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DOING DEMOCRACY 'DIFFERENTLY': THE TRANSFORMATIVE POTENTIAL OF HUMAN RIGHTS NGOs IN TRANSNATIONAL CIVIL SOCIETY

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It is time to give a different content to 'democracy', to retool it so that it can work for and not against the progressive transformation of communities. Breaking out of the present limited vision of representative democracy in the international community of states entails both an expansion of its terrain and an improvement of its techniques.¹ Doing democracy differently does not mean duplicating state structures at the peripheries – that is, simply shifting them above and below the state. Rather, to do democracy differently entails widening its terrain to include the space known as transnational civil society and improving the techniques of the democratic enterprise to promote enriched norms of participation, transparency and accountability.²

The emphasis of any democratic enterprise is necessarily shaped by circumstances of time and place. My focus is on the transnational civil society³ created in the wake of post-Cold War globalization and on its interaction with those who are marginalized and relatively powerless in the global order. Paul Hirst reminds us that all of the major political doctrines that have claimed to be democratic – classic liberalism, democratic socialism and corporatism – have shared a conception of the state as the central and compulsory organization that

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¹ Tony Wright, *Reinventing Democracy?*, in *REINVENTING DEMOCRACY* 13 (Paul Hirst & Sam Khatoun eds., 1998).

² These norms have become recognized as essential elements of several areas of international law and practice. See Gregory Fox, *Remarks*, in Karen Ann Widess, *Implementing Democratization: What Role for International Organizations?*, 91 AM. SOC'Y INT'L L. PROC. 356, 360 (1997).

³ See, e.g., Jean Cohen & Andrew Arato, *The Contemporary Revival of Civil Society*, in CIVIL SOCIETY & POLITICAL THEORY (1992); Victor Pérez-Díaz, *The Possibility of Civil Society: Traditions, Character & Challenges*, in CIVIL SOCIETY: THEORY, HISTORY, COMPARISON (1995); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 378 (1998); Benedict Kingsbury, *Indigenous Peoples, in International Law: A Constructivist Approach To the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998) [hereafter Kingsbury, *Indigenous Peoples*].

alone determines the forms of governance within a definite territory.⁴ And yet the recent rush/push towards economic globalization has altered both the state and its relationship to wider society and transformed the nature and character of nonstate actors. The ferment of democracy from the extremities – democracy from below – is the focus of this analysis.

This essay is divided into three parts. First, I outline the main elements of the post-Cold War developments relating to transnational civil society and their relationship to globalization, with particular emphasis on the opening of participation for those who are otherwise marginalized by the state-based system. Transnational civil society has the potential to create a 'setting of settings'⁵ in which agendas for progressive change can be worked out, tested and applied. However, as the second section of my work explains, a counter-democratic tension limits the role that human rights NGOs currently play in transnational civil society. Transnational human rights NGOs mainly do democracy from the top-down, failing to operate according to norms of participation, transparency and accountability. The final section of my work suggests an alternative, bottom-up approach. I argue that we need to do democracy differently if human rights NGOs in transnational civil society are to fulfill their promise of representing unheard voices and promoting progressive values across borders.⁶

I. NEW OPENINGS FOR DEMOCRATIC PARTICIPATION IN TRANSNATIONAL CIVIL SOCIETY

Transnational 'civil society' refers to the space of uncoerced human association and also the set of relational networks that fill this space.⁷ These voluntary associations are constituted by and interact through transboundary networks⁸ created for particular political, social

⁴ Paul Q. Hirst, *Democracy and Civil Society*, in *REINVENTING DEMOCRACY*, *supra* note 1, at 13 (hereafter Paul Hirst, *Democracy and Civil Society*).

⁵ Michael Walzer, *The Civil Society Argument*, in *Dimensions Of Radical Democracy* 89, 98 (C. Mouffe, ed., 1992) (hereafter Walzer, *The Civil Society Argument*).

⁶ See Richard Falk, *The Global Promise of Social Movements: Explorations on the Edge of Time*, 12 *ALTERNATIVES* 173 (1987).

⁷ Walzer, *The Civil Society Argument*, *supra* note 5, at 89. See also Cohen and Arato, *supra* note 3, at 38.

⁸ See Ronald Inglehardt, *Modernization And Postmodernization: Culture, Economic And Political Change*, 43 *SOCIETIES* 188 (1997) (importance of organizational networks); Patez-Diaz, *supra* note 3, at

and cultural purposes.⁹ Transnational civil society includes such entities as nongovernmental advocacy organizations (including human rights organizations), humanitarian service organizations, unions, religious groups, civic and neighborhood associations, political and social movements, information and news media, educational associations, and certain forms of economic organization.¹⁰ Ideally, the associational life of transnational civil society is open and encouraging of diverse participation.¹¹

The recent rise of transnational civil society and the increasing importance of nonstate actors¹² is a product of the complex

⁹ (noting emerging economic, social and informational networks); Timothy W. Luke, *New World Order or Neo-World Order: Power, Politics and Ideology in Internationalizing Globalities in Global Modernities* 91-107 (Mike Featherstone et al. eds., 1995) (discussing emerging local/global 'webs'); Patricia Chilton, *Mechanics of Change: Social Movements, Transnational Coalitions, and the Transformation Process in Eastern Europe in BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS* 225 (Thomas Risse-Kappen ed., 1995) (explaining how "transnationalism takes account of coalitions of non-state actors across national borders"); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 *NW. J. INT'L L. & BUS.* 1014 (1996-97) (networks in international economic systems contributing to fragmentation). For an excellent case study of the impact of international networks on global politics, consider the nuclear freeze campaign. See COALITIONS & POLITICAL MOVEMENTS: THE LESSONS OF THE NUCLEAR FREEZE (Thomas R. Rochon & David S. Meyer eds., 1997).

¹⁰ Ronnie D. Lipschutz, *Reconstructing World Politics: the Emergence of Global Civil Society*, 21 *MILLENNIUM: J. OF INT'L STUDIES* 389, 393 (1992) (emphasizing that this concept of civil society refers to something broader than social networks).

¹¹ For an overview with respect to the human rights movement, see HENRY J. STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT* (1991). One debate that will not be resolved here is whether business nongovernmental organizations should be considered part of civil society. Hegel and his followers define civil society as that which is apart from the state. Many theorists writing today see civil society as the space "mediating between private markets and 'government'". BENJAMIN R. BARBER, *Jihad vs. McWorld* 285 (1995). A more nuanced view is that civil society may encompass certain economic institutions, such as worker organizations and consumer cooperatives that function in private markets but have their origins outside the market. See Michael Walzer, *A Better Vision: The Idea of Civil Society: A Path to Social Reconstruction*, *DISSIDENT* 293, 300 (Spring 1996). See also ROBERT HELBRONER, *BEYOND THE VEIL OF ECONOMICS: ESSAYS IN WORLDLY PHILOSOPHY* 13-34 (1988) (proposing economic sphere as civil society); DAVID HELD, *MODELS OF DEMOCRACY* 300 (1987) (arguing that democratic civil society is incompatible with unrestricted private ownership).

¹² A primary work supporting this thesis is ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIL TRADITIONS IN MODERN ITALY* (1993). Joshua Cohen and Joel Rogers have also suggested that straightening voluntary associations could rejuvenate the democratic state. See Joshua Cohen and Joel Rogers, *Associations and Democracy*, in *I ASSOCIATIONS AND DEMOCRACY: THE REAL UTOPIAS PROJECT* 1-110 (Erik Olin Wright ed., 1995). But see MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1982) (understanding the difficulties and contradictions with collective action).

¹³ See John Spanier, *Who are the 'Non-State Actors'?* in *THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS* 43 (William C. Olson ed., 1991); Benedict Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, 88 *AM. SOC'Y INT'L L. PROC.* 1 (1994). Note that this essay uses the term nonstate actor to refer to an actor that is not answerable to a state and Rosalyn Higgins' term

phenomenon known as globalization. Richard Falk's distinction between 'globalization from above' and 'globalization from below' identifies two interrelated tendencies: the restructuring of the world economy on a regional and global scale through the agency of transnational corporations and financial markets from above, and the rise of transnational social forces concerned with environmental protection, human rights, and peace and human security from below.¹³ Both globalization from above and globalization from below are not 'natural', 'private' or 'apolitical' phenomena, but rather are political, public and contestable processes that are constituted through the actions of people.¹⁴ The impact of globalization from above and below is the creation of a transnational civil society, a space beyond the boundaries of states where individuals and groups interact and shape collective life.¹⁵

Globalization opens spaces for transnational civil society. *First*, globalization refers to increasing interdependence at the world level, wherein the activities of people in specific areas have repercussions that move beyond local, regional or national borders. Human rights problems in an interdependent world increasingly cross state borders.¹⁶ Thus, for example, products that present environmental hazards endanger the health of people in numerous states.¹⁷ The interdependence of markets can result in reverberating cross-border explosions when one or a few markets falter, resulting in mass migration and widespread threats to economic and social rights. In order to find solutions to such issues, human rights NGOs working at

'participants' to refer to all to whom international law is applicable. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 94 (1994).

¹³ Richard Falk, *The Right to Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in SELF-DETERMINATION AND SELF-ADMINISTRATION: A SOURCEBOOK 338 (V. Danneberg ed., 1997).

¹⁴ See Anne Orford & Jennifer Beaud, *Making the Seas Safe for the Market: The World Bank's World Development Report 1997*, 22 MELBOURNE U. L. REV. 195, 216 (1998).

¹⁵ Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L CRQ. 613, 627 (1998).

¹⁶ For early articulations of the interdependence theory, see TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye, Jr. ed., 1972).

¹⁷ Alexandre Kiss, *The International Protection of the Environment*, in INTERNATIONAL LAW: CLASSIC & CONTEMPORARY READINGS (Charlotte Ka & Paul Diehl eds., 1998); Edith Brown Weiss, *Planetary Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES & ACTION* (Richard Claude & Burns Weston eds., 1992); Pérez-Díaz, *supra* note 3, at 90; see generally, Hugh J. Marbury, *Hazardous Waste Exports: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251 (1995).

all levels of communities must find new ways to gather information and conduct transborder advocacy.

Second, globalization results in the fragmentation of states and peoples into autonomous groups and areas. In a globalized world, homogeneity is no longer a feasible expectation. The club of globalization encourages and in some cases even demands that minority cultures form their own economic, social and cultural networks to preserve and promote their own collective interests.¹⁸ Associations also form around identity markers such as language, culture and kinship.¹⁹ Identity groups place increased demands for their own rights to culture, language, and association.²⁰ While the ability of minority cultures to assert their interests is a positive development, the formation of identity groups may, by design or as an unintentional by-product, threaten the human rights of other identity groups. The markers chosen by identity groups cross state boundaries, but within a demarcated territory or population.²¹ The rise of identity groups is experienced as fragmentary because it emphasizes the division of an imagined larger identity into smaller pieces. Fragmentation may serve to secure identity in a way that promotes the ability of minority cultures to work for justice. Yet when tensions between identity groups are manipulated by local power brokers,²² a combative, pluralistic civil society may drain itself of life. Transnational civil society needs to recognize both the positive and negative potential of fragmentation.

Third, globalization also results in some degree of homogenization²³ and uniformity.²⁴ Two branches to this process of

¹⁸ See, e.g., Sol Picotero, *supra* note 8, at 1014; DAVID KNOX, POLITICAL NETWORKS: THE STRUCTURAL PERSPECTIVE 76-81 (1990).

¹⁹ See generally examples in HUGH POULTON & SUHA TAJF-TAROUKI, MUSLIM IDENTITY AND THE BALKAN STATE (1997); Benedict Kingsbury, *Indigenous Peoples*, *supra* note 3, at 414.

²⁰ See David S. Meyer & Sidney Tarow, *A Movement Society: Contentious Politics for a New Century*, in THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 1, 18 (David S. Meyer and Sidney Tarow ed., 1998).

²¹ Muslim identity in Bosnia provides a good illustration of these phenomena. See TONE BRIGA, BEING MUSLIM THE BOSNIAN WAY: IDENTITY AND COMMUNITY IN A CENTRAL BOSNIAN VILLAGE (1995).

²² See JULIE MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999).

²³ See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 421 (1994) [hereafter Kingsbury, *The Concept of Compliance*]; see also, Itana M. Parris, *A Latent Sensibility Approaches the International: Reflections on Environmental Rights as Third Generation Solidarity Rights*, 28 U. MIAMI INTER-AM. L. REV. 413, 424 (1997).