, *supra* note 47, art. 25 (“Every citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . [t]o take part in the conduct of public affairs, directly or through freely chosen representatives.”); UDHR, *supra* note 18, art. 21(1) (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”).

It may be the case that at some level the desire of members of a diaspora to play a significant role in the imagining of their homeland is inversely related to how well the particular diasporic community is integrated in the life of the host land. The more a community feels marginalized (or discriminated against), the more likely it will seek to invest energy and resources in the cultivation and imagining of its former homeland. In this sense, the strength of a diaspora's bond with the homeland may partly be related to the weakness of its bond with the host land.⁸³ But this is not always, nor even often, the case.

The second way in which the relation between homeland and diaspora is moving to the center is as a result of the diminishment or disaggregation of the authority of the nation-state. Power is migrating from the nation-state in two directions: upward to supranational institutions and power centers and downward to the constituent parts of the nation-state, be they public or private.⁸⁴ As a result of various globalizing phenomena, such as the communication revolution, the notion of policeable borders—"the idea of a self-enclosed and autochthonous territory over which the *demos* governs"⁸⁵—is increasingly challenged. The diaspora-homeland relationship is a clear example of politics beyond nation-state borders—the globalization of politics. But it is a globalization of a specific kind. It is a politics beyond the nation-state that affirms a

83. Charles King & Neil J. Melvin, *Diaspora Politics: Ethnic Linkages, Foreign Policy, and Security in Eurasia*, 24 INT'L SECURITY 108, 137 (1999) ("A stronger sense of attachment between homelands and diasporas may then come about as a result of conflict within the host state."). See also Andrea Elliott, *A Call to Jihad, Answered in America*, N.Y. TIMES, July 11, 2009, at A1, for a discussion of the rather worrying phenomenon of a number of young male Somali Americans from Minneapolis disappearing to be found later to have joined radical Islamists to fight in Somalia. One friend and family member noted: "[a]t the root of the problem was a 'crisis of belonging' . . . They want to belong, but who do they belong to?" *Id.* It is worth mentioning a related point here. In some circumstances, the presence of a diaspora could be used by a segment or segments of the population of the homeland "as a font for host-land definition . . . as a differentiating tool of state formation; for example Chinese diasporas have been used as a 'resource to construct a nationalist Self and a foreign Other', as personified by anti-Chinese pogroms in Indonesia in 1998." Chris Ogden, *Diaspora Meets IR's Constructivism: An Appraisal*, 28 POL. 1, 3 (2008) (quoting William A. Callahan, *Beyond Cosmopolitanism and Nationalism: Diasporic Chinese and Neo-Nationalism in China and Thailand*, 57 INT'L ORG. 481, 482 (2003)).

84. State power is migrating to constituent administrative units such as provinces or federal states and private entities such as NGOs or even private companies. An example of power transfer to private companies is the latest move in the United States where military activities are increasingly being contracted out to private companies. See P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004) ("One of the most interesting developments in warfare over the last decade has been the emergence of a global trade in hired military services, better known as the 'privatized military industry.' . . . Even the U.S. military has become one of the prime clients of the industry.").

85. BENHABIB, *supra* note 14, at 216.

particular idea of a nation-state. It is one that seeks to reconstitute we the people by stripping it of two conditions that have traditionally been used to define it: territory and citizenship. And the communication revolution, which is increasingly allowing members of the diaspora to communicate (and organize) with citizens of the homeland almost instantaneously and at increasingly reduced cost, will continue to encourage more active participation by members of the diaspora in the political and economic affairs of the homeland.

As noted earlier, if one wishes to explore the notions of democracy, community, and legality in the age of globalization, then exploring the relationship between diaspora and homeland may provide one of the best vehicles. As one commentator put it, “[d]iasporas are the exemplary communities of the transnational moment.”⁸⁶ One may add that they are also exemplary communities that affirm the nation-state. The paradox of globalization is perfectly captured by diaspora–homeland relationships. And the mediation between universalism and localism may have its seed in this unique relationship—a relationship that affirms localism by attempting to redefine (extend) the local.

V. CONSTITUTING THE PEOPLE IN THE AGE OF THE DIASPORA

A. *The Silence of International Law*

As noted earlier, in some significant sense, the diaspora has been understood to be the Other of the nation-state. And to the extent that international law has been concerned with interstate relations, the notion of the diaspora has, by and large, been outside its concern. One is either a national (or under the jurisdiction) of this or that state. One is either an alien or a citizen. International law, which was given life to and sustained over a long period of time by the idea of the nation-state, has largely been a process of sharp lines, as has been the subject of its primary concern—the nation-state. For international law, as for the state system, there is no ambiguous diasporic space.

It is true that international law is increasingly broadening the domain of its concern and the kind of actors that it recognizes as subjects of its signals. Thus, nongovernmental organizations (NGOs) and even individuals are now recognized as subjects of international law.⁸⁷ The state is now accountable under international law for what

86. Tölölyan, *supra* note 76, at 5.

87. See VAUGHAN LOWE, INTERNATIONAL LAW §§ 1.3-1.5 (2007) (discussing the rise of NGOs and their role in international law).

it does to its citizens.⁸⁸ The veil of we the people as the community personified is pierced to get to the individual, to the extent that international human rights law is to apply to the action of the state vis-à-vis its citizens. However, although international law has expanded its subjects and the domain of its concern, it essentially continues to adhere to a statist version of we the peoples that graces the UN Charter. International law may have pierced the statist veil to reach the individual under certain circumstances, but only in the context of affirming the traditional narrative of how the people (personified by the state) are constituted. That is, international law imposes certain obligations on the state to treat members of its own people in a particular way, but it does not open to question how the people are constituted. International law seems to leave the question of membership to political communities themselves.⁸⁹ The people of a political community determine how they wish to distribute membership goods, even though international law increasingly demands accountability in terms of how members are treated (clearly the purpose of the corpus of international human rights law).

The ambivalence that international law has shown to the issue of secession is a good example of how it has been rather unconcerned about the process of the constitution of peoplehood.⁹⁰ To be sure, there have been commentaries in recent years as to whether democratic governance has become an entitlement under

88. One need only refer to the huge corpus of human rights law that requires states to treat their citizens in a particular way. Add to that the development of universal jurisdiction that gives states the authority to prosecute individuals for certain crimes committed by anyone anywhere. See Addis, *supra* note 7, at 130 (“The availability of universal jurisdiction is, therefore, premised on the presumed effect of those crimes on humanity as a whole.”).

89. See LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW 852 (Robert Jennings & Arthur Watts eds., 9th ed. 2008) (“[I]t is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national.”); see also Convention on Certain Questions Relating to Conflict of Nationality Laws, art. 1, Apr. 13, 1930, 179 L.N.T.S. 89 (“[I]t is for each State to determine under its own law who are its nationals.”).

90. The United Nations has consistently declined to embrace the right of secession as being an aspect of the right to self-determination. See HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 46 (1990) (discussing the bundle of rights associated with the right to self-determination). But, of course, the United Nations has recognized secessionist entities as independent states after the fact of successful break from the larger country (e.g. Bangladesh). This is not a recognition of the right of secession but a pragmatic acceptance of the political reality. Recently, the International Court of Justice in the *Kosovo* advisory opinion declared that there is no prohibition to unilateral declaration (secession) of independence by a political unit, while not resolving the issue of whether secession is or can be an aspect of the international law of self-determination. See generally Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

international law.⁹¹ Whether such entitlement exists (and if so, what would constitute democracy to satisfy the entitlement), the question goes only to the nature of the institutions to which we the people may be entitled once constituted, not to how the people will constitute themselves as an initial matter.

B. *The Constitution of Peoplehood in an Age of Transition:
The League of Nations and the Dependency Model*

There was a time when the relationship between homelands and diasporas was a concern of the international community and even of international law—the interwar period (between the two World Wars). During this period, and under the auspices of the League of Nations, the international community sought to ensure stability in Europe by providing for the protection of religious, linguistic, and ethnic minorities through a series of treaties and unilateral declarations.⁹² A number of new states were required to guarantee the rights of ethnic and religious minorities before those states were admitted to the League. The states guaranteed those rights through a

91. [D]emocracy is beginning to be seen as the *sine qua non* for validating governance. . . . This newly emerging 'law'—which requires democracy to validate governance—is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations. The transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually.

Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46–47 (1992).

A bright line links three generations of democratic entitlement. The rules and the processes for implementing self-determination, freedom of discursive expression, and electoral rights, have much in common. They evidently aim to achieve a coherent purpose: allowing all persons to assume shared responsibility for shaping the civil society in which they live and work.

Id. at 79.

92. For a list of treaties, see PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES app. (1991). See also ATHANASIA SPILIOPOULOU ÅKERMARK, JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW 104–05 (1997) (discussing treaties providing for minority protection); LOWE, *supra* note 87, at 11 (“Close attention was paid in the years after the Great War to the treatment of ethnic minorities within States.”); *Protection of Linguistic, Racial and Religious Minorities by the League of Nations, Provisions Contained in the Various International Instruments at Present in Force*, League of Nations Publications Series, I.B. Minorities, 1927 I.B.2 (1927) (establishing a system for protecting minorities under the guarantee of the League of Nations).

series of treaties, mostly bilateral or unilateral declarations.⁹³ Those treaties and declarations were not required or dictated by any provision of the Covenant of the League of Nations.⁹⁴ Indeed, the Covenant contained no provision for international cooperation for the protection of minorities, although President Woodrow Wilson attempted to include a provision requiring the protection of minorities as a precondition for recognition of the particular territorial community as a state.⁹⁵ The special minorities' treaties that formed the basis for the protection of minorities under the auspices of the League originated with the Paris Peace Conference,⁹⁶

93. The minority protection system under the League of Nations was a result of territorial changes that came about following the Paris Peace Conference. The protection system included three distinct approaches. One approach was for countries to join separate treaties with the principal Allied and Associated Powers providing for the protection of racial, linguistic, and religious minorities. This group included five countries: Poland, Czechoslovakia, Yugoslavia, Hungary, and Greece. A second approach was to insert provisions on minority protection in the general treaties. This approach was taken by four countries: Austria, Bulgaria, Hungary, and Turkey. And still a third approach was for states to make unilateral declarations before the Council of the League of Nations undertaking obligations to protect minorities within their borders as a condition of their admission to the League. Albania, Lithuania, Latvia, Estonia, and Iraq made such declarations. See NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 11–12 (1991) (discussing provisions on minority rights incorporated into Austria's, Bulgaria's, Hungary's, and Turkey's peace treaties, and discussing how Albania, Lithuania, Latvia, Estonia, and Iraq "undertook obligations on the protection of minorities in declarations made before the Council of the League of Nations").

94. What make these treaties and declarations international in character are the fact that they were required as a condition of admission to the League of Nations, they were to be altered only with the approval of a majority of the League Council, and any dispute as to their reach and meaning was to be resolved by the Permanent Court of International Justice (PCIJ). Thus, the two pillars of the international system—the League and the Council—were to act as guarantors of these treaty systems. For example, the Polish treaty (Minorities in Poland: Treaty Between the Principal Allied and Associated Powers and Poland) provided that any differences of opinion on the question of law and fact concerning the treaty between Poland and other parties and members of the Council was to be regarded as an international dispute. Article 14 of the League's Covenant established the PCIJ to hear and determine disputes that are referred to it either by the Assembly or the Council. League of Nations Covenant art. 14.

95. THORBERRY, *supra* note 92, at 38. President Wilson's second draft of the League of Nations Covenant included the following:

The League of Nations shall require all New States to bind themselves as a condition precedent to their recognition as independent or autonomous States, to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of their people.

Id.

96. Convened in 1919, immediately after WWI, the Paris Peace Conference was designed to settle disputes through a number of peace treaties with the defeated states, as well as to map the future through the establishment of the League of Nations. Asbjørn Eide, *The Framework Convention in Historical and Global Perspective*, in *THE*

where many minority treaties were signed as part of the various peace treaties. The Conference also contained a special chapter that dealt with the issue of minorities in peace treaties. That too formed the basis for subsequent minority treaties.

Not only were the treaties intended to ensure that religious, linguistic, and ethnic minorities in these new states were accorded equal treatment, they were also designed to ensure that those minorities were able to preserve their "traditions and their *national characteristics*."⁹⁷ Put simply, ethnic minorities, such as the Greek minorities in Albania, were viewed by the international community, to use Walzer's description in another context, as "communities of character."⁹⁸ The major reason for requiring these systems of

RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES 25, 33 (Marc Weller ed., 2005).

97. Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 17 (Apr. 6, 1935) [hereinafter *Minority Schools in Albania Opinion*] (emphasis added).

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language, or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their *national characteristics*.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes *the very essence of its being as a minority*.

Id. (emphasis added).

98. WALZER, *supra* note 11, at 62. It was not just Greek minorities that had protection as communities of character; Greeks in Turkey had a similar protection. In the Treaty of Lausanne, Turkey agreed that "adequate facilities shall be given to Turkish nationals of non-Turkish speech [mostly Greek minorities] for the oral use of their own language before the courts"; non-Muslim nationals will be granted "adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Turkish nationals through the medium of their own language"; and that non-Muslim Turkish nationals will not be "compelled to perform any act which constitutes a violation of their faith." Treaty of Lausanne, art. 39-43, July 24, 1923, 28 U.N.T.S. 11 [hereinafter *Treaty of Lausanne*]. The treaty provided that the minority clauses constituted obligations of international concern and were placed under the guarantee of the League of Nations. They were not to be modified without the consent

protection as a condition of admission to the League was not the humanitarian impulse of the League, but rather the desire of members of the League to minimize armed conflict among nation-states, which members felt would follow if ethnic minorities were not allowed to retain their "national characteristics." The members of the League viewed minorities as part of a "nation," part of a "people," outside the territorial unit in which they found themselves.⁹⁹ Their mistreatment by the government of the territorial state might have led to intervention by the government of a kin state that viewed itself as a guarantor of the welfare and security of those minorities.¹⁰⁰ Indeed, in many cases, the kin states pleaded the case of the diasporic minorities before international tribunals and conferences. Thus, for example, the Greek government raised the issue of Greek minorities in Albania before the League.¹⁰¹

The minority protection systems of the interwar years were partly premised on the ambiguous nature of the space occupied by "the near-abroad" diasporas. The minorities were citizens of the "hoststate"¹⁰² and yet the homeland (the kin state) had an interest in their welfare that it might have been prepared to protect, even militarily.¹⁰³ These were not just minorities but "national minorities."

of the majority of the League's Council. *Id.* art. 44. Any dispute on the law and facts arising "out of these Articles between the Turkish Government and any one of the other Signatory Powers or any Other power, a member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations [and may] be referred to the Permanent Court of International Justice." *Id.*

99. The rewriting of the boundaries of Europe had left "approximately *twenty-five million* [people] outside their national homelands." Erin Jenne, *National Self-Determination: A Deadly Mobilizing Device*, in NEGOTIATING SELF-DETERMINATION 7, 11 (Hurst Hannum & Eileen F. Babbitt, eds. 2006).

100. President Woodrow Wilson of the United States made the point in a policy-setting address. "Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might, in some circumstances be meted out to the minorities . . . If this Conference is going to recognise these various Powers as new sovereignties with defined territories, the chief guarantors are entitled to be satisfied that their territorial elements are of a character to be permanent, and that the guarantees given are to insure the peace of the world." THORNBERRY, *supra* note 92, at 40–41 (quoting JACOB ROBINSON ET AL., WERE THE MINORITY TREATIES A FAILURE? 21 (1943)); see also *Minority Schools in Albania Opinion*, *supra* note 97, at 7–10 ("[W]hat the Council of the League of Nations asked Albania to accept, and what Albania did accept, was a regime of minority protection substantially the same as that which had been already agreed upon with other States in which there were no "communities.").

101. See generally *Minority Schools in Albania Opinion*, *supra* note 97. The minorities could not represent themselves as they did not have *locus standi*.

102. Indeed, some of the treaties specifically required citizenship for minorities "with a view of preventing members of minorities from becoming stateless." LERNER, *supra* note 93, at 12.

103. During a debate in the League Assembly in 1933, the German delegate noted what he thought was an essential truth, the importance of "ethnic nationalism":

They were not just to be treated equally, but to be allowed to retain and cultivate their "national characteristics." The minority protection systems were attempts to reconcile the principle of territorial sovereignty and the reality of interborder allegiances and loyalties. To some extent, those arrangements express the ambiguous identity of we the people.

One could refer to the minority-treaties model as the Dependency Model. The Dependency Model sees the relationship between the diaspora and the homeland as one where the government of the homeland is viewed as the benevolent protector of the kin living in other, mainly neighboring, countries. The relationship between diaspora and homeland in this instance is a more or less one-way affair: the homeland as a potential protector of the diaspora's welfare.¹⁰⁴ The treaties stood as surrogates for the homeland in protecting minorities in the host land, but there was no attempt or even desire to articulate and protect the stake the diaspora might have had in the political and cultural life of the homeland. Indeed, most members of the diaspora never claimed that they had such a stake. The interwar treaty system, or the Dependency Model, simply viewed diasporas as dependent on the homeland for providing the condition to participate fully in the economic and political life of the "host land," as well as to retain their "traditions and their *national characteristics*."¹⁰⁵ This is not surprising, because those treaties were meant to be part of an attempt to ensure international peace and security, rather than an attempt at defining comprehensively the diaspora-homeland relationship. They were not even a sustained attempt at defining the nature of minority rights in the context of an international system that put a premium on the state system and the notion of territorial integrity. Interestingly, however, the minority protection guarantees that states had undertaken were viewed as so essential to the stability of the territorial arrangements that those states were required to treat them as fundamental law that could not

The members of a nation or an ethnic group living in a foreign environment constitute . . . an organic community The very fact that they belong to a nation means that the nation in question has a natural and moral right to consider that all its members—even those separated from the mother country by State frontiers—constitute a moral and cultural whole.

LEAGUE OF NATIONS OFFICIAL JOURNAL, SPECIAL SUPPLEMENT 120, at 23 (1933).

104. In some sense one could argue that the interwar treaties did assume a two-way affair to the extent that the existence of a patron state was partly thought to be informed by the active irredentist politics among the diaspora.

105. See *Minority Schools in Albania Opinion*, *supra* note 97, at 11 (emphasis added) (maintaining that an important reason for the minorities protection system "is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics"). The specific issue in this case was the establishment of private schools by Greeks using the Greek language as a medium of instruction.

be derogated by ordinary legislation. Amendments to those commitments were to be made only with the approval of the Council of the League of Nations.

As is well known, the minority-protection regime did not endure, not only because of the collapse of the League system, but also because of the conceptual tension inherent in the arrangement itself. The collapse of the regime of minority treaties occurred under the weight of political as well as conceptual pressures.¹⁰⁶ There was tension between the international community's desire to ensure the consolidation and stability of the established nation-states (we the people of the territorial state), on the one hand, and, on the other hand, the protection of distinct and diasporic communities (which in the view of those nation-states tended to fragment we the people). The ambiguous nature of we the people—we the people of the territorial state and we the people of the kin state—was evident in the minority-treaties system, but it was finally resolved in favor of the nation-state model of we the people.

Even though there are currently no international institutions or processes similar to the interwar treaty regime that are designed to minimize the risk of a kin state intervening on behalf of minorities in another (often neighboring) state, the notion of a kin state viewing itself as a patron and guarantor of the security of a diasporic minority has not entirely disappeared.¹⁰⁷ A good example is Turkey's intervention on behalf of coethnics in Cyprus in 1974.¹⁰⁸ Russia may

106. One needs to point out that another factor for the demise of the minority protection system was the fact that it was selectively applied, mainly in Eastern European countries, and that was viewed as unfair and resented by those who were subject to the policy. Borhan Uddin Khan & Muhammed Mahbubur Rahman, *Protection of Minorities: A South Asian Discourse*, § 2.4 (July 2009), available at http://www.eurac.edu/en/research/institutes/imr/Documents/EURASIA-Net_Del_17_South_Asian_Discourse.pdf (“The system of minority protection also lost much of its legitimacy due to its selective application and its manipulation by Nazi [sic] for its expansionist policies. Consequently, the issue of minority rights, on the whole, was seen as damaging, its potential for abuse more pre-eminent than its constructive faculties.”).

107. The issue of the diaspora being a pretext of state-sponsored irredentism is another concern if the “diaspora,” or the “near-abroad” as it is often referred to, occupies a territory adjacent to a kin state. See Donald L. Horowitz, *Irredentas and Secessions: Adjacent Phenomena, Neglected Connections*, in *IRREDENTISM AND INTERNATIONAL POLITICS* 9, 15–16 (Naomi Chazan ed., 1991) (using the example of the Ogaden region of Ethiopia where Ethiopian Somalis reside and which has often been used by the state of Somalia to pursue a policy of irredentism); see also MANDELBAUM, *THE NEW EUROPEAN DIASPORA: NATIONAL MINORITIES AND CONFLICT IN EASTERN EUROPE*, *supra* note 63, at 19–80 (using the Hungarian minority populations as an example); King & Melvin, *supra* note 83, at 108 (addressing the question of whether “transborder ethnic ties can or may increase the insecurity of states”).

108. See WILLIAM MALLINSON, *CYPRUS: A MODERN HISTORY* 80–83 (2005) (discussing Turkey's plans to intervene in Cyprus). Serbia played such a role in 1991 in

provide another example. Russia (or at least some section of its ruling elite) apparently views itself as a patron and defender of the Russian diaspora residing in the successor states of the former Soviet Union, a group that has been referred to as “a stranded minority.”¹⁰⁹ Indeed, the conflict between Russia and Georgia a few years ago was partly premised on Russia’s presumed desire to protect Russians living in Georgia.¹¹⁰ As China increasingly becomes a global power, it may

conflicts involving countries that came out of the former Yugoslavia, especially Bosnia-Herzegovina.

109. Smith, *supra* note 68, at 501 (“Engagement with the literature on diasporic people, however, suggests that the Russians might be more usefully labeled a ‘stranded minority’ rather than a diaspora.”); *see also id.* at 508 (“Russian statisticians also began to talk about their ‘compatriots abroad’ (*sootchestvenniki*) and to argue that the protection of the rights of such compatriots was now ‘one of the fundamental factors of Russia’s foreign policy.’”). Charles King and Neil Melvin explain:

From winter 1992 through autumn 1993, a gradual consensus arose among Russian policy makers that the Russian state was organically linked to the settler communities and bore responsibility to their well-being, a consensus that was first crystallized in President Boris Yelstin’s decree ‘On the Protection of the Rights and Interests of Russian citizens outside the Russian Federation’ in November 1992.

King & Melvin, *supra* note 83, at 120. It is interesting that the multiple terms that Russian officials use to describe their coethnics in countries of the former Soviet Union shows the rather ambiguous nature of the relationship. They are referred to as “ethnic Russians’ (*russkie*), ‘citizens of Russia’ (*grazhdany Rossiiskoi Federatsii*), ‘inhabitants of Russia’ or ‘cultural Russians’ (*rossiiane*), ‘Russian speakers’ (*russkoiazychne*), ‘compatriots’ (*sootchestvenniki*), and even the oxymoronic ‘ethnic inhabitants of Russia’ (*etnicheskie rossiiiane*.” *See id.* at 122. There are indications that though less assertive and menacing, there are other states which still seek to play some role as the protector kin state and have concluded bilateral treaties to ensure that their diaspora are treated well. *See id.* at 112. Thus, for example, Hungary and Romania have concluded an agreement that obligates the parties to protect the Romanian and Hungarian minorities in the territory of the respective countries. *See Treaty of Understanding, Cooperation, and Good Neighborliness, Hung.-Rom.*, art. 15, Sept. 16, 1996, 36 I.L.M. 340.

110. According to Reuters, Russia’s Foreign Minister Sergei Lavrov claimed at the time that Russia had received reports that villages in South Ossetia, one of the enclaves seeking secession from Georgia and one with a sizable Russian population, were being ethnically cleansed. He was reported as having said: “We are receiving reports that a policy of ethnic cleansing was being conducted in villages in South Ossetia, the number of refugees is climbing, the panic is growing, people are trying to save their lives.” Conor Sweeney, *Russia’s Lavrov: South Ossetia “Ethnic Cleansing Reports,”* REUTERS, (Aug. 8, 2008, 9:16 AM), <http://www.reuters.com/article/2008/08/08/us-georgia-ossetia-lavrov-idUSL87225682008080808>. Russian President Dmitry Medvedev, quoted by the Russian news agency Interfax, said Russians had died because of Georgia’s operations. Russia “will not allow the deaths of our compatriots to go unpunished” and “those guilty will receive due punishment,” he said. “My duty as Russian president is to safeguard the lives and dignity of Russian citizens, wherever they are.” Helen Womack, Tom Parfitt & Ian Black, *Russian Troops and Tanks Pour Into South Ossetia*, GUARDIAN, Aug. 8, 2008, <http://www.guardian.co.uk/world/2008/aug/09/russia.georgia>; *see also Russia Resurgent*, ECONOMIST, Aug. 16, 2008, http://www.economist.com/node/11920701?story_id=11920701 (noting Russia’s

start flexing its muscles in relation to the Chinese diaspora in various southeast Asian countries—such as Malaysia, Indonesia, Thailand and the Philippines—where a sizable Chinese minority lives, often in tension with the “natives.”¹¹¹ The extent to which a kin state, such as China, may view itself as a protector of fellow ethnics in another country will, of course, depend on the extent to which those fellow ethnics are having difficulty integrating into the host state. That is, the positive feeling on the side of the diaspora for ethnic and cultural solidarity with the homeland is often heightened by the negative condition of nonacceptance or unequal treatment of the diaspora on the part of the host land.¹¹² As discussed later in some detail, Israel’s desire to protect the Jewish diaspora goes even further than any country has gone by asserting extraterritorial jurisdiction to criminally sanction anyone who has committed an offense against “the life, body, health, freedom or property of a Jew, as a Jew, or the property of a Jewish institution, because it is such.”¹¹³

To some extent, current international human rights law has taken up the cause of the cultural and national minorities that the interwar treaties attempted to deal with. Nation-states are prohibited from denying those minorities the right to retain and cultivate their culture, heritage, and religious commitments.¹¹⁴ But the protection of minorities under current human rights law is not premised on what a kin state would do were these minorities not protected. Put simply, current human rights law regimes that protect minorities as groups

perfunctory attempt to justify the invasion on the ground that it was defending Russian citizens).

111. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 36 (2003). It is interesting to note that the persecution of Chinese diasporic communities in southeast Asia as well as other places has apparently been viewed historically as an attempt to humiliate China, and consequently the treatment of the diaspora has been “used as a symbolic resource for the continued production of Chinese national identity.” Ogden, *supra* note 83, at 3 (citing William A. Callahan, *Beyond Cosmopolitanism and Nationalism: Diasporic Chinese and Neo-Nationalism in China and Thailand*, 57 INT’L ORG. 481, 493 (2003)). The size of the Chinese minority in southeast Asia varies from a high of about 35 percent in Malaysia down to less than 10 percent in Cambodia and Laos. Of course, Singapore has a Chinese majority (about 75 percent).

112. The requirement in the Baltic states that people of Russian descent learn the local language to be accorded full citizenship was an example of processes that were meant to, or at least had the effect of, making a group unwanted by the host land. See Annelies Lottmann, Note, *No Direction Home: Nationalism and Statelessness in the Baltics*, 43 TEX. INT’L L.J. 503, 507 (2008) (requiring rigorous examinations of nonnative speakers attempting to undergo the naturalization process).

113. Penal Law, 5737-1977, § 13(b)(2) (1977) (Isr.).

114. See, e.g., ICCPR, *supra* note 47, art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”).

are not concerned about the relationship between kin states and diasporic minorities.¹¹⁵

To summarize, although the interwar minority-treaties regime could be said to be one of the earliest attempts by international law to deal with the ambiguous nature of the traveling notion of peoplehood, and even though the notion of the kin state as protector of the interest of coethnics in neighboring countries may currently exist in parts of the globe, the Dependency Model does not fully capture the issues that are raised by the nature of modern day diaspora-homeland relationships. This is so for a number of reasons. First, the Dependency Model embodied in the minority-treaties systems described, and worried about, only one side of the relationship—the kin state's attitude toward coethnics and its actions regarding their welfare. The inquiry never addressed whether coethnics have any stake in the homeland. Indeed, unlike modern diasporas, the diasporas of the “near abroad” never left their land, although the border might have moved. Therefore, the idea of participating in the life of the “former homeland” is not a significant or pressing issue for them.

Second, the issue of who is allowed to define we the people that encompasses the homeland and the diaspora, which has been the point of contention among modern diasporas and many governments of homelands, did not figure into the Dependency Model. The Dependency Model entertained a weak notion of peoplehood, while modern diasporas seek a stronger or thicker version where there is a sharing, or at least an aspiration, of collective agency between the diaspora and the people of the homeland.

115. There is, however, an arrangement that seems to be reminiscent of the process of the interwar period. In 1990 the European Union adopted a declaration setting out the criteria that member states would apply to determine when and whether a new state ought to be recognized. One of those criteria was how a state treated its minorities. The conditions in Europe in the 1990s were similar to those that prevailed immediately after WWI. In the same way that new states were emerging out of the collapse of the Austro-Hungarian Empire, the 1990s saw the collapse of the USSR and Yugoslavia leading to the establishment of many new states with substantial ethnic minorities from bordering states. The same sorts of concerns that led to the interwar treaty system seemed to have led to the adoption of the declarations of state recognition by the European Union and the proliferation of “interstate treaties on good neighborly relations [that] regularly include a provision acknowledging the signatories' reciprocal interests in their cultural diasporas in neighboring states.” King & Melvin, *supra* note 83, at 112. For an example of such a treaty see Treaty of Understanding, Cooperation, and Good Neighborliness, *supra* note 109. Article 15 of the Treaty deals exclusively with the reciprocal duties of the two countries toward each other's ethnic minorities within their boundaries. *Id.* art. 15.

C. *The Constitution of Peoplehood: The Communitarian Model*

As noted in the last subpart, although there are some hints that the Dependency Model may inform policy choices on rare occasions, it currently neither captures the reality of the modern-day relationship between diasporas and homelands nor suggests a normatively defensible theory of peoplehood in light of that relationship. It cannot describe the relationship accurately, for it does not capture the two-way nature of the relationship and the desire of members of the diaspora to actively participate in the economic and political life of the homeland, rather than simply receiving security guarantees. It does not paint a normatively desirable picture because, to the extent that dealing with the relationship between diasporas and homelands is seen as a matter of minimizing interstate conflict, it does not help explain the multiple ways in which communities are constituted, people are imagined, and identities are vindicated. The diaspora-homeland relationship is about how communities form across territorial boundaries in the age of the communication revolution and globalization generally.

The rest of the Article explores both the nature of communities (and peoplehood) that the relationship between diaspora and homeland suggests, and how consistent such communities and peoples are with the demands of democratic legitimacy and just political institutions.

1. The Issue of Community Deferred (Unaddressed)

The relationship between diaspora and homeland can often be mutually supportive and highly beneficial. For the diaspora, the homeland can become a source of cultural and identity reinforcement and sometimes even a guarantor of security.¹¹⁶ For the government of the homeland, the diaspora can often serve as a source of financial support (remittance and investment),¹¹⁷ as well as an important

116. See Shain & Barth, *supra* note 65, at 451.

117. See Okonjo-Iweala & Ratha, *supra* note 72. Diaspora investments take various forms—from direct investment to the purchase of diaspora bond (“a retail saving instrument marketed only to migrants”). *Id.* Many countries, many in the developing world, have used the selling of bonds to their diaspora as a means of raising needed capital to finance projects within the homeland. The bonds could be sold in as small a denomination as \$100, thus allowing many members of the diaspora to participate. They can be sold “globally to diaspora groups through national and international banks and money transfer companies. They can be marketed through churches, community groups, ethnic newspapers, stores, and business associations in places where migrants live in large numbers.” *Id.* The concept of diaspora bonds is not new, although it did not get wide use until recently. Israel has used it since 1951 to get support for developmental projects from the Jewish diaspora, mainly in the United States and Canada. India has utilized the system since 1991 to great effect. See

lobbying group within host lands in support of the homeland (in terms of foreign aid and other general foreign policy issues).¹¹⁸ As long as the diaspora plays a supporting role, it remains useful and congenial to the government and authorities of the homeland. The issue of who is a legitimate member of the political community (the homeland) need not be (and is not) addressed. Each group is left to understand its relationship with the other in its own way.

To be sure, the relationship is not left entirely unaddressed. Some countries grant dual or plural citizenship to members of their diaspora,¹¹⁹ but there is no general expectation or requirement that they do so in relation to all members.¹²⁰ Put simply, to be part of we the people, it is not sufficient that one claims to be or is a member of the diaspora. One has to be admitted through the traditional ritual of citizenship or residency. Some countries, such as India and Ethiopia, have accorded their diasporas (selectively in the case of Ethiopia) a status that gives them better access than other foreigners to opportunities in the economic life of the country (to invest).¹²¹ This

Chander, *supra* note 28, at 1013. Other countries, such as Ethiopia, have issued diaspora bonds but with little success “in mobilizing funds.” See Okonjo-Iweala & Ratha, *supra* note 72. There are a number of reasons for the lack of success of these bonds—from perception of high political risk and economic uncertainty to limited marketing and publicity to diaspora opposition to the government to power. These certainly seem to have been the factors that diminished the chance of success in relation to Ethiopian bonds.

118. Sometimes, the homeland may use the diaspora to undermine the government of the host land.

119. See Nicholas Wood, *Croatia's Prime Minister Looks for Votes from Croats Living in Bosnia*, N.Y. TIMES, Nov. 24, 2007, at A6 (“An estimated 300,000 ethnic Croats live here, and anyone claiming Croatian ethnicity is allowed to vote.”). For a number of other countries that afford dual nationality see Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 380 (1996) (discussing the changing attitudes of various countries to allow for dual citizenship); see also ALEINIKOFF, *supra* note 19, at 28 (“The rising incidence of dual citizenship is also due to the growing number of countries that have altered their laws to permit their citizens to retain nationality despite naturalization elsewhere.”); Chander, *supra* note 4, at 69 (stating that over the past ten years the Philippines, Mexico, and India have all begun offering a form of dual citizenship); Sejersen, *supra* note 50, at 534 (“[F]rom a limited number of countries in the 1950s, currently almost half of the 115 countries analyzed here allow dual citizenship.”).

120. The one exception is the Israeli Law of Return. See Law of Return, 5710–1950, 4 LSI 114 (1950) (Isr.) (“An oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel.”). International law of course leaves the issue of citizenship (its acquisition and its maintenance) to states' discretion, but it seems to disfavor the practice of dual citizenship. Thus, the preamble to the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws holds: “it is in the interest of the international community to secure that all members should recognize that every person should have a nationality and should have one nationality only.” Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, pmbl., Apr. 12, 1930, 179 L.N.T.S. 89.

121. See, e.g., Chander, *supra* note 4, at 72.

extension of opportunities does not, however, deal with the question of whether members of the diaspora are part of we the people of the homeland, such that it is not for the government to “give or deny” that right of membership. The grant of the favorable permits to members of the diaspora is based not on any sense of members of the diaspora being part of the political community, but rather because diasporas are thought to be more likely than other outsiders to be interested in investing in the country.¹²² Therefore, special permits act as incentives and encouragements to those adjudged likely to invest in the country. Of course, the assumption that diasporas are more likely to invest than other foreigners contains its own implicit judgment about the closeness of the relationship between diaspora and homeland.

2. The Issue of Community Joined: When Relationships Sour

The relationships between diasporas and the government of the homeland can also be one of mutual suspicion and antagonism. Two factors inform this suspicion and antagonism: the differing images of the homeland each carries and the level of involvement by members of the diaspora in homeland affairs considered proper or tolerable. The divisions are, therefore, often over whose vision (image) of homeland will prevail.

In the Ethiopian context, for example, there has been serious division between members of the diaspora and the government in power about the proper vision for the country.¹²³ Is the country well-

In 1999, India introduced the possibility of being a card-carrying member of its diaspora. Upon the payment of a fee, anyone who was formerly an Indian citizen or who was the child, grandchild, or great-grandchild of Indian citizens, can become a “Person of Indian Origin” (PIO). According to the Indian government, “besides making their journey back to their roots simpler, easier, and smoother, this Scheme entitles, the PIOs to a wide range of economic, financial, educational and cultural benefits.”

Id.

122. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 36 (2006) (“In embracing nationals abroad, at least symbolically and rhetorically, emigration states anticipate that emigrants will invest at home economically.”). Similar processes exist in relation to Ethiopia.

123. There are numerous Ethiopian diaspora organizations both in the United States and other developed countries (mainly in Western Europe, Canada, and Australia) that challenge the democratic credential as well as specific policies of the current government. Many of these groups have essentially taken the role of opposition parties in a context where the role of opposition (both political and civic) within the country is highly controlled. The relationship between the Ukrainian government of Leonid Kravchuk and the Ukrainian diaspora turned sour during the 1990s after Ukraine’s independence because the diaspora had such a different image of the course the country should follow from that of the government that it (especially the western diaspora) was viewed as a “threat to the interests of local politicians and entrenched

served by ethnic federalism? Should part of the country (Eritrea) have been allowed to secede without the entire population of the country being given the chance to express its view on the matter? Was the government acting in the interest of the country when it accepted the landlocked status of the country, without even a semblance of involving the people in the discussion and decision? While the Ethiopian diaspora charges that decisions such as these cast doubt on the commitment of the government to advance the welfare of the nation, the government argues that the resistance of the diaspora to these policies is based, among other things, on a romanticized and often very dated and erroneous image of the country. On this account, the diaspora is viewed as unwisely clinging to an image of a homeland that never was (or perhaps never should have been). These very questions—whether changes have benefitted the homeland and who has the authority to effect those changes—cause the divisions among diasporas and homeland governments. Interestingly, often the diaspora's challenge to the homeland's government on the question of which direction the country should take is premised on the notion that the diaspora does in fact represent the wishes and preferences of the citizens of the country, which are not fully (if at all) represented by the government in power.

In some circumstances the decision of the government of the homeland may affect the diaspora much more directly. Thus, for example, if the Armenian government were to conclude a bilateral agreement with Turkey on the condition that the Armenian government accept the proposition that no genocide was committed by the Ottoman Empire, that will affect not only Armenians within Armenia but the Armenian diaspora as well. For the Armenian diaspora, the central defining features of Armenian history are the 1915 massacre, regarded by them and many others as a genocide, and the forced deportations, both of which they believe were orchestrated by the Turks.¹²⁴ In this sense, the question of who is getting involved

economic elites," and President Kravchuk threatened to "expel diaspora returnees who were critical of the government." King & Melvin, *supra* note 83, at 124. During the Soviet years, the Ukrainian diaspora was a powerful lobby on behalf of Ukraine and Ukraine's independence.

124. See SHAIN, *supra* note 10, at 120 ("To the extent that an Armenian rapprochement with Turkey requires deemphasizing the genocide issue, for example, it threatens the identity of diaspora Armenians."); see also Shain & Barth, *supra* note 65, at 466–73 ("While the genocide was the most central issue to the diaspora's identity and its organizational agenda, it was less important to the homeland community [i.e. the Armenian state], which for the most part had escaped the trauma."). Thus, when President Ter-Petrosian of the Armenian Republic advocated opening up to Turkey and establishing "normal" relations, that policy became highly controversial among the diaspora who viewed it as downplaying the significance of the genocide. *Id.* at 469. Indeed, Ter-Petrosian

in whose affairs becomes a lot more complicated. One can argue that to the extent the government of the homeland is attempting to write or rewrite the history of the entire community, it is not simply diasporic involvement that is at issue, but also the involvement of the homeland government in diasporic affairs. Here, the diaspora's interest does not depend on whether it reflects the interest of citizens within the homeland. The diaspora has an independent interest that it wishes to protect from the government's action.¹²⁵ The diaspora has an independent stake.

To summarize, suspicion and conflict between the homeland government and the diaspora occur over the image each has of both the historical and the current homeland. Each may view the other as insufficiently loyal to the homeland and its history, and each may seek to vindicate and protect that image through various policies. Those strategies may, and often do, come into conflict. Of course, there are conflicts about the future and identity of the homeland even among those within the homeland. But two factors distinguish those controversies from controversies between the diaspora and the authorities of the homeland. First, the government treats opposition within the homeland as a legitimate voice that needs to be taken into account and responded to (at least in minimally democratic states). However, it does not view the complaints of members of the diaspora in the same way it views complaints by those residing within the homeland—as complaints of the people. Second, formal institutional mechanisms exist to resolve, or at least manage, disputes among the members of the territorial political community about the future and identity of the homeland. No similar institutions have been

lost standing among diasporic sympathizers for underestimating the risk of another genocide without fundamental changes in the policies of Turkey and Azerbaijan. In the face of these domestic, international, and intrakin failures, Ter-Petrossian was ultimately forced to resign in 1998. By many accounts, the diaspora was highly instrumental in his removal.

See SHAIN, *supra* note 10, at 148.

125. A report about a proposed law by the Israeli Knesset a few years ago (which passed first reading) according to which "conversions performed in Israel would be recognized only if performed by Orthodox rabbis," is another example. See Chaim Gans, *National Self-Determination: A Sub- and Inter-Statist Conception*, 13 CAN. J.L. & JURIS. 185, 195 (2000). Gans notes:

Since many Jews living outside Israel do not adhere to the Orthodox version of the Jewish religion, this particular Knesset decision offended many Jews who are not Israeli citizens and who can't participate in this debate or any other decisions of this sort. If the issue were only related to Jewish life within Israel, and to issues of identity resulting from the special status of homeland in national identities, Jews living outside Israel might have had no case for complaining. However, the decision in question is not of this type.

Id.

established to entertain, evaluate, and resolve the differences between the diaspora and the homeland's government. Neither international legal principles nor national institutional structures exist to deal with those disputes and differences.

As diasporas seek to play a more direct and prominent role in the political processes of their homelands, and as the communication revolution makes it easier for that to happen, the tension between diasporas and authorities of the homelands will continue to intensify, especially when their visions for the homeland collide. As a RAND study shows, in the post-Cold War era, governmental support of insurgencies has declined sharply, and diasporas have become a major source of that support.¹²⁶ The questions of who we the people are, who should legitimately establish and modify (or alter) "our" government and our institutions, and who should define the identity of the homeland are squarely joined. The boundaries demarcating membership, belonging, and exclusion become highly contested.¹²⁷ For what purpose is the diaspora included, and for what purpose is it not? For what purpose is the diaspora part of "us," the homeland, and for what purpose is it "them," the foreigner, the outsider? Put simply, what is the appropriate relationship between the diaspora and the political community called homeland? That is, what relationship is consistent with a version of democratic process where we the people originate the rules and institutions under which they live and through which they express and project themselves to the outside world. At bottom, the dividing issue becomes who has the ability to define the political community called homeland and to write its formal history in the public arena.

3. The Contest to Define We the People

As noted earlier, the contest between diasporas and governments of homelands focuses on how communities are to be constituted and how the notion of we the people is to be understood.

126. See DANIEL BYMAN ET AL., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENT 41 (2001) ("Diasporas—immigrant communities established in other countries—frequently support insurgencies in their homelands."). A good example is the Haitian diaspora, which, as one observer put it, has played a central role "in engineering coups d'état—with the help of one or more foreign governments." Laguerre, *supra* note 55, at 207; see also Walt Bogdanich & Jenny Nordberg, *Mixed U.S. Signals Helped Tilt Haiti Toward Chaos*, N.Y. TIMES, Jan. 29, 2006, at A1 (discussing the relationship between Washington officials and the Haitian coup).

127. BRAH, *supra* note 59, at 208–09. Avtar Brah defines "diasporic space" as "the point at which boundaries of inclusion and exclusion, of belonging and otherness, of 'us' and 'them', are contested." *Id.*

a. The Nation-State Model of Community: Whose Self-Determination?

Governments of homelands that are targeted by diasporas often assert that, for all practical purposes, diasporas are foreigners and their attempt to involve themselves in the political and economic life of the country without the permission of the legitimate government and at variance with its policies and objectives is an impermissible interference, both as a matter of international law and according to principles of democracy. The legal principle of self-determination of peoples captures both the idea of international rule of law and the principle of democracy.¹²⁸ Self-determination is about self-government, and self-government is a reality only to the extent that people originate the rules and institutions that will govern their lives.¹²⁹ Democracy conceives of an identity between the ruled and the originators of the rules. As Jürgen Habermas argues, in a democratic state “citizens are autonomous only if the addressees of the law can also see themselves as its authors.”¹³⁰ Of course, only a

128. The notion of self-determination of peoples is listed as one of the primary purposes of the United Nations. See U.N. Charter art. 1 (stating that one of the “[p]urposes of the United Nations” is “respect for the principle of equal rights and self-determination of peoples”); see also Declaration on Principles of International Law Concerning Friendly Relations and World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 2, UN Doc. A/CONF.157/23 (July 12, 1993) [hereinafter Declaration on Principles of International Law]; Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, A/8028, at 124 (Oct. 24, 1970) (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, A/4684, at 66–67, ¶ 2 (Dec. 14, 1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”). The Declaration on Principles of International Law declared that the right of self-determination

shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people.

Declaration on Principles of International Law, *supra*.

129. See BRUNKHORST, *supra* note 23, at 68–77 (proclaiming that legitimate modern democracy requires legal obligations to be self-imposed rather than externally dictated such that the people represent themselves and are not being represented by a ruler).

130. JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 215 (Ciaran Cronin & Pablo de Greiff eds., 1998); see also BENHABIB, *supra* note 14, at 217 (“[T]hose who are subject to the law should also be its authors.”); JAMES BOHMAN, *DEMOCRACY ACROSS BORDERS: FROM DÉMOS TO DÉMOI* 29 (2007). A

few of the addressees will be the literal authors of the law, but the idea is that the literal authors receive their general instruction from all addressees and remain accountable to them in regard to the rules adopted.

Given that diasporas live outside the territorial jurisdiction of the homeland, the argument goes, their involvement in the political and economic life of the homeland without the permission of the duly constituted government of the homeland is a clear violation of the internationally recognized principle of self-determination. For the notion of community that puts a premium on territory and citizenship, the "we" who constitutes the legitimate originators of the laws and institutions of the political community does not include former members of the political community who have left the territory, either voluntarily or otherwise, to make a life for themselves elsewhere. Decampers cannot (and should not) be allowed to exercise direct influence over the nature of the political community they "elected" to abandon or refused to rejoin (or join for the first time). According to this view, not only are diasporas physically absent from the spheres of deliberation, but, in most circumstances, they also have dual loyalty: loyalty to homeland and loyalty to host land.

To recap, the statist challenge to the "uninvited" involvement of the diaspora in the life of the political community is informed by the proposition that self-determination would be compromised to the extent that those outside the territorial entity could affect policies and institutions that only bind citizens and residents of the territorial unit. A process that allows those outside the territorial unit to play a role in determining policies and establishing institutions for others, without any serious risk to themselves were these choices to turn out to be wrong or suboptimal, is one that is likely to lead to decisions that are not well considered. In addition, there is the risk that most members of the diaspora do not have much appreciation of the condition of the homeland and the daily lives of their compatriots. Many may have lived for a considerable length of time in other countries and cultures, and the image they hold of the homeland may not be congruent with the current reality of life. Under those circumstances, they would likely base decisions and interventions on erroneous assumptions.

legitimate order is one that is a "self-legislation *demos*, of citizens ruling and being ruled in return . . . consisting of all those and *only* those who are full citizens and thus *both* authors *and* subjects of the law." *Id.*

b. Responses to the Nation-State Model of Democracy and Community

Those who consider members of the diaspora to be a legitimate part of we the people of the homeland are likely to respond to the statist challenge in various ways. Contrary to the argument that intervention uninvited by, or against the wishes of, the government of the homeland is inconsistent with the idea of self-determination; the truth is that often it is when there is a lack of internal self-determination that diasporas assume the role of the opposition. For example, in the case of Ethiopia, it is in the context of the suppression of dissent and the imprisonment of opposition leaders that members of the diaspora have actively challenged successive governments of the homeland. In this sense, diasporas provide voices for the voiceless and perhaps contribute to the conditions for the emergence of a genuine process of self-determination. The conversations that are not allowed to go on in the country about the conditions of the country and about alternatives can be aired and discussed largely due to the energetic involvement of the diaspora. In relation to many developing countries that are ruled by brutal dictators and are not of any strategic interest to the big powers (or if those dictators are seen to be useful strategic allies), the voice of members of the diaspora is the only voice of challenge to those dictatorships—both in terms of articulating the hopes and concerns of people in the homeland and lobbying governments of the host land to put pressure on the government of the homeland. In any case, many of the members of those diasporas left their homeland because they were victims of that lack of internal self-determination.

The argument that genuine deliberations could only be conducted within a territorial unit is also open to challenge.¹³¹ In an age of instant and worldwide communication, deliberation can take place even among people separated by oceans and territorial borders. In any case, even in relation to deliberation within territorial units, the mass media mediate a great deal of public deliberation. Communities of communication can be constituted across national boundaries, as they can be within territorial boundaries. Indeed, in many cases, the active intervention of diasporas might help communities of communication develop within the homeland itself.

131. David Martin makes the argument that restricting voting of dual nationals only in the country in which they reside will promote "mature deliberation and seriousness about the vote, because the voter will have to live with the consequences in the most direct way." David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 *GEO. IMMIGR. L.J.* 1, 26 (2000).

There is some merit to the argument that members of the diaspora are far removed from the daily life of residents of the homeland. Many members may have lived outside of the homeland for so long that the image of the homeland they hold, and on the basis of which they make decisions, tends to be incongruent with current conditions. The power of that argument, however, is somewhat blunted by the fact that instant and constant communications have made it easier for people across national boundaries to learn about conditions in other political units. In fact, in some circumstances the diaspora may have more accurate information about conditions in the homeland than residents, for governments of many of the countries in relation to which the diasporas are actively opposed tend to control the means of communication and discourage the dissemination of diverse information.¹³²

Perhaps the statist's strongest argument is that the democratic principle of identitary self-legislation¹³³ will have been violated, to the extent the rules and institutions advocated by diasporas will end up applying to others (residents of the territorial community) and not to members of the diaspora themselves. It is true that members of the diaspora live in other countries and are subject to the laws and institutions of those countries. Their interventions in homeland affairs could thus be said to be immune from the costs those interventions might entail.¹³⁴ But it can be argued that the rules, policies, and regulations that are intended to apply to the homeland are not entirely without effect on the diaspora. To begin with, some members of diasporas still retain their citizenship—perhaps the most

132. The Ethiopian government, which has closed access to many websites because they were viewed as challenges to the power of the regime, is a good example of the value of diasporic involvement for the purpose of broadening the sources of information for an effective deliberative process. The argument that emphasizes the need for physical presence in the territory as an important condition of genuine deliberation is undermined to the extent that governments allow their citizens that reside abroad, either on a temporary basis or on a more permanent assignment, to participate in the election process (as some do).

133. For the proposition that democracy entails an identity between the ruled and the originators of the rules, see BRUNKHORST, *supra* note 23, at 74 ("Minimizing domination through a 'rule by the ruled' that supersedes domination is the highest constitutional task in democracy."). See also JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 458 (William Rehg trans., MIT Press 1996) ("[T]he only regulations and ways of acting that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses."); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 67 (James Bohman & William Rehg eds., 1997) (defining deliberative democracy as "an association whose affairs are governed by the public deliberation of its members").

134. See Michael Ignatieff, *Immigration: The Hate Stops Here*, *GLOBE AND MAIL*, Oct. 25, 2001, at A17 ("Diaspora nationalism is a dangerous phenomenon because it is easier to hate from a distance: You don't have to live with the consequences—or the reprisals.").

visible indication of wishing to retain ties with the homeland.¹³⁵ In some cases, members of diasporas may have dual citizenship.¹³⁶ In addition, members of the diasporas accept the risks of investing in their former homeland not simply (or even primarily) because they think that these investments will lead to good returns, but because they are committed to the development of their homeland. Financial contributions and investments, whether direct investment or the purchasing of diaspora bonds,¹³⁷ are partly (perhaps primarily) about protecting and strengthening the identity of the homeland. It follows then that diasporas have a stake in the rules and regulations that are developed and adopted.

Also, to the extent that many diasporas define their identities through the cultural and historical life of the homeland, actions that affect that history and culture also affect members of the diaspora. The cultures, traditions, and histories of the homeland sustain not only those inside the homeland but also those in the diaspora. Thus, for example, a policy of the Israeli government may have consequences not only for Israelis but also for the Jewish diaspora.¹³⁸ A treaty between the Armenian government and the government of Turkey that included a provision denying genocide against Armenians clearly has an impact not only on citizens of Armenia but on the Armenian diaspora as well, to the extent that their history and self-understanding were officially altered by a government that appears to speak on behalf of all Armenians. There are numerous, though perhaps less stark, examples of a decision of the homeland that has an impact on the identity of members of the diaspora. Thus, for example, a decision of the Ethiopian government to divide the

135. And most countries extend the voting franchise broadly to citizens living abroad. See Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 211 (2006) ("Although many states restrict the franchise of nonresidents, the clear trend is towards allowing and facilitating greater electoral participation by external citizens."). Spiro has recently argued that dual citizenship should be considered a human right. See generally Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111 (2010).

136. See, e.g., Sejersen, *supra* note 50, at 530 (discussing the evolving global attitude toward allowing for dual citizenship); Wood, *supra* note 119, at A6 ("An estimated 300,000 ethnic Croats live here, and anyone claiming Croatian ethnicity is allowed to vote.").

137. See Chander, *supra* note 28, at 1060. The "patriotic" discount (a higher than market price) at which these bonds are sold to the diaspora and the diaspora's willingness to pay supports the hypothesis that the investment is primarily driven by loyalty to the homeland and the desire to help it than by sound investment. For the homeland the offer of these bonds at a lower than market interest rate (which is essentially a charity) saves them from asking an outright charity from the diaspora, which might be regarded as politically demeaning. And it is also the case that diaspora bonds, rather than outright charity, will have a favorable impact on a country's sovereign credit rating. See *id.* at 1067–69.

138. See, e.g., Law of Return, 5710–1950, 4 LSI 114 (1950) (Isr.) (granting citizenship to all members of the diaspora that desire to reside in Israel).

country into two nations—Ethiopia and Eritrea—drastically altered how some members of the diaspora saw themselves and their very identities. One was no longer an Ethiopian but an Eritrean, even if his or her kin lived just across the border. If one resided in the part that was denominated as Ethiopia, one was not to see Eritrea as being part of one's history and heritage. The same thing could be said about the effect of the government's strategy of organizing Ethiopia into ethnic states. Even more relevantly, some members of the current government waged a huge campaign for the first few years of their reign, both within and outside the country, to disparage Ethiopia's history.¹³⁹

To recap, the democratic theory of the rules of the ruled does not entirely undermine the claim by members of the diaspora to a right to participate in the economic and political life of the homeland. After all, as argued earlier, they too are likely to be affected by the rules and institutions that emerge within the political community. They too are often addressees of those rules and regulations, and consequently, they too belong to we the people. It may also be useful to point out that members of the diaspora contribute a great deal to the economic life of many poor developing countries through remittances. Those governments' economic policies are likely to have some impact on members of their diaspora.

Even if the claim that only citizens are the legitimate originators of the rules and institutions of the political community is consistent with some version of democratic theory, it certainly will be at odds with the reality of cross-border participation that has become a feature of social and political life in this globalized world. Because of the communication revolution, diasporas will remain part of the political dialogue about the homeland, and they will do so with increasing ease and greater impact. To disregard this would be to live in a fantasyland. The issue is not whether members of the diaspora should be allowed to participate in the political, economic, and social life of the homeland. They will. Rather, the question is what are the best conceptual and institutional ways of understanding and facilitating this participation?

139. At national and international meetings, high-ranking officials made it a point to remind audiences that Ethiopia was not older than a hundred years, even though historians have shown that the history of the country extends for thousands of years and that history has defined the identity of the nation and its citizens. For the history of the country, see HAGGAI ERLICH, *ETHIOPIA AND THE MIDDLE EAST* 3 (1994) ("[T]he kingdom of Aksum, the first stage of today's Ethiopia, emerged in the first century A.D."). See also DONALD N. LEVINE, *GREATER ETHIOPIA: THE EVOLUTION OF A MULTIETHNIC SOCIETY* 33-36 (1974).

VI. A THEORY OF PEOPLEHOOD IN THE AGE OF GLOBALIZATION:
AN INCLUSIVE COMMUNITY OF THE
AFFECTED (STAKEHOLDERS)

Three factors determine whether there is a people in the era of global communication. The first factor is whether common narratives of origin and fate tie together those who consider themselves part of the people.¹⁴⁰ Physical territory does not exhaust the boundaries of a community, as William Connolly explained.¹⁴¹ Second, members of a people subject themselves to the same or similar consequences of institutional action as other members. That is, a community is defined not only in terms of the narratives that members share but also in terms of the common institutions they inhabit—political, religious, or cultural. And members open themselves up to the effects of institutional decisions, whether good or bad. To put it differently, members feel *special* and *personal* links (responsibilities) to one another through the institutions they inhabit or share.¹⁴² The first

140. A people is a “social fact of common sentiments, shared language, culture, and religion that lead individuals to form bonds of solidarity.” Applbaum, *supra* note 53, at 374. This is what Applbaum calls anthropological sense of peoplehood. *See id.*; *see also* WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 319–20 (2001) (“People belong to the same community of fate if they *care* about each other’s fate, and want to share each other’s fate—that is, want to meet certain challenges together, so as to share each other’s blessings and burdens.”).

141. *See* WILLIAM E. CONNOLLY, THE ETHOS OF PLURALIZATION 163 (1995) (discussing how “points of affinity among citizens residing in different states establish new possibilities for political movements exceeding the boundaries of any particular state”). Territory may be the beginning but not the entire definer of a people. Rainer Bauböck is correct when he notes that:

A nation may need a territory, where its culture and tradition is sustained by state institutions, in order to survive as a distinct community Yet, once such a homeland has been established as an independent state, the nation can reach beyond its borders and include individuals who are seen to belong to it by virtue of their ethnic descent or cultural affiliations.

Bauböck, *supra* note 22, at 2414. So, when I note that territory does not exhaust the boundaries of community, I simply mean to suggest that distinct public culture rather than physical territory distinguishes a people from one another in the way I define people. For a similar understanding of communities, see DAVID MILLER, ON NATIONALITY 27 (1995) (defining community by “[{(1)}] shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture”).

142. Ronald Dworkin uses a similar but not exact description in the account he gives of what constitutes a community. *See* RONALD DWORKIN, LAW’S EMPIRE 199 (1986); *see also* Adeno Addis, *Authority and Community*, 18 ASIA PAC. L. REV. 63, 63–72 (2010) (discussing how members of a community will regard the obligations which exist within the group as distinctive to that group).

and second factors could collectively be referred to as the “affectivity” criterion.¹⁴³

Third, legitimacy in the twenty-first century requires that the people are the originators of the rules and institutions that regulate their lives and activities. Hauke Brunkhorst calls this “identitary self-legislation.”¹⁴⁴ The rules are the rules of the ruled. This assumes a “community of equals,” to borrow a phrase.¹⁴⁵ While the first factor is anthropological, the last two are normative to the extent that they concern the capacity of a people for shared agency—either directly or through established institutions.

The above three factors interconnect. The narratives of origin and fate can only be fully disseminated and understood within common institutions (at least imagined common institutions), and the idea of identitary self-legislation assumes that the people act as a corporate (group) agent¹⁴⁶ to originate rules through common institutions. That is, shared agency assumes shared institutions.

Loosening the tight link between territory and community and thinking of communities as capable of being constituted across physical boundaries also indicates that, contrary to the notion of an all-purpose community and peoplehood that physical boundaries have often suggested, communities and peoples are capable of being defined differently for different purposes.¹⁴⁷ However, to deterritorialize the notion of community is not to collapse it to the rather extravagant claim of an all-inclusive international community

143. See List & Koenig-Archibugi, *supra* note 37, at 81 (stating that the affectivity criterion may be “defined by underlying cultural commonalities and a shared identity, at least with regards to the given issues”).

144. BRUNKHORST, *supra* note 23, at 140; see also HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 133, at 458 (“[T]he only regulations and ways of acting that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses.”).

145. See FISS, *supra* note 19. Ronald Dworkin makes a similar point when he argues that one of the factors that constitute a community is that members believe that the group’s practices embody an *equal concern* for all the members of the group. For Dworkin, therefore, a community is “conceptually egalitarian.” DWORKIN, LAW’S EMPIRE, *supra* note 142, at 200. The “roles and rules are equally in the interests of all, that no one’s life is more important than anyone else’s.” *Id.* at 200–01.

146. By “corporate (group) agent” I mean what Christian List and Mathias Koenig-Archibugi meant when they define “group agent” as “a collection of individuals that meets the conditions of agency, that is, roughly speaking, it has attitudes on the issues it faces and acts so as to pursue those attitudes [i.e. beliefs and preferences].” List & Koenig-Archibugi, *supra* note 37, at 91.

147. Here I am making a point analogous to that Ian Shapiro made when he remarked that the notion of affected interests requires that we define “the demos decision by decision rather than people by people.” IAN SHAPIRO, THE MORAL FOUNDATIONS OF POLITICS 222 (2003). We may not agree with Shapiro that every decision defines the demos, but his general point that stakeholding is an important way of defining the demos is eminently reasonable.

(global peoplehood) that some cosmopolitans regard as the only natural alternative to territorial communities.¹⁴⁸

A. *The Diaspora and a Common Narrative of Origin and Fate*

By now it should be clear that the relationships between diasporas and homelands are defined by narratives of origin and fate—backward and forward-looking. The boundary that ties together diasporas and homelands is not a physical boundary, but rather narratives of origin and common fate. One can easily see the origin aspect of the narrative. Diasporas link their histories to the land and people of the homeland. But the relationship is also defined by a common fate (forward-looking), one that is partly cultivated by the actions of governments of the homelands, as well as the actions of diasporas themselves. The narrative of fate distinguishes between the relationship of modern diasporas and homelands, on the one hand, and the relationship that existed between diasporas and homelands of earlier periods. While the narrative of origin is common to both periods, the idea of common fate is distinctly (or largely) a product of the modern world of instant and effective communication. One only needs to browse the various websites linking diasporas and homelands—allowing them not only to exchange information about the homeland but also to learn about one another. The ease with which diasporas and people in their respective homelands can communicate and continually constitute and reconstitute the nature of their relationships has allowed them to define and affirm a common fate that would not have been possible in an earlier period. This collective imagining of the past, present, and future, which has been made significantly easier by the modern media, is what Benedict Anderson, in another context, suggests results in “imagined communities.”¹⁴⁹ Understood this way, imagined communities are neither false nor true. Communities are not distinguished by their genuineness or falsity but rather by the manner in which they are imagined.¹⁵⁰

148. For an account of varying aspects of cosmopolitanism, see Held, *supra* note 6 (summarizing cosmopolitan values in terms of a set of universally shared principals); William E. Scheuerman, “*The Center Cannot Hold*”: A Response to Benedict Kingsbury, in MORAL UNIVERSALISM AND PLURALISM 205, 207 (Henry S. Richardson & Melissa S. Williams eds., 2009) (arguing “[c]osmopolitans offer a no-less one sided *universalistic* approach” of international order than one-sided pluralist account of the realists “since they devalue the fact of pluralism and exaggerate the extent to which shared agreement on deeply controversial issues is possible at the international level”).

149. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 1991) (giving the title *Imagined Communities* to a book on the origin and spread of nationalism).

150. See *id.* at 6 (“Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.”).

B. *The Diaspora and Institutions of the Homeland*

Peoplehood is also partly shaped by members inhabiting common institutions. Oftentimes, narratives of origin and fate are possible primarily because members share common institutions that make the production and narration of those stories possible and meaningful. Those institutions could be religious and cultural (as in ethno-cultural peoplehood) or economic and political (as in political peoplehood). In regard to the relationship between diasporas and homelands, members often share both sets of institutions. Even in relation to political institutions, which are often assumed to have territorially limited authority and application, in the age of globalization, those institutions are reaching to diasporas as easily as diasporas are reaching back to them. Take political parties as an example. Many members of diasporas are active in or organizers of political parties established either within or outside the territorial limits of the homeland. Indeed, many members hold leadership positions in those political parties. In relation to political participation, diasporas play increasingly active roles. Members of diasporas also participate, at various levels of governance, in many of the economic institutions of their homelands. And those institutions' decisions often have significant and widespread effect on members of the diaspora.

C. *Diasporic Participation and the Issue of Democracy Deficit*

As a normative matter, a people is also defined by its capacity for agency and self-determination in the same way that an individual is defined as a full human being by the capacity for independence and agency.¹⁵¹ Self-determination has two aspects: external and internal.¹⁵² External self-determination refers to the principle that it is impermissible for outsiders (nonmembers) to dictate how a particular people ought to arrange its affairs.¹⁵³ External self-

151. This is not to say that, as an empirical matter, a people cannot be an object of limitation, degradation, or oppression. The fact that a people is subject to conditions of slavery does not erase the fact that there is a people. And it may be that there are also circumstances where a people can be forced to be free (what appears to be contrary to the idea of free agency). See Applbaum, *supra* note 53, at 367–71 (discussing whether it is possible to force a people to be free).

152. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 52, 101 (1995) (discussing self-determination as “an expression of popular will” and how “[i]nternal self-determination means the right to authentic self-government”); see also David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 3 (2002) (“The doctrine of sovereignty developed in two distinct dimensions: the first concerned with the ‘internal,’ the second with the ‘external’ aspects of sovereignty.”).

153. Actually, external self-determination itself has two dimensions to it. First, it is viewed as synonymous with the right to statehood. A people is said to have had the

determination provides that a people and its boundaries (however the boundaries are defined) are immune from coercive interference by outsiders.¹⁵⁴ The function of external self-determination in relation to communities and peoples is similar to the function of rights in Ronald Dworkin's legal theory: they are trump cards. They play a negative or restraining role.¹⁵⁵

Since the mid-twentieth century, legal scholars and international legal actors have promoted internal self-determination as an

right to self-determination to the extent that it has a right to a state of its own. The second version holds that outsiders must not interfere with the way that people choose to run their state. For a legal account of external self-determination, see generally HANNUM, *supra* note 90 (using case studies and contemporary international legal norms to analyze minority rights and the concept of self-determination); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993) (discussing self-determination in a post-colonial era). For an exploration of the concept of external self-determination from a political-philosophy focus, see MILLER, *supra* note 141, at 81–118 (discussing national self-determination); JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 110–30 (1994) (addressing the moral justifications for national self-determination); Daniel Philpott, *In Defense of Self-Determination*, 105 *ETHICS* 352, 355–58 (1995) (discussing self-determination and its relation to liberal democracy).

154. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 245 (2d ed. 1947) (stating that outsiders must leave it “to every populus” to define their form of democracy for themselves). I must hasten to add that to say that the notion of self-determination prohibits coercive interference from the outside, and that it implies the existence of full agency is not to suggest that the exercise of self-determination therefore occurs (or is even possible) in an isolated environment where the self-determining entity acts within its border in any manner it wishes, oblivious of the interests and concerns of others (outsiders) with whom it is connected in some way. Craig Scott is correct when he argues that

self-determination is not a right for peoples to determine their status without consideration of the rights of other peoples with whom they are presently connected and with whom they will continue to be connected in the future. For we must realize that peoples, no less than individuals, exist and thrive only in a dialogue with each other. Self-determination necessarily involves engagement with and responsibility to others . . . We need to begin to think of self-determination in terms of peoples existing in relationship with each other.

Craig Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, 18 *HUM. RTS. Q.* 814, 819 (1996). Rather, by the notion of external self-determination, I mean to simply make coercive interference impermissible. Or to put it differently, I mean to start with the presumption that the entity has the right to establish its institutions and make its own decisions without interference from outsiders. But if the entity makes a decision that affects outsiders adversely, then self-determination does not preclude others from making claims that need to be dealt with or adjudicated on. For a relational notion of self-determination, see IRIS MARION YOUNG, *GLOBAL CHALLENGES: WAR, SELF-DETERMINATION AND RESPONSIBILITY FOR JUSTICE* 49–53 (2007) (discussing “the self-determination of peoples in the context of relationships”).

155. See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 152, 153–67 (Jeremy Waldron ed. 1984) (“If someone has a right . . . this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did.”).

important international principle as well. The principle of internal political self-determination views a people as a community of equals that is defined by two important elements. First, each member of the community has a roughly equal chance to contribute to the origination of the rules¹⁵⁶ that apply to and bind the community. That is, the ruled are to be the equal originators of the rules.¹⁵⁷ Second, the default principle is that the rules and institutions of a community are to treat each member equally.¹⁵⁸ Strong and publically articulable reasons must exist if the rules and institutions of the community are to treat members differentially. If a people is to enjoy full internal self-determination, then its members must choose, control, and participate in their government. The only explicit international legal document to address this issue is the International Covenant on Civil and Political Rights (ICCPR), which declares that “every citizen shall have the right and the opportunity . . . without unreasonable restrictions: to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage.”¹⁵⁹

Traditional international law and political theory have assumed that a community of equals, at the level of both the constitution and the application of rules, is possible only within the limits of the territorial state¹⁶⁰—what Hannah Arendt calls “the living together of people.”¹⁶¹ But that cannot now be the case, even if it were ever completely so in earlier periods, which is doubtful. Clearly, the communication revolution is making it easier for individuals across physical boundaries to engage in a common project of co-origination. In the era of the communication revolution, democracy does not require the hard parameter of physical boundaries, but only “public

156. See HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 133, at 120–22 (“The idea of self-legislation by citizens, that is, requires that those subject to law as its addressees can at the same time understand themselves as authors of law.”).

157. See Joshua Cohen, *Truth and Public Reason*, 37 *PHIL. & PUB. AFF.* 2, 7–8 (2009) (defining democracy as “a society of equals, whose members decide together how to live together”); see also BOHMAN, *supra* note 130, at 21 (holding that the people act through the elected legislature to give themselves laws according to the popular will).

158. The egalitarian principle is expressed by Ronald Dworkin thusly: “[I]ndividuals have a right to equal concern and respect in the design and administration of the political institutions that govern them.” See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1978).

159. ICCPR, *supra* note 47, art. 25; see also UDHR, *supra* note 18, art. 21 (“[E]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.”).

160. See KYMLICKA, *supra* note 140, at 324 (“Territorialized linguistic/national political units provide the best and perhaps the only sort of forum for genuine participatory and deliberative politics.”).

161. HANNAH ARENDT, *THE HUMAN CONDITION* 201 (2d ed. 1958) (“[T]he only indispensable material factor in the generation of [collective] power is the living together of people.”).

spaces and points of reference through which issues can be defined and pressures for action can be organized.”¹⁶² The use of new communication technologies (such as websites, e-mails, and online editions of newspapers and broadcasts) has brought about and consolidated the transnational public space,¹⁶³ which may be referred to as the diasporic public space.¹⁶⁴ The dissemination of news about the homeland raises issues for discussion. The diasporic public space brings the stakeholders together. The question of self-determination is not, therefore, about who occupies a particular physical space at a given moment of time. Rather, it is about who comprises the stakeholders¹⁶⁵ and what institutional structures will enable all stakeholders to participate in the affairs and life of the community and the people. The traditional (and radical statist) assumptions that territory acts as the basic unit of both external and internal self-determination and that only those within the territory of the nation-state can be stakeholders do not fully capture the reality. Members of diasporas can be stakeholders, and their interests can be affected by decisions of the authorities of the homeland. The principle of affected interests suggests that their participation in some aspects of the life of the homeland therefore comports with the notion of self-determination. The territorialist position is also at odds with how people can organize themselves as agents and the various venues in or through which democratic participation can take place.

Two responses address the concern that the participation of diasporas in the life of the homeland is largely premised on the notion

162. CONNOLLY, *supra* note 141, at 153.

163. Exploring the reasons why Chinese citizens who have spent time in the West may show a hostile streak to the West, Melinda Liu and Duncan Hewitt make the following observation:

Some of the nationalism exhibited by Chinese living abroad might also be sustained, rather than diluted, by the Internet. “As soon as they get online they can be totally immersed in a Chinese environment,” says Zhao Chuan, a novelist who lived in Australia from 1987 to 2000 before coming home to write about Shanghai. “When we were studying abroad . . . occasionally you went to Chinatown to read a Chinese paper. Now if you’re in the U.K. you can easily not read English papers or watch English TV.”

Melinda Liu & Duncan Hewitt, *Rise of the Sea Turtles: China’s Most Modern Citizens Aren’t Drawing It Any Closer to the West*, NEWSWEEK, Aug. 25, 2008.

164. Iris Young defines (international) public space as one that “consists in a discursive space mediating strangers in which claims and criticisms can be made with the knowledge that they are heard by many others, including political leaders and other powerful actors.” YOUNG, *supra* note 154, at 1.

165. See HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 133, at 107–11 (“I include among ‘those affected’ (or involved) anyone whose interests are touched by the foreseeable consequences of a general practice regulated by norms at issue.”). Some refer to the notion of stakeholding as the principle of “affected interests.” See, e.g., Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40, 50 (2007).

that these actors “may shape and determine the autonomy of”¹⁶⁶ homeland residents and citizens without the latter’s agreement or consent. This Article explored one of those responses in the preceding pages. First, the conception that diasporas are “choice-makers” and the people residing in the homeland are “choice-takers” assumes that diasporas do not have a stake in homeland affairs, or that they do not shoulder the consequences of their choices to the same degree as those in the homeland. However, as argued earlier, this view conflicts with reality. Homeland governments often make decisions that affect diasporas, and thus diasporas’ desire to have input in the decision making process represents the proper approach for a stakeholder. Second, as this Article shall show in the next few pages, the way to ensure the accountability of choice-takers is to allow them to make choices concerning the specific areas in which they have a stake and to subject choice-makers to a degree of vulnerability to the consequences of institutional action similar to that faced by other members of the political community. This approach conceives of a dynamic notion of community and a more complicated structure of membership.

D. Institutional Arrangements for the Community of Stakeholders: The Avenues of Participation

What institutional arrangements will be consistent with the idea of diasporas as stakeholders in the community of the homeland? That is, how can members of the diaspora best play a role in the affairs of the homeland without raising the issue of democracy deficit? What is the package of privileges (and rights) to which members of diasporas are entitled? The issue here concerns the conditions for shared agency—the circumstances for the constitution of normative peoplehood.

1. To Vote or Not to Vote

One of the most important means of participating in the affairs of a community (to manifest shared agency) is to have the opportunity “to vote and to be elected,” to use the ICCPR formulation.¹⁶⁷ As

166. Held, *supra* note 152, at 26.

167. See ICCPR, *supra* note 47, art. 25. Article 25 mandates:

Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors

Arthur Applbaum put it: “an election (when the conditions for its legitimacy are met) is a performative, the action of a shared agent.”¹⁶⁸ But the ICCPR recognizes this right only for “all individuals within [the State’s] territory *and* subject to its jurisdiction.”¹⁶⁹ So, the right under the ICCPR seems to assume the rigid community of the territorial state, where presence in the territory acts as a prerequisite for the enjoyment of the right.¹⁷⁰ According to this reading, diasporas of all types (including temporary absentees from the homeland) have no claim for equal suffrage. Of course, there is no limit under international law on a particular state franchising its diaspora, no matter which category the diaspora falls within. Some states allow their citizens temporarily residing outside of the country to vote,¹⁷¹ other states grant dual citizenship,¹⁷² and still others have franchised

Id. For an interpretive comment from the Human Rights Committee on the scope of Article 25, see Human Rights Comm., CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), *The Right To Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

168. Applbaum, *supra* note 53, at 375.

169. ICCPR, *supra* note 47, art. 2 (emphasis added).

170. The Human Rights Committee has not read the phrase “all individuals within its territory and subject to its jurisdiction” as requiring both presence in the territory and subjection to jurisdiction, contrary to the position of the United States and to what the conjunction “and” seems to suggest. The Committee reads the phrase as requiring states to ensure the rights to “all persons who may be within their territory and to all persons subject to their jurisdiction.” See Human Rights Comm., General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). The U.S. position is set out in its response to the Committee’s comment on its Third Periodic Report. See Human Rights Comm., *Comments by the Government of the United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb 12, 2008) (“[T]he United States respectfully disagrees with the view of the Committee that the Covenant applies extraterritorially.”). It reaffirms its long-standing position that signatory states are required “to ensure the rights in the Covenant only to individuals who are (1) within the territory of a State Party *and* (2) subject to that State Party’s jurisdiction.” *Id.*

171. Thus, for example, the Austrian Constitutional Court has read the Federal Constitution Act (Bundes-Verfassungsgesetz [B-VG] [Constitution] BGB1 No. 393/1929, arts. 26(1), 60(1) (Austria)), which provides that the Austrian national parliament and the federal president shall be elected by the Bundesvolk (“federal people”), as including all Austrian citizens regardless of residence in the country or abroad.

172. See Sybil Rhodes & Arus Harutyunyan, *Extending Citizenship to Emigrants: Democratic Contestation and a New Global Norm*, 31 INT’L POL. SCI. REV. 470, 471 (2010) (“Recent scholarship on the relations between emigrants and their homelands has shown that many states tolerate multiple citizenship and have developed programs to channel their participation in national political, civic, and economic life.”). See generally U.S. OFFICE OF PERS. MGMT., FED. INVESTIGATIVE SERVS., *CITIZENSHIP LAWS OF THE WORLD* (2001), <http://www.opm.gov/extra/investigate/IS-01.pdf> (providing summaries of the citizenship laws for most countries). Some emigrant countries, mainly European, have laws that allow second- or third-generation descendants of their emigrant citizens to reacquire the nationality of their

all first-generation expatriates, even if they do not hold citizenship of the homeland and even if they have not applied for and received dual citizenship.¹⁷³

What voting procedure would be most consistent with the notions of democracy and self-determination, both for those living in the homeland and for the diaspora? One must start with the observation that different communities exist in a nation-state for different purposes (federal, state, and municipal communities, for example), and individuals are accorded the right to vote within those various communities if they are regarded as stakeholders.¹⁷⁴ A similar approach may be helpful in relation to the issue of whether members of a diaspora should be accorded the right to vote. If the issue is about national identity, rather than specifically about the condition of life within the territorial homeland, then it seems reasonable to allow members of the diaspora to take part in the voting process. After all, members of the diaspora are stakeholders in the identity of the nation to the extent that their very identity is partly defined by the identity of the homeland.¹⁷⁵ For this purpose, members of the diaspora are part of we the people. If the issues concern only those living in the homeland, then the members of the diaspora need not (and perhaps should not) participate in the voting process, for under those circumstances they cannot be viewed as stakeholders. On the other hand, because issues of a general nature indirectly impact members of the diaspora, even though they may not specifically concern them, some representation of the diaspora would be important. That representation could range from an advisory board of diaspora members¹⁷⁶ to the reservation of some seats in the

ancestors. Thus, for example, in 1992 Italy passed a law that allowed "the descendants of Italians who had emigrated before 1970 to acquire citizenship." Patrick Weil, *From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World*, 9 INT'L J. CONST. L. 615, 630 (2011). And apparently, between 1998 and 2007, 786,000 foreigners of Italian descent obtained Italian citizenship. *Id.*

173. Iraq, for example, allowed Iraqis around the world to vote in the first free elections after the fall of Saddam Hussein.

174. It is not just in relation to federal states (countries) that this occurs. The European Union has also adopted a procedure that allows citizens of member states to vote in the election of municipalities of any other member state in which they reside. Thus, for example, an Italian is allowed to vote in a Paris mayoral election if she is living in Paris. Consolidated Version of the Treaty Establishing the European Community, art. 19, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

175. See CHAIM GANS, *THE LIMITS OF NATIONALISM* 84 (2002) ("Voting rights on matters of national identity and membership that have little to do with life in the homeland . . . could be granted equally to all members of the national group.").

176. For example, the Jewish-American diplomat, Dennis Ross, who was the chief negotiator for the U.S. Middle East Peace Team under the Clinton administration, suggested to the Israeli government under Ariel Sharon that it grant diaspora Jewry an official consulting status when it comes to Israeli foreign policy that has an effect on the entire Jewish people. See SHAIN, *supra* note 10, at 112.

national legislative body for diaspora members.¹⁷⁷ The manner in which those seats are filled could vary from country to country, depending on the conditions in the country.

The question of whom to include as a member of the diaspora for purposes of voting or representation presents a complex issue: who can legitimately be considered a member of the community of the affected (a stakeholder).¹⁷⁸ As the discussion thus far indicates, as a general matter, first-generation members of the diaspora would be presumed to be members of the community of the affected because they have a stake in the community they call the homeland. For instance, the identity of the nation shapes, at least partly, their senses of self and identities; they are likely to have close family members (for whom they might be financially responsible) who would be affected by the policies and actions of the government; some may have been forced out of the country by regimes with less-than-democratic credentials; and many may offer important contributions to a post-conflict society.¹⁷⁹ With regard to subsequent generations, there would have to be further requirements, such as active involvement in the affairs of the homeland, to indicate their investment in the community that renders them stakeholders.

As a matter of practical politics, proposals to enfranchise members of diasporas may face resistance from people within the territory of the homeland because the notion of territorial boundary

177. See Bauböck, *supra* note 22, at 2401. In the 2006 Italian parliamentary election, “[e]xpatriates were subdivided into four geographic constituencies . . . and voted for twelve reserved seats in the lower chamber and six in the senate, for which all of the candidates were themselves expatriates.” *Id.* For different forms of representation of members of the diaspora see Spiro, *supra* note 135, at 226–31. The French Constitution makes provisions for French citizens living abroad to elect two members of the French Senate as representatives of the French diaspora. See 1958 CONST. art. 24 (Fr.) (“French Nationals living abroad shall be represented in the National Assembly and in the Senate.”). Apparently, under French law, a simple acquisition of another nationality is not sufficient ground for losing French citizenship. See CODE CIVIL [C. CIV.] art. 23 (Fr.) (“An adult of French nationality residing usually abroad, who acquires voluntarily a foreign nationality, loses French nationality only where he so declares expressly, in the way provided for in Article 26 and following of this Title.”). Article 26 then provides the procedure by which the French national should indicate that he wishes to terminate his or her French nationality: “Declarations of nationality shall be received by the juge d’instance or by consuls in the form prescribed by decree in Conseil d’Etat. An acknowledgment of receipt must be issued after the filing of the documents necessary for proving their admissibility.” *Id.* art. 26.

178. See generally Goodin, *supra* note 165 (exploring how members of the decision-making group should be those with affected interests).

179. For a discussion of the role of diasporas in post conflict societies (especially severely fractured societies), see Adeno Addis, *Deliberative Democracy in Severely Fractured Societies*, 16 IND. J. GLOBAL LEGAL STUD. 59, 78–79 (2009). For a more detailed discussion of the role of diasporas in conflict perpetuation and settlement, see *infra*, note 207.

remains deeply ingrained in people's imaginations. That is partly because people in the homeland may still harbor suspicions about those who have left home rather than sticking with the homeland through bad and good times. Resistance may also arise partly because people in the homeland may believe that the enfranchisement of the diaspora would have too strong an impact on the political and economic life of the homeland, given the high ratio of people in the diaspora to people in the homeland. In Hungary, for example, a 2004 referendum concerning dual citizenship for Hungarians in neighboring countries, estimated at 3.5 million, was defeated. One of the main concerns of the proposal's opponents was the fact that the availability of external voting rights would have significant impact in a country of 10 million citizens.¹⁸⁰

Allowing members of the diaspora to participate in the electoral process of the homeland will, of course, lead to dual voting for most members of the diaspora: one vote in the homeland and another in the host land. Dual voting may be objected to on two grounds: that it is somehow unjust for some people to have a right to vote twice, and that the process may lead to a split, and hence diminished, loyalty to both homeland and host land.¹⁸¹ As to the unfairness of allowing multiple (dual) voting for members of the diaspora, the issue is not the number of votes cast, but whether the individuals casting them have a stake in the various communities in which they seek representation. After all, in a federal system, individuals have opportunities to cast votes at various levels of government without

180. Bauböck, *supra* note 22, at 2401.

181. *See id.* at 2428–30 (noting a singular conception of voters' national loyalty is inaccurate in a globalizing world, particularly when the voter's home and host states enjoy a peaceful relationship and high levels of interaction). The conversation in relation to a recent case in the United States makes the point. Representative Michele Bachmann, a conservative member of the U.S. Congress from Minnesota and one who campaigned for the office of the presidency in the recent Republican primary as the champion of Tea Party values, had apparently taken Swiss citizenship by virtue of the fact that her husband was born to Swiss immigrants to the United States. When the fact that she has dual citizenship was reported, there was uproar from the right-wing bloggers who are usually her political supporters. The uproar led her to publicly ask the Swiss consulate to withdraw her citizenship. Her statement read partly thus: "I took this action to make it clear . . . I am a proud American citizen. I am, and always have been, 100 percent committed to our United States Constitution and the United States of America." Tim Mak, *Michele Bachmann Renounces Swiss Citizenship*, POLITICO (May 10, 2012, 5:14 PM), <http://www.politico.com/news/stories/0512/76175.html>. Some of the comments from the bloggers indicate that they believe that dual citizenship will lead to diminished loyalty. One blogger wrote: "Dual citizenship isn't simply a matter of convenience, a way to make travel easier or a sentimental tie to the Auld Sod . . . It's an insult to both countries." Tim Mak, *Michele Bachmann Blasted by Right Blogs*, POLITICO (May 11, 2012, 12:10 PM), <http://www.politico.com/news/stories/0512/76211.html>. Another simply observed that dual citizenship "is [t]reason." *Id.* And still another penned that "[f]or most of the [United States] history, dual citizenship was considered the equivalent of political bigamy." *Id.*

that system raising any serious conceptual or fairness issues because the individuals are thought to have a stake in the various communities in which they participate. If they have a stake, then the right to participate in constituting the government of the community and making that government accountable will not (and should not) appear odd.

As to the issue of dual and diminished loyalties,¹⁸² the idea of limited and exhaustible loyalty is conceptually incoherent and at odds with the reality of a globalized world where individuals are increasingly attached to varying communities with different commitments and loyalties.¹⁸³ Being a stakeholder in one community does not drain all the commitments one may have to another community to which one is also attached. Indeed, even in a nation-state, individuals manifest loyalty to different layers of communities without diminishing their commitment and loyalty to the other layers.¹⁸⁴ The world will increasingly be one where individuals happily belong to multiple, and at times overlapping, communities (and peoples)—a world which the notion of exhaustible loyalties cannot describe or capture.

2. To Be or Not to Be a Card-Carrying Member

Although voting is one of the most important means of participation, and a very clear signal of membership in a community, it is not the only one. A number of countries have started to devise programs that allow members of their diasporas to have residency cards that make it easier for them to enter the country without visas, to pursue business ventures without having to comply with

182. See Alexander Aleinikoff, *Between National and Post-National: Membership in the United States* 4 MICH. J. RACE & L. 241, 258 (1999) (discussing how frequent movement across borders “may challenge the creation of stable, rooted associations,” and “[i]ndividuals may end up living in what is in effect a transnational community, straddling two worlds but at home in neither”). David Martin makes the point that dual citizens ought to vote in only one country. David A. Martin, *Introduction: The Trend Toward Dual Nationality*, in RIGHTS & DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS 3, 14 (David A. Martin & Kay Hailbronner eds., 2003).

183. See Peter Spiro, *Political Rights and Dual Nationality*, in RIGHTS & DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS 135, 135 (David A. Martin & Kay Hailbronner eds., 2003) (noting the erosion of the singular national loyalty concept).

184. This is not to say that there may not be times when the two loyalties conflict, such as in times of war. But such an occasion is likely to be rare, for an individual is unlikely to maintain dual nationality in countries that are in such state of unfriendliness. There could be clashes of loyalties in circumstances that do not involve direct military conflicts between the two countries of which one is a national. A good example is military service. In circumstance such as those, there is going to be a need for a principle that will allow us to adjudicate as to which country has priority. Perhaps something like the place of primary residence would work.

regulatory requirements that apply to foreigners, to hold jobs that are generally unavailable to foreigners, and the like.¹⁸⁵ If members of diasporas who are citizens of another country and do not have dual citizenship return to the country with a residency card that allows them to work and invest in the country in a manner no different from citizens of the country, then it would not be improper to allow them to vote, for they hold a direct stake in the community. The concern with outsiders determining rules and policies from which they are safely immune (the fear of democratic deficit) will not apply in this circumstance.¹⁸⁶ But, of course, to have these rights entails corresponding duties to the community. The members of a diaspora who avail themselves of these rights may, for example, be conscripted for military service in the homeland. Packages of membership privileges entail packages of membership duties.

3. Diasporic Participation: A Caution

The brief remarks about voting and residency permits as examples of diasporic participation are meant to be just that: examples. They should not and cannot be interpreted as an exhaustive list of the ways in which stakeholders can participate. There are many other ways in which diasporic participation could be envisaged and structured, such as diasporic advisory councils. What is important, however, is the realization that members of diasporas are stakeholders in relation to aspects of the life of the homeland and that their participation in the life of the homeland vindicates, rather than negates, the principle of “affected interests” that a number of political theorists have advanced as a central feature of democratic governance.¹⁸⁷ As Christian List and Mathias Koenig-Archibugi put

185. Ethiopia is a good example. The Ethiopian government offers “Ethiopian Origin Identity cards to Ethiopians who hold foreign citizenship. According to [an official in the Ethiopian Embassy in Washington] the cards entitle the holder to all Ethiopian-citizen rights except for the right to vote.” Terrazas, *supra* note 4. Apparently, the government also allows the “creation of domestic accounts in foreign currency for Ethiopians abroad,” although with limits on the amount to be deposited. *Id.*

186. Some states in the United States allow local governments to enfranchise noncitizen permanent residents to participate in local elections. See RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 87–107 (2006). The European Union also allows citizens of member countries to participate in local elections where they happen to reside. See EC Treaty, *supra* note 174, art. 19.

187. Although formulated in various ways by various political theorists, the principle of affected interests simply means that people should be allowed to influence the decisions that will have an effect on them. The principle is based on two important assumptions. First, it is unjust for individuals to suffer or experience the consequences of decisions that they did not have any right or chance to shape or influence. This is so partly because the decisions may not have taken their interests into account. Second, the idea of individual autonomy requires that individuals be acknowledged as agents

it, “[A]ll those (potentially) affected by decisions on the given issues are entitled to take part in those decisions and should therefore be members of the demos.”¹⁸⁸

The affected interests principle implies (requires) that different communities or different constituencies of voters participate for different issues. As argued earlier, this is not a drawback of the principle, as some view it,¹⁸⁹ but rather its virtue. It recognizes the reality of the globalized world where there are many overlapping communities. Therefore, different communities could be drawn for different issues. The all-purpose territorial community does not describe the current world, and it will even less describe the world ahead.

E. *Institutional Arrangements for the Community of Stakeholders: The Avenues of Protection*

1. Diasporic Jurisdiction

Membership in a community bestows not only the right to participation in the affairs of the community, but also the right to protection (by the authorized leaders and institutions of the community) from unwarranted attacks. This subpart shall explore the sorts of protection members of the diaspora could justly expect from the government and authorities of the homeland by virtue of the fact that they are inside the people, although outside the state. Suppose the government of the homeland (the kin state) wishes to protect its diaspora from criminal attacks anywhere. This assertion of

capable of self-governance. For various formulations of the principle see DAHL, *AFTER THE REVOLUTION*, *supra* note 36, at 64–67 (noting that while the practical application of the principle of affected interests make it “a good deal less compelling than it looks,” it nonetheless gives affected parties a case for participating in relevant decisions); Goodin, *supra* note 165, at 51–63 (exploring the feasibility of different articulations of the “all affected interests” principle); List & Koenig-Archibugi, *supra* note 37, at 80–84 (describing how the membership of a group may change based on affectedness or affectivity criteria).

188. List & Koenig-Archibugi, *supra* note 37, at 80–81.

189. An obvious practical difficulty with the all-affected principle is that it would require a different constituency of voters or participants for every decision: the status of fellow-citizens would not be permanent, as is the case in territorial states with which we ordinarily associate the concept of citizenship, but would shift in relation to the issue proposed.

Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in *LIBERAL DEMOCRACY: XXV NOMOS 13*, 19 (J. Roland Pennock and John W. Chapman eds., 1983).

protective jurisdiction can be called “diasporic jurisdiction.”¹⁹⁰ On the one hand, that is precisely what a community would do to ensure the safety and well-being of its members. But on the other hand, this would look dangerously close to universal jurisdiction, about which critics have raised a number of concerns and issues.¹⁹¹ To the extent that the diasporas of countries such as Israel, Armenia, and even Ethiopia are spread all over the world, diasporic jurisdiction appears to be functionally equivalent to universal jurisdiction, at least in the territorial sense. This subpart shall argue that diasporic jurisdiction does, in fact, differ from universal jurisdiction and that it presents a more justifiable assertion of jurisdiction.

Diasporic jurisdiction refers to the assertion of extraterritorial jurisdiction by a kin state over crimes committed against members of its diaspora. Thus, for example, Israeli law gives its courts jurisdiction over what it terms “extraterritorial crimes”—crimes committed against “the life of a Jew, his body, his health, or his property, because he is a Jew, or the property of a Jewish institution, because it is Jewish.”¹⁹² Israel is not the only country showing interest in its diaspora. Many countries (e.g., Armenia, India, and Russia) are reaching out to their diasporas as the diasporas are reaching back to them, although not always positively. The Polish Constitution provides in its preamble: “We, the Polish Nation, . . . [b]ound in community with our compatriots dispersed throughout the world . . . [h]ereby establish this Constitution of the Republic of Poland as the basic law for the State”¹⁹³ Similarly, Article 2 of The Irish Constitution provides: “[T]he Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”¹⁹⁴

Under what circumstances should a kin state assert diasporic jurisdiction? And what are the political and legal consequences of the assertion of such jurisdiction? Under the Israeli law, the assertion of jurisdiction is directed at identity-motivated criminal attacks. The law is triggered when a Jew is criminally attacked by virtue of the fact that he is a Jew, and his property damaged precisely because it is

190. For a comparison of diasporic jurisdiction with one of the internationally recognized bases of prescriptive jurisdiction, passive personality jurisdiction, see *infra* Part VI.E.2.

191. See Addis, *supra* note 7 (discussing how the concept of universal jurisdiction has been criticized). See generally Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July–Aug. 2001 (warning of the injustice inherent to the extreme use of universal jurisdiction and offering the creation of ad hoc tribunals by the UN Security Council as an alternative).

192. Penal Law (1977), 5737–1977, art. 2, § 13(b) (amended 1994) (Isr.).

193. POL. CONST. pmb1., available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (emphasis added).

194. IR. CONST., 1937, art. 2, available at <http://www.constitution.ie/constitution-of-ireland/default.asp>.

Jewish property. So, one limit on diasporic jurisdiction is that it concerns identity-based attacks. That is a reasonable line to draw. First, the identity of the members of the diaspora (being a Jew, being Armenian, or being Indian) is precisely what links the diaspora and people of the homeland as a people. If the members of the diaspora are attacked precisely for the traits shared (or presumably shared) with members of the homeland, then an attack on the diaspora can fairly be regarded as an attack on the whole community. The particular member of the group was attacked precisely because he or she is considered to be a type, a representative, of a group that is ultimately the target.

Second, as the Israeli law shows, another limit to diasporic jurisdiction is the targeting of only criminal acts. That, of course, greatly narrows the universe of acts for which diasporic jurisdiction could be asserted and, consequently, reduces the number of occasions that might put the homeland and the host land in jurisdictional conflict. In this regard, diasporic jurisdiction will not be any different from current forms of universal jurisdiction. It is not only the negative political virtue that recommends the limit to criminal jurisdiction, but also the fact that it deals with the most often used (and often the deadliest) means of identity-based attacks.

Even in this limited sense (targeting identity-based criminal attacks), diasporic jurisdiction could potentially lead to chaotic assertions of jurisdiction and to less-than-tranquil international relations. How can such dangers be avoided, or at least minimized? First, unlike the Israeli law, which is aimed at any identity-based attack, however serious, perhaps diasporic jurisdiction should be invoked only in relation to attacks on individuals (without including jurisdiction in relation to property damage) and only in relation to serious crimes. These serious crimes could be construed as those generally regarded as subject to universal jurisdiction under customary international law—genocide, crimes against humanity, torture, war crimes, etc.—some of which are also codified under the Rome Convention, the instrument that established the International Criminal Court.¹⁹⁵ Beyond often being identity-motivated, those crimes also pose the greatest threat to the group as a group. Furthermore, under those circumstances, the government of the host state is likely to be either implicated or incapable of rendering justice.

195. The Rome Statute of the International Criminal Court defines the international crimes within the jurisdiction of the Court as: genocide, crimes against humanity, war crimes, and the crimes of aggression. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–17, 1998, art. 5, U.N. Doc A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

Now, the question may arise as to why one would bother about diasporic jurisdiction if the same crimes are subject to universal jurisdiction. Three responses come to mind. First, diasporic jurisdiction proves conceptually and functionally more defensible than universal jurisdiction. Second, given the close relationship between the kin state and the diaspora, diasporic jurisdiction may have a better chance of being used than universal jurisdiction. If the universal jurisdiction is treaty-based, then the relevant state might not be a signatory state. Third, it is reasonable to assume that a state intervening to protect or avenge a vulnerable kin will be more likely to be guided by the interests and needs of victims than a country invoking universal jurisdiction in relation to individual victims with whom it has no discernible connection.¹⁹⁶

A second reasonable limit on the assertion of diasporic jurisdiction is procedural in nature. Diasporic jurisdiction should be asserted only after it becomes clear that the state with a traditional jurisdictional link to the actors or to the event has no intention or capacity to prosecute the perpetrators or to otherwise render justice. The host state or the state with the most appropriate traditional jurisdictional link ought to be given priority to deal with the issue. This, of course, is what is referred to as the complementarity principle that is enshrined in Article 17 of the Rome Statute.¹⁹⁷ Such a principle would not only minimize the occasions for interstate conflicts, but it would affirm the importance of internationally recognized territorial communities while also signaling that other, equally legitimate ways of constituting communities exist.

Perhaps a third limit might be to require that the kin state's law follow the internationally accepted definitions of those crimes if the kin state wishes to assert diasporic jurisdiction. Thus, for example, a kin state that wishes to prosecute defendants who have committed the crime of genocide against its diaspora should do so under a law that has incorporated the international definition of genocide. Indeed,

196. It is probably true that interventions by a kin state on behalf of vulnerable diaspora is likely to have mixed motives when the host state is a neighboring state and where the diaspora has become a pretext for irredentism. Two things need to be said about that possibility. First, the requirement that only the most egregious crimes allow the assertion of diasporic jurisdiction may provide the necessary restraint. Given the fact that the neighboring countries' relationships would presumably have already been strained, the world will watch the intervention with critical eyes. That too may have a restraining effect. Second, if the relationship between diaspora and host land is such that irredentism is a live issue, then the relationship is already in serious trouble. With or without diasporic jurisdiction, irredentism would likely have been advanced by the kin state.

197. Article 17(1)(a) provides: "[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has [traditional] jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute, *supra* note 195, art. 17(1)(a).

this should be the case whether diasporic or universal jurisdiction is being asserted.

There are now two more questions to consider about diasporic jurisdiction. First, is the Israeli case unique, such that it should not be regarded as an indication of what other countries may or should do? Second, is diasporic jurisdiction conceptually and functionally more, or less, defensible than universal jurisdiction?

In regard to the first question, it is true that the Israeli case has historically been viewed as unique. The country was set up as a home for Jews, foreshadowing that Jews anywhere constitute potential members of the Israeli community. In fact, the Law of Return that entitles any Jew anywhere to immigrate to Israel (“to make *aliyah* to Israel”) affirms the deep connection between Israel and the Jewish diaspora.¹⁹⁸ Also, the history of anti-Semitism, the continuing migration of Jews to Israel, and the fact that Israel is defined as the “state of the Jewish people”¹⁹⁹ all contribute to making the relationship between Israel and the Jewish diaspora uniquely close and strong. Despite unique aspects of the Israeli case, diasporic jurisdiction can and may appeal to other kin states. First, as argued throughout this Article, many homeland governments have shown great interest in their diasporas as the diasporas have increasingly embraced the homeland. The security of the diaspora has become part of some governments’ foreign policy. Russia provides a good example, apparently viewing itself as a protector of the “stranded” diaspora living in the successor states of the former Soviet Union. Often, protection comes in the form of military attacks or military threats, reminiscent of the condition that prevailed during the interwar period. Pursuing the similarity between that period and the current one, the diasporic jurisdiction would be equivalent to the many bilateral treaties and unilateral declarations required as conditions of membership to the League of Nations. One of the major purposes of those treaties and unilateral declarations was to minimize military engagements on behalf of coethnics in other, often neighboring, states. Diasporic jurisdiction may partly serve a similar purpose.

As to the question of whether diasporic jurisdiction is conceptually and functionally more defensible than universal jurisdiction, the answer is “yes.” The availability of prescriptive and adjudicative universal jurisdiction for certain acts (often crimes) is premised on the proposition that these acts affect all people, not just the specific individual or group victimized, or the country of which the victims are nationals. Indeed, those who commit these offenses are

198. Law of Return, 5710–1950, 4 LSI 114 (1950) (Isr.) (“Every Jew has the right to come to this country as an *oleh*.”).

199. Basic Law: The Knesset (Amendment No. 9), 5745–1985, SH No. 1155 p. 196 (Isr.).

referred to as *hostes humani generis*—enemies of human kind. Universal jurisdiction, therefore, is premised on the notion that there is an international community of humankind that can be injured whenever and wherever certain crimes are committed. Universal jurisdiction is a form of cosmopolitanism—the idea that we owe our highest allegiance to humankind. However, it is not always clear how that allegiance develops and how a crime directed against an individual on the other side of the globe, with no visible connection with the political community that seeks to intervene on the individual's behalf, could be said to constitute an attack on that community or any other community outside the political community to which the victim belongs. Unlike the uncertain status of an international community,²⁰⁰ the relationship between diasporas and homelands manifests a community of character. The concern of the homeland for the safety and security of its diaspora, therefore, is a concern for individuals who might be outside the state but are inside the people. The members of the diaspora clearly view themselves as part of the homeland. The homeland, in turn, views them as connected to the political community, and third parties see them as connected to the kin state.

Diasporic jurisdiction is also functionally more defensible than universal jurisdiction to the extent that kin states are more likely to come to the aid of members of diasporas by utilizing diasporic jurisdiction than states are to assert universal jurisdiction in the defense of victims who have no obvious connection to their political community. In the event that an international tribunal has been authorized by a treaty (or by the relevant international organ) to assert universal jurisdiction over the perpetrators of crimes that victimized members of a diaspora, then the kin state must give priority to the international tribunal to assert its jurisdiction (in the same way that it must defer to the state with the most appropriate traditional jurisdictional link before it asserts diasporic jurisdiction).²⁰¹ This, too, will limit the occasions for jurisdictional conflicts, while ensuring that victims receive redress for their injuries.

200. In a recent article, I have attempted to describe and defend a theory of universal jurisdiction that appropriates a notion of community that I believe better accounts for the list of crimes that international law, especially customary international law, considers crimes against all of us. See Addis, *supra* note 7, 142–62.

201. See *id.* at 157–58 (describing how judicial chaos has been avoided as “jurisdictional priority is settled through diplomatic means and the balancing of different states’ interests”).

2. Diasporic Jurisdiction Compared with Passive Personality Jurisdiction

As it is probably clear to those familiar with the norms of international prescriptive jurisdictions, diasporic jurisdiction bears a passing resemblance to what international lawyers and legal scholars refer to as passive personality jurisdiction. Both concern protecting people with a personal connection (kin) to the state asserting the jurisdiction. According to the Restatement of Foreign Relations Law, the passive personality principle provides that “a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.”²⁰² As the Restatement notes, this jurisdiction has not really been accepted “for ordinary torts or crimes.”²⁰³ However, it is increasingly being accepted for “organized attacks on a state’s nationals by reason of their nationality.”²⁰⁴ In this sense, it appears

202. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) cmt. g (1987); *see also* LOWE, *supra* note 87, at 175 (“Some States apply a variant of national jurisdiction known as ‘passive personality jurisdiction, under which the State may apply its laws to person who injure its nationals.’”).

203. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) cmt. g.

204. *Id.* And this clearly is not totally accurate. The United States officially opposes the passive personality theory of jurisdiction on the ground that it intrudes into the sovereignty of states. *See* United States v. Yunis, 681 F. Supp. 896, 903 (D.D.C. 1988) (stating that “the Passive Personal principle traditionally has been an anathema to United States lawmakers”), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991). But the United States has nevertheless passed statutes that can best be explained or defended under that theory of jurisdiction. For example, the Hostage Taking Statute, 18 U.S.C. § 1203 (1996), provides:

[W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment . . . [if] the offender or *the person seized or detained is a national of the United States.*

Id. (emphasis added). The statute was passed as an implementation of the Convention Against Taking Hostages. Perhaps one could conclude that the United States applies passive personality jurisdiction to terrorism-related acts. *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT’L L.J. 1, 11 (1993) (arguing that the United States does not apply passive personality jurisdiction outside terrorist crimes).

France too had once opposed this basis of jurisdiction. Indeed, its objection was stated early in the famous *S.S. Lotus*. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). France’s objection persisted until the mid-1970s when its nationals became victims of hostage taking by terrorists. *See* Eric Cafritz & Omer Tene, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 COLUM. J. TRANSNAT’L L. 585, 594 (2003) (describing the enactment of legislation which established the basis for passive personality jurisdiction in France after the 1974

to be similar to the sorts of limits that this Article argued should be put on diasporic jurisdiction. The difference between passive personality and diasporic jurisdiction is that the former is limited to citizens (“nationals,” to use the Restatement’s formulation), while the latter captures all those who are part of a people, whether citizens or not, but who reside outside the territory in a host state. A second difference is in the range of criminal acts considered subject to these jurisdictions. This Article argued that diasporic jurisdiction ought to be limited to the most serious of crimes—essentially those identity-based crimes that have been accepted as violations of *jus cogens* norms—while passive personality is often invoked for a wide variety of crimes. In this sense, diasporic jurisdiction has less potential for intrusiveness than jurisdiction based on passive personality. Another consequence of limiting diasporic jurisdiction to those grave crimes is that, in the event that a kin state seeks the extradition of the alleged perpetrator of the crime, the request would not run up against the “dual criminality”²⁰⁵ requirement that many countries have adopted. The requirement provides that the alleged crime be defined as a crime in both the requesting and the requested state for extradition to occur. Because the crimes proposed to be subject to diasporic jurisdiction are crimes in almost all countries, the dual criminality requirement would not pose a problem.

*F. Institutional Arrangements for the Community of
Stakeholders: The Role of the Diaspora in
Constitutional Settlement in Post-Conflict Societies*

Diasporas, especially those from severely fractured societies, play a significant role in the life of their homelands.²⁰⁶ Here, the

“Hague incident”). Now France has statutes that appropriate passive personality jurisdiction. Article 113-7 of the French Penal Code, for example, provides that “French criminal law is applicable to any felony, as well as any misdemeanor punishable by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offense.” CODE PÉNAL [C. PÉN.] (Fr.), available at http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf (Fr.). The breadth of the passive personality jurisdiction under the French law is, therefore, much wider than the Restatement’s suggestion. As John G. McCarthy notes, the “French law provides jurisdiction to the broadest extent possible under passive personality principle.” John G. McCarthy, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 FORDHAM INT’L L.J. 298, 314 (1990). Other countries such as China, Italy, and Denmark apply passive personality jurisdiction, but for “certain classes of crimes or to crimes with a certain minimum degree of punishment.” Cafritz & Tene, *supra*, at 596.

205. See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, (No. 3), [2000] 1 A.C. 147 (H.L.) [182]–[183] (U.K.).

206. See Addis, *supra* note 179, at 78–79 (“It is abundantly clear that diasporas, especially those from severely divided societies, have played and will continue to play significant roles in the life of their homelands.”).

concern is the role members of the diaspora have played in starting or sustaining conflicts in the homeland. The involvement of diasporas from severely fractured societies in conflicts involving various groups in the homeland is well documented.²⁰⁷ Diasporas have financed rebellions²⁰⁸ and supported coethnics fighting for independence.²⁰⁹ They have lobbied host governments on behalf of the favored group in the conflict. At times, they have even organized political parties outside the country or run those established within the country from abroad. And yet, despite the widespread recognition of the important role diasporas play in conflict perpetuation²¹⁰ as well as conflict resolution in their homelands, there have not been serious attempts intellectually or institutionally to focus on how diasporas could be included in the process of constitutional settlement.²¹¹ Part of the reason for this neglect is the assumption that diasporas are outside the country and, therefore, do not constitute part of the people of the territorial state. Put simply, they are not stakeholders who should play a formal role in the establishment of the basic documents and institutions that are meant to resolve the differences among all the stakeholders.

207. See SHAIN, *supra* note 10, at 101–26 (“The diaspora’s role in homeland conflict perpetuation and conflict resolution can be so powerful that homeland leaders ignore diaspora preferences at their own peril.”); see also Yossi Shain & Tamara Cofman Wittes, *Peace as a Three-Level Game: The Role of Diasporas in Conflict Resolution*, in ETHNIC IDENTITY GROUPS AND U.S. FOREIGN POLICY 169, 173 (Thomas Ambrosio ed., 2002) (citing as an example of the military fundraising of the Eritrean and Ethiopian diaspora during the 1998–2000 Ethio-Eritrean War.).

208. See Laguerre, *supra* note 55, at 207 (describing the role of the Hatian diaspora, especially those living in the United States, in organizing coups). See generally Bogdanich & Nordberg, *supra* note 126 (describing the 2008 Haitian rebellion).

209. The Tamil diaspora living in Canada and Europe provided substantial resources that sustained the armed struggle for a separate Tamil state in the north and northeastern part of war-torn Sri Lanka for many years. Paul Collier & Anke Hoeffler, *The Political Economy of Secession*, in NEGOTIATING SELF-DETERMINATION 37, 52 (Hurst Hannum & Eileen F. Babbitt, eds. 2006) (“The Liberation Tigers of Tamil Eelam (LTTE) secessionist movement in Sri Lanka is financed in part from Canada; for example, the 1996 bomb that killed 86 civilians and injured a further 1,400 in Colombo was mainly financed by the Tamil diaspora in Canada.”). Serb, Croat, and Muslim members of the diaspora from the former Yugoslavia contributed greatly to supporting their respective groups in the war that broke out in the former Yugoslavia. See Håken Wiberg, *Diasporas and Conflict*, in THE ROLE OF DIASPORAS IN PEACE, DEMOCRACY AND DEVELOPMENT IN THE HORN OF AFRICA 37, 45 (Ulf Johanssen Dahre ed., 2007).

210. Collier & Hoeffler, *supra* note 209, at 51 (“There are various ways in which a diaspora might revive conflict. The two most obvious routes are to continue to publicize grievances and/or to finance violent organizations.”).

211. See Jennifer M. Brinkerhoff, *The Potential of Diasporas and Development*, in DIASPORAS AND DEVELOPMENT 1, 1 (Jennifer M. Brinkerhoff ed., 2008) (“Governments, international organizations, and donors increasingly recognize diasporas as important actors in peace and conflict and development, but policymakers have few, if any, guidelines or formal policies on how best to incorporate diasporas into peace and development strategies.”).

This Article has argued that diasporas are indeed stakeholders, and hence are part of the people. To reiterate, members of diasporas are stakeholders in a number of ways. First, their identities are often tied to the identity of the homeland, so that decisions by home governments often affect how members of the diaspora view themselves and how the people in the host state view them. The flourishing of the homeland is seen as the precondition for the cultural flourishing of the diaspora—the *cultural stake*. Second, in the case of many developing countries of the south, members of their diasporas living in the developed north have assumed, by necessity, increasingly large financial burdens because they have family members who continue to depend on them. Therefore, decisions by the homeland government on economic matters significantly affect a large number of the members of the diaspora—the *economic stake*. Third, many members of the diaspora were forced to leave the homeland because of oppressive political conditions. The governments of those countries often discourage, or even prohibit, internal oppositions and challenges. Under those circumstances, members of the diaspora assume the role of the opposition, determined to put pressure on the government of the homeland (either through lobbying the host government or through organizing political parties, or even paramilitary forces) so as to reform the political process that continues to deny their relatives' political freedoms, coethnics' political freedoms, or both—the *political stake*. Members of diasporas are therefore stakeholders culturally, economically, and politically, and thus have a deep interest in the nature of a constitutional settlement in their war-torn homelands because that settlement would end up shaping the character of the community that emerges from it.

Beyond reasons of stakeholding, even on a purely pragmatic level, it seems rather straightforward that a group that has had an enormous role in conflict perpetuation—from South Asia to the Horn of Africa, from Central America to the Middle East, from the Balkans to the Iberian Peninsula—would be considered a legitimate (and even a key) participant in the process of conflict resolution and constitutional settlement. The reason why some diasporas play crucial roles, both in terms of conflict perpetuation and conflict resolution, is because they “provide a great deal of financial support [and] because they frame the conflicts through their control over media outlets [that reach the homeland] and other institutions and venues where political strategies are debated and leadership legitimized.”²¹² And in the age of the communication revolution and globalization, the availability and use of financial and communication resources to perpetuate conflicts is only going to increase. It makes

212. Lyons, *supra* note 72, at 123.

sense to find ways to marshal these resources for the purpose of conflict resolution.

The manner in which diasporas are included in the process of constitutional settlement will, of course, depend on the nature of the conflict in the homeland.²¹³ Some conflicts may allow for a united diaspora, such as conflicts between the homeland and another country or when the internal divisions are simply between unaccountable governmental authorities and a dispossessed homeland population. Others—such as ethnic-based conflicts—may reproduce the division at home within the diaspora. Under those conditions, diasporic representation may call for a nonunitary or a loosely federated representation. But the important thing is to realize that taking the interests of the diaspora into account will often lead to stable and enduring constitutional settlements.

It is reasonable to assume that because the homeland is “a special category of territory, laden with symbolic meaning for those who identify with it from afar” and because the daily costs of conflict may not affect diasporas to the same degree as those within the territory of the homeland, diasporas may be “less likely to support compromise or a bargain that trades off some portion of the sacred homeland [or an important cultural heritage] for some other instrumental end.”²¹⁴ But it would be a terrible mistake to think that the lesson to be drawn from that is, therefore, that diasporas ought never be a part of the process of settlement. Indeed, the opposite is true. In some circumstances, because of financial and other powers of the diaspora, their exclusion is likely to make a tough situation virtually impossible. Excluded diasporas are likely to put enormous pressure—financial or otherwise—on negotiators within the homeland, or they may start funding alternative, spoiler groups.²¹⁵

VII. CONCLUSION: “OUTSIDE THE STATE BUT INSIDE THE PEOPLE”: THE DIASPORA AS THE BRIDGE BETWEEN THE LOCAL AND THE GLOBAL

Yossi Shain aptly described diasporas as being “outside the state but inside the people.”²¹⁶ Three things are implied by this description. First, the territorial state does not exhaust the venues within which

213. See Wiberg, *supra* note 209, at 44 (“How diasporas are created and what positions they take depends, among other things, on the nature of the conflict that may have contributed to creating them.”).

214. Lyons, *supra* note 72, at 116.

215. See generally CHALLENGES TO PEACEBUILDING: MANAGING SPOILERS DURING CONFLICT RESOLUTION (Edward Newman & Oliver Richmond eds., 2006) (discussing challenges to peace building from spoiler groups).

216. SHAIN, *supra* note 10, at 124 (emphasis omitted).

people organize themselves as communities of character. This will increasingly be the case as globalization intensifies and people continue to be members of multiple and overlapping communities, often across territorial boundaries. In this sense, the diaspora–homeland relationship exemplifies the transnational movement and points to the cosmopolitan world that is increasingly a reality. Second, and as a qualifier to the first point, the diaspora–homeland relationship indicates that to take hold and to last, cosmopolitan sentiments must be worked out in the context of common sympathy and commitments. The diaspora–homeland relationship provides one example of how to begin bridging two aspects of people’s existence in this globalized world: national attachments and cosmopolitan sentiments. It offers one point of departure to understanding the formation and transformation of communities across territorial borders, as well as how legal obligations and allegiances develop and are altered. The position of diasporas described in this Article has affinity with what Kwame Anthony Appiah has called “rooted cosmopolitanism,”²¹⁷ the proposition that a defensible and successful cosmopolitanism would have to acknowledge and start with the reality of “at least some form of partiality.”²¹⁸ The diaspora–homeland relationship offers an example of that.

Third, Shain’s description speaks to the necessity of developing the appropriate legal and political language to capture these overlapping and quasi-transnational communities and affiliations. Developed in the context of the binary of the territorial state (territorial nationalism) and the (undifferentiated) international community, current political and legal language is not adequate to describe fully the various ways in which communities and peoples develop and are transformed.

The purpose of this Article has been to develop the appropriate political and legal language to capture these intermediate communities and to suggest what institutional structures will sustain them and enhance their effectiveness. “Effectiveness” refers not just to the quality and depth of the communities that are cultivated, but also to whether and how these communities comply with the democratic norm that the governing rules should be the rules of the ruled. No one group (such as the diaspora) should enjoy the role of a choice-maker unless it is also a choice-taker, subject to the consequences of those choices, whether good or bad. The theory of peoplehood this Article advances, which takes the principle of affected

217. See KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 213, 256–59 (2005) (explaining the concept of rooted cosmopolitanism).

218. *Id.* at 223 (“A cosmopolitanism with prospects must reconcile a kind of universalism with the legitimacy of at least some forms of partiality.”).

interests as its guide, would require that diasporas should only be able to influence decisions about the homeland that affect them.
