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## **SYMPOSIUM: GOVERNING CIVIL SOCIETY: NGO ACCOUNTABILITY, LEGITIMACY AND INFLUENCE**

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### **CONTENTS**

#### **INTRODUCTION: GOVERNING CIVIL SOCIETY**

*Dana Brakman Reiser & Claire R. Kelly* 813

#### **ARTICLES**

The Impact of NGOs on International Organizations: Complexities and Considerations  
*Dr. Shamima Ahmed* 817

“Accountability” as “Legitimacy”: Global Governance, Global Civil Society and the United Nations  
*Kenneth Anderson* 841

The Illegitimacy of Preventing NGO Participation  
*Steve Charnovitz* 891

NGO Standing and Influence in Regional Human Rights Courts and Commissions  
*Lloyd Hitoshi Mayer* 911

Through the Looking Glass: European Perspectives on Non-Profit Vulnerability, Legitimacy and Regulation  
*Dr. Oonagh B. Breen* 947

Wait! That’s Not What We Meant by Civil Society!: Questioning the NGO Orthodoxy in West Africa  
*Thomas Kelley* 993

Linking NGO Accountability and the Legitimacy of Global Governance  
*Dana Brakman Reiser & Claire R. Kelly* 1011

**NOTES**

The Gray (Goods) Elephant in the Room: China's Troubling Attitude  
Toward IP Protection of Gray Market Goods  
*Amy E. Conroy* 1075

Hosting the Games For All and By All: The Right to Adequate Housing  
in Olympic Host Cities  
*Elizabeth Hart Dahill* 1111

Cyberattack Attribution Matters under Article 51 of the U.N. Charter  
*Levi Grosswald* 1151

The Most Dangerous Game: U.S. Opposition to the Cultural Exception  
*Kevin Scully* 1183

# INTRODUCTION: GOVERNING CIVIL SOCIETY

*Dana Brakman Reiser & Claire R. Kelly\**

Globalization challenges an array of international actors to confront myriad problems. Increasingly, non-governmental organizations (“NGOs”) take up this challenge by themselves or in coordination with other actors. *Governing Civil Society: NGO Accountability, Legitimacy and Influence* brought together prominent scholars and experts in a range of subject matters and disciplines to address how improving NGOs as institutions relates to the legitimacy of their role in civil society. NGO scholars consider the legitimacy of NGO action on the ground, among the constituencies affected by their efforts as they operate within international institutions that make law. Nonprofit law scholars address similar issues, but often focus on the internal workings and external regulation of NGOs and how their missions can be accomplished most accountably and effectively. This symposium brought together these disparate, but linked, disciplines for an important conversation on enhancing these essential institutions.

Our first panel, Assessing the Influence of NGOs on International Organizations confronted the work of NGOs in International Organizations (“IOs”). In *The Impact of NGOs on International Organizations: Complexities and Considerations*, Professor Shamima Ahmed notes the perception that nonprofits are succeeding in connection with their work either on the ground or in IOs, but also questions the lack of rigorous scholarship regarding NGOs’ impact. Admittedly, examining this impact will be complex. Any examination should consider whether the NGO made the norm making process more accessible or democratic and whether the NGO succeeded in changing the status quo. Any framework that measures NGO impact also should consider structural and contextual factors. The size, nature of issues, scope of operations, political opportunity structure, and the ability of the NGO to speak with one voice all affect NGOs’ impact. The subject matter that an NGO addresses (e.g. technical matters) also affects how we measure an NGO’s impact. Professor Shamima’s article guides us through three case studies that illustrate these factors, confirming the claim that NGO impact is complex and the need for further study.

In “*Accountability*” as “*Legitimacy*”: *Global Governance, Global Civil Society and the United Nations*, Kenneth Anderson calls attention to the danger that the self-legitimizing relationships between IOs and NGOs presents to accountability. Examining external accountability, he

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considers whether “international NGOs, and transborder social movements more generally, have any special governance role to play.”<sup>1</sup> After tracking the evolution of NGOs pre- and post-9/11, he distinguishes between civil society having a role to play as experts versus as representatives. He argues that NGOs should embrace a role as experts and “even as enthusiasts and advocates for their causes”<sup>2</sup> and forego claims to represent anyone.

In *The Illegitimacy of Preventing NGO Participation*, Steve Charnovitz constructs three frames by which we may view NGO participation in international organizations: State positivism, IO functionalism, and community. The State positivism frame would limit the NGO participation in IOs to that specifically provided by the states that establish the IO. Under the functional view, it is the IO that would consult NGOs as it deemed appropriate. He notes that NGO participation may have its costs, but from a functional standpoint it should also promote “the long-term effectiveness of the IO.”<sup>3</sup> The community frame views the IO as “a place where a community of actors debates and makes decisions.”<sup>4</sup> This community has the individual, not the state, at its center. Each framework suggests a different answer to the question posed by Professor Charnovitz: whether it is illegitimate to exclude NGOs from IOs. The positive view would leave the question up to the member states (although a minority view of the positive approach would impose some limitations on the state’s ability to exclude NGOs). The functionalist approach sees the IO as having a personality and defers to each IO to decide if NGO involvement would “promote the IO’s purposes.”<sup>5</sup> The community approach sees the IO as a community, of which NGOs must be a part.

Professor Lloyd Hitoshi Mayer’s *NGO Standing and Influence in International Human Rights Courts and Commissions* examines NGO involvement in the development and implementation of international human rights law. He undertakes regional analysis considering Europe, the Americas, and Africa. First, he examines the existing provisions for NGO involvement in the human rights courts in each region. NGOs play a variety of roles from applicants, to counsel, to intervenors. Professor Hitoshi Mayer then undertakes an analysis of these roles by reviewing tribunal decisions from these systems over a ten year period. After con-

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1. Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841, 845 (2011).

2. *Id.* at 888.

3. Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT’L L. 891, 902 (2011).

4. *Id.* at 904.

5. *Id.* at 910.

sidering the differences and similarities among the three systems, he then considers the ramifications of NGO involvement. Ultimately he concludes that “the development and support of human rights NGOs should [] be targeted in different ways in these different systems.”<sup>6</sup> He also examines NGO accountability in the regional human rights enforcement system. Admittedly, there are relatively few NGOs who are given a disproportionate role in the process. Nevertheless, he finds that there is “significant oversight” from “reputable individuals and groups from both within and outside the relevant member states.”<sup>7</sup>

The second panel of the day considered Models for Governance and Regulation of NGOs. In her paper *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation*, Oonagh B. Breen looks at the regulation of nonprofits through a European lens. First, Professor Breen outlines EU Regulation and considers the evolution of European policy. She recounts how the events of 9/11 triggered concern over nonprofit finances, leading to the Financial Action Task Force (“FATF”)—Special Recommendation VIII, focusing on the activities of nonprofits, Member State implementation of the FATF recommendations, and the European Commission’s 2005 Communication on the Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector. Three important reports issued between 2007 and 2009 caused the EU to re-assess its strategy and consider a more contextual approach that took account of empirical evidence, proportionality, as well as sensitivity to national regimes and needed flexibility for humanitarian organizations. She argues, in conclusion, for a more balanced approach that would “focus on improving non-profit governance in those areas that raise concern at EU level or that may particularly benefit from a concerted European (as opposed to an ad hoc Member State) policy solution.”<sup>8</sup>

In *Wait! That’s Not What We Meant By Civil Society: Questioning The NGO Orthodoxy In West Africa*, Thomas A. Kelley looks at NGOs on the ground and in particular, development organizations’ efforts to promote civil society in Africa and in particular West Africa. Starting from the premise that a stable civil society fosters democratic governance, stability and prosperity, international development workers sought to engender civil society. As he explains, “the aid industry presumed a causal connec-

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6. Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT’L L. 911, 914 (2011).

7. *Id.* at 939.

8. Oonagh Breen, *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation*, 36 BROOK. J. INT’L L. 947, 949 (2011).

tion between a thriving civil society, democratization, and economic prosperity.”<sup>9</sup> Most northern or donor countries envision that civil society in developing countries would look much as it does in those donor countries. But as Kelley points out, the experience in West Africa has shown that while law reformers might be successful in creating a space for civil society, they cannot dictate the inhabitants of that space. In West Africa, Muslim social reformers have stepped into the space and espoused their own beliefs and traditions. Professor Kelley concludes “that there is little that western governments and aid organizations can do to prevent the civil society sphere in West Africa from evolving in its own direction.”<sup>10</sup>

We were honored to present our *Linking NGO Accountability and the Legitimacy of Global Governance* for discussion in the symposium’s final panel. In it, we consider how global regulators can help improve NGO accountability as well as the legitimacy of global regulation. After considering the roles the NGOs play in global governance, the article describes the various legitimacy frameworks used to assess IOs and how NGO involvement plays an important role in them. It then reviews NGO accountability regimes supplied by domestic nonprofit law and reveals that these regimes will fall short in ensuring legitimacy for NGOs efforts internationally. Next, the article evaluates the accreditation, monitoring, and enforcement efforts IOs use to ensure and maintain the accountability of the NGOs upon whom they rely. Ultimately, we argue for improvements in these systems, to improve the legitimacy of NGO participation and allow global regulators to better “serve as gatekeepers and [] better utilize NGOs as part of their legitimacy strategies.”<sup>11</sup>

*Governing Civil Society: NGO Accountability, Legitimacy and Influence* made a valuable contribution to encouraging the dialogue between NGO and nonprofit legal scholars. As NGOs continue to play a significant role within and among States and IOs, this critical conversation and the research it has spurred will no doubt continue. We thank the scholars whose work appears in these pages, as well as the other panelists and participants at the symposium, for their efforts.

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9. Thomas Kelley, *Wait! That's Not What We Meant By Civil Society!; Questioning the NGO Orthodoxy in West Africa*, 36 BROOK. J. INT'L L. 993, 997 (2011).

10. *Id.* at 1009.

11. Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1011 (2011).

# THE IMPACT OF NGOS ON INTERNATIONAL ORGANIZATIONS: COMPLEXITIES AND CONSIDERATIONS

*Dr. Shamima Ahmed\**

## INTRODUCTION

Since the 1970s, there has been an explosion in the growth of non-governmental organizations (“NGOs”). Their prominence and significance has been conceptualized by some as the “third sector,” the “independent sector,” and by others as the “fifth estate.”<sup>1</sup> Several factors favor such growth. Most importantly, the retreat of the nation state, heterogeneous population, “contract failure,” “market failure,” and technological advancement are widely acknowledged factors attributed to this growth.<sup>2</sup>

The work and impact of NGOs, both at the domestic and international levels, has been widely noted, studied, and recognized. The contributions of NGOs are widely recognized, including in providing relief and emergency services, providing economic and social development, raising consciousness among groups about their rights, shaping agendas, monitoring national and transnational actors, and promoting environmental and many other issues. However, most of these acclamations are based on perceptions, on anecdotal evidence, and on mostly nonscientific assessments of their work and impact.<sup>3</sup> The prominence of NGOs, and at the same time the increasing realization of the subjective assessments and perceptions of their work and impact, has recently raised issues, doubts, and skepticism about their performances, effectiveness, and ultimate impact. As Silova pointed out, “What a decade of intellectual debate and research has brought, however, is a realization that NGOs are obscure organizations, whose impact is often impossible to predict.”<sup>4</sup> Measuring or assessing the impact of NGOs is anything but easy; nevertheless,

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1. See Stuart E. Eizenstat, *Nongovernmental Organizations as the Fifth Estate*, 5 SETON HALL J. DIPL. & INT’L REL. 15, 25–26 (2004).

2. See J. Steven Ott, *Economic & Political Theories of the Nonprofit Sector*, in THE NATURE OF THE NONPROFIT SECTOR, 179, 179–89 (J. Steven Ott ed., 2001).

3. See SHAMIMA AHMED & DAVID. M. POTTER, NGOS IN INTERNATIONAL POLITICS 250–52 (2006).

4. Iveta Silova, *International NGOs and Authoritarian Government in the Era of Globalization*, 10 CURRENT ISSUES COMP. EDUC. 26 (2008).

NGO effectiveness has become an inquisitive topic for discussion and research.

The work of NGOs engages different actors including individuals, groups, states, multinational corporations, and international organizations ("IOs"). NGOs engage with IOs at different levels and in different ways. IOs include international NGOs ("INGOs") and intergovernmental organizations ("IGOs"). This Article focuses on assessing the impact of NGOs on IGOs, and selectively uses the United Nations ("UN"), the World Trade Organization ("WTO"), and the World Bank ("WB" or "the Bank") to discuss the complexities of such inquiry. The discussion is structured in two parts. Part I explains the complexities of assessing the impact of NGOs and identifies several factors that any such assessment needs to consider. Part II describes the relationships between NGOs and the three IGOs, and uses selective examples of the impacts of NGOs on the UN, the WTO, and the WB. The concluding Section emphasizes the complexity of delineating the impact of NGOs on IGOs.

#### I. NGO IMPACT: COMPLEXITIES AND CONSIDERATIONS

The relationship between NGOs and IGOs is multifaceted—they work side by side as partners of development, as agenda-shapers, as policy-makers, as sources of information and expertise, and often times as "watch dogs."<sup>5</sup> On another front, NGOs observe and monitor the work and activities of IGOs in a critical way. Often, it is NGOs that press IGOs to be transparent and accountable, as can be seen in the example of environmental and development organizations since the 1970s.<sup>6</sup> These organizations have come together across the world in diverse transnational advocacy coalitions to lobby and monitor IGOs. As Uvin explains, "NGOs have been faster and more active in lobbying international organizations than governments. These institutions are relatively easy to influence, and pose no danger: they have no power to imprison or torture NGO staff."<sup>7</sup>

There is no doubt that NGOs are active, vibrant, and prominent in their interaction with IGOs. However, the question is: How do we assess their impact on IGOs? That question begs one to focus on the performance or impact of NGOs. Measuring their performance or impact is a delicate matter that involves issues of validity and reliability. In terms of the va-

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5. See Shamima Ahmed, *Nongovernmental Organizations*, in 1 GLOBALIZATION AND SECURITY: AN ENCYCLOPEDIA: ECONOMIC AND POLITICAL ASPECTS 293, 299–306 (G. Honor Fagan & Ronaldo Munck eds., 2009).

6. AHMED & POTTER, *supra* note 3, at 51.

7. *Id.* at 51, 56 n.28.



lidity, researchers need to first define what they are measuring under “performance” or “impact.” The issue of reliability makes one careful about the reality that performance or impact is negotiated by a variety of factors, both internal and external. This is true for any type of assessment, whether assessing the impact of NGOs or of any other phenomenon. In regard to the impact of NGOs, the literature is quite mixed—some speaks vigorously about their significant, positive, and long lasting impact, and in some ways tries to overrate them, while other literature questions the significance of their impact, if any.<sup>8</sup> One reason for this difference lies in the reality that the impact of NGOs will vary considerably across issues and across time due to a multitude of internal and external factors. As Michael Edwards concluded in 1998, there was only one possible answer to the question of whether or not NGOs were overrated: “It all depends on the NGOs concerned, the type of work that they do, and the contexts they work in.”<sup>9</sup> Thus, there are several factors to consider when one attempts to assess the impact of NGOs. This Section identifies some of the important ones that scholars have identified in their attempt to assess the impact of NGOs on IOs.

He and Murphy used six criteria to examine NGO impact on the construction of global social contract.<sup>10</sup> They use the following two NGO campaigns towards the WTO as case studies in their research: (1) the campaign to add an enforceable labor standard clause linked to WTO’s trade liberalization, and (2) the campaign to clarify the use of the safeguard measures contained in the WTO’s Trade-Related Intellectual Property Rights (“TRIPS”) agreement so as to increase access to medicines in developing countries by making them more widely affordable. Their findings are discussed at a later section of this Article.

He and Murphy define social contract as a “political and moral principle for international agreements and for governing the conduct of all actors in the international arena.”<sup>11</sup> As they explain, this is a global principle meaning that citizens in all countries (developed, undeveloped, and developing) ought to be regarded as important contracting parties.<sup>12</sup> They also include the value of social justice which embodies the principle of

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8. See Sebastian Mallaby, *NGOs: Fighting Poverty, Hurting the Poor*, 144 FOREIGN POL’Y 50, 51–58 (2004) (questioning whether NGO involvement helps or hinders projects to further international development).

9. Michael Edwards, *Are NGOs Overrated? Why and How to Say “No,”* 1998 CURRENT ISSUES COMP. EDUC. 55, 55 (1998).

10. He Baogang & Hannah Murphy, *Global Social Justice at the WTO? The Role of NGOs in Constructing the Global Social Contracts*, 83 INT’L AFF. 707, 712 tbl.2 (2007).

11. *Id.* at 711.

12. *Id.*

equality.<sup>13</sup> Finally, the social contract, according to the authors, must be based on following a democratic process and thus be based on consent rather than imposed from above.<sup>14</sup>

He and Murphy first developed the following six questions or criteria to examine the impact of NGOs in these two cases, which they used as empirical evidence:<sup>15</sup>

1. Are NGOs significant parties to the global social contract? Are they outside challengers or inside policy-making participants?
2. Have NGOs successfully challenged the international business community to implement universal values?
3. In challenging the undemocratic process, are NGOs making the process more democratic, and if so, in what sense?
4. Are NGOs forcing the WTO to revise some economic contracts in order to meet social demands?
5. Do the poor benefit from the campaigns against the WTO agreements organized by NGOs?
6. Do NGOs make trade fairer? Do they make the WTO agreements fairer, and if so, in what sense?<sup>16</sup>

The above questions lead to some meaningful criteria to assess the impact of NGOs. We can categorize them into two different sets of criteria: process and outcome. The process criteria include NGO access in the policy-making process and whether the participation of NGOs made the decision-making process more democratic. Outcome criteria include their success in challenging the status quo, ensuring more fairness in the agreements, and the impacts of the campaigns in benefitting the poor.

Let us take another example with Corell and Betsill's research on two different case studies, both involving the "study of NGO influence in international environmental regulations."<sup>17</sup> These two authors raise a very basic question, the issue of what we mean by "influence."<sup>18</sup> As they point out, "[a] review of the literature demonstrates large discrepancies between approaches and reveals such discrepancy in the types of evidence used to indicate NGO influence that very few conclusions can be

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13. *Id.*

14. *Id.*

15. *Id.* at 712 tbl.2.

16. *Id.* at 713–14.

17. Elisabeth Corell & Michele M. Betsill, *A Comparative Look at NGO Influence in International Environmental Negotiations: Desertification and Climate Change*, 1 GLOBAL ENVTL POL. 86, 86 (2001).

18. *Id.* at 86–88.

drawn about the overall level of NGO influence.”<sup>19</sup> They emphasize, very appropriately, that one needs to pay careful consideration to what one means by NGO “influence” and how “influence” might be assessed.<sup>20</sup>

Corell and Betsill develop and use a framework to analyze NGO impact on the following two cases: the negotiations of the Desertification Convention and the Kyoto Protocol to the Climate Change Convention. The framework operationalizes “influence” as the following: “influence can be said to have occurred when one actor intentionally transmits information to another that alters the latter’s actions from what would have occurred without that information.”<sup>21</sup> This means that the transmission of information is intentional, and that it affected or altered the recipients’ action or behavior.<sup>22</sup> To complete the scientific method of research, their framework also considers external factors that might affect the outcome.<sup>23</sup> As they point out, it is important to consider whether other factors with similar goals might be responsible for the outcome.<sup>24</sup>

Emphasizing the importance of influence at both the process and the outcome levels, they develop a list of indicators to measure or assess NGO “influence” on the above two negotiations:

- (1) being present at the negotiations,
- (2) providing written information supporting particular position (e.g. research reports),
- (3) providing verbal information supporting a particular position (through statements),
- (4) providing specific advice to government delegations through direct interaction,
- (5) having the opportunity to define the environmental issue under negotiation,
- (6) opportunity to shape the negotiating agenda, and
- (7) ability to ensure that certain texts supporting a particular position are incorporated in the Convention.<sup>25</sup>

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19. *Id.* at 86.

20. *See id.* at 87.

21. *Id.*

22. *Id.*

23. *Id.* at 87–88.

24. *Id.* at 88.

25. *Id.* at 90.

As one can delineate from these indicators, the authors view "influence" as more of a process with different degrees of influence.<sup>26</sup> So, this indicates another dimension of influence or impact—that there is a continuum.

He, Murphy, Correl, and Betsill's studies no doubt inform us of some important indicators of NGO impact. However, there are additional structural and contextual factors that one needs to consider in assessing the impact of NGOs. Factors like size, resources and scope of operations (local, national, and international), political opportunity structure, nature of the issue, and the ability of NGOs to speak in one voice, are important considerations. For example, in regard to nature of issues, there are some issues (e.g., abortion) that divide NGOs into different competing or rival groups, while others (e.g., environmental protection) usually bring most of them together under one umbrella. Even though there are differences between NGOs and NGO coalitions with respect to their understanding of strategies to protect the environment, in regard to the ultimate goals, they usually have one common aim which is protection of the environment. Such agreement gives them homogeneity and hence strength.

However, even if NGOs can speak in one voice, the scope of opportunity they have to participate at various levels in the process of policy or decision-making will limit their level of impact. For example, if NGOs do not have an opportunity to participate in debates that policy-makers are engaged in, no matter how homogeneous they are, their voice most likely will not be reflected in the ultimate policy, as compared to situations where they are participating equally with other policy-makers. This is how the political opportunity structure plays a part in effecting the impact of NGOs. Another contextual factor is the nature of the issue (technical versus nontechnical) that NGOs are advocating. Technical issues, like climate change, involve expert knowledge and speak of more intangible issues. Few NGOs have the technical expertise, nor possess the scientific knowledge, to assume an equal and valid stake in the deliberation process involving technical issues. In contrast, issues like genital mutilation are tangible and involve social, cultural, and development issues, so that grassroots and community-based NGOs can successfully portray themselves as part of the solution.

Similar to the contextual factors, there are several structural factors that affect the scope of NGO impact. The impact of a large NGO, in most cases, will be more significant in scope compared to a small NGO. Similarly, an NGO which is more resourceful in terms of its financial, human resources, and political connections, will have a broader scope of opera-

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26. *Id.* at 90–91.

tion and hence a broader scope of impact compared to a smaller NGO. Scope of operation also includes the geography (local, national, or international). For example, the level of impact that an INGO will have, in most cases, will be significantly broader compared to a local NGO. The point here is that one cannot assess the impact of a local NGO the same way as the impact of an INGO, or the impact of a local NGO on a technical issue the same way as a social issue, and so forth. The broader argument is thus that NGO impact assessment needs to take into consideration a variety of structural and contextual factors.

## II. THE RELATIONSHIP BETWEEN NGOS AND IOS

### *A. The Relationship between NGOs and the UN*

The UN was founded in 1945 after the Second World War by fifty-one countries that were committed to maintaining international peace and security, to developing friendly relations among nations, and to promoting social progress, better living standards, and human rights.<sup>27</sup> Due to its unique international character, and the powers vested in its founding Charter, the UN can take action on a wide range of issues. It also provides a forum for its member states to express their views through the General Assembly, the Security Council, the Economic and Social Council, and other bodies and committees.

The relationship between NGOs and the UN provides NGOs with the opportunity for agenda-setting at the international level, through participation at the deliberations that take place at the United Nations. Their relationship is formalized and structured through Article 71 of the UN Charter, issued in 1945, which empowers the Economic and Social Council ("ECOSOC") to "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."<sup>28</sup> "The UN has developed the longest relationship with NGOs. That relationship also serves as the model for other IGOs."<sup>29</sup>

In their relationship with the UN, NGOs may fall within three categories of status: general consultative status, special consultative status, and roster status.<sup>30</sup> General consultative status is reserved for large international NGOs whose area of work covers most of the issues on the agenda

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27. *United Nations at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Apr. 2, 2011).

28. U.N. Charter art. 71.

29. AHMED & POTTER, *supra* note 3, at 77.

30. *Id.* at 78.

of the ECOSOC and its subsidiary bodies.<sup>31</sup> The majority of the NGOs in this category are large, long-standing, international organizations that are well established and geographically wide reaching. NGOs that are more narrowly focused, with specific expertise in an area covered by the ECOSOC, fall under the special consultative status.<sup>32</sup> These NGOs are often smaller and newer to the scene. NGOs that fall outside of these two categories but seek consultative status are added to the roster.<sup>33</sup> NGOs with roster status usually have narrow and/or technical focuses or have been given formal status with another UN body or agency.<sup>34</sup> These NGOs are thought to be able to make "occasional and useful contributions to the work of the Council or its subsidiary bodies."<sup>35</sup>

Through their consultative status, NGOs can propose agenda items, send observers to all meetings, and submit brief written statements.<sup>36</sup> They have access to all UN documents once the documents are officially released.<sup>37</sup> In addition, they are able to attend different meetings and proceedings.<sup>38</sup> This means that they can gain high levels of information about the political process involved in deliberations at the UN. NGOs with consultative status have security passes which give them access to all of the buildings, including the lounges, bars, and restaurants used by the diplomats.<sup>39</sup> This also gives them access to the delegates, which in turn, provides them with the opportunity to obtain more information through informal discussion, including hearing about what happened at the private meetings. Finally, being awarded consultative status gives NGOs a legitimate place within the political system. This means that the NGO activist is seen as having a right to be involved in the process. As a result, in the informal contacts with delegates, it is possible to express views about issues on the agenda and to lobby for particular decisions to be made. This exposure to information gives NGOs the opportunity to influence the agenda-setting process at the UN. There are wide-ranging

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31. *Id.*

32. *Consultative Status with ECOSOC*, U.N. DEPT. ECON. & SOC. AFF., 2008, <http://esa.un.org/coordination/ngo/new/index.asp?page=intro> (last visited Apr. 2, 2011).

33. *Id.*

34. These specialized agencies include, for example, the Food and Agriculture Organization; the International Labor Organization; the United Nations Conference on Trade and Development; the United Nations Educational, Scientific and Cultural Organization; the United Nations Industrial Development Organization; and the World Health Organization. *Id.*

35. *Id.*

36. AHMED & POTTER, *supra* note 3, at 78.

37. *Id.* at 53.

38. *Id.*

39. *Id.*

policy areas (e.g., protection of the environment, women's rights, and individual rights) where the main issues have been seriously considered because of the work of different groups of NGOs at different UN conferences.

Thousands of NGOs attend different conferences and present information to different UN agencies, commissions, and field offices. Furthermore, international agencies like the International Fund for Agricultural Development ("IFAD"), the United Nations Development Programme ("UNDP"), the World Health Organization ("WHO"), the United Nations Commission on Human Rights ("UNCHR"), and the WB all have regular NGO consultation meetings.<sup>40</sup> Often NGOs play a leading role in promoting the various dedications of "days," "years," and "decades" that the UN system regularly proclaims.<sup>41</sup> NGOs are also partners with different UN development programs through a variety of the UN's development and relief agencies (e.g., WHO, UNHCR, UNICEF). They are actively involved in implementing a variety of programs related to family planning, sex education, HIV prevention, and vaccination.

As of February 20, 2011, there are 3,400 NGOs in consultative status with the UN.<sup>42</sup> There are several noteworthy impacts resulting from the relationships of NGOs with the UN. As mentioned, NGOs have a long-standing institutionalized relationship with the UN through their consultative status with the Economic & Social Council. They made their mark in the Preamble of the UN Charter which states, "We the Peoples of the United Nations determined . . . to affirm in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."<sup>43</sup> Earlier drafts of the Charter did not start out that way. In fact, it was on the initiative of women delegates and forty-two NGOs accredited to the founding conference that the provisions banning discrimination based on sex were added.<sup>44</sup> NGOs were instrumental in securing the establishment of the UN Human Rights Commission, which drew up the Universal Declaration of Human Rights with NGO input in

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40. *Id.*

41. *Id.*

42. *Consultative Status with the ECOSOC and Other Accreditations*, U.N. DEPT OF ECON. & SOC. AFF., <http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=falsehttp://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=falsehttp://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false> (last visited Apr. 2, 2011).

43. U.N. Charter pmbl.

44. U.N. DEP'T OF PUB. INFO., *THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945-1995*, VOL. VI., at 10, U.N. Sales No. E.95.I.29 (1995).

1948.<sup>45</sup> In recent years, there are several areas of accomplishments that NGOs secured at the UN level. Among those, some have significant impact. One example is in the area of promoting women's rights. The advocacy of NGOs at the UN eventually led to the integration of women's rights as human rights, the establishment of a permanent UN Commission on the Status of Women ("CSW"), and adoption of the Declaration on the Elimination of Violence Against Women. Gender rights are now part of international law.<sup>46</sup>

NGOs are gradually encroaching on other UN organs too, including the General Assembly and the Security Council. NGOs involved in conflict regions have been allowed to present their views before the General Assembly. They have addressed special sessions on disarmament and development. In fact, some committees, such as the UN Special Committee against Apartheid and the UN Special Committee on Palestinian Rights, even have broad, ongoing relationships with NGOs.<sup>47</sup> A few NGOs, for example, the International Committee of the Red Cross, are granted recognition to become observers in the General Assembly.<sup>48</sup> CARE,<sup>49</sup> for example, has briefed the different committees of the Security Council.

#### *B. The Relationship between NGOs and the World Trade Organization*

The World Trade Organization ("WTO") is a global international organization "dealing with the rules of trade between nations."<sup>50</sup> The WTO framework consists of several agreements that have been signed and ratified by the majority of the world's trading nations.<sup>51</sup> The basic legal rules for international commerce are located in these agreements, guaranteeing that every member is afforded certain important trade rights. In addition, nations are obligated under the agreement to abide by certain agreed upon limits, which benefit all trading nations. Ultimately, the goal of the WTO is to facilitate business among producers of goods and services, exporters, and importers as well as to enhance the welfare of all.<sup>52</sup>

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45. *See id.* at 10–16.

46. AHMED & POTTER, *supra* note 3, at 53.

47. *Id.* at 83.

48. *See* G.A. Res. 45/6, ¶ 1, U.N. Doc. A/RES/45/6 (Oct. 16, 1990).

49. AHMED & POTTER, *supra* note 3, at 83.

50. *What is the WTO?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Apr. 2, 2011) [hereinafter *What is the WTO?*].

51. *Id.*

52. *Id.*



One of the youngest of the international organizations, the WTO came into being in 1995, as the successor to the General Agreement on Tariffs and Trade ("GATT") established in the wake of the Second World War.<sup>53</sup> The WTO's top level decision-making body is the ministerial conference which meets at least once every two years.<sup>54</sup> As of July 2008, the WTO has 153 members.<sup>55</sup> The WTO's procedure for resolving trade quarrels falls under its Dispute Settlement provisions. When a member believes its rights have been infringed, it brings a dispute to the WTO, where specially-appointed experts make judgments based on their interpretations of the agreements and the member state's individual commitments.<sup>56</sup>

The WTO has established a formal relationship with NGOs since 1996.<sup>57</sup> Its relationship with NGOs is structured similar to the UN model. Article V. 2 of the Marrakesh Agreement, which established the WTO, states the following: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."<sup>58</sup> Thus, NGOs can register with the IGO provided they can prove that they are concerned with matters related to those of the WTO. On July 18, 1996, the General Council further clarified the framework for relations with NGOs by adopting a set of guidelines which "recognizes the role NGOs can play to increase the awareness of the public in respect of WTO activities."<sup>59</sup> The interaction between the WTO and NGOs often consists of "sharing information, requesting information from NGOs, organizing symposia on specific WTO-related issues, and making informal arrangements to receive information."<sup>60</sup> Further, registered NGOs are enti-

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53. See AHMED & POTTER, *supra* note 3, at 81.

54. See *Understanding the WTO: What We Do*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_we\\_do\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm) (last visited Apr. 2, 2011) [hereinafter *WTO: What We Do*].

55. *What is the WTO?*, *supra* note 51.

56. *WTO: What We Do*, *supra* note 54.

57. *Relations with Non-Governmental Organizations/Civil Society*, WORLD TRADE ORG., [http://www.wto.org/english/forums\\_e/ngo\\_e/intro\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/intro_e.htm) (last visited Apr. 2, 2011).

58. Marrakesh Agreement Establishing the World Trade Organization, art. V:2, Apr. 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/forums\\_e/ngo\\_e/estwto\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/estwto_e.htm).

59. See Guidelines for Arrangements on Relations with Non-Governmental Organizations para. 2, adopted by the General Council on 18 July 1996, WT/L/162 (July 23, 1996) [hereinafter *NGO Guidelines*].

60. AHMED & POTTER, *supra* note 3, at 81.

tled to observe plenary sessions and ministerial conferences.<sup>61</sup> NGOs may wish to be available for consultation by interested delegations. NGOs may also continue with the past practice of responding to WTO requests for general information and briefings. However, since WTO agreements are legally binding intergovernmental treaties of rights and obligations among its members, NGOs are not permitted to be directly involved in the work of the WTO or its meetings.<sup>62</sup>

Tensions between NGOs and the WTO are not hidden—the 1991 Seattle Protest clearly publicized the tensions worldwide. From the NGO standpoint, the legitimacy of WTO agreements are compromised and are not democratic due to the lack of mechanisms for the citizens of member states to participate in WTO deliberations. As He and Murphy explain, “The focus of economic liberalization at the WTO, combined with the lack of citizen input through its member states, has meant that the impact of WTO agreements on social equality is not adequately accounted for, even though international trade rules often bear significantly upon social justice.”<sup>63</sup> The WTO’s mandate is strictly limited to the administration of a rules-based system for governing international trade liberalization—in contrast to most other international organizations, the WTO does not allow NGOs to participate in its decision-making process.

As mentioned before, He and Murphy examined the roles of NGOs in constructing global social contracts using two specific cases involving the WTO: (1) international NGO campaign for an enforceable labor standards clause linked to trade liberalization, and (2) the campaign to clarify the use of the safeguard measures contained in the WTO’s Trade-Related Intellectual Property Rights (“TRIPS”) agreement to increase access to medicines in developing countries by making them more widely affordable.<sup>64</sup>

#### 1. The International NGO Campaign for an Enforceable Labor Standards Clause

The international NGO campaign for an enforceable labor standards clause was led by the International Confederation of Free Trade Unions (“ICFTU”).<sup>65</sup> The ICFTU focused on the connection between trade liberalization and labor exploitation, arguing that the WTO dispute settlement body should be responsible for addressing violations of labor rights in

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61. *Id.*

62. NGO Guidelines, *supra* note 59, para. 6.

63. Baogang & Murphy, *supra* note 10, at 710.

64. *Id.* at 708.

65. *Id.* at 714.

the export arena.<sup>66</sup> During the 1996 conference in Singapore, the ICFTU lobbied WTO members to push for the incorporation of a clause that would commit member states to respect seven basic International Labour Organization (“ILO”) conventions relating to the freedom of association, the right to collective bargaining, the abolition of forced labor, the prevention of discrimination in employment, and the minimum age of employment.<sup>67</sup> They also argued that the WTO had become a weak enforcement body to implement the values and goals of the international labor movement.<sup>68</sup>

Even though developed WTO member states led by the U.S. and the EU pushed strongly for the WTO to formally recognize labor issues in the context of trade liberalization, the majority of the developing countries opposed the incorporation of labor standards into WTO framework.<sup>69</sup> This opposition was based on the notion that this measure could harm the growth potential of developing nations that depend on labor-intensive industries, thus making the WTO the wrong locus of such a cause.<sup>70</sup>

In addition to the disagreement among the member states, there was a similar disagreement among different NGOs. Most importantly, a coalition of NGOs organized by the Third World Network (“TWN”) issued a public statement that opposed the WTO taking in new issues, including labor standards.<sup>71</sup> The TWN claimed that developed country protectionists would misuse the labor standards clause as a means to prevent imports of products from less developed countries.<sup>72</sup> All of these disagreements eventually resulted in the failure to adopt the proposed core labor standards clause, even though the discussion dominated the conference in Singapore.<sup>73</sup> However, a number of NGOs reoriented their resources towards targeting prominent multinational corporations (“MNCs”) to encourage/pressure them to promote labor rights.<sup>74</sup> Nevertheless, the trade unions and NGOs involved in these campaigns have played an important role in drawing attention to the issue of universal labor standards, a controversial agenda which likely will remain a prominent factor in international trade governance and in relationships among nation states, civil

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66. *Id.*

67. *Id.* at 714–15.

68. *Id.* at 714.

69. *Id.* at 715.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.*

society organizations, and the international business sector. He and Murphy arrived at the following assessment of NGO impact on WTO: While NGOs clearly influenced the WTO agenda, and forced some MNCs to adopt code of conducts to uphold workers' rights, they were not successful in forcing the WTO to incorporate that particular clause on labor standards.<sup>75</sup> Nevertheless, the coalition played an important role in drawing attention to the issue of universal labor standards.

## 2. TRIPS and the Access to Medicines Campaign

The TRIPS agreement, part of the framework of the WTO that came into force on January 1, 1995, sets out mandatory minimum standards for the protection of intellectual property, covering various types of products such as pharmaceuticals.<sup>76</sup> TRIPS recognizes the detrimental impact patent protection can have on public health and as a result includes certain safeguards to ensure access to medicines. However, it is not clear how these safeguards can be employed by developing countries who seek to provide its citizens with access to affordable medicines.<sup>77</sup>

Médecins Sans Frontières, Oxfam, and Health Action International ("HAI"), in conjunction with local NGOs from developing countries, spearheaded a campaign to shed light on the ways in which TRIPS is detrimental to developing countries.<sup>78</sup> The main argument focused on the disastrous impact on public health in developing countries of limiting production of essential generic medicines, particularly for sufferers of HIV/AIDS, tuberculosis, and malaria.<sup>79</sup> The campaign was born in 1998 after the Pharmaceutical Manufacturers' Association of South Africa and forty pharmaceutical manufacturers brought a suit against the government of South Africa in response to its 1997 Medicines and Related Substances Control Amendment.<sup>80</sup> The suit alleged violation of the TRIPS agreement as well as South Africa's constitution, which included specific provisions on dealing with generic and name brand pharmaceuticals.<sup>81</sup> In addition to the pharmaceutical companies, the European Union and the U.S. government both lent their support and had also pressured the South African government themselves in connection to the production of generic drugs.<sup>82</sup>

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75. *Id.* at 716–17.

76. *Id.* at 717–18.

77. *Id.* at 718.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

South Africa was not alone in its stance on issuing compulsory licenses to manufacture generic medicines, receiving support from the international NGO campaign network and other member states such as Brazil and India.<sup>83</sup> The issue finally came to a head in November 1999, when the “Amsterdam Statement” was issued.<sup>84</sup> Promulgated by 350 individuals on behalf of NGOs from fifty countries, the statement contemplates the “establishment of a working group within the WTO regarding TRIPS and access to medicines in order to consider the impact of trade policies on developing countries’ citizens and to provide a public health framework for the interpretation of key features of the TRIPS agreement and other WTO accords.”<sup>85</sup> International organizations such as the World Health Organization, the World Bank, and the United Nations Development Programme also got involved, arguing the importance of the right to issue compulsory licenses and to form strategic partnerships with generic pharmaceutical manufacturers, especially with regard to life saving medicines such as those used to treat HIV/AIDS.<sup>86</sup> The enormous profits earned by pharmaceutical companies on the sale of HIV/AIDS medications were in fact the key to discrediting these companies’ arguments against South Africa. As a result, the U.S. and EU withdrew from the suit.<sup>87</sup>

In 2001, NGOs realized a partial victory at the ministerial conference (Doha conference), with the passage of the Declaration on TRIPS and Public Health.<sup>88</sup> The Declaration states the following:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly while reiterating our commitments to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, promote access to medicines to all.<sup>89</sup>

However, as pointed out by He and Murphy, despite the importance of the Doha Declaration for public health, it fails to address the issue of nations that do not have the infrastructure to manufacture the medicines and must rely instead on the import of generic medicines produced under compulsory licenses.<sup>90</sup> This issue was addressed in 2003 with the passage

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83. *Id.*

84. *Id.*

85. *Id.* at 719.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 719–20.

of the temporary waiver known as the August 30 decision.<sup>91</sup> This solution allowed developing countries that lacked the ability to manufacture its own generic drugs to import cheaper generic medicines made pursuant to a compulsory license.<sup>92</sup> This waiver was eventually made permanent on December 6, 2005, as an amendment to the TRIPS agreement.<sup>93</sup> While this amendment has been heralded as a major accomplishment, many NGOs criticize the provisions for being overly complex.<sup>94</sup> Based on their research, He and Murphy found that the first campaign was in part a failure while the other campaign was for the most part successful.<sup>95</sup>

### *C. The Relationship between NGOs and the World Bank*

The WB, established in 1944, provides financial and technical assistance to developing countries through “low-interest loans, interest-free credits, and grants to developing countries for a wide array of purposes.”<sup>96</sup> These purposes include “investments in education, health, public administration, infrastructure, financial and private sector development, agriculture, and environmental and natural resource management.”<sup>97</sup> The WB is like a cooperative, in which its 187 member countries are shareholders.<sup>98</sup> The shareholders are represented by a Board of Governors who is the ultimate policy-makers at the World Bank. Generally, the governors are member countries’ finance or development ministers.<sup>99</sup>

The first interaction the WB had with NGOs came in the 1970s concerning environmental issues.<sup>100</sup> “Today, the Bank consults and collaborates with thousands of members of civil society organizations throughout the world, such as community-based organizations, NGOs, social movements, labor unions, faith-based groups, and foundations.”<sup>101</sup> In

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91. *Id.* at 720.

92. *Id.*

93. *Id.*

94. *See id.*

95. *See id.* at 723–25.

96. *See About Us, WORLD BANK*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Apr. 2, 2011).

97. *Id.*

98. *See id.*

99. *See About Us: Board of Governors, WORLD BANK*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20873632~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (last visited Apr. 2, 2011).

100. *The World Bank and Civil Society, WORLD BANK*, <http://go.worldbank.org/PWRRFJ2QH0> (last visited Apr. 2, 2011).

101. *Id.*

1981 the Bank developed its first operational policy note on relations with NGOs, which emphasizes its collaboration with NGOs and encourages borrowers and staff members to consult with NGOs and to involve them, as appropriate, in Bank-supported activities, including economic and social sector work and all stages of a project's processing—identification, design, implementation, and monitoring and evaluation.<sup>102</sup> Along with this operational policy, the Bank instituted a World Bank NGO Committee with sixteen top international NGOs as the founding members.<sup>103</sup> In response to criticisms that the deliberation process in the Committee was not sufficiently transparent and that the NGOs involved were not acting independently, in 1984 the NGO members of the Committee constituted themselves as an autonomous NGO Working Group on the World Bank.<sup>104</sup> They now meet separately to decide on NGO priorities before the annual meetings with World Bank staff in the Committee.<sup>105</sup> They also hold meetings in developing countries and organize their own programs of research and information exchange in order to strengthen their inputs to policy dialogue with the Bank. The WB has an extensive network of engagements with NGOs, and relies on over 120 civil society focal points, which includes over eighty civil society country staff working in seventy Bank country offices, more than forty staff at the regional level (Civil Society Group), and the Civil Society team at the global level.<sup>106</sup>

The world's wealthiest countries are the primary funders of the Bank and, hence, their governments exercise much control.<sup>107</sup> Civil society groups in these countries have therefore introduced strategies to work in solidarity with Southern NGOs to hold their government representatives

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102. *Civil Society: Background*, WORLD BANK (Mar. 24, 2010), <http://go.worldbank.org/Y55YH23K50>.

103. Peter Willetts, *NGO Working Group on the World Bank* (Oct. 24, 2001), [www.staff.city.ac.uk/p.willetts/PIE-DOCS/INDEX.HTM](http://www.staff.city.ac.uk/p.willetts/PIE-DOCS/INDEX.HTM).

104. See Jane G. Covey, *Critical Cooperation? Influencing the World Bank*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS AND GRASSROOTS MOVEMENTS* 81, 96–97 (Jonathan A. Fox & L. David Brown eds., 1998) [hereinafter *THE STRUGGLE FOR ACCOUNTABILITY*].

105. See *id.* at 97.

106. *World Bank Staff Working with Civil Society*, WORLD BANK, <http://go.worldbank.org/WZAC4X2A70> (last visited Apr. 2, 2011).

107. ALEX WILKS, EUR. NETWORK ON DEBT & DEV. [EURODAD], 11.11.11, *PUBLIC CONTROL FOR THE PUBLIC INTEREST: ASSESSING WORLD BANK ACCOUNTABILITY IN RICHER COUNTRIES 2* (Mar. 18, 2010) [hereinafter *EURODAD REPORT*], available at, [http://www.eurodad.org/uploadedFiles/Whats\\_New/Reports/World%20Bank%20accountability%20study.pdf](http://www.eurodad.org/uploadedFiles/Whats_New/Reports/World%20Bank%20accountability%20study.pdf).

accountable for the policies they pursue via the Bank.<sup>108</sup> To that end, when key international meetings are on the horizon, or new funds are about to be allocated to the Bank, NGOs insert themselves and their agendas.<sup>109</sup> Different country governments have responded in different ways to the activism of NGOs with respect to WB projects,<sup>110</sup> some are receptive to reform while others forsake the NGOs proposals in support of their own national agendas.<sup>111</sup>

For more than two decades, the Bank has been a lightning rod for transnational civil society action. Coalitions of civil society organizations—NGOs, churches, indigenous peoples movements, and international environmental and human rights networks—have repeatedly challenged the Bank's high profile promotion of socially and environmentally costly development strategies.<sup>112</sup> For instance, during the mid-1980s, a coalition of NGOs waged a series of campaigns against WB projects using the strategy of showing that the projects, far from promoting development, were causing or would cause harm to the environment and people living in the area. They used evidence from different projects to argue that the Bank must institute tighter environmental and social directives across the board.<sup>113</sup> NGOs also vehemently argued against the Bank's structural adjustment program, which tends to focus on macroeconomic policy reform, thereby overlooking the side effects of this program. "Some NGOs have gone so far as to argue that structural adjustment does not simply hurt the poor by raising poverty and unemployment levels; rather, these policies are inherently anti-poor, offering economic and political elites the opportunity to cut welfare and other social benefits in the name of reform."<sup>114</sup> The Bank policy engagement with NGOs was initially a reaction to these criticisms.

In the U.S., NGOs pushed for the Bank Information Center ("BIC"), the primary institution responsible for policing the accountability of the Bank to both the NGO community and the U.S. Congress.<sup>115</sup> Since its inception in 1987, the BIC, with funding largely from U.S. foundations,

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108. *Id.*; see also Robert H. Wade, *Accountability Gone Wrong: The World Bank, Non-Governmental Organisations and the US Government in a Fight over China*, 14 NEW POL. ECON. 25, 26 (2009); PAUL J. NELSON, *THE WORLD BANK AND NONGOVERNMENTAL ORGANIZATIONS* 183–84 (1995).

109. EURODAD REPORT, *supra* note 107, at 2–3.

110. *See id.* at 3.

111. *Id.* at 3.

112. *See e.g.*, Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in *THE STRUGGLE FOR ACCOUNTABILITY*, *supra* note 104, at 393–403.

113. *See AHMED & POTTER*, *supra* note 3, at 88–93.

114. *Id.* at 79.

115. Wade, *supra* note 108, at 29.



has been reporting on the Bank's activities to the broader NGO community.<sup>116</sup> Another structural change at the Bank came in 1993 with the Inspection Panel ("IP"), a type of grievance committee which was the brainchild of U.S. NGOs such as the Center for International Environmental Law.<sup>117</sup> The IP is an avenue of redress for people in borrowing countries who have been affected by Bank projects.<sup>118</sup> Allowing them to bypass their own governments, complaints can be lodged "against the Bank in the event they perceive that the Bank has not fully complied with its operational directives and that their welfare has been harmed as a result."<sup>119</sup> The IP is therefore a mechanism for project-affected people, and for NGOs to act on their behalf, to lodge a campaign against the WB and generate pressure on governments that are borrowing money from the Bank for these projects.<sup>120</sup> Congress made its creation a condition of U.S. funds for the Bank's International Development Association in the early 1990s. "For the first decade of its existence, the IP was one of the most divisive issues among the Board of Directors."<sup>121</sup> A few developed countries supported it enthusiastically, the U.S. above all; most developed countries supported it tepidly; virtually all the developing countries opposed it strongly. The disagreement was mostly due to the reality that the IP challenged conventional notions of state sovereignty, which was a large part of why the borrowing states were opposed to it.

Over time, as NGOs became more powerful in terms of their dealings with the Bank, the Bank finally responded by reformulating its operational policies and procedural instructions so as to make a sharper distinction between what was required and what was advisory. Beginning in 1997, the Bank issued a total of ten "safeguard policies," or policies in connection to environmental and social issues, "covering environmental assessment, natural habitats, forestry, pest management, resettlement, and indigenous peoples," as well as dam safety policies, international waterways, and projects regarding disputed areas.<sup>122</sup> The terminology, "safeguard policies," clarified the Bank's responsibility "not just to comply with discrete bits of policy, but to comply with a whole family of things whose common denominator was the risk of serious political trou-

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*

121. *Id.*

122. *Id.*

ble in the event of non-compliance, especially in light of NGOs' watchful gaze."<sup>123</sup>

The Bank does have a policy note on engagement with civil society, entitled "Good Practice 14.70." It encourages, but does not require, its staff to engage with civil society, and identifies information sharing, policy dialogue, and operational collaboration as the three broad areas for contact.<sup>124</sup> However, the document discourages over-involvement of the third sector in its core economic business, cautioning that many NGOs have "limited expertise in macro or specific economic issues."<sup>125</sup>

In 2003, the Bank further developed and clarified its relationship with civil society, and emphasized the facilitation role of the Bank in its consultative relationship with NGOs. Facilitation, defined as "encouraging" governments to work through civil society, replaced the "information-sharing" recommended in "Good Practice 14.70." The shift toward an increasingly proactive and interventionist comportment in developing countries, in conjunction with civil society, is explained as a reflection of "new models of public-private cooperation, transparency and oversight that give a greater role to [civil society organizations] in public life."<sup>126</sup>

In terms of practice, the Bank values NGOs mostly for their role in implementation of WB projects. The 1989 Operational Directive that established basic policy towards NGOs emphasizes that aspect. Because the WB in principle lends only to governments, its willingness to provide grants to NGOs remains limited. According to Nelson, the most common form of WB-NGO collaboration involves NGOs carrying out a project, or a part of it.<sup>127</sup> He also found that the Bank staff resisted NGO attempts to redefine development agendas or cooperate in designing programs beyond specific projects.<sup>128</sup>

There are diverse points of view about how much civil society groups have managed to influence the World Bank. No doubt, the Bank has opened up many processes and much information for NGOs, but consultation and transparency do not necessarily mean meaningful influence.

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123. *Id.*

124. *Involving Non-Governmental Organizations in Bank Supported Activities*, G.P. 14.70, WORLD BANK (Mar. 23, 2010), <http://go.worldbank.org/0WT7SICZY0>.

125. *Id.* para 6(g).

126. *Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations*, para. 38 (Oct. 24, 2003) (World Bank discussion paper), available at <http://siteresources.worldbank.org/CSO/Resources/CSPaper.pdf>.

127. See NELSON, *supra* note 108, at 67.

128. See *id.* at 72–79, 190–92.

Some believe that the Bank's intention is mostly to inform these NGO groups, and not to involve them in decision-making.<sup>129</sup>

The Narmada Protest is considered one of the most powerful NGO campaigns against the WB,<sup>130</sup> which to a great extent eventually damaged the Bank's international credibility. The WB approved the project in 1985 with a loan of U.S. \$450 million to build a dam on the Narmada River in India.<sup>131</sup> The project was fraught with environmental and resettlement problems from the outset. Most of the people who would be resettled to a different place did not even know about this, and even those who knew did not have access to basic information about their impending resettlement—basic entitlements, time tables, or locations where they would be resettled. Concerned with the WB and the Indian government's neglect of these issues, NGOs and activists formed a very powerful coalition with the affected population and demanded from the WB access to information about resettlement plans and timetables, results of environmental studies, etc. Along with finding out that there would be severe environmental and social devastation, the activists also discovered that the resettlement rehabilitation plan, which according to the Bank's policy was supposed to be completed before project appraisal, was not completed even five years after project approval.<sup>132</sup> The movement received its momentum when the Bank's involvement in the project became the subject of a special U. S. Congressional oversight hearing.<sup>133</sup> The Bank found itself in a difficult public relations situation and formed a commission to conduct an independent review of the project. Based on the findings of the commission, and amidst the chaos and opposition, the Bank finally decided to withdraw from the project.<sup>134</sup>

However, there is another issue of NGO impact on the WB, the issue of NGO representation or legitimacy as an advocate of the affected population. Mallaby's account of the ill-fated WB's project of promoting a dam in Bujagali, Uganda speaks of an emerging problem in transnational networking of NGOs—NGO activists joining hands with each other and forming formidable blocks against projects which are otherwise supported by local residents.<sup>135</sup> These activists engage in strategies of opposition without gathering adequate and valid information and with little or no consultation with the affected parties. As Mallaby narrates, western

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129. *See id.* at 176–78.

130. AHMED & POTTER, *supra* note 3, at 89.

131. *See id.* at 89.

132. Udall, *supra* note 112, at 394–95.

133. *See id.* at 396–97.

134. *See id.* at 398–421.

135. Mallaby, *supra* note 8, at 51–52.

NGOs were in revolt once the World Bank made the proposal public.<sup>136</sup> NGOs argued that the Ugandan environmental movement was outraged at the likely damage to waterfalls at the site, and that the poor who lived there would be uprooted from their land for the sake of electricity they could not afford.<sup>137</sup> When Mallaby traced the activists of the Ugandan environmental movement, he eventually met the director of Uganda's National Association of Professional Environmentalists—a small group of twenty-five members—which was spearheading this opposition.<sup>138</sup> His interviews with villagers gave a different picture—the latter actually supported the project because they were offered generous financial terms to relocate.<sup>139</sup>

This story is a tragedy for Uganda. Clinics and factories are deprived of electricity by Californians whose idea of an electricity crisis is a handful of summer blackouts. But it is also a tragedy for the fight against poverty worldwide, because projects in dozens of countries are similarly held up for fear of activist resistance.<sup>140</sup>

NGO information sharing and dissemination are two other concerns for stakeholders. The One World Trust, an NGO, studied the accountability mechanisms of NGOs, international businesses, and intergovernmental organizations.<sup>141</sup> The study found that intergovernmental organizations such as the WB and the WTO scored highly with respect to online information sharing, while NGOs like the World Wild Fund for Nature and CARE received much lower marks.<sup>142</sup> The study also revealed that many NGOs fail to furnish relevant information that is useful to stakeholders.<sup>143</sup>

#### CONCLUSION

The above discussion points out the complexities of any attempt to assess the impact of NGOs on international organizations. This stands true whether one attempts to delineate their impact on multinational corporations, on development, on the environment, or on other areas in which NGOs operate.

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136. *Id.* at 51.

137. *Id.*

138. *Id.* at 52.

139. *Id.*

140. *Id.*

141. HETTY KOVACH, CAROLINE NELIGAN & SIMON BURALL, *Power Without Accountability?*, THE GLOBAL ACCOUNTABILITY REPORT VOL. IV, at 1 (2003), available at [http://www.wto.org/english/news\\_e/news03\\_e/gar2003\\_e.pdf](http://www.wto.org/english/news_e/news03_e/gar2003_e.pdf).

142. *See id.* at 28, 24.

143. *See id.* at 33–34.

There is a close connection between impact and power; the higher the impact, the higher the political power, and vice versa. Any political process, to put it in layman's terms, generally consists of an agenda-setting phase, a negotiation or decision-making phase, and an implementation phase. An actor that has access and opportunity to participate in each of these phases will undoubtedly have more power than an actor that does not. The policy-making scholarship emphasizes the importance of access to the agenda-setting process, which is similar to the gatekeeper's function.

Let us try to understand the differences in the impact of NGOs on different IOs. NGOs, so far, have more impact on the UN than the WTO or the WB. This difference, as discussed in this Article, could be attributed to several factors. Political opportunity structure is definitely a major factor. The working relationship of NGOs with the UN is more institutionalized than the relationship of NGOs with the WTO and the WB. As explained earlier, the consultative status of NGOs within the UN gives them access and opportunity to influence agenda at the international level. Along with access to the UN building, the offices, and the delegates, they have access not only to all information once it is officially released, but they can also propose agenda items, send observers to all meetings, and submit brief statements. In regard to the relationship of NGOs with the WTO and WB, it mostly boils down to their observant role in the case of the former and information exchange and project implementation in the case of the latter. The UN also has a more positive attitude toward non-state actors which is quite different for the WTO and the WB.

The issues that NGOs deal with in their engagement with the WTO and the WB are also more technical compared to the ones at the UN. Along with that, some issues are easy to advocate as a common voice (e.g., human rights), compared to other issues (e.g., climate change). The experience from the relationships of NGOs with these three IOs is that even though the deliberation processes are open in the early stages of discussion and preparations, NGOs are shut out at later stages when states bargain over the final decision. As He and Murphy point out, during the Kyoto Protocol, NGOs were denied access to the floor during plenary debates and most negotiation took place in closed door meetings.<sup>144</sup>

The other factor to consider is the population affected—who defines what is beneficial to them? In all fairness, it is the affected populations who have the right to define that. However, the ill-fated dam in Bujagali shows the dilemma here—one may say that NGOs were successful in stopping the building of that dam and thus that they had a significant

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144. See Corell & Betsill, *supra* note 17, at 93–97.

positive impact on the affected population; however, others will take a different view. Coalition, in a way, increases legitimacy. Nevertheless, it is also essential that NGOs have connections to the grassroots and ground-level experience. One major source of NGO legitimacy comes from transporting the voices and concerns of the poor. As Yanacopulos explains, "This bridging function between the grassroots and the global level gives them legitimacy at a time when NGO credibility is being questioned."<sup>145</sup> So, any impact assessment also needs to take this in-depth analysis into consideration. A related issue is a lack of accountability. David Chandler, for example, states that civil society actors fail to engage in collective politics and that the international connections formed by NGOs exaggerate their level of support, masking the reality that civil society groups tend to represent views held by an elite minority.<sup>146</sup>

With all these complexities in assessing the impact of NGOs, there is no doubt that in the process of contributing to international policy debates, NGOs exercise an important function in challenging other actors to clarify, defend, and account for their actions. As Steve Charnovitz explains, the value of NGO participation in international politics lies in their role as policy entrepreneurs rather than as formal representatives.<sup>147</sup>

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145. Helen Yanacopulos, *The Strategies That Bind: NGO Coalitions And Their Influence*, 5 GLOBAL NETWORKS 93, 101 (2005).

146. David Chandler, *Building Global Civil Society 'From Below'?*, 22 MILLENNIUM: J. INT'L STUD. 313, 333-38 (2004).

147. See Steve Charnovitz, *Opening the WTO to Non-Governmental Interests*, 24 FORDHAM INT'L L.J. 173, 209-10 (2000).

# **“ACCOUNTABILITY” AS “LEGITIMACY”: GLOBAL GOVERNANCE, GLOBAL CIVIL SOCIETY AND THE UNITED NATIONS**

*Kenneth Anderson* \*

## **INTRODUCTION: THREE VARIETIES OF NGO ACCOUNTABILITY UNDER GLOBALIZATION**

A contested issue of globalization is the question of whether, how, and to what extent an economically integrating world requires a politically integrated planet—a world that has a global law, regulation, and enforcement that transcends all lesser political authority and to which all other political entities must cede their sovereignty.<sup>1</sup> A federal world, a world under a global constitution—loosely configured of necessity, naturally, but nonetheless one in which international law establishes a distinct hierarchy under which the sovereignty of individual states must necessarily give way.

For many, such a politically integrated world is morally and politically desirable on its own terms. It is moral progress as such. For others, the justification for political integration is because it is presumably a necessary corollary of global economic integration—a matter of global welfare and justice, but also of global economic efficiency on its own terms. This amounts to a descriptive causal claim that political integration is driven by material economic factors of economic integration and conducive to them, the necessary political economy of an integrated global market.

The fact of a world in which economies are coming together among economic actors, such as multinational business enterprises that are able

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1. See, e.g., Dani Rodrik, *Governance of Economic Globalization*, in *GOVERNANCE IN A GLOBALIZING WORLD* 347 (Joseph S. Nye & John D. Donahue eds., 2000) (discussing a global federalism to enable the formation of a fully integrated international economy).

to act across national political borders, gives, according to many, ever greater urgency to building what has been called "global governance."<sup>2</sup> An economically integrating world requires mechanisms of accountability for those economic actors, which must perforce be regulating political institutions—but which themselves stand in need of mechanisms of accountability.

That is on the side of the ledger of public international law and institutions under globalization. At the same time, since the end of the Cold War in 1990, there has been unprecedented growth of international non-governmental organizations ("NGOs") and transborder social movements, drawing in large numbers of people around the world.<sup>3</sup> The place of NGOs in this globalizing world also poses questions, particularly as they take up political activities at the global, and not merely national, level. To take up global political activities presupposes global actors with which to have political intercourse. The influence, reach, presence, and power of these international NGOs have grown fantastically in the past two decades, and they pose questions about for whom they speak—on anyone's behalf rather than their own? To whom are they accountable for the positions they advocate, and does it matter? Do they represent anyone other than themselves? Should states and international organizations pay particular attention to them, and if so, why and how? Who, if anyone, should be accountable to them, and in what ways?

The Brooklyn Symposium to which this Essay is a contribution made particular note of two different meanings of the "accountability" of NGOs. Each meaning is important, indispensable even, but they are not the same thing. To those two, I add a third, by way of introduction.

First, NGOs are institutions that offer greater or lesser degrees of accountability in an "internal" sense—an internal "governance" sense. In other words, the accountability that would be relevant to any organization in its fiduciary governance, but particularly fiduciary institutions of a nonprofit nature that also owe obligations of public trust. These obligations of accountability include, to start with, mechanisms to account for the stewardship of funds, fidelity to the mission for which those funds were conveyed, and the range of often quite technical accountability issues that go along with the classic fiduciary duties of care and loyalty, as well as (in the case of a charitable organization) some duty of transparency.

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2. See generally Hakan Altinay, *Global Governance: A Work in Progress*, YALE GLOBAL ONLINE (Jan. 26, 2010), <http://yaleglobal.yale.edu/about/altinay.jsp>.

3. For the best-known account from the 1990s, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).



These "internal" forms of accountability ensure stewardship of resources toward a mission, and they can be satisfied—indeed, really can only be satisfied—through expert and technical ministrations by auditors, accountants, lawyers, and others. There is a further important question, as papers in the Brooklyn Symposium note in detail,<sup>4</sup> as to whom those "internal accountability" monitors should themselves be accountable. For example, in the transborder NGO arena, to which country's regulators must monitors answer? Those giving aid assistance, or those receiving it, or both? Since presumably no one favors embezzlement of NGO funds, and more broadly everyone favors accountability in the sense of stewardship toward a declared mission, this form of accountability is largely instrumental and not contested, even if the role of the government regulator raises important questions of political governance in a world in which NGOs cross borders.

A second form of accountability, however, might be thought of as "external" accountability. It is explicitly about the relationship of NGOs to the globalized world in a political sense—the accountability of their role as political actors, both to whom they ought to be accountable, and who ought to be accountable to them—in each instance an open and contested question. This is the question of whether NGOs claim, and by some actor are conveyed, a role in political governance of a kind that hitherto might have thought to attach to governments and their governed peoples. If, as has often been claimed during the last twenty or so years, NGOs act as "stand in" representatives of the "peoples" of the world before international organizations, in what sense and to whom are they accountable, if they now stand alongside or supplant states in this role? And in what sense are these international organizations to account to NGOs, why, on what basis, and what principle of justification, if at all?

This Essay addresses itself to this second, "external," sense of accountability. As a consequence, it does not focus very much on the first sense of accountability, in large part because it is in agreement that the first sense of accountability is crucial and indisputable as a proposition, even if there is much useful discussion to be had as to forms. Mechanisms to enforce the basic rules of internal fiduciary accountability are essential for any organization, for profit, non-profit, or governmental alike. Whereas the most contested issues for cross-border NGOs and accountability at this moment arise from this second sense, the political, external sense of accountability, without in any way slighting the enormous importance

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4. Symposium, *Governing Civil Society: NGO Accountability, Legitimacy, and Influence*, 36 BROOK. J. INT'L L. 813 (2011).

of the often highly technical work around the standards, rules, regulations, laws, and best practices for internal accountability.

Yet at least in passing, note that there is a third question of accountability that has not received sufficient attention. It particularly attaches to those NGOs taking human rights and such “values” issues as their subject matter—those NGOs devoted to questions of international morality, whether framed as human rights law, politics, or some other way. This third question of accountability asks whether (and if so under what circumstances) an NGO actor making pronouncements and offering judgments of law and morality (judgments, for example, on the law of war applied to terrorism situations, or calls for forcible humanitarian intervention by states or international governmental organizations) should be called to “account” for its judgments, given that it has no “skin in the game.” One way in which human rights NGOs, in particular—though it can be seen to extend to other issues and NGOs as well—might be described as “unaccountable” is the relative ease with which entities with no direct stake may call for others to act.<sup>5</sup> It is natural, irresistible even, to ask to whom “accountability” is owed by the NGO that is responsible for the safety of no population, no territory, has no governance responsibilities and yet freely calls for many sweeping things, including the expenditure of blood and treasure. God? Kant? The Categorical Imperative?

Yet, with respect to this third question of accountability, *when* the failure to have a stake in the outcome should be regarded as an accountability liability is a vexed question in jurisprudence and ethics. After all, there

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5. I raised this third issue of accountability while drafting a blog post at *Opinio Juris* and received a comment to the effect that human rights organizations sometimes do have “skin in the game”—monitors at risk in various situations and countries who might be attacked, etc. Kenneth Anderson, *Conceptualizing Accountability in International Law and Institutions*, *OPINIO JURIS* (Feb. 25, 2011, 10:42 PM), <http://opiniojuris.org/2011/02/25/conceptualizing-accountability-in-international-law-and-institutions/>; BH, Response, Kenneth Anderson, *Conceptualizing Accountability in International Law and Institutions*, *OPINIO JURIS*, (Feb. 26, 2011, 8:44 PM) <http://opiniojuris.org/2011/02/25/conceptualizing-accountability-in-international-law-and-institutions/>. That is of course sometimes true, but it is not quite what I mean by “skin in the game” here. To be clear, the kind of skin in the game that matters for the kinds of sweeping things sometimes urged, seemingly quite cavalierly, by human rights organizations is not simply having personnel at risk; it is having whole populations and societies at stake, the commonweal as such, the kinds of stakes that force one to weigh one’s moral seriousness in concrete relation to one’s fiduciary obligations to those one governs as a state and its leaders. This is a much larger topic than either this Essay or this footnote can address, but it seems to me important, in laying out the varieties of accountability at issue for NGOs, to put it squarely on the table, even if it is not here pursued further.

seems to be something rather too easy about a human rights NGO solemnly instructing governments in their duties while sitting in the comfortable position of the "kibitzer" who has nothing at stake. At the same time, however, in many situations, for equally compelling instincts about morality and the rule of law, we do *not* want the actors who pronounce duties to have anything directly at stake—judges, for example, for whom having no skin in the game is a *sine qua non* of the rule of law.

There are important observations one could make about why judges are not to have stakes in the matters they judge, while still being critical of the too-easy claims of NGOs—starting with the way in which judges are connected directly to the second question of accountability raised above, a connection with the state, the impartial judiciary as an embedded part of a state that does have the commonweal as its moral and political obligation. But this Essay leaves aside this important and difficult issue, and limits itself to a consideration of the second, which is to say the "external": the connection between legitimacy and global governance, NGOs and public international organizations.

What follows suggests that these two actors and issues—global governance, through institutions of the United Nations, and international NGOs and their global role—are deeply interlinked. What links them is the question of *legitimacy*, which is to say, the quality of a political order to be able to act with the broad and largely unquestioning support of its members. At stake in this debate over legitimacy, the UN, and international NGOs is the question of whether global governance—one overarching lawgiver for the planet, a constitution for the world, the liberal internationalist dream of replacing interstate power politics with the rule of international law and institutions—is a desirable or even possible thing.<sup>6</sup> And whether, in this account of global governance, international NGOs, and transborder social movements more generally, have any special governance role to play.

The conclusion of this Essay is a skeptical one. The skepticism is more than just the customary realist skepticism that this governance role is easy to achieve or is in fact coming to pass. The most important skepticism offered by this Essay is one grounded in idealism, not realism. That is to say, it is skeptical, on the one hand, of the desirability of global governance as conceived by global elites, including those in international NGOs as well as in public international organizations. And it is especially skeptical, on the other hand, of the proposed role for international

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6. Drawing on Francis Fukuyama's useful characterization of liberal internationalism. FRANCIS FUKUYAMA, *AFTER THE NEOCONS: AMERICA AT THE CROSSROADS* 7 (2006).

NGOs on the global stage in promoting and legitimating global governance.

This Essay argues that international NGOs lack the capacity in accountability, representativeness, and political intermediation to carry out the legitimation functions that one prevailing, prominent account of global governance gives them, whether forthrightly or, on account of criticism such as that of this Essay, *sotto voce*. The argument of this Essay is that public international organizations and international NGOs engage in a mutually congenial but quite circular act of “auto-legitimation,” each to the other. Each believes itself importantly “legitimated” in this process—so enhancing, each in its view, its authority in the international community.

The sense of this Essay is that this circle of auto-legitimation, each for the other, is rather too small to increase *actual* legitimacy or authority in the world, and that it has a deeply unfortunate consequence for the accountability of each. In other words, each of these institutions treats these acts of mutual legitimation as forms of accountability, accounting to each other in what each sees as a check-and-balance on the other, but which appears to the skeptical outsider as a positive feedback cycle upwards of mutually bestowed “legitimacy” and ever more imaginary “accountability.”

#### I. UNFREEZING THE NGOS AND TRANSNATIONAL SOCIAL MOVEMENTS IN THE FOUNDING OF THE UNITED NATIONS

To understand the gradual evolution of the relationship between public international institutions and international NGOs and transnational social movements, let us go back a little—not very much, for these purposes—in the history of each. The post-WWII period saw the founding of the United Nations in 1945<sup>7</sup> and with it the reemergence of transnational nongovernmental organizations and social movements that had been largely frozen, dissipated, or destroyed by the war and attendant changes. These organizations played a part in the San Francisco meetings that led to the UN Charter. Indeed, the Charter makes explicit, if passing, reference to them as consulting organizations.<sup>8</sup> Yet the tensions and ideological divisions of the Cold War meant that the role of transnational NGOs was subordinated to the struggle between the two superpowers as well as

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7. BASIC FACTS ABOUT THE UNITED NATIONS 3 (2004).

8. The Charter of the United Nations, Article 71, provides that “[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” U.N. Charter art. 71.

the gradually emerging non-aligned movement at the UN, anti-colonialist and post-colonialist coalitions within the UN General Assembly and its attendant agencies.<sup>9</sup> During the 1950s through the 1980s, large-scale social movements developed; to some degree, these social movements transcended borders, and likewise the organizations supporting them.<sup>10</sup> Many of these movements had to do with peace and disarmament and anti-nuclear weapons campaigns; by the 1970s, these had started seriously to develop into the genuinely transnational movement for human rights, the environment, women's rights and issues, and the other social movements that are most familiar to us today and which, to some degree, have supplanted the most traditional and oldest concern of transnational social movements—international peace.<sup>11</sup> This account notably runs together transnational NGOs with social movements; the latter are by their nature larger movements of people who might or might not express themselves through NGOs, while the former are actual organizations, although organized and run in a wide variety of institutional ways.<sup>12</sup>

The social and cultural shifts that led to a redefinition of NGOs in the 1990s actually began in the 1970s, in part with the development of new social movements, but in large part with the growth of the institutional human rights movement and the international environmental movement. The emergence of the Helsinki Accords in 1975, with their nearly off-hand reference to human rights, in retrospect turned out to have given birth to many of the human rights monitoring and advocacy NGOs that today are taken almost for granted.<sup>13</sup> What the Helsinki reference to human rights did, in the context of a mid-Cold War document, was give NGOs an implied legitimacy in matters of politics, power, diplomacy, and basic existence and voice. The Chernobyl nuclear disaster of 1986 created tragic and dangerous circumstances that allowed ordinary people to take advantage of the new-found legitimacy of citizens' groups, even

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9. I am pleased to see that this account largely agrees with the new and outstanding history of the human rights movement found in SAMUEL MOYN, *THE LAST UTOPIA* (2010).

10. See, e.g., *History of Organization*: NOBELPRIZE.ORG, [http://nobelprize.org/nobel\\_prizes/peace/laureates/1963/red-cross-history.html](http://nobelprize.org/nobel_prizes/peace/laureates/1963/red-cross-history.html) (last visited May 17, 2011).

11. See, e.g., *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* (Enrique Larana, Hank Johnston & Joseph R. Gusfield eds., 1994); David Plotke, *What's So New About New Social Movements?*, in *SOCIAL MOVEMENTS: CRITIQUES, CONCEPTS, CASE STUDIES* 113 (Stanford M. Lyman ed., 1995) [hereinafter *SOCIAL MOVEMENTS*].

12. See Stanford M. Lyman, *Social Theory and Social Movements: Sociology as Sociodicy*, in *SOCIAL MOVEMENTS*, *supra* note 11, at 397.

13. For the U.S. Department of State's explanation of the Helsinki Final Act (1975), see *Office of the Historian, Helsinki Final Act, 1975*, U.S. DEP'T OF STATE, <http://history.state.gov/milestones/1969-1976/Helsinki> (last visited May 16, 2011).

within a communist regime and internationally among their global counterparts. And it accelerated the movement toward the legitimacy of international NGOs, not just in human rights matters, but in environmental issues, as well.<sup>14</sup> The spillover radiation effects upon Western and Eastern Europe of a nuclear reactor disaster in communist Russia<sup>15</sup> focused much attention on the cross-border effects of environmental problems, further empowering the idea of cross-border NGOs.

The recursive legitimacy of transborder NGOs that arose from these historical events has gradually turned into a genie that authoritarian regimes have been seeking to keep bottled up ever since, as attest the massive efforts of China, for example, to police the ability of NGOs inside and outside China to utilize the Internet.<sup>16</sup> The UN Charter makes reference to transnational NGOs as a source of advice and expertise,<sup>17</sup> but the Helsinki Accords implies a *political* legitimacy that hints, however obliquely and, really, only in historical retrospect, at a seat at the table of governance. The fact that this legitimacy arose in the context of human rights rather than other leading values of the UN—peace and security, or economic development and relief of global poverty, for example—gave an absolutist moral tenor to the NGO movement. Human rights, after all, are matters of rights, at least in principle, not matters of social tradeoffs; and those who advocate for them, according to the narrative, thus have a similar absolute right to be heard and take part. It was a short ideological step to add that this meant a right to participate in governance concerning these issues, which is to say, participation in governance about everything, because what does not have a connection to human rights?

The human rights advocates that emerged as global players in that era—Human Rights Watch and Amnesty International, in particular—saw themselves as accountable to no government or, really, any other authority.<sup>18</sup> On the contrary, governments in moral theory if not political

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14. See, e.g., ZHORES A. MEDVEDEV, *THE LEGACY OF CHERNOBYL* (1992) (retelling the story of the Chernobyl accident to shed light on the facts and misinformation that have been used to serve state and institutional interests).

15. 3 CHERNOBYL ACCIDENT, *THE NEW ENCYCLOPEDIA BRITANNICA* 170–71 (15th ed. 2005).

16. See, e.g., HUMAN RIGHTS WATCH, *RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP* (2006), available at <http://www.hrw.org/reports/2006/china0806/>.

17. See *supra* note 8 and accompanying text.

18. One relatively neutral journalistic account of the rise of the modern human rights movement—meaning, an account not merely hagiographic—is KIRSTEN SELLARS, *THE RISE AND RISE OF HUMAN RIGHTS* (2002). For a semi-anthropological account—a social scientist observing from the inside—of the interior culture of Amnesty International, including its many tensions and conflicts, see STEPHEN HOPGOOD, *KEEPERS OF THE*

fact, ought to account for their behavior to *them*. At the same time, they saw themselves as having global moral authority, as it were, derived as guardians and trustees of Kant's categorical moral imperative.<sup>19</sup> In this they exhibited a certain peculiar echo reaching clear back to the ancient moral claims of the Church in early Europe, as the voice of God against "mere" temporal authority.<sup>20</sup>

Yet the 1980s was also a highly contradictory political period. On the one hand, human rights advocates made common cause with the US government in opposition to communist oppression in the Soviet empire (without, however, actually denouncing socialism as an economic system). On the other hand, they sharply attacked the US government for its Central American policies and proxy wars that were, after all (and as the rising American neoconservatives pointed out), fundamentally aimed at rolling back communist expansionism. From the standpoint of human rights advocates, this was moral consistency in an exemplary fashion—the application of common human rights standards without exception. From the standpoint of American conservatives of the day, such as the Reagan administration UN ambassador, Jeane Kirkpatrick, this amounted to application of a purely formal and sterile consistency that resulted, in fact, in an insidious double standard.<sup>21</sup> The double standard consisted in the appearance of formal, equal treatment of all regimes, but with the objective result of undermining admittedly authoritarian but pro-Western dictators (who might, in theory at least, eventually be reformable) in favor of totalitarian dictators and Communist regimes (which, in theory as well as fact, would not be reformed, at least not as totalitarian, Communist regimes).<sup>22</sup>

Throughout all of this, however, the UN was still *not* the focal point of the rising human rights NGOs. The UN was still caught in the paralysis of the Cold War and ideals of the self-determination of peoples, not "individual" human rights. The idea of global structures to govern the world through international law seemed madly utopian, given two superpowers were locked in global struggle. The UN mattered, principally, to the in-

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FLAME: UNDERSTANDING AMNESTY INTERNATIONAL (2006). For a brief review of it, from the standpoint of someone who has worked inside Human Rights Watch, a similarly situated organization, see Kenneth Anderson, Book Review, 30 INT'L HIST. REV. 911 (2008).

19. See generally, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 19–51 (Mary Gregor, ed. & trans., 1998).

20. For a critical take on this tendency, see Kenneth Anderson, *Secular Eschatologies and Class Interests of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 107, 110, 113 (Peter Juviler & Carrie Gustafson eds., 1998).

21. JEANE J. KIRKPATRICK, DICTATORSHIPS & DOUBLE STANDARDS (1982).

22. *Id.*

creasingly vocal nations of the third world and the post-colonial world as an expression of post-colonialism, not to the first or second worlds, save on occasions of high drama at the Security Council as a matter of great power politics, not human rights.

However, transnational NGOs and new social movements *were* rising throughout the 1980s in the first and second worlds. They were rising in places ranging from the Western democratic networks supporting the Polish Solidarity movement and the Charter 77 advocates in Czechoslovakia,<sup>23</sup> to peace networks with aspirations to banish nuclear weapons from Western Europe in the Reagan years,<sup>24</sup> to global human rights monitoring, and the rise of global feminism and women's rights advocacy, and the global environmental movement.<sup>25</sup> These were movements primarily within the industrialized world, within the first and second worlds, the world of industrialized democracies, and the world of socialist and communist states (at least those in the West, though certainly not China). The UN and global governance were not directly the focus of these efforts, because this would have constituted a massive diversion of resources at that point into organizations that carried no great weight with the Cold War still underway.<sup>26</sup> There was also a growing, parallel network of developing world organizations that were focused on the United Nations as a source of influence and legitimacy, but they were to a large extent not visible to the organizations dealing with East-West issues in the 1980s. The groundwork was yet being laid at the intellectual and ideological level for the entry of NGOs into a far more direct dialo-

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23. Nick Young, *NGOs and Civil Society in China*, NICK YOUNG WRITES (Feb. 16, 9:00 AM), [http://www.nickyoungrwrites.com/?q=civil\\_society](http://www.nickyoungrwrites.com/?q=civil_society).

24. Lawrence S. Wittner, Professor of History, State Univ. of N.Y. at Albany, Address at NGO Committee on Disarmament, Peace & Security (Nov. 18, 2004) (transcript available at <http://disarm.igc.org> (follow "events" hyperlink; then search "Wittner" and click follow "The Role of NGOs in Achieving Disarmament" hyperlink)).

25. The critical theory journal *Telos*, with its close attention to the intellectual and political currents of dissident movements in Eastern Europe and the Soviet Union, perhaps best captured the theory and practice of these movements over the 1970s, 1980s, and 1990s. The intellectual evolution of these movements is found in English language sources in the *Telos* archives. See *About TELOS*, TELOS PRESS, <http://www.telospress.com/> (follow "About TELOS" hyperlink) (last visited Mar. 16, 2011).

26. The general thrust of this observation is, I entirely grant, highly first world-centric. There was a proliferation of more nonstate actors arising from the politics of, and ideological struggles of, the third world, but they were still not so very important in the Cold War and still not so very important to the UN, except to gradually effect a takeover of many of its—still not very important—institutions. For a strong exception to this point, see AKIRA IRIYE, *GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD* 96–125 (2002).



gue with both state actors and international organizations such as the United Nations—primarily, but not exclusively, through the lever of international human rights—about no less a question than who should have the legitimacy to run the world.

## II. RE-THINKING GLOBAL GOVERNANCE IN THE POST-COLD WAR

The opening provided by the end of the Cold War caused many people to believe that the world might enter a new period of global political coordination to match the economic globalization that was emerging during the time. It was a period of heady liberal internationalism—the belief was popular that sovereign power politics could be overcome through a liberal version of international law, resulting in a benevolent and liberal global governance under a loose, but still federal, global law.<sup>27</sup> Leading international law scholars offered pronouncements that the era of truly sovereign states was over, hope offered as description.<sup>28</sup>

These hopes and dreams were fostered, somewhat perversely, by the remarkably united front offered by countries around the world, through the UN and the Security Council, to the invasion, occupation, and sack of Kuwait by Saddam Hussein's Iraq. For once, it seemed, leading countries came together—including Russia and the United States—to take concerted military action against Iraq.<sup>29</sup> Even if the United States overwhelmingly took the military lead, it was supported by a very broad coalition of states and the Security Council.<sup>30</sup> President George H.W. Bush excited a great many globally when, in the wake of this action, he described a "new world order" that apparently seemed to foreshadow global governance through the UN and genuine collective security.<sup>31</sup>

In retrospect, it is clear that different actors supported the collective military action against Iraq in Kuwait for very different reasons. Some did so because they were genuinely worried about Saddam's naked use

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27. I borrow Francis Fukuyama's useful definition. See FUKUYAMA, *supra* note 6, at 7.

28. Perhaps most famously, Columbia Law School international law scholar, Louis Henkin, said, "Sovereignty . . . is not a necessary or appropriate external attribute for the abstraction called a state . . . . For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9–10 (1995).

29. See *Background Note: Kuwait*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/35876.htm#history> (last visited May 17, 2011).

30. *Id.*

31. President George H. W. Bush, *Toward a New World Order*, Address Before A Joint Session of Congress (Sept. 11, 1990) (transcript available at <http://www.sweetliberty.org/issues/war/bushsr.htm>); see also GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* (1998).

of force to acquire an entire country as territory. Others joined because of Saddam's genocidal (as Human Rights Watch concluded) human rights abuses within Iraq against the Kurds and others; their concern was fundamentally the internal political order under Saddam.<sup>32</sup> Still other states, particularly Middle Eastern states such as Saudi Arabia, looked at the conflict through the geopolitical aim of weakening Iraq. And still others supported the First Gulf War from the idealistic belief that this essentially unprecedented military exercise in collective security would lead to long-term global governance through the United Nations.

That was with respect to sovereign states and international organizations. Within a few years, however, those idealistic hopes for collective security were dashed—in large part by the outbreak of the Yugoslavia wars and, still later, the genocide in Rwanda. The international community proved unable to respond to provide collective security; Europe proved unable to provide security even within Europe, and the Yugoslavia wars came to a halt only when the United States, under the Clinton administration, decided finally that it had to intervene.<sup>33</sup> In lieu of collective security as such, the UN Security Council implemented a series of war crimes tribunals that aimed to provide after-the-fact justice, first for Yugoslavia and later for Rwanda. These were widely celebrated as the beginnings of an international criminal justice system but, critics noted, their origins were as an *alternative* to actual intervention before or during the fact.<sup>34</sup> At the same time, however, in the early 1990s, international

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32. See HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993), available at <http://www.hrw.org/reports/1993/iraqanfal/>. My own contribution to this research, as a field researcher for Human Rights Watch in Iraq in 1991, was published as HUMAN RIGHTS WATCH, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME (1992), available at <http://www.hrw.org/en/reports/1992/12/01/anfal-campaign-iraqi-kurdistan>. For the definitive account of the use of chemical weapons in Iraq, see JOOST R. HILTERMANN, A POISONOUS AFFAIR: AMERICA, IRAQ, AND THE GASSING OF HALABJA (2007). My review can be found as Kenneth Anderson, *America, Iraq, and Poison Gas*, TIMES LITERARY SUPP., Jul. 9, 2008.

33. Derek Chollet and James Goldgeier provide a superb account of the Clinton administration's foreign policy in all these matters. DEREK CHOLLET & JAMES GOLDGEIER, AMERICA BETWEEN THE WARS: 11/9 TO 9/11 (2008).

34. *About the ICTY*, U.N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Mar. 16, 2011); *About ICTR*, U.N. INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Mar. 16, 2011); see also Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33. VA. J. INT'L L. 385, 405 n.56 (1993). The suggestion that post hoc tribunals were being offered as an alternative to actual action was not a message anyone wanted to hear at that time, as I

NGOs became ever more active in these causes—human rights, international tribunals, agitation for sovereign states to act in the former Yugoslavia, and many more. Their activities at the United Nations became more active as well.

The cause that transformed the self-understanding of international NGOs during the 1990s was the international campaign to ban antipersonnel landmines.<sup>35</sup> By the late 1980s, humanitarian groups, particularly the International Committee of the Red Cross ("ICRC"), had begun to raise awareness of the damage being caused by the heavy and increasing use of landmines in conflicts around the world. The issue appealed to a wide variety of international NGOs from a surprising range of perspectives—human rights groups, environmentalists, humanitarian relief organizations, development NGOs, and more—and in the early 1990s, they came together to form a loose network, the International Campaign to Ban Landmines.<sup>36</sup> Taking advantage of the emerging technologies of the Internet—the cutting edge communications technologies of the day, email and listservs—they forged an international campaign for a treaty that would ban use, production, stockpiling, and transfer of landmines.<sup>37</sup> Initially rejected and, indeed, laughed off by leading states, the movement succeeded in forcing powerful states, including the United States and others, to take account of the movement.<sup>38</sup> The campaign eventually

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discovered whenever I raised this among human rights groups, funding foundations, academics, or government officials.

35. I speak in this section from my personal experience as director of the Human Rights Watch Arms Division during the inception of the landmines ban campaign and the formation of the International Campaign to Ban Landmines.

36. For one of the early manifestos of the movement, see THE ARMS PROJECT OF HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* (1993). The book was an encyclopedic volume in the beginning days of the campaign. It laid out the basic propositions behind a ban treaty as well as the role of a wide range of international NGOs in pursuing it.

37. For a discussion in particular on the role of then-new Internet technologies in the globally networked world of international NGOs, see Charlotte Ku & John King Gamble, *International Law-New Actors and New Technologies: Center Stage for NGOs?*, 31 *LAW & POL'Y INT'L BUS.* 221 (2000).

38. The U.S. military's approach to landmines and the campaign—sympathetic to the general humanitarian goal, but convinced both that new technologies would solve the problem and that, in any case, the situation of international border-guarding landmines were indispensable to the peace and security of the Korean peninsula—is discussed in Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 *CHI. J. INT'L L.* 445 (2003).

succeeded in enlisting Canada and several other important states and eventually produced the Ottawa Convention banning landmines.<sup>39</sup>

The success of the NGO campaign against landmines did not go unnoticed by the United Nations, including the eventual Secretary General, Kofi Annan, and his senior advisors. They had been looking for political mechanisms to strengthen the UN as an instrument, not merely of the Member States of the UN or as a kind of negotiating table between sovereign states, but of independent global governance.<sup>40</sup> Global governance that was to be conducted by the UN in its own name and as its own source of legitimacy and authority, beyond and indeed above that of individual nation-states, no matter how powerful. One question of deep and abiding importance, however, was the fact that the UN lacked legitimacy as a democratic actor.<sup>41</sup> It had connections to Member States, but the UN itself lacked any direct connection, in the sense of democratic legitimacy, with the "peoples" of the world, as stated in the preamble of the Char-

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39. For an account of the landmines campaign that argues both for the special role of NGOs, but also for the special role of Canada as facilitating the special role of NGOs, see WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES (Maxwell A. Cameron, Robert J. Lawson & Brian W. Tomlin eds., 1998). In particular, look to Michel Dolan & Chris Hunt, *Negotiating in the Ottawa Process: The New Multilateralism*, in WALK WITHOUT FEAR, *id.* at 392, 399, 408; Maxwell A. Cameron, *Democratization of Foreign Policy: The Ottawa Process as a Model*, in WALK WITHOUT FEAR, *id.* at 424, 434, 440; Lloyd Axworthy, *Towards a New Multilateralism*, in WALK WITHOUT FEAR, *id.* at 448, 456.

40. This was the view of what came eventually to be known by political scientist and senior UN advisor John Ruggie's terminology: the "traditionalists" within the Secretariat who saw the legitimacy and authority of the UN as a function of the Member States, and the "modernizers" who saw the need to go beyond, or indeed around, the Member States and reach directly to legitimacy with global populations, including through and intermediated by, the international NGOs. This internal argument within the Secretariat is discussed in JAMES TRAUB, *THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER* 383 (2006).

41. The notion of legitimacy used in this Essay is not intended to be a highly technical one, as the subject is too complicated on its own. It is used here in the loosely Weberian sense that "action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order." 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (Geunther Roth & Claus Wittich eds., 1978). I do not commit myself here to any deeply technical sense of the term, and broadly speaking this Essay subscribes to the generally understood idea of legitimacy as "widespread belief in a system of governing institutions . . . . Legitimacy denotes the positive valuation and acceptance enjoyed by a system of power and its bearers . . . ." JOHN KEANE, *PUBLIC LIFE AND LATE CAPITALISM: TOWARD A SOCIALIST THEORY OF DEMOCRACY* 224 (1984). Specifically with regard to legitimacy and law in the contemporary United States, see the fine article by Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983).

ter.<sup>42</sup> The lack of a connection to people as such meant, by implication, that the legitimacy of the UN was merely through the Member States and, by further implication, that its legitimate activities and scope of authority were merely what the Member States granted. The highest goal of global governance, as far as the senior leadership of the UN General Secretariat was concerned, however, was to transcend the reliance for authority and legitimacy upon the Member States, to govern, at least in some important matters, directly in the name of the UN and by appeal to the "peoples" of the world.

And yet, there is no direct election to the UN; it is structured as an association of Member States. It is not a global parliament that is elected by its people(s); it is a meeting ground of states. The ideological problem—the legitimacy problem—for the United Nations leadership, in pursuit of the authority of genuinely global governance, was to find a source of legitimacy that did not run through the Member States and yet did not require something that seemed—and seems—quite implausible if not fantastic: global parliamentary elections.<sup>43</sup> The lesson of the NGO landmines campaign, to the UN leadership under Annan, was that international NGOs, which could be perhaps plausibly understood as groups of global citizens, could be asserted as 'representatives' of the world's peoples for purposes of providing the UN with a form of quasi-democratic legitimacy, or at least a plausible connection to a global constituency that did not run through the Member States.<sup>44</sup>

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42. Indeed, the very term "peoples" as used in the Charter preamble raises questions all its own, as distinguished from what might have been used instead. For example, "We the *people* of the world." U.N. Charter pmb1.

43. There was indeed a movement, partly among academics and partly among activists, for a global parliament; proposals for its composition were sometimes modeled on the European parliament and sometimes expressed the view that its membership should consist of representatives of international NGOs. It was an idea that was given a veneer of public international respectability in the 1990s by appearing in a report of global "big names." OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE (1995). Most theorists, however, even those of impeccable liberal internationalist persuasion, found this a bridge too far. But this conceptual position had the salutary quality of forcing liberal internationalists to articulate what they believed would be plausible for the legitimate governance in the way of representation and consent—plausible both as a matter of being "doable" and as a matter of normatively satisfying the requirement of consent, if it was not to be democracy in the ordinary sense of the term. The global parliamentarians were refreshingly direct in their assertion that governance would *not* be legitimate if it was not democratic in the ordinary way—no obfuscation, no elision.

44. Annan's rhetoric on this theme became more rhapsodic and ever more attuned to adulation of the international NGOs to a crescendo in 1999 to 2000. The Seattle riots and collapse of the trade talks in 1999 created what might best be described as great cognitive

For their part, the NGOs were happy to see themselves in this role. Besides confirming their own auto-vision as the citizens of the world forcing themselves into the closed negotiating sessions of states, being treated by the institutional UN as the legitimate representatives of the world's peoples who, in turn, conferred legitimacy upon the UN and its claims to governance over the Member States, gave considerable status and power institutionally. International NGOs were no longer merely unofficial players standing outside the doors of power, outside the rooms in which states made their agreements—they had, in effect, the backing of the UN leadership at a minimum to seek a place at the negotiating tables themselves, armed with the claim that they had a special role as representatives of the world's peoples.<sup>45</sup> States overall were not pleased with this claim, but some—Canada, for example—tended to go along, particularly insofar as it might serve other state purposes, usually to diminish the power of the world's remaining superpower, in the traditional geopolitical habit of middling states.<sup>46</sup> And the precedent for NGOs join-

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dissonance for Annan in relation to the international NGOs and new transborder social movements, and 9/11, as the text discusses, was a game changer, as it were, in Annan's attentions.

45. This is explicitly Maxwell A. Cameron's argument in his essay, which appeared at the high water mark of theorizing of international NGOs as the interlocutors of states and international organizations in a new form of "democratized" global governance in 1998. Cameron, *Democratization*, *supra* note 39, at 437, 444.

46. As Eric Posner notes in his book, the final results of the landmines movement might be as explainable by the traditional realist hypothesis that medium sized and middle power states, such as Canada, in effect supported and brought the Ottawa treaty about because, as with many other initiatives in international law, it supported their power positions by using rhetorical tools to bind the superpower. The NGOs were not irrelevant in this process, but it is mostly explainable by state-centric mechanisms, not some grand theory of international politics. ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* 62–64 (2009).

I do not share Posner's skepticism, at least nowhere to that extent. My misgivings about NGOs, on the contrary, largely stem from the view that they are only too able to leverage their voices into debates above their level of legitimacy. I think that is true with respect to issues with which I disagree with the progressive NGO view *and* ones with which I agree, such as the landmines ban. On the factual question of the effectiveness of NGOs in doing something that governments would not otherwise have (eventually) done, my view, as an insider and academic of that process, is that the international campaign to ban landmines would not have achieved a widely accepted treaty—certainly not as quickly—had the NGO movement not been so visible and so vocal, but also had the government of Canada not decided to make it Canada's foreign policy objective of the later 1990s. I do not slight the NGO campaign in saying that Canada's decision essentially to turn its entire worldwide diplomatic apparatus over to the NGO campaign gave access and lines of communication that otherwise would have made the campaign perhaps one of those unending but never quite "closing" campaigns. Canada's actions, however, while

ing in treaty negotiations was already on the table after the landmines campaign—although, quite distinct from most other treaty negotiations, it was in the first place sponsored as much by the NGOs themselves.

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compatible with its own vision of itself as the “moral” internationalist, are also compatible with what, in those years, was widely seen as the interests of middling powers, to constrain the United States.

Moreover, the personal ambitions of Canada’s foreign minister in those years, Lloyd Axworthy, to win the Nobel Peace Prize, cannot be ruled out as a factor, and for that matter, ambitions among the NGOs and their leaders, as well. The ugly competitions among the various ‘virtuecrats’ for the Prize were, at least to me, astonishing—not least because they were conducted in the way that Angels of Mercy conduct their internecine competitions: the passive-aggression worthy of middle-school girls. The level of distraction they caused within the broader ban campaign was enough to persuade me that the merest hint of awarding some worthy cause the Prize suffices to derail that cause from its mission of goodness. As applied to Posner’s thesis, it bears noting that the NGOs are not the only “private” activities in such a campaign; personal ambitions, honor, glory, and a host of other factors are also at play. I doubt that Posner would deny that they have a place subsumed within larger state interests—but put that way, I think it underplays the sheer personal ambitions of Axworthy, Williams, and several others. Western realists persistently underestimate *gloire* as an individual motive—something Machiavelli, Hobbes, and Thucydides never did (and thanks to Philip Bobbitt for recalling this historical point to me).

In any case, we must be clear on what the campaign achieved and did not achieve: a ban treaty that has received adherence from a vast number of the world’s States, in some cases almost certainly insincerely, but with surprisingly plain rejection by precisely those States that must contemplate fighting a serious war in which losing is a serious possibility, which is to say, among others, the United States, India, Pakistan, China, Taiwan, and all the Middle East. Or countries with international borders, such as the Korean peninsula, in which unilateral removal of landmines could be as profoundly destabilizing as the introduction of nuclear weapons. Presumably the strategic calculus in favor of clarity lies in signaling to one’s likely enemies that all weapons, at least conventional ones, are on the table, and that breaking the status quo will be costly in materiel.

It does not detract from the achievement of the landmines ban treaty to note that it has received almost precisely the adherence that power theories would predict, but not more. In treaty matters, as the economists teach us, what matters is behavior on the margin. The fact that Germany adheres to the treaty does not really matter because, as Afghanistan demonstrates, Germany does not intend ever to fight (although it does write quite outstanding laws of war manuals which receive remarkable numbers of citations for documents never really used in practice), while the fact that India does not adhere *does* matter, because one of these days, it might. Yet for all that, finally, the NGO movement was an indispensable catalyst on the front end, and scourge to see it through on the back end. See Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT’L L. 445, 452–53 (2003).

### III. LEGITIMATION CRISIS: GLOBAL GOVERNANCE AND DEMOCRATIC SOVEREIGNTY

The institutional UN sought to elevate the UN's own intellectual and ideological claims to governance by treating NGOs as the locus of the legitimacy of the world's 'peoples'. The NGOs, for their part, elevated their own intellectual and ideological self-conception by treating themselves (and inviting the UN and the rest of the world to treat them), not merely as international NGOs, but as something mysteriously called 'global civil society'. Why this special term and what was its special significance? Why shift from calling international NGOs by a plain, practical, descriptive term—nongovernmental organizations—to calling them by a term far more laden with ideological significance in social and political theory, the far more intellectually portentous, but also ideologically fraught—'global civil society'?<sup>47</sup>

The origins of the terminological shift lie in the effort by intellectuals and theorists of the landmines ban campaign to draw larger lessons—with respect to both future NGO activity in very different fields as well as the very conception of globalization and global governance—from the leading role played by NGOs themselves. The increasingly fawning overtures made to the NGO community in this period by their counterpart intellectuals and theorists within international organizations, the UN Secretariat and its so-called "modernizers"—those UN strategists who saw the transformation of the organization as dependent upon finding a source of legitimacy that would 'go around' the Member-States directly to global populations and constituencies—also played a role.<sup>48</sup> This was also the period, after all, in which the International Campaign to Ban Landmines and its coordinator, Jody Williams, won the 1997 Nobel Peace Prize over state officials, such as then-Canadian foreign minister Lloyd Axworthy, who had thrown all the weight of Canada's worldwide

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47. Among the voluminous literature on "global civil society," the source that stands out is the yearbook series, *GLOBAL CIVIL SOCIETY* (Helmut Anheier, Marlies Glasius & Mary Kaldor, eds.). The series features empirical as well as conceptual articles on global civil society.

48. The whole proposition linking this newly described phenomenon of "global civil society" and the institutional UN was laid out in U.N. Secretary-General, *We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations–Civil Society Relations*, ¶¶ 68–72, U.N. Doc. A/58/817 (June 11, 2004).



diplomatic service behind the ban campaign and who might have thought that their efforts deserved equal recognition.<sup>49</sup>

As a theoretical matter, however, NGOs, merely as such, are what they are—simply organizations consisting of interested individuals. Their motivations might be noble, altruistic, cosmopolitan, and so on, but they are, as a matter of political role, simply organizations that attempt to persuade international organizations, states, or others in authority, to act—sometimes on the basis of NGO expertise and sometimes simply on the basis of their enthusiasm and ability to influence the national governments where they hold some level of political capital. Unsurprisingly, NGOs are most active in the world's democratic states in which citizens' groups can make themselves heard and their influence felt.<sup>50</sup>

Expertise, even when genuine, and enthusiasm are not ordinarily considered sufficient to give one authority, however.<sup>51</sup> The moral authority

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49. See Jody Williams, Nobel Laureate for Peace, Nobel Lecture at Nobel Peace Prize Ceremony (Dec. 10, 1997) (transcript available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/1997/williams-lecture.html](http://nobelprize.org/nobel_prizes/peace/laureates/1997/williams-lecture.html)).

50. John Bolton provides a telling practical example of the way in which international NGOs operate in the quasi-alliance among international NGOs, sympathetic middling states, and UN bureaucrats in his description of the fights surrounding the UN's attempts to create a small arms and light weapons control treaty—an effort that, in the hands of gun control NGOs, quickly morphed from a useful attempt to control the rampant spread of light weapons from the arsenals of the former Soviet Union across Africa into a campaign to create an international treaty that would effectively seek an end run around handgun laws in individual states, and the United States in particular. JOHN BOLTON, *SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND ABROAD* 87–92 (2007). That long term campaign, and counter-campaign, is ongoing, but Bolton, in his memoir of his time in the State Department and as U.S. ambassador to the UN, offers a revealing view of how NGOs pursued influence in the endless rounds of meetings—“wear the United States down until only its key issues are unresolved, declare it isolated, and then use the sleeplessness and frayed tempers of many late-night sessions to press us to ‘join consensus’ and avoid ‘isolation’.” *Id.* at 91.

51. Martin Shapiro astutely observes however, that the shift from government to governance marks a “significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 9 (2004) (quoting Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 *IND. J. GLOBAL LEGAL STUD.* 369, 374 (2001)). One result is “to advantage ‘experts and enthusiasts,’ the two groups outside government that have the greatest incentive and desire to participate in governance processes; however ‘while the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us. Few of us would actually enjoy living in a Frank Lloyd Wright house.’” *Id.* at 9–10 (quoting Martin Shapiro).

Shapiro makes a crucial point. Indeed, my text above comes close to saying that expertise is enough, so long as “representativeness” by NGOs is not proclaimed. But that is actually too much of a concession on my part, in consideration of Shapiro's observa-

of NGOs in the international arena had traditionally rested upon recognized expertise and effectiveness in their particular missions—the relief group, for example, whose acknowledged record in wartime humanitarian aid gave a certain practical as well moral authority to its views before international bodies in areas of its subject matter. The ICRC was always the model—careful, precise, never flamboyant, typically self-effacing, and above all *competent* in its areas of expertise. But the ICRC, and international NGOs seeking to model their efforts at global public policy on its example, never sought to claim a role in governance as such.<sup>52</sup>

Indeed, the contrast between the ICRC and everyone else is instructive. The nature of the ICRC's mission is far more automatically self-limiting than that of the human rights and other “values” based international NGOs. The ICRC's ostensible mission is the narrow conditions of humanitarian relief in the most dire conditions in which the baseline moral theory is that no one—no side—can rationally, let alone morally, object to the provision of humanitarian relief to the suffering noncombatants.<sup>53</sup>

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tion about experts and enthusiasts under regimes of “governance” rather than “government.” Were I giving a full statement of my view, it would be far closer to Shapiro's on this essential matter. For that matter, we ought not to leave this without noting how much the debate owes to two scholarly works: MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); ALBERT O. HIRSCHMAN, *EXIT, LOYALTY, AND VOICE* (1970). Experts and enthusiasts are able to gain their special traction through Olson's collective action problem. OLSON, *supra* note 51. And the problem of the “governed” in this case is that there is no obvious mechanism, faced with the passions of experts and enthusiasts (and those for whom they are the same thing), for the governed to make an “exit” from their regimes of governance. See HIRSCHMAN, *supra* note 51, at 60–61.

52. The ICRC stands, however, in a position slightly different from that of any other international NGO. Indeed, in an important sense, the ICRC *does* have a limited, recognized, treaty-based role in governance in the laws of war. The 1949 Geneva Conventions give juridical recognition to the unique role of the ICRC in conveying neutral humanitarian aid and relief; in convening conferences and treaty negotiations in international humanitarian law; and in acting as the repository of sovereign accessions to the Geneva Conventions. In other words, when it comes to drafting international humanitarian law treaties, the ICRC *does* have a juridical seat at the table, and might well chair it. This privilege has been far from irrelevant to the ICRC; unsurprisingly, it has been not entirely enthused about the barbarians at the gates, as it were, the hoi polloi of the NGO movement seeking to join negotiations on roughly the same terms. But the ICRC claims to a role in the “governance” of international humanitarian law have always been based on the assertion of its unique neutrality, not, as the text elaborates with respect to the general international NGO movement, representativeness and intermediation.

53. The ICRC's stated mission is as follows: “The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.” *The ICRC's Mis-*

The rationale of what one's mission, legitimacy, reach can be when constrained by the notion of "bare rationality" to which no one could object can, and has been, stretched in practice. It has been most stretched in practice at the ICRC in its efforts to shepherd along the trends of international humanitarian law—the temptation to extend is harder to resist than it is when confined by bare humanitarian necessity as a justification.

Nevertheless, despite some temptation to inflate a bubble of idealism, the nature of the ICRC's work contains a large amount of automatic deflators. That is not so with the rest of the human rights NGOs, for whom the tendencies point overwhelmingly to inflate one's sense of self-importance, reach of mission, and definition of that upon which one should both opine and be heard. The tendency starts from the fundamental problem that anything can, if one likes, be formulated as a human right; the rhetoric starts from an inflated bubble and carries on from there. But these tendencies to inflate are independent of the claims of expertise and competence; they raise their own problems, quite separately, that we all understand that the line between "neutral" expertise and expertise that somehow magically drives without fail to a given policy end, interested and disinterested technocracy, is far more of an artifact than reality, at least in these inevitably values-driven matters of human rights. When one's expertise lies in "human rights"—even when it is the "law" of human rights—to take the simplest example, expertise is itself a set of ideological commitments, good or bad. In Martin Shapiro's terms, in these matters, at least, the "experts" are inevitably also "enthusiasts."<sup>54</sup>

The success of the landmines ban campaign, however, including the resulting attention from senior leadership of international organizations, convinced theorists of the international NGO movement that it was something more than merely a collection of organizations speaking for themselves.<sup>55</sup> The intellectuals and theorists of the international NGO movement developed an ambitious political and social theory that reconceptualized international NGOs into something politically and ideologically suitable to serve as a partner to public international organizations—the UN—in the service of global governance. This reconceptualization drew upon an old political and social theory in Western intellectual tradition, the theory of civil society, and asserted it as a

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sion Statement, INT'L COMM. OF THE RED CROSS (June 19, 2008), <http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm>.

54. Shapiro, *supra* note 51.

55. See Kenneth Anderson & Monica Schurtman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 HARV. INT'L L. J. 359, 359 (1995).

paradigm at the global level, as 'global civil society'.<sup>56</sup> The conventional account of global civil society—but also its unconventional, skeptical critique—runs approximately as follows; it begins again where this Essay began.<sup>57</sup>

Economic globalization has taken place through innovations that have brought down the cost of transportation and, even more dramatically, communications across borders and over long distances.<sup>58</sup> That implies, in the view of many, a corresponding need for political globalization to address the many issues of coordination that arise when economic activities (in the broadest sense of movement of goods, services, capital, and labor) can shift increasingly freely around the world.<sup>59</sup> Political globalization can take either of two main forms, however, a minimalist form or a maximalist form. The minimalist form says that globalization can be given such regulation as it requires by coordination of sovereign jurisdictions without, however, giving up the essential attribute of sovereignty<sup>60</sup>—a political community, without a political superior.<sup>61</sup> Cooperation

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56. The leading statement was given by the left wing British political theorist John Keane, in his influential and impressive book published in 2003 which drew upon his theoretical work over the previous decade. JOHN KEANE, *GLOBAL CIVIL SOCIETY* (2003).

57. This is a version of the critical argument offered in Kenneth Anderson & David Rieff, *Global Civil Society: A Sceptical View*, in *GLOBAL CIVIL SOCIETY* 2004/5, at 26 (Helmut Anheier, Marlies Glasius & Mary Kaldor eds., 2005).

58. Although the specific facts are now out of date, the argument is as relevant as ever. See ALAN RUGMAN, *THE END OF GLOBALIZATION* (2000) (arguing that much of what is understood as globalization is really the lowering of communications costs and anything digitized that can be transmitted relying upon such technologies. Things that weigh, and hence have transportation costs associated with them, still have transaction costs of movement, and hence there is a noticeable tendency to regionalization of such goods).

59. For an excellent introduction to the social theory of globalization, see MALCOLM WATERS, *GLOBALIZATION* (2d ed. 2001). Waters sets out the sociology relevant to the argument that economic globalization implies some form of political globalization.

60. The argument for coordination among sovereigns as the proper form of political globalization is laid out in Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1259–66 (2005) [hereinafter Anderson, *Squaring the Circle*]. It is also what Francis Fukuyama calls for as the position of the United States after neoconservatism, in FUKUYAMA, *supra* note 6, at 155–80; likewise, JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004). Yet this position is not that far, in principle, from the global government networks approach offered by SLAUGHTER, *supra* note 51. Much of the difference has to do with where you think the process should, over the long run, wind up—as permanent multilateralism among sovereigns or some sort of gradually emerging, genuinely global governance.

61. Borrowing Lincoln's classic formulation. Abraham Lincoln, Message to Congress in Special Session (Jul. 4, 1861).

and coordination among sovereigns, even entering various political arrangements that would provide for arbitration and rule-making in matters as diverse as the environment or public health, can be robust, yet without ever conceding the fundamental attributes of sovereignty: call this 'robust multilateralism.'

The maximalist form says, on the contrary, that globalization requires an ultimately federal system in which sovereignty of individual nation-states is given up in favor of a central locus of governance that can enforce behavior in the collective interest, rather than a situation of individual countries forever breaking the rules in their immediate self-interest, whether the matter at issue is economic, security, or something else.<sup>62</sup> Maximalists ordinarily point to the UN as the forum that should gradually evolve from a forum for multilateral discussion and, sometimes, cooperation and coordination, into a true global government. The term 'global governance' is currently favored over the more plain 'global government' because, as it became clear in the course of the 1990s that nation-states were not interested in giving up their sovereignty as such to a global government, theorists of political globalization invented a new theory by which the UN would exercise "governance" without (somehow) actually being the "government."<sup>63</sup>

What speaks in favor of the maximalist model? The practical argument is that no effective global coordination or cooperation will last over the long term except by a single global governor, able to enforce law and regulation in the classic definition of law as command backed by the effective threat of coercion. That argument appeals to realists, for whom the test of law really is a command backed by an effective threat.<sup>64</sup> Equally important, however, is the idealistic argument—indeed, this is the one that has always appealed to the global bourgeoisie, the emerging middle classes from the dawn of the modern era onwards—that the world and history are gradually progressing toward a unified world, in which individually sovereign states must gradually give way to a global government for the cooperative good of all. Particularly given that nation-

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62. The literature on this proposition is nearly endless. See, e.g., Antonio F. Perez, *Who Killed Sovereignty: Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L. J. 463 (1996). Perez, like many (including me) who started out enthusiastic about global governance and the supposed erosion of sovereignty, over the years has become much, much more cautious.

63. The conceptual machinery behind the terminological shift was given by WOLFGANG H. REINICKE, *GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT?* (1998).

64. See generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2090–94 (1995).

states are established precisely on the principle of the ability to exercise ultimate control over activities within their territory—why should a global political system not require precisely such reach? It is an argument from idealism that takes the successful nation-state as the model for what a global order ought to look like, even though that means supplanting the nation-state itself. Indeed, it is a form of constitutionalism—global constitutionalism—and is often represented as such.<sup>65</sup>

The minimalist position—the defender of national sovereignty, even if committed to robust multilateralism—usually comes off in this comparison as the retrograde stance: defender of crude sovereignty and the privileges, justified or not, of states simply because they are states. But there is both a realist and idealist argument to be made for the ‘sovereigntist’ position. First, the necessary regulation of the global economy *can* take place among sovereigns; the range of things that can be undertaken will almost certainly be shorter and narrower and regulation less satisfyingly global than it would be under a genuinely federal constitutional system for the planet as a whole. Regulation of trade, in which the benefits of adhering to a common system even when one loses sometimes in rulings and arbitration vastly outweigh the costs of staying out, is likely to gain in solidity over time.<sup>66</sup>

Security, on the other hand, is likely to remain fragmented; the costs of adhering to a system that might pose to important players, if not existential threats, then very serious ones, makes it a matter of adherence that is discontinuous with an activity such as trade. But the idealist argument explains why, in any case, this should be: the idealist argument for sovereignty, for robust multilateralism without giving up sovereignty, asserts the intrinsic value of a self-governing political community, a democratic political community, one that obtains its legitimacy from the consent of its members.<sup>67</sup>

If that ideal argument has merit, then a certain amount of departure from maximalist efficiency in running the world is merited in the interests of self-government. It will be observed, however, that this idealist argument in favor of sovereignty is most particularly an argument in fa-

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65. See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51 (2006) (de Wet's footnotes are especially helpful in tracing through the full impact of this thought in contemporary European public international law).

66. Unsurprisingly, therefore, the most successful of the international governance organizations has been the World Trade Organization; the least successful have been those related to collective security.

67. This is not always a “conservative” position. In particular, see, Jed Rubenfeld, *The Two World Orders*, WILSON Q., Fall 2003. Rubenfeld, a leading constitutional law scholar at Yale Law School, is very, very far from being a conservative.

vor of *democratic* sovereignty, in which sovereignty is genuinely an expression of the consent of the governed.<sup>68</sup> Not all the idealistic arguments are on the side of global governance, with merely a crabbed realism counseling against—although one would scarcely know it, to survey the literature, which frankly soars into a limitless Platonism over the future possibilities of a unified, globally governed world.<sup>69</sup>

#### IV. THE INVENTION OF 'GLOBAL CIVIL SOCIETY'

If, however, one is persuaded by the global governance position, whether on realist or idealist grounds, or both, then one must confront the question of legitimacy that the UN's own theorists of global governance confronted. For them, the international NGO movement could provide that legitimacy, the will of the peoples of the world, that otherwise seemed lacking. But this role also corresponded nicely, in the view of other theorists of international NGOs and global social movements, with the concept of civil society in a domestic society.<sup>70</sup> By the 1980s, 'civil society' (which has a very long and, importantly, shifting lineage in Western political and social theory<sup>71</sup>) had come to mean the "independent sector,"<sup>72</sup> as theorized especially by intellectuals of the new social movements and dissident writers in such movements as Poland's Solidarity. That is to say, social institutions that were neither the market nor the state, the NGOs, the social movements, citizens groups, religious organizations, some political but many not, which gave meaning and social texture to individuals' lives.<sup>73</sup>

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68. I make this argument at greater length in Anderson, *Squaring the Circle*, *supra* note 60, at 1266. As expressed in that article, "we are all idealists now." *Id.*

69. Platonism about global governance and the United Nations reaches its fullest flower in PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* (2006). "UN Platonism" is a term that I have borrowed from Michael Glennon. See Michael J. Glennon, *Platonism, Adaptivism and Illusion in UN Reform*, 6 CHI. J. INT'L L. 613 (2006).

70. A useful introduction to the historical and contemporary uses of the term is found in *CIVIL SOCIETY: THEORY, HISTORY, COMPARISON* (John A. Hall ed., 1995).

71. See MARVIN B. BECKER, *THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY: A PRIVILEGED MOMENT IN THE HISTORY OF ENGLAND, SCOTLAND, AND FRANCE* (1994) (an outstanding study of the role of civil society in a certain place and time in history).

72. The archives of the critical theory journal, *Telos*, with its emphasis on critical European thought and social theory, especially from Eastern Europe, are vital sources in understanding the evolution of thinking around the concept of civil society as it emerged in the 1980s and 1990s.

73. See, e.g., JEAN L. COHEN AND ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992).

In democratic societies, the civil society organizations were a mechanism by which citizens could organize to express and press and advocate for their views. In undemocratic authoritarian and totalitarian societies, civil society organizations were sometimes swept up by or co-opted by the state—the union of the Church and fascist political authority by Franco's Spain,<sup>74</sup> for example. In the 1970s and 1980s, as civil society organizations began to thrive as the forbidden, and later half-forbidden— forbidden but tolerated within certain bounds—in the Soviet empire, they served as a means of pressing authorities with an implicit claim to represent the 'true' interests and desires of the people. The difference in the role of civil society organizations in the two types of society is crucial.<sup>75</sup>

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74. See, e.g., VÍCTOR PÉREZ DÍAZ, *THE RETURN OF CIVIL SOCIETY: THE EMERGENCY OF DEMOCRATIC SPAIN* (1993).

75. In identifying the contrasting roles of civil society in settled domestic democratic societies bearing democratic legitimacy with undemocratic societies lacking fundamental legitimacy domestically, I am leaving aside two otherwise crucial points about legitimacy.

First, legitimacy is not an on-off switch; a society or a regime of governance either has it or it does not. It is not that simple. Indeed, it is so far from being that simple that legitimacy is not well explained as a matter of "degree" along a sliding continuum, either. The legitimacy of a governing regime, for example, is not confined to having "more" or "less" legitimacy. Rather, the crucial question with regards to legitimacy is instead, "Legitimacy for what?" Maintaining basic law and order on the streets, or essential public services, even in a repressive, undemocratic regime? Collecting taxes? Undertaking war?

Regimes of governance can and often do have "general" legitimacy, a legitimacy of general "status," because the fullest form of legitimacy is a sort of latency, a residual propensity to adhere among the governed. That is what we ordinarily associate, in Weber's terms, with the general status-legitimacy of settled domestic societies and their governance. See Weber, *supra* note 41.

But on the margins, the question is not status-legitimacy, nor is it possessing "more" legitimacy or "less," but instead legitimacy to what particular ends. In Fujimori's Peru, the regime's ordinary police officers had the legitimacy to stop speeders in cars on the highway; its investigators had the legitimacy to pursue Sendero's leader, Abimael Guzman; and to be clear, this otherwise most illegitimate of regimes nonetheless *had* the legitimacy to fight Sendero Luminoso and the Tupac Amaru urban guerrillas. See Peter Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, 44 AUSTL. J. POL. & HIST. 373, 382–84 (1998). The law of occupation offers another example of this sense of "legitimate" order amidst what might well be regarded by many people internally as the essential "illegitimacy" of the occupier. (I am grateful to conversations with Stephen D. Krasner on exactly this matter of particularized points of legitimacy even amidst a broader regime of illegitimacy, and its flip-side, particularized points of illegitimacy amidst a broader regime of legitimacy. Interview with Stephen D. Krasner, Professor, Stanford Univ. (Jan. 13, 2011)).



In a genuinely democratic society, civil society organizations are free to advocate, organize, argue, debate, and cajole. Ultimately, however, political authorities are accountable *not* to civil society organizations, but instead to citizens who vote in the privacy of the voting booth. The legitimacy of the democratic system depends, ultimately, upon the free and

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The second is that the world is filled with many states that are both non-democratic and legitimate. Not necessarily good—but still broadly legitimate. Some of them correspond to what Weber described as “traditional” bases of legitimacy in genuinely traditional societies—although those bases, as well as those regimes, come under increasing pressure in the modern world. Bases of social legitimacy abound even in the modern world, ranging from (still) the divine right of kings to “he who prevents the tribes from slaughtering each other” and many bizarre and frankly bad rationales of legitimacy. Moreover, legitimacy in the modern world as Weber himself conceived it was not about democracy or consent, but rather was about the rise of the bureaucratic and administrative state, replacing traditional and charismatic sources of legitimacy with those of administrative efficiency, the “rational-legal” authority of the state—not consent of the governed as such, for Weber, after all, was a product not of America but Germany. *See* Weber, *supra* note 41.

At this moment, the rising notion of legitimacy in the world is not democracy and consent, but the legitimacy of an authoritarian government that leverages the “coherence” given by its authoritarianism, command-and-control, to create rapid economic growth: China and its would-be imitators. In that sense, legitimacy is, as Weber suggests, simply a matter of fact about what a people and a society will accept as “legitimate.” *See* Weber, *supra* note 41. (For purposes of this Essay, I leave aside saying more either about genuinely “traditional” societies, or conceptual views of legitimacy that introduce genuine normativity, beyond simply the fact of what populations accept.)

In societies whose governance is undemocratic and yet broadly legitimate, however, the notion of civil society is quite different—or quite possibly, largely nonexistent. It is a profound mistake to assume that all associations of private life should be construed as “their” form of civil society—civil society is a commitment that arises in a specific social and political history and is not in that sense ‘universal private life.’ Far from it. Even if it arises prior to the rise of genuine universal democracy—late-arriving, after all—it is deeply associated with private association *in public life*. It is in this meaning contrasted with the withdrawal into private life—the consolations of private life and family away from the public square. They have different social functions and correspond to different human values.

Civil society, even if it historically antedates universal democratic states, is utterly historically intertwined with notions of governance by some form of *public consent*. That is not the case with many forms of legitimate, but not democratic, society, and with the notion of private life as such, which may or may not be civil society. The discussion above does not address these kinds of societies. One might say, speaking normatively, that they ought to develop both mechanisms of genuine public consent at the level of the state, and concomitantly civil society as well. That they are broadly legitimate is not at issue—although recent events in the Arab world serve to point out that “legitimacy” can be real, and yet vanish quickly—but what they can teach us about civil society, including global civil society, is really very little, because, structurally speaking, they don’t possess it.

unconstrained vote of the citizens. Civil society organizations are important to the free flow of information and debate and policy in society—but they are not the guarantor of its legitimacy. In particular, in a domestic, democratic society, civil society is immensely important to the robust and intelligent functioning of democracy, especially representative democracy, but civil society is conceived as neither ‘representative’ nor as a necessary political ‘intermediary’ between government and the governed. The ballot box plays that role instead.<sup>76</sup> Legitimacy in a democracy is given by people raising their hands and voting—not by the presence of citizens or activist groups as civil society, however important they may be to articulating versions of a society’s politics.

In an undemocratic society that nonetheless tolerates *some* level of civil society organizations, however, matters are quite different. There is no ballot box to convey legitimacy and, if democracy in fact matters, then in an important sense the society’s governance is not (fully) legitimate. Legitimacy is not always conveyed by democracy, to be sure; historically, democracy is a rather special idea, in a historical world in which legitimacy was conveyed by kingship, by blood, by kinship, by religious sanction—by mechanisms in which the consent of the governed was scarcely at issue and certainly not by specifically democratic mechanisms and voting.<sup>77</sup> In the world that has emerged since 1945, however, the secular trend has been toward a world in which democratic consent in some fashion, and most usually by the ballot box, has been understood as a *sine qua non* of legitimate government.<sup>78</sup> But what happens to civil society, what is its role in an otherwise modern society that lacks democracy or

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76. For a fascinating account of the rise of the ballot box and the secret ballot, see Jill Lepore, *Rock, Scissors, Paper: How We Used to Vote*, THE NEW YORKER, Oct. 13, 2008, at 90.

77. The notes have earlier stipulated that this discussion utilizes only a crude, non-technical, broadly Weberian notion of legitimacy. However, the legitimacy for the purposes sought in genuinely federal global governance requires more than a *politics*—it requires a *society*, in Weber’s sense and for Weberian reasons. The kind of legitimacy that now exists in the UN is essentially political in nature and derivation, because there is no international society in the sense of actual people. The international society of states offers an analogue, a homologue, of legitimacy within domestic social orders, but that is a political construct taken by analogy to the social legitimacy found within actual societies. The political legitimacy of the international order is limited and analogical, as Thomas Franck acknowledged in his influential book, THOMAS FRANK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990).

78. A point argued by some even as a matter of international law. See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992) (international legal scholar Thomas Franck, writing in 1992, that democracy “is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes”).

democratic legitimacy? Either civil society is repressed, often brutally, as in a truly totalitarian society. Or else tolerated—precisely because it serves as a political safety valve for the broader democratic aspirations of the population. Either way, however, what it cannot do is *actually* offer democratic legitimacy, because it is not the ballot or the ballot box.

Indeed, in fascist regimes, such as Mussolini or Franco's, the "officially" accepted organizations of what we might call 'faux civil society' were explicitly treated as representative, intermediary organizations between the people and the state, in a corporatist sense.<sup>79</sup> The Communist dictatorships did something similar.<sup>80</sup> The ruling elites of these undemocratic societies knew perfectly well that they lacked ballot box legitimacy—or at least were unwilling to test it, over and over again, in the way of a long term, stable democracy—and so substituted organizations of 'faux civil society' as the supposed legitimating intermediaries between state and people. This is political "corporatism," not democracy or republicanism.<sup>81</sup> Organizations of genuine civil society, such as Solidarity in Poland, constantly wrestled with what its role should be in an *undemocratic* society.<sup>82</sup>

In the conventional account, global civil society is offered as the global homologue of civil society in a settled domestic society. For several years, this analogy seemed unimpeachable; global civil society would act as civil society does in an ordinary domestic society. It would agitate, advocate, cajole, demand, organize, lobby, and do all the functions of organizations and social movements in a settled domestic society. But gradually, the question arose as to what *kind* of domestic society and what *kind* of civil society. The civil society of a domestic democratic

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79. See, e.g., DÍAZ, *supra* note 74.

80. See, e.g., C.J. Albertie, *Survey and Critique of Russian Law and Its Effect on NGOs*, 2 INT'L J. CIV. SOC'Y L. 12 (2004); Marcia A. Weigle, *On the Road to the Civil Forum: State and Civil Society from Yeltsin to Putin*, 10 DEMOKRATIZATSIYA 117 (2002); ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, & LEGITIMACY (2000).

81. I am here adapting an argument against global civil society as bearer of democratic legitimacy offered by John Bolton who was, so far as I know, the first person to articulate it in the current debate. "It is," Bolton writes, "precisely the detachment from governments that makes international civil society so troubling, at least for democracies . . . the civil society idea actually suggests a 'corporatist' approach to international decision-making that is dramatically troubling for democratic theory because it posits 'interests' (whether NGOs or businesses) as legitimate actors along with popularly elected governments . . . Mussolini would smile on the Forum of Civil Society." John Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 217–18 (2000). But it is noteworthy that a serious, reflective, liberal internationalist such as Anne-Marie Slaughter has taken the essence of the criticism on-board in her own call for governance via global government networks, not NGO networks. See SLAUGHTER, *supra* note 51.

82. See, e.g., POLAND: A COUNTRY STUDY (Glenn E. Curtis ed., 1992)

society, in which legitimacy ultimately flowed from votes of citizens, and in which the function of political civil society was to organize and channel—but not pretending to stand, because of the independent existence of the ballot box, as corporatist intermediaries or representatives between the people and their government? Or the civil society of an undemocratic society, in which, precisely because of the state's undemocratic character, civil society was—by necessity, by opposition, by cooption, by whatever mechanism—treated as a representative and intermediary?

Given that the international system—the UN system—the system of global governance, to the extent it existed or could be, among international idealists, imagined into being, was palpably *not* democratic, then these international NGOs, recast as a matter of ideology as 'global civil society,' were likewise palpably not the organizations of civil society of a democratic society. This did not matter much, so long as the aspirations of the players in the system—the governance ideologists of the UN system and their confreres among the international NGOs—did not extend to matters of global importance. The fact that the international system lacked specifically *democratic* legitimacy did not so much matter when the issues presented to the system were either narrowly technocratic or else matters of mere multilateral negotiation among states, not claims for the UN to govern in its own name.<sup>83</sup>

But by the mid-1990s, the aspirations of this global system were reaching beyond the legitimacy that could be said to attach to the earlier system. The UN was seeking to take on governance tasks that quite apparently required much greater legitimacy than the existing system had or could claim to possess, given the available sources of legitimacy—effectively delegation from the member-states.<sup>84</sup> It was doing so as a strategy of a virtuous circle—leveraging up its legitimacy by leveraging

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83. There is, of course, another possibility altogether, the customary radical move—that democratic legitimacy is a red herring that does not matter. On the contrary, it is merely a front argument from reactionary defenders of sovereignty. Legitimacy does not require democratic participation as such. This is approximately the radical left view offered by global civil society activist and scholar Alison Van Roy in ALISON VAN ROOY, *THE GLOBAL LEGITIMACY GAME: CIVIL SOCIETY, GLOBALIZATION, AND PROTEST* (2004). It is a form of radical argument distinct from the "redefinition" of participation, representation, and democracy response, however, found in David Held and others, and critiqued separately below. See *infra* note 90; DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995).

84. See, e.g., Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605 (2008). For a representative list of the tasks the UN undertook, see *Honouring 60 Years of United Nations Peace Keeping*, UNITED NATIONS, <http://www.un.org/events/peacekeeping60/1990s.shtml> (last visited May 16, 2011).

up its governance activities, so to acquire more legitimacy, and so on round and round. Moreover, it was *also* being assigned such tasks by powerful nation-states (not infrequently including the United States) seeking to offload global obligations from their own shoulders.<sup>85</sup>

Peacekeeping, peace enforcement, weapons of mass destruction anti-proliferation, human rights in an ever expanding array with reach into individual sovereign states, the security problems of failed and failing states—these issues, especially as they reached inside states, were understood to require greater legitimacy than offered by the multilateral system of Member States of the UN. That legitimacy, in order to legitimate such governance, required overcoming the so-called “democratic deficit”—a deficit also identified and much debated in the context of the European Union. Indeed, for numbers of global constitutionalists—global federalists of global governance located in European academic and policy centers—the European Union offered the way forward for the world. It had achieved, in the minds of its architects and civil servants, at any rate, democratic legitimacy without all the ordinary trappings of nation-state democracy—and the same model could, with sufficient attention, be ramped up to the world as a whole.<sup>86</sup>

In that case, however, legitimacy that was close to democratic legitimacy—ballot box legitimacy—was required and, yet, at the planetary level, not really imaginable. Some dreamers dreamed—and still do—of a planetary parliament directly elected by populations around the world.<sup>87</sup> Most others—even many who are otherwise deeply committed to the political ideals of global governance in a globally federal system—accept that planetary democracy in that sense is meaningless and unachievable.<sup>88</sup> Among its many difficulties, it confuses the limits in space and

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85. For example, see CHOLLET & GOLDGEIER, *supra* note 33, at 272–75, on the U.S. seeking to find ways to utilize the UN against terrorism and other issues in the Clinton years.

86. See, e.g., de Wet, *supra* note 62 (describing an international system, and annotated with compelling footnotes). Much of this is challenged, with an equally engrossing set of footnotes, in Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 532–38 (2003).

87. See, e.g., Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212, 216–20 (2001).

88. Anne-Marie Slaughter, for example:

Yet world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty. Further, the diversity of the peoples to be governed makes it almost impossible to conceive of a global demos. No form of democracy within the current global repertoire seems capable of overcoming these obstacles.

population upon what can be genuinely called a 'democracy' with the unlimited, potentially infinitely upwardly scalable, networks of a common market.<sup>89</sup> The latter becomes more efficient the larger it becomes; the former breaks down. The world's great democratic societies are tradeoffs, sometimes uneasy ones, between the political requirements of democracy, which counsels limits on size, and the economic blessings of an ever larger common market. But, in the search for legitimacy in a system that, imagined for the planet as a whole, is too large for ballot box legitimacy, but which proposes tasks for which the legitimacy is greater than that which can be conveyed 'upwards' by Member States to the UN as a multilateral exercise—what is available?

The NGOs, of course, are available. But in that case, the form of analogy with domestic civil society is *not* that of a democratic society, but instead one in which necessarily the NGOs act in the absence of the ballot box. They are therefore treated as a kind of ideological stand in for democratic institutions and in that sense resemble civil society in an undemocratic state. Why does it matter? It matters because under these conditions, this global civil society is treated by the international system, by the UN and its administrators and governors and ideologists, as representative and intermediaries of the 'peoples of the world' who do not otherwise have a direct vehicle for their expression.<sup>90</sup> The conventional

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SLAUGHTER, *supra* note 51, at 8.

89. Researchers who study global democracy have noted the size and population constraints—smaller along both dimensions makes democracy easier and more likely. See Larry Diamond & Svetlana Tsalkis, *Size and Democracy: The Case for Decentralization*, in LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 117–60 (1999).

90. For many, to be sure, and the NGOs not least among them, this is a feature, not a bug. It is the argument laid out by, for example, David Held and his co-authors in many books and articles—that legitimacy does not require democracy in the ballot box sense, and that legitimacy in the sense of consent can be got by many different mechanisms, including through intermediaries such as global civil society. (Held's is a very peculiar body of work—by turns technocratic, predictive, rhapsodic, hortatory, and, well, *scheming*, but always toward the proper ends of history, or something very like that.) See, e.g., HELD, *supra* note 83; see also Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 127–29 (1996). One would caution those seeking to make this move because they (a) want to declare global civil society as "representative" and (b) recognize that democracy won't be possible, make it rather easy on themselves; this practically defines ad hoc, not to say self-serving, political theory. But it is a move urged not merely by those advocating for civil society organizations over the ballot box; it is a move quite consistent with a certain form of law-and-economics reductivism—the reductivism of dismissing the ballot box not as the means to "consent" in the deep sense of civic republicanism, but merely as one means among many by which to find "revealed preferences." This bland

account of global civil society, as the wholesome homologue of civil society in a settled domestic society—particularly in an era in which civil society and its virtues had been extensively theorized, discussed, and praised as a necessary pillar of liberal democratic society—attained tremendous influence. It figured in many speeches at the UN, by UN senior leaders such as Kofi Annan and his chief aides. Kofi Annan, after all, could not have been more explicit when in 1999 he said that if the “global agenda is to be properly addressed, a partnership with civil society is not an option; it is a necessity. I see a United Nations that recognizes . . . the non-governmental organizations['] revolution.”<sup>91</sup> And NGOs, he added, will give “global civil society its rightful place as one of the pillars of the international community in the twenty-first century.”<sup>92</sup>

Likewise, the sentiment of a “partnership” between global civil society and the United Nations figured in many speeches and activities of the world’s leading international NGOs, as they celebrated the undeniable achievements of the landmines ban campaign and took from that experience the conviction that they were indeed representatives and intermediaries for the peoples of the world.<sup>93</sup> They would democratize foreign policy and international relations and bring the peoples of the world into the rarified chambers of the United Nations. And they would contribute to the erosion of sovereignty in favor of a progressive form of global governance that would have at its core a partnership between the institutional UN, as the seat of global governance, and global civil society, which would intermediate on behalf of and represent the world’s peoples.

#### V. AFTER SEATTLE: THE REACTION AGAINST GLOBAL CIVIL SOCIETY

The critique was always implied in the conventional account: democratic legitimacy matters, and corporatist forms of intermediation and representation, even if actually true (a questionable assumption, as it turns out), are insufficient to yield the kind of legitimacy for global governance that it claims. Put another way, the UN and the international NGOs were locked in a sort-of ‘lovers’ embrace’—eyes only upon each other, each in pursuit of its own ideological goal, but finding in the other

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and anodyne characterization is, let us be clear, an ideological move of the first order, albeit by elision.

91. Kofi Annan, Sec’y Gen. U.N., Address to World Civil Society Conference (Dec. 8, 1999).

92. *Id.* One example among a great many, was Kofi Annan saying “global people-power . . . is the best thing that has happened to [the United Nations] in a long time.” *Id.*

93. See, e.g., Maxwell Kerley, *Achieving Zero New Victims of Landmines*, U.N. CHRONICAL (2009).

the confirmation of its special status. The UN sought to be the seat of global governance—and international NGOs, recast as global civil society, appeared to be able to give it the measure of legitimacy needed. The international NGOs, recast and confirmed by the UN as being intermediaries and representatives of the peoples of the world, thereby had an unquestioned seat at the table of power. Moreover, the NGOs had a place at the table that required less *actual* expertise and competence at some *actual* activity or mission than before, because, after all, the *representatives* of the world's peoples have a place at the table *because* they are representatives, not because of their technical skills or competences. It really was as though these two were lovers, each gratifying and confirming the other, eyes for each other and no one else—because, so far as each was concerned, each confirmed the worth of the other, without regard for the world beyond.

This love affair went on more or less unchallenged until an event that today (having now experienced 9/11, the Iraq war, the emergence of Al Qaeda and transnational jihadist terrorism, and much else besides) seems rather quaint. The event was rioting by anti-globalization protestors that brought to a crashing halt WTO trade talks in Seattle, December 1999. Anti-globalization protestors (with the active, profound assistance and coordination, and moral and material support of global civil society) took to the streets and forced the trade talks to shutdown.<sup>94</sup> Very quickly, global business interests that had looked upon the global civil society movement with a sort of benign interest (seeing it in precisely the terms offered by it, as a sign of the maturation of a global society, a global demos) began to question precisely those aspects that made the claim of global civil society special: its representativeness and its claims to intermediate. But it was not merely global business interests that looked with profound dismay at what the rioters and their supporters had wrought—the senior leadership of the UN, including Annan, saw this as a disastrous development because, indeed, they genuinely saw free trade, if properly managed, as deeply in the interests of the world's poor.

Hitherto, supporters of the idea of global civil society and global governance—so long as it included free trade—such as the *Economist*, began to raise serious questions about the elevated political and ideological claims that intellectually transformed international NGOs into global

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94. Anup Shah, *WTO Protests in Seattle, 1999*, GLOBAL ISSUES (Feb. 18, 2001), available at <http://www.globalissues.org/article/46/wto-protests-in-seattle-1999>; *WTO Meeting and Protests in Seattle (1999)—Part 2*, HISTORYLINK.ORG, [http://www.historylink.org/\\_content/prINTER\\_friendly/pf\\_output.cfm?file\\_id=9213](http://www.historylink.org/_content/prINTER_friendly/pf_output.cfm?file_id=9213) (last visited May 16, 2011).



civil society.<sup>95</sup> The skepticism was easy enough to develop—all one had to ask was, who do these groups actually speak for, anyway?<sup>96</sup> As David Rieff baldly put it, “So who elected the NGOs?”<sup>97</sup> Governments in the developing world—the democratic among them desperate for free trade—acidly noted that these groups purported to speak for peoples but denied the legitimacy of their governments, even ones that had been democratically elected.<sup>98</sup> The journalist Sebastian Mallaby conducted a celebrated—and reviled—study of the membership of one such NGO in Uganda that claimed to have the legitimacy to prevent a dam project with the capacity to bring electricity to vast numbers of people; the NGO in Uganda turned out to have twenty-five inscribed members.<sup>99</sup>

The international NGOs, under attack and subjected to a wave of unfamiliar skepticism from the long supportive Western elite press, began to back away from the most extravagant claims to represent peoples and populations—at least when dealing with journalists. The head of Greenpeace UK, for example, gave interviews in which he denied claiming

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95. See, e.g., *The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance?*, THE ECONOMIST, Dec. 11, 1999; *Sins of the Secular Missionaries*, THE ECONOMIST, Jan. 29, 2000.

96. For example, the highly regarded policy scholar and former State Department official, Thomas Carothers, wrote an article imploring us to reevaluate what civil society means. He was not even referring to global civil society, but to the limitations of what one could expect from civil society in newly emerging democracies in such places as Eastern Europe. Thomas Carothers, *Think Again: Civil Society*, FOREIGN POL’Y MAG., Winter 1999–2000, at 18.

97. Rieff raised this charge at a conference on child-soldiers and then followed it up in a widely circulated article that was quickly picked up as a talking point by many critics of NGOs. David Rieff, Address at the Conference on the Landmines Campaign and International Civil Society, Washington Coll. of Law, American Univ. (Feb. 27, 1998) [hereinafter Rieff, Address] (panel moderated by Kenneth Anderson); David Rieff, *The False Dawn of Civil Society*, THE NATION, Feb. 22, 1999 [hereinafter Rieff, *False Dawn*].

98. Fareed Zakaria, then Managing Editor of *Foreign Affairs*, found after contacting ten NGOs after the Seattle riots, that “most consisted of ‘three people and a fax,’” and expressed the concern that rich world “governments will listen too much to the loud minority” of first world activists and “neglect the fears of the silent majority” in the developing world who would benefit from activities not considered virtuous by the NGOs of the developed world. Justin Marozzi, *Whose World is it, Anyway?*, THE SPECTATOR, Aug. 5, 2000.

99. SEBASTIAN MALLABY, *THE WORLD’S BANKER: A STORY OF FAILED STATES, FINANCIAL CRISES, AND THE WEALTH AND POVERTY OF NATIONS* 7–8 (2004). There is practically a cottage industry among NGO activists responding to Mallaby’s charges regarding the situation of this Ugandan dam. For a discussion of this debate, see, e.g., Kenneth Anderson, *What NGO Accountability Means—And Does Not Mean*, 103 AM. J. INT’L L. 170, 170–71 (2009) (reviewing NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS (Lisa Jordan & Peter van Tuijl eds., 2006)).

legitimacy to represent anyone except the members of the group itself.<sup>100</sup> Many other organizations adopted the same tack.<sup>101</sup> Yet, outside the venues of the press, when it came to demanding privileges based on the exalted status of global civil society—places in the negotiations of treaties and agreements and so on—the demands remained fundamentally unchanged.

The institutional UN, for its part, reacted with uncertainty. On the one hand, the legitimating role envisioned for global civil society remained unchanged: who else was there to play it? On the other hand, Annan and his senior advisors, in the weeks and months following the Seattle debacle, remonstrated openly with global civil society.<sup>102</sup> Annan, in particular, rather bravely—given that he had declared these groups to be his constituency—gave multiple speeches directly to NGO conferences and congresses in 2000, telling them flatly that they were wrong about economic globalization and trade.<sup>103</sup> The task before them, he said, was not to prevent globalization, but to make its fruits available to all—a plea to make globalization a positive sum, not a zero sum game.<sup>104</sup> “We swim with the currents of our time,” Annan said, in one of the most cogent speeches of his career, delivered at the 2000 Millennium Forum of global civil society meeting at and with the UN, to an audience that, if not personally hostile to him, was broadly hostile to the idea.<sup>105</sup>

Global civil society, it seemed, had overstated its claims and even politically overplayed its hand. The collapse of the Seattle WTO trade talks badly damaged the global civil society movement with otherwise broadly sympathetic corporate, business, and many, many government interests, as well as intellectuals and policy experts. It was seen as unruly, anarchic, undisciplined, and often willing to tolerate street violence and thug-

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100. Marozzi, *supra* note 98 (quoting Peter Melchett, Executive Director of Greenpeace UK: “Democratic governments are elected and have democratic legitimacy. Other organizations, such as Greenpeace, The Spectator and the Guardian, do not. We have the legitimacy of our market of who buys us or supports us. I don’t claim any greater legitimacy than that, nor do I want it.”).

101. Alison Van Rooy collects and critiques some of this reaction. See VAN ROOY, *supra* note 83, at 64–76.

102. *Riots in Seattle: The Opening NGO Salvo Demanding Global Governance*, 1 DISCERNING THE TIMES DIG. 11 (Dec. 1999), available at <http://www.discerningtoday.org/members/Digest/1999Digest/December/Riots%20in%20Seattle.htm>.

103. See Kofi Annan, Sec’y Gen. of the U. N., Address at the Millennium Forum (May 22, 2000) (transcript available at <http://www.un.org/News/Press/docs/2000/20000522.sgsm7411.doc.html>).

104. *Id.*

105. *Id.*

gish language against economic globalization. In some respects the institutional UN pulled back from global civil society, feeling pressure from Member States.

Yet to a large extent, global civil society continued to have a positive reception at the UN. This was particularly so of global civil society's most presentable, upper-middle class, bourgeoisie emissaries—not the violent anarchists of the street, having a good time throwing stones at police and ransacking the McDonald's,<sup>106</sup> but instead the high-minded, respectful, respectable faces, those of large, serious, well-funded organizations in the human rights world, development, and humanitarian communities.

Global civil society (its glamour a bit faded as the bearer of global democratic legitimacy, but the only available suitor for the role) remained a "partner" to the UN, in Annan's parlance, while nonetheless receiving a distinctly chillier reception. Because, for the UN, the underlying issue of legitimacy remained unchanged and its possible choices constrained. The institutional UN and its leadership—the "modernizers" in the Secretary General's offices among the organization's senior executives—remained convinced that the UN-destined-for-global-governance *had* to find a way around the limited and limiting legitimacy conferred narrowly and jealously by the Member States and reach directly to the populations of the world as the UN's legitimating constituency. This became especially clear in the discussions and arguments between the 'traditionalists' and the 'modernizers' in the Secretary General's offices in the policy run-up in the early 2000s to Kofi Annan's ill-starred UN Reform Summit in 2005.<sup>107</sup> The UN and global civil society—lovers, still, but no longer out of a sense of true love—each giving legitimacy and countenance to the other. The intellectual high water mark had been crossed and critical intellectuals were mounting attacks upon the history and concept of the very idea of global civil society, let alone that it might confer authority upon the UN as the representative and intermediary of the world's peoples to their global government.<sup>108</sup>

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106. Shah, *supra* note 94.

107. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of Non-Governmental Organizations, and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

108. Intellectuals including me. In particular, see *id.*

VI. THE UN'S RETURN TO THE MEMBER STATES AND KOFI ANNAN'S  
RETURN TO THE SECURITY COUNCIL POST 9/11

Post 9/11, the debate over the nature and status of global civil society within the global system seemed somehow childish and silly. A form of non-state actor had made its presence known, but its claims, demands, origins, ideologies, zealotries, and fanaticisms had very little to do with the non-state actors that made up global civil society. The Seattle protests—and beyond Seattle, anywhere the IMF or World Bank, or WTO might hold meetings— all seemed like a form of recreation for bored Western young people after 9/11, throwing a few stones at policemen and burning a Macdonald's, events that were all quickly forgotten as Western adolescent games when instead the twin towers came down. But even serious, respectable NGOs found that they no longer occupied attention in the way that they had even following the Seattle debacle. International NGOs were suddenly swept off the board as political actors. Global civil society, as an intellectual construct for conveying legitimacy, was suddenly irrelevant. The nation-state was back. If the UN wanted a role to play, it would pay attention to nation-states and above all to the Security Council.<sup>109</sup>

As for the NGOs, they could be the camp-followers of the nation-states as the Western alliance went to war, or they could stay home. Or they could issue press releases and studies and reports and statements, as they preferred or not, but they were no longer at the center of attention. It was as though global civil society had been, for the UN, a lovely but temporary dalliance with a mistress; but when reality intruded, the lover rushed back to his wife, and so the attentions of the UN leadership returned to the Security Council. This was so even though some of the leading NGOs, in the human rights field especially, found their work more in the public eye than ever, as the war on terror began to unfold following 9/11. The run-up to the Iraq war that began in 2003 emphasized even more the preeminence of nation-states and the central importance of the Security Council, especially for the UN senior leadership.<sup>110</sup> When the questions of war and peace were on the table in ways that directly involved the world's great powers, then the NGOs and global civil society seemed small fry indeed. This was so despite the efforts of global civil society to

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109. See Traub, *supra* note 40, at 156–66.

110. See *id.* at 167–87.

mobilize large numbers of people in protests against the Iraq war in many countries.<sup>111</sup>

But the response to the war on terror and the Iraq war illustrated something that everyone had always known to be true, but which was always glossed over by the apparently politically neutral language of global civil society: although in principle, institutions of civil society can include a wide variety of political orientations and, in democratic societies, do, in fact, in the international community the term is reserved for politically 'progressive' organizations, defined in broad terms as a left wing politics and an orientation toward global governance over merely democratic sovereign governance.<sup>112</sup> The legion academic literature on global civil society largely assumes that it is about the left wing Human Rights Watch and Greenpeace, not the pro-life efforts of the Evangelical Christian and Catholic Churches, and that it is committed to precisely what the institutional UN sought from it—an a priori commitment to the idea of global governance, a preference for the international over the merely national.<sup>113</sup>

The covert narrowness of the received view, however, with its politically constrained but apparently neutral view, was not exposed by the presence of some dissident international NGOs that defied the consensus—the National Rifle Association and its global affiliates, for example.<sup>114</sup> It was exposed, instead, by the emergence of transnational, non-state actors of great power and, as it turned out, dismayingly wide appeal in the Muslim world, at least for a time, that owed nothing intellectually or politically to the concept of civil society in relation to the international system. Put another way, after a post-Cold War decade in which global governance was pursued by the UN and global civil society as “international law,” it turned out that there *was* a growing form of transnational law, under the radar screen of global civil society and international organizations equally, but with far greater weight, impress, and conse-

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111. The veteran peace activist, campaigner, and new social movements theorist, Mary Kaldor, makes the case for the global social movement against the Iraq war in her book. MARY KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003).

112. A point made long ago by Rieff in Rieff, *False Dawn*, *supra* note 97.

113. Rieff, *Address*, *supra* note 97; Rieff, *False Dawn*, *supra* note 97.

114. This is one of the many reasons why the intense debate (in the United States, at least) over domestic gun control efforts under the guise of a UN small arms and light weapons treaty is so important: among many other things, it is a demonstration of the essential non-neutrality of global civil society as a category in international politics. See David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43 (2008).

quence. It turned out to be not international law as such, but shari'a.<sup>115</sup> One could plausibly argue that shari'a law has a considerable claim to be *the* genuine growth industry in transborder, global law.

This should give pause, one might think, to democratic liberal progressives who somehow automatically favor the transborder over the merely national, the international and global over the merely parochial sovereignty of the nation-state. That this largely does not says something about how liberal, or not, "liberal internationalism" actually is today. Global law might indeed grow, but not necessarily in a *liberal* direction. The reason this does not appear to give concern to progressive forces of global civil society is simply that these forces, like the UN itself, have largely given up the dream of an international order based around liberal, secular, neutral principles that separate out private belief from public conduct in the public square, and have instead embraced religious and ethnic communalism and multiculturalism, rather than the neutral liberalism of individual rights and liberties, as the ideal for managing conflicts among religious and ethnic communities.<sup>116</sup> What is the actual world in which the legitimacy of democratic nation-states is systematically degraded in favor of a shallow cosmopolitanism, promoted by global civil society, embraced by de-racinated academics, the media, and international institutions, and all for the sake of the supposed abstract virtue of governance at the global level? It is a world that *in fact* empowers simultaneously sub-national and supra-national religious and ethnic groups. Is that a more *liberal* world because it is more shallowly cosmopolitan at the global level?<sup>117</sup>

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115. See, e.g., OLIVIER ROY, *GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH* (2004); MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006) (exploring the necessary and growing influence of Islam on all aspects of global society).

116. For more discussion on this point, see Kenneth Anderson, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT'L L. REV. 277, 315–19. However, from the standpoint of the social geographer, one way to understand this shallow cosmopolitanism is as a universalized version of the ancient idea of the "port city," the mingling and clash and melding of cultures and societies at the point of trade in goods, the chaotic and often relaxed mores of sailors, dock workers, merchants, importers and exporters, tax and customs authorities, bazaar traders, inn-keepers, brothel workers, and so on. The great port cities have always served a crucial social function across borders—not just an economic one, but a genuinely social one—in the mingling of societies. It is also equally true that the social life of the port city depends upon having social structures above them that are not as chaotic.

117. A better way to see this, but one that would carry us very far afield, is through the lens of New Class analysis. This shallow, uncommitted cosmopolitanism is better understood as a mechanism for allowing global elites to sell their expert services in technology, management, finance and, yes, academia, as free agents in a global market as unconstrained as possible by national, state-level forces. Much of what we are pleased to call

Much of what we are pleased to call global governance operates at the subnational level to empower forces of illiberalism over liberal democracy, while yet handing to them the keys to liberalism's forms, rhetoric, and processes in the form of trumping rights over attempts by liberalism's institutions to rein them in like any other group in society. It is as though liberalism had no substantive moral, political, legal, or historical commitments—a strange position indeed for idealists and ideologists who otherwise count themselves as “progressive” and therefore practically committed to some theory of moral progress in history. And as though “liberalism” were merely a temporary and contingent commitment to “revealed preferences” that might, for all we know, point the way to communal governance by religious authorities. It is a mistake to confuse proud liberalism with this shallow cosmopolitanism.<sup>118</sup>

Why a world of transborder, multiculturally-‘managed’ cousin loyalties, however, would be a better place—merely because it endorses ‘global’ governance—than a liberal one based around individual human rights and democratic participation in religiously and ethnically neutral states is far from self-evident. Nonetheless, it appears to be what global civil society and the institutional UN have endorsed as the new global ethic in the wake of 9/11 and the Iraq war. Anyone doubting that proposition might take the opportunity to attend the sessions of the “reformed” UN Human Rights Council in Geneva and see how much of its agenda is devoted systematically to replacing liberal concepts of free expression with impeccably multiculturalist ideals of religious communalism, beginning with the proposition that no religion, or at least Islam, shall ever be offended by contrary speech.<sup>119</sup>

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global and transnational theory of governance is best understood not as the elaboration of a theory of global governance, but as a manifesto for setting out a global market for expert elite free agents, those whose Global New Class interests are as real as any other class in history, but which are facilitated by the dismantling of barriers at the national level, because they live, work, and play in the jet stream. I have discussed the New Class theory behind all this, in the context particularly of lawyers' roles in the global economy. See Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062 (1996).

118. This being, in effect, the (very) short response to PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2007).

119. The indispensable source of information on a daily basis is UN WATCH, <http://www.unwatch.org/site/c.bdKKISNqEmG/b.1277549/k.BF70/Home.htm> (last visited Mar. 17, 2011); see also Brett D. Schaefer, *Commentary: Free Speech? Not at the U.N. Human Rights Council*, THE HERITAGE FOUND., Mar. 29, 2007.

## VII. WHAT NEXT FOR GLOBAL GOVERNANCE, THE UN, AND GLOBAL CIVIL SOCIETY?

Global governance, as a federal world under the UN, as a global constitutional order, as a political project to correspond to economic globalization of goods, capital, and increasingly labor and services, is stalled. But it is stalled in a peculiar way. The UN is immobilized in a cul-de-sac in which it can neither move forward meaningfully toward that political goal, nor give up that overarching political goal in favor of something more modest, achievable, or frankly useful. Its legitimacy is peculiarly linked to the vision of its glorious future as the seat of global governance, and it seemingly cannot get on with something more functionally important because then the limited legitimacy that it does have is *also* at stake. It is a little like the exiled queen who has lost everything, except the claim to the throne, which justifies everything else and yet which precludes her from doing anything different other than being pretender to the throne.

There are, in other words, useful, functional, greyly technocratic things the UN might be doing well—but which it finds difficult to undertake because, in a certain way, doing them would be beneath its dignity. Doing them would constitute an acknowledgment that the UN will never really be the Parliament of Man, at least not in the grand and glorious sense of global governance. And because of that commitment to the future, too, other actors are skeptical about entrusting the UN with anything they really care about—peacekeeping in some forsaken failed-state hellhole, yes; replacing ICANN with the UN to regulate the Internet, no—because they understand the deep tendencies of the organization to politicization of even apparently routine issues.<sup>120</sup>

Unsurprisingly, the global civil society movement is caught in precisely the same cul-de-sac. It turns out to be both unable to confer the legitimacy that the UN's ideas of global governance require, but also not able to act as “representatives” and “intermediaries” for the peoples of the world, at least not compared to nation-states. The more savvy among them have moved to a two-sided, uneasy strategy of publicly abandoning the intellectual pretensions of global civil society and appearing, publicly, to beat a retreat to just being NGOs again. Beat a retreat, that is, from making such grandiose claims of representativeness and have gone back to asserting—rightly or wrongly, true or false—their expertise and com-

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120. See, e.g., Jay P. Kesan & Andres J. Gallo, *Pondering the Politics of Private Procedures: The Case of ICANN*, 4 INFO. SOC'Y J. L. & POL'Y 345 (2008) (a generally sympathetic article about the idea of UN agency regulation but giving a scrupulously useful account of those who are not).



petence as reasons why anyone should pay attention to them. At the same time, however, international NGOs build on earlier success in creating an atmosphere of "partnership" among global civil society, international institutions, and like-minded states (precisely the formulation drawn out of the success of the landmines campaign) in order to demand a 'seat at the table.' The old, and one might have thought, discredited, corporatist claim of representativeness and intermediation continues to operate within the more limited precincts of international organizations—not at the level of deliberations of the Security Council, but in the myriad lower level issues that are the natural fodder of interest groups that have found a way to ally themselves with the UN's institutional interests, and to call it "representativeness" when that suits and "expertise" when it does not.<sup>121</sup>

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121. Because this Essay was largely completed before the appearance of David Gartner's exceptionally fine argument in favor of drawing the NGOs into many more things in the processes of public international organizations, I will not try to respond to it in detail. See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595 (2010). On this particular issue, Gartner argues that the resistance on grounds of overclaiming legitimacy by NGOs-as-Global Civil Society is alarmist and overstated; what is the harm in inviting knowledgeable NGOs to give input in some formalized way in venues, such as World Bank or UN organs for particular activities, in which they might have much expertise to offer?

Part of the response though, is that it does not actually work this way. Having sat through many NGO strategy meetings, the aim was always to use the seat at the table of negotiations in order to ratchet up legitimacy to the point of being able to assert that "our" place was no longer discretionary, because we "represented" people. As for expertise, as noted earlier—harking back to Martin Shapiro's powerful critique of experts and enthusiasts that even Anne-Marie Slaughter, no sovereigntist defender herself, found persuasive—in many of the matters under discussion, there is no purely neutral expertise, but rather it always melds with prescriptive agendas, quite sincerely held. See *supra* note 51. The act of being able to intervene in the discussion and make statements in the course of negotiation of a statement or declaration, a treaty text, whatever it might be, is indeed a real form of influence; if it were not, the NGOs would not bother. But it is influence both in that act, but also in the process of legitimation for which, in my experience at least, international organizations and states that permit this expect a sort of broad reciprocal legitimation in return, and why not?

The other part of the response to this critique that NGOs really are not looking to make claims of representativeness that they do not bear is that they are not making them now because it is strategically imprudent to do so, but in fact they do regard themselves as representatives in some grand moral sense, and will assert it if it becomes strategically and politically plausible down the road. There is a curious bait and switch that goes on here—when the NGOs are called on their ideological pretensions of "representativeness" in the form of the claim to be global civil society and all the massive ideological connotations it brings, there is an immediate retreat back to a touchingly modest, demure, submissive mien—who, us? But as soon as the pressure is off, then the claims to legitimacy ratchet back up—the pretender to the throne never really stops being the pretender.

The ideological argument over global civil society will presumably resonate in the academic and NGO literature for years to come. The model worked out in the 1990s for global civil society has continued to operate, with some surface modifications. In order to accommodate new sensitivities, the NGOs are no longer announced as “partners” but instead as “norm entrepreneurs” and “transnational advocacy networks.”<sup>122</sup> The new terminology tends to obscure what is the same—call it by these terms, and so seek to defang the problems of representation, intermediation, and corporatism, but the moving actor is *still* an ideologically conceived global civil society. The academic literature will find itself enthralled for some years yet with analyzing how global civil society is drawing new norms in the international market in ideas and so democratizing and opening the “international community.” The academic activist-scholars have difficulty taking on board that this supposed “openness” is actually and essentially a *closed* legitimization-circle between global civil society and international organizations. Calling it “entrepreneurship” obscures as much as it illuminates what is the overarching issue of the United Nations and the ideal of global governance—the on-going, decades-long legitimization crisis.

Yet a new and intellectually powerful assortment of scholars—impeccably liberal internationalists, wedded to global governance, but not at all wedded to the sanctity of global civil society—has already moved beyond the idea that global governance can or should be sought through global civil society. They are almost certainly right in viewing the global civil society movement as an element, but not the most compelling one, in creating global governance. Anne-Marie Slaughter, Benedict Kingsbury, and Kal Raustiala, among others, are all committed to some form of global governance, but none suggests that its legitimacy would come about through global civil society.<sup>123</sup> As Slaughter said flat-

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Gartner, in my view, offers the “aw shucks, it’s just us NGOs,” but does not address the large body of material in which the “aw shucks” view is overtaken by the “we, the peoples of the world” view. What in the internal workings of the NGOs have changed their self-perception, and why should it change? Put a different way, Gartner needs to explain less why Anderson is wrong, and more why John Keane, the leading 1990s theorist of global civil society in all its legitimate glory, and the one at that point embraced by “global civil society,” is wrong and show that it has actually been repudiated as the internal ideological stance of the NGO community in its heart of hearts. All that said, Gartner’s article is an impressive work, and one of the best defenses of a certain role of NGOs in international organizations.

122. See KECK & SIKKINK, *supra* note 3.

123. See SLAUGHTER, *supra* note 51; see also Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* (Inst. Int’l L. & Just., Working Paper 2004/1, 2004); Kal Raustiala, *The Architecture of International Coopera-*

ly, global governance needs forms of legitimacy that *only* states, and their agencies, can provide; she elaborates a form of governance that goes far beyond the idea of robust multilateralism that this Essay has suggested, but one which is distinctly cool to the idea of genuine legitimacy coming from global civil society.<sup>124</sup>

Benedict Kingsbury's project of global administrative law skips over the very problem of political legitimacy altogether—a troubling jump, to be sure—in favor of purely technocratic legitimacy achieved simply by technocratic competence, whether through networked agencies among governments or networks including relevant corporate or NGO actors, what matters is competence and accomplishment, not political legitimacy in the abstract.<sup>125</sup> This essentially technocratic account is noteworthy for the fact that nowhere does it refer to international NGOs as “global civil society,” and it prefers to treat private actors as including both NGOs and corporate actors because, in the end, what matters is who has genuinely expert knowledge and who is able to prove competence.<sup>126</sup> It is an account coolly indifferent to the heated romanticism of the NGO claims, for and against, a certain shrug of the shoulders as if to say, it is nearly 2010 and those arguments are all so . . . 90s.

There are, in my estimation, serious problems with these various alternatives. In the first place, the one thing that the troubled discourse of global civil society and the UN is right about is that political legitimacy does matter, and it cannot be achieved for the purposes and activities for which the UN has declared itself fit and fitting on a purely technocratic basis. Global civil society cannot convey that legitimacy; but it was not wrong to insist that it matters and is not reducible to bureaucracy, no matter how competent. That said, *they*, the theorists of networks of bureaucrats and judges and what, in a more adequately theorized system, would come to be known as the globalized “wholly-administered society”—not global civil society, not NGO norm entrepreneurship, not transnational advocacy networks—represent the cutting edge of theory of global governance and, by extension, the emerging conceptual poverty of the role of international NGOs.<sup>127</sup>

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*tion: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002). The next move in this ongoing debate, I suppose, will be that international law theorists will begin to realize that they have possibly placed too much faith in network theory.

124. SLAUGHTER, *supra* note 51, at 8–11

125. See Kingsbury, Krisch & Stewart, *supra* note 123.

126. See generally *id.*

127. The “wholly-administered society” refers to a concept developed as part of New Class theory among the editors of *Telos* in the 1970s and 1980s. It is a discussion for

In any case, however, the world at the time of this writing appears to be moving toward a multipolarity that raises a whole different set of issues both practical and ethical with respect to international NGOs, public international institutions, and global governance. What happens when it becomes clear that the superpower, while militarily still the superpower, does not have unlimited resources and powers to be able to impose its will on China, Russia, or such "resource extraction authoritarian states" as Iran, Venezuela, Saudi Arabia, etc., at least within their own spheres of influence and local geographies? Whether that condition will continue to accelerate or not is unclear and depends on so many contingencies—shifts in oil prices, a US that loses interest in offering a global security guarantee or even a NATO one, a China that fails to continue achieving legitimacy through growth and sets off serious internal unrest, etc. Yet were this trend to continue, many will celebrate that as the advent of a more "equal," more "just," better world. Many will also likely come to regret it, were that truly to come to pass, however, at least if they also count themselves fans of global governance. Why?

A genuinely multipolar world is, as David Rieff has noted, not a cooperative world but, almost by definition, a competitive one.<sup>128</sup> In that kind of world, states are more important than they ever were when they were under the hegemony of the United States, and there is less room, not more, for cooperation. Competition is not limited to the issues of deep conflict—Georgia, the Taiwan straits—but spills over into seemingly unrelated matters, such as whether the authoritarians of the Security Council, Russia, and China, will begin reflexively to oppose initiatives in parts of the world—failed states, for example—in which they have no deep interests, simply for the sake of putting pressure on initiatives sponsored by the rest. In other words, there is a hold-up value on otherwise unrelated issues—countries at the UN, after all, thrive on it as a form of rent-seeking. Global governance does not have a real place in this world, at least not global governance conceived in its 'high church' sense as a federal world under the UN, with the Charter as its constitution. In place of governance, the UN becomes what, on a more realist view, it always was—at best, the talking shop of the nations.

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another day, but we are not so very far from the need for a globalized theory of the New Class, and the wholly-administered, professionalized-yet-marketized society that *Telos* debated several decades ago, in order to understand in a genuinely radical way the content of extant ideologies of global governance. The memory of Paul Piccone lives.

128. David Rieff, *Concerts and Silly Seasons*, OPEN DEMOCRACY (Feb. 23, 2007), [http://www.opendemocracy.net/democracy-americanpower/concerts\\_4380.jsp](http://www.opendemocracy.net/democracy-americanpower/concerts_4380.jsp). Rieff is here criticizing Michael Lind's idea of a "concert of power." MICHAEL LIND, *THE AMERICAN WAY OF STRATEGY* 171–88 (2006).

One could argue, perhaps, that NGOs in such a world become more, rather than less, influential, but frankly, the opposite argument seems far more persuasive. Global civil society and global governance achieve their maximal ideological appeal and, indeed, political influence when the basic security of much of the planet is taken care of. And that guarantee is provided not by the UN, with the great powers in much greater conflict and (even without great power conflicts as such) the free-rider problems endemic to the collective security system, but by a relatively benign hegemon that, in pursuit of its own very broadly conceived security interests, a combination of its ideals and interests, carries along much of the industrialized world's security interests in train. The cause of global governance, and partnership with global civil society, looks much less attractive when security itself is an issue; moral exhortation is a lovely but superfluous attribute when what is needed are the big battalions. The NGOs might consider prayer to Kant in the name of the categorical imperative, then, that the US not lose interest or capacity or undertake a calculation of fundamental tradeoffs as to the costs of being the hegemon: the global order that the superpower underpins is the one in which the NGOs swim as fishes in the sea.<sup>129</sup>

It is less clear whether a competitive, multipolar world favors or disfavors global governance conceived as a more limited, more technocratic project. Jettisoning the grand political project of political representativeness and intermediation and legitimacy in any grand sense cannot hurt in such a world. The attempt to bring together technocrats rather than politicians, and seek only such legitimacy as is required to solve particular problems and presume only such legitimacy as is required—only to make a limited set of global trains run on time for the sake, especially, of very poor people about whom no else really very much cares—seems like it must be less disfavored, at least, even in a competitive multipolar world. Yet the problem of hold-up value in projects and tasks globally that seem, on their own, to have little to do with competitive great powers, does not go away. Still, there is much to recommend the approach—*provided* of course that it never gets above itself and begins to believe that the legitimacy of technocrats for discrete functions can somehow be built up into some ideologically grander structure.

There is no grander structure. Coordination among democratic sovereigns in robust multilateralism is the most that can, and should, be

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129. I address these questions in blunt language in Kenneth Anderson, *Paul Kennedy's The Parliament of Man: The Past, Present, and Future of the United Nations* (Wash. Coll. of Law, Research Paper No. 2008-70, 2008) (book review), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265833).

sought in the way of political globalization. It does not satisfy the vast imaginations for those that only the grandiosity of the Parliament of Man can satisfy. It promotes the UN-of-Less-Visibility and not the UN-of-Rock-Stars. It is resolutely state-centric and sovereign. It does not give NGOs a special place in the global firmament and certainly grants them no special legitimating authority. Their ethical status does not include representation or intermediation—something that ought to be understood within and without the United Nations, because it has implications for how the UN ought to treat them: but, then, that would require that the UN take account of how it treats itself. Robust multilateralism, for its part, as a model of governance, at least has the possibility of effectiveness in particular matters for particular people and particular places: taken together, enough of them, they after all make up the globe. The ethics of global governance, in other words, ought finally to include the acknowledgment that while there are international NGOs, there is no global civil society.

#### CONCLUSION: FROM LEGITIMACY, BACK TO ACCOUNTABILITY

This conclusion is not an argument that the NGOs ought to pack up and go home. On the contrary, it is a plea for the NGOs to find ways to discipline themselves and their ideological pretensions, so as to remain useful as experts and, yes, even as enthusiasts and advocates for their causes. To that extent they can function like civil society in domestic democratic society. Concomitantly, they need to give up the claim—really give it up, not merely strategically set it aside for down the road—that they represent anyone or that they deserve attention as intermediaries for the peoples of the world. It misconceives the nature of the role but, more crucially, makes an illegitimate power play for status that is not, in fact, legitimate for the ends that they, and public international organizations, have in mind. But to do so, the NGOs have to give up the whole ideological apparatus of global civil society, and in so doing, give up the love affair with public international organizations.

That is a hard thing for the NGO community to do. It requires intentional self-discipline and self-awareness of a kind that NGOs and social movements, like any other institution, find hard to achieve—precisely because it swims against the apparently compelling and irresistible tide of strategic behavior that magically confirms one's highest ideological self-perception. Modesty is the hardest institutional virtue for NGOs. The ICRC has the right set of modesty-inducing incentives insofar as it sees itself as constrained around an institutional competence and "right to participate" of "bare rationality" in situations of dire humanitarian emergency; less so insofar as it sees itself as the forward-looking, progressive

voice of international humanitarian law.<sup>130</sup> But overall, the ICRC's rationales are self-constraining in a way that few other organizations or new social movements in the world of international NGOs are; on the contrary, they lead them to positive feedback mechanisms that in turn lead directly to the ideology of global civil society and a legitimization-affair with public international organizations.

Moreover, it is made more difficult by a set of social dynamics that have not been explored at all in this Essay—the relationship not only with public international organizations, but with the funders of these movements, the philanthropists and foundations that set the priorities, establish the incentives and disincentives, and which represent a whole other set of social and economic pressures upon NGOs and social movements. If the Global New Class elites are about global markets unfettered to allow them to sell their expert services without regard to borders, national loyalties or identities (save for China), and an account of class interest that thus far seems to have escaped much analytic notice, then the great philanthropists likewise have not been studied with any deeply critical eye.

One place to begin might be to assume that they are not like the Global New Class—those who have already won in that arena—and that their motives are no longer those of money and profit, but instead “glory,” the quality of individuals seeking something grander and longer lived than liquid capital. One might begin, then, by thinking of them within historical and social traditions that take glory seriously—does not a Soros, for example, at least on the global philanthropic stage, seem less today like a plutocrat and more like a genuine “baron,” in the formal sense of medievalism? A Gates or even a Clinton—feudal lords in a world with no clearly defined king—seeking not money and not even power exactly, but . . . *gloire*? And around whom the NGOs clump as courtiers, flatterers, or perhaps peasants and serfs? Human Rights Watch has an annual budget of some \$44 million. For those of us who have ever engaged in international NGO fundraising, it is an amount that is frankly staggering in absolute terms for the NGO world that does not benefit from government funds. Is there no “critical political economy” to be elaborated here, no sternly critical and unsentimental ‘public choice’ account to be given of funders and fundees?

This then leads us, at long last, back to the question of accountability. The foregoing, after all, said it was about accountability, but then took up a lengthy disquisition instead about legitimacy. What is the relationship?

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130. See generally David P. Forsythe, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L R. RED CROSS 63 (2007).

It is not a complicated one, and can be stated simply and by way of conclusion.

The problem of legitimacy as it has been set forth here, both for NGOs and for public international organizations, is that their mutual intertwining leads to claims of legitimacy that are inflated and premised upon claims of legitimacy—democracy, representation, intermediation—that are simply untrue. A false, or inflated, or unsustainable claim of legitimacy, however, is a dangerous thing and particularly when it involves institutional actors mutually legitimating each other. It is dangerous insofar as anyone actually relies upon it, because the claim might eventually turn out to be worthless and a bad thing for those who relied upon it as a source of strength or protection—peacekeepers who invite reliance by the local population, but then make their own decisions to withdraw, for example.

But it is particularly problematic for the idea of accountability, for either NGOs or public international organizations. This faux-legitimacy invites these institutions to believe that their presumed legitimacy—derived by assiduously consulting each other—is accountability, at least in the external sense. Whereas David Rieff's insouciant question, "So who elected the NGOs?"<sup>131</sup> remains as salient as ever, the claim of legitimacy allows the question of external accountability—to whom does one account for the positions one takes, the policies one urges, the courses of action one demands?—to be answered by saying, we represent vast, but naturally silent, populations of the world. Our accountability is to them, if anyone—and they are . . . silent. And does not silence give consent?

This is not, to say the least, accountability of civil society in a domestic democratic society, in which external legitimacy is automatically triggered by the fact that everyone will raise their hands, independent of the mediation of the civil society actors. There is no similar reality-check in the form of accountability for NGO actors who, in asserting themselves as global civil society, serve as their own gate-keepers. That is the fundamental problem of legitimacy and the accountability of international NGOs in a world of public international organizations. Modesty, it turns out, is a very hard thing.\*

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131. See *supra* note 97 and accompanying text.

\*One does not usually dedicate journal essays, but this one is to the memory of Paul Piccone, founding editor of *Telos*, who many years ago introduced me to the social theory of the *New Class*.



# THE ILLEGITIMACY OF PREVENTING NGO PARTICIPATION

Steve Charnovitz\*

Nongovernmental organizations (“NGOs”) have exerted a profound influence on international action. Although NGOs go back to antiquity,<sup>1</sup> the influence of transnational or international-minded NGOs began in the 1770s.<sup>2</sup> Historically, NGOs have been important catalysts in the promotion of the goals of peace and disarmament,<sup>3</sup> antislavery,<sup>4</sup> women’s rights,<sup>5</sup> humanitarian law,<sup>6</sup> environmental law,<sup>7</sup> human rights,<sup>8</sup>

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1. See, e.g., JACK C. ROSS, AN ASSEMBLY OF GOOD FELLOWS: VOLUNTARY ASSOCIATIONS IN HISTORY (1976). There is also a large literature on the topic of “civil society.” See, e.g., JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999). Some of this literature discusses civil society organizations as participants and some does not.

2. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 190–92 (1997) [hereinafter Charnovitz, *Centuries of Participation*]; see also CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., 1999) (discussing the proliferation and influence of international NGOs since 1875).

3. See, e.g., DAVID CORTRIGHT, PEACE: A HISTORY OF MOVEMENTS AND IDEAS (2008); THOMAS RICHARD DAVIES, THE POSSIBILITIES OF TRANSNATIONAL ACTIVISM: THE CAMPAIGN FOR DISARMAMENT BETWEEN THE TWO WORLD WARS (2007).

4. See, e.g., ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES (2005); JIM POWELL, GREATEST EMANCIPATIONS (2008).

5. See, e.g., BONNIE S. ANDERSON, JOYOUS GREETINGS: THE FIRST INTERNATIONAL WOMEN’S MOVEMENT, 1830–1860 (2000); NITZA BERKOVITCH, FROM MOTHERHOOD TO CITIZENSHIP: WOMEN’S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999); DAVID S. PATTERSON, THE SEARCH FOR NEGOTIATED PEACE: WOMEN’S ACTIVISM AND CITIZEN DIPLOMACY IN WORLD WAR I (2008); HILKKA PIETILÄ, ENGENDERING THE GLOBAL AGENDA: THE STORY OF WOMEN AND THE UNITED NATIONS (2002); LEILA J. RUPP, WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN’S MOVEMENT (1997); LINDA K. SCHOTT, RECONSTRUCTING WOMEN’S THOUGHTS: THE WOMEN’S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM BEFORE WORLD WAR II (1997).

6. See, e.g., JOHN F. HUTCHINSON, CHAMPIONS OF CHARITY: WAR AND THE RISE OF THE RED CROSS (1996).

7. See, e.g., SHERMAN STRONG HAYDEN, THE INTERNATIONAL PROTECTION OF WILD LIFE (1942); ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION AND THE CONSERVATION OF NATURE (1981); SARAH ABREVAYA STEIN, PLUMES: OSTRICH FEATHERS, JEWS, AND A LOST WORLD OF GLOBAL COMMERCE (2008); Steve Charnovitz, *Learning from Early NGO Activity*, 92 AM. SOC’Y INT’L L. PROC. 338 (1998).

8. See, e.g., PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (1998); LINDA RABBen, FIERCE LEGION OF FRIENDS: A HISTORY OF HUMAN RIGHTS CAMPAIGNS AND CAMPAIGNERS (2002).

worker rights,<sup>9</sup> and international economic law.<sup>10</sup> Indeed, to quote José Alvarez in his masterful treatise on international organizations, “no one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs.”<sup>11</sup> Although there may be disagreement as to when NGO influence commenced, few would deny the contemporary influence of NGOs on the international plane.<sup>12</sup>

The importance of NGOs has led to a spirited debate about their status in international law. Some scholars, such as Pierre-Marie Dupuy, have noted a “paradox” wherein NGOs “do a lot . . . in the functioning of international institutions and the implementation of the law created in their midst,” even though “de jure, these entities have no existence or a very narrowly defined one . . . .”<sup>13</sup> Other scholars, such as Anna-Karin Lindblom, agree that NGOs are influential, but are more optimistic about

9. See, e.g., JOHN W. FOLLOWS, ANTECEDENTS OF THE INTERNATIONAL LABOUR ORGANIZATION (1951); ERNST B. HAAS, BEYOND THE NATION-STATE (1964).

10. See, e.g., GEORGE L. RIDGEWAY, MERCHANTS OF PEACE: TWENTY YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE (1938); CATHERINE SEVILLE, THE INTERNATIONALISATION OF COPYRIGHT LAW (2006) (discussing the role of associations).

11. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 611 (2005).

12. See, e.g., Tullio Treves, *Introduction to CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES* 1, 7 (Tullio Treves et al. eds., 2005) (noting that “the role of NGOs is becoming an important chapter of the growing field of the law of international courts and tribunals”); CRAIG WARKENTIN, *RESHAPING WORLD POLITICS: NGOS, THE INTERNET AND GLOBAL CIVIL SOCIETY* (2001); SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* (2005); *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* (Ann M. Florini ed., 2000); AKIRA IRIYE, *GLOBAL COMMUNITY* (2002) (esp. chaps. 1, 5); JULIE FISHER, *NONGOVERNMENTS: NGOS AND THE POLITICAL DEVELOPMENT OF THE THIRD WORLD* (1998); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 CARDOZO L. REV. 957 (1996); Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-ST. ACTORS & INT’L L. 7 (2001); THE ASHGATE RESEARCH COMPANION TO NON-STATE ACTORS (Bob Reinalda ed., 2011); BARBARA K. WOODWARD, *GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE* (2010). Woodward chronicles the history of NGOs as starting in the nineteenth century, then covers the League of Nations period, and then points to three generations of NGOs, beginning with the first generation (1945–91), second generation (1992–96), and third generation (post–1996). *Id.* at 81–102. For another view of periodicity in NGO influence, see Charnovitz, *Centuries of Participation*, *supra* note 2, at 190.

13. Pierre-Marie Dupuy, *Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems Which Arise for Legal Scholarship*, in NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 204, 214 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

their legal status within the international plane.<sup>14</sup> Considerable writing exists on the issue of whether NGO activism is legitimate and whether NGO activities are accountable.<sup>15</sup> Some of this scholarship is largely theoretical;<sup>16</sup> some of it largely empirical;<sup>17</sup> and much in between.<sup>18</sup> Moreover, there is a parallel literature on the legitimacy of intergovernmental organizations.<sup>19</sup>

Considerable writing also exists on the benefits gained by the international system from NGO participation.<sup>20</sup> The stream of benefits differs

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14. ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 15–22 (2005) (noting the increasing role of NGOs); *see also id.* at 519 (noting the frequency of use of the term NGO “participation” at the expense of “consultation”).

15. On accountability, *see, e.g.*, Patrick Kilby, *Nongovernmental Organizations and Accountability in an Era of Global Anxiety*, 5 SETON HALL J. DIPL. & INT’L REL. 67 (2004); Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261 (2004); Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT’L L. 139 (2005); NGO ACCOUNTABILITY (Lisa Jordan & Peter van Tuijl eds., 2006); Michael Szporluk, *A Framework for Understanding Accountability of International NGOs and Global Good Governance*, 16 IND. J. GLOBAL LEGAL STUD. 339 (2009); Diana Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 COLUM. HUM. RTS. L. REV. 119 (2010); ANNE HERZBERG, NGO MONITOR, NGO “LAWFARE”: EXPLOITATION OF COURTS IN THE ARAB-ISRAELI CONFLICT (2d ed. 2010); Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society, and the United Nations*, 36 BROOK. J. INT’L L. 841 (2011); Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT’L L. 1011 (2011); Oonagh Breen, *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy, and Regulation*, 36 BROOK. J. INT’L L. 947 (2011).

16. The best of that genre may be TERRY MACDONALD, *GLOBAL STAKEHOLDER DEMOCRACY* (2008).

17. *See, e.g.*, CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? (Jens Steffek et al. eds., 2008); ANTON VEDDER ET AL., *NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY* (Anton Vedder ed., 2007).

18. *See, e.g.*, J. J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES* (1963); LINDBLOM, *supra* note 14.

19. *See, e.g.*, *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

20. *See, e.g.*, George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 18 MICH. ST. J. INT’L L. 165 (2010); Monica Schurtman, *The Challenges of Evaluating NGO “Success” in Cross-Border Rights Initiatives: The Examples of the International Campaign to Ban Landmines and the Autotrim/Customtrim Initiative Under the NAFTA Labor Side Agreement*, in *PROGRESS IN INTERNATIONAL LAW* 357 (Russell A. Miller & Rebecca M.

between the service-delivery NGOs and the advocacy NGOs. (Some NGOs encompass both categories.) Service delivery NGOs, sometimes called private voluntary organizations, carry out relief and other charitable activities on behalf of donor governments, international organizations ("IOs"), foundations, or individuals.<sup>21</sup> The Red Cross is an early example of this NGO style. The advocacy NGOs (e.g., Amnesty International and the International Chamber of Commerce) seek to influence governments and IOs. Of course, whether any particular NGO contributes something useful requires analysis of specific facts.

In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs.<sup>22</sup> First, in having a transnational orientation, NGOs provide a counterweight to the nationalism of governments, particularly economic nationalism. States seek to impose costs on other states and NGOs can counter such actions by exposing them to public attention and arguing against them. Second, NGOs can help governments and IOs address problems of market failure, particularly those crossing borders. Often, government regulators are slow to recognize a problem, uncreative in finding positive-sum solutions to the problem, and stymied in addressing a problem because intergovernmental cooperation is impeded by a foot-dragging nation. NGOs ameliorate this predicament by bringing in data and expertise to show that a problem exists, by putting potential new solutions on the table, and by putting pressure of uncooperative governments. NGOs are said to help generate "political will" by governments, meaning that NGOs use discursive methods to influence public opinion. Third, and related, NGOs are especially adept at addressing problems of the global commons, such as the atmosphere, the oceans, and biodiversity. Governments can set up IOs to address these problems, but the catalyst to do so is often the civic NGOs who then go on to help energize international decisionmaking.

Fourth, NGOs can address the problem of government failure either at the national or international level. Whenever there are failed states,

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Bratspies eds., 2008); Steve Charnovitz, *How Nongovernmental Actors Vitalize International Law*, in LOOKING TO THE FUTURE 135 (Mahnoush H. Arsanjani et al. eds., 2011).

21. See, e.g., Lara Stemple, *The AIDS Funding Crisis: International Commitments, Global Donors and the Role of NGOs*, ASIL INSIGHTS (Am. Soc'y Int'l Law, Washington, D.C.), Dec. 14, 2010, available at [http://www.asil.org/files/2010/insights/insights\\_101213.pdf](http://www.asil.org/files/2010/insights/insights_101213.pdf).

22. In contrast to NGOs which are spontaneous, self-directed initiatives, independent commissions are another long-utilized approach of harvesting new ideas for international debates. The legal scholar Ernst H. Feilchenfeld was an early advocate of utilizing a "non-governmental board" to supply "impartial and reliable investigations, reports and recommendations." ERNST H. FEILCHENFELD, THE NEXT STEP: A PLAIN MAN'S GUIDE TO INTERNATIONAL PRINCIPLES 46, 52 (1938).

NGOs spontaneously ramp up their efforts to fill in for hollow governments.<sup>23</sup> When there are failures in IOs, such as policy insularity when IOs fail to coordinate norms with each other, NGOs can serve as competitors to international and national bureaucrats in debates before elected or ministerial-level national government officials who make decisions at IOs. NGOs can also call attention to situations when IOs get captured by authoritarian governments. This happened, for example, with the United Nations ("U.N.") Commission on Human Rights.<sup>24</sup> Fifth, NGOs bring in their individual passions to international governance and seek to add new rules that governments might not champion on their own. Human rights is probably the best example. Even as early as the Congress of Vienna in 1815, there were NGOs and crusading individuals who championed the introduction of human rights guarantees into international accords.<sup>25</sup> Sixth, as enduring organizations, NGOs are in a position to stand up for the needs of future generations. This is not to argue that NGOs are uniquely qualified for that task, but they can manifest greater concern for posterity than politicians and business enterprises. Seventh, NGOs also work to improve the market by providing more information to consumers about products and companies.

The question taken up in this Article is not whether it is legitimate to allow NGOs into international governance, but rather the opposite: is it legitimate to keep NGOs out? In particular, the Article explores whether IOs, autonomous institutional arrangements, or other transgovernmental organizations have a duty to provide opportunities for NGOs to observe, consult, and participate. Or, to put it another way, do NGOs have a right to participate in all forms of international governance?

The traditional view is that IOs have no inherent duty to provide deliberative space for NGOs. When IOs do so, and they do so regularly and with increasing frequency, this practice is viewed as a consequence of the positive law of the particular IO as written by its member states.<sup>26</sup> In other words, an IO may be open to NGO participation if states so legislate or may be closed to NGOs if member states prefer that insular arrangement. This first view can be termed the *positive* approach.

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23. For example, there are many NGOs working hard on problems in Somalia, Sudan, and Haiti.

24. *The Shame of the United Nations*, N.Y. TIMES, Feb. 26, 2006, at C11. The new U.N. Human Rights Council has been criticized on the same grounds. *The U.N.'s Human Rights' Council*, WASH. POST, Mar. 27, 2011, at A18.

25. Charnovitz, *Centuries of Participation*, *supra* note 2, at 195–96.

26. See Emanuele Rebasti, *Beyond Consultative Status: Which Legal Framework for Enhanced Interaction Between NGOs and Intergovernmental Organizations?*, in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?*, *supra* note 13, at 21, 24–25.

A second view is that an IO, as an organization with its own legal personality, has independent authority and volition to decide how to communicate with NGOs and furthermore that a rational IO would select the optimal NGO participation to achieve the IO's distinct functional mission. Scholars differ on what benefits NGOs convey to an IO. A very favorable view is that NGOs can help to confer legitimacy on the international system,<sup>27</sup> or that NGOs can reduce the democratic deficit of IOs.<sup>28</sup> The perspective of the autonomous, NGO-friendly IO can be termed the *functional* approach.<sup>29</sup>

A third view starts with a different assumption about the nature of IOs. Instead of seeing them as persons with an individual, independent personality, this perspective sees IOs as a community of participants. At the center of the community is the individual. Other participants include government diplomats, other IOs and NGOs, business entities, and international civil servants. Not all participants have equal powers within the IO, but the community of the IO should be as open and inclusive as possible. The participants in the community might seek to exclude uncivil society, such as terrorists, but the IO itself would not be viewed as a decisionmaker. This perspective can be termed the *community* approach.

This Article proceeds in four parts: Part I explains the frame of state positivism, that is, the idea that states determine the openness of IOs toward NGO participation. Part II explains the frame of IO functionalism, the idea that IOs have the autonomy to calibrate how much NGO participation to permit. This Part further argues that a rational IO would permit NGO participation as needed to help the IO achieve its functional mission. Part III explains the frame of community, the idea that an IO is a community composed of individuals, NGOs, states, business entities, and international officials. Part IV concludes.

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27. See Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93, 110 (Philip Alston ed., 2005).

28. See James Crawford & Susan Marks, *The Global Democracy Deficit: an Essay in International Law and its Limits*, in RE-IMAGINING POLITICAL COMMUNITY 72, 83 (Daniele Archibugi, David Held & Martin Köhler eds., 1998) ("[T]he vastly enhanced participation in recent years of non-governmental organizations at the international level is one indication of the pressures and possibilities for democracy in global decision-making."); DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS* 82 (2008).

29. Of course, another logical possibility is for an autonomous NGO-unfriendly IO to decide that involvement in NGOs is antithetical to achieving the IO's function.

## I. FRAME ONE: STATE POSITIVISM

The positive<sup>30</sup> approach posits that the role of NGOs in a particular IO is determined by that IO's founding treaty as written by states. If states do not provide for NGO participation in the IO's charter or procedural rules, then the IO has no duty to, and should not, welcome in NGOs. Correspondingly, an NGO has no inherent legal right to participate in an IO. The status of the NGO within an IO is solely a function of the rules for participation legislated for the IO by states members.

Until recently, this view was widely accepted in the doctrines of international law. Even now, it surely states the majority view. For instance, consider Cedric Ryngaert's recent study finding that "Non-state actor participation in international norm-setting processes remains a 'discretionary' decision of relevant bodies and institutions."<sup>31</sup> Additionally, Alan Boyle and Christine Chinkin's study on the making of international law observes that "it seems premature to assert that there is a right to access and participation" of non-state actors.<sup>32</sup> Another recent study by Anne Peters finds that "a customary right of NGOs to participate freely in the international legal process does not yet exist."<sup>33</sup>

The view that IOs have limited autonomy to make policy decisions on their own is reflected in the decision of the International Court of Justice ("ICJ") in the case involving the request by the World Health Organization ("WHO") for an advisory opinion on nuclear weapons.<sup>34</sup> In its decision, the ICJ denied the WHO's request for an advisory opinion on the

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30. In general, the move to positivism and voluntarism in international law was a movement away from natural and religious influences on the content of international law. As Georg Schwarzenberger explained over seventy years ago:

Formerly the law was a truth to be sought after, but now it becomes the equivalent of the will of those who give or refuse their consent. The relation between international law and spiritual and other standards of value ceases to be regulated by a process of subconscious growth, and becomes dependent on the will of those whose behavior is to be restrained or refined by the law.

Georg Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, 33 AM. J. INT'L L. 56, 65 (1939).

31. Cedric Ryngaert, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 69, 81 (Math Noortmann & Cedric Ryngaert eds., 2010).

32. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 57 (2007).

33. Anne Peters, *Membership in the Global Constitutional Community*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 222 (2009).

34. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66 (July 8).

grounds that the WHO lacked competence to request such an opinion because the topic was outside the scope of the WHO's Constitution and its functions.<sup>35</sup> In agreeing that the WHO request should be dismissed, Judge Shigeru Oda explained that it seemed clear to him from the WHO records that the request for an advisory opinion "was initiated by a few NGOs . . . ."<sup>36</sup> Although Judge Oda did not explain why NGO lobbying was relevant to the Court's decision as to the WHO's powers, his judgment seems to indicate that the limited capacity of an IO to make its own decisions can be diminished even more when the IO chooses to follow the advice of NGOs.

On the other hand, there is a minority view that NGOs do have some inherent rights to participate in international processes. In other words, although it is states that decide whether an IO should admit NGO participation, states are constrained in that choice by customary practice that prevents them from excluding NGOs. Few have championed this view as boldly as just stated, but there are many scholars who suggest that a participation right for NGOs is emerging. For example, Lindblom reaches the conclusion that "the question can be raised if the international legal system will reach a point when NGOs have a general right to participate in international legal discourse. I suggest that, as of today, they have at least a legitimate expectation."<sup>37</sup> Peters' article, quoted above,<sup>38</sup> also offers more nuanced views. For example, she asserts that "NGOs have the right to apply for an accreditation and be duly considered. Such a principle of openness has not yet fully crystallized into law, but is nascent."<sup>39</sup> Furthermore, she argues that "NGOs already enjoy a *legitimate expectation* that—when accredited—the participatory conditions will entail four components: prior notification of meetings and agenda items, automatic and continuous admission to meetings, the option to distribute documents, and being allowed to address the conference upon explicit permission."<sup>40</sup> Peters also calls for "recognizing a presumption of admissibility of *amicus curiae* briefs" by NGOs to international organizations.<sup>41</sup>

In my own scholarship, I have suggested that state practice is moving "toward a duty to consult NGOs" in the "activities of IOs and in multi-

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35. *Id.* ¶¶ 31–32.

36. *Id.* at 96, ¶ 16 (separate opinion of Judge Oda).

37. LINDBLOM, *supra* note 14, at 526.

38. *See supra* note 33 and accompanying text.

39. Peters, *supra* note 33, at 222.

40. *Id.* at 226.

41. *Id.* at 232.



lateral negotiations.”<sup>42</sup> I reached this conclusion by examining actual practice, treaty law, and the views of highly qualified publicists.<sup>43</sup> In particular, I found support in Immanuel Kant’s 1795 essay *Perpetual Peace*<sup>44</sup> and Nathan Feinberg’s 1932 Hague Academy lecture on *The Petition in International Law*.<sup>45</sup> In *Perpetual Peace*, Kant posited that “every nation should seek advice from philosophers concerning the principles on which it should act toward other nations.”<sup>46</sup> He then argued that “The arrangement between states, on this point, does not require that a special agreement should be made, merely for this purpose; for it is already involved in the obligation imposed by the universal reason of man which gives the moral law.”<sup>47</sup> Over a century later, Feinberg, in a Hague Academy lecture, explained that NGO petitioning to international assemblies of governments began as a pattern of usage, but over time developed into “an obligatory norm.”<sup>48</sup> He described the norm as the “obligation incumbent on international authorities not to refuse to receive [petitions] and to follow up on them.”<sup>49</sup> Feinberg’s essay gives numerous examples of state practice in early international assemblies to accept and take action on NGO petitions.<sup>50</sup>

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42. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 368 (2006) [hereinafter Charnovitz, *Nongovernmental Organizations*].

43. For references to the views of contemporary international law scholars, see *id.* at 371 n.161.

44. IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (M. Campbell Smith trans., George Allen & Unwin Ltd. 1903) (1795).

45. Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371–72; Nathan Feinberg, *La Pétition en Droit International*, 40 RECUEIL DES COURS 529, 628 (1932). Feinberg’s essay is in French and the translations herein are mine.

46. Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371; see KANT, *supra* note 44, at 158–59. The role of the philosopher is discussed in Ian Hunter, *Kant’s Regional Cosmopolitanism*, 12 J. HIST. INT’L L. 165, 182–83 (2010).

47. KANT, *supra* note 44, at 159.

48. Feinberg, *supra* note 45, at 631.

49. *Id.* at 632; see also Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371–72.

50. Feinberg, *supra* note 45; see also Charnovitz, *Centuries of Participation*, *supra* note 2, at 192 (discussing the Webster-Ashburton negotiations of 1842), 193 (discussing the Peace Treaty of Paris of 1856 ending the Crimean War), 195 (discussing the Congress of Vienna of 1815), 196 (discussing the Congress of Berlin of 1878 and the Brussels Congress of 1889–90 on ending the slave trade), 196–97 (discussing the First Hague Peace Conference of 1899).

## II. FRAME TWO: FUNCTIONALISM

The functional view is that the inclusion of NGOs is up to the IO itself and that the IO should embrace NGOs to the extent that it promotes the purpose of the IO. The vision of the IO as a person with legal personality and autonomy goes back to the late nineteenth century.<sup>51</sup> Today, international scholars typically view the IO as an independent actor having its own identity and will.<sup>52</sup> If an IO has some autonomy, then it has at least some discretion to act without authorization by governments. One early exponent of this frame was the Austrian legal scholar Karl Zemanek who, in a book on international organizations written in 1957,<sup>53</sup> addressed the “contracts on ‘consultation’ between [IOs] and private international organizations.”<sup>54</sup> This field of law was considered new and “fragmentary,” and the “norms [were], at [that] time, unilaterally posited by the international organizations.”<sup>55</sup>

ICJ decisions seem to embrace the view that IOs can exercise powers not explicitly delegated by its founding treaty. In the *Reparations* case, the ICJ states with respect to the United Nations that “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”<sup>56</sup> The same sentiment appears in the ICJ *Nuclear Weapons* advisory opinion referenced above.<sup>57</sup> The Court explains that “the necessities of international life may point to the need for organizations, in order to

51. See CATHERINE BRÖLMANN, *THE INSTITUTIONAL VIEW IN PUBLIC INTERNATIONAL LAW* 44–48 (2007); see also ALVAREZ, *supra* note 11, at 129–39. For further discussion of IO personality, see David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte*, 36 VA. J. INT'L L. 275 (1996); Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

52. See generally DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* (Ian Brownlie & Vaughan Lowe eds., 2005).

53. KARL ZEMANEK, *DAS VERTRAGSRECHT DER INTERNATIONALEN ORGANISATIONEN* (1957).

54. Josef L. Kunz, Book Review, 52 AM. J. INT'L L. 565, 566 (1958) (reviewing KARL ZEMANEK, *DAS VERTRAGSRECHT DER INTERNATIONALEN ORGANISATIONEN* (1957)).

55. *Id.*

56. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11). The Opinion also states that the United Nations is not “merely a centre for harmonizing” national actions because the United Nations has also been “equipped . . . with organs . . . [with] special tasks.” *Id.* at 178 (internal quotation marks omitted).

57. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 25 (July 8).

achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities.”<sup>58</sup> In neither opinion does the Court state that an IO could act in disregard of a collective dictate from member governments. Yet the ICJ opinions do suggest that IOs have some autonomous decisionmaking authority. One theory of IOs goes even further to suggest that IOs have “inherent powers to perform . . . those acts which they need to perform to attain their aims,” and that the source of this authority comes from organizationhood.<sup>59</sup>

In contrast to the Positive frame, which holds that states determine whether NGOs can participate in an IO, the Functional frame holds that the IO itself has some authority for deciding whether to invite and utilize NGO participation. Viewing the IO as a person with discretion leads to the normative question of how the IO should decide what amount of NGO participation is appropriate. My own answer to that question is that a rational IO would choose the amount of NGO participation most appropriate for achieving its functions and no more. Conceivably for some functions, the degree of optimal NGO participation might be zero. But for all (or nearly all) IO functions, NGO participation (including business NGOs) would appear to help the IO achieve its purposes.<sup>60</sup> For example, UNAIDS is governed by a Programme Coordinating Board that includes five representatives from NGOs.<sup>61</sup>

Why would an IO need NGO participation when the IO already has the benefit of national officials and international civil servants? The question almost answers itself. National officials and international civil servants alone are too parochial, cautious, and unimaginative to get much done. Skeptics of greater international governance point out that there can be an unholy alliance between IOs and international NGOs who share a common interest in more lawmaking.<sup>62</sup> Although the critics may sometimes be wrong in opposing certain global rules, they are surely right in

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58. *Id.*

59. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 75 (2002) (discussing Finn Seyersted’s work of 1963).

60. This author knows of no area of functional intergovernmental cooperation in which NGOs have not already made a signal contribution.

61. *UNAIDS Programme Coordinating Board*, UNAIDS, <http://www.unaids.org/en/aboutunaids/unaidsprogrammecoordinatingboard/> (last visited Apr. 9, 2011).

62. See, e.g., MARGUERITE A. PEETERS, HIJACKING DEMOCRACY: THE POWER SHIFT TO THE UNELECTED (AEI ed., 2001); JAMES M. SHEEHAN, GLOBAL GREENS: INSIDE THE INTERNATIONAL ENVIRONMENTAL ESTABLISHMENT (1998).

seeing a symbiotic relationship between IOs and NGOs.<sup>63</sup> My own scholarship shows that this symbiosis began in the nineteenth century and has gotten much stronger in the last 30 years.<sup>64</sup>

IOs operate at considerable distance from democratic processes such as elections. This challenge of distance has led political theorists, such as Robert Dahl, to question whether IOs can ever be democratic.<sup>65</sup> As I have elsewhere stated, I am not as pessimistic as Dahl on that point,<sup>66</sup> nor do I subscribe to the oft-stated criticism<sup>67</sup> that the distance between the IO and the public necessarily detracts from its legitimacy. But I think it is clear that the distance from the public undermines the effectiveness of many IOs, as does the claim that IOs have a democratic deficit. Thus, IOs should promote NGO participation not merely to gratify NGOs, but also to promote the long-term effectiveness of the IO itself.

What is the cost to the IO of allowing in NGOs? There are several. If NGOs participate, the IO will inevitably have to increase its disclosure and transparency.<sup>68</sup> If the IO has policies or practices that factions of the public would disagree with if they became known, then NGO participation might lead to greater pressure from outside to change those policies or practices. Second, once NGOs participate, they are sure to discover conflicts between the IO's policies and the NGO's vision of a good world order. For example, it is not universally known that the International Monetary Fund ("IMF") prohibits governments from using a gold

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63. See Kenneth Anderson, Review Essay, *What NGO Accountability Means—And Does Not Mean*, 103 AM. J. INT'L L. 170, 171–72 (2009) (quoting then-Secretary General Kofi Annan as saying “that ‘global people power’ was the ‘best thing for [the] United Nations’ in a ‘long time’”).

64. See generally Charnovitz, *Centuries of Participation*, *supra* note 2.

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

66. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45, 57 (2003).

67. See, e.g., Pascal Lamy, Director-General, WTO, Address at Bocconi University: Global Governance: Lessons from Europe (Nov. 9, 2009) (transcript available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl142\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl142_e.htm)) (“Since legitimacy depends on the closeness of the relationship between the individual and the decision-making process, the challenge of global governance is distance.”).

68. Laurence Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 INT'L ORG. L. REV. 655, 660 (2009) (“Transparency may be achieved by greater proximity between international organizations, non-State actors and individuals. . . . [A]llowing non-State actors to participate in decisionmaking processes can be seen as a form of transparency.”).

standard in an exchange agreement.<sup>69</sup> At present, the IMF provides little opportunity for NGO participation. If there were greater awareness of the way that the IMF limits the sovereignty of governments regarding a gold standard, some NGOs would likely lobby to emancipate governments and to allow gold to serve as a counterweight against reckless monetary and fiscal expansion. Third, as NGO participation can enhance the accountability of an IO,<sup>70</sup> such participation is costly to the IO insiders to the extent that it cabins their discretion.

Experience over the past 20 years has shown that NGOs are especially good at pointing out the tensions between the norms of different international organizations and often work to promote more harmony between them. A leading example of this is the debate on trade and environment, in which NGOs called attention to international trade rules that seemed to jeopardize national environmental regulation. When this first happened in the early 1990s, the multilateral trading system was quite defensive about it and accused the NGOs of not understanding the benefits of trade.<sup>71</sup> Eventually, however, the trading system came to embrace environmental quality and sustainable development as one of its own norms.<sup>72</sup> So, the NGO pressure that might have been viewed as a cost in the beginning later came to be a benefit to the World Trade Organization ("WTO").

In my view, a rational IO would want to avoid the problem of insular functionality. Such insularity occurs when an IO is too inward looking and does not think through its relationship with other IOs. A rational IO would want the assistance of NGOs that could help the IO develop greater harmony with the programs of other IOs. Of course, there is a difference between saying that an IO should welcome NGOs and that it has a legal obligation to do so. It is often said that IOs have an obligation to

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69. Articles of Agreement of the International Monetary Fund art. IV, § 2(b), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 (as amended), available at <http://www.imf.org/external/pubs/ft/aa/index.htm>.

70. John Clark, *The Role of Transnational Civil Society in Promoting Transparency and Accountability in Global Governance*, in ENGAGING CIVIL SOCIETY: EMERGING TRENDS IN DEMOCRATIC GOVERNANCE 44 (G. Shabbir Cheema & Vesselin Popovski eds., 2010); Edith Brown Weiss, *International Law in a Kaleidoscopic World*, 1 ASIAN J. INT'L L. 21, 27 (2010) ("For international institutions, the bottom-up approach means that the institutions are accountable not only to the states that established them but, significantly, to the communities, groups, and individuals they are intended to serve.").

71. See 1 GEN. AGREEMENT ON TARIFFS & TRADE, INTERNATIONAL TRADE 90–91, at 19–39 (1992) (special section on trade and the environment).

72. Michael M. Weinstein & Steve Charnovitz, *The Greening of the WTO*, FOREIGN AFF., Nov.–Dec. 2001, at 147; see also THE GREENING OF TRADE LAW (Richard H. Steinberg ed., 2002).

obey international law, but whether international law provides NGOs with a right to participate is uncertain and contested, as noted above.<sup>73</sup> If NGOs do enjoy such a right, then arguably that right is opposable to IOs in the same way that it would be opposable to states.

The ongoing project by the International Law Commission ("ILC") on the Responsibility of International Organizations details how an IO is to be held responsible for an internationally wrongful act.<sup>74</sup> Unfortunately, the draft articles do not detail which acts are wrongful. Perhaps in a future project, the ILC could delineate the IO responsibilities that are different from state responsibilities. Of course, it is doubtful that the ILC would ever say that IOs have a duty to allow NGO participation, because the ILC itself has resisted suggestions that it seek NGO participation and public comment.<sup>75</sup> On the other hand, the fact that there is a concurrent practice in nearly every IO to be open to NGO input may suggest the fruition of an international custom of openness that IOs may already perceive as a legal obligation.

### III. FRAME THREE: COMMUNITY

Rather than viewing an IO anthropomorphically as a corporate person who operates according to her will, an alternative, more realistic, view is that an IO is a place where a community of actors debates and makes decisions. I call this the *community* frame because the IO operates as a community, or epistemic community, where experts focus on a particular range of public problems. I credit David Bederman with the insight that the modern IO is better conceived as a place rather than as a person, actor, or lawmaker.<sup>76</sup> Bederman, a fine legal historian, traces this idea back to Otto von Gierke, Paul Reinsch, Pierre Kazansky, and Donisio Anzilotti.<sup>77</sup>

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73. See *supra* text accompanying notes 31–33.

74. See Rep. of the Int'l Law Comm'n, 61st sess, May 4–June 5, July 6–Aug. 7, 2009, U.N. Doc. A/64/10; GAOR, 64th Sess, Supp. No. 10 (2009), available at <http://untreaty.un.org/ilc/reports/2009/2009report.htm>. This ILC project has not included NGOs under the rubric of international organization. See Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25, 28–29 (2010).

75. See generally Steve Charnovitz, *New Opportunities for Nongovernmental Actors in the International Law Commission* (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 508, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1616868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616868).

76. Steve Charnovitz, *The Relevance of Non-State Actors to International Law*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 543, 547–48 (Rüdiger Wolfrum & Volker Röben eds., 2005).

77. Bederman, *supra* note 51, at 352–53, 371–72.

Metaphorically, I would situate the individual (rather than the state) at the center of that community.<sup>78</sup> Imagining an international community as state-centric is a contradiction in terms. The state may be the center of the national community, but it can hardly be the center of the international community when states hold themselves out to be sovereign and independent from each other.<sup>79</sup> In other words, an international community comprising only sovereign states has no center.

Thus, the core of the IO can be modeled as an individual engaged in multiple legal orders. The nineteenth-century Scottish legal philosopher James Lorimer was one of the first to appreciate this modern reality. In his *Institutes of the Law of Nations*, Lorimer explained:

If there is not an international man, neither is there a national man. So long as there are two nations in the world, every citizen of each of them must *eo ipso* be an international man, and cannot *eo ipso* be only an international man. In order that he may be either national or international, he must be both; and must be governed, or must govern himself, in both capacities.<sup>80</sup>

Viewed in this way, a particular IO is an arena where individuals address transborder problems through the use of overlapping legal orders. One of the key issues to be decided with respect to any problem is at what level the problem should be addressed. The doctrine of subsidiarity suggests that problems should be dealt with at the lowest level in which a solution may still be obtained.<sup>81</sup>

The arena of modern governance is more horizontal than vertical and de-emphasizes status and hierarchy. As World Bank President Robert Zoellick recently explained:

Modern multilateralism will not be a constricted club with more left outside than seated within. It will look more like the global sprawl of the Internet, interconnecting countries, companies, individuals, and NGOs through a flexible network. Legitimate and effective multilateral institutions, backed by resources and capable of delivering results, can

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78. Recall in that regard the U.N. Charter which begins “We the Peoples of the United Nations . . .” U.N. Charter pmb.

79. See Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 WIDENER L. REV. 265, 282 (2007) (“International organizations have only a tenuous call on state loyalty.”).

80. 2 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS* 261 (Edinburgh & London, W. Blackwood & Sons 1884). The quoted passage comes from a chapter titled, “Want of an International Nation.” *Id.*

81. See Dinah Shelton, *Subsidiarity, Democracy and Human Rights*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS 43, 43–49 (Donna Gomien ed., 1993).

form an interconnecting tissue, reaching across the skeletal architecture of this dynamic, multi-polar system.<sup>82</sup>

Individuals join with likeminded colleagues, forming NGOs to influence global plural legal orders.<sup>83</sup> Using NGOs makes it possible for an individual to delegate the function of representing himself. Social and economic NGOs are also efficient in that an individual interested in, say, environment and peace, can join two different NGO social networks, both of which will be specialized in its own area. Because NGOs are so important in allowing individuals to form and present their views, one might say that the core principle of international community is freedom of association.<sup>84</sup>

A robust norm of freedom of association would forbid IOs or states from interfering with the legal capacity of an NGO to lobby for its interests. This point was postulated clearly in the late nineteenth century by Pope Leo XIII, who explained in the great encyclical *Rerum Novarum*:

[A]lthough they exist within the body politic, and are severally part of the commonwealth, [private societies] cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a “society” of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them; and, if it forbid its citizens to form associations, it contradicts the very principle of its own existence, for both they and it exist in virtue of the like principle, namely, the natural tendency of man to dwell in society.<sup>85</sup>

In 1944, a transnational committee tasked by the American Law Institute (“ALI”) developed the “Statement of Essential Human Rights” that became an important foundational document for the drafting of the Universal Declaration of Human Rights. The ALI Statement lists “the Freedom

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82. Robert B. Zoellick, *The End of the Third World*, INT'L ECON., Spring 2010, at 40, 43.

83. See generally Josef L. Kunz, Editorial Comment, *Pluralism of Legal and Value Systems and International Law*, 49 AM. J. INT'L L. 370 (1955); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); MACDONALD, *supra* note 16, at 163–92 (the chapter on “Theorizing Global Representative Agency: Non-Electoral Authorization and Accountability”).

84. See Greg Lebedev & John Sweeney, *On Free Association, Business and Labor Agree*, WALL ST. J., Sept. 17, 2010, at A19.

85. LEO XIII, RERUM NOVARUM: ENCYCLICAL OF POPE LEO XIII ON CAPITAL AND LABOR ¶ 51 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html).



to Form Associations” as an essential human right and posits that “The state has a duty to protect this freedom.”<sup>86</sup>

Although traditional democratic theory imagines that individuals delegate their will to elected representatives, a more realistic view is that the individual is born into legal orders, such as family, church, local government, national government, and international government, and then in the process of socialization learns how to obey, evade, and/or to work to change such legal orders. To argue that the elected official is the better representative of the individual than the NGO is to miss the point that the individual voluntarily chooses what NGO she joins but does not, merely by voting, get to choose the elected officials that make decisions for her. One should not assume that on any particular issue, such as climate change, an individual has delegated more decisionmaking to an elected politician rather than to a NGO. Indeed, the individual may have voted against the politician who claims to represent her in Congress.

Although international action can be promoted by nongovernmental individuals (e.g., Raphael Lempkin), the more common methodology is that reform proposals from individuals get taken up by a group. As Professor Feilchenfeld explained in 1938:

The most common reform method in world affairs in our age has been this: Individuals advance suggestions for a particular reform. These suggestions, quite frequently, are then taken up by organisations concerned with reform work of various kinds. The organisation concerned may be a private one, such as the Institut de Droit International, composed of international lawyers selected for membership by an international academy. Or, it may be a public one, such as the International Labour Office.<sup>87</sup>

He further noted that “Much reform work has been done in this way, and it is difficult to see how reform work might, under present conditions, be started otherwise.”<sup>88</sup> This insight is strikingly similar to the observation attributed to Margaret Mead: “Never doubt that a small group of thoughtful, committed people can change the world. Indeed, it is the only thing that ever has.”

Viewing the IO as a community also provides a solution to the conundrum of the nature of the role played by actors within the IO. For example, the WTO contains a court-like dispute settlement system (indeed the strongest court in any IO), a parliament-like Ministerial Conference, and

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86. Am. L. Inst., *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 20, art. 5 (1946).

87. FEILCHENFELD, *supra* note 22, at 68.

88. *Id.*

an executive-like Director-General.<sup>89</sup> Clearly, the WTO Appellate Body and the Director-General have separate wills, but how do these wills relate to the purported will of the WTO? In my view, there is no aggregate will or volition of the WTO itself. "Willness," so to speak, exists only in the volition of the individuals who act out different roles, such as judges, government negotiators, and WTO bureaucrats. For example, if the urgently needed Doha Trade round is concluded in 2011, it is not because the WTO itself decides to go forward, but because a critical mass of the WTO's actors jointly agrees to go forward.

The core activity in the IO as a community is deliberation.<sup>90</sup> Lawmaking too may occur, but it does so only as an end product of cosmopolitan conversation. While NGOs can be kept on the sidelines when so-called lawmaking occurs within an IO, there can hardly be any grounds for excluding NGOs from the conversation that precedes lawmaking.

Herbert Shenton was an early theorist of how conversation sparked by private associations has the capacity to change international outcomes.<sup>91</sup> Although Shenton's particular interest was the interplay of different languages spoken by NGOs at international conferences, Shenton, writing in 1933, was also one of the earliest scholars tracking private participation in international affairs.<sup>92</sup> As he explains:

When people from all over the world come together thus to confer on matters of general interest, this intercourse takes on the nature of cosmopolitan conversation. . . . This new habit of cosmopolitan conversation is in a sense a new folkway . . . . At least, it is a new way of doing things in the world, and it is fraught with limitless possibilities, in terms of mutual understanding that may lead to a more intelligent public opinion on matters affecting the various nations of the world.<sup>93</sup>

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89. See JAN WOUTERS & BART DE MEESTER, *THE WORLD TRADE ORGANIZATION: A LEGAL AND INSTITUTIONAL ANALYSIS* 187–88, 220–21, 226–51 (2007).

90. See generally Faina Milman-Sivan, *The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation*, 30 COMP. LAB. L. & POL'Y 801 (2009).

91. See generally HERBERT NEWHARD SHENTON, *COSMOPOLITAN CONVERSATION: THE LANGUAGE PROBLEMS OF INTERNATIONAL CONFERENCES* (1933). For a good discussion of the meaning of cosmopolitanism in an international law context, see Brian F. Havel & Gabriel S. Sanchez, *Restoring Global Aviation's "Cosmopolitan Mentalité"*, 29 B.U. INT'L L. J. 1, 5–11 (2011).

92. See generally SHENTON, *supra* note 91. Lyman Cromwell White also wrote a pioneering book about NGOs in 1933. See LYMAN CROMWELL WHITE, *THE STRUCTURE OF PRIVATE INTERNATIONAL ORGANIZATIONS* (1933).

93. SHENTON, *supra* note 91, at 12–13.

. . . It should be noted also that many private conferences were followed by formal public conferences, which established international agreements and conventions recommended by the private conferences. Thus, and in other ways, have these private concourses generated new international stateways.<sup>94</sup>

Although Shenton, a sociologist, did not draw any legal conclusions about the normativity of the “new international stateways,” his theory highlighted the importance of conversation in international decisionmaking. Shenton recognized that such discourse is cosmopolitan in nature and that private folkways were changing state-to-state ways.<sup>95</sup>

#### IV. CONCLUSION

This Article considers the question of whether it is legitimate for an international organization to refuse NGO participation. As background to that question, the Article provides an overview of the literature on the role, status, and legitimacy of international NGOs. Next, the Article postulates seven ways in which NGOs add value to the international system. Then, the Article pioneers a new approach to the study of IOs by introducing and utilizing three frames as to the ontology of international organizations.

In the first frame, denoted as state positivism, the duty of the IO toward NGOs is decomposed into the duties of the member states of the IO. In other words, this frame suggests that the IO itself is not really an autonomous actor and so decisions about NGO participation are made by the member states for the IO. In exploring this frame, the article contrasts the majority and the minority views. The majority view is that states do not have an obligation under international law to allow NGO contestation within the IO. The minority view is that such a right may exist. My own scholarship associates with the minority view and suggests that state practice is moving toward a duty to consult NGOs in the activities of IOs.

In the second frame, denoted as IO functionalism, the IO, as a legal person, is seen as manifesting its own will as to whether to consult NGOs. The Article analyzes the advantages and disadvantages for the IO in consulting with NGOs, and then offers a theory that a rational IO would willingly decide to involve NGOs in its work. The more difficult question is whether the IO has a legal duty to consult NGOs. This Article

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94. *Id.* at 452.

95. Shenton died in 1937 and thus did not live to see or chronicle the expansion of NGO activity in the United Nations.

suggests that the IO has a duty to consult NGOs if doing so would promote the IO's purpose.

In the third frame, denoted as community, the IO is viewed not as a being with personality, but rather as an arena where the true participants deliberate. The key participant in each international community is the individual, and the Article explains why the individual is the true basic unit for the international system. Since human individuals by nature are sociable, freedom of association has to be seen as the core principle of international law and community. Although this idea is sometimes characterized as being a byproduct of the postwar twentieth century human rights movement, the Article points out that the centrality of freedom of association and individual agency were recognized no later than the nineteenth century, particularly in the Papal encyclical *Rerum Novarum* and in Lorimer's *Institutes of the Law of Nations*.

By the early 1930s, the activism by NGOs in international conferences had inspired the Columbia University sociologist Herbert Shenton to coin the term "cosmopolitan conversation," which he used to describe the discourse with IOs and other conferences. Most notably, Shenton recognized the patterns of NGO participation as representing new "international stateways." Contemporary NGO scholars should better appreciate Shenton's work for its many cogent insights as to how practice in international conferences had been changing to accommodate contributions by NGOs. And perhaps, in detecting new international stateways, Shenton was also recording the birth of a new legal obligation to welcome NGOs into the world community.

# NGO STANDING AND INFLUENCE IN REGIONAL HUMAN RIGHTS COURTS AND COMMISSIONS

Lloyd Hitoshi Mayer\*

## INTRODUCTION

Nongovernmental organizations (“NGOs”) are well-known actors in the development and implementation of international human rights law.<sup>1</sup> Nevertheless, how exactly they are involved in various human rights institutions has only occasionally been studied, and then often with a focus on the broad sweep of NGO involvement across many international bodies rather than with a deeper focus on involvement in particular types of international human rights entities.<sup>2</sup> This Article seeks to take a first step toward filling that gap by considering how NGOs both can be and are involved in proceedings before the major regional human rights enforcement systems.

For purposes of this Article, the term NGO is defined using three of the five characteristics identified by Lester M. Salamon and Helmut K. Anheier. Those characteristics are: “(a) formally constituted; (b) organizationally separate from government; [and] (c) non-profit-seeking.”<sup>3</sup> These characteristics distinguish NGOs from other common types of organizations, specifically governmental bodies, businesses, and informal entities such as families and households.<sup>4</sup> The other two characteristics Salamon and Anheier identify—“self-governing” and “voluntary to some significant degree”<sup>5</sup>—are not used because, while these two characteristics are commonly associated with NGOs in the popular understanding of

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1. See, e.g., Felix Ermacora, *Non-governmental Organizations as Promoters of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 171, 173–74 (Franz Matscher & Herbert Petzold eds., 2d ed. 1990) (listing seven categories of NGO activities relating to human rights).

2. For an example of a more focused, although now dated, study, see Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611 (1994).

3. LESTER M. SALAMON & HELMUT K. ANHEIER, THE EMERGING NONPROFIT SECTOR: AN OVERVIEW xvii–xviii (John Hopkins Nonprofit Sector Ser. No. 1, 1996).

4. See JON VAN TIL, GROWING CIVIL SOCIETY: FROM NONPROFIT SECTOR TO THIRD SPACE 20–21 (2000).

5. SALAMON & ANHEIER, *supra* note 3, at xviii.

that term, they are not necessary to distinguish NGOs from the other common types of organizations listed above.

The human rights enforcement systems considered in the Article are for Europe, the Americas, and Africa. All three of these regional systems have at one time or another used the dual institutions of a commission and a separate court. The European system moved to a court-only system a little over ten years ago, however, and the African system has only recently had its court begin operations.<sup>6</sup> But to the extent that both institutions functioned in each of the systems during the time period under consideration, the role of NGOs are reviewed with respect to not only the courts but also the commissions.

The focus of this inquiry is on decisions or judgments on the merits.<sup>7</sup> These decisions are in many ways only the tip of the iceberg in that most applications filed with the commissions and courts are resolved short of such a decision, usually either by a determination that the application does not satisfy the criteria for admissibility—such as exhaustion of domestic remedies<sup>8</sup>—or through a settlement. NGOs also are involved with these bodies in a number of ways other than through participating in actual cases.<sup>9</sup> Nevertheless, there are two reasons for this focus on decisions on the merits. First, the impact of NGOs on the development of international human rights law is arguably strongest when they are involved in decisions on the merits that resolve not only the specific violations alleged in a given case but also interpret and develop that law. Second, the decisions on the merits are one of the most visible outputs of these human rights enforcement systems.<sup>10</sup>

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6. See *infra* nn. 27, 54 and accompanying text.

7. While the various bodies use different labels for such decisions, for the sake of clarity, this Article will refer to all decisions, judgments, or other determinations regarding whether a member state has, or has not, violated the relevant human rights laws as “decisions on the merits.”

8. See *infra* nn. 34, 46, and 56, and accompanying text.

9. See, e.g., EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES* 2 (1996) (describing efforts by NGOs “to make the [African] Commission more accessible”); *id.* at 186 (describing other ways NGOs are permitted to be involved in African Commission activities); RACHEL MURRAY, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW* 88 (2000) (describing other ways NGOs are permitted to be involved in African Commission activities); Nina Vajic, *Some Concluding Remarks on NGOs and the European Court of Human Rights*, in *CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES* 93, 96–97 (Tullio Treves et al. eds., 2005) [hereinafter *CIVIL SOCIETY*] (describing efforts by NGOs to further human rights in Europe).

10. See ANKUMAH, *supra* note 9, at 1–2 (noting the limited availability of public information about the activities of the African Commission).

Part I of this Article considers how NGOs can be involved under the existing conventions or charters that govern the operation of these systems. Consideration of these documents reveals that in each system NGOs are able to serve in a variety of roles, including as applicants, as representatives of the alleged victims, and as third parties serving in an *amicus curiae* or intervener role, although there are some variations.<sup>11</sup> The most important variation is that in the Americas, which use a dual commission/court structure, the ability to serve in these multiple roles is initially only with respect to the commission, with the court only considering matters referred to it by the commission.<sup>12</sup> In this system, the commission therefore serves a gate-keeping function, including with respect to cases in which NGOs are involved. However, NGOs involved at the commission stage often are also involved at the court stage, if it occurs in a given case.<sup>13</sup> In the African system, NGOs may bring cases before the commission, and NGOs that have received “observer” status before the commission may bring cases before the court.<sup>14</sup>

Part II considers how NGOs can be involved in these systems by looking at all decisions on the merits rendered during the ten-year period from 2000 through 2009. Consideration of these decisions reveals both striking similarities and differences. The most significant similarity is that NGO involvement is primarily in the form of serving as representatives of alleged victims of human rights violations. The most significant differences are that NGO involvement in the European system is concentrated both with respect to the member states and the specific NGOs involved and occurs only in a relatively small proportion of the decisions.<sup>15</sup> In contrast, in the Inter-American system, NGOs are involved in a much higher proportion of the decisions, and while there are concentrations with respect to the specific NGOs, there are less apparent concentrations with respect to member states. Finally, in the African system, there is also a high proportion of NGO involvement but no obvious concentrations either with respect to the specific NGOs or member states involved.

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11. While the parties bringing allegations of human rights violations are identified by different labels by the various bodies considered in this Article, for the sake of clarity this Article shall refer to all such parties as “applicants.”

12. See *infra* note 42 and accompanying text.

13. See *infra* note 48 and accompanying text.

14. See *infra* note 60 and accompanying text.

15. While the three systems use different labels for countries that have consented to be subject to such systems, and the degree of that consent can vary, for the sake of simplicity and because it does not impact the analysis that is the focus of this Article, all countries that have agreed to be subject to these systems such that decisions on the merits can be rendered against them will be referred to as “member states” with respect to the relevant system.

Part III then considers the ramifications of the permitted and actual degree of NGO involvement in these systems. One ramification is the importance of NGOs as representatives of alleged victims of human rights violations, although that importance varies as between the different systems. Variations may arise from a number of factors, including the availability of legal aid (or lack thereof) and the size and relative strength of the legal bar in member states. Another ramification is that in Europe, the role of NGOs appears primarily to draw attention to human rights violations in a relatively narrow set of member states where conditions for private representation of alleged victims may not exist, while in the Americas and Africa, it appears that there is a broader need for NGOs to represent alleged victims from a broad swath of the member states. These ramifications suggest that the development and support of human rights NGOs should perhaps be targeted in different ways in these different systems. Finally, both the relatively close ties between the most active NGOs and the larger international human rights community and the relative open access of not only NGOs but private parties of all types to these systems suggests that there is no need to carefully screen NGOs before they can become involved, as has been done at least to some extent for the African court. This approach contrasts with that taken with respect to many other international bodies, as others have discussed in this Symposium, where NGOs often have privileged access to deliberations and discussions as compared to other private parties.<sup>16</sup>

#### I. NGO INVOLVEMENT IN THEORY

Each court has its own procedural rules that govern what entities may formally appear before the commissions and courts and in what capacities. Individuals and groups who are not able to take advantage of these formal avenues of participation may still be able to influence the court through other means, such as by urging entities to exercise the right to appear or by encouraging member states to alter the rules or judicial composition of the commissions and courts. Such indirect means are, however, necessarily filtered by the other entities involved, making it difficult to determine how much influence NGOs actually have through these avenues. Such indirect means are also much more difficult to identify. For these reasons, the focus here is on the extent to which NGOs

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16. See generally Shamima Ahmed, *NGOs Impact on International Organizations: Complexities and Considerations*, 36 BROOK. J. INT'L L. 817 (2011); Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011 (2011).



may themselves come before the courts and, where applicable, related commissions.

*A. European Court of Human Rights*

When initially created in 1959, under what is commonly known as the European Convention on Human Rights (the “European Convention”), individuals and private groups, including NGOs, did not have the right to appear before the European Court of Human Rights (the “ECHR”).<sup>17</sup> However, with the agreement of the applicable member states, individuals and groups, including NGOs, could file complaints with the European Commission of Human Rights (the “European Commission”), claiming a violation by one of the member states of his, her, or its rights as set forth in the European Convention.<sup>18</sup> The European Commission could in turn bring cases to the ECHR if it deemed the complaint admissible and irresolvable by friendly settlement.<sup>19</sup> The European Commission generally exercised this option if it viewed the case as involving “an important question of interpretation of the [European] Convention.”<sup>20</sup> Even in instances where the European Commission brought such cases, the Commission was the party before the ECHR, not the individual or group that had filed the complaint, although the ECHR eventually provided an opportunity for the original complainant to participate through the ECHR’s procedural rules.<sup>21</sup>

Individuals and groups, including NGOs, also had the ability from at least 1989 forward to ask the President of the ECHR for the opportunity to intervene in any given case, which opportunity would be granted if doing so would be in the “interest of the proper administration of justice.”<sup>22</sup> Over time, the President granted such opportunities to both individuals and NGOs in a number of cases.<sup>23</sup> Individuals and groups, in-

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17. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 44, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Original European Convention].

18. *Id.* art. 25(1); DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 42 (1996); ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 246 (2005).

19. GOMIEN, *supra* note 18, at 73; *see also* Original European Convention, *supra* note 17, art. 48(a).

20. GOMIEN, *supra* note 18, at 73.

21. GOMIEN, *supra* note 18, at 79–80; LINDBLOM, *supra* note 18; Shelton, *supra* note 2, at 630.

22. GOMIEN, *supra* note 18, at 80; LINDBLOM, *supra* note 18, at 329.

23. Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples’ Rights: Lessons from the*

cluding NGOs, also had the ability from 1994 forward to ask the ECHR to consider their complaint after the European Commission had issued a report even without a referral by the Commission, but the ECHR could decline to do so if a three-judge panel of the ECHR concluded that there was not a sufficient reason to consider the case.<sup>24</sup> Even given these various avenues for participation before 1998, it appears NGOs participated in only several dozen cases in total.<sup>25</sup> This compares to over a thousand ECHR judgments on the merits between 1959 and 1998, when Protocol 11 to the European Convention came into effect.<sup>26</sup>

When Protocol 11 went into effect in 1998, it eliminated the European Commission but, at the same time, greatly expanded the entities that had a right to bring a case before the ECHR.<sup>27</sup> More specifically, Protocol 11 amended Article 34 of the European Convention to provide that “[t]he Court may receive [individual] applications from any person, non-governmental organisation [sic] or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”<sup>28</sup> Protocol 11 also amended Article 36 of the European Convention to maintain the authority of the President to invite other persons to appear before the court in a given case if doing so is in the interest of the proper administration of justice.<sup>29</sup> While a new protocol that went into effect in 2010 signifi-

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*European and Inter-American Courts of Human Rights*, 43 J. AFR. L. 201, 207–08 (1999).

24. Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 5 ¶¶ 1(e)–2, Nov. 6, 1990, E.T.S. No. 140, *repealed by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155; GOMIEN, *supra* note 18, at 74; LINDBLOM, *supra* note 18, at 246.

25. See, e.g., LINDBLOM, *supra* note 18, at 330 (finding that NGOs filed *amicus curiae* briefs in “at least” thirty-six cases from 1969 to Sept. 30, 1998); see also Shelton, *supra* note 2, at 632 (as of 1994, describing the ECHR’s track record with respect to accepting third-party participation in cases).

26. See LINDBLOM, *supra* note 18, at 253.

27. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155 [hereinafter Protocol 11]; see also GOMIEN, *supra* note 18, at 91; LINDBLOM, *supra* note 18, at 247.

28. Protocol 11, *supra* note 27, art. 34; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, 213 U.N.T.S. 221, *amended by* Protocol 11, *supra* note 27, and Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, C.E.T.S. 194 [hereinafter Amended European Convention].

29. Protocol 11, *supra* note 27, art. 36; Amended European Convention, *supra* note 28, art. 36(2).

cantly altered the ECHR's procedures, the protocol did not change these avenues for NGO participation in cases before the Court.<sup>30</sup>

As the language of current Article 34 of the European Convention indicates, an NGO that wants to appear as an applicant before the ECHR must satisfy the same requirements as any other type of person seeking to make such an appearance, i.e., it must have a claim that it has been the victim of a violation by a member state of the rights set forth in the European Convention.<sup>31</sup> It is apparently not sufficient that the rights of the group of individuals which the NGO represents have been violated; to meet this requirement it must be the rights of the NGO itself that have been violated.<sup>32</sup> The ECHR has not fully determined what rights set forth in the European Convention actually apply to NGOs, but assuming an NGO can claim to be a victim of a violation of an applicable right,<sup>33</sup> it clearly may bring a case before the ECHR if it meets the other threshold requirements, such as exhausting domestic remedies.<sup>34</sup> To appear at the invitation of the President in a given case, the President must determine that such an invitation to an NGO, like an invitation to any other entity, is "in the interest of the proper administration of justice."<sup>35</sup> NGOs therefore do not have any avenues for appearing before the ECHR that are not common to other types of entities. Not all NGOs may take advantage of these avenues, however. It appears that only NGOs legally established within one of the member states generally qualify, although there have been exceptions when the entity's lack of formal legal establishment is related to its rights violation claim.<sup>36</sup>

The expansion of what entities can be claimants before the ECHR also provides another potential avenue for NGO participation in ECHR cases: serving as the representative of such entities, which could include both individuals and groups claiming to be victims of a violation by a member

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30. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, C.E.T.S. 194; THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 36–37 (Pieter van Dijk et al. eds., 4th ed. 2006) [hereinafter THEORY AND PRACTICE].

31. Amended European Convention, *supra* note 28, art. 34; LINDBLOM, *supra* note 18, at 252.

32. Marco Frigessi di Rattalma, *NGOs before the European Court of Human Rights: Beyond Amicus Curiae Participation?*, in CIVIL SOCIETY, *supra* note 9, at 57, 60.

33. See THEORY AND PRACTICE, *supra* note 30, at 53–55 (discussing which rights have been found excisable by a legal, as well as by a natural, person).

34. Amended European Convention, *supra* note 28, art. 35(1).

35. *Id.* art. 36(2); Rules of the Court, 2010 Eur. Ct. H.R., R. 44(3)(a) [hereinafter ECHR Rules].

36. See LINDBLOM, *supra* note 18, at 247–51.

state of the rights set forth in the European Convention.<sup>37</sup> While the fees for representatives are generally paid by the defendant member state if the alleged victim is successful in his or her claim, NGOs (and other representatives) may also be paid for their services through a legal aid system established by the Council of Europe “for applicants who do not have sufficient means.”<sup>38</sup> However, at least one prominent human rights organization that is active before the ECHR has complained that the legal aid payments are “very low.”<sup>39</sup> As discussed in the next Part, serving as a representative has become the primary way NGOs come before the ECHR.

### *B. Inter-American Human Rights Commission and Inter-American Court of Human Rights*

Similar to the initial structure of the European human rights system, the Inter-American system contains both the Inter-American Commission on Human Rights (the “Inter-American Commission”) and the Inter-American Court of Human Rights (the “IACHR”). Unlike the European system, however, the Inter-American system began with only the Inter-American Commission in 1959, formed under the American Declaration of the Rights and Duties of Man (the “Declaration”), although it was later incorporated into the Charter of the Organization of American States and the subsequent American Convention on Human Rights (the “American Convention”).<sup>40</sup> It was not until the American Convention entered into effect in 1979 that the IACHR came into existence.<sup>41</sup> Also unlike the

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37. See Ermacora, *supra* note 1, at 177 (prior to Protocol 11, NGOs could serve as counsel to European Commission applicants).

38. *Basic Information on Procedures* § 1(3), EUR. CT. H.R. <http://www.echr.coe.int/echr/en/header/the+court/how+the+court+works/procedure+before+the+court> (last visited May 22, 2011).

39. *Taking a Case to the European Court of Human Rights*, LIBERTY <http://www.yourrights.org.uk/yourrights/the-human-rights-act/taking-a-case-to-the-european-court-of-human-rights.html> (last updated Aug. 18, 2008) [hereinafter *Taking a Case to the European Court of Human Rights*].

40. American Convention on Human Rights pmbl., art. 33(a), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter *American Convention*]; SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 15–16, 99 (1997); see also Charter of the Organization of American States, art. 53(e), Apr. 30, 1948, 119 U.N.T.S. 3. The United States is a party to the Declaration and so is subject to the jurisdiction of the Inter-American Commission. However, the U.S. has not ratified the American Convention and so is not subject to the jurisdiction of the IACHR. See B-32: *American Convention on Human Rights*, INTER-AM. COMM’N H.R., <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Jan. 24, 2011) (showing that the United States has not ratified the Convention).

41. See American Convention, *supra* note 40, arts. 52–69.

European system, the Inter-American system continues to this day to have this two-part structure.

Only member states or the Inter-American Commission may bring cases directly to the IACHR.<sup>42</sup> All others alleging violations of the American Convention, including NGOs, must bring their complaints to the Inter-American Commission instead. More specifically, Article 44 of the American Convention permits “[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states” to file a petition with the Inter-American Commission.<sup>43</sup> In contrast to the European system, the person filing the petition need not be the victim of the alleged American Convention violation; instead, the filer may assert a claim on behalf of any specific victim.<sup>44</sup> The fact that the NGO filing a petition need only be organized in any member state and not necessarily in the member state where the alleged violation occurred, also means NGOs that are relatively insulated from retaliation by the member state involved could bring a claim on behalf of residents of that member state, if those residents could be identified with sufficient specificity.<sup>45</sup> In addition, the petition must meet certain threshold requirements, including exhaustion of domestic remedies.<sup>46</sup>

NGOs also have at least two other avenues for participation in cases before the Inter-American Commission and the IACHR. First, NGOs may serve as representatives of other petitioners before the Inter-American Commission.<sup>47</sup> If the Inter-American Commission then refers the petition to the IACHR, which is generally required if the member state has not complied with the Commission’s final recommendations within a certain time period, the IACHR’s Rules of Procedure permit the autonomous submission of pleadings, motions, and evidence by not only

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42. DAVIDSON, *supra* note 40, at 138.

43. American Convention, *supra* note 40, art. 44; DAVIDSON, *supra* note 40, at 156 (States that are party to the Convention have no ability to deny this right of petition as against them); *see also* Statute of the Inter-American Commission on Human Rights, art. 19(a), Oct. 1979, O.A.S.T.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80.

44. American Convention, *supra* note 40, art. 44; DAVIDSON, *supra* note 40, at 157; LINDBLOM, *supra* note 18, at 271–72.

45. *See* DAVIDSON, *supra* note 40, at 157. For purposes of this Article, NGOs filing claims on behalf of others are classified as “representatives” of the alleged victims even if the NGOs are acting without a formal relationship with or consent from the alleged victims.

46. American Convention, *supra* note 40, arts. 46–47.

47. R. P. Inter-Am. Ct. H.R. 2(26), 25(1) [hereinafter IACHR Rules]; R. P. Inter-Am. Comm’n H.R. 23.

the alleged victims, but also their “duly accredited representatives.”<sup>48</sup> Neither the Commission nor the IACHR appears to have a legal aid system in place to help petitioners who lack the financial means to hire representatives.<sup>49</sup> Second, those rules also provide for *amicus curiae* briefs before the IACHR.<sup>50</sup> The Inter-American Commission has also permitted such briefs on occasion, although there does not appear to be a clear legal basis for doing so.<sup>51</sup>

Given the breadth of Article 44 of the Convention, there has been little if any need for either the Inter-American Commission or the IACHR to develop a definition of the term NGO. The only significant limitation is that under Article 44, an NGO filing a petition before the Inter-American Commission must be legally recognized by one or more member states.<sup>52</sup> In practice, this requirement does not appear to have been a significant barrier for NGO involvement, presumably because it is the NGOs formed under the laws of one of the member states that are interested in bringing alleged violations of the American Convention to the attention of the Inter-American Commission.

### *C. African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights*

The current African human rights system also operates under a dual commission/court structure. The African Commission on Human and Peoples' Rights (the “African Commission”) began operations in 1987 under the auspices of Article 30 of the African Charter on Human and Peoples' Rights (the “African Charter”).<sup>53</sup> The Protocol to the African Charter (the “Protocol”), which entered into force in 2004, created the

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48. IACHR Rules, *supra* note 47, 2(26), 25(1); R. P. Inter-Am. Comm'n H.R. 45(1); Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 372, 378–79 (Malcolm Langford ed., 2008) [hereinafter *SOCIAL RIGHTS JURISPRUDENCE*]; DAVIDSON, *supra* note 40, at 204 (describing the referral process).

49. Melish, *supra* note 48, at 380–81.

50. IACHR Rules, *supra* note 47, 44; *see also* LINDBLOM, *supra* note 18, at 355–56 (discussing how, even before enactment of this rule, NGOs successfully submitted *amicus curiae* briefs in a number of IACHR cases); *see also* Shelton, *supra* note 2, at 638 (“the [IACHR] appears never to have rejected an amicus filing”).

51. LINDBLOM, *supra* note 18, at 355.

52. American Convention, *supra* note 40, art. 44.

53. Afr. Charter on Hum. & Peoples' Rts., art. 30, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter *African Charter*]; *History*, AFR. COMM'N HUM. & PEOPLES' RTS., [http://www.achpr.org/english/\\_info/history\\_en.html](http://www.achpr.org/english/_info/history_en.html) (last visited Jan. 24, 2011).

African Court on Human and Peoples' Rights (the "ACHPR").<sup>54</sup> The African Union has, however, determined that the ACHPR should be merged into the African Court for Justice, although the latter court has yet to begin operations so it not clear if and when that merger will actually occur.<sup>55</sup>

An application relating to the rights referred to in the African Charter will be considered by the African Commission if certain threshold requirements are met, including the exhaustion of local remedies (unless it is obvious that local procedures are unduly prolonged) and approval by a majority of the African Commission's members.<sup>56</sup> It appears that any individual or entity, including an NGO, may submit such an application to the African Commission either on its own behalf or on behalf of someone else.<sup>57</sup> A party submitting such an application may have legal representation, and there does not appear to be any restriction that would prevent an NGO from serving in that role.<sup>58</sup> Finally, it appears that NGOs may participate as *amici curiae* before the African Commission.<sup>59</sup>

The African Commission and the ACHPR can refer cases to each other, and NGOs that have been granted "observer" status by the African Commission may bring cases to the ACHPR under Article 5 of the Protocol.<sup>60</sup> The African Commission has in fact granted such status to al-

54. Protocol to the Afr. Charter on Hum. & Peoples' Rts. on the Establishment of an Afr. Ct. on Hum. & Peoples' Rts., art. 1, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter African Charter Protocol]; *History, AFR. CT. HUM. & PEOPLES' RTS.*, <http://www.african-court.org/en/court/history/> (last visited Jan. 24, 2011).

55. *The African Court on Human and Peoples' Rights*, AFR. INT'L COURTS & TRIBUNALS, [http://www.aict-ctia.org/courts\\_conti/achpr/achpr\\_home.html](http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html) (last visited Jan. 24, 2011).

56. African Charter, *supra* note 53, arts. 55(2), 56.

57. *Guidelines for Submission of Communications*, AFR. COMM'N HUM. & PEOPLES' RTS., [http://www.achpr.org/english/\\_info/guidelines\\_communications\\_en.html](http://www.achpr.org/english/_info/guidelines_communications_en.html) (last visited Jan. 24, 2011) [hereinafter Afr. Comm'n *Guidelines*] ("Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the commission denouncing a violation of human rights. Ordinary citizens, a group of individuals, NGOs, and states Parties to the Charter can all put in claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned."); ANKUMAH, *supra* note 9, at 52–53; LINDBLOM, *supra* note 18, at 362; *see also* African Charter, *supra* note 53, arts. 55–56.

58. Afr. Comm'n *Guidelines*, *supra* note 57; Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 273 (1998) (the African Commission has "allowed individuals to be represented by NGOs" before it).

59. Odinkalu & Christensen, *supra* note 58, at 279; LINDBLOM, *supra* note 18, at 361–62.

60. African Charter Protocol, *supra* note 54, art. 5(3).

most 400 NGOs,<sup>61</sup> and the application requirements for obtaining such status appear to be relatively minimal.<sup>62</sup> The Protocol also requires, however, that the member state involved make a declaration accepting the competence of the ACHPR to receive cases brought by such NGOs; absent such a declaration, the ACHPR is not able to receive a petition from even an NGO with observer status.<sup>63</sup>

Article 10 of the Protocol also grants any party to a case before the ACHPR the right "to be represented by a legal representative of the party's choice," which presumably would include NGOs.<sup>64</sup> As with the Inter-American system, neither the Commission nor the ACHPR appear to have a system of legal aid to help alleged victims hire a representative. Finally, Rule 45 of the ACHPR's Interim Rules of Procedure permits the ACHPR to ask any person or institution for information relevant to a case, although it is not clear what the mechanism would be for an NGO to submit a request to receive such an invitation.<sup>65</sup> NGOs therefore appear to have the ability to participate in cases before the ACHPR as representatives of a party or by invitation.

## II. NGO INVOLVEMENT IN PRACTICE

It is clear that NGOs have a variety of ways in which they could participate in the human rights systems in Europe, the Americas, and Africa. To what extent they take advantage of these avenues for participation is less clear from the reports and statistics published by the courts and, in the Americas and Africa, the commissions. It is therefore necessary to examine the actual decisions issued by these bodies to determine the extent of NGO involvement.

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61. See Afr. Comm'n Hum. & Peoples' Rts. [ACHPR], *Activity Rep. of the Afr. Comm'n on Hum. & Peoples' Rts., Submitted in Conformity with Article 54 of the Afr. Charter on Hum. & Peoples' Rts.* 7 (2008) (reporting that as of 2008, the African Commission had granted observer status to 380 NGOs).

62. See Afr. Comm'n Hum. & Peoples' Rts. [ACHPR], *Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human Rights with the African Commission Human and Peoples' Rights*, ACHPR /Res.33(XXV)99 (May 5, 1999). But see MURRAY, *supra* note 9, at 90–92 (the African Commission has considered refusing to recognize NGOs that are not legally recognized in their home country).

63. African Charter Protocol, *supra* note 54, art. 34(6); see also Ibrahim Ali Badawi El-Sheikh, *Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 9 AFR. J. INT'L & COMP. L. 943, 946–47 (1997) (describing the history of this provision).

64. African Charter Protocol, *supra* note 54, art. 10(2).

65. Interim Rules of Court, AFR. CT. HUM. & PEOPLES' RTS. 45(2) (2008).



To evaluate what information could be feasibly gathered about NGO involvement and, to the extent possible, what initial observations or hypotheses could be formed based on that information, the decisions by each court and, where applicable, commission for the ten-year period from 2000 through 2009 were examined. As detailed in the appendix, the exact methodology used to identify and evaluate NGO involvement varied based on the publicly available information for the relevant body. For all of the bodies, however, it appears to be possible to identify the vast majority if not all of the NGO direct involvement in decisions on the merits during this time period. As previously discussed, for these purposes an NGO was defined as any organization that was formally constituted, organizationally separate from government, and non-profit-seeking.<sup>66</sup> While an organization's possession of these characteristics was generally evident by the description of the organization in the relevant decision, when necessary, an organization's NGO status was verified by checking other sources, such as the organization's self-description on its website.

The 2000 through 2009 time period was selected for several reasons. First, 2009 is the most recent year for which all decisions on the merits were readily available. Second, late 1998 was the effective date of Protocol 11 to the European Convention, which fundamentally changed the structure of the European human rights system.<sup>67</sup> Third and finally, ten years appears to be a sufficient passage of time so as to make any common patterns or trends unlikely to reflect merely the unique circumstances of a particular year or few years.

#### *A. European Court of Human Rights*

From January 1, 2000 through December 31, 2009, the ECHR rendered 10,067 decisions on the merits.<sup>68</sup> Of those decisions, 394 or approximately four percent had direct NGO involvement as follows:

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66. See *supra* nn. 3–5 and accompanying text.

67. See *supra* note 27 and accompanying text.

68. See EUR. CT. H.R., SURVEY OF ACTIVITIES 2000 69 (2001); EUR. CT. H.R., SURVEY OF ACTIVITIES 2001 33 (2002); EUR. CT. H.R., SURVEY OF ACTIVITIES 2002 29 (2003); EUR. CT. H.R., SURVEY OF ACTIVITIES 2003 32 (2004); EUR. CT. H.R., SURVEY OF ACTIVITIES 2004 33 (2005); EUR. CT. H.R., SURVEY OF ACTIVITIES 2005 31 (2006); EUR. CT. H.R., SURVEY OF ACTIVITIES 2006 42 (2007); EUR. CT. H.R., SURVEY OF ACTIVITIES 2007 59 (2008); EUR. CT. H.R., ANNUAL REPORT 2008 133 (2009); EUR. CT. H.R., ANNUAL REPORT 2009 145 (2010) [hereinafter ECHR ANNUAL REPORT 2009], for the numbers of decisions on the merits for each year from the ECHR's Surveys of Activities for 2000 through 2007, as well as Annual Reports for 2008 and 2009.

<b>Year</b>	<b>Decisions on Merits</b>	<b>NGO Involved<sup>69</sup></b>	<b>As Representative</b>	<b>As Applicant</b>	<b>As Intervener</b>
<b>2000</b>	446	11	7	2	2
<b>2001</b>	726	9	2	3	4
<b>2002</b>	665	12	7	2	5
<b>2003</b>	548	8	5	0	3
<b>2004</b>	629	18	13	3	2
<b>2005</b>	1042	37	29	3	6
<b>2006</b>	1510	36	29	4	5
<b>2007</b>	1425	74	55	13	7
<b>2008</b>	1489	85	69	8	8
<b>2009</b>	1587	104	89	13	7
<b>Total</b>	<b>10,067</b>	<b>394</b>	<b>305</b>	<b>51</b>	<b>49</b>

<b>NGO Concentrations (10% or more decisions)</b>	<b>Member State Concentrations (10% or more decisions)</b>
Kurdish Human Rights Project 39 decisions involving NGOs (10%) Lawyers for Human Rights	Moldova 73 decisions (18%) Russia

<sup>69</sup> The “NGO Involved” figures for some years and in total are less than the sum of the three types of involvement columns because in a few decisions (eleven over the ten-year period) NGOs were involved in more than one capacity.

56 decisions involving NGOs (14%)	149 decisions (37%)
Stichting Russian Justice Initiative	
79 decisions (20%)	

The relatively low level of involvement by NGOs is consistent with the pre-Protocol 11 level of direct NGO involvement before the European Commission, identified by other scholars.<sup>70</sup> It is also consistent with the post-Protocol 11 level of NGO involvement from 1999 until 2003, as determined by Anna-Karin Lindblom.<sup>71</sup>

Even with the relatively low level of direct NGO involvement, certain patterns emerge. First, NGO direct involvement in ECHR decisions on the merits primarily came as representatives of the alleged victim(s), although in some cases an NGO was either the alleged victim (including several cases where an NGO or its members were complaining of delays in being able to register formally with the member state) or, slightly more rarely, an intervener.<sup>72</sup> Second, there is a significant concentration within these decisions as to both the member state defendant and the specific NGO involved. With respect to the member state, almost forty percent of the judgments with direct NGO participation involved Russia as compared to approximately eight percent of all judgments on the merits during this time period.<sup>73</sup> In turn, this concentration appears to be driven

70. See *supra* note 25 and accompanying text.

71. See LINDBLOM, *supra* note 18, at 253–54 (identifying “at least” twenty-nine applications filed by NGOs that resulted in decisions on the merits, as compared to over 3,300 such decisions during this time period).

72. Lloyd Hitoshi Mayer, Collection of Data from the Decisions Rendered by the African Commission, European Court and Inter-American Commission and Court from 2000 to 2009 (May 22, 2011) (unpublished collection, Notre Dame University) [hereinafter Mayer Data].

73. *Id.* From 2000 through 2009, the ECHR issued 779 decisions on the merits involving Russia as compared to 9,714 decisions on the merits total. See, e.g., ECHR ANNUAL REPORT 2009, *supra* note 68, at 145 (216 decisions on the merits involving Russia as compared to 1,587 decisions on the merits total in 2009); *Survey of Activities 1999*, at 13–28, EUR. CT. H.R. (2000), available at <http://www.echr.coe.int/NR/rdonlyres/BA4CD581-4E3E-4324-83A6-1A753F92C1DE/0/SurveyofActivities1999.pdf> (listing decisions in 1999, including 132 decisions on the merits); *Ten Years of the “New” European Court of Human Rights 1998–2008 Situation and Outlook* 77, EUR. CT. H.R., (2009), available at <http://www.echr.coe.int/NR/rdonlyres/494676B6-727F-49FE-9158-17687F914D5D/0/ActesVersionEN.pdf> [hereinafter ECHR 1999–2008] (listing 563 decisions on the merits involving Russia as compared to 8,260 decisions on the merits total from 1999 through 2008. It is not clear why the total number of decisions on the merits

in large part by three specific NGOs. One of those NGOs is the Stichting Russian Justice Initiative ("SRJI"), which alone was involved in twenty percent of the decisions with direct NGO involvement.<sup>74</sup> The other two are the European Human Rights Advocacy Center ("EHRAC") (directly involved in twenty-eight decisions) and the Human Rights Center "Memorial" ("Memorial") (directly involved in thirty-two decisions).<sup>75</sup> These two NGOs appear to work closely together based both on EHRAC's website and the fact that they were both involved as representatives in twenty-five decisions.<sup>76</sup> After accounting for decisions in which more than one of these NGOs was involved, these three NGOs collectively accounted for 113 of the 149 decisions with direct NGO participation against Russia, or over three-quarters of them.<sup>77</sup> These 149 decisions in turn represented approximately nineteen percent of the decisions on the merits involving Russia during these ten years.<sup>78</sup>

The member state with the second highest level of decisions has a similar pattern. Almost twenty percent of the judgments on the merits with direct NGO participant had Moldova as a defendant, as compared to less than two percent of all judgments on the merits over this time period.<sup>79</sup> Again, this concentration appears to be driven in large part by certain specific NGOs—Lawyers for Human Rights (fifty-six decisions) and the Helsinki Committee for Human Rights (Moldova) (eleven decisions, including one with Lawyers for Human Rights).<sup>80</sup> Together these two NGOs accounted for sixty-six of the seventy-three decisions involving Moldova, or ninety percent.<sup>81</sup> Finally, the seventy-three decisions with NGO participation involving Moldova were over forty percent of the decisions on the merits involving Moldova during this time period.<sup>82</sup>

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provided in these reports for 2000 through 2009 is slightly less than the total figure obtained by reviewing the annual reports and annual surveys for each year during this period. *See supra* note 69.

74. Mayer Data, *supra* note 72.

75. *Id.*

76. *See About Us*, EUR. HUM. RTS. ADVOC. CTR., <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/home.cfm> (last visited Jan. 24, 2011) ("EHRAC has a long-established partnership with the Russian NGO, Memorial").

77. Mayer Data, *supra* note 72.

78. *See id.*

79. From 2000 through 2009, the ECHR issued 148 decisions on the merits involving Moldova as compared to 9714 decisions on the merits total. *See id.*

80. Mayer Data, *supra* note 72.

81. *Id.*

82. *See Id.*

In Europe, therefore, five NGOs have been involved, primarily as representatives, in approximately forty-five percent of the decisions on the merits for which direct NGO involvement has been identified (once the involvement of multiple NGOs in the same decision has been taken into account).<sup>83</sup> This NGO concentration also appears to have translated into member state concentration, in that these same five NGOs focus exclusively on one of two countries (Russia and Moldova), leading to a disproportionate number of the NGO-involved cases being brought against those two member states. This NGO concentration, as well as the apparent agenda-shifting ability of these NGOs through drawing greater attention to activities of two specific member states, suggests that attention should be given to whether and to whom these NGOs are accountable.

It is natural to first look at SRJI, which was the most active NGO before the ECHR from 2000 through 2009 as measured by involvement in decisions on the merits.<sup>84</sup> In part, to demonstrate broad international support for its efforts, its various governing and advisory bodies appear to be drawn primarily from outside of both the North Caucasus region and Russia generally, although the staff appears to be primarily if not exclusively Russian.<sup>85</sup> Perhaps as significantly, its 2009 funding appears to have come primarily from similar, non-Russian sources, including not only the Open Society Institute and other private parties concerned with human rights, but also the government of Norway and various United Nations bodies.<sup>86</sup> EHRAC, Memorial through EHRAC, and the Kurdish Human Rights Project (the third NGO appearing in ten percent of the decisions with direct NGO involvement)<sup>87</sup> appear to have similar patterns of engagement with the international human rights community.<sup>88</sup> These

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83. *Id.*

84. *Id.*

85. ANNUAL REPORT 2009, at 17, RUSSIAN JUST. INITIATIVE (2010), <http://www.srji.org/files/reports/2009.pdf> [hereinafter RUSSIAN JUSTICE INITIATIVE].

86. *Id.* at 19.

87. Mayer Data, *supra* note 72.

88. See EHRAC ANNUAL REPORT 2009, EUR. HUM. RTS. ADVOC. CTR. 36–37 (2010), <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Publications/EHRAC%20AR09%20COMPLETE%20for%20email.pdf> (listing individual and organizational affiliations); *Donors*, EUR. HUM. RTS. ADVOC. CTR., <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/donors/donors.cfm> (last visited Feb. 7, 2011); *About KHRP*, KURDISH HUM. RTS. PROJECT, <http://www.khrp.org/about-khrp.html> (last visited Feb. 7, 2011) (listing a wide range of private and government supporters). Information in English regarding Lawyers for Human Rights could not be located. See *Noutăți*, LAW. FOR HUM. RTS., <http://www.lhr.md/> (last visited Feb. 7, 2011) (organization's website, apparently in Moldovan except the name of the organization, is provided in English).

results suggest that these NGOs are both well-known and well-monitored within the international human rights community, even without any apparent formal mechanism to ensure such monitoring or accountability.

*B. Inter-American Human Rights Commission and Inter-American Court of Human Rights*

Turning now to the Inter-American system, given the gate-keeping function of the Inter-American Commission, both the decisions by that body and by the IACHR during the 2000 through 2009 period were considered. Since both bodies have relatively few decisions on the merits each year, all of such decisions for the entire time period were reviewed to identify possible NGO involvement. Only Commission decisions that did *not* lead to a Court decision were considered, as to the extent an NGO was involved in a case that led to a Court decision—including at the Commission stage of the proceedings—that is reflected in the figures for the Court. Such Commission decisions also do not appear to be publicly reported, except to the extent that they are discussed in the related Court decision. The results of this review are as follows:

**Inter-American Commission**

<b>Year</b>	<b>Decisions on Merits</b>	<b>NGO Involved<sup>89</sup></b>	<b>As Representative</b>	<b>As Applicant</b>	<b>As <i>Amicus</i></b>
<b>2000</b>	26	18	18	0	1
<b>2001</b>	20	9	9	0	0
<b>2002</b>	11	6	6	0	0
<b>2003</b>	6	4	3	1	0
<b>2004</b>	4	3	3	0	0

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<sup>89</sup> As was the case with the ECHR data, the “NGO Involved” figures for some years and in total are less than the sum of the three types of involvement columns because in a few decisions (two over the ten-year period) NGOs were involved in more than one capacity. Mayer Data, *supra* note 72.

<b>2005</b>	7	3	3	0	0
<b>2006</b>	8	4	4	0	0
<b>2007</b>	4	1	1	0	0
<b>2008</b>	7	5	4	0	1
<b>2009</b>	13	7	5	2	1
<b>Total</b>	<b>106</b>	<b>60</b>	<b>56</b>	<b>3</b>	<b>3</b>

<b>NGO</b>	<b>Member State</b>
<b>Concentrations</b> (10% or more decisions)	<b>Concentrations</b> (10% or more decisions)
<p>Corporación Colectivo de Abogados José Alvear Restrepo (José Alvear Restrepo Lawyers' Collective) (CCAJAR)</p> <p>7 decisions involving NGOs (12%)</p> <p>Centro por la Justicia y el Derecho Internacional (Center for Justice and International Law) (CEJIL)</p> <p>16 decisions (27%)</p>	<p>Brazil</p> <p>13 decisions (22%)</p> <p>Columbia</p> <p>8 decisions (13%)</p> <p>Peru</p> <p>9 decisions (15%)</p> <p>United States</p> <p>9 decisions (15%)</p>

**Inter-American Court**

<b>Year</b>	<b>Decisions on Merits</b>	<b>NGO Involved<sup>90</sup></b>	<b>As Representative</b>	<b>As Applicant</b>	<b>As <i>Amicus</i></b>
<b>2000</b>	4	0	0	0	0
<b>2001</b>	7	5	3	0	3
<b>2002</b>	2	0	0	0	0
<b>2003</b>	5	5	5	0	0
<b>2004</b>	11	11	8	0	5
<b>2005</b>	16	16	15	0	9
<b>2006</b>	17	14	13	0	4
<b>2007</b>	10	7	7	1	2
<b>2008</b>	10	7	5	0	3
<b>2009</b>	14	10	10	0	0
<b>Total</b>	<b>96</b>	<b>75</b>	<b>66</b>	<b>1</b>	<b>26</b>

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<sup>90</sup> As was the case with the ECHR data, the “NGO Involved” figures for some years and in total are less than the sum of the three types of involvement columns because in a few decisions (two over the ten-year period) NGOs were involved in more than one capacity. *Id.*



<b>NGO</b>  <b>Concentrations</b>  (10% or more decisions)	<b>Member State</b>  <b>Concentrations</b>  (10% or more decisions)
Asociación Pro Derechos Humanos (Association for Human Rights in Peru) (APRODEH)  8 decisions involving NGOs (11%)  Centro por la Justicia y el Derecho Internacional (Center for Justice and International Law) (CEJIL)  36 decisions (48%)	Columbia  8 decisions (11%)  Guatemala  9 decisions (12%)  Peru  15 decisions (20%)

The pattern of NGO involvement in decisions on the merits by the IACHR and the Inter-American Commission is very different in two respects from that found for ECHR. First, while there were far fewer decisions on the merits—approximately two percent of the ECHR’s total taking into account both the Commission and IACHR—the proportion of NGO involvement was much higher.<sup>91</sup> For the Commission, NGOs were involved directly in a majority of the decisions on the merits, while for the IACHR the percentage was almost eighty percent.<sup>92</sup> Similar to the ECHR, however, when NGOs were involved directly, they were most often involved as representatives of the alleged victims (in ninety percent of the decisions on the merits with direct NGO involvement before both the Commission and the IACHR) as opposed to as alleged victims themselves or as third-parties, although the latter occurred in approximately a third of the decisions on the merits with direct NGO involvement at the IACHR.<sup>93</sup> This high proportion of cases involving NGOs is consistent with the findings of Lindblom for an earlier period that partially overlaps

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91. *Id.*

92. *Id.*

93. *Id.*

with the period considered here with respect to the Commission, although it is higher with respect to the IACHR.<sup>94</sup>

Second, while there was significant NGO concentration—more on that issue in a moment—there was less obvious member state concentration. Given the high proportion of NGO involvement, comparisons with the overall proportion of member state involvement are not particularly meaningful, yet for both the Inter-American Commission and the IACHR only one member state appeared in twenty percent or more of the decisions in which NGOs were involved, and these member states were different for the Commission (Brazil) and the IACHR (Peru).<sup>95</sup> Also, less strong was the role of a single NGO in driving these concentrations. For decisions by the Commission involving Brazil, the Centro por la Justicia y el Derecho Internacional (Center for Justice and International Law) (“CEJIL”) was involved in only eight of the twelve decisions, while for decisions by the IACHR involving Peru, the most commonly involved NGO—Asociación Pro Derechos Humanos (Association for Human Rights in Peru) (“APRODEH”)—was involved in only seven of the fifteen.<sup>96</sup> Unlike the European experience, however, there was one NGO—CEJIL—that was involved in numerous decisions involving different member states, including over a quarter of the Commission decisions with direct NGO involvement and almost half of the IACHR decisions with direct NGO involvement.<sup>97</sup> More specifically, CEJIL represented alleged victims against eight different member states before the Commission and against thirteen member states before the IACHR.<sup>98</sup> This limited concentration with respect to NGO involvement is consistent with the findings of Lindblom for an earlier period that overlapped in part with

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94. See LINDBLOM, *supra* note 18, at 275 (for 1998 through 2003, approximately half of the Inter-American Commission case reports on the merits and friendly settlements were in cases instituted by NGOs, whether acting alone or ‘with other bodies or individuals’); *id.* at 277–78 (approximately a third of IACHR judgments on the merits involved cases that originated with petitions filed by NGOs with the Inter-American Commission); see also Mónica Pinto, *NGOs and the Inter-American Court of Human Rights*, in CIVIL SOCIETY, *supra* note 9, at 47, 50 (stating, without any more details, that “[t]he great majority of complaints registered with the Inter-American Commission . . . are lodged by NGOs acting as petitioners”).

95. Mayer Data, *supra* note 72.

96. With respect to the Commission, an NGO that, at least at one time, was affiliated with CEJIL was involved with two of the cases relating to Brazil. See *Diniz Bento da Silva v. Brazil*, Case 11.517, Inter-Am. Comm’n H.R., Report No. 23/02, OEA/Serv.L./V/II.02, doc. 5 ¶ 1 (2002) (indicating that the Comissão Pastoral da Terra [Pastoral Land Commission] was affiliated with CEJIL, at least when the original application was filed in 1995).

97. Mayer Data, *supra* note 72.

98. *Id.*

the period considered here, although she did not provide details regarding the extent of such concentration.<sup>99</sup>

Similar to SRJI, CEJIL appears to be well-integrated into the international human rights community. Its Board of Directors includes individuals associated with a range of other human rights organizations and NGOs, including American University, Columbia University, Human Rights Watch, and the Myrna Mack Foundation, as well as indigenous human rights organizations in a number of the member states.<sup>100</sup> Its financial supporters include a broad range of organizations and governments, including many from outside of member states, such as the Ford Foundation, Save the Children Sweden, and the Federal Ministry of Foreign Relations of Germany.<sup>101</sup> At the same time its staff appears to be drawn exclusively from the member states.<sup>102</sup>

*C. African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights*

The ACHPR only began operations recently and appears to have only issued a single judgment to date, which was not on the merits but instead concluded that the ACHPR lacked jurisdiction to hear the case at issue.<sup>103</sup> The existence of only a single ACHPR jurisdictional decision in 2009 (or ever, it appears) makes it impossible to determine if any patterns exist with respect to NGO involvement in cases before the ACHPR. The role of the ACHPR is also limited by the fact that as of 2008, only two states had allegedly made declarations consenting to the court's jurisdiction.<sup>104</sup>

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99. See LINDBLOM, *supra* note 18, at 276–77 (noting that as of 2003, commonly involved NGOs were “CEJIL, the Colombian Commission of Jurists . . . APRODEH[], Americas Watch (now Human Rights Watch), and Comisión Ecuémica de Derechos Humanos (CEDHU)”).

100. *The Board of Directors*, CEJIL, <http://cejil.org/en/cejil/board-directors> (last visited Jan. 21, 2011).

101. ACTIVITIES REPORT 2008/9, at 5, CEJIL (2010), [http://cejil.org/sites/default/files/CEJILs\\_Report\\_2008\\_2009.pdf](http://cejil.org/sites/default/files/CEJILs_Report_2008_2009.pdf).

102. *Staff*, CEJIL, <http://cejil.org/en/cejil/staff> (last visited Feb. 7, 2011).

103. *Latest Judgments*, AFR. CT. HUM. & PEOPLES' RTS., <http://www.african-court.org/en/cases/latest-judgments/> (last visited Feb. 7, 2011) [hereinafter *Latest Judgments*]; Michelot Yogogombaye v. The Republic of Senegal, Afr. Ct. Hum. & Peoples' Rts. No. 001/2008 ¶ 37 (Dec. 15, 2009) [hereinafter *Senegal Judgment*].

104. *Senegal Judgment*, *supra* note 103, ¶¶ 17, 35 (discussing how Michelot Yogogombaye alleged that the Republics and States of Senegal and Chad had made such declarations). Furthermore, only twenty-five of the fifty-three African Union member states have ratified the Protocol creating the ACHPR. *General Information*, AFR. CT. HUM. & PEOPLES' RTS., <http://www.african-court.org/en/court/mandate/general-information/> (last visited Feb. 7, 2011).

As for the African Commission, there were only thirty decisions on the merits from 2000 through 2009 that had direct NGO involvement, but that low number reflects the low number of total decisions on the merits during that same period of forty-four.<sup>105</sup> Because of the low number of decisions, the following table does not provide a year-by-year breakdown but instead collects the data for the entire ten-year period:

<b>Year</b>	<b>Decisions on Merits</b>	<b>NGO Involved<sup>106</sup></b>	<b>As Representative</b>	<b>As Applicant</b>	<b>As <i>Amicus</i></b>
<b>2000 to 2009</b>	44	30	30	3	1

<b>NGO Concentrations</b> (10% or more decisions)	<b>Member State Concentrations</b> (10% or more decisions)
Institute for Human Rights and Development in Africa (IHRDA)  6 decisions involving NGOs (20%)  International Centre for the Legal Protection of Human Rights (Interights)  5 decisions (17%)	Nigeria  4 decisions (13%)  Zimbabwe  4 decisions (13%)

As the table shows, the level of NGO involvement is proportionately very high, representing over two-thirds of the decisions on the merits. Also, similar to the European and Inter-American systems, NGOs primarily served as representatives of alleged victims, as opposed to rarer

<sup>105</sup> Mayer Data, *supra* note 72.

<sup>106</sup> As was the case with the ECHR data, the "NGO Involved" figures for some years and in total are less than the sum of the three types of involvement columns because in a few decisions (two over the ten-year period) NGOs were involved in more than one capacity. *Id.*

appearances as the alleged victim or as a third party.<sup>107</sup> Given the small number of decisions, concentrations with respect to NGOs or member states are less meaningful than in the other two systems, although at least two NGOs—the Institute for Human Rights and Development in Africa (“IHRDA”) and the International Centre for the Legal Protection of Human Rights (“Interights”)—were each involved in more than ten percent of the decisions (with two decisions involving both of them).<sup>108</sup> Consistent with these findings, a previous review of African Commission Activity Reports by Lindblom found that a majority of applications that led to decisions on the merits from 1997 to 2003 had been filed by one or more NGOs.<sup>109</sup> Lindblom also found some NGO concentration during that time period, although of the three NGOs named by Lindblom as being frequent parties before the Commission,<sup>110</sup> only Interights appears to have remained as heavily involved in the period considered here.

Neither of the two most frequently involved NGOs appears to have focused on any particular member state, as IHRDA represented alleged victims in cases brought against five different member states and Interights in cases brought against four different member states.<sup>111</sup> No obvious member state concentrations existed generally either, with only Nigeria and Zimbabwe appearing in slightly more than ten percent of the decisions involving NGOs.<sup>112</sup> The twenty-two remaining decisions involving NGOs are spread among twenty other member states.<sup>113</sup>

Finally and similar to SRJI, CEJIL, and other NGOs most frequently directly involved in decisions on the merits in the European and Inter-American human rights systems, both IHRDA and Interights appear to be tied into the larger international human rights community. IHRDA’s funding base includes both non-African NGO sources such as the Ford Foundation and the Swedish NGO Foundation for Human Rights and non-member state government sources, such as the Department for International Development UK.<sup>114</sup> Similarly, the Board of Directors and Advisory Council for the London-based Interights is drawn primarily from companies and NGOS from outside the African Commission’s member

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107. *Id.*

108. *Id.*

109. LINDBLOM, *supra* note 18, at 283 (discussing how twenty-eight out of forty-eight “communications had been filed by one or several NGOs”).

110. *Id.* at 284 (noting that the Nigerian organizations Constitutional Rights Project and Civil Liberties Organisation had filed multiple communications with the Commission, as had the British organization Interights).

111. Mayer Data, *supra* note 72.

112. *Id.*

113. *Id.*

114. *Funders*, IHRDA, <http://www.ihrda.org/funders/> (last visited Feb. 7, 2011).

states.<sup>115</sup> The only deviation from this pattern is that IHRDA's Board of Directors consists entirely of individuals from the member states, although one of them (a co-founder of IHRDA) currently works for the Open Society Justice Initiative, based in New York.<sup>116</sup> Again, these apparently extensive international linkages appear to have developed without any formal requirements by the African Commission or ACHPR.

### III. RAMIFICATIONS OF NGO INVOLVEMENT

NGOs have many avenues for involvement in the three regional human rights enforcement systems considered, including coming forward as alleged victims themselves, serving as representatives of alleged victims, and seeking the ability to intervene in a pending case as a third party. Yet in all three systems the primary avenue for NGO involvement over the ten year period ending in 2009 was as representatives of alleged victims. This result is perhaps not surprising, since all three systems appear to rely heavily on private parties bringing alleged human rights violations to the attention of the commissions and courts even though under the African and Inter-American human rights enforcement systems, the commissions have pro-active authority to investigate such violations.<sup>117</sup>

What is perhaps surprising is the difference in the extent of NGO-provided representation in the European system as compared to the Inter-American and African systems. In the European system, NGOs appear to have served as representatives in a relatively small proportion of cases that resulted in decisions on the merits—approximately four percent during the years reviewed—while in the other two systems NGOs served as representatives in a majority of such cases.<sup>118</sup> While there may be some undercounting of NGO involvement, particularly with respect to the European system for reasons detailed in the appendix, it seems highly unlikely that any undercounting would significantly change such a dramatic difference.

The reasons for this difference are not self-evident, although several hypotheses present themselves. One hypothesis is that the availability of legal aid in the European system but not, apparently, in the Inter-American or African systems makes representing alleged victims more financially attractive to private lawyers in Europe, although the apparent-

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115. See *Board of Directors*, INTERIGHTS, <http://www.interights.org/about-us-board/index.htm> (last visited Feb. 7, 2011); *International Advisory Council*, INTERIGHTS, <http://www.interights.org/about-us-advisory/index.htm> (last visited Feb. 7, 2011).

116. *Board*, IHRDA, <http://www.ihrda.org/board/> (last visited March 19, 2011).

117. See African Charter, *supra* note 53, arts. 45–46; see also American Convention, *supra* note 40, art. 41.

118. Mayer Data, *supra* note 72.

ly relatively low level of such aid would argue against this reason.<sup>119</sup> Another, also financially based hypothesis, is that the ECHR's common practice of awarding legal costs to alleged victims whose claims are successful may also make cases more attractive to private lawyers, although the fact that the vast majority of applications fail (primarily on admissibility grounds) makes reliance on such awards a risky proposition at best.<sup>120</sup> Finally, a perhaps more likely hypothesis is that, for the most part, the private bar in European member states is sufficiently large, financially stable, and not vulnerable to retaliation such that there are sufficient private lawyers willing to pursue human rights cases even if there is little chance of compensation for doing so.<sup>121</sup> Which, if any, of these hypotheses explains the apparent disparity in the number of NGOs representing alleged victims in the Inter-American and African systems as opposed to the European system is beyond the scope of this article, but could be a direction for future research into the operation of these systems and the defense of human rights more generally. However, even without knowing the exact reasons for this difference, it is possible to draw some ramifications for the development of human rights NGOs from this difference, as is detailed below.

A second important difference between the various systems is with respect to member state concentrations. In Europe, while NGOs are involved in a relatively small proportion of cases, those cases are disproportionately focused on two member states (Russian and Moldova) that are involved in almost two-thirds of the decisions with direct NGO involvement.<sup>122</sup> That concentration is substantially higher than the proportion of all decisions on the merits involving those two countries.<sup>123</sup> While

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119. See *supra* note 39 and accompanying text.

120. See, e.g., ECHR 1999–2008, *supra* note 73, at 77, 79 (reporting 181,965 “[a]pplications declared inadmissible or struck off” by the ECHR from 1999 through 2008, as compared to 8,260 decisions on the merits during the same time period); *Taking a Case to the European Court of Human Rights*, *supra* note 39 (noting that while private lawyers may be willing to take a case under a conditional fee agreement, they may be reluctant to do so because of the risk of not winning the case and therefore not being paid).

121. While it may also be that domestic systems for resolving alleged human rights violations are relatively effective in most European member states, the statistics for all decisions on the merits from 1999 through 2008 indicate that alleged victims from all of the member states seek relief at the ECHR; it is just that alleged victims from most of the member states do not appear to be represented by NGOs in the vast majority of cases. See, e.g., ECHR 1999–2008, *supra* note 73, at 80 (showing judgments involving every member state, except Montenegro and Monaco).

122. Mayer Data, *supra* note 72.

123. *Id.*

some member state concentrations appear in the other two systems, they are significantly more muted. This concentration in Europe appears to have been the result of five NGOs that focus all of their activities on these two member states,<sup>124</sup> demonstrating that a relatively small handful of NGOs can have a significant effect on the ECHR's docket of cases.

This observation leads to an important similarity between at least the European and Inter-American systems: the disproportionate role of one or a handful of NGOs. In Europe this disproportionate role is found with respect to the five NGOs that have brought cases against two specific member states.<sup>125</sup> In the Americas, this disproportionate role is found with respect to a single NGO (CEJIL) that does not have a particular member state focus.<sup>126</sup> In both systems, however, a single NGO or small group of NGOs significantly impacted the docket of the relevant bodies and therefore, presumably, the shaping of human rights law by those bodies (and, therefore, probably, the behavior of the targeted member states).

These observations suggest that the development and support of a few, or even a single, human rights NGO can have a profound effect on the development of human rights law in a region of the world. In Europe, this effect is seen through a handful of NGOs focused on member states that appear, for whatever reasons, to lack a private bar that is willing and able to bring claims of alleged human rights violations to the ECHR—a lack that does not apparently exist in most European member states. In the Americas, this NGO role is seen in the form of a single NGO that works throughout the region. In Africa, it appears that neither level of NGO concentration exists as of yet, although there are at least two NGOs that appear to be candidates for stepping into such a role on a regional-wide basis.<sup>127</sup>

These observations also have ramifications for the issue of NGO accountability that is the focus of this Symposium. Given the disproportionate role of a relatively few NGOs in this regional human rights enforcement system, it is natural to ask whether these NGOs have account-

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Of course, the existence of committed and well-resourced NGOs is only one ingredient for a successful regional human rights enforcement system. *See, e.g.*, George Mukundi Wachira, *African Court On Human and Peoples' Rights: Ten Years On and Still No Justice*, 2008 MINORITY RTS. GRP. INT'L 10–12 (noting other concerns about the effectiveness of the African Commission); Danwood Mzikenge Chirwa, *African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights*, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 48, at 335–36.



ability to outside individuals and groups to ensure that they use this influence appropriately. This is especially true since there do not appear to be any significant formal or legal limitations on the structure, leadership, funding, or other characteristics of NGOs that represent alleged victims or otherwise appear before the regional human rights bodies. Even a cursory review of the most heavily involved NGOs reveals, however, that well known and reputable individuals and groups from both within and outside of the relevant member states appear to provide significant oversight to these NGOs both through serving on the governing and advisory boards of these NGOs and through providing funding.<sup>128</sup> While a more in-depth review of these NGOs could be done, an initial review of these groups does not reveal a lack of accountability.

This apparent accountability, even without any formal or legal requirements, combined with the relatively wide open access to the regional human rights bodies, not only for NGOs but for all types of organizations, strongly suggests that there is no need in this context for any formal or legal limits or requirements on NGOs seeking to participate in proceedings between these bodies. This conclusion is in contrast to the limitations, discussed by some of my fellow presenters, on what groups qualify as “NGOs” for purposes of gaining a place at the table at other international bodies, such as the United Nations, the World Health Organization, and the World Trade Organization.<sup>129</sup> This contrast makes sense, however, once one realizes that for the latter entities, organizations identified as “NGOs” have special access to deliberations and decision-making processes that is not enjoyed by other private parties. For the regional human rights bodies discussed here, there is no such special access. Instead, the filter for involvement—particularly in decisions on the merits—is the merits (and admissibility) of the underlying case or the usefulness to the tribunal of the information presented (for *amicus curiae* or interveners) and not the intrinsic characteristics of the presenter or their representative (beyond perhaps a connection to a member state). It therefore appears unnecessary to attempt to limit the definition of “NGO” for purposes of appearing before the regional human rights bodies in any significant way (except perhaps for requiring a connection to a member state). This conclusion suggests that the decision to limit access to the African court to only NGOs granted observer status before the African commission imposed an unnecessary barrier to NGO involvement with that court.<sup>130</sup>

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128. See *supra* nn. 86–89, 101–03, and 115–16 and accompanying text.

129. See *supra* note 16 and accompanying text.

130. See *supra* note 60 and accompanying text.

## CONCLUSION

This study is limited to decisions on the merits and therefore does not explore the role of NGOs in bringing alleged violations to these bodies that are either unsuccessful because of a lack of admissibility or other defect, or are resolved through settlement or other means short of a decision on the merits. This study also does not explore other means by which NGOs may influence regional human rights enforcement systems. Nevertheless, the observations described above indicate that it is worthwhile to consider not only the level of direct NGO involvement in a particular regional human rights enforcement system, but also to consider the patterns of that involvement and to compare those patterns between systems. Doing so may provide indications of which NGOs, and in what locations, are doing the most to not only protect individual victims but also to shape the agendas of the commissions and courts that make up these systems. Such indications may in turn suggest where attention should be directed to ensure the strength of such critical human rights NGOs. In particular, this study reveals the critical role of NGOs in representing alleged victims, particularly in countries or regions where it appears the private legal bar is not, for whatever reasons, providing such representation. By identifying and supporting such NGOs, the work of the regional human rights enforcement systems may then be significantly enhanced.

## APPENDIX

## METHODOLOGY

*1. In General*

*Year:* The year of each decision was determined based on the date of that decision reported in the decision itself. For dating issues that arose with respect to the African Commission, see the section below relating to that commission.

*Decisions on Merits:* Whether a decision was on the merits was determined based on the classification provided by the relevant body (commission or court), if available, or on a review of the decision itself. Decisions on the merits were defined for these purposes as decisions that reached an ultimate conclusion regarding whether the member state involved had, or had not, violated the asserted portions of the relevant human rights document. Decisions on the merits therefore did not include the following types of decisions:

- Admissibility Decisions: Decisions regarding whether the applicants had met the threshold requirements for consideration of their claims, such as exhaustion of domestic remedies, unless an admissibility decision was part of a decision that also determined whether there had been a violation.
- Decisions Closing Cases for Other Reasons: These decisions included decisions memorializing settlements by the parties, decisions acknowledging withdrawn applications, and decisions closing cases because of a failure on the part of the applicant to pursue their case.
- Decisions Reconsidering Earlier Decisions on Merits: Such decisions included, for example, IACHR decisions interpreting earlier decisions on the merits in the same case.

*NGO Involved:* Whether a decision involved an NGO was determined by reviewing each decision identified as possibly having NGO direct involvement (using the methods described below for each relevant body) for entities that were NGOs. Whether a named entity was an NGO was determined based on the description of the entity in the decision, in other decisions of the same body, or, absent such information, the description of the entity provided by the entity itself on its website. For purposes of this article, entities identified as political parties were not considered NGOs because of their mixed private/public character. The instances of political parties directly involved in decisions on the merits were also

relatively rare, with the parties generally among the alleged victims in those decisions.

Since this methodology required that the NGO involved be identified in the decision, it is possible that NGO involvement was undercounted to the extent the individual representatives involved in a given case in fact worked for an NGO but the NGO itself was not identified in the opinion. For example, in at least four Inter-American Commission decisions involving death row inmates, the United Kingdom attorney who represented the inmates was identified in the decisions as associated with a private law firm, even though he was also associated with an NGO (the Death Penalty Project) housed at that firm at the time.<sup>131</sup> Because, however, the NGO was not identified in the decisions, those decisions were not counted as having direct NGO involvement. Similarly, an IACHR decision identified two individuals as representatives of the alleged victims who work for the Center for Civil and Human Rights at Notre Dame Law School, but that association was not mentioned in the decision.<sup>132</sup> Again, because the NGO was not identified in the decision, that decision was not counted as having direct NGO involvement. Finally, in a number of decisions before the ECHR, the Inter-American Commission, and the IACHR, representatives were identified as professors but there is nothing to indicate that the institutions where they teach are themselves involved

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131. In each decision the representative of the alleged victim is identified only as Saul Lehrfreund of the London, United Kingdom law firm of Simons Muirhead & Burton. Paul Lallion v. Grenada, Case 11.765, Inter-Am. Comm'n H.R., Report No. 55/02, OEA/Ser.L./V/II.02, doc. 5 rev. 1 ¶ 1 (2002); Benedict Jacob v. Grenada, Case 12.158, Inter-Am. Comm'n H.R., Report No. 56/02, OEA/Ser.L./V/II.02, doc. 5 rev. 1 ¶ 1 (2002); Denton Aitken v. Jamaica, Case 12.275, Inter-Am. Comm'n H.R., Report No. 58/02, OEA/Ser.L./V/II.02, doc. 5 rev. 1 ¶ 1 (2002); Dave Sewell v. Jamaica, Case 12.347, Inter-Am. Comm'n H.R., Report No. 76/02, OEA/Ser.L./V/II.02, doc. 5 rev. 1 ¶ 1 (2002). Saul Lehrfreund is, however, also the co-founder and joint Executive Director of The Death Penalty Project, an NGO that was housed at the Simons Muirhead & Burton firm until 2005. *Executive Directors and Staff*, THE DEATH PENALTY PROJECT, [http://www.deathpenaltyproject.org/content\\_pages/2](http://www.deathpenaltyproject.org/content_pages/2) (last visited Jan. 24, 2011); *Directors and Trustees*, THE DEATH PENALTY PROJECT, [http://www.deathpenaltyproject.org/content\\_pages/8](http://www.deathpenaltyproject.org/content_pages/8) (last visited Mar. 1, 2011).

132. Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006); H. Sofia Galván Puente, *Legislative Measures as Guarantees of Non-Repetition: A Reality in the Inter-American Court, and a Possible Solution for the European Court*, REVISTA IIDH 69, 89 (2009) (discussing how in "*Castro Castro v. Peru* . . . the Center for Civil and Human Rights of the University of Notre Dame represented the victims").

in the case.<sup>133</sup> Such decisions are therefore also not counted as having direct NGO involvement.

For purposes of this Article, direct NGO involvement did not include merely a mention of an NGO in the facts at issue, such as, for example, as a participant in the domestic proceedings involving the claims asserted or as a source of evidence such as a report provided by one of the parties.<sup>134</sup> Similarly, direct NGO involvement did not include mention of an NGO as a group to which the alleged victim belonged or sought to belong if the NGO itself was not a party to the proceedings before the relevant body. Finally, references to bar associations were not counted as direct NGO involvement when the references were made only for purposes of identifying the bar association to which the individual representatives of alleged victims belonged or as a source of information regarding whether legal fee reimbursement requests were reasonable, and lacked any indication that the bar association itself was party to the proceedings before the relevant body.

*Role of NGO (Representative, Applicant, or Amicus Curiae/Intervener):* The role of the NGO was determined by reviewing each decision identified as having direct NGO involvement. The NGO was classified as a representative if it was explicitly identified as such for the alleged victims, or if the NGO was identified as the applicant but the alleged victims were individuals or entities other than the NGO itself. The NGO was classified as an applicant if the NGO itself was identified in the decision as the alleged victim or one of the alleged victims. Finally, the NGO was classified as an *amicus curiae* or intervener only if explicitly identified as such in the decision.

## 2. Specific Bodies

### a. European Court of Human Rights<sup>135</sup>

Given the volume of decisions on the merits from 2000 to 2009, decisions in which NGOs were involved were identified initially by conducting a search for common words and terms associated with NGOs using

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133. See, e.g., *Cesar Fierro v. United States*, Case 11.331, Inter-Am. Comm'n H.R., Report No. 99/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶ 1 (2003) (identifying one of the representatives of the alleged victim as a Professor of Law at Ohio State University).

134. See LINDBLOM, *supra* note 18, at 328 (noting the use by non-NGOs of NGO materials as evidence).

135. ECHR, [http://www.echr.coe.int/echr/homepage\\_EN](http://www.echr.coe.int/echr/homepage_EN) (last visited Jan. 24, 2011).

the Lexis database of these decisions.<sup>136</sup> The Lexis database was chosen, as opposed to the ECHR's own HUDOC database,<sup>137</sup> because of the versatility and speed of the former database. To confirm the accuracy of the Lexis database, parallel searches in the HUDOC database for 2009 were also conducted, which found all of the same cases as identified through the Lexis database using the same search terms. All of the decisions found through this search were then reviewed to determine both whether the decision was on the merits and whether an NGO was directly involved, using the criteria described in the "In General" section above. For example, a decision might include the word "association" because the alleged victims asserted a violation of freedom of association, not because an "association" was a party to the proceedings.

The search results also revealed a number of decisions where an entity clearly identified as an NGO either in other cases or through other sources was not so identified in that particular decision, leading to the question of whether the search results were under-inclusive because of such omissions. Searches using the names of the NGOs identified as such in other decisions (except for NGOs with such common names that they would yield numerous false results, *e.g.*, Justice, Liberty) revealed an additional ninety-three decisions with direct NGO involvement. Even with these additional searches, however, it is possible that some NGOs that either were not identified through the original search terms or had too common names to be searched for using those names in fact directly participated in ECHR decisions but, because they were not identified in any way as NGOs in the decision text, their participation is not reflected in the reported results.

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136. See Source Information, LEXISNEXIS, [http://w3.lexis.com/research2/source/srcinfo.do?\\_m=3a4605c03ad091a4af6b2e43b7e49efb&src=360688&wchp=dGLzVlZ-zSkAB&\\_md5=0c2131b4355b53915286bd9781cdf827](http://w3.lexis.com/research2/source/srcinfo.do?_m=3a4605c03ad091a4af6b2e43b7e49efb&src=360688&wchp=dGLzVlZ-zSkAB&_md5=0c2131b4355b53915286bd9781cdf827) (last visited Jan. 24, 2011). The database contains decisions from November 1960 through current, as received directly from the ECHR. *Id.* The search terms used were: "association"; "charitable organization"; "charity"; "NGO"; "N.G.O."; "non-for-profit"; "non-governmental organization"; "non-profit"; "nonprofit"; "not-for-profit"; "NPO"; "religious group"; and "religious organization". *Id.* Reflecting the British spelling, the terms including the word "organization" were also searched for using "organisation" instead. Mayer Data, *supra* note 72.

137. HUDOC Database, ECHR, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (last visited Jan. 24, 2011).

b. Inter-American Commission on Human Rights<sup>138</sup>

The decisions on the merits by the Inter-American Commission were identified by relying on the Commission's own classification of its decisions, which it divides into "Admissible," "Inadmissible," "Friendly Settlement," and, more recently "Archival Decisions" categories as well as "Merits."<sup>139</sup> The full text of all of the Commission's decisions is available on the Commission's website, divided both by these classifications and by the year in which the Commission issued the decision.<sup>140</sup> For the 2000 through 2009 time period, all of the "Merits" decisions on the Commission's website were reviewed for direct NGO involvement based on the methodology described in the "In General" section above.

c. Inter-American Court of Human Rights<sup>141</sup>

The full text of all of IACHR's decisions are available on the IACHR's website in chronological order.<sup>142</sup> For the 2000 through 2009 time period, all of the IACHR's decisions were reviewed to determine if they were decisions on the merits and, if they were, for direct NGO involvement, using the methodology described in the "In General" section above for both determinations.

d. African Commission on Human and Peoples' Rights<sup>143</sup>

The full texts of the African Commission's decisions are available on the Commission's website in chronological order based on the date of the filing of the relevant application (called a "communication"). For decisions involving multiple applications, the decision is listed based on the earliest application filed. This ordering made it difficult to easily identify decisions issued from 2000 through 2009. To overcome this difficulty, all decisions involving applications filed in 1993 or later—including decisions involving multiple applications when one or more of the applica-

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138. INTER-AM. COMM'N H.R., <http://www.cidh.oas.org/DefaultE.htm> (last visited Jan. 24, 2011).

139. *E.g., Cases Published During the Year 2009*, INTER-AM. COMM'N H.R., <http://www.cidh.oas.org/casos/09.eng.htm> (last visited Jan. 24, 2011).

140. *Cases Published by the IACHR by Year*, INTER-AM. COMM'N H.R., <http://www.cidh.oas.org/casos.eng.htm> (last visited Jan. 24, 2011).

141. CORTE INTERAMERICANA DE DERECHOS HUMANOS [INTER-AM. CT. H.R.], <http://www.corteidh.or.cr/index.cfm?CFID=842550&CFTOKEN=49913401> (last visited Jan. 24, 2011).

142. *Jurisprudencia casos contenciosos*, CORTE INTERAMERICANA DE DERECHOS HUMANOS, <http://www.corteidh.or.cr/casos.cfm> (last visited Jan. 24, 2011).

143. AFR. COMM'N HUM. & PEOPLES' RTS., [http://www.achpr.org/english/\\_info/news\\_en.html](http://www.achpr.org/english/_info/news_en.html) (last visited Jan. 24, 2011).

tions had been filed in 1993 or later—were reviewed to determine if the decision had been issued in the relevant time period. While several decisions based on applications filed in 1993 and 1994 lacked a date for the decision (including lacking any mention of the session of the Commission at which the decision had been rendered, which would have indirectly identified the year in which the Commission had issued the decision), only one of those decisions was a decision on the merits.<sup>144</sup> Given the fact that this decision was on a 1993 application, the decision itself was relatively short (less than three pages), and there was nothing in the decision to indicate that consideration of the application had been unduly delayed (in fact, if anything the indications were to the contrary in that the Commission had declared the application admissible at the Commission's 16th session, held in 1994), it was decided that the Commission almost certainly rendered this decision before 2000 and so it was not included in the data reported in the main text.<sup>145</sup>

All decisions found to have been issued by Commission from 2000 through 2009 were then reviewed to determine if they were decisions on the merits and, if they were, for direct NGO involvement, using the methodology described in the "In General" section above for both determinations.

e. African Court on Human and Peoples' Rights<sup>146</sup>

The ACHPR's website lists only a single judgment (with two opinions), issued by the ACHPR in late 2009.<sup>147</sup> That judgment is not a decision on the merits, as the term is defined for purposes of this article, because the ACHPR determined that it had no jurisdiction to hear the case.<sup>148</sup> The ACHPR does not appear to have issued any other decisions from 2000 through 2009.<sup>149</sup>

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144. See *Civil Liberties Organization v. Nigeria*, Afr. Comm'n on Hum. & Peoples' Rts., Report No. 101/93 (2000), available at [http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.101-93.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.101-93.pdf).

145. See *id.*; see also *Sessions*, AFR. COMM'N ON HUM. & PEOPLES' RTS., [http://www.achpr.org/english/\\_info/past\\_en.html](http://www.achpr.org/english/_info/past_en.html) (last visited Jan. 24, 2011) (listing the dates and locations for past Commission sessions).

146. AFR. CT. HUM. & PEOPLES' RTS., <http://www.african-court.org/en/> (last visited Jan. 24, 2011).

147. *Latest Judgments*, *supra* note 103.

148. *Senegal Judgment*, *supra* note 103, ¶ 37.

149. *Latest Judgments*, *supra* note 103.



# THROUGH THE LOOKING GLASS: EUROPEAN PERSPECTIVES ON NON- PROFIT VULNERABILITY, LEGITIMACY AND REGULATION

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The ability of an NGO to govern itself free of outside interference is not—any more than the right to freedom of association—absolute—but any restrictions imposed must have a legal basis, serve a legitimate purpose and not be disproportionate in their effect. Some admissible restrictions are expressly recognised in international standards and others may be inferred from them.<sup>1</sup>

This Article reviews European institutional efforts to develop a European regulatory framework for non-profit organizations and chronicles the motivations for this new endeavour on the part of the European Union (“EU” or the “Union”). Set initially against a background of concerns over terrorism financing, the EU’s interest in regulation of non-governmental organizations (“NGOs”)<sup>2</sup> has expanded beyond the remit of counter-terrorism measures to include greater scrutiny of non-profits under the heading of accountability and transparency. This Article explores the tensions inherent in the roll-out of any pan-European legislative agenda, which are magnified in the case of the non-profit sector given the varying legal definitions of charitable and public benefit entities, the regional differences in the supervision of such entities, the absence of a point of reference for exchange of learning and experience at a

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1. Council of Europe, *Expert Council on NGO Law, Second Annual Report: The Internal Governance of Non-Governmental Organisations*, ¶ 17, OINGConf/Exp. 1/2010 1 (Jan. 2010).

2. This Article uses the terms non-profit organization (“NPO”) and non-governmental organization (“NGO”) interchangeably. In general, the European Commission also uses both terms. In the past, the Commission seemed to favour the NGO concept. See, e.g., *The Commission and NGOs: Building a Stronger Partnership*, COM (2000) 11 final (Jan. 18, 2000) (a Commission Discussion Paper which sought to suggest ways of providing a more coherent Commission-wide framework for co-operation with NGOs that had hitherto been organised on a sector-by-sector basis). More recently, in the development of its guidelines to prevent use of NGOs for terrorist financing purposes, the Commission has switched from NGO to NPO terminology. *The Prevention of and Fight Against Terrorism Financing Through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector*, COM (2005) 620 final (Nov. 29, 2005).

transnational level within the EU, and the operational distance between agencies charged with NGO supervision, financial crime regulation, and counter-terrorism security.

Part I outlines the international call for better non-profit regulation in the wake of 9/11 and the universal problems experienced in giving full effect to that call. Part II then considers the particular historical and legal difficulties that the EU has experienced in legislating for non-profit organizations in the past. Part III moves on to review European efforts to implement the Financial Action Task Force ("FATF") Special Recommendations. In this regard, the Article looks at the 2005 Communication on the Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-Profit Sector, promulgated by the European Commission (the "Commission"), and how it attempted to introduce a regulatory (albeit 'voluntary') regime for charities and the non-profit reaction to these Commission initiatives.

Part IV turns its attention to the EU's re-assessment of its counterterrorism strategy in the context of non-profit organizations in light of three important reports carried out between 2007 and 2009. These reports, though coming from different perspectives, make a common point regarding non-profit regulation: the best European regulation is based on empirical evidence of abuse, is proportional to the perceived wrong, and is sensitive both to existing national regimes and to the flexibility that humanitarian organizations, in particular, require to carry out their missions in areas of high risk. Part V reviews the Commission's most recent foray in the area of non-profit regulation with the release of its Discussion Paper on Voluntary Guidelines for EU-based non-profit organizations. It outlines the challenges facing the European Commission as it works towards the publication of its proposed Communication on Voluntary Guidelines for EU-based Non-profit Organizations in 2011 and how these challenges are likely to affect international non-profits' delivery of their charitable missions within and without the European Union.

Part VI concludes that the current institutional passion for combating the financing of terrorism appears set to be the driving influence behind the proposed European regulation of non-profit organizations. It is submitted that a more balanced approach, which would still speak to the prevention of terrorism, would be to focus on improving non-profit governance in those areas that raise concern at EU level or that may particularly benefit from a concerted European (as opposed to an ad hoc Member State) policy solution. In this context the contrasting regulatory experiences of the United States Department of the Treasury (with its focus on the enforcement of anti-terrorist financing guidelines) and the Council

of Europe's Expert Council on NGO Law (with its focus on internal NGO governance) are briefly set out as diverging policy options for the European Commission's consideration.

#### I. THE BACKDROP TO EUROPEAN REGULATION

In October 2001, the FATF, in response to 9/11, issued nine special recommendations on terrorist financing. Special Recommendation ("SR") VIII focuses on the activities of non-profit organizations and requires that:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- by terrorist organisations posing as legitimate entities;
- to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.<sup>3</sup>

The FATF SR VIII created a political climate in which it was seen as unacceptable for a signatory state to have ineffective laws overseeing non-profit activity in the context of combating terrorist financing.<sup>4</sup> In his book, *Agendas, Alternatives and Public Policies*,<sup>5</sup> John Kingdon identifies the prerequisites for effective policy change as being the convergence of three streams, namely, a recognised and existing "problem," an available and waiting "solution," and the necessary catalytic "political climate" to force problem and solution together through an open policy

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3. Financial Action Task Force [FATF] & Groupe d'Action Financière [GAFI], *FATF IX Special Recommendations*, at 3 (Oct. 2001).

4. See G8 Finance Ministers' Statement at Deauville, (May 17, 2003), available at [http://www.minefi.gouv.fr/fonds\\_documentaire/archives/communiqués/2003/c0305192\\_angl.htm](http://www.minefi.gouv.fr/fonds_documentaire/archives/communiqués/2003/c0305192_angl.htm); see also G8 Justice & Home Affairs Ministers, *Recommendations for Enhancing the Legal Framework to Prevent Terrorist Attacks* (May 11, 2004), available at [http://www.usdoj.gov/criminal/cybercrime/g82004/G8\\_Recs\\_Legal\\_Frameworks\\_Preventing\\_Terrorism.pdf](http://www.usdoj.gov/criminal/cybercrime/g82004/G8_Recs_Legal_Frameworks_Preventing_Terrorism.pdf); Press Release, Council of the Eur. Union, Council Declaration on the EU Response to the London Bombings (July 13, 2005) [hereinafter London Bombings Press Release], available at <http://register.consilium.europa.eu/pdf/en/05/st11/st11116.en05.pdf>.

5. JOHN KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (Eric Stano ed., 2d ed. 2003).

window thereby creating policy change.<sup>6</sup> When a policy window opens, in the words of Kingdon, “participants dump their conceptions of problems, their proposals, and political forces into the choice opportunity, and the outcomes depend on the mix of elements present and how the various elements are coupled.”<sup>7</sup> In other words, prevailing circumstances affect policy outcomes in so far as they influence our conceptions of both the problem and the likely solution. Identifying those prevailing circumstances can thus help us better understand resulting policy outcomes that emerge.

The FATF Special Recommendations seized upon the catalytic event that was the political turmoil following the 9/11 terrorist attacks to open a new policy window in respect of non-profit regulation. Finding the correct ‘solution’ to push through that window has not proven easy. To a large degree, there is lack of agreement as to the nature of the ‘problem,’ making it all the more difficult to arrive at a consensual solution. Policymakers may argue that public security and the wider public interest demand greater regulatory oversight of charities post 9/11 due to their perceived vulnerability to abuse through terrorist financing. Non-profits may concede the argument in favour of regulation if two conditions are met—first, the reality of the perceived threat is supported by empirical evidence; second, the measures are proportional to the likelihood of the alleged threat occurring. As yet, there has been no meeting of the minds on these all important issues of threat and proof.

The recent pace of regulatory change in NGO governing legislation in a number of FATF member states, however, would seem to imply a willingness by national governments to take action.<sup>8</sup> Undoubtedly, the close scrutiny of states’ progress via FATF mutual evaluation reports has put

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6. *Id.* at 88.

7. *Id.* at 166.

8. Reference in this regard can be made to the Charities and Trustee Investment (Scotland) Act, 2005, (A.S.P. 10), the Charities Act, 2006, c. 50 (Eng.), the Charities Act (Northern Ireland), 2008, c. 12, and Charities Act, 2009 (Act No. 6/2009) (Ir.). Many of the newer EU member states have completely overhauled their non-profit regimes in recent years. Note, for instance, Poland’s introduction of its Law on Public Benefit Activity and Volunteerism, (Poland), 2003; Law on Non-Profit Legal Entities, (Bulgaria), Amendment 2006, SG No105/22.12.2006 (2006); and Estonia’s Non-Profit Association Act, (Estonia), 1996, Amendment 2006, RT I 2005 and its 2005 amendments to Foundations Act 1995, Foundation Act (Estonia), 1995, Amended 2005, RT I 2004. More sporadic change is evident amongst older EU continental member states. *See, e.g.*, Belgium’s La Loi de L’Association Sans But Lucratif, (Belgium), Amended 2002.; Spain’s Foundation Law 2002; and Finland’s Foundation Law (Finland), 109/31, Amended 248/2001.

pressure on states to act.<sup>9</sup> The FATF has an oversight ally in the form of the United Nation's ("UN") Counter Terrorism Committee, which, in furtherance of Security Council Resolution 1373 (imposing binding obligations on all states to adopt a series of counterterrorism measures), monitors the extent to which states have the necessary laws and regulations in place to ensure that charities and other non-profits are not being used to finance or otherwise support terrorism.<sup>10</sup> There is thus great emphasis on the need for new or revised non-profit regulation. The form that this regulation should take, however, has proved more difficult to devise. A related area, yet to be tackled by legislators and policymakers alike, is the acceptable impact of any such measures on non-profit organizations and their missions.<sup>11</sup>

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9. See, e.g., FATF & GAFI, *Third Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorism: UK and Northern Ireland*, at 244 (June 29, 2007), available at <http://www.fatf-gafi.org/dataoecd/55/29/39064399.pdf>, awarding the UK a "largely compliant" rating for SR VIII on the basis that at the time Northern Ireland's legislation did not cover the registration, transparency, and supervision of charities. Ireland received a "partially compliant" rating from the FATF on the basis that "Ireland is in the process of completing a review of its NPO sector, but has not yet implemented measures to ensure accountability and transparency in the sector so that terrorist organisations cannot pose as legitimate non profit organisations, or to ensure that funds/assets collected by or transferred through non-profit organisations are not diverted to support the activities of terrorists or terrorist organisations." See FATF & GAFI, *Third Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorism: Ireland*, at 135 (Feb. 17, 2006), available at [http://www.antimoneylaundering.gov.ie/en/AML/FATF-Third\\_mutual\\_eval.pdf/Files/FATF-Third\\_mutual\\_eval.pdf](http://www.antimoneylaundering.gov.ie/en/AML/FATF-Third_mutual_eval.pdf/Files/FATF-Third_mutual_eval.pdf). In a subsequent follow-up report on the UK in 2009, the FATF recognised that the United Kingdom had made significant progress in addressing deficiencies identified in the 2007 Report to be removed from the regular follow-up process and agreed that it should henceforth report on a biennial basis.

10. In Ireland's case, a United Nations Security Council Counter-Terrorism Committee requested that Ireland review and update its charity legislation amid fears that charities set up in Ireland could be abused. This was the political driver that prioritised the enactment of new charity regulation. See S.C. Res. 816, U.N. Doc. S/Res/816 (Aug. 18, 2003); see also, 589 Dáil Deb. Col. 3 (Oct. 5, 2004). New Zealand's legislative efforts culminating in the Charities Act 2005 stemmed from a similar UN request to that country. See *Security: New Zealand Response to the United Nations Security Council Counter-Terrorism Committee*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE (April 30, 2004), <http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/International-Security/0-NZ-UN-Counter-Terrorism-April-04.php>.

11. ERIC ROSAND, ALISTAIR MILLAR, & JASON IPE, CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, CIVIL SOCIETY AND THE UN GLOBAL COUNTERTERRORISM STRATEGY: OPPORTUNITIES AND CHALLENGES (Sept. 2008).

In its 2002–2003 Annual Report, the FATF, noting the level of member non-compliance with SR VIII, recognized the complexity of the issues involved and the need for further guidance.<sup>12</sup> In an effort to facilitate better implementation of SR VIII, the FATF issued a Best Practices Paper in 2002<sup>13</sup> and a subsequent Interpretative Note in 2006.<sup>14</sup> The Best Practices Paper highlighted the need for governments to focus their oversight of non-profit organizations in the core areas of a) financial transparency; b) programme verification; and c) administration.<sup>15</sup> The Interpretative Note, issued four years later, reflects the continuing difficulties experienced by member states in giving tangible effect to SR VIII.<sup>16</sup> To this end, it reiterates the general objectives of SR VIII and the general principles for compliance. In particular, it focuses on the need for countries to a) engage with non-profit organizations through appropriate outreach to the sector; b) promote effective oversight and monitoring of such organizations; c) undertake effective investigation and information gathering; and d) put in place appropriate mechanisms for international cooperation.<sup>17</sup> Notwithstanding these clarifications, uncertainties of application still remain.<sup>18</sup> FATF members, amongst which are fifteen of the EU's Member States and the European Commission,<sup>19</sup> still experience

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12. FAFT & GAFI, *Annual Report 2002–2003*, ¶ 28 (June 20, 2003), available at <http://www.fatf-gafi.org/dataoecd/13/0/34328221.pdf> (noting that “[w]ith regard to assessing compliance levels for SR VIII, FATF members continue to consider the best way to accomplish this task taken into account the best practices paper issued by FATF on this subject in October 2002. The FATF is likely to continue examining appropriate assessment criteria in the context of development of further guidance on this recommendation.”).

13. FATF & GAFI, *Combating the Abuse of Non-Profit Organizations: International Best Practices* (Oct. 2002) [hereinafter *Combating the Abuse of Non-Profit Organizations*], available at <http://www.fatf-gafi.org/dataoecd/53/53/34260889.pdf>.

14. FATF & GAFI, *Interpretative Note to Special Recommendation VIII: Non-Profit Organisations* (Feb. 2006) [hereinafter *Interpretative Note to SR VIII*], available at <http://www.fatf-gafi.org/dataoecd/43/5/38816530.pdf>.

15. *Combating the Abuse of Non-Profit Organizations*, *supra* note 13.

16. *Interpretative Note to SR VIII*, *supra* note 14.

17. *Id.* ¶ 6.

18. Mark Pieth, *Criminalising the Financing of Terrorism*, 4 J. INT'L CRIM. JUST. 1074, 1075 (2006) (observing that the distinction between charitable functions and the support of guerrilla warfare is not easy, a problem unresolved by the Interpretative Note to Special Recommendation VIII).

19. Newer members of the European Union who are not members of the FATF are currently members of the Council of Europe's Moneyval process. Comprising twenty-eight permanent members and two temporary members, Moneyval obtained associate member status of the FATF in January 2006, having previously enjoyed observer status. Within the FATF, Moneyval is viewed as a FATF style regional body (“FSRB”).

difficulties with SR VIII and are unable to agree on a common approach to its implementation to date.<sup>20</sup>

The difficulties experienced in a European context stem in part from the fact that the EU has not played a regulatory role in the past in regard to non-profit organizations. The reasons for this regulatory void are best attributed to a combination of historical and legal factors, discussed below.<sup>21</sup> Whether the policy window that has now opened as a result of the FATF SRs will enable the EU to overcome this regulatory void is an open question. Much will depend upon whether the prevailing circumstances, linked as they are to anti-terrorist concerns, will be influential enough to overcome the past legal and historical obstacles and result in the development of an appropriate policy solution.

## II. THE MANDATE FOR REGULATORY REVIEW

Historically, the Treaty of Rome was silent on the role of non-profit organizations under EU law. For almost fifty years, the only express reference to non-profit organizations in the Articles of the Rome Treaty was a negative one. Article 54 of the Treaty on the Functioning of the European Union ("TFEU") expressly excludes non-profit bodies based in one Member State from the right to establish in the territory of another Member State, a right that is enjoyed by for-profit companies and EU workers.<sup>22</sup> This difference in treatment highlights the EU's preference for fa-

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20. For the comments of the European Commission in this regard, conceding to such difficulties, see Commission of the European Communities, *The Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-Profit Sector*, at 9, COM (2005) 620 final (Nov. 29, 2005) [hereinafter Commission Communication (2005) 620 final]; see also Eur. Comm'n, Directorate-General Justice Freedom & Security, *Independent Scrutiny in Response to Recommendation 41 of the EU Counter Terrorist Financing Strategy to Assess the EU's Efforts in the Fight against Terrorist Financing: Final Report*, 5 (2007) [hereinafter *Independent Scrutiny Report*]. The report noted that in the context of the FATF Special Recommendations, "there are still problems with regard to definitions of terrorism . . . and a consensus on policy towards NPOs (SRVIII) is still to be reached." *Id.*

21. See *infra* Part II.

22. Article 54 of the TFEU provides: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making." Consolidated Version of the Treaty on the Functioning of the European Union art.54, Sep. 5, 2008, 2008 O.J. (C 115) 69 [hereinafter TFEU].

cilitating economic actors within the EU. For a Treaty founded on economic interests and corresponding trade rights, which created a community for many years known as the "European *Economic* Community," this initial disregard for non-profit bodies is unsurprising.<sup>23</sup>

It was not until 2000, with the ratification of the Treaty of Nice, that a specific reference to "civil society" first appeared in the governing provisions of the Treaty.<sup>24</sup> The Nice Treaty amended Article 257 TEC to include reference to "organised civil society" as one of the constituent groupings to be represented by the Economic and Social Committee, thus giving non-profit organizations an indirect (though largely ineffective) voice in European affairs.<sup>25</sup> More recently, the Treaty of Lisbon paid further lip service to the important role that civil society organisations play in European democracy,<sup>26</sup> yet even this fleeting reference is a watered down version of earlier draft provisions that attempted to formalise institutional interaction with civil society organizations.<sup>27</sup> From a constitu-

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23. See Case C-70/95, *Sodemare SA v. Regione Lombardia*, 1997 3 C.M.L.R. 591, 604 (noting that "[Article 54 TFEU] . . . has the function of assimilating companies, firms and other legal persons, other than those which are non-profit-making (hereinafter normally referred to as "commercial companies"), to natural persons who are nationals of Member States, for the purposes of freedom of establishment. Thus, non-profit-making companies, firms and other legal persons do not benefit from freedom of establishment.").

24. Between 1957 and 2000 there were protocols to various Amending Treaties that did refer to charities and non-profit organizations such as Declaration 23 of the Treaty on European Union ("The Conference stresses the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of cooperation between the latter and charitable associations and foundations as institutions responsible for social welfare establishments and services." Treaty on European Union, Declaration 23, July 29, 1992, 1992 O.J. (C 191)) and Declaration 38 of the Treaty of Amsterdam ("The Conference recognises the important contribution made by voluntary service activities to developing social solidarity. The Community will encourage the European dimension of voluntary organisations with particular emphasis on the exchange of information and experiences as well as on the participation of the young and the elderly in voluntary work." Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Declaration 38, Oct. 2, 1997, 1997 O.J. (C 340)). These declarations, however, had no legal basis in European law, and thus do not provide a source of legal rights to such organizations.

25. See Article 300 of the TFEU, introduced upon the ratification of the Nice Treaty, which makes specific reference to "civil society" and its right of representation within the European Economic and Social Committee. TFEU art. 300.

26. See Article 15 of the TFEU, promising a level of transparency and openness in the operation of the Union's institutions so as to "promote good governance and ensure the participation of civil society." *Id.* art. 15.

27. Earlier draft provisions required European institutions to "maintain an open, transparent and regular dialogue with representative associations and civil society." The



tional perspective, therefore, the European approach towards non-profit organizations has progressed from a negative to a superficially positive attitude.

In practice, European institutions have adopted a functional approach towards non-profits. The European Court of Justice has found non-profits to be subject to community law in areas ranging from labour law<sup>28</sup> to competition law,<sup>29</sup> and recent case law confirms that non-profit organizations enjoy the same rights under the Treaties as for-profit entities in relation to the free movement of capital between Member States.<sup>30</sup> With regard to Community legislative competence, as long ago as 1987, the Committee on Legal Affairs and Citizens' Rights of the European Parliament suggested three potential Treaty bases that could provide Community competence over non-profit organizations.<sup>31</sup> The utility of these various Treaty provisions has been somewhat mixed.

Article 18 TFEU, with its focus on prohibition of discrimination on the basis of nationality, has provided the European Court of Justice (the "ECJ") with an indirect and limited means of reviewing national laws that discriminate against certain member-based non-profit associations.<sup>32</sup> The use of Articles 114 TFEU and 352 TFEU as legislative bases has

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ratified version of Lisbon (Article 19 TFEU), however, limited this more specific promise of engagement to churches and religious organizations. *Id.* art. 19.

28. Case C-29/91, *Sophie Redmond Stichting v. Hendrikus Bartol*, 1992 E.C.R. I-3189 (holding that functionally there was nothing to prevent the application of the Directive on the Transfer of Undertakings to non-profits on the transfer of their employees).

29. The European Court of Justice has held that the non-profit-making nature of the entity in question or the fact that it seeks non-commercial objectives is irrelevant for the purposes of defining it as an "undertaking" for the purposes of the application of European competition law. *See* Case C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v. Ministère de l'Agriculture et de la Pêche*, 1995 E.C.R. I-4013, ¶ 21; Joined Cases C-180/98 to C-184/98 *Pavlov Stichting Pensioenfonds Medische Specialisten*, 2000 E.C.R. I-6451, ¶ 117.

30. *See, e.g.*, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt Munchen fur Körperschaften*, 2006 E.C.R. I-8203; Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, 2009 E.C.R. I-359.

31. Eur. Communities & Eur. Parliament, *Report on Non-Profit Making Associations in the European Community* (Jan. 8, 1987) (by Nicole Fontaine) (citing Article 18 TFEU (ex Article 12 TEC); Article 114 TFEU (ex Article 95 TEC) and Article 352 TFEU (ex Article 308 TEC)).

32. Case C-172/98, *Commission of the European Communities v. Belgium*, 1999 E.C.R. I-3999 (holding that Belgian laws that made the granting of legal personality to non-profit membership associations contingent on the presence of Belgian nationals in the organization or its governing structure breached Article 18 TFEU, which prohibited discrimination on the grounds of nationality).

proven more controversial. Article 352, while providing the broader basis for community action,<sup>33</sup> requires unanimity within the European Council (the "Council") for the successful passage of any regulation—a difficult feat with twenty-seven Member States involved. Article 114, on the other hand, has the advantage of requiring only a qualified majority vote within the Council but it is more limited in its use since it only applies to a narrower range of Council measures, most specifically "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."<sup>34</sup> The absence of a user-friendly legal basis for non-profit regulation at the EU level may thus be seen as a contributing factor to the lack of a proactive legislative agenda on the part of the Commission in the past.

The Commission has also tended to emphasize the facilitative role played by NGOs in advancing the European agenda (a role greatly welcomed by the Commission),<sup>35</sup> more so than any supervisory role that the Commission feels it should play in relation to these organizations. In its White Paper on European Governance, issued in July 2001, the Commission mentions the need for stronger NGO governance but sees its role as being to encourage such an outcome as opposed to regulate for it.<sup>36</sup> Yet,

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33. TFEU art. 352 (providing that "[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, [and this Treaty has] not provided the necessary powers, the Council [shall], acting unanimously on a proposal from the Commission" and after consulting the European Parliament, take the appropriate measures.").

34. See Case C-436/03, *European Parliament v. Council*, 2006 E.C.R. I-3733 (determining whether the Regulation on the Statute for a European Cooperative Society was correctly adopted on the basis of Article 352 TFEU or whether Article 114 TFEU provided a more appropriate legal basis); see also Oonagh Breen, *EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society*, 10 INT'L J. NOT-FOR-PROFIT L. 50, 63–64 (2008).

35. *Commission White Paper on European Governance*, at 14–15, COM (2001) 428 final (July 25, 2001) (noting that "[n]on governmental organizations . . . often act as an early warning system for the direction of political debate . . . . This offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest.").

36. *Id.* at 15 (providing that "[w]ith better involvement comes greater responsibility. Civil society must itself follow the principles of good governance, which include accountability and openness. The Commission intends to establish, before the end of this year, a comprehensive on-line database with details of civil society organisations active at European level, which should act as a catalyst to improve their internal organisation."). This database, the Register of Interest Representatives, currently lists over 3,000 bodies, one-third of which are NGOs. See *Register of Interest Representatives*, EUR. COMM'N,

within a three-month period of the events of 9/11, the Commission's interests in regulating non-profits changed dramatically, in line with Kingdonian prevailing circumstances.

### III. COMMUNICATION (2005) 620

As a full member of the FATF, the EU has sought to give effect to the FATF Special Recommendations on the suppression of terrorist financing within the framework of the Treaty on European Union ("TEU") and the TEC. Such measures are additional to those measures taken by the EU's respective Member States in fulfillment of their obligations under the FATF SRs and UN Resolution 1373/2001.<sup>37</sup> The European Commission used the FATF Special Recommendations as a basis for combating terrorist financing at the EU level by establishing European Action Plans and enacting Framework Decisions.<sup>38</sup> Spurred on by the Madrid and London bombings in 2004 and 2005, the European Council turned its attention to the regulation of non-profit organisations,<sup>39</sup> which in turn

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<https://webgate.ec.europa.eu/transparency/regrin/consultation/search.do?reset=> (last visited Apr. 7, 2011).

37. *European Union Report to the Counter-Terrorism Committee—Res 1373* (Dec. 12, 2001), available at [http://www.europa-eu-un.org/articles/en/article\\_1031\\_en.htm](http://www.europa-eu-un.org/articles/en/article_1031_en.htm).

38. Council of the European Union, *Note from the Presidency: Co-ordination of Implementation of the Plan of Action to Combat Terrorism*, 12800/01 (Oct. 16, 2001), available at <http://register.consilium.europa.eu/pdf/en/01/st12/st12800.en01.pdf>; Council of the European Union, *Conclusions Adopted by the Council (Justice and Home Affairs)*, 12156/01 (Sept. 20, 2001), available at <http://register.consilium.europa.eu/pdf/en/01/st12/st12156.en01.pdf>; Council Framework Decision on Combating Terrorism, 2002/475/JHA, 2002 O.J. (L 164) 3 (EC) [hereinafter Council Framework Decision on Combating Terrorism]; Council of the European Union, *European Union Action Plan to Combat Terrorism—Update of the Roadmap*, 10773/2/02 REV 2 (July 17, 2001); Council of the European Union, *EU Plan of Action on Combating Terrorism*, 10010/04 (June 1, 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st10/st10010.en04.pdf>; Council of the European Union, *The European Union Counter-Terrorism Strategy*, 14469/4/05 REV 4 (Nov. 30, 2005), available at <http://register.consilium.europa.eu/pdf/en/05/st14/st14469-re04.en05.pdf> (noting at paragraph twenty-nine that "tackling the misuse of the non-profit sector remains a priority. We must also ensure that financial investigation is an integral part of all terrorism investigations. These measures and others which build on the Financial Action Task Force's recommendations, form part of the EU's comprehensive strategy for combating terrorist financing.").

39. Council of the European Union, *Declaration on Combating Terrorism*, 7906/04 (Mar. 29, 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st07/st07906.en04.pdf> (issued after the Madrid bombings and committing the Commission to strengthening the accountability and transparency of charities and stating a European strategic objective as being to

informed the Commission's policy statement on the implementation of the FATF's SR VIII at European level in November 2005.<sup>40</sup> Commission Communication (2005) 620 spoke to two issues—the need for enhanced national coordination by Member States and 'relevant actors'<sup>41</sup> in the exchange of information to cut off terrorist financing; and secondly, the need to address vulnerabilities of non-profit organizations to terrorist financing and other criminal abuse.

In this latter regard, the Commission set out its European implementation strategy for SR VIII through a series of recommendations to Member States and in a framework for a Code of Conduct for Non-profits to promote transparency and accountability best practices.<sup>42</sup> Prior to the framework's publication, the Commission issued a draft version for public consultation in July 2005. The draft was not well received by the non-profit sector from either a procedural or substantive perspective. Procedurally, in allowing initially for only a 6-week consultation window, the Commission breached its own Minimum Standards on Consultation of Interested Parties,<sup>43</sup> which requires that consultations be open for at least an eight-week period, a breach much commented upon in the submissions received.<sup>44</sup> Even though the time was subsequently extended to eight weeks, the summer timing still rankled with respondents.

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"[d]evelop and implement an EU strategy on the suppression of terrorist financing, including the regulation of charitable organisations and alternative remittance systems"); see also London Bombings Press Release *supra* note 4 (noting in response to the London bombing the Council's determination to agree a code of conduct to prevent misuse of charities by terrorists by December 2005).

40. Commission Communication (2005) 620 final, *supra* note 20. The Communication was issued after discussions at workshops organized by the Commission in October 2004 and April 2005 and following public feedback in response to a public consultation on a draft recommendation and Code of Conduct.

41. These actors include government justice or treasury officials, Financial Intelligence Units, specialized financial police, Public Prosecutor's Offices, Customs Authorities, Tax Revenue Services, intelligence services, financial regulators, and the Central Bank.

42. Commission Communication (2005) 620 final, *supra* note 20, annex.

43. *Communication from the Commission, Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 704 final (Dec. 11, 2002).

44. See *Public Consultations*, EUR. COMM'N, [http://ec.europa.eu/home-affairs/news/consulting\\_public/consulting\\_0014\\_en.htm](http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0014_en.htm) (last visited Apr. 7, 2011), for the responses of ActionAid International, the EU Civil Society Contact Group, and the Carmichael Centre for Voluntary Groups, Ireland, on this issue. This is not an isolated occurrence; non-profits again chided the Commission in July 2010 for the lack of advance notice to comment on its Discussion Paper on the voluntary guidelines. See also Hanneke de Bode, *EU Non-profits and Counterterrorism Consultation: Your Opinions?*, EUCLID NETWORK (Sept. 3, 2010), <http://www.euclidnetwork.eu/news.php/en/404/eu->

Substantively, the inclusion of a list of ‘risk indicators’ to identify non-profits involved in terrorist financing or other criminal purposes in the proposed Code of Conduct caused consternation for many NGOs.<sup>45</sup> Those indicators included such matters as: (a) the sharing of office space and legal or accountancy service providers; (b) the presence on the board of directors or trustees who hold positions with other non-profits; (c) a low ratio of employees to funds managed; and (d) the fact that funds distributed or collected fluctuated suddenly in amount.<sup>46</sup> All of these were said to constitute risk factors pointing to criminality rather than efficient NGO administration. The Commission’s draft proposals regarding financial management risk factors also lacked coherency. It is a common EU Programme requirement (many of which are administered by the Commission) that new bank accounts be established for each individual project run and that separate financial and auditing records should be kept. Yet, for the purposes of its Code, the Commission had proposed that the holding of multiple banks accounts by an NGO would constitute a risk factor, as would a sudden change in the amount of funds disbursed or collected.

The effect of this risk indicators list, according to respondents,<sup>47</sup> would have been to confuse NGO operational efficiency measures with suspect terrorist/criminal activities. It did not go unnoticed by non-profits that the Commission’s first serious engagement in the regulation of the sector was one based not on facilitating the sector but rather suspicion of it.<sup>48</sup>

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non-profits-and-counterterrorism-consultation-your-opinions [hereinafter EUCLID NETWORK].

45. See Eur. Comm’n, *Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices*, at 2, JLS/D2/DB/NSK D (2005) 8208 (July 22, 2005), available at [http://ec.europa.eu/home-affairs/news/consulting\\_public/0014/draft\\_recommendations\\_en.pdf](http://ec.europa.eu/home-affairs/news/consulting_public/0014/draft_recommendations_en.pdf).

46. *Id.* at 7–8.

47. For a complete list of the submissions received by the European Commission, see *Public Consultations: Open Consultation on the Document “Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices,”* EUR. COMM’N, [http://ec.europa.eu/home-affairs/news/consulting\\_public/consulting\\_0014\\_en.htm](http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0014_en.htm) (last visited Apr. 7, 2011).

48. Letter from Carmichael Ctr. for Voluntary Groups, Ireland, to Dir. Gen. Justice, Freedom & Security, Eur. Comm’n, (Aug. 22, 2005), available at [http://ec.europa.eu/home-affairs/news/consulting\\_public/0014/contributions/carmichael\\_centre\\_for\\_voluntary\\_group\\_s%20ireland\\_en.pdf](http://ec.europa.eu/home-affairs/news/consulting_public/0014/contributions/carmichael_centre_for_voluntary_group_s%20ireland_en.pdf) (noting that “[p]revious attempts by the sector to get EU-level

The final version of the Framework Code, published in 2005 as part of Commission Communication (2005) 620, omitted the risk indicators annex entirely.<sup>49</sup>

Communication (2005) 620 called on EU Member States to better oversee their non-profit sectors through maintaining/creating publicly accessible registration systems for all non-profits; to provide greater financial transparency guidance to non-profits; and to encourage compliance with the proposed Framework Code.<sup>50</sup> Acknowledging that the primary purpose of the Communication was to prevent abuse of non-profits by terrorist financing, an ancillary hope of the Commission was that the proposed enhanced transparency and accountability measures would also help to protect organisations from other forms of criminal abuse.<sup>51</sup> Not content to leave the initiative solely in the hands of Member States and non-profits, the Communication also provided that the Commission would consider further “whether in certain circumstances community funding of non-profits could be linked to compliance with enhanced transparency and accountability measures.”<sup>52</sup>

The actual provisions of the Framework for the Code relate predominantly to the need for registration of non-profit organisations and the proper keeping of accounts.<sup>53</sup> Although the Commission recognised the need for coordination amongst Member States in the Code’s operation, no guidance was given in the Communication as to how this could best be achieved,<sup>54</sup> nor was there any consideration of how the additional

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recognition for NGOs and NPOs in the form of the European Statute of Association have not received similar attention from the European Commission. It is disappointing that this first stage to recognition is to take place based on suspicion of our sector rather than appreciation for its potential to bring the EU closer to the citizen.”); *see also* Letter from CONCORD (Eur. NGO Confederation for Relief & Dev.), to Franco Frattini, Comm’r for Justice, Freedom & Security, Eur. Comm’n (Sept. 26, 2005), *available at* [http://ec.europa.eu/home-affairs/news/consulting\\_public/0014/contributions/concord\\_en.pdf](http://ec.europa.eu/home-affairs/news/consulting_public/0014/contributions/concord_en.pdf) (noting that “[f]rom the very legitimate concern to prevent financing from terrorism the Commission proposal has taken as a starting point NPOs as a problem that needs to be better controlled and regulated. We believe a more constructive approach would have been to see NPOs as a resource and reach out in a dialogue with civil society on what can be done and improved to curb this problem as much as possible.”).

49. *See* Commission Communication (2005) 620 final, *supra* note 20.

50. *Id.* at 2.

51. *Id.* at 9.

52. *Id.* at 10.

53. *See id.* at 11–16.

54. *Id.* at 12 (“[T]he Recommendation and the Framework for a Code of Conduct should not in any way hinder legal cross border activities of NPOs. The aim of the Euro-

Code requirements would affect existing national regulatory requirements. However, as part of its commitment to the implementation of Communication (2005) 620 at the European level, the Commission promised further Commission engagement with the non-profit sector on the proposed code. Specifically, it pledged to establish an informal contact group in 2006 and to organize a conference with representatives of the non-profit sector and relevant authorities to consider further implementation of principles laid down in the Recommendation and Framework for a Code of Conduct.<sup>55</sup>

Following the publication of the Commission's Communication, the European Council reaffirmed its commitment to a code of conduct and agreed on five key principles in relation to the future treatment of non-profit organizations, recognizing that:

- Safeguarding the integrity of the non-profit sector is a shared responsibility of states and non-profit organisations.
- Dialogue between Member States, the non-profit sector and other relevant stakeholders is essential to build robust defences against terrorist finance.
- Member States should continually develop their knowledge of their non-profit sector, its activities and vulnerabilities.
- Transparency, accountability and good governance lie at the heart of donor confidence and probity in the non-profit sector.
- Risks of terrorist finance are managed best where there are effective, proportionate measures for oversight.<sup>56</sup>

Implementation of the Framework code to date has been sporadic. The Commission has organized three conferences on non-profit sector accountability and transparency with the most recent occurring in July 2010. Participation, however, is by Commission invitation only and no information on the conference or its deliberations are otherwise publicly available. The promised contact group, first mentioned in Commission

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pean approach is thus to establish common principles on which national implementation can be based.”).

55. *Id.* at 9.

56. Press Release, Council of the Eur. Union, 2696th Council Meeting: Justice and Home Affairs (Dec. 1–2, 2005), at 32, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/05/296&format=HTML&aged=0&lg=sl&guiLanguage=en>.

(2005) 620 and given further consideration by the Commission in 2006,<sup>57</sup> never materialised and the Commission formally abandoned the idea in October 2007.

#### IV. THE REPORTING ERA: INDEPENDENT SCRUTINY, MATRIX AND EUROPEAN CENTER FOR NON-PROFIT LAW ("ECNL") STUDIES

In the past five years since the publication of Communication (2005) 620, the EU has both reviewed and revised its broader counterterrorism strategy in the context of non-profit oversight. Three reports are worthy of mention in this regard; the first in 2007 assessing EU progress on its counter terrorist financing strategy in the implementation of the FATF special recommendations ("Independent Scrutiny Report, 2007") and two later reports dealing respectively with the vulnerability of non-profits to financial crime ("Matrix Report, 2008") and with public and self regulatory initiatives to improve non-profit transparency and accountability ("ECNL Study, 2009").

##### *A. The Independent Scrutiny Report*

A robust anti fraud (including anti tax fraud) regime would be of more general value to the [non-profit] sector and produce better data than a [Terrorist financing] oriented regime toned down for political reasons.<sup>58</sup>

In 2007, the European Commission published an Independent Scrutiny Report evaluating the EU's efforts in the fight against terrorist financing under the FATF's Special Recommendations and the EU Counter Terrorist Financing Strategy. According to the report, the fact that the FATF Recommendations and Special Recommendations did not constitute treaty obligations but were rather "informal political commitments" left their implementation more vulnerable to national and regional politics with the effect that five years later, the nine special recommendations were still regarded as "Work in Progress."<sup>59</sup> In particular, the Report identified a number of structural difficulties that complicated the EU's task of giving effect to the FATF's ordinances at European level, many of which are particularly pertinent to European non-profit regulation efforts and

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57. See Eur. Comm., *Draft Minutes, European Forum for the Prevention of Organised Crime: Minutes of the Round Table Meeting of 30th March 2006 on "Preparatory Meeting to the Conference Transparent NPO Governance,"* at 1, Brussels JLS/D2/DB D (2006) [hereinafter *Draft Minutes, European Forum for the Prevention of Organised Crime*].

58. *Independent Scrutiny Report*, *supra* note 20, at 34.

59. *Id.* at 4.



the associated difficulties experienced at EU level with regard to the implementation of SR VIII.

### 1. No Fully Informed Baseline Assessment of Threats and Risks to the EU

Notwithstanding the myriad of action plans, action points, and activities introduced by EU committees relating to combating the financing of terrorism (“CFT”), the EU lacks the capacity to undertake an ongoing internal review mechanism for its anti-money laundering and CFT measures. The report highlighted the absence of “a key instrument”—a fully informed baseline assessment of threats to the EU.<sup>60</sup> According to the report, “without this, there is no way to direct the efforts and set priorities, nor attribute success nor learn from failure. There are overlaps, gaps and difficulties in coordination.”<sup>61</sup>

There is thus, in the words of Keohane, a paradox in the EU’s role in counter-terrorism:

On the one hand, governments agree in principle that co-operation at the EU level is a good thing because of the cross-border nature of the terrorist threat. On the other hand, they are slow to give the Union the powers . . . and resources . . . it would need to be truly effective.<sup>62</sup>

This difficulty is particularly acute in the context of SR VIII, given the absence of any EU wide assessment of the risk posed by the tens of millions of non-profits operating in the EU. The report acknowledged attempts to fill this knowledge void in the context of non-profit organizations but conceded that these efforts were not proving successful.<sup>63</sup>

### 2. Cultural Differences in Old and New Member States’ Approach

Prior to the ratification of the Lisbon Treaty the EU did not exercise primary responsibility for CFT measures. Under the Maastricht Treaty’s three-pillar structure, the EU had direct effective powers under the first pillar relating to communautarised areas whereas matters arising under

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60. *Id.* at 18.

61. *Id.*

62. Daniel Keohane, *The Absent Friend: EU Foreign Policy and Counter-Terrorism*, 46 J. COMMON MKT. STUD. 125, 129 (2008).

63. *Independent Scrutiny Report*, *supra* note 20, at 33 (noting that “currently there is no EU wide assessment of the risk [non-profits] pose in the terrorist financing context . . . . The ongoing absence of substantial and accepted corpus of empirical evidence of misuse impedes the dialogue with the third sector that the EC and some MS seek in order to develop effective policy.”).

either the second pillar (dealing with common foreign and security) or the third pillar (dealing with justice and home affairs) relied on efforts to coordinate, harmonise, and influence policies at an intergovernmental level.<sup>64</sup> Decisions taken under the third pillar relating to CFT took the form of framework decisions,<sup>65</sup> which gave considerable leeway to national parliaments in the transposition of law, which in turn led to significant legal variation across national legislation.

The Scrutiny Report observed that “member states and their agencies are cautious in the extent to which they will allow the EU to take steps that impinge on national security issues arrangements unless it is part of a wider political process.”<sup>66</sup> The cultural differences in approach between older EU Member States (comprising FATF members) and newer EU Member States (which learned to tackle anti-money laundering under the Council of Europe’s Moneyval process) further exacerbated this legislative reticence. The former group approached FATF measures from the perspective of maintaining the integrity of the financial system—a First Pillar matter—whereas the latter’s exposure under the Moneyval process had its roots in judicial cooperation, more associated with Third Pillar matters. According to the Scrutiny Report, there were thus “divergent approaches to AML/CFT on policy and in operational matters, which can feed back as particularism at the political level.”<sup>67</sup> The effect of this regional division has had implications for the EU’s implementation of SR VIII because of the division of opinion amongst Member States on the nature of regulation required.<sup>68</sup>

### 3. Management of Key Individual Specialists

With regard to the general implementation of the FATF SRs, even in areas in which the EU has competence to act for Member States, the Scrutiny Report found that the qualitative nature of Member State consultation varied dramatically depending upon whether policies were based on the input of experienced front line professionals in law enforcement and financial intelligence, well versed in the highly complex environment of CFT, or upon the contribution of hard pressed government officials nominally responsible for the area. This problem is magnified in the context of European non-profit regulation, an area in which

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64. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

65. See, e.g., Council Framework Decision on Combating Terrorism, *supra* note 38.

66. *Independent Scrutiny Report*, *supra* note 20, at 19.

67. *Id.*

68. *Id.* at 22 (noting that “implementation of SR VIII is still under discussion within the EU and awaits consensus regarding the policy towards NPOs, where a number of MS have strong reservations”).

the Scrutiny Report noted there was no effective control environment due to an absence at the EU level of a centralised system of registration, accreditation, monitoring, and fiscal controls. Creation of such a centralised system would require a level of cooperation between national agencies that currently does not exist and even if it did, success would not be guaranteed since “nearly all member states are missing elements of such a system, and time and expense will be needed to put them in place, which again raises resources issue with respect to both individual NPOs and national level cooperation mechanisms.”<sup>69</sup> Perhaps more damning, the Scrutiny Report raised a spectre that not all Member States were convinced that an effective control system requires elements of registration and closer monitoring.<sup>70</sup>

Turning to the Scrutiny Report’s findings on the specific implementation of SR VIII, the report found generally that terrorist financing of non-profit organisations was not a prime concern in many European Member States.<sup>71</sup> The report went so far as to query whether any additional gains would be made through the introduction of a specialist terrorist-financing regime for charities that could not be achieved through a tweaking of existing regimes.<sup>72</sup> In the words of the report, “of the three main objectives of SR VIII, posing as legitimate entity is seen as a form of conspiracy, whilst the use of NPOs as conduits, and for the purposes of diversion, are seen as forms of money laundering and fraud,” leading authors and respondents alike to conclude that it might simply be wiser to strengthen existing anti-fraud measures instead.<sup>73</sup> Conscious also that an effective anti-terrorist influenced regulatory regime for non-profits might undermine the work of non-profit organisations engaged in reducing the influence of militant groups in sensitive areas simply because they were working in these areas, the report concluded that superior information on those militant groups could better be obtained through existing powers or other covert means.<sup>74</sup>

That the Commission intended to heed the advice of the Independent Scrutiny Report and to adopt a broader basis for reviewing the good governance of EU-based non-profits seemed a strong possibility in late 2007. Abandoning its plan to create a twenty-four-member contact group

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69. *Id.* at 33.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 34.

drawn from the public and private non-profit sector<sup>75</sup> to implement the Non-profit Framework Code, the Commission instead funded two studies on the non-profit sector that were designed to begin to resolve the European information deficit in relation to the sector, identified by the Scrutiny Report.

*B. The Matrix Report (2008)*

In the absence of reliable information on the real level of threat, vulnerability and compliance, and without adequate understanding of the potential benefits of new legislation the EC should be cautious about introducing new forms of regulation and legislation.<sup>76</sup>

The European Commission appointed Matrix to research and report on the most serious and frequent types of financial criminal activity affecting non-profit organizations in the EU. Matrix was asked to estimate the volume and value of these offences at EU level and to identify appropriate policy responses that might reduce non-profit vulnerability to financial criminal abuse.<sup>77</sup> A worthy study from a European governance perspective—the results would assist the EU in ensuring that European grants at least were expended in a transparent and accountable fashion. The first difficulty encountered by Matrix was the lack of reliable statistical databases on non-profit abuse in any Member State or across the EU as a whole. Many of the questions posited in the Delphi study elicited a high level of non-responsiveness notwithstanding the general nature of the questions asked.<sup>78</sup> Moreover, the literature review revealed a great

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75. The creation of the contact group was first announced by the Commission in its Commission Communication (2005) 620 final, *supra* note 20. It was intended that both the Commission's Communication and the FATF Interpretative Note on SR VIII would serve as a basis to define the exact mandate of the group. See *Draft Minutes, European Forum for the Prevention of Organised Crime*, *supra* note 57, at 3.

76. MATRIX INSIGHT, STUDY TO ASSESS THE EXTENT OF ABUSE OF NON-PROFIT ORGANISATIONS FOR FINANCIAL CRIMINAL PURPOSES AT EU LEVEL, EUROPEAN COMMISSION, DG JUSTICE, FREEDOM AND SECURITY 8 (Apr. 3, 2008) [hereinafter MATRIX REPORT], available at [http://ec.europa.eu/home-](http://ec.europa.eu/home-affairs/doc_centre/terrorism/docs/study_abuse_non_profit_orgs_for_financial_criminal_purposes_avril09.pdf)

[affairs/doc\\_centre/terrorism/docs/study\\_abuse\\_non\\_profit\\_orgs\\_for\\_financial\\_criminal\\_purposes\\_avril09.pdf](http://ec.europa.eu/home-affairs/doc_centre/terrorism/docs/study_abuse_non_profit_orgs_for_financial_criminal_purposes_avril09.pdf) (report commissioned by the European Commission Directorate-General Justice, Freedom and Security).

77. *Id.* at 13.

78. Questions in the Delphi Study ranged from, "Could you estimate the number of instances of financial abuse of NPOs in your country of residence in the last 12 months? (this should **not** be restricted to legal cases)" to "In your opinion, do you think the number of instances of financial abuse of NPOs has increased or decreased in the last five years?" *Id.* at 70–75.

reliance of existing data on journalistic and unsupported case descriptions.<sup>79</sup> Given these lacunae, Matrix was forced to substantially modify its data collection plans (eliminating entirely a second-round Delphi study) and to settle for collation of a “general picture of the NPO abuse field” instead of the desired “accurate quantified estimates of volume, impact, incidence or prevalence” of non-profit financial abuse.<sup>80</sup>

Two interesting and related findings emerge from the Matrix Report. The first relates to incidence and prevalence of non-profit financial abuse within the EU. According to the Report:

If the available information is to be believed, the incidence and prevalence of NPO financial abuse in the EU are limited. Nevertheless, some level of criminal and terrorist misuse exists. The extent to which this is judged to be “a serious threat” depends on the tolerance levels of the observers . . . . [W]ithout better databases, reporting mechanisms and monitoring systems there is no way of knowing whether the expert group estimates are realistic or merely badly informed.<sup>81</sup>

This finding led the authors to call for any imposed regulatory response to be a proportionate one, noting that stricter regulatory legislation “could create costs that might damage efficiency and effectiveness of the sector.”<sup>82</sup> These findings are entirely consistent with the findings of the Independent Scrutiny Report. Referring specifically to the current levels of compliance with the FATF recommendations, the EU Communication (2005) 620 recommendations, and the proposed codes of conduct thereunder, the report urged that notwithstanding the importance of governmental and EU regulation in this context, the need for any further regulation had to be approached with caution “especially considering the UK and US records.”<sup>83</sup>

Secondly, the Matrix Report recognised the potential for governments in politically challenged environments to use regulation to undermine the work of non-profit organisations.<sup>84</sup> Drawing on UK research,<sup>85</sup> the report

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79. *Id.* at 6.

80. *Id.* at 7.

81. *Id.* at 66. Statistically, there was very little evidence of non-profit abuse as regards terrorist financing. According to Matrix, “In terms of court trials, in 2005–06 a total of 303 persons across Europe were tried on terrorism charges (the majority, 205, in Spain) and a further 136 court proceedings were reported as ongoing. No information was available either formally or informally about the involvement of NPOs in these cases.” *Id.* at 28.

82. *Id.* at 66–67.

83. *Id.* at 8.

84. *Id.* at 33.

referred to the negative effect that counterterrorism legislation in particular had already had on non-profit organisations, noting the implications of unintentional violation of counter-terrorism measures for non-profits and suggesting that the burden of mitigating this risk had led to scaling back of humanitarian work in some areas.<sup>86</sup>

The message sent out very clearly from the Matrix Study was thus that a first step along the path to greater regulation of non-profits must involve a more accurate understanding of the true level of threat to these organizations. The need for such empirical data was essential to enable a proportionate and appropriate response. In addition, Matrix saw the way forward for European regulation of non-profits as involving the conducting of a periodic victimisation survey with an adequate budget to generate an effective database to assess threat and vulnerability trends, examine the efficacy of preventive measures, and monitor regulation and legislation; the creation of a virtual NPO 'college' to encourage greater information exchange; a proactive media strategy; maintenance and improvement of non-profit registers; training and tools for non-profit self-regulation; simple due diligence models; NPO to NPO mentoring; and identification of a lead agency in every Member State.<sup>87</sup>

### *C. ECNL Report (2009)*

The disconnect between the areas covered by ongoing public and self regulation initiatives and the FATF and EC recommendations signal the difficulties [Member States] face when attempting to implement recommendations in their national contexts . . . .<sup>88</sup>

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85. Most particularly the work of International NGO Training and Research Center ("INTRAC") and National Council for Voluntary Organisations ("NCVO"). See INT'L NGO TRAINING & RESEARCH CTR., [www.intrac.org](http://www.intrac.org) (last visited Apr. 7, 2011); see also NOLAN QUIGLEY & BELINDA PRATTEN, NCVO, SECURITY AND CIVIL SOCIETY: THE IMPACT OF COUNTER-TERRORISM MEASURES IN CIVIL SOCIETY ORGANIZATIONS (2007), available at [http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/Policy/Civil\\_Society\\_and\\_Participation/2007%2001%2024%20Security%20and%20Civil%20Society-A%20report%20from%20NCVO.pdf](http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/Policy/Civil_Society_and_Participation/2007%2001%2024%20Security%20and%20Civil%20Society-A%20report%20from%20NCVO.pdf).

86. MATRIX REPORT, *supra* note 76, at 33–34.

87. *Id.* at 8–9.

88. Eur. Ctr. for Not-for-Profit Law [ECNL], *Study on the Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organizations in the European Union*, at 94 (2009) (by Nilda Bullain & Katerina Hadzi-Miceva) (commissioned by the European Commission Directorate-General Justice, Freedom and Security) [hereinafter ECNL Study], available at [http://ec.europa.eu/home-affairs/doc\\_centre/terrorism/docs/initiatives\\_improving\\_transparency\\_accountability\\_npops\\_avr09.pdf](http://ec.europa.eu/home-affairs/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npops_avr09.pdf).

The Commission published the second of the two commissioned reports in April 2009.<sup>89</sup> The ECNL Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union sought to consider the measures adopted in the twenty-seven EU Member States to improve non-profit transparency and accountability in the overall context of international and European initiatives to address the risk of non-profits being used as conduits for terrorist financing.<sup>90</sup> To this end, the study focused on the response of Member States to the implementation of the FATF SR VIII in light of Commission Communication (2005) 620, the interpretative note to FATF SR VIII, and the FATF Best Practices Paper on SR VIII.

The ECNL Study begins to tackle the information deficit that exists at a European level in relation to statutory and non-statutory regulatory measures currently underway in the twenty-seven Member States of the EU. Following interviews with over 130 government officials and policymakers, non-profit lawyers and practitioners, and research centres across the Union, ECNL identified more than 140 self-regulation and public regulation initiatives relating to non-profit accountability and transparency undertaken in the past five years.<sup>91</sup> As part of the study, ECNL sought to carry out an in-depth analysis of selected initiatives in terms of the motivating factor behind their introduction and an assessment of their impact to date. The breadth of the research undertaken also allowed ECNL to begin to identify common trends in these initiatives, with a view towards identifying and creating best practice.

The ECNL Study begins to identify the challenges that face the EU when it seeks to act at the EU level in relation to non-profit organizations. Like the Independent Scrutiny Report, the study found regional differences a factor influencing implementation—in this case, the differing common law and civil law conceptions of the ‘non-profit sector.’<sup>92</sup> The treatment of non-profits under common law is governed by the legal concept of charity.<sup>93</sup> Thus, in the UK’s three legal jurisdictions<sup>94</sup> and in

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89. *Id.*

90. *Id.* at 8–9.

91. *Id.* at 8.

92. *Id.* at 11–18.

93. *Id.* at 12.

94. The United Kingdom comprises, apart from England and Wales, the devolved governments of Scotland and Northern Ireland. The parliamentary assemblies of the latter two regions possess competence to legislate independently in the realm of charity regula-

Ireland, regulators focus on the activity of an organisation and whether it provides a public benefit.<sup>95</sup> Qualifying organisations, or 'charities,' are subject to a more stringent regime of regulation than other non-profits.<sup>96</sup> Yet, it is estimated that charities account for only half the 865,000 non-profits in the UK.<sup>97</sup> In contrast, civil law treatment of non-profits is based upon legal form and not activity.<sup>98</sup> In many civil law jurisdictions, the purpose of registration as either an association or foundation is to obtain legal personality and basic tax exemptions although it is becoming more common for extra tax exemptions to be awarded to a subset of these registered non-profits that serve publicly beneficial purposes.<sup>99</sup>

In European terms, this divergence in terminology can lead policymakers to talk at cross-purposes since 'the sector' in common law countries commonly refers to the smaller 'charity sector' (which tend to enjoy similar treatment when it comes to registration, reporting, and tax issues) whereas 'the sector' in civil law countries tends to refer to the broader 'non-profit sector,' which includes but is in no way limited to public benefit organisations that are subject to a range of registration, reporting, and tax requirements. Culturally, registration—a term used frequently in the Commission Communication (2005) 620 and FATF documents—has different connotations depending on one's common law or civil law perspective. In the former, registration refers to "an act of state acknowledgement of eligibility for public support"<sup>100</sup> whereas in the latter registration refers to "the act of acquiring legal personality, quite independent of any eligibility for tax benefits."<sup>101</sup>

Understanding this legal and cultural divide between European Member States is crucial to the development of any proposed EU level common action in so far as it indicates that the 'non-profit sector' is not a homogenous entity. For its part, the FATF takes a narrow interest in non-profit organisations, defining them in its Interpretative Note on SR VIII as comprised of "legal [entities] or organization[s] that primarily engage in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out

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tion with the exception of matters relating to tax, which are decided on a uniform basis for the entire United Kingdom by the parliament at Westminster.

95. ECNL Study, *supra* note 88, at 12.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*



of other types of ‘good works.’”<sup>102</sup> Closer to home, the European Commission has drawn on this FATF guidance, proposing that its suggested more stringent non-profit registration and accountability requirements should apply to those non-profits “that are wishing to take advantage of special tax treatment, access to public grants, [and] the right to public fundraising.”<sup>103</sup> Yet, as the ECNL Study points out,<sup>104</sup> this categorization works efficiently only in common law jurisdictions. Many civil law countries lack the charity/public benefit concept and in its absence different laws provide tax benefits and state support to a variety of non-profit forms using various accountability standards. Even in those civil law countries that have a concept equivalent to public benefit, there is no uniform application of tax benefits or accountability requirements, making it at best difficult to conceive of a European-wide measure that could reach the non-profit sector and regulate it accordingly.<sup>105</sup>

The nub of the challenge, identified by the Study, relates to the difficulties of the imposition of top-down regulation. In the words of the Study authors, “the need to overcome the basic differences between the two major legal systems in addition to the varying cultural and historical factors may make any attempt at a pan-European regulatory or self regulatory initiative extremely challenging.”<sup>106</sup> Given the obstacles to a top down harmonization of non-profit regulation, the study instead comes at the problem from a bottom up perspective. The Study identifies more than 140 non-profit regulatory initiatives introduced in the twenty-seven Member States of the EU, aimed at enhancing non-profit transparency and accountability over the past five years.<sup>107</sup>

The report outlines nineteen of these initiatives (comprising both public and self-regulatory measures) in detail.<sup>108</sup> The selected initiatives are viewed by the authors as examples of best practices in areas ranging from registration and reporting,<sup>109</sup> accounting,<sup>110</sup> fundraising,<sup>111</sup> certifica-

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102. *Interpretative Note to SR VIII*, *supra* note 14, ¶ 4.

103. Commission Communication (2005) 620 final, *supra* note 20.

104. ECNL Study, *supra* note 88, at 13.

105. ECNL Study, *supra* note 88, at 13 (This led the ECNL to comment that “the implementation of the requirements of EC COM and FATF SR VIII, which seem to treat the ‘NPO sector’ as a homogenous entity, would be more easily enforceable in the common law systems (through the charity concept) than in the civil law systems.”).

106. *Id.* at 15.

107. *Id.* at 130.

108. *Id.* ch. IV.

109. Case studies of Ireland’s proposed registration and reporting system under the new Charities Act 2009; of Malta’s integrated system of registration, reporting and regu-

tion and accreditation,<sup>112</sup> codes of conduct,<sup>113</sup> to public benefit status,<sup>114</sup> and counter-terrorism.<sup>115</sup> In addition, an attempt is made to gauge the potential transferability of these programmes to other jurisdictions.<sup>116</sup> Amongst the chosen jurisdictions is a good mixture of old EU Member States (e.g., Ireland, the UK, and the Netherlands) and newer Members (Poland, Malta, Estonia, Bulgaria, and Hungary), allowing also for a consideration of regulatory practices in both civil and common law systems with non-profit regimes at different degrees of maturity and establishment.

To a degree, there is some alignment between the aims of the FATF guidelines, the objectives of Commission's Communication (2005) 620, and the policy goals of a number of the national initiatives considered by ECNL. There is thus a strong focus on registration and public database requirements, as well as requirements relating to accounts, reporting, and monitoring of non-profits. A divergence, however, does exist between the EU/FATF emphasis on 'know your donor/beneficiary' principles, which according to ECNL, are scarcely addressed in recent national initiatives, as well as those issues which Member States are concerned with but which feature to a much lesser extent in EU/FATF documents—namely, public benefit status; NPO accounting and bookkeeping; internal governance; fundraising; and transparency of public funding.<sup>117</sup>

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lation; of the central registry systems in the UK, Austria, and Bulgaria; and of the proposed European registers under Guidestar. ECNL Study, *supra* note 88, at 31.

110. Case study of the UK's Statement of Recommended Practice for Charity Accounting (the "SORP")—described by ECNL as "[a] comprehensive framework and set of standards for charity accounting and interpretation on how to meet those standards." ECNL Study, *supra* note 88, at 30.

111. Case study of Ireland's mixed regulatory model for fundraising and of Finland's Money Collection Act. *Id.* at 67.

112. *Id.* at 33 (drawing on examples from Austria (Austrian Seal of Quality for Donations to Charities), Hungary (Trademark of Trust scheme), The Netherlands (International Committee on Fundraising Organisations ("ICFO") and Central Bureau on Fundraising)).

113. *Id.* at 72–77 (presenting case studies of both the Estonian Code of Ethics of Non-profit Organizations ("The most successful effort to develop a sector-wide code in CEE") and Irish Code of Corporate Governance for Irish Development Non-profit Organisations).

114. *Id.* at 28, 49–51, 60–63 (presenting case studies of The Netherlands and Bulgaria as interesting model approaches to public benefit status).

115. *Id.* at 40–45 (presenting a case study of the Charity Commission for England and Wales' Counter Terrorism Strategy—the only explicit counter-terrorist strategy for the NPO sector published by a European regulator).

116. ECNL Study, *supra* note 88, at 31.

117. *Id.* at 94.

*D. Implications of Matrix and ECNL Studies for Pan-European Non-profit Regulation*

Whereas the Matrix Report comes from a financial abuse perspective and the ECNL Study comes from a mapping of existing accountability structures perspective, the message they deliver to the Commission is similar: favouring bottom-up accountability based on a better empirical understanding of the European non-profit sector. Both reports focus on the need for some determination of the common interests of stakeholders if policy implementation is to be advanced. Identifying one such interest as the strengthening of the non-profit sector, ECNL outlines the advantages that a successful achievement of this interest would hold for Member States (by increasing capacity to comply with public regulation), the EU (by making the sector a reliable and significant partner in the fight against terrorism and money laundering), and for non-profits themselves (by improving relationships with regulators through an increased capacity to understand the need for regulation).

Matrix, for its part, envisages a strengthening of the sector through institutional changes, including the creation of European mechanism (e.g., a virtual NPO college) to allow non-profit representatives and public officials at national and EU level to share information and good practices, thereby building up expertise in particular areas. Matrix acknowledges the uneven development and maturity of the European non-profit sector, however, when it advocates the creation of non-profit to non-profit mentoring schemes across the EU.<sup>118</sup> Both reports admit that much work remains to be done before the principle of ‘know your donor, know your beneficiary’ can be achieved effectively at EU level. Whereas Matrix calls for better due diligence by non-profits in this regard,<sup>119</sup> ECNL is more circumspect citing the need for further discussions and progress in other areas as a precursor to achieving this principle.<sup>120</sup>

The sector’s generally positive response to both reports shows broad support for the common findings that there is little evidence of non-profit abuse for terrorist financing purposes and that to continue to base regula-

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118. MATRIX REPORT, *supra* note 76, at 68.

119. *Id.* at 9 (advocating that “[t]he simplest procedures such as checking the references and CVs of prospective staff are often the most effective. These measures should add value to the general management of NPOs as well as contribute to threat reduction.”).

120. ECNL Study, *supra* note 88, at 30 (“Given that the implementation of these principal recommendations is highly sensitive and that many interests are involved, it would seem that in order to have a fruitful stakeholder discussion on these issues, [achievement of] the previously described [ECNL recommendations] would be useful . . .”).

tory efforts purely on this ground is unjustified.<sup>121</sup> Rather, non-profits urge that any future role of the EU should be driven by proportionality and subsidiarity, thereby complementing existing or encouraging new regulation at a national level.<sup>122</sup> At a meeting in April 2008 to discuss the recommendations of and follow-up to the Matrix Report, the Commission, in response to non-profit submissions, stated that “any follow up action would be proportionate and focused on the threats” and that “enhanced NPO transparency has to be considered in a larger perspective, that good governance and transparency help provid[e] assurance that NPOs operate with integrity and effectiveness in meeting their mission purposes.”<sup>123</sup> The Commission, therefore, stressed the importance of a “focus on prevention rather than repression.”<sup>124</sup> The extent to which the Commission and, indeed, other EU actors adhere to these principles is questionable in light of recent developments, to which we now turn.

#### V. RECENT DEVELOPMENTS 2009–2010

The strong support for a subsidiarity approach to non-profit regulation espoused by Matrix and ECNL has not found universal acceptance in the EU. In the words of the European Counter Terrorism Coordinator, “Since non-profit organisations frequently have an international profile, it is necessary to find international solutions, notably at EU level, as a com-

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121. See Cordaid, Contemporary Minutes of Commission Meeting on Non-Profit Sector Transparency, EC, DG JLS (Apr. 25, 2008); *see also* EU CIVIL SOC'Y CONTACT GROUP, CONTRIBUTION ON NPO TRANSPARENCY AND COUNTER-TERRORISM 2 (2009) [hereinafter EU CIVIL SOC'Y CONTACT GROUP] (observing that “[c]ounter-terrorism concerns should not overlook the other obligations of the NPO sector, and the EC should address transparency and accountability issues under a wider and mutually reinforcing approach. A pure counter-terrorism approach would create the feeling that initiatives are singling out the NPO sector without justification rather than contributing to strengthening it, and would jeopardize ownership by NPOs.”); MARK SIDEL, REGULATION OF THE VOLUNTARY SECTOR: FREEDOM AND SECURITY IN AN ERA OF UNCERTAINTY 97–98 (2010).

122. EU CIVIL SOC'Y CONTACT GROUP, *supra* note 121, at 1; *see also* EUR. FOUND. CTR., COMMENTS ON THE STUDY “RECENT PUBLIC AND SELF-REGULATORY INITIATIVES IMPROVING TRANSPARENCY AND ACCOUNTABILITY OF NON-PROFIT ORGANISATIONS IN THE EUROPEAN UNION” 2 (2009), *available at* [http://www.efc.be/EUAdvocacy/EFC%20Statements/2009\\_EFCcomment\\_ECNLrpt.pdf](http://www.efc.be/EUAdvocacy/EFC%20Statements/2009_EFCcomment_ECNLrpt.pdf) (adopting a more hard-line approach that “based on the findings of the ECNL study, which have confirmed the preliminary results of the 2008 Matrix study, there is no scope for specific legislation regarding Transparency and Accountability . . . of national foundations and other NPOs or soft law approach (Code of conduct) at EU level.”).

123. Sidel, *supra* note 121, at 97 (internal quotations and citation omitted).

124. *Id.*

plement to domestic measures.”<sup>125</sup> In his 2009 Strategy Implementation Report, referring to the Matrix and ECNL studies, the Coordinator claimed:

Based on these studies and the input received [from non-profits invited to comment on the studies], the Commission will further examine the right way to respond to the threat of potential abuse of non-profit organisations for terrorist financing purposes. The aim should be that all Member States are assessed as ‘compliant’ with regard to Special Recommendation VIII of the FATF.<sup>126</sup>

These comments have prompted some NGOs to argue that the reports are being used by the EU to justify the implementation of FATF SR VIII “despite failing to provide supporting evidence that NGOs have been abused/exploited by terrorists.”<sup>127</sup>

Notwithstanding its more accommodating stance in its response to the publication of the Matrix Report, the Commission too seems to have reconsidered its broader governance basis and once more has returned to counter-terrorism concerns as the basis for European non-profit regulation. In its 2009 Communication on the draft Stockholm Programme it proposed:

The instruments for combating the financing of terrorism must be adapted to the new potential vulnerabilities of the financial system and to the new payment methods used by terrorists. We must have a mechanism that allows both adequate monitoring of financial flows and effective and transparent identification of people and groups likely to finance terrorism. Recommendations must be prepared for charitable organisations to increase their transparency and responsibility.<sup>128</sup>

The Stockholm Programme, negotiated by the European Council, defines a five-year framework for the EU in the area of justice and home

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125. Council of the European Union, Counter Terrorism Coordinator, *Revised Strategy on Terrorist Financing*, at 8, 11778/1/08 REV 1 (July 17, 2008).

126. Council of the European Union, Counter Terrorism Coordinator, *Report on the Implementation of the Revised Strategy on Terrorist Financing*, at 7, 8864/1/09 REV 1 (May 5, 2009).

127. Ben Hayes, *Statewatch*, *Briefing on EU Proposals to Increase the Financial Transparency of Charities and Non-Profit Organisations*, STATEWATCH.ORG (Jan. 2010), <http://www.statewatch.org/analyses/no-92-briefing-eu-financial-transparency-charities.pdf>.

128. *Communication from the Commission to the European parliament and the Council: An Area of Freedom, Security and Justice Serving the Citizen*, at 23, COM (2009) 262 final (June 10, 2009).

affairs.<sup>129</sup> The Swedish Presidency's draft programme, published in October 2009, ominously directed the Commission "to propose legal standards for charitable organisations to increase their transparency and responsibility so as to ensure compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF)."<sup>130</sup> This threat of legally binding measures, however, disappeared in the final version of the Stockholm Programme, which requested the Commission instead to "promote increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF)."<sup>131</sup>

The Commission's response to date has been two-fold: in June 2010, it indicated its intention to publish a Communication on voluntary anti-terrorist financing guidelines for EU based non-profit organizations in 2011;<sup>132</sup> and in July 2010, it published a short Discussion Paper on the proposed non-profit organization guidelines.

*A. Commission Discussion Paper on NPO Guidelines under Consultation (Sept 2010)*

On July 2, 2010, the Commission held its third transparency and accountability conference in the non-profit sector for a select group of invited non-profit organisations and representatives from Member State governments.<sup>133</sup> The Directorate General for Home Affairs ("DG Home") used the conference to launch its discussion paper on Voluntary Guidelines for EU based non-profit organizations. The four-page paper opens with the claim that there is concrete proof of the vulnerability of non-profit organizations for terrorist financing purposes.<sup>134</sup> The cited au-

129. Council of the European Union, *The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J. (C 115) [hereinafter *Stockholm Program*].

130. Council of the European Union, *The Stockholm Programme—An Open and Secure Europe Serving the Citizen (Draft)*, at 23, 14449/09 (Oct. 16, 2009).

131. *Stockholm Programme*, *supra* note 129, ¶ 4.5.

132. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme*, at 40, COM (2010) 171 final (Apr. 20, 2010) [hereinafter *Action Plan Implementing the Stockholm Programme*].

133. Eur. Comm., DG Home, *Discussion Paper on Voluntary Guidelines for EU Based Non-profit Organisations* ¶ 2.1.3 (July 2, 2010) [hereinafter *DG Home Voluntary Guidelines*], available at [http://www.efc.be/EUAdvocacy/Documents/2010\\_DGHOME\\_NPOGuidelines\\_Discussion%20Paper.pdf](http://www.efc.be/EUAdvocacy/Documents/2010_DGHOME_NPOGuidelines_Discussion%20Paper.pdf).

134. *Id.* at 1.

thorities in support of this statement, however, date back to 2003<sup>135</sup> and no reference is made to the Commission's more recent commissioned studies that demonstrate that the risk of such abuse is remote in most instances of well-governed organizations. Proceeding from this basis of threat, the Discussion Paper identifies six specific areas in which the Commission intends to develop guidance, namely: a) basic principles for good non-profit organization practice; b) good governance; c) accountability and transparency; d) relations to the donor; e) relations to the beneficiary; and f) suspicious activity reporting.<sup>136</sup>

The principles set out under these headings although addressed broadly to 'non-profit organizations' are aimed, as is common in previous EU documents, at entities that use their assets "exclusively for charitable or other legitimate purposes" and whose activities are "directed towards the attainment of the organisation's stated public benefit goals."<sup>137</sup> Once more, this approach applies a common law definition of "non-profit" to common and civil law jurisdictions alike, with all the attending problems identified by the ECNL Study that this creates.<sup>138</sup> Five of the draft guidelines are taken verbatim from the original Framework Code,<sup>139</sup> and for the most part, problems identified earlier with these requirements in the Commission's original 2005 consultation have not been taken into consideration.

One such example lies under the heading of accountability and transparency and relates to the requirement on non-profits to keep audit trails of all funds transferred outside the EU, including a requirement to carry out on-site audits of beneficiaries to ensure that funds are safe from terrorists.<sup>140</sup> The audit guideline makes no reference to already existing national reporting requirements for non-profits and thus may be assumed to be an additional requirement. More worryingly, the guideline makes no allowance for the compliance capacity of smaller organizations. The only concession to smaller organizations occurs in the recognition that

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135. *Id.*

136. *Id.*

137. *See id.* at 2.

138. *See supra* note 88.

139. *See DG Home Voluntary Guidelines, supra* note 133. Guidelines 2.3(1), 2.3(3), and 2.3(5) pertain to transparency and accountability, and Guideline 2.5(1) pertains to relations to the beneficiary. Most of Guideline 2.3(10), dealing with the use of formal channels for money flows, also originates from the Framework Code of Conduct, although a qualifier to this guideline has been added to the effect that account may be taken of the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns.

140. *See id.* ¶ 2.3(3).

“[s]implified accounting and reporting requirements should apply to NPOs under a certain size,”<sup>141</sup> but no similar concession is made in relation to audit requirements.

The Guidelines also lack clarity in their current form. Under the heading ‘Basic Principles for good non-profit organization practice’ the guidelines provide that a non-profit “will answer honestly all reasonable questions about its fundraising costs and it will do so within a reasonable timeframe.”<sup>142</sup> There is no indication as to whether this refers to requests in general or requests simply from national regulators. Another of the Basic Principles’ provisions requires that “NPOs should consider, on a risk-based approach . . . making reference to publicly available information, to determine whether any of their own employees are suspected of being involved in activities relating to terrorism, including terrorist financing.”<sup>143</sup> The discussion document, however, is silent as to which government list of proscribed organizations should be used to vet employees or the consequences for the organization of any such finding.

Ambiguity persists also in relation to Suspicious Activity Reporting, with the guidelines providing that “NPOs should make a report to the Police or the Financial Intelligence Unit when there is any knowledge or suspicion of terrorist property/activity.”<sup>144</sup> Aside from the mandatory tone of this language, which does not sit with the voluntary nature of the guidelines, it is unclear to which Financial Intelligence Unit or police authority such reports should be made or at what level. Further problems can be identified in the guidelines on governance, one of which provides that “it is important for NPOs to have independent oversight of its charitable operations, whereby the oversight structure best could be defined following the individual organisation of the NPO.”<sup>145</sup> Yet, it is unclear from this statement whether independent oversight means board review of management decisions or some other form of external audit.

Risk indicator factors make a return in the Commission’s Discussion Paper, with non-profits being “asked to identify the specific risk which they have to face of being abused for terrorist financing purposes.”<sup>146</sup> The Discussion Paper suggests some broad-ranging criteria for determining the existence of such risk, which include non-profit:

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141. *Id.* ¶ 2.3(1).

142. *Id.* ¶ 2.1(1).

143. *Id.* ¶ 2.1(6).

144. *Id.* ¶ 2.6(1).

145. *Id.* ¶ 2.2(1).

146. *Id.*



- involvement in programmes or projects in territories outside the EU, in particular in high risk areas (where terrorist activity is known to occur);
- co-operation with NPOs that conduct or contribute to programmes or projects in these areas;
- usage of alternative remittance systems or other payment methods, which are beyond the traditional financial mechanisms;
- difficulties in overseeing own projects, for example because of third parties being involved in them.<sup>147</sup>

For EU-based non-profits working in high-risk areas where governmental control has broken down and/or terrorist organisations are known to be active, these requirements raise serious concerns. From a legal perspective, the guidelines are silent as to whom non-profits are to report the outcome of their risk evaluation; neither is there any discussion as to legal or liability consequences that meeting these risk indicators will have for non-profits. It is difficult to see how a requirement of this nature fits under a heading entitled ‘basic principles’ since no principle is stated—rather action is required on the part of the non-profit. The implication of this section is that meeting these risk indicators will result in a finding of non-profit abuse for terrorist financing purposes. In this regard, the thinking of DG Home Affairs appears to be at odds with the policy of DG Development, as expressed in the European Instrument for Democracy and Human Rights (“EIDHR”)<sup>148</sup> and in the Commission’s 2007 Communication on Fragile Situations.<sup>149</sup> In the Commission’s EIDHR Strategy Paper for 2011–2013, the Commission recognises its role under the EIDHR as being one allowing for the delivery of assistance in principle without the need for host government consent, thus enabling it “to focus on sensitive political issues and innovative approaches and to cooperate

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147. *Id.* ¶ 2.1(5).

148. See Council Regulation 1889/2006, 2006 O.J. (L 386) (EC). The European Instrument for Democracy and Human Rights (“EIDHR”) is aimed at those difficult situations in which donors shift from direct engagement with governments to support other actors that can drive change. Procedures established under the EIDHR are well adapted to situations of fragility, which support alternative actors in situations that are not favourable to participatory development or to respect for human rights.

149. *Communication Towards an EU Response to Situations of Fragility*, COM (2007) 643 final (Oct. 25, 2007). The Communication acknowledges the important role played by civil society organizations in fragile situations, noting that these entities “have great potential for driving change, which can be maximised by facilitating their access to funding.” *Id.*

directly with local civil society organisations that need to preserve independence from public authorities, as well as to be active in countries that may be described as 'difficult partnerships.'"<sup>150</sup>

The Discussion paper does not address how the non-binding guidelines outlined therein will be applied by the Commission (for instance, whether they will be a factor in the awarding of European funding) nor is there any indication of the Commission's expectations regarding Member States or national regulatory authority implementation of them. Despite DG Home Affairs' strong interest in adopting a final proposal only after close consultation with the non-profit sector and Member States,<sup>151</sup> there is pressure on the Commission to deliver on its commitments in the Stockholm Action Plan and to publish a Communication with recommendations on the prevention of non-profit abuse for terrorist financing in early 2011.<sup>152</sup> A Communication would not be legally binding but would provide policy guidance for the Council of Ministers and the European Parliament.

#### *B. Non-profit Sector Responses to Commission Discussion Paper*

To date, the Commission's consultation with non-profit bodies has been narrowly focused on a select group who were invited to its July meeting on non-profit transparency and accountability.<sup>153</sup> These bodies along with Member State representatives were asked to comment on the draft guidelines by mid-September, with the Commission proposing to consider submissions in October 2010.<sup>154</sup> No general public consultation

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150. *Commission Strategy Paper 2011–2013: European Instrument for Democracy and Human Rights (EIDHR)*, at 13, COM (2010), 2432 (Sept. 23, 2010).

151. *See DG Home Voluntary Guidelines*, *supra* note 133.

152. *See Action Plan Implementing the Stockholm Programme*, *supra* note 132; *see also Commission Communication, The EU Counter-Terrorism Policy: Main Achievements and Future Challenges*, at 8, COM (2010) 386 final (July 19, 2010) (the Commission noting that, "Apart from legislation, the Commission also develops policy measures to counter terrorist financing, for example voluntary guidelines to address the vulnerability of non-profit organisations with regard to abuse for terrorist financing purposes. A Communication is planned for early 2011.").

153. About fifteen non-profit bodies were represented at the Commission's meeting in July, along with representatives of some, but not all Member States. In some instances the non-profit invitees received very little advance notice, putting them at a disadvantage when it came to representing their members. *See, e.g., EUCLID NETWORK*, *supra* note 44 (noting that Euclid, a European network of civil society leaders, was invited to participate in the meeting one week before it occurred, giving it "little or no time to consult with members").

154. EUR. FOUND. CTR., THERE IS NO NEED FOR EU VOLUNTARY GUIDELINES FOR NPOS (Sept. 14, 2010), *available at* <http://www.efc.be/News/Pages/thereisnoneedforEuvoluntaryguidelines.aspx>.

has been undertaken to elicit the views of potentially affected non-profits on the draft guidelines. Indeed, neither the Discussion Paper nor the deliberations of the July meeting are publicly available on the DG Home Affairs website. It is thus unsurprising that the Commission has not published non-profit submissions received to date though some non-profits have published their submissions independently.<sup>155</sup>

Non-profit responses to the Commission share a series of concerns with respect to the draft guidelines. These concerns cover the misplaced motivations behind and rationale for the guidelines, their proposed scope, the lack of clarity and consistency in the language used, and the failure in drafting the guidelines to fully appreciate and respect the diversity of the entities that make up the non-profit sector. Most of the submissions make the point that terrorist abuse of European based non-profit organisations is both rare and unlikely in the European context.<sup>156</sup> In a joint declaration on the proposed voluntary guidelines, the European Foundation Centre (“EFC”), Cordaid, and the Samenwerkende Brancheorganisaties Filantropie (“SBF”) point to the Commission’s own research in the form of the Matrix and ECNL Studies in this area to rebut the case of presumed vulnerability on the part of non-profits.<sup>157</sup> The EFC/Cordaid/SBF statement further calls on the Commission to disentangle specific counter-terrorist provisions from elaboration of general good practices in the discussion paper on the basis that “[c]riminal practices should be dealt with by crim-

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155. See, e.g., Eur. Found. Ctr., Cordaid, & Samenwerkende Brancheorganisaties Filantropie, *Joint Comments on the Discussion Paper “Voluntary Guidelines for EU based Non-Profit Organisations,”* (Sept. 10, 2010), [http://www.efc.be/EUAdvocacy/Documents/EFC\\_CordaidJoint-SBF-comment\\_10September.pdf](http://www.efc.be/EUAdvocacy/Documents/EFC_CordaidJoint-SBF-comment_10September.pdf) [hereinafter *Joint Comments on the Discussion Paper*]. The EUCLID Network and Humanitarian Forum have also published their submissions. ECNL provided the author with a copy of its response to the Commission, Eur. Ctr. for Not-for-Profit Law, *Comments on Discussion Paper, “Voluntary Guidelines for EU based Non-Profit Organisations,”* (Sept. 10, 2010). BOND informed the author that it submitted a letter supporting the submission of EFC/Cordaid/SBF that raised no new issues. Email from Katherine Astill, Sector Advocacy Officer, BOND, to Oonagh Breen, Senior Lecturer in Law, School of Law, University College Dublin (Sept. 27, 2010, 11:46 GMT) (on file with author).

156. See EUCLID NETWORK, *supra* note 44 (drawing on the comments of experts present at the Commission’s July meeting); see also The Humanitarian Forum, *Response to Consultation Paper from European Commission: Enhancing Transparency and Accountability of the Non-Profit Sector* (Sept. 1, 2010) [hereinafter *Response to Consultation Paper from European Commission*] (arguing that the threat of the sector is overstated and the case for additional measures in respect of non-profits is unproved).

157. *Joint Comments on the Discussion Paper*, *supra* note 155.

inal law and not by tightening the requirements, oversight and operating frameworks of a single sector, namely that of NPOs.”<sup>158</sup>

A common theme in the submissions is the disappointment expressed at the Commission’s failure to appreciate and articulate the immense value of the non-profit sector to the EU in terms both of service delivery and also as a facilitator of European integration. The EFC/CORDAID/SBF joint declaration finds it regrettable that the

role of NPOs and their contribution to stable and healthy societies is not always clearly acknowledged, nor is their vital contribution in areas such as conflict resolution or addressing violent radicalism. NPOs play a crucial social and economic role in Europe and beyond and their contribution to the public benefit is highly valuable to society and should not be called into question.<sup>159</sup>

Two submissions take the Commission to task over its non-contextual use of the term ‘voluntary’ guidelines.<sup>160</sup> In its submission, the ECNL cites the negative experience of American non-profits under the US Treasury Department’s Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities.<sup>161</sup> The common difficulty with ‘voluntary’ guidelines, as is illustrated by the American experience, is that what may be voluntary in theory can evolve into de facto legal requirements for those subject to them.<sup>162</sup> Given that the Commission is silent as to the intended use of the guidelines, the fact that the voluntariness element of the guidance might be overlooked in practice both by European institutions and other government bodies is a live issue. In the words of the ECNL, “[i]f the EC or MS were, for example, to incorporate

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158. *Id.* at 2.

159. *See id.*; *see also* *Response to Consultation Paper from European Commission*, *supra* note 156, at 1 (to the effect that the guidelines show little “visible understanding of the great work done by NGOs from Islamic countries or the West alike, nor of the challenges they face”).

160. *See Joint Comments on the Discussion Paper*, *supra* note 155 (arguing that there is no need for the proposed new voluntary guidelines); *see also* ECNL, *Comments on Discussion Paper “Voluntary Guidelines for EU Based Non-Profit Organisations,”* at 2 (Sept. 14, 2010) [hereinafter ECNL Comments].

161. U.S. DEP’T OF THE TREASURY, U.S. DEP’T OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES [hereinafter ANTI-TERRORIST FINANCING GUIDELINES].

162. ECNL Comments, *supra* note 160, at 2 (citing the example of the federal agency running the Combined Federal Campaign invoking the Treasury Guidelines to insist that recipients of CFC funding certify that they did not “knowingly employ individuals or contribute funds to organizations found on the . . . terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union.” Although later reversed, this requirement cost non-profits a significant amount in lost funding.).

certification of compliance with the guidelines as a condition of funding, the guidelines would become, in effect, legal requirements.”<sup>163</sup>

Moreover, in cases in which Member States imposed different mandatory requirements at national level to the European voluntary guideline criteria, this could cause great confusion for non-profit organizations faced with choosing between contradictory standards. A further fear is raised in this regard by the Humanitarian Forum, which suggests that the draft guidelines could be used by non-EU governments in a manner oppressive to non-profit organizations and their activities, particularly in regions in which “NPOs may be under suspicion for providing competition with, or advocacy against, oppressive and/or corrupt Governments.”<sup>164</sup>

Nearly all the submissions seek to clarify the role of the Commission in relation to the non-profit sector and the context for its Discussion Paper. For ECNL, the purpose of the guidelines is “to encourage NPOs to review their internal rules, to increase awareness about potential terrorism abuse and thus reduce the risk of NPOs’ possible abuse for terrorist financing purposes.”<sup>165</sup> Achievement of this goal would require the guidelines to lose their prescriptive tone and instead serve as “descriptors of the common issues and practices, leaving room for further development of a diverse range of practices, appropriate to particular kinds of NPOs, to lessen the risk of diversion of funds.”<sup>166</sup> In its submission, ECNL argues that the EU is in a position to act as a convenor, bringing Member States and their best practices together to be shared precisely because of the lack of specific regulation at an EU wide level that could otherwise serve as a reference point for the guidelines.<sup>167</sup> The Euclid Network (“Euclid”) also sees value in the recasting of the guidelines but in its model based on good governance principles, the Commission’s role is not one of convenor but of adjudicator, empowered both to stimulate good governance and to reward those organizations actively trying to implement them through its financial regulation and funding practices.<sup>168</sup>

In contrast to both ECNL and Euclid, the EFC/Cordaid/SBF joint declaration seeks to eliminate the Commission from the non-profit regulato-

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163. *Id.* at 3.

164. *Response to Consultation Paper from European Commission, supra* note 156, at 3.

165. ECNL Comments, *supra* note 160, at 3.

166. *Id.* at 4.

167. *Id.*

168. EUCLID NETWORK, *supra* note 44.

ry picture entirely.<sup>169</sup> In this regard, these comments are consistent with EFC's earlier responses to the 2005 Framework Code of Conduct.<sup>170</sup> Dismissing the basis for the guidelines as ill founded, these organizations argue that the improvement of non-profit management and governance should be left to non-profits, their support organizations, and networks.<sup>171</sup> The uncompromising wording of the joint declaration leaves little room for the Commission to play any regulatory role in relation to the sector. According to its signatories, it is for Member States (rather than the EU) to maintain an open dialogue and to cooperate with non-profit organizations in any review of the scope and impact of FATF SR VIII. The only mention of the Commission in this context is a preemptive warning to it not to add to the regulatory burdens already borne by non-profits in the implementation of the Stockholm Programme.<sup>172</sup> The Humanitarian Forum also queries the rationale for the guidelines, asking in what specific respects existing charity law and regulation in EU Member States is perceived as inadequate for the task of combating the financing of terrorism.<sup>173</sup>

All of the submissions seen by the author urge the Commission to re-draft the guidance in more precise and consistent terms with greater appreciation of the intended non-profit audience<sup>174</sup> and the roles played by that audience (whether grant-making or programmatic). In this regard, ECNL highlights certain inconsistencies in the draft that result in an apparently non-binding measure implying in some of its provisions that

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169. *Joint Comments on the Discussion Paper*, *supra* note 155, at 2.

170. See EFC, *Comments on the Discussion Document, "Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices: An EU Design for Implementation of FATF Special Recommendation VIII—Non-profit Organisations,"* (2005), available at [http://www.efc.be/EUAdvocacy/Documents/2005\\_EFCCCommentsJAI\\_Code.pdf](http://www.efc.be/EUAdvocacy/Documents/2005_EFCCCommentsJAI_Code.pdf).

171. See *Joint Comments on the Discussion Paper*, *supra* note 155, at 2.

172. *Id.* at 2 (calling "on the Commission and EU Member States to ensure that any initiative, as part of the implementation of the Stockholm programme action plan, does not lead to new layers of rules and red tape or introduce unrealistic regulatory provisions and/or financial obstacles, which would hinder the sector's ability to perform vital work on behalf of its beneficiaries in Europe and beyond, including NPOs that work in conflict zones").

173. *Response to Consultation Paper from European Commission*, *supra* note 156, at 1.

174. The ECNL Comments are particularly strong in this regard in seeking that the Commission clarify its intended target audience as being either all non-profits or merely public benefit/charitable organizations with clearer distinctions being drawn between the standards expected of both big and small non-profits and those non-profits engaged in grant-making as opposed to direct programme delivery. ECNL Comments, *supra* note 160, at 5–6.

non-profits “should do” certain actions, stating in others what non-profits “must do,” while declaring in yet further provisions what non-profits “will do.”<sup>175</sup> The Humanitarian Forum submission takes the Commission to task for its vague references to required higher standards and better practices that should be followed by non-profits.<sup>176</sup> It points out that to encourage non-profits to “adopt practices in addition to those required by law that provide additional assurances that all assets are used exclusively for charitable or other legitimate purposes” is not helpful when the Commission does not outline the nature of these practices.<sup>177</sup> Similarly, in an EU system that does not have a recognized or harmonized system of accounting procedures, a requirement that non-profits follow “proper book-keeping practice” in paragraph 2.3.1 of the draft Guidelines without further elaboration does not lead to greater clarity. Such equivocation has adverse consequences for non-profits, according to Humanitarian Forum, since it forces them to guess what is meant and how particular guidelines will be applied in practice, with resulting “confusion, over-caution and unnecessary expense—or confused disinterest” on the part of affected organizations.<sup>178</sup>

As to the next steps, if the Commission heeds the responses received to date, it will need to substantially revise its guidelines and to engage in wider public consultation in advance of proceeding with its proposed Communication in 2011. One must hope that ECNL’s expressed confidence in due process is well placed<sup>179</sup> and that, in contrast to previous occasions, sufficient time will be allocated for effective public consultation.

## VI. THE WAY FORWARD: TAKING WISDOM WHERE ONE FINDS IT

Legitimacy and public integrity are vital to [non-profit organizations] and are essential to the effectiveness of their mission . . . . As transparency and accountability are demanded of NGOs, however, the same transparency and accountability are needed from governments . . . . Of-

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175. *Id.* at 8 (referring respectively to paragraphs 2.1.6, 2.1.4 and 2.1.1. in the Guidelines).

176. *See Response to Consultation Paper from European Commission, supra* note 156, at 2.

177. *DG Home Voluntary Guidelines, supra* note 133, ¶ 2.1.3.

178. *Response to Consultation Paper from European Commission, supra* note 156.

179. The ECNL Comments go so far as to say that ECNL “is aware that wider consultations are planned for once the current draft is revised.” ECNL Comments, *supra* note 160, at 6. At the time of writing, there is still no public reference to the Discussion Paper on DG Home Affairs webpage.

officials who make public claims and establish policies on the basis of alleged NGO associations with terrorism have a responsibility to justify such assertions. Responsible NGOs should not be made to invest resources in proving their bona fides in the absence of legitimate charges or verifiable evidence.<sup>180</sup>

There is much truth in the old adage—it's not what you do, it's the way that you do it. NGOs play many important roles in the European Union: from policy advisors to policy advocates. They act as valuable conduits between the institutions and the citizenry in areas ranging from direct service provision to grassroots involvement and both help to give voice to pluralist agendas as well as providing a focal point for bringing common interests together. In as much as they play an important part in dispelling the democratic deficit in the EU, it is also important to shine a bright light on their involvement, thereby ensuring it is carried out with integrity. Institutional concern to ensure such good governance would indeed be a welcome starting point.

Yet, as this Article demonstrates, the institutional concern spearheading the current move towards European regulation of non-profits is driven less by governance concerns and far more by combating the financing of terrorism. It is inevitable that this latter prevailing circumstance will colour any resulting policy solution. As the Commission's own reports have shown, to adopt this approach is to put the cart before the horse. Arguably, it would be far better to focus on improving the governance of EU-based non-profits in those areas that either raise concern at EU level or may benefit from a European as opposed to an ad hoc Member State approach. As the Independent Scrutiny Report showed, a direct focus on better governance will reap many indirect benefits that will assist in combating the financing of terrorism. Examples of both models currently exist in the form of the United States Treasury Guidelines (an anti-terrorism model) and the recommendations on NGO Governance from the Council of Europe's Conference on International NGOs (a governance model).

In revising its Voluntary Guidelines, the European Commission may choose to place ongoing emphasis on the need for effective counter-terrorism measures in the non-profit sector at European level, even though, as non-profit organizations are quick to point out, the 'fit' is not good. The fear for many non-profits may be that the Commission will be overly influenced by the United States' policy in this area, a policy that has drawn vociferous criticism from charities, human-rights watchdogs,

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180. DAVID CORTRIGHT ET AL., FRIEND NOT FOE: CIVIL SOCIETY AND THE STRUGGLE AGAINST VIOLENT EXTREMISM 17 (2008).



and scholars since its introduction in 2002.<sup>181</sup> The policy, contained within the United States Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities,<sup>182</sup> mirrors in structure the Commission's draft Code of Conduct, with guidance on fundamental principles of good charitable practice, governance accountability and transparency, financial accountability and transparency, programme verification, and anti-terrorist financing best practices, respectively.

In force since 2002, these guidelines were revised in 2006 and supplemented by a risk matrix in 2007.<sup>183</sup> These revisions have not addressed the concerns of US charities, which, in response to the guidelines, developed alternative principles of best practice for international charities in 2005.<sup>184</sup> Of particular concern to European based non-profits will be the 'know your donor/know your beneficiary' provisions, a principle that USAID has given effect to through its unpopular 'partner vetting system,'<sup>185</sup> and one that remains of concern to EU-based nonprofits in terms of the Commission's intentions in this regard.

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181. See Nancy Billica, Political Scientist, Univ. Colorado, & Advisor to Urgent Action Fund for Women, Remarks at Panel Discussion: Safeguarding Charity in the War on Terror, Georgetown University Center for Public & Nonprofit Leadership (June 14, 2005), available at [http://cpnl.georgetown.edu/doc\\_pool/Charity061405.pdf](http://cpnl.georgetown.edu/doc_pool/Charity061405.pdf); see also Mark Sidel, *Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of "War on Terror" States*, 10 INT'L J. NON-PROFIT L. 7, 13–14 (2008); AM. CIVIL LIBERTIES UNION [ACLU], BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" (2009) [hereinafter ACLU, BLOCKING FAITH, FREEZING CHARITY]; Mark Sidel, *Counter-terrorism and the Regulation of Civil Society in the USA*, 41 DEV. CHANGE 293 (2010) [hereinafter Sidel, *Counter-terrorism*]; U.S. Dep't of the Treasury, Response to Comments Submitted on the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (2006), available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/response.pdf> (responding to criticisms of the Guidelines).

182. ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 161.

183. U.S. DEP'T OF THE TREASURY'S OFFICE OF FOREIGN ASSETS CONTROL, RISK MATRIX FOR THE CHARITABLE SECTOR (2007), available at [http://www.ustreas.gov/offices/enforcement/ofac/policy/charity\\_risk\\_matrix.pdf](http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf).

184. TREASURY GUIDELINES WORKING GROUP OF CHARITABLE SECTOR ORGS. & ADVISORS, PRINCIPLES OF INTERNATIONAL CHARITY (2005), available at [http://www.independentsector.org/uploads/Policy\\_PDFs/CharityPrinciples.pdf](http://www.independentsector.org/uploads/Policy_PDFs/CharityPrinciples.pdf); see also Sidel, *Counter-terrorism*, *supra* note 181, at 299 (documenting the charity/Treasury impasse on the primacy of the conflicting guidelines that still existed in 2009).

185. See *Issue Brief: USAID Must Consider Alternative Vetting Approaches*, CHARITY & SEC. NETWORK, [http://www.charityandsecurity.org/analysis/Issue%20Brief\\_USAID\\_Alternative\\_Vetting](http://www.charityandsecurity.org/analysis/Issue%20Brief_USAID_Alternative_Vetting)

To be sure, the Commission stands in a much weaker position than the Department of Treasury in the US when it comes to implementing effectively any such code. The worst-case scenario for non-profits would be the introduction of an ill-conceived 'voluntary' European code of conduct that draws half-hearted support from Member State governments and is indiscriminately applied to non-profit organizations both by EU institutions, Member States, and third country governments in which some of these non-profit organizations operate. The effect of such application would be to burden compliant NGOs with an additional layer of bureaucracy, and if issued in its current form, cause confusion amongst NGOs as to what is actually required of them under the guidelines, leading in some cases to inevitable self censorship or restriction of humanitarian work in high risk areas. The absence of a centralised European oversight schema will also make it difficult to apply the code in an even-handed manner to all non-profits, resulting (again in a worst case scenario) in certain types of organizations being subjected to scrutiny under the code (for instance, Muslim charities) with others escaping entirely under the radar.<sup>186</sup>

A better outcome for non-profits would be for the EU Commission to play to its strengths and to use its fulcrum position to act as a facilitator of information exchange and best practice for European non-profits. Again, achievement of this role is not something that can be accomplished overnight. As all the reports commissioned by the Commission over the past five years have demonstrated, effective and proportional regulatory action is only possible when it is based upon sound empirical research.<sup>187</sup> To this end, it may be worth learning from the practices of

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\_Approaches (last visited Apr. 7, 2011) (describing the PVS as creating "unnecessary and potentially dangerous barriers for humanitarian groups providing relief in global hot spots").

186. In this regard, consider the disproportionate effect that the anti-terrorist financing guidelines in the United States has had on Muslim charities. For a discussion, see ACLU, BLOCKING FAITH, FREEZING CHARITY, *supra* note 181.

187. A recent DG Home invitation to tender to conduct a feasibility study on mapping out which actors and through which tools and steps could create a non-profit organisation observatory in the EU is thus a welcome step in the direction. See Commission Service Contract Notice 387044-2010, B-Brussels, *Feasibility Study on Mapping Out Which Actors, and Through Which Tools and Steps, Could Create a Non-Profit Organisations Observatory in the EU*, OJ S252/2010, available at <http://ted.europa.eu/udl?uri=TED:NOTICE:387044-2010:TEXT:EN:HTML>. The tender process closes in mid-February 2011 and ten months is allocated for the project's completion upon award, meaning the Commission should have better information on hand by early 2012. Of course, this date is still substantially later than the Commission's advertised 2011 date for the release of its proposed Communication on the Non-Profit Code of Conduct.

the Council of Europe (the “CoE”) in light of its recent forays into the area of NGO governance and best practice.

Founded in 1949, the CoE is Europe’s oldest political organization and comprises forty-seven members, which includes all Member States of the EU.<sup>188</sup> The Council was established to achieve greater European unity through the promotion of democracy, human rights, and the rule of law, and to develop common responses to political, social, cultural, and legal challenges in Member States.<sup>189</sup> The CoE and the EU enjoy good political relations, which were further strengthened in 2007, when the two entered into a Memorandum of Understanding that provided for a new framework for enhanced co-operation and political dialogue.<sup>190</sup> In terms of impact, the CoE is perceived as an intergovernmental structure whose decisions have relatively little impact on social and economic redistribution in Europe when compared to EU decisions.<sup>191</sup> Conventions promulgated by the CoE are non-binding since the CoE cannot impose ratification except in the case of the European Convention on Human Rights. Equally, CoE recommendations are not legally binding on either an international or national level.<sup>192</sup> However, in practice, Member States do bear them in mind when developing related legislation. Since the CoE cannot sanction violations by Member States, the CoE must work through the cajoling of governments and the encouragement of best practice.<sup>193</sup> To this end, the general influence of the CoE outside of the European Convention on Human Rights mirrors the current influence of the EU Commission in the area of European non-profit regulation.

At the heart of the CoE lies a quadrilogue of institutions: the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and

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188. *Council of Europe in Brief*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> (last visited Apr. 7, 2011).

189. *Mission Statement*, COUNCIL OF EUR., [http://www.coe.int/t/e/social\\_cohesion/soc-sp/general\\_information/02\\_mission\\_statement/MISSION%20STATEMENT.asp](http://www.coe.int/t/e/social_cohesion/soc-sp/general_information/02_mission_statement/MISSION%20STATEMENT.asp) (last visited Apr. 7, 2011).

190. Memorandum of Understanding between the Council of Europe and the European Union, CM (2007) 74 (May 10, 2007). Core areas of cooperation between the two currently include: human rights and fundamental freedoms, rule of law, justice and home affairs, fight against organized crime and corruption, culture, education, and other joint activities.

191. Silke M. Trommer & Raj S. Chari, *The Council of Europe: Interest Groups and Ideological Missions?*, 29 W. EUR. POL. 665, 666 (2006).

192. *Id.*

193. Matti Niemivuo, *Good Administration and the Council of Europe*, 14 EUR. PUB. L. 545, 545–46 (2008).

Regional Authorities, and the Conference of International NGOs (the "Conference"). Together, these actors actively participate in the policies and work programme of the CoE and reinforce co-operation between the CoE and the various associations in Member States. Since the introduction of participatory status for INGOs in 2003,<sup>194</sup> the Conference has been in a stronger position to influence policy development at the Committee of Ministers.

In 2008, the Conference established an Expert Council on NGO Law (the "Expert Council"), the task of which is "to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law and its implementation, and promoting its compatibility with Council of Europe standards and European good practice."<sup>195</sup> The Expert Council has published two reports to date: its first report undertook a thematic study on the conditions for the establishment of NGOs with case studies of six countries: Azerbaijan, Belarus, France, Italy, Russia, and Slovakia.<sup>196</sup> In its second report, published in January 2010, the Expert Council turned its attention to the internal governance of NGOs and examined the scope for self-governance, supervision and intervention by authorities, accountability and transparency, management, and decision-making processes. This report included case studies of Armenia, Ireland, Luxembourg, Moldova, and the former Yugoslav Republic of Macedonia,<sup>197</sup> along with less detailed descriptions of practice in other CoE Member States based on the return of country questionnaires.

The Expert Council's recommendations, which were endorsed by the Conference of INGOs in January 2010, call on Member States to ensure, inter alia, that the scope of obligations relating to the auditing of accounts and reporting on activities is clarified and does not place an undue

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194. Comm. of Ministers, Council of Eur., *Participatory Status for International Non-Governmental Organisations with the Council of Europe*, Res (2003) 8 (Nov. 19, 2003). Prior to 2003, NGOs enjoyed a lesser form of "consultative status" with the CoE.

195. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law Terms of Reference*, OINGConf/Exp (2008) 1 (Jan. 2008).

196. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law, First Annual Report: Conditions of Establishment of Non-Governmental Organisations*, OINGConf/Exp 2009 1 (Jan. 2009). The Conference of INGOs adopted this report on January 28, 2009, and made a series of recommendations regarding its implementation. See Conference of INGOs of the Council of Eur., *First Report of the Expert Council on NGO Law*, CONF/PLE (2009) REC 1 (Jan. 28, 2009).

197. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law, Second Annual Report: The Internal Governance of Non-Governmental Organisations*, OINGConf/Exp (2010) 1 (Jan. 2010).

burden on NGOs.<sup>198</sup> It points out that the basis for public authorities to challenge the decision-making of NGOs should be limited to circumstances in which there is a legitimate public interest to be protected.<sup>199</sup> Furthermore, the report argues that the appropriate sanction against NGOs for breach of legal requirements applicable to them should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil, or criminal penalty on them and/or any individuals directly responsible.<sup>200</sup> Clarity and proportionality are thus the keywords here.

This emphasis on institutional clarity and proportionality can also be seen in the CoE Recommendation (2007) 14 on the legal status of non-governmental organizations in Europe.<sup>201</sup> The Recommendation requires, *inter alia*, that the activities of NGOs should be presumed to be lawful in the absence of contrary evidence and that no external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.<sup>202</sup> These principles give effect to the underlying legitimacy of non-profit organizations and require that any impediments to their operations be based on a sound legal basis.

At present, the work of the Expert Council on NGO Law is producing empirically sound accounts of European Member State NGO law and practice, thus assisting in the establishment of common trends of best practices and common problems. If the essence of these principles were to inform the European Commission in its relations with non-profit organizations and in the drafting of its voluntary code of conduct, a better outcome would be assured in achieving stronger NGO accountability and transparency through better governance while simultaneously, albeit indirectly, supporting the anti-terrorism agenda without undermining the achievement of non-profits' missions.

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198. Conference of INGOs of the Council of Eur., *Internal Governance of NGOs*, recommendations 4, 6, CONF/PLE (2010) REC 1 (Jan. 27, 2010).

199. *Id.*

200. Comm. of Ministers, Council of Eur., *Legal Status of Non-Governmental Organizations in Europe*, para.72, CM/Rec (2007) 14 (Oct. 10, 2007) [hereinafter *Legal Status of Non-Governmental Organisations in Europe*]. Compare the approach of the Expert Council with that of the ACLU in ACLU, BLOCKING FAITH, FREEZING CHARITY, *supra* note 181, at 21 (calling on the U.S. Congress to provide charities with an opportunity to cure any issues before taking disruptive action).

201. *Legal Status of Non-Governmental Organisations in Europe*, *supra* note 200.

202. *Id.* cls. 67, 70.

# WAIT! THAT'S NOT WHAT WE MEANT BY CIVIL SOCIETY!: QUESTIONING THE NGO ORTHODOXY IN WEST AFRICA

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## INTRODUCTION

Among those whose vocations or avocations involve spreading democracy and market driven prosperity<sup>1</sup> to the developing world, it has long been an article of faith that creating a vibrant, highly ing civil society is a necessary (some would say *the* necessary) precursor. This Article focuses on the complicated and messy business of promoting civil society in Africa, Muslim West Africa in particular.

I assume, and this Article argues, that when we—people and institutions from the Global North<sup>2</sup>—envisage civil society in Africa, we picture citizens forming voluntary non-governmental organizations (“NGOs”) and then sitting around conference tables (perhaps the most culturally attuned among us include visions of people sitting in circles under village trees) debating and passing resolutions that will advance women’s rights, the rights of minority groups, protections for children and other vulnerable members of society, environmental justice, freedom of expression, due process, and the rule of law.<sup>3</sup>

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1. Alison Van Rooy & Mark Robinson, *Out of the Ivory Tower: Civil Society and the Aid System*, in CIVIL SOCIETY AND THE AID INDUSTRY 31, 36–37 (Alison Van Rooy ed., 1998) [hereinafter CIVIL SOCIETY AND THE AID INDUSTRY] (stating that promotion of democracy and promotion of economic development are the two major aims of the civil society movement, and that improved economic performance is assumed to be a byproduct of strong civil society).

2. Throughout this Article I employ the terms “Global North” and “West” interchangeably and somewhat loosely to refer to the wealthy countries of the world—and the institutions that they control—that dominate international development. I realize fully that the salience of these terms is fading as China and other non-western countries exert ever greater influence in Africa and other parts of the developing world.

3. Indeed, the United States Secretary of State, Hillary Rodham Clinton, has traveled the world recently delivering the good word that civil society “undergirds both democratic governance and broad-based prosperity.” See Hillary Rodham Clinton, U.S. Sec’y of State, *Civil Society: Supporting Democracy in the 21st Century*, Community of Democracies, Krakow Poland (July 3, 2010), *available at* <http://www.state.gov/secretary/rm/2010/07/143952.htm>. When she specifies the civil society actors she has in mind, she tends to refer to “organizations . . . fighting for justice and law, or clean and open government, or public health, or a safe environment, or honest elections . . .” *Id.*; see also Wachira Maina, *Kenya: The State, Donors and the Politics of*

What we of the Global North do not picture in our collective conception of civil society, and what we are not prepared to deal with, is groups of Islamic *imams* crowding into the public square agitating for norms and laws that would, among other things, deny women equal inheritance rights or the right to marry without elder males' permission. Yet, this is precisely what has happened across Islamic West Africa, partly as a result of Western-inspired reforms that were intended to bolster civil society. The civil society sector that we envisioned and helped engineer in poor countries across Africa has been occupied by nongovernmental actors whose visions of a just society diverge radically from our own. The question that this Article begins to answer is what if anything we in the Global North ought to do about it.

Because this Article is linked to a symposium, I feel obligated to draw an explicit connection to the theme of Governing Civil Society: Linking NGO Legitimacy to Nonprofit Accountability. If civil society is to have any meaning and any efficacy in non-Western societies and states, it will have to develop its own peculiarities in its own social and political context. Ultimately, civil society in far away countries will probably look very little like civil society in the United States or Western Europe. Efforts to transplant U.S.-generated norms and "best practices" on nonprofit governance and accountability to civil society actors in Africa and other parts of the developing world are probably a waste of time. Just as Africans will have to develop their own civil society, they will have to develop their own norms concerning the proper governance of its constituent members. And that may take a long time.

In pursuit of that argument, Part I of this paper examines what we mean by civil society and concludes that, though it means many things to many people, a core conception shared by most donor countries and Northern multilateral organizations and NGOs is that it is, or at least should be, comprised of high functioning voluntary associations dedicated to protecting universal human rights and upholding democracy. Stated more precisely, civil society in poor countries should look a lot like the nonprofit sector in the United States and the voluntary sector in Europe. Part II offers examples of how our plans for civil society in Africa, particularly in Islamic West Africa, have gone awry. A brief preview of that story is that the US and its Global North allies encouraged law reform that would create a social space for the growth of a civil society sector, but Muslim social reformers rushed into that social space and successful-

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*Democratization*, in CIVIL SOCIETY AND THE AID INDUSTRY, *supra* note 1, at 134, 137–38 (arguing that Western promoters of civil society in Africa have a narrow, culturally determined view of what constitutes legitimate civil society).

ly launched popular efforts to institute Islamic norms and practices. Part III grapples briefly with the question of what we should do about it, and concludes that our best course is to permit divergent visions of civil society to take root in countries that are historically and culturally different from our own.

#### I. CIVIL SOCIETY: A PROTEAN CONCEPT BECOMES A KEYSTONE OF INTERNATIONAL LAW AND DEVELOPMENT PROGRAMS

Civil society means many things to many people. Accounts of its origins and evolution have become numerous in recent years, typically beginning with Ancient Rome (where the term civil society described civilized people organizing their public affairs through a *polis*), continuing to a revival of the concept during the eighteenth century Scottish Enlightenment (where it was conceptualized as a check on the power of the state), nodding to the Italian Marxist theorist Antonio Gramsci (who saw it as the sphere in which battles for and against capitalism were fought), and ending with the fall of the Berlin Wall, the break-up of the Eastern Bloc, and the international flowering of democracy propelled by citizens' voluntary associations.<sup>4</sup>

For purposes of this brief Article, we pick up the story of civil society at its last chapter as the Cold War was coming to an end. At that time—in the late 1980s through the 1990s—civil society became “one of the big ideas of the millennial moment,”<sup>5</sup> a “key element in the post-Cold War zeitgeist.”<sup>6</sup> The Berlin Wall fell, the Cold War ended, and the development of civil society was declared essential to the Western project of creating democracy and prosperity across the world, including Africa.<sup>7</sup>

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4. For a comprehensive and nicely written account of the history of the term “civil society,” see Alison Van Rooy, *Civil Society as Idea: An Analytical Hatstand?*, in *CIVIL SOCIETY AND THE AID INDUSTRY*, *supra* note 1, at 6–24 [hereinafter Van Rooy, *Civil Society as Idea*]. For an entertainingly sardonic version of the same story, see John L. Comaroff & Jean Comaroff, *Introduction*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA* 1–22 (John L. Comaroff & Jean Comaroff eds., 1999) [hereinafter *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*].

5. Comaroff & Comaroff, *Preface*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*, *supra* note 4, at vii [hereinafter Comaroff & Comaroff, *Preface*].

6. Thomas Carothers, *Civil Society: Think Again*, *FOREIGN POL'Y* 19 (1999).

7. See Naomi Chazan, *Africa's Democratic Challenge*, 9 *WORLD POL'Y J.* 279, 280 (1992). The civil society notion received a boost from the work of Robert Putnam, who studied democracy in small towns in northern Italy and concluded that it functioned well there because the inhabitants of the small towns had built up a store of what he called “social capital.” Robert Putnam, *Bowling Alone, America's Declining Social Capital*, *J. DEMOCRACY* 61, 67 (1995). He warned that associational life in the U.S. was losing its



At an operational level, building civil society became the marching orders for a vast array of institutional actors engaged in international development work.<sup>8</sup> American development institutions such as USAID began churning out reports and making grants to engender civil society.<sup>9</sup> Even international finance institutions such as the World Bank, whose core missions were not supposed to involve democracy building and social engineering,<sup>10</sup> began including civil society in their programs and reports.<sup>11</sup>

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vibrancy, and that a decline in associational life would reduce our social capital and undermine our democracy. *See id.* at 67–70.

8. Nelson Kasfir, *The Conventional Notion of Civil Society: A Critique*, in CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES 2 (Nelson Kasfir ed., 1998); Stephen N. Ndegwa, THE TWO FACES OF CIVIL SOCIETY: NGOS AND POLITICS IN AFRICA 2, 15 (1996); *see also* Alan Whaites, *Let's Get Civil Society Straight: NGOs, the State, and Political Theory*, in DEVELOPMENT, NGOS AND CIVIL SOCIETY 124, 126 (Deborah Eade ed., 2000) [hereinafter DEVELOPMENT, NGOS AND CIVIL SOCIETY] (arguing that it has become a development industry orthodoxy that development, particularly efforts to create good governance in the developing world, should be undertaken through civil society).

9. *See* GARY HANSEN, CONSTITUENCIES FOR REFORM: STRATEGIC APPROACHES FOR DONOR-SUPPORTED CIVIC ADVOCACY GROUPS (USAID Program and Operations Assessment Report No. 12) (1996), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/constituenices.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/constituenices.pdf) (stating “a core component of USAID’s democracy and governance agenda is support for strengthening civil society”).

10. *See generally* NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS (2006) (examining the role of the IMF and the World Bank in international relations). A slightly more cynical version of this explanation points out that the international financial organizations such as the World Bank and the IMF that have taken the lead in implementing the law-as-technology approach are forbidden by their charters from straying into the realm of politics, whereas nothing prevents them from being involved in technology transfer. *See* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEM AND ECONOMIC DEVELOPMENT AROUND THE WORLD 20–21, 209 (2008). They therefore adopt, consciously or unconsciously, strained definitions of law that permit them to take what they view as appropriate action. *Id.*

11. *See, e.g.*, THE WORLD BANK, FRAGILE STATES—GOOD PRACTICE IN COUNTRY ASSISTANCE STRATEGIES 5–6 (2005), available at [http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/12/22/000090341\\_20051222094709/Rendered/PDF/34790.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/12/22/000090341_20051222094709/Rendered/PDF/34790.pdf); THE CIVIL SOCIETY FUND OF THE WORLD BANK GROUP, SMALL GRANTS BIG RESULTS: SMALL GRANTS PROGRAM ANNUAL REPORT FISCAL YEAR 2008 7–8 (2008), available at <http://siteresources.worldbank.org/INTSMALLGRANTS/Resources/CSFAnnualReport2008.pdf> (describing small grants intended to spur civic engagement and listing various targeted civil society groups).

The aid industry presumed a causal connection between a thriving civil society, democratization, and economic prosperity.<sup>12</sup> When talking about Africa, some Western experts explain the causation as economic liberalization leading to a powerful middle class, which protects its interests by forming robust civil society, giving rise in turn, to stable democracy.<sup>13</sup> Others place civil society first in this causation cascade; a thriving civil society gives rise to healthy democracy, which creates the conditions for long-term economic development.<sup>14</sup> No matter the details of the causal explanation, it has become accepted wisdom that civil society plays a vital role in creating democracy and long-term prosperity.<sup>15</sup>

Given policy makers' and aid experts' unbounded enthusiasm for civil society, its definition is surprisingly hazy and malleable.<sup>16</sup> A USAID study on civil society defines it somewhat tautologically as "nonstate organizations that can act as a catalyst for democratic reform[,]"<sup>17</sup> implying that democratic reform is the sole or primary reason for civil society's existence. A more flexible (and typical) definition of civil society, attributed to the noted civil society theorist Larry Diamond, is "the voluntary and self-supporting legally ordered social space between government and market where citizens act collectively to express opinions, concerns, and demands, especially pertaining to the state."<sup>18</sup> The noted anthropologists, Jean and John Comaroff, apply their disciplinary perspective to civil society and define it as "a public sphere, separated from

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12. See generally Van Rooy & Robinson, *supra* note 1, at 36–37 (stating that the two primary goals of civil society projects are promotion of democracy and promotion of economic development, and that improved economic performance is generally assumed in the civil society literature to be a byproduct of strong civil society).

13. Maina, *supra* note 3, at 154.

14. Van Rooy & Robinson, *supra* note 1, at 36.

15. *Id.* at 44–50 (reviewing various popular theories explaining why civil society bolsters democracy).

16. Comaroff & Comaroff, *Preface*, *supra* note 5, at viii, 6 (arguing that the concept of civil society was revived after the Cold War and that it has come to mean all things to all people); see also MICHAELLE L. BROWERS, *DEMOCRACY AND CIVIL SOCIETY IN ARAB POLITICAL THOUGHT: TRANSCULTURAL POSSIBILITIES* 6 (2006) (arguing that those who invoke civil society often attempt "to insinuate theoretical and ideological assumptions into their analysis, stressing particular aspects of the notion as well as different historical sources and traditions, as suit the writer's purposes").

17. See HANSEN, *supra* note 9.

18. Simon Stacey & Sada Aksartova, *The Foundations of Democracy: U.S. Foundation Support for Civil Society in South Africa, 1988–96*, 12 *VOLUNTAS* 373, 383 (2002) (citing Larry J. Diamond, *Rethinking Civil Society: Towards Democratic Consolidation*, 5 *J. DEMOCRACY*, no. 3, 1994 at 4–17).

church or government, perceived as an impersonal, self-regulating site for the pursuit of voluntaristic civic action . . . ."<sup>19</sup>

It is noteworthy that civil society practitioners and theorists disagree on whether religion falls within its ambit.<sup>20</sup> Some exclude religious organizations,<sup>21</sup> viewing them as a type of primordial attachment, akin to clan and tribal affiliation, that can have no place in a highly functioning civil society in the context of a modern democracy.<sup>22</sup> Others include religious organizations in their civil society definitions,<sup>23</sup> but almost always limit their discussion to Christian organizations<sup>24</sup> and, even then, generally mention them only as an afterthought.

Non-Christian religions, particularly Islam, are portrayed implicitly, and sometimes explicitly, as antithetical to civil society.<sup>25</sup> Although some commentators argue forcefully that Islam is compatible with democratic governance and civil society,<sup>26</sup> many hold the opposite view.<sup>27</sup> Addition-

19. Comaroff & Comaroff, *Preface*, *supra* note 5, at viii.

20. See Comaroff & Comaroff, *Introduction*, in CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA, *supra* note 5, at 6–7 [hereinafter Comaroff & Comaroff, *Introduction*]; see also Van Rooy & Robinson, *supra* note 2, at 57–58 (arguing that there is no shared understanding among donors about the specific types of organizations that constitute civil society, and noting that different divisions of USAID emphasize different sorts of organizations); Amy S. Patterson, *A Reappraisal of Democracy in Civil Society: Evidence From Rural Senegal*, 36 J. MOD. AFR. STUD. 423 (1998) (citing Michael Walzer, *The Idea of Civil Society*, in 38 DISSENT 293 (1991)).

21. See Whaites, *supra* note 9, at 127–29 (arguing that associations based on “primordial attachments” such as tribal affiliation and religion ought not be considered part of civil society); see also Dorothea E. Schulz, *Political Factions, Ideological Fictions: The Controversy Over Family Law Reform in Democratic Mali*, 10 ISLAMIC L. & SOC’Y 132, 160 (2003) (arguing that many Western oriented civil society organizations involved in democratization debates in Mali did not consider Islamic actors as legitimate participants).

22. Whaites, *supra* note 8, at 129.

23. See Carothers, *supra* note 6, at 19–20; see also Patterson, *supra* note 21, at 423.

24. Maina, *supra* note 3, at 146–49.

25. See Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19; see also Naomi Chazan, *Africa’s Democratic Challenge*, 9 WORLD POL’Y J. 279, 287 (1992) (claiming that Islamic religious organizations fall outside of civil society, partly because they “seek to take over the state”); Dale F. Eickelman, *Islam and the Languages of Modernity*, 129 DEADALUS 119, 120 (2000) (summarizing various arguments about why Islamic organizations should not be included in the concept of civil society).

26. See Eickelman, *supra* note 25, at 132 (arguing that Islam, in its multiple and contested forms, can and should act as a vibrant part of civil society). See generally Robert W. Hefner, *Public Islam and the Problem of Democratization*, 62 SOC. RELIGION 491, 498 (2001) (arguing that modern interpretations of Islamic scriptures have increasingly accepted freedom and democracy as Islamic endowments).

27. See, e.g., Charles K. Rowley & Nathanael Smith, *Islam’s Democracy Paradox: Muslims Claim to Like Democracy, so Why Do They Have so Little?*, 139 PUB. CHOICE

ally, many majority Muslim countries undergoing democratic transformations continue to debate whether or not Islamic leaders are legitimate members of civil society entitled to a seat at the table when deciding the rules that will govern their societies.<sup>28</sup>

If there is disagreement over whether religious organizations have a role to play in civil society, there is virtual unanimity, at least among Global North actors, that NGOs are vital. In fact, although definitions of civil society rarely say so explicitly, those who implement and comment on civil society initiatives often conflate the two and simply assume that when we talk about spurring the growth of civil society in developing countries, we in fact are talking about developing those countries' NGO sectors.<sup>29</sup>

There are at least two reasons that Global North actors consider NGOs as either essential to or the alter ego of civil society.<sup>30</sup> The first is cultural and historical. Stated bluntly, wealthy actors from the Global North often are convinced, based on their own historical experience and political philosophy, that a rich associational life, by which they generally mean a thriving NGO sector, is the key to healthy democracy.<sup>31</sup> Americans and Europeans who consider their societies as the apogee of democratic evolution, and who observe the central role that the NGO sectors played in the development of their own democracies, naturally assume that poor countries will follow them down the same democratic path if they can construct a civil society sector "akin to what we have in Western Europe and North America."<sup>32</sup>

A second reason that NGOs migrated to the center of civil society and democracy and governance strategies is that actors in the Global North began to view them as vehicles for addressing the problem of failed states in the developing world, particularly in Africa. Soon after independence in the early 1960s, Africa succumbed to strongman leadership, and by the late 1980s and early 90s, many African states were in full

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273 (2009) (arguing that democratic deficits in Muslim-majority countries have to do with Islam itself).

28. Schulz, *supra* note 21, at 160.

29. Van Rooy, *Civil Society as Idea*, *supra* note 4, at 6, 15–16 (arguing that among development practitioners civil society is synonymous with NGOs).

30. See Kasfir, *supra* note 8, at 2, 5 (arguing that commentators and development professionals generally assume that NGOs are the constituent members of civil society).

31. See Mikael Karlström, *Civil Society and Its Presuppositions: Lessons from Uganda*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*, *supra* note 4, at 104, 115; see also Maina, *supra* note 3, at 139 (arguing the prevailing conceptions of civil society reveal a strong Western bias).

32. Stacey & Aksartova, *supra* note 18, at 382 (quoting the Soros Foundation's description of an "open society").

blown crisis.<sup>33</sup> At the same time, the Northern development community was looking for new partners to carry out its post-Cold War development agenda of democracy and economic liberalization.<sup>34</sup> Donors came to view NGOs, whether preexisting or created by the donor organizations, as magic bullets that could solve many of the problems and address many of the deficiencies of African states.<sup>35</sup> The NGOs could act as institutional substitutes for weak African states in the grand project of democratization and economic development<sup>36</sup> and, simultaneously, could act as bulwarks against backsliding states and venal state actors straining to hold on to power.<sup>37</sup>

When Western development experts described the ameliorative benefits of NGOs, they had a particular sort of NGO in mind, even if they did not say so. What they meant was advocacy organizations, led by Western-oriented intellectuals, lawyers, entrepreneurs, academics, and teachers,<sup>38</sup> all devoted to public interest causes such as the environment, hu-

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33. Maina, *supra* note 3, at 153.

34. See Ndegwa, *supra* note 8, at 17 (arguing that development organizations viewed states as stumbling blocks to development and tried to avoid them by channeling aid through NGOs).

35. William Cunningham Bissell, *Colonial Constructions: Historicizing Debates on Civil Society in Africa*, in CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA, *supra* note 4, at 124, 124; see also Maina, *supra* note 3, at 134 (referring to the aid industry's assumption that civil society would be the "midwife of democracy" in Africa); Stacey & Aksartova, *supra* note 18, at 373, 375 (claiming that U.S. private foundations came to believe that civil society was essential to democracy in the post Cold War developing world).

36. Johanna Kalb, *The Institutional Ecology of NGOs: Applying Hansmann to International Development*, TEX. INT'L L.J. 295, 297 (2006); see also Chazan, *supra* note 25, at 286 (linking the West's imposition of structural adjustment programs, with their emphasis on shrinking states, with the rise of the NGO sector in Africa); Maina, *supra* note 3, at 134 (arguing that building civil society emerged in the 1990s as a corrective to derelict African states and a general air of Afropessimism); Mick Moore & Sheelagh Stewart, *Corporate Governance for NGOs?*, in DEVELOPMENT, NGOS AND CIVIL SOCIETY, *supra* note 8, at 80 (noting that bilateral and multilateral donors avoided states and switched their development budgets to NGOs).

37. See generally Patterson, *supra* note 20, at 423 (describing the West's focus on civil society in Africa as the key to democratization and stability); see also Comaroff & Comaroff, *Introduction*, *supra* note 20, at 18–24 (arguing that because the organizations of civil society promote democratic values among their members, they are able to challenge repressive state actions and facilitate democratic development); Van Rooy & Robinson, *supra* note 1, at 49–50 (arguing that many proponents of civil society in developing countries view it as the sector where citizens learn the habits and skills of democratic participation).

38. Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19.

man rights,<sup>39</sup> women's issues, election monitoring, anti-corruption, and other things that we in the Global North tend to applaud.<sup>40</sup>

Though this implicit vision was perfectly in harmony with the West's historical experience, or at least its own narrative describing its historical experience, it generated problems when implemented in Africa. One stemmed from the elitism inherent in the NGOs favored by Western aid agencies. Such organizations typically were and are dominated by educated, western oriented citizens who have only tenuous ties to those citizens whose interests they claim to represent.<sup>41</sup> Little of the language<sup>42</sup> and few of the techniques employed by such organizations arise from the grassroots of the subject countries.<sup>43</sup>

Another problem resulting from Western donors' narrow (and self-referential) focus on NGOs as the key to prosperity and democracy in Africa is that many important and potentially efficacious forms of public associational life are excluded.<sup>44</sup> Western commentators on NGOs and civil society tend to ignore organizations and institutions that do not focus on the defense of individual rights<sup>45</sup> or that do not directly engage the

39. Van Rooy & Robinson, *supra* note 1, at 40 (stating that in international aid circles, civil society is often conflated with human rights).

40. *Id.* at 16; Carothers, *supra* note 6, at 19; *see also* Maina, *supra* note 3, at 159–60 (arguing that theorizing on civil society in Africa views “good” civil society as professional groups, human rights lobbying organizations, law reform organizations, and the church, and that in Kenya, those groups receive the lion's share of Western civil society funding); Ndegwa, *supra* note 8, at 3 (describing the typical work of NGOs in Africa as civic education and election and human rights monitoring).

41. Carothers, *supra* note 6, at 20; *see also* Comaroff & Comaroff, *Introduction*, *supra* note 20, at 19. *See generally*, Kalb, *supra* note 36, at 303 (arguing that educated elites seek jobs in the NGO sector of developing countries because the pay and stability are better than the civil service or private sector); Ndegwa, *supra* note 8, at 3–5 (arguing that African NGOs typically are run by elites who are out of touch with grassroots concerns and that they depend almost entirely on external funding from donor countries); Maina, *supra* note 3, at 158 (arguing that Western aid money goes to the usual NGO suspects, many of which are run by Western oriented lawyers).

42. Maina, *supra* note 3, at 162 (arguing that most of the language employed by host country NGOs is fed to it by the donor countries and their development agencies, including the concepts of “empowerment” and “aid re-engineering”).

43. *Id.*

44. Kasfir, *supra* note 8, at 5; *see also* Maina, *supra* note 3, at 137–38 (arguing that much associational life in Africa occurs outside of formal organizational life in ethnic and religious organizations).

45. *See generally* Elizabeth Garland, *Developing Bushmen: Building Civil(ized) Society in the Kalahari and Beyond*, in *CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA*, *supra* note 4, at 72, 72–77 (discussing whether civil society is a Western construct inapplicable to non-Western societies that do not conceive of society as composed of individuals versus a powerful state).

state in ways that enhance its democratic character.<sup>46</sup> They tend not to realize or acknowledge that much associational life in African societies and much of African's social organization happens in places that are geographically and culturally distant from the state.<sup>47</sup> Thus, donor countries' and development agencies' narrow focus on Western-oriented NGOs ruled out a significant role for traditional African social institutions such as clans,<sup>48</sup> tribal associations,<sup>49</sup> the *chefferrie*,<sup>50</sup> and, as discussed later, Islamic religious organizations.<sup>51</sup>

To summarize, the quest to engender civil society in the developing world has migrated to the center of the Global North's development agenda. But even as enthusiasm for civil society has become ubiquitous, no common working definition has emerged. At an operational level, however, where development agencies go about the business of stimulating the growth of civil society, a tacit set of definitional concepts has evolved. When development actors say civil society, they generally mean NGOs organized and run by western-oriented elites, if not westerners themselves, working to implement democracy and universal human rights. In Africa, this narrow working definition has limited the effectiveness of civil society development programs and, as discussed in the next Section, has given rise to unintended consequences.

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46. Karlström, *supra* note 31, at 105.

47. Admittedly, there are a few prominent counter examples where Western states and their proxies have celebrated and supported traditional, non-state institutions. Perhaps the most celebrated example was the West's support for Rwanda's use of traditional *gacaca* courts in adjudicating suspected participants in that country's 1992 genocide. See Marc Lacey, *After the Horror, Truth and Some Healing, Maybe*, N.Y. TIMES, June 20, 2002, at A4 (reporting favorably on the institution of *gacaca* courts in Rwanda).

48. Karlström, *supra* note 31, at 107.

49. Maina, *supra* note 3, at 159.

50. This is a French term that refers to the traditional chieftaincy. See Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U. J. INT'L L. & POL. 635, 653–55.

51. See Comaroff & Comaroff, *Introduction*, *supra* note 20, at 20–22 (arguing that policy makers have ignored the potential for Africanized modes of civil society that might incorporate and build off of kin based and ethnic organizations); see also Van Rooy, *Civil Society as Idea*, *supra* note 4, at 22 (arguing that many associations in Africa are excluded from working definitions of civil society because they are “ascriptive” rather than truly voluntary).

## II. CIVIL SOCIETY EVOLVES IN UNEXPECTED DIRECTIONS IN WEST AFRICA

### *A. Western-Oriented Elites Start Down the Path of Civil Society and Democracy*

The 1990s was a time of political ferment across West Africa. As the shockwaves from the fall of the Berlin Wall spread across the region, countries attempted with varying success to shed their authoritarian pasts and institute democratic reforms with civil society at the core.<sup>52</sup> The illustrative example that follows focuses primarily on the West African Republic of Niger, partly because its experience with civil society and democratization is typical among Islamic African countries, and partly because it is the West African country with which I am most familiar. Western Africa is rife with numerous similar examples, though, including Senegal, Mali, and somewhat to the north, Morocco.

In the early 1990s, Nigerien democracy activists composed largely of Western-oriented intellectuals, students, and labor activists<sup>53</sup> compelled the military regime then in power to convene a national conference that would, in theory, negotiate and agree upon scaffolding for the country's democratic future.<sup>54</sup> The conference quickly declared itself sovereign and assumed the task of drafting a new democratic constitution and adopting a series of legal codes that it considered fundamental to any democratic society.<sup>55</sup> At a minimum, the conference intended to adopt laws governing the operation of the electoral system, private ownership of land, freedom of expression and the press, and family life.<sup>56</sup> However, it quickly

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52. See Leonardo A. Villalón, *From Argument to Negotiation: Constructing Democracy in African Muslim Contexts* 6–7 (Feb. 4, 2010) [hereinafter Villalón, *Argument to Negotiation*] (unpublished discussion paper) (on file with author) (describing the interaction of democracy and Islam in Niger, Senegal, and Mali). See generally MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, *IMPLICATION DE LA SOCIÉTÉ CIVILE DANS LA GESTION DES AFFAIRES PUBLIQUES POUR UNE BONNE GOUVERNANCE AU NIGER* 32–34 (2003) [hereinafter NIGER MINISTER OF FINANCE REPORT ON CIVIL SOCIETY] (a report funded by the United Nations Development Fund) (on file with author) (describing how civil society organizations in Niger inserted themselves into the center of democracy struggles in the early 1990s).

53. Leonardo Villalón, *The Moral and the Political in African Democratization: The Code de la Famille in Niger's Troubled Transition*, 3 DEMOCRATIZATION 41, 54 (1996) [hereinafter Villalón, *Moral and the Political*]; see also Chazan, *supra* note 25, at 279–80 (noting that political liberalization across Africa in the early 1990s was often led by civil servants, students, professional organizations, trade unions, and churches).

54. Villalón, *Moral and the Political*, *supra* note 53, at 41.

55. *Id.* at 48.

56. *Id.*



became bogged down in practical and political disagreements, and much of its ambitious legal agenda was left to be worked out by the post-conference, democratically elected government.<sup>57</sup>

The fundamental meaning of democracy and the details of democratic governance were hotly contested in Niger, but from the start there was broad consensus, at least among Western-oriented leaders, about the fact that democracy necessarily includes the liberalization of the public sphere.<sup>58</sup> This meant freedom of speech, freedom of the press, and freedom of association, and the new constitution and statutes established those rights as part of the DNA of the emerging democratic state.<sup>59</sup>

For philosophical and practical reasons described in the previous Section, democracy proponents and their Western sponsors did not stop at enshrining general rights of expression. They also passed laws explicitly intended to facilitate and spur the development of civil society in Niger.<sup>60</sup> Most fundamentally, Niger's new constitution explicitly provided its citizens the right to form political parties and other voluntary associations.<sup>61</sup> Further, statutes that had originally been enacted by a military regime in the 1980s were updated to provide a solid legal existence to voluntary associations, a comparatively streamlined process for registering them, and a dedicated government office to oversee them.<sup>62</sup> Unofficial lists of

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57. *Id.*

58. Villalón, Argument to Negotiation, *supra* note 52, at 10.

59. See Villalón, *Moral and the Political*, *supra* note 53, at 48; see also CONSTITUTION OF NIGER (1999), tit. II (enumerating various individual rights including the right to free expression).

60. Villalón, Argument to Negotiation, *supra* note 52, at 11 (referring to the "official recognition of voluntary social life" in Niger); see also *Gestion Participative et Démocratie Associative* (Feb. 2001) (a pamphlet, funded by the United States Government, explaining good governance principles for civil society actors) (copy on file with the author); *Renforcement de la Capacité de la Société Civile* (Feb. 2001) (a pamphlet, funded by the United States government, explaining among other things the vital role of civil society in a democracy) (copy on file with the author).

61. CONSTITUTION OF NIGER (1999), tit. II, art. 9.

62. See generally Ordonnance no. 84-06 du 1<sup>er</sup> mars 1984 portant régime des Associations (modifiée par l'ordonnance n°84-50 du 5 décembre 1984 et la loi n°91-006 du 20 mai 1991) [Ordonnance no. 84-06 of March 1, 1984 Ordinance Governing Associations, Amended by Ordinance No. 84-50 of December 5, 1984 and Law No. 91-006 of May 20, 1991] (République du Niger) (laying out a restrictive scheme to create a narrow, controlled existence for voluntary associations); CONSTITUTION OF NIGER (1999), tit. II, art. 15 (further restricting the activities of student associations); *Id.* tit. II, arts. 17-18 (explicitly permitting foreigners to form voluntary associations in Niger); *Id.* tit. II, art. 21 (recognizing *organisations non gouvernementales*, or NGOs, as a subset of voluntary associations that are "animated by a spirit of voluntarism that they carry out in the service of others and where its aims are the support of development through social and/or economic activities"); Decret no 92-292/PM/MF/P du 25 septembre 1992, portant modalités

new voluntary associations indicate that while a handful of new NGOs completed the registration process each year in the early and mid-1990s, in 1998 fifty-two new organizations registered, and between 2000 and 2003, 237 new organizations were officially formed.<sup>63</sup> Many of these organizations were formed with the hope of influencing the ongoing debate about what Nigerien democracy should look like.<sup>64</sup>

### *B. Islamic Organizations Learn to Love Civil Society*

In accordance with the plans laid in the Global North, the flood of new voluntary associations and NGOs included many Western-oriented human rights organizations. For example, the *Association nigerienne pour la defense des droits d l'homme* ("ANDDH"), is a well established NGO populated by lawyers and intellectuals that agitates for universal human rights and the rule of law, and Timidria, is funded by Western aid organizations to advocate for human rights protections for the country's customary slaves.<sup>65</sup> What Nigerien democracy activists and their Western sponsors did not anticipate was that Islamic religious organizations, which had only been peripherally involved in the earliest struggles for democracy,<sup>66</sup> would see a valuable opportunity in this new civil society space, and would aggressively seize it.<sup>67</sup>

The proliferation of publicly assertive Islamic religious organizations was a novel phenomenon in Niger and many other countries in West Africa. In Niger, the repressive military regimes that had dominated post-independence governance generally permitted the existence of only one

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d'application de l'article 20.1 d l'Ordonnance no 84-06 du 1er mars 1984, portant regime des Associations [Decree no. 92-292/PM/MF/P of September 25, 1992] (Republique du Niger) (laying out a streamlined process for the recognition and monitoring of domestic and foreign NGOs and describing their rights and responsibilities).

63. Interview with Madam Sayo Aysatu, Directrice de Direction des Liberte Publique, Direction Generale des Affaires Politiques et Juridiques, Ministere de l'Interieur et de La Decentralization, in Niamey, Niger (Feb. 4, 2004) (interview notes on file with author). Copies of the unofficial annual list of NGO registrations are on file with the author.

64. Villalón, Argument to Negotiation, *supra* note 52, at 7.

65. See *Working in Partnership*, ANTI-SLAVERY ORG., [http://www.antislavery.org/english/what\\_we\\_do/working\\_in\\_partnership.aspx](http://www.antislavery.org/english/what_we_do/working_in_partnership.aspx) (last visited May 16, 2011).

66. Villalón, Argument to Negotiation, *supra* note 52, at 34 (indicating that the early pro-democracy movement in Niger was propelled by French educated elites, but that religious organizations gradually gained influence).

67. *Id.* at 8; see also Mustapha K. Al-Sayyid, *A Civil Society in Egypt?*, 47 MIDDLE E. J. 228, 228-229, 239 (1993) (describing how the opening of civil society in Egypt and several other North African countries led to increasingly voluble participation by "intolerant" Islamic organizations).

Islamic religious organization in the public sphere—the *Association Islamique du Niger* (“AIN”)—and carefully controlled its activities and pronouncements.<sup>68</sup> The creation of a freewheeling civil society sector, however, gave rise to a democratization of religion and a new profusion of religious organizations. Under the new rules of the game, not only was the AIN able to express its views without government approval or censure, but a welter of religious actors began to vie to put forward popular visions of what a just, democratic, *Islamic* society would look like.<sup>69</sup> While the new multitude of Islamic associations represented a multiplicity of competing views on the true meaning of Islam, they quickly realized that any position labeled “Muslim” would strike a responsive chord in a country where the overwhelming majority of the population professes that religion.<sup>70</sup> To the extent they could coalesce around certain public policy or legal principles and speak with one voice, they could impose their will in open civil society debates.<sup>71</sup>

### C. Civil Society Showdown(s) Over Family Law

In Niger and nearby African countries,<sup>72</sup> the fiercest debates between secular, Western-oriented, human rights-based civil society groups on one hand, and Islamic religious organizations on the other, concerned the proposed reform of family laws.<sup>73</sup> For Western-oriented democracy activists, the development of a modern “family code” was a fundamental ingredient in the development of a democracy. By “modern,” the democracy activists generally meant “French” family laws based upon universal human rights principles such as equal inheritance for women, a wom-

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68. Villalón, *Moral and the Political*, *supra* note 53; see also Chazan, *supra* note 25, at 285 (describing a post-Independence phenomenon common in Africa whereby states permitted some voluntary associations to form but limited them in number and carefully controlled their activities).

69. Villalón, *Argument to Negotiation*, *supra* note 52, at 10–11.

70. Villalón, *Moral and the Political*, *supra* note 53, at 56. See generally Léon Buskens, *Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere*, 10 ISLAMIC L. & SOC'Y 70 (2003) (describing attempts in Morocco to modernize family law and institute civil society where multitudinous, competing Islamic organizations entered the sector and tested “the limits of freedom of speech”).

71. See Schulz, *supra* note 21, at 145 (noting that in Mali, Muslim groups that normally competed with one another came together to effectively block Western women's rights and family law reforms).

72. See Buskens, *supra* note 70, at 71 (describing political and religious struggles over family law in Morocco); Schulz, *supra* note 21, at 132–33.

73. See *id.* at 122 (stating that in Morocco, the reform of family law became a symbol of the place of Islam in society).

an's right to consent to marriage (and to decline to engage in polygamous marriage), and the equal right to seek divorce and to retain custody of minor children.<sup>74</sup>

But these Western conceived rights (and the Western-funded efforts to implement them)<sup>75</sup> were and are in tension with Islamic and customary<sup>76</sup> Nigerien social and legal traditions that grant husbands superior rights in the context of marriage relations. For example, Muslim law stipulates that a son's inheritance should be twice that of a daughter's.<sup>77</sup> In addition, the Koran explicitly permits men to engage in polygamous marriage and makes it much harder for a woman to obtain a divorce than a man.<sup>78</sup> In Niger and other Islamic African countries, these gender-imbalanced legal traditions generally have been upheld by state legal authorities, who are permitted by statute to diverge from formal state codes and instead rule on family law matters according to custom.<sup>79</sup> Quite clearly, including "universally accepted" notions of gender equality in the fundamental laws that would give shape to Niger's new democracy was going to require deft cultural, religious, and political maneuvering by the country's secular, Western-oriented civil society actors.

Ultimately, they failed. The French-style family code was placed on the agenda by Niger's transitional government as one of the fundamental texts that had to be elaborated in building the legal infrastructure for the new democracy, but it was blocked by Islamic actors' effective political

74. Villalón, *Argument to Negotiation*, *supra* note 52, at 24.

75. See Schulz, *supra* note 21, at 142 (noting that in Mali, efforts to reform family law were pushed by women activist groups that were heavily subsidized by Western donor organizations).

76. It is far beyond the scope of this Article to attempt to disentangle Islamic law on one hand and non-Islamic African customary law on the other. It must suffice to say that in Niger and other West African countries, both exist but they overlap significantly. In many instances, Islamic law is more protective (at least from a Western perspective) of women's rights than customary law. To take an example from southwestern Niger, Islamic law permits a female descendant to inherit a half share of her father's real and personal property, while customary law forbids her to inherit any rights in real property. In Niger and elsewhere in West Africa, state courts are often empowered to take customary law into account, particularly in matters of family law, and those courts typically apply an unpredictable blend of Islamic and customary law. See generally Kelley, *supra* note 50, at 645–51.

77. Villalón, *Moral and the Political*, *supra* note 52.

78. *Id.* at 52; see also, Patterson, *supra* note 20, at 427 (noting that social norms in patrilineal Africa generally limit women's access to property, education and credit, and prevent them from participating fully in public life); Schulz, *supra* note 21, at 140 (noting that in Mali, women owe a legal right of obedience to their husbands).

79. See Schulz, *supra* note 21, at 140–41 (describing courts' enforcement of customary laws in Mali that generally favor the rights of men over women).

organization and agitation in the civil society sector.<sup>80</sup> To oversimplify a protracted political and cultural battle that unfolded over a period of several years, Islamic organizations took advantage of the new civil society infrastructure to organize themselves and to loudly proclaim, and mobilize public support for, the notion that the supposedly universal rights enshrined in the proposed family code were un-Islamic and/or part of a Western neo-imperialist project.<sup>81</sup> The Islamic actors won popular support,<sup>82</sup> overwhelmed the Western-educated, secular-leaning organizations such as ANDDH, and blocked the reform legislation.<sup>83</sup>

In the end, a legislative reform effort aimed primarily at increasing women's standing in society opened up a field for conservative religious forces to mobilize popular discontent by entering the civil society sector—with its freedom of expression and of association—and offering a vision of Islamic cultural autonomy as an alternative to political dependence on the West. The internationally sponsored promotion of women's rights not only offered a new rallying ground for conservative oppositional forces, but ended by endowing them with greater moral authority and greater standing in the emerging African democracies.<sup>84</sup>

### III. CONCLUSION

Western countries' plans to engender civil society in West African nations as an essential component of democratization and liberalization contained an inescapable conundrum: the only way we could create a civil society in Islamic West Africa—at least a civil society in our own secular, human rights-based image—was to do it over the objections of the Islamic majority; in a word, to do it undemocratically.

We in the Global North assumed that if we coached emerging African democracies through the process of establishing truly democratic politi-

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80. *See id.* at 137 (noting that Muslim activists in Mali were able to blunt political westernization by “successfully appeal[ing] to an alternative normative order,” particularly among the lower classes).

81. *See id.* at 133 (noting that Islamic actors defeated family law reform in Mali partly by portraying it as an example of Western imperialism); *see also* Buskens, *supra* note 70, at 95, 100, 102 (describing the same dynamic in the context of family law reform efforts in Morocco).

82. *See* Schulz, *supra* note 21, at 159 (noting that in Mali many Islamic women lined up publicly against the legal reforms that would have put them on equal legal footing with men).

83. Villalón, *Argument to Negotiation*, *supra* note 52, at 24–25; *see also* Schulz, *supra* note 21, at 133 (stating that Islam took over the “center-stage” in Mali's moves toward political modernity).

84. *See* Schulz, *supra* note 21, at 163.

cal institutions, including free and fair elections and broad freedoms of expression and assembly, the people, often organized and represented by their NGOs, inevitably would choose legal and social structures much like our own. Not only would contract rights and property rights be protected, but individual rights, most notably women's rights to equal treatment under law, would become sacrosanct. This is not what happened. The people, who assembled in the physical and metaphorical space of the civil society sector, vigorously debated whether to institute Western-style laws to govern family life and other sectors of their societies, and decided—democratically—that they preferred their own, non-Western, largely Islamic laws and traditions.

This leads to the ultimate question posed by this paper. What if anything should western proponents of civil society do about it? When we promote civil society and democracy in Africa and other parts of the developing world, are we satisfied by democratic procedures; that is, by open debate and free and fair elections followed by the implementation of laws that a majority of the population has endorsed?<sup>85</sup> More to the point, is it acceptable if the democratically determined social order and legal system adopted by those countries lacks the recognition and protection of the universal human rights that we hold dear?<sup>86</sup>

Or did we mean something different, something more normatively substantive, when we said we wanted to guide developing countries toward civil society and democracy? Are western-oriented NGOs inescapably necessary to the development of civil society and democracy, and are there certain unequivocal, universal, inalienable rights that all democracies must recognize and protect, including women's right to equality under law?<sup>87</sup>

The answer to these fundamental questions is the topic for a book, or a series of books, not a brief symposium article. However, my initial response is that there is little that western governments and aid organizations can do to prevent the civil society sphere in West Africa from evolving in its own direction. Having supported the implementation of structures that permit, even encourage, open, society-wide debate about the nature of justice and governance, it is impractical, and frankly, unseemly for westerners to attempt to intervene when we disapprove of the principles and structures that our ostensible tutees have devised.

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85. See Patterson, *supra* note 20, at 424 (defining democracy as a procedure in which individuals are free to participate and have the means to hold their leaders accountable).

86. See Villalón, *Moral and the Political*, *supra* note 86.

87. See *id.* at 42 (arguing that democratization has come to imply a package of universalist human rights concerns).

Besides, the ultimate result may not be bad, even from a western perspective. Although Islamic actors have had an outsized influence on the shape of civil society and other democratic institutions in West Africa, there is no reason to believe that the end result of the democratic contestation in the civil society sector will be a conservative, closed Islamic republic along the lines of Iran or Saudi Arabia or Taliban-controlled Afghanistan.

This is because in Niger and elsewhere in Islamic West Africa, the metes and bounds of the religious subsector within civil society are open to vigorous, democratic debate and contestation. While it is true that the story of Niger's family code showed what can happen when Islamic forces coalesce around a particular issue, there is in Niger and elsewhere in West Africa roiling debate and contestation surrounding the interpretation of the Koran and other holy texts and how they should (or should not) be applied in the public sphere.<sup>88</sup> This "constructive fragmentation"<sup>89</sup> of Islamic religious debate is likely to increase as literacy rates rise<sup>90</sup> and as freedom of expression continues to permit broad participation in political discourses.

In sum, there is an emerging Muslim public sphere in West Africa and a general, society-wide reconsideration of the role of Islam in these emerging democratic societies.<sup>91</sup> The end result of the open debates will very likely not result in a civil society dominated by NGOs dedicated to protecting universal human rights. Nor, however, is it likely to result in closed, repressive Islamic societies. Having jumpstart a dynamic process of democratic change, civil society proponents from the West are probably going to have to allow it to play out. They can attempt to influence the debates. They can even insist that the NGOs that they fund adhere to western values and to western conceived "best practices" for civil society actors. But, as recent struggles in West Africa have shown, they are very unlikely to succeed in determining the outcomes of the processes that they set in motion, and they probably should not try. We can hope that the promotion of civil society will lead toward just and stable societies, but we should accept that this may look little like our own.

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88. See Eickelman, *supra* note 25, at 124–25, 130.

89. *Id.* at 129.

90. *Id.* at 124–25.

91. *Id.* at 130.

# LINKING NGO ACCOUNTABILITY AND THE LEGITIMACY OF GLOBAL GOVERNANCE

*Dana Brakman Reiser and Claire R. Kelly\**

Commentators often express concern over whether global regulators suffer from a democracy deficit and sometimes offer nongovernmental organizations (“NGOs”) participation in these entities as a cure for this ill. To serve such an ameliorative role and to be legitimate actors in international civil society more generally, though, the internal accountability of participating NGOs matters. NGOs need to be composed and governed accountably in order to legitimate their role in global governance. Current domestic nonprofit law, which forms the basis for how NGOs are governed internally, attempts to create an effective and enforceable regime of nonprofit accountability. These governance and accountability frameworks offered by domestic law, however, provide insufficient content to appropriately regulate and incentivize NGOs working internationally. This Article demonstrates how global regulators can help fill this gap, thereby improving NGO accountability and the legitimacy of global regulation.

Part I reviews the roles that NGOs play in global governance. NGOs regulate third party conduct themselves and also influence the regulatory efforts of other global governance entities. Part I also examines how scholars typically assess the legitimacy of global regulators. Part II then reviews the basic accountability regimes applied to NGOs by domestic nonprofit law, primarily using U.S. law as an example. It describes how domestic enforcement mechanisms affect NGO accountability, highlighting the differential emphasis these mechanisms place on NGOs’ mission, organizational, and financial accountability. We argue that while domestic nonprofit law provides some measure of legitimacy to NGO regulatory efforts internationally, it falls short in several ways that matter. The gaps in nonprofit mission, organizational, and financial accountability enforcement call into question the ability of NGOs to pursue normative goals; the value of NGOs’ participation in the global regulatory process; and the suitability of NGOs as a proper site for regulation. International organizations can serve as gatekeepers that ameliorate these accountability gaps.

Part III looks both at how global regulators can serve as gatekeepers and how they can better utilize NGOs as part of their legitimacy strategies. Some global regulators have established accreditation, monitoring,

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and enforcement systems for their participating NGOs. However, not all global regulators that capitalize on NGO participation have such mechanisms in place, or have mechanisms that are suited to the task. These systems can be improved by structuring them to reflect the role of NGOs in each regulator's legitimacy strategy and to complement domestic non-profit accountability regimes. If the NGOs that participate in global regulation are themselves not sufficiently accountable, they may undermine, rather than bolster, the legitimacy of global regulation. Finally, this Part makes suggestions on how to safeguard NGOs' role in global regulators' legitimacy strategies. Part IV briefly concludes.

## I. REGULATORS, LEGITIMACY, AND ACCOUNTABILITY

### *A. NGOs as Regulators in Global Governance*

NGOs contribute to global governance in two ways that implicate their legitimacy. First, they act as non-State regulators ("NSRs"). They influence behavior by setting standards, establishing best practices, and campaigning for particular actions.<sup>1</sup> Second, they influence the regulatory efforts of other NSRs, such as international organizations and transgovernmental networks.<sup>2</sup> All NSRs need legitimacy to different degrees, and NGO participation is often used to enhance legitimacy.

NGOs regulate. Regulation involves the attempt to alter the behavior of actors through various means.<sup>3</sup> Regulators may attempt to impose norms through hard law (statutes, treaties, regulations) or through soft law (norms, guides, best practices, and voluntary codes of conduct). Internationally, a host of NSRs seek to modify conduct including international organizations, transgovernmental networks, and NGOs. NGOs may act independently as NSRs or contribute to the efforts of other NSRs.<sup>4</sup>

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1. Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J.L. & SOC'Y 56, 60 (2002) (giving as an example Amnesty International, Transparency International, and Greenpeace International as "private overseers of national governments").

2. Indeed Ahmed and Potter document how some NGOs view themselves as not only "creating their own networks across national boundaries but [] assuming international roles historically the preserve of the states." SHAMIMA AHMED & DAVID M. POTTER, *NGOS IN INTERNATIONAL POLITICS* 69 (2006).

3. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 139 (2008) [hereinafter Black, *Constructing and Contesting Legitimacy*].

4. See Julia Black, *Legitimacy and the Competition for Regulatory Share* 10–11 (Lon. Sch. Econ. Legal Studies, Working Paper No. 14/2009, 2009) [hereinafter Black,

NGOs cannot create hard law, but they may create soft law through campaigns, codes, or standards.<sup>5</sup> For example, the International Standards Organization (“ISO”), an international NGO, devises standards that States or private actors may choose to employ.<sup>6</sup> The standards propagated by NGOs, while not hard law, may influence conduct nonetheless and contribute to polycentric regulatory regimes.<sup>7</sup> Thus, for example, in 1992 a coalition of NGOs<sup>8</sup> formed to begin the International Campaign to Ban Landmines (“ICBL”). This effort eventually led to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,<sup>9</sup> banning landmines.<sup>10</sup> Subsequently, the ICBL became a steering member of the Cluster Munitions Coalition which promotes the Cluster Munitions Convention.<sup>11</sup> Thus, even though NGOs cannot make law they can contribute in important ways to the development and implementation of law.

NGOs also contribute to the regulatory efforts of other NSRs.<sup>12</sup> NGOs lobby and influence national, international, and transgovernmental bod-

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*Competition for Regulatory Share*], available at [http://www.lse.ac.uk/collections/law/wps/WPS2009-14\\_Black.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2009-14_Black.pdf).

5. See AHMED & POTTER, *supra* note 2, at 15 (arguing that NGOs do have the power to persuade and although communicating without coercion NGOs build upon and change international and interstate relations); see also Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 544 (2009) (discussing bottom up regulation by NGOs); Scott, *supra* note 1, at 60–68.

6. See *About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/about.htm> (last visited Mar. 7, 2011).

7. See Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 146 (NGOs generate awareness amongst consumers which results in economic pressure on market actors to conform to norms of all or a selected group of legitimacy communities.); see also Abbott & Snidal, *supra* note 5, at 505–07 (discussing regulatory standard setting and transnational new governance).

8. These NGOs include Human Rights Watch, Medico International, Handicap International, Physicians for Human Rights, Vietnam Veterans of America Foundation, and the Mines Advisory Group. *Campaign History*, INT'L CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/index.php/icbl/About-Us/History> (last visited Apr. 12, 2011) [hereinafter *Campaign History*].

9. *Mine Ban Treaty*, INT'L CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/index.php/icbl/Universal/MBT/States-Parties> (last visited Mar. 18, 2011).

10. *Campaign History*, *supra* note 8.

11. *Governance Bodies*, CLUSTER MUNITION COAL., <http://www.stopclustermunitions.org/the-coalition/steering-committee/> (last visited Mar. 18, 2011).

12. NGOs also often seek to influence national governments through domestic political processes.

ies.<sup>13</sup> Many, if not most, international bodies also have some mechanism to allow for participation by civil society.<sup>14</sup> In fact, some international bodies welcome NGO participation as part of their own legitimacy strategies.<sup>15</sup> The United Nations 2004 Cardoso Report, recognizing the importance of embracing civil society participation, noted that “[t]he growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism. Civil society organizations are also the prime movers of some of the most innovative initiatives to deal with emerging global threats.”<sup>16</sup>

NSRs need legitimacy to garner compliance with their norms.<sup>17</sup> They need legitimacy to enlist support for their efforts.<sup>18</sup> NSRs sometimes seek NGO participation as part of their legitimacy strategies, both because NGOs may enhance input legitimacy through increased participation and output legitimacy because they have the credentials to speak to the normative issues at stake. Of course, when NGOs act as NSRs, they also want to improve both their input and output legitimacy. These important concepts and the role of NGOs in creating input and output legitimacy are discussed below.

#### *B. Assessing Legitimacy and Accountability*

Although legitimacy can be discussed as either a descriptive<sup>19</sup> or sociological matter,<sup>20</sup> we approach it here from the latter perspective, i.e., as

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13. See AHMED & POTTER, *supra* note 2, at 44–53. NGO participation in international organizations and transgovernmental networks has not gone unchallenged. In particular, such participation raises questions about state sovereignty, the equality of the states, and democratic accountability of these global regulators. NGOs have answered these claims in part with reference to their own legitimacy. *Id.* at 245–50.

14. See UN Charter art. 71: “The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters in its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”

15. See Black, *Constructing and Contesting Legitimacy*, *supra* note 3.

16. U.N. Secretary-General, *We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations–Civil Society Relations*, at 3, U.N. Doc. A/58/817 (June 11, 2004) [hereinafter *Cardoso Report*].

17. See AHMED & POTTER, *supra* note 2, at 14–15, 241–44; see also Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* 30–31 (Geo. Wash. Law Sch. Pub. Law Research Paper No. 145, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=716381&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=716381&download=yes) (explaining that NGOs care about their influence and would be eager to improve accountability).

18. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 154.

19. By descriptive we mean that as a matter of objective fact something is legitimate. Describing something as legitimate requires a normative baseline. Thus, descriptive legit-

socially constructed. Something is legitimate because people perceive it as legitimate.<sup>21</sup> Although it is impossible to assess a perception, one can still assess what perceptions should, or will likely, be by looking at legitimacy criteria. Moreover, we believe NSRs will consider legitimacy criteria in order to improve perceptions of themselves as legitimate.

Generally speaking, commentators have identified two types of legitimacy criteria worth considering. Normative (output) legitimacy criteria focuses on whether an institution effectively promotes what is right, acceptable, desired, or just.<sup>22</sup> Will the product of the global regulator be a good one?<sup>23</sup> Will it be effective, fair, well-ordered, universally accepted, morally defensible, or supportive of a particular goal such as human rights or trade liberalization?<sup>24</sup> Thus, output legitimacy assumes a normative prescription of what is a good outcome.<sup>25</sup> One might assume, for example, that to be legitimate an institution must respect human rights,<sup>26</sup> or at minimum, institutions “are legitimate only if they do not persist in

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imacy is sometimes referred to as normative legitimacy because the description reflects the notion that the thing is normatively desirable. First, an institution is descriptively legitimate if, after one accepts a normative premise of what is right, good, acceptable, desired, or appropriate, one determines as an objective fact that an institution meets these criteria. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFFAIRS 405, 406 (2006).

20. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 144; *see also* Buchanan & Keohane, *supra* note 19, at 406. Other commentators have identified regulatory legitimacy as a separate concept pertaining to the legitimacy of NGOs within international governance institutions such as the UN or the World Bank. *See* Anton Vedder, *Questioning the Legitimacy of Non-Governmental Organizations*, in NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY 1, 5 (Anton Vedder ed., 2007) [hereinafter NGO INVOLVEMENT].

21. *See* Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 144 (internal citation omitted); *see also* Buchanan & Keohane, *supra* note 19, at 406. Either approach requires that we assess the underlying criteria; either we must agree on what the normative baseline is to argue that something either is or is not descriptively legitimate, or we must identify criteria that people consider when they develop their perceptions.

22. *See* Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 106, 124 (Tomer Broude, Marc L. Busch & Amelia Porges eds., 2010) [hereinafter Kelly, *UNCITRAL*].

23. *See id.*

24. Legitimacy and effectiveness are linked. *See id.* Likewise, international and national legitimacy are linked. As countries become more democratic the calls for legitimacy become more pronounced. *See* Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451, 460 (2001).

25. Buchanan & Keohane, *supra* note 19, at 418 (discussing the persistent disagreement over the norms underlying legitimacy).

26. *Id.*

violations of the least controversial human rights.”<sup>27</sup> Alternatively, one might require that an institution be effective.<sup>28</sup> Of course, observers contextualize “effectiveness” in a way that requires a normative position. The trade regime is effective if it liberalizes trade.<sup>29</sup> The child labor regime is effective if it eliminates the worst forms of child labor.<sup>30</sup> One must start with a normative prescription of what it is that one wants to accomplish.<sup>31</sup>

Once an NSR has a normative prescription, its legitimacy might benefit from NGO participation. NGOs may have invested in the normative goals that the NSR seeks to regulate. They might be experts in the policy or technical matters that the NSR addresses. They may have engaged in significant deliberation that lends credibility to their views. An NSR may benefit from NGO participation, not only from greater input legitimacy, but also because the NGO can help the NSR achieve a good outcome according to its own defined prescription of the good.

The second criteria, procedural (input) legitimacy criteria, assess the participation in, and the process of, decision making. Administrative law devices such as transparency,<sup>32</sup> opportunities for comment,<sup>33</sup> power sharing,<sup>34</sup> and review,<sup>35</sup> improve the functioning of organizations.<sup>36</sup> These devices may promote better decisions by creating more deliberation,

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27. *Id.* at 420. The authors explain that it is difficult to categorize human rights because what many commonly refer to as “rights,” are actually protective mechanisms for “basic human interests.” *Id.* at 419.

28. COMMONWEALTH SECRETARIAT, ECONOMIC PAPER SERIES NO. 85, REFORM OF INTERNATIONAL INSTITUTIONS: TOWARDS A COMMONWEALTH AGENDA 1–5 (2009).

29. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, pmbl., 61 Stat. A-11, 55 U.N.T.S. 194.

30. *See* ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, 2133 U.N.T.S.161; *see also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

31. Claire R. Kelly, *Financial Crisis and Civil Society*, 11 CHI. J. OF INT’L L. 505, 536 (2011).

32. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1530 (2006).

33. *Id.* at 1527–28.

34. *Id.* at 1534–36.

35. *Id.* at 1535–36.

36. *Id.* at 1534–37 (discussing how horizontal and vertical power-sharing mechanisms can increase the legitimacy of international rulemaking); *see also* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 4 (2006) (noting the tendency of IOs to improve participation and accountability by incorporating various administrative law mechanisms into their decision-making, including procedures for notice-and-comment).

more reasoned decision making, and more accountability.<sup>37</sup> NSRs may seek NGO participation because such participation facilitates better procedures. NGOs may foster transparency and opportunity for comment. Additionally, decisions are more legitimate when those affected by the decision are included in the process of making it.<sup>38</sup> It would be difficult, if not impossible, for international organizations and transgovernmental networks to be democratic,<sup>39</sup> but they can broaden participation by engaging NGOs as well as private parties.<sup>40</sup> Greater participation hopefully leads to better deliberation. NGOs, for example, often raise issues that would otherwise not be considered,<sup>41</sup> either directly or by lobbying national governments to broach new issues in international fora. Thus, the Basel Committee on Banking Supervision might provide notice and comment procedures for its proposals to which NGOs might respond.<sup>42</sup> The United Nations Commission on International Trade Law (“UNCITRAL”) might invite NGO experts to participate in its working groups.<sup>43</sup>

Legitimacy relates to but should not be confused with accountability.<sup>44</sup> As discussed below, scholars differ over NGO accountability. Accountability can mean that the organization has a responsibility to a certain

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37. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 163–78 (2005).

38. See Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 J. INT’L ECON. L. 751, 753–56 (2008).

39. Esty, *supra* note 32, at 1515–16.

40. See Henry W. McGee, Jr. & Timothy W. Woolsey, *Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano’s the Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000), 20 UCLA J. ENVTL. L. & POL’Y 109, 116 (2002).

41. AHMED & POTTER, *supra* note 2, at 82.

42. See Stephany Griffith-Jones & Kevin Young, *Reforming Governance of International Financial Regulation: Have the G20 Done Enough?*, (Initiative for Pol’y Dialogue, Policy Brief, 2009), available at [http://policydialogue.org/files/publications/Griffith-Jones\\_Young\\_Policy\\_Brief.pdf](http://policydialogue.org/files/publications/Griffith-Jones_Young_Policy_Brief.pdf).

43. David Satola & W.J. Luddy, Jr., *The Potential for an International Legal Approach to Critical Information Infrastructure Protection*, 47 JURIMETRICS J. 315, 326 (2007).

44. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 138. The question of legality is another separate issue. Anton Vedder, *Questioning the Legitimacy of Non-Governmental Organizations*, in NGO INVOLVEMENT, *supra* note 20, at 9 [hereinafter Vedder, *Questioning the Legitimacy*]. Like accountability it can be considered a necessary though not sufficient factor. *Id.*

stakeholder or stakeholders.<sup>45</sup> These stakeholders may be governments, donors, boards, members, employees, or people affected by the NGO's actions.<sup>46</sup> NGOs may be accountable to these stakeholders for their finances, their policies, and their effectiveness.<sup>47</sup>

Accountability matters because it fosters the perception of legitimacy.<sup>48</sup> It involves a "discourse of accountability."<sup>49</sup> As Julia Black argues:

Auditing, for example, is not simply an accountability tool which can be used to give an account of financial expenditure, or indeed increasing performance in achieving a wide range of social objective, such as sustainable development, ethical labour practices, and so on, as the growing practices of social auditing illustrate. Judicial review is not simply the application of a set of legal norms to the behaviour of public actors. Deliberative polyarchies which engage regulators in democratic deliberation and in which regulators are called to give account are not simply the engagement of the public in reviewing actions of regulators. Rather, each is an interpretive and discursive schema through which participants in the accountability relationship make sense of their own and each others' roles, which is constitutive of their relationship and which is fundamentally shaped by it.<sup>50</sup>

Thus the process of accounting can foster the perception of legitimacy.

### *C. Problems Assessing Legitimacy and Accountability*

Assessing global regulators' legitimacy raises a number of problems. First, NSRs will seek NGO participation as a strategy to improve both output and input legitimacy criteria.<sup>51</sup> These efforts should be closely

45. AHMED & POTTER, *supra* note 2, at 126; *see also* L. DAVID BROWN, CREATING CREDIBILITY: LEGITIMACY AND ACCOUNTABILITY FOR TRANSNATIONAL CIVIL SOCIETY 3, 36 (2008) [hereinafter BROWN, CREATING CREDIBILITY].

46. *See* AHMED & POTTER, *supra* note 2, at 126–27; *see also* BROWN, CREATING CREDIBILITY, *supra* note 45, at 3, 36.

47. *See* L. DAVID BROWN & JAGADANANDA, CIVICUS, CIVIL SOCIETY LEGITIMACY AND ACCOUNTABILITY: ISSUES AND CHALLENGES 9 (2007), *available at* [http://www.civicus.org/new/media/LTA\\_ScopingPaper.pdf](http://www.civicus.org/new/media/LTA_ScopingPaper.pdf); *see also* AHMED & POTTER, *supra* note 2, at 126–27 (Questions of accountability often leave out NGO responsibility to their clients. Instead, concerns are raised about caving to donor demands and responsiveness to multiple stakeholders.).

48. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 148–49.

49. *Id.* at 152.

50. *Id.*

51. *See* Kenneth Anderson & David Rieff, 'Global Civil Society': A Sceptical View, in GLOBAL CIVIL SOCIETY 26, 26 (Helmut Anheier, Marlies Glasius, & Mary Kaldor, eds., 2005) (noting the "intertwined quests of legitimacy" of NGOs and international organizations that results in an undemocratic system and "drives the severe inflation of ideological rhetoric surrounding claims about 'global civil society'").

scrutinized because they may not improve legitimacy. Second, NSRs, as regulators, as well as the subjects they regulate, are constantly changing in response to each other as well as other forces. Any measure of legitimacy must take into account that dynamic process and the effect that it has on the desirable balance of output and input criteria.<sup>52</sup> Finally, the relationship between legitimacy and accountability is muddy. Accountability promotes legitimacy, but in some ways accountability is self-defining and therefore difficult to assess objectively.

First, NSRs pursue strategies to improve their legitimacy criteria including promoting NGO participation as a legitimacy enhancer.<sup>53</sup> The value of NGO participation in global governance, either as a regulator or as a participant in the efforts of another regulator, cannot be taken as a given.<sup>54</sup> NGO participation may successfully help an NSR build legitimacy if it in fact contributes to the efficacy of the NSR and thus improves its output legitimacy, or if it participates in a meaningful way and thereby improves its input legitimacy.<sup>55</sup> Whether it will succeed at either depends not only on whether the NSR allows for real participation (rather than just the veneer of NGO participation),<sup>56</sup> but also on the *bona*

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52. Kelly, *UNCITRAL*, *supra* note 22, at 124–25.

53. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 146–47. Seeking NGO participation is part of attempting to build legitimacy. As Julia Black notes:

Managing [] legitimacy encompasses building legitimacy, maintaining it, and repairing it once lost. Organizations can manage their legitimacy by attempting to conform to the legitimacy claims that are made on them; they can seek to manipulate them; or they can select from among their environments audiences (legitimacy communities) that will support them. The form that the strategy takes will vary with the type of legitimacy that is in issue: pragmatic legitimacy (based on self interested claims of legitimacy communities); moral or normative legitimacy (based on assessments that this is the ‘right thing to do’); or cognitive legitimacy (based on assumptions that things could not be any other way); and on whether the organization is seeking to build, maintain or repair legitimacy.

*Id.*

54. See, e.g., *Cardoso Report*, *supra* note 16, ¶ 140.

55. But see Anderson & Rieff, *supra* note 51, at 29–30 (specifically rejecting the argument that NGOs can help improve democratic legitimacy).

56. Assessing legitimacy requires that observers consider the means by which an organization pursues legitimacy. An organization may manage the perception that it is or is not legitimate without addressing that legitimacy as a normative matter. An organization might take superficial steps to appear more legitimate than it is. Thus, some companies for example make unjustified environmental claims in order to better their image (i.e., green-washing). Greenpeace defines “green washing” as “the cynical use of environmental themes to whitewash corporate misbehavior.” *Introduction to StopGreenwash.org*, GREENPEACE, <http://www.stopgreenwash.org/introduction> (last visited Mar. 18,



*fides* of the NGO itself. An NGO without a clearly defined mission is not in a good position to improve the output legitimacy of an NSR. As discussed below, an NGO that is poorly governed, opaque, or being used for the financial benefit of its managers is not in a good position to improve the input legitimacy of an NSR. In fact, these and other lapses in participating NGO accountability could harm an NSR's legitimacy.

Second, any assessment of legitimacy must be dynamic because institutions and the measures by which we judge them are constantly changing. International organizations address a range of different issues over time. These organizations respond to world events.<sup>57</sup> The key players in the organizations change. The organizations compete with each other for legitimacy and therefore develop strategies to improve their own legitimacy.<sup>58</sup> NGOs respond to these changes because they themselves evolve, compete, and seek legitimacy from their participation in global governance.<sup>59</sup> As NGOs evolve, the international organizations and transgovernmental networks respond in kind. The dynamic evolution of NSRs means that the normative baseline for both NSRs and NGOs are, in important ways, always subject to change. Both NSRs and NGOs must constantly assess their own missions and whether they align with each other.

The struggle to identify a stable normative baseline in a constantly shifting world is compounded by the fact that there is an ongoing debate concerning the appropriate balance of output and input legitimacy. Buchanan and Keohane, for example, make the case that organizations should possess "minimal moral acceptability, comparative benefit and

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2011). An organization may adopt procedures that appear to make it more procedurally legitimate but in fact have no effect on how the organization operates. The Basel Committee on Banking Supervision sought public comments on its work—it received not comments from the public generally, but rather predominantly received comments from members of the banking industry. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 26 (2006). It may be that an organization masks its lack of legitimacy by association with another organization or group that has legitimacy. Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605, 646 (2008).

57. See *Financial Crisis: What the World Bank is Doing*, WORLD BANK, <http://www.worldbank.org/financialcrisis/> (last visited Feb. 25, 2011); see also Int'l Monetary Fund [IMF], *World Economic Outlook: Financial Stress, Downturns, and Recoveries* (Oct. 17, 2008). For the Basel Committee's response to the financial crisis, see *Monetary & Financial Stability*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/fincriscomp.htm> (last visited Mar. 6, 2011).

58. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 154.

59. For example, Professors Ahmed and Potter note that "being awarded consultative status [in the UN] gives NGOs a legitimate place within the political system. This means that the NGO activist is seen as having a right to be involved in the process." AHMED & POTTER, *supra* note 2, at 53.

institutional integrity.”<sup>60</sup> Simon Caney argues that international economic institutions should be judged by a hybrid standard that accounts for persons’ “most fundamental rights” and provides a “fair political framework in which to determine which principles of justice should be adopted to regulate the global political economy.”<sup>61</sup> Daniel Esty suggests adoption of a host of administrative law tools allowing procedural rigor to support “supranational policy making.”<sup>62</sup> It is impossible to say with certainty where the line should be drawn. At best, we can assess whether various groups perceive a particular mix as appropriate. Unfortunately, different audiences may vary in their perceptions<sup>63</sup> as a result of both different measures of whether an organization has met its stated goal (has it been effective) and also different views about the goal itself (what is a worthy goal). World pluralism makes the hope for an objective normative standard impossible.<sup>64</sup>

Third, legitimacy depends in part on accountability, but accountability is an elusive criterion itself. Stakeholders perceive an organization as legitimate when that organization is accountable.<sup>65</sup> Accountability may be to a person (a stakeholder) or an idea (a mission).<sup>66</sup> Accountability to a person is problematic because accountability is audience-dependent

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60. Buchanan & Keohane, *supra* note 19, at 419. Additionally, they would require as necessary conditions that the organizations have the “ongoing consent of democratic states” as well as epistemic virtues to make credible judgments about the needed criteria and the ability to reassess the criteria and “to achieve the ongoing contestation and critical revision of their goals, their terms of accountability, and ultimately their role in a division of labor for the pursuit of global justice, through their interaction with effective epistemic agents.” *Id.* at 432–33; see also Vedder, *Questioning the Legitimacy*, *supra* note 44, at 7.

61. Simon Caney, *The Responsibilities and Legitimacy of Economic International Institutions*, in *LEGITIMACY, JUSTICE & PUBLIC INTERNATIONAL LAW* 117 (Lukas Meyer ed., 2009).

62. Esty, *supra* note 32, at 1537–42.

63. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 14 (discussing inevitable normative conflict with respect to NGOs).

64. Buchanan & Keohane, *supra* note 19, at 418–22. Buchanan and Keohane identify the problem as the persistence of normative disagreement about “first, what the proper goals of the institution are (given the limitations imposed by state sovereignty properly conceived), second, what global justice requires, and third, what role if any the institution should play in the pursuit of global justice.” *Id.* at 418.

65. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 6–10.

66. BROWN, *CREATING CREDIBILITY*, *supra* note 45, at 36; Alnoor Ebrahim, *Towards a Reflective Accountability in NGOs*, in *GLOBAL ACCOUNTABILITIES: PARTICIPATION, PLURALISM AND PUBLIC ETHICS* 193, 195–98 (Alnoor Ebrahim & Edward Weisband eds., 2007); BROWN & JAGADANANDA, *supra* note 47, at 5, 9.

and ever changing.<sup>67</sup> NGOs may also be accountable to a mission, however, missions may sometimes evolve. Although an NGO's mission can be legitimately transformed over time, doing so requires using governance mechanisms that enable a dialogue among stakeholders.<sup>68</sup>

In the NGO context, though, there are almost always multiple parties from whom legitimacy is sought and accountability to all of them will likely be impossible.<sup>69</sup> For this reason, we prefer to assess accountability to mission, rather than accountability to a particular stakeholder.<sup>70</sup> In this sense, accountability means that the organization owes fealty to achieving its particular goals or purpose, i.e., its mission.<sup>71</sup> An organization may have a mission to promote higher education, aid the poor, or provide for the sick. This mission is an abstract principle, informed by, but independent of, who founded the organization, who funds it, who regulates it, and who benefits from it. Indeed if any of those parties change or cease to exist, the mission remains to guide the organization in its decisions. As is discussed more in Part II, domestic nonprofit law regulates this type of accountability.

## II. DOMESTIC NONPROFIT LAW AND NGOS

NGOs have likely been founded in every nation that encourages or tolerates the organized existence of nonprofits.<sup>72</sup> For purposes of this Arti-

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67. Vedder, *Questioning the Legitimacy*, *supra* note 44, at 8 (noting the difficulty of identifying all the stakeholders); *see also* Thomas L. Greaney & Kathleen Boozang, *Mission, Margin and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1, 82 (2005) (noting the multiple stakeholders at issue in nonprofits); Evelyn Brody, *Agents Without Principals: The Economic Convergence Of The Nonprofit And For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 465 (1996) (noting that "most state nonprofit laws, perhaps without intending to, create agents without principals").

68. *See* Dana Brakman Reiser, *Filling the Gaps in Nonprofit Accountability: Applying the Club Perspective in the U.S. Legal System*, in VOLUNTARY REGULATION OF NGOS AND NONPROFITS (Aseem Prakash & Mary Kay Gugerty eds., 2010).

69. Black, *Constructing and Contesting Legitimacy*, *supra* note 3, at 153.

70. BROWN, CREATING CREDIBILITY, *supra* note 45, at 36 ("Accountability is usually defined in terms of performance for a particular stakeholder . . . . But CSOs have multiple competing stakeholders, so accountability to missions may have to balance against or align the multiple claims of diverse stakeholders.").

71. *See* Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 212–15 (2004) [hereinafter Brakman Reiser, *Enron.org*].

72. NGOs are nonprofit organizations, but the nonprofit concept embraces a broader range of entities, including everything from private clubs to hospitals to domestic advocacy groups.

cle, however, we narrow this global field to those NGOs that either operate as NSRs themselves, or engage with NSRs in an effort to impact global governance. As Part I explains, NGO accountability is a key factor in understanding how NGO participation can enhance the legitimacy of global regulators. Yet, NGO accountability is regulated, in the first place, on the domestic level by domestic nonprofit law.<sup>73</sup> Many NGOs are formed in North American and European nations,<sup>74</sup> and this Article

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Jurisdictions vary greatly in the extent to which they support and welcome nonprofits. In states like the U.S., NGOs are offered legal personhood, granted rights to association, and provided various tax benefits. *See* REVISED MODEL NONPROFIT CORPORATION ACT (RMNCA) § 3.02 (1987) (“Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs . . .”); *see also* *Roberts v. United States Jaycees*, 468 U.S. 609, pt. II (1984) (describing the right of individuals to come together in groups to engage in constitutionally protected expression); I.R.C. §§ 170(c), 501(c)(3) (providing for deductibility of charitable contributions and income tax exemption for organizations with “religious, charitable, scientific, testing for public safety, literary, [ ] educational [and a few other] purposes”).

In other states, NGOs are often seen as suspect, rights to associate suggest potential threats to a ruling regime, and tax benefits may be unavailable. *See, e.g.*, Anil Kumar Sinha & Sapana Pradhan Malla, *Nepal, in* PHILANTHROPY AND LAW IN SOUTH ASIA 45, 50–54 (Univ. of Iowa Legal Studies Research Paper No. 08-13, Mark Sidel et al., May 2008), *available at* <http://ssrn.com/abstract=1126337> (describing the pattern of restrictions imposed on Nepalese NGOs and their leaders, seemingly intended to discourage their formation and continuation); Kareem Elbayar, *NGO Laws in Selected Arab States*, 7 INT’L J. OF NOT-FOR-PROFIT L. 3, 6 (2005) (noting that Algerian “law does not encourage the formation of NGOs by providing any direct or indirect financial benefits, such as tax exemptions or public utility discounts”); Rebecca Lee, *Modernizing Charity Law in China*, 18 PAC. RIM L. & POL’Y J. 347, 355 (2009) (explaining that China’s government has “welcomed charitable organizations (including international charitable organizations) if they worked with it on issues such as education, health, environment, and culture” but “saw those organizations [involved in political or religious issues] as a source of political instability and suppressed them”) (internal citations omitted).

For a review of the dimensions of the nonprofit sector in various jurisdictions, see 1 GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (Lester M. Salamon et al. eds., 1999) and 2 GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (Lester M. Salamon ed., 2006).

73. *See* Menno T. Kamminga, *What Makes an NGO “Legitimate” in the Eyes of States?*, in NGO INVOLVEMENT, *supra* note 20, at 179.

74. According to The World Association of Non-Governmental Organizations (“WANGO”), there are 22,787 non-governmental organizations listed in North America and 17,630 in the four European regions (including Russia). The number of NGOs recorded in the directory for the rest of the world totals 10,465. *Worldwide NGO Directory*, THE WORLD ASS’N OF NON-GOVERNMENTAL ORGS., <http://www.wango.org/resources.aspx?section=ngodir> (last visited Mar. 18, 2011).

Of course, NGOs formed in one jurisdiction will often have affiliates or branches in others, and particular issues of interest arise when NGOs form related organizations in de-

focuses primarily on nonprofit law in those jurisdictions, especially the U.S. This Part evaluates the content and achievements of domestic nonprofit law enforcement. In doing so, it identifies predictable accountability gaps that threaten the ability of NGOs to play the legitimacy-enhancing role contemplated by NSRs.

*A. Internal Structures for NGO Accountability*

Regardless of their jurisdictional home, all NGOs take some organizational form to provide for decision-making and accountability. Key to all of these structures is some governing organ that is authorized to make decisions on the NGO's behalf. Practically, this governing organ is the ultimate decision-maker for NGOs on most questions. Its accountability is thus pivotal in evaluating the accountability of the organization, and the governing organ is, above all, accountable to the constituency empowered to compose it.

Of course, other constituencies may make or affect important decisions for NGOs. Managers and front-line staff make many day-to-day decisions about how to execute an NGO's purposes and programs. In some forms of organization, members have the right to approve or veto major decisions, and additional rights can be guaranteed to them at the NGO's election. Donors may restrict the funds they contribute to certain uses, thereby significantly influencing an NGO's programmatic decisions. Partner organizations may induce an NGO to move in a particular direction, in order to gain the advantages of affiliation and collaboration—a point that Part III explores in further detail, when considering the complementary role NSRs can play in enforcing NGO accountability. Beneficiaries, clients, and even the public may influence an NGO's actions. Nonprofit law requirements for NGOs' internal governance, however, primarily concentrate on composing and regulating governing organs.

Under various domestic regimes, governing organs may be composed in one of three ways: through election, self-perpetuation, or authorization of some outside appointing authority. Elected governing organs are elected by some constituency of an NGO. Self-perpetuating governing organs may originally be composed through selection by a donor or a founder. Once vacancies arise, however, the self-perpetuating organ itself selects new members. In the third case, an individual or an entity outside the formal confines of the NGO selects members of the governing organ, either in certain situations or always.

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veloping countries in which they operate. The legal impacts of the law of these jurisdictions are in part addressed by other papers in this Symposium.

These governance structures provide for internal enforcement of accountability within an NGO, but are often quite weak. For example, U.S. law requires NGOs forming as nonprofit corporations to seat a board of directors, but NGOs may choose to make this governing organ either elected or self-perpetuating.<sup>75</sup> Self-perpetuating boards, however, are the default.<sup>76</sup> Directors in a self-perpetuating nonprofit corporate board are bound by their fiduciary obligations of care and loyalty in all of their directorial actions, including nominating and selecting replacement directors.<sup>77</sup> These decisions, however, are virtually unreviewable.<sup>78</sup> Alternatively, an NGO may form as a U.S. nonprofit corporation and expressly opt to create a voting membership empowered to vote for directors.<sup>79</sup> The level of accountability enforcement by a voting membership depends on how it is constituted. When institutional membership is used to connect nonprofits in a system or federation,<sup>80</sup> a voting membership structure is

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75. See, e.g., RMNCA § 8.04 (allowing for an alternative “method of election” or appointment).

76. See, e.g., RMNCA § 8.04(b).

77. See, e.g., RMNCA § 8.30(a); see also PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 300 (Tentative Draft No. 1, 2007) [hereinafter PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS] (identifying nonprofit fiduciaries’ duties of care and loyalty).

78. Only gross negligence or naked self-interest infecting the nomination and appointment process would likely disturb these personnel decisions. See Michael W. Peregrine & James R. Schwartz, *The Business Judgment Rule and Other Protections for the Conduct of Not-for-Profit Directors*, 33 J. HEALTH L. 455, 456 (2000). Standing to challenge them is limited. See Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 657–58 (1998).

79. The NGO must draft bylaws identifying the criteria by which membership will be determined. See, e.g., RMNCA § 6.01. Members may be individual natural persons or institutions. See, e.g., RMNCA §1.40 (21), (25).

80. For example, a voting membership structure may be used to make a parent nonprofit the sole member of a subsidiary nonprofit or nonprofits, consolidating the parent’s authority and empowering it to appoint the subsidiary’s board. See Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 988–94 (2001) (describing this structure); see also Robert P. Borsody, *Parent-Subsidiary Relationship of Not-for-Profit Corporations Raises Official Oversight Issues*, N.Y. ST. BAR J. 20, 20 (2004) (similarly describing this structure). Alternatively, national, regional, or local chapters of a nonprofit might be made institutional members of an international umbrella nonprofit, providing them with a means to voice concerns and impact the umbrella organization’s policy choices. See, e.g., Amended and Restated Bylaws of United Way Worldwide, approved May 13, 2009, available at [http://liveunited.org/page/-/UWWbylaws\\_Approved-2009.pdf](http://liveunited.org/page/-/UWWbylaws_Approved-2009.pdf) (providing for institutional members that elect the entity’s governing organ).

more likely to be a significant force in maintaining the NGO's accountability.

In contrast, if an NGO empowers natural persons as voting members, it usually designates nominal financial or voluntary labor contributions as membership criteria. Concerned members could expend resources investigating how an NGO's board is pursuing and evolving organizational mission, following the strictures of organizational form, and stewarding the NGO's resources. If dissatisfied, these same members could turn out or threaten to turn out a board of directors as a result of its failures. In return for a member's efforts in monitoring and governing an NGO, she receives only the psychic benefits of seeing the NGO make some headway towards its goals. For a rational member to expend the real resources of time and money in obtaining and digesting information needed to diagnose potential accountability failures and advocating for organizational change informally or through a formal director election or removal process, this benefit would have to be substantial.<sup>81</sup> Rational apathy makes it unlikely that individual members will play an active role in policing and disciplining the board.

Furthermore, individual members are also subject to serious and substantial collective action problems. A single member's action is likely ineffective; she must motivate her fellow members to join her to effect a real difference on the board. A member must be well-resourced, extremely committed, charismatic, and perhaps lucky to make this work. Defecting to another organization that is better managed or more closely aligned with the member's vision of the good, or settling for somewhat less than optimal accountability are both likely more attractive courses, as is free-ridership. Although members may also be empowered to pursue accountability of their directors through litigation, this route imposes even greater costs. In the U.S. context, members simply cannot be relied upon to take the initiative in policing accountability—even if the organizational structure provides for members. It must always be borne in mind that in the U.S., an elected board is the exception, not the rule. In other jurisdictions, for NGOs structured as organizations with a required voting membership, perhaps members could play a more consistent monitoring and enforcing role.<sup>82</sup>

The governing organ of a charitable trust, a single trustee or group of trustees, also may be empowered to self-perpetuate. The charitable trust

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81. See Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 859–62 (2003).

82. For a discussion of European NGO form, see *supra* notes 88–94 and accompanying text.

form is available to NGOs that are organized in the U.S., United Kingdom, and other common law jurisdictions.<sup>83</sup> In the U.S., the trust form is more commonly used by grant-making, rather than operating charities,<sup>84</sup> but NGOs organized primarily to disburse funds to service-providers in international settings may well take this form.<sup>85</sup> The document creating a charitable trust will often name the initial trustee or trustees and provide a line of succession, process for filling vacancies, or both. If the trust document empowers incumbent trustees to name their successors, internal governance adds little to the enforcement of NGO accountability. That said, when planned techniques for filling trustee roles run out or fail, courts are empowered to select new trustees for charitable trusts.<sup>86</sup> The outside chance that a government official may, at some future time, appoint new trustees is likewise unlikely to be a powerful force in enforcing NGO accountability.

The two main nonprofit forms of organization for NGOs in European nations with a civil law tradition differ primarily along the fault lines of internal governance structure. NGOs organized in these states may utilize the association or the foundation form.<sup>87</sup> Both contemplate a board of directors as a governing organ,<sup>88</sup> but in an association, members elect directors and make other major decisions for the nonprofit, while in a foundation, there are no members.<sup>89</sup> The foundation's founder is empow-

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83. See RESTATEMENT (THIRD) OF TRUSTS § 27 (2007); see also Hubert Picarda, *Harmonizing Nonprofit Law in the European Union: An English Perspective and Digest*, in COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS 170, 184 (Klaus J. Hopt & Thomas von Hippel eds., 2010) [hereinafter COMPARATIVE CORPORATE GOVERNANCE]; *Choosing and Preparing a Governing Document*, UK CHARITY COMM'N (Apr. 2008), <http://www.charity-commission.gov.uk/Publications/cc22.aspx#5> (describing the charitable trust as one form of organization available to those forming charities).

84. See JACK B. SIEGEL, A DESKTOP GUIDE FOR NONPROFIT DIRECTORS, OFFICERS AND ADVISORS 25 (2006).

85. See KERRY O'HALLORAN, CHARITY LAW AND SOCIAL INCLUSION: AN INTERNATIONAL STUDY 59–60 (2007).

86. See RESTATEMENT (THIRD) OF TRUSTS § 34(2).

87. See Klaus J. Hopt, *The Board of Nonprofit Organizations: Some Corporate Governance Thoughts from Europe* 5 (Eur. Corp. Governance Inst., Working Paper No. 125/2009, 2009), available at <http://ssrn.com/abstract=1425670>.

88. This board can go by varying names by jurisdiction; indeed, in some civil law countries, dual boards may be an option, with a board of directors and a supervisory board. See, e.g., Katrin Deckert, *Nonprofit Organizations in France*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 303–07; Tymen J. Van der Ploeg, *Nonprofit Organizations in the Netherlands*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 245. Still, however many boards there are, boards will be the governing organ to consider. See *id.* at 244.

89. Association law actually frequently points to the membership, acting together in a general meeting or general assembly, as the ultimate authority for the nonprofit. See



ered to select from various options for constituting the board going forward.<sup>90</sup> For example, the founder of a German foundation may set the number of directors and the process for their appointment, which may include self-perpetuation.<sup>91</sup> Alternatively, the founder may opt to retain power over appointment of board members.<sup>92</sup> Notably, in the Netherlands, the founder is permitted to empower some group or body to appoint members of the board, though this group cannot be made the ultimate authority of the organization, as in an association.<sup>93</sup>

Whether the association/foundation distinction makes a real difference for the internal enforcement of accountability is debatable. Association law frequently points to the membership, acting together in a general meeting or general assembly, as the ultimate authority for the nonprofit.<sup>94</sup> In addition, it is the membership who must elect, and can therefore unseat, the governing organ. That said, a general meeting made up of natural persons with only a psychic or nominal connection to the NGO unlikely operates as a consistent and substantial internal check on accountability. Likewise, when a foundation board self-perpetuates, they appear accountable only to themselves, and when a founder retains appointment power, she may be more likely to enforce accountability, but may do so with a decided bias toward her own view of the foundation's proper course or even in her own financial favor.

Finally, it is important to note that even governing organs that appear to be elected may actually be self-perpetuating. This occurs if a nonprofit takes a form of organization requiring members to elect the governing organ, but in fact defines the directors or others composing the governing organ as the only membership constituency.<sup>95</sup> When the members then

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Thomas von Hippel, *Nonprofit Organizations in Germany*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 214 [hereinafter Thomas von Hippel, *Nonprofits in Germany*]. As the general meeting is hardly ongoing, though, the board will be the place where the practical "buck stops" for most decisions.

90. These options vary by jurisdiction, but all states require the selected option to be clearly stated in the foundation's constitution or charter. *See, e.g., id.* at 215; Kateřina Ronovská, *Nonprofit Organizations in the Czech Republic*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 402.

91. *See* Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 215.

92. *Id.*

93. *See* Van der Ploeg, *supra* note 88, at 234.

94. *See* Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 214.

95. *See* MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 159 (2004); *see also* Greyham Dawes, *Charity Commission Regulation of the Charity Sector in England and Wales*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 890 (noting this situation in "many charitable companies").

vote for directors, they vote in their membership capacity, but in fact vote for themselves or their own successors.

Across these organizational forms, internal governance structures speak to the question of accountability of a governing organ. None of them, however, provide for very strong internal enforcement of NGO accountability. The next Section considers the additional accountability enforcement provided by various external actors in the domestic context.

### *B. External Enforcement of NGO Accountability under Domestic Non-profit Law*

Various external actors are also empowered to enforce NGO accountability under domestic nonprofit law. Domestic nonprofit law focuses on how an NGO's governing organ is pursuing its mission,<sup>96</sup> whether it is doing so by efficiently deploying its assets and resources, and if it is a legitimately and effectively managed organization.<sup>97</sup> These responsibilities are fundamental to running a legitimate and successful NGO.<sup>98</sup> They also can be traced to a variety of legal doctrines and requirements. Yet, the ability of external actors to enforce these expectations of governing organs varies considerably. Mission, financial, and organizational accountability will not be equally enforced by external actors in a single jurisdiction, and the strength and focus of nonprofit enforcement also may vary across jurisdictions. This Subpart takes the U.S. as its primary example, explaining how external regulators variably enforce these different elements of NGOs' obligations.

#### 1. Mission Accountability

The ultimate responsibility of nonprofits and their leaders is to achieve their missions. As an obligation to an abstract ideal, rather than a set of particular individuals, though, mission accountability is difficult to track and enforce. To do so, one first needs to know how and where a nonprofit's mission is articulated. Nonprofit law can be of some assistance here, as it generally requires the formulation of a statement of purpose in the organization's formative documents.<sup>99</sup> This purpose statement, however,

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96. See Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 2 (2011) [hereinafter Brakman Reiser, *Charity Law's Essentials*]; see also Greaney & Boozang, *supra* note 67, at 80–87 (articulating a view of nonprofit law based on “mission primacy”).

97. See Brakman Reiser, *Enron.org*, *supra* note 71, at 209–10.

98. See BROWN & JAGADANANDA, *supra* note 47, at 5–6, 9, 39.

99. See, e.g., RMNCA § 2.02(b)(1); RESTATEMENT (THIRD) OF TRUSTS §§ 27, 28; GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 323 (3d ed. 2000).

may be quite general, such as an organization formed for “religious” or “educational” purposes. When little is documented, the mission of a nonprofit is articulated over time, as the nonprofit makes statements to donors, regulators, beneficiaries, and the public, and as it undertakes programs and activities that speak to its purposes.<sup>100</sup> In the NGO context, consider a nonprofit incorporated in the U.S., formed to secure a fair, safe, and sustainable future for consumers. The purpose clause in its articles might state that it is formed to “protect consumers from deceptive practices.” This purpose clause is narrower than the mission described above, but is far from unambiguous. Governing organ approved appeals to donors, describing its work as focused on deceptive and fraudulent practices in the U.S. food industry, provides further clarification.

The task of tracking mission accountability is made even more difficult by the fact that the missions of nonprofits, including NGOs, can legitimately evolve over time. These entities are often given perpetual life, among other benefits, in return for the perceived good they generate for society. So, nonprofits must continue to change over time to better address the issues they were formed to resolve, or move on to new issues as times and circumstances change to make them more salient. This ability to change course and innovate is, in fact, one of the strengths of the nonprofit sector.<sup>101</sup> Recall our consumer protection NGO. Perhaps it begins its work in the U.S. food industry, focusing its efforts there for fifteen years. If it is successful with these efforts, the NGO’s governing organ might consider beginning an advocacy effort to national governments and even international organizations, to rid the world of deceptive practices that defraud consumers. This might be an addition to its work in the food industry or in the United States. Alternatively, it might be a complete change of course from exposing fraud to rooting out corruption or setting standards. If the governing organ undertakes any of these courses, who will evaluate their decision for faithfulness to the nonprofit’s mission? And, using what baseline?

These are challenging issues, and unfortunately, the obligations and enforcement architecture imposed by domestic nonprofit law is likely to

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100. See PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, at 126 (describing the gap between mission and purposes).

101. See *id.* at 126 (noting the need for charitable mission to evolve over time); see also FREMONT-SMITH, *supra* note 95, at 225–26 (asserting that charitable trust fiduciaries also have obligations to ensure mission continues to address “contemporaneous needs”). See generally Dana Brakman Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 BYU L. REV. 1181, 1240–41 and accompanying notes (describing the value of nonprofits in providing innovation and transforming to address new issues and concerns).

be of little assistance. For example, in the U.S., where the key regulators are state attorneys general (“AGs”) and the federal Internal Revenue Service, public enforcement of mission accountability is likely to be low. First, the authority and tools with which these regulators are equipped are ill-suited to enforcing mission accountability. State AGs have the closest to plenary power to regulate nonprofits organized in their jurisdictions, but their mandates generally speak in terms of safeguarding charitable assets.<sup>102</sup> Further, while AGs typically have at their disposal a wider range of enforcement tools, they work primarily through litigation and its attendant processes of investigation, along with imposing disclosure requirements, the results of which they have limited resources to mine.<sup>103</sup>

Limited legal, financial, and human resources and practical concerns about their political futures lead U.S. state AGs to limit their involvement in enforcing mission accountability. They are most likely to raise or respond to mission accountability challenges when they become extreme, such as when the doctrine of *cy pres* must be invoked in court to permit the change of purpose to which a charitable trust’s assets have been dedicated.<sup>104</sup> This doctrine applies by its terms only to assets impressed with a charitable trust, though it has been applied to incorporated nonprofits looking to change the use of restricted gifts<sup>105</sup> and analogically to address more general issues of mission change.<sup>106</sup> The apocryphal example here is a home for abandoned animals morphing into a vivisectionist socie-

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102. See Brakman Reiser, *Enron.org*, *supra* note 71, at 219–20 & n.49.

103. See *id.* at 227.

104. See RESTATEMENT (THIRD) OF TRUSTS § 67 (explaining that a court may apply *cy pres* where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose); see also John Eason, *Motive, Duty, And The Management Of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 128–38 (2010) (explaining current *cy pres* doctrine as a preface to advocating its reform in the context of restricted gifts).

105. See, e.g., UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (UPMIFA) § 6(c) (applying *cy pres* concept to restricted funds held by incorporated nonprofits); RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. A. See generally Evelyn Brody, *From The Dead Hand To The Living Dead: The Conundrum Of Charitable Donor Standing*, 41 GA. L. REV. 1183, 1206–12 (2007) [hereinafter Brody, *Dead Hand or Living Dead*] (discussing the confused nature of case law addressing standing and the merits in cases involving change of use for restricted gifts to incorporated charities); Eason, *supra* note 104 (criticizing this maneuver and advocating reform).

106. For a review of state court cases using trust law concepts to address mission change by nonprofit healthcare corporations, see Greaney & Boozang, *supra* note 67, at 54–72.

ty.<sup>107</sup> Less extreme changes of purpose are unlikely to be targeted by AGs, wary of wasting their enforcement resources or engaging in a battle with well-heeled nonprofit boosters who may be attractive donors to a race for the governorship.<sup>108</sup>

Moreover, with any public regulator enforcing mission accountability, there are potential overtones of unconstitutional state action. If public regulators become overly involved in interpreting and managing the evolution of an NGO's mission, they might well impose upon the associational or expressive rights of these organizations. No less troubling, public regulators aggressively enforcing mission accountability might directly, or through a chilling effect, push NGOs to pursue only those courses that are in line with some government administration's views on appropriate development, trade, or other policies.<sup>109</sup> In some other jurisdictions, domestic nonprofit law provides public regulators a greater role in policing mission accountability. For example, the UK Charity Commission was recently empowered to focus more deeply and closely on the purpose and public benefits provided by UK charities.<sup>110</sup> After undertaking assessments at a number of charities, the Commission found that several did not adequately pursue public benefits and worked with the charities to restructure their activities to comply with the public benefit requirement.<sup>111</sup> Of course, governmental authorities inclined to use nonprofit regulation to further political agendas and dampen opposition could also deploy the power to approve and review the purpose of nonprofits to these ends.<sup>112</sup>

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107. See *Attorney General v. Hahnemann Hosp.*, 397 Mass. 820, 836 n.18 (1986) (hypothesizing such an example in a case regarding change in use of donated funds).

108. See Evelyn Brody, *Whose Public? Parochialism And Paternalism In State Charity Law Enforcement*, 79 IND. L.J. 937, 946 (2004) (Political cynics believe that "A.G." stands not for "attorney general" but for "aspiring governor.").

109. Shades of such argument have arisen in claims by Z Street, a pro-Israel group that is suing the IRS, claiming its exemption application is being delayed to determine the alignment of its mission with administration policies in the Middle East. See Grant Williams, *Pro-Israel Group Says IRS Plays Politics*, CHRON. PHILANTHROPY, Sept. 6, 2010. The IRS declined to comment on the issue, noting only that it must subject applications by groups with overseas activities to special review. See *id.*

110. See UK CHARITIES ACT 2006 §§ 1–3 (providing that all UK charities must pursue charitable purposes, defined in the statute, and public benefit, on which the Charities Commission is directed to issue guidance).

111. *The Public Benefit Assessment Reports*, CHARITY COMM'N (July 2010), [http://www.charitycommission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/pbassessreports.aspx](http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbassessreports.aspx).

112. See, e.g., Mark Sidel, *Maintaining Firm Control: Recent Developments in Nonprofit Law and Regulation in Vietnam*, 12 INT'L J. NOT-FOR-PROFIT L. 52 (2010). Note that some critics of the new "public benefit" test applied under the UK Charities Law of

Regulators are certainly not the only avenue for external enforcement of an NGO's mission accountability. Private parties, such as donors, employees, partner organizations, beneficiaries, and citizens more broadly may care deeply about the accountability of an NGO to its mission. None of these potential groups of private enforcers, however, can effectively police NGOs' mission accountability alone.

Donors might be especially motivated to police the mission accountability of NGOs' governing organs. They have, after all, staked not only their hopes, but their fortunes on a recipient NGO's mission. Perhaps this would give them a greater incentive to monitor and enforce mission accountability. For small donors, similar collective action problems to those plaguing individual members are likely to limit mission accountability enforcement. But large, repeat, or institutional donors might overcome these problems because they are more heavily invested in the NGO's mission and have greater resources to allocate to accountability enforcement, or both. Under U.S. law, however, donors are not granted significant legal authority to enforce nonprofit accountability, to mission or otherwise. Other than what they negotiate by contract, which again suggests that large, repeat, or institutional donors are the key players here, donors do not have rights to access donee information, or to participate in selecting a donee's governing organ, or standing to sue members of that governing organ for fiduciary breach.<sup>113</sup> This is not to suggest that donors are impotent to impact and monitor NGOs' mission. In fact, the potential for donors' outsized influence over NGOs is noted in the literature.<sup>114</sup> But this influence is of practical, not legal, origin. Just two of many examples of this are when a large donor becomes a board member as a result of her donation or when a historically large donor pressures directors to pursue her unique vision or risk losing access to anticipated future contributions. The role for donors can differ across jurisdictions of course; as noted earlier, some European regimes bestow significant legal authority on founders of foundations. In the U.S. model, though, donors have little, if any, legal authority to enforce mission accountability.

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2006 worry that this test might be just so inappropriately used. *See, e.g.,* Picarda, *supra* note 83, at 180–81.

113. *See* FREMONT-SMITH, *supra* note 95, at 324–42 (2004) (noting general restrictions on standing outside of the attorney general, but sometimes successful suits by donors alleging breaches of gift terms); *see also* Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1187–88.

114. *See, e.g.,* L. David Brown & Mark H. Moore, *Accountability, Strategy, and International Nongovernmental Organizations*, 30 NONPROFIT & VOLUNTARY SECTOR Q. 569, 576 (2001) (noting that “[d]ependence for financial support on contributors creates some important accountability dilemmas for INGOs”).

Likewise, while the legal enforcement resources of employees and partner organizations are extremely limited, their practical influence can be significant, even problematically so. For example, the executive director and other top level managers of a nonprofit often provide the governing organ with its only source of information on the problems it seeks to ameliorate, the progress of the organization on the ground, the activities of other organizations in the field, etc. In addition, powerful nonprofit CEOs often research and suggest candidates for the governing body.<sup>115</sup> This power to manage the information a governing organ receives as well as its personnel can give high level employees significant power to frame a governing organ's agenda and influence its decisions. The power of staff can be so overwhelming as to up-end the conceptual ideal of the governing organ as a nonprofit's ultimate decision-maker.<sup>116</sup> These are serious problems that should not be underestimated and should be targeted, but they are not based on employees' legal authority. In fact, the only authority that employees may have to influence a nonprofit's governing organ under U.S. law is access to the rarely granted category of "special interest" standing to allege fiduciary breach.<sup>117</sup> The legal influence of partner organizations is likewise limited, though they may have significant practical sway that might be bolstered, as suggested in Part III, in an NGO's boardroom.

NGOs' beneficiaries or the average citizen tend to engage in even less enforcement of mission accountability. They have occasionally been granted special interest standing to challenge actions by a governing organ.<sup>118</sup> As noted above, however, the use of this doctrine is very rare. Individuals from either group could also choose to fund public regulatory

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115. "[S]trong or long-serving CEOs may gain significant influence in the selection of board members, in effect choosing their own bosses." MICHAEL J. WORTH, *NONPROFIT MANAGEMENT: PRINCIPLES AND PRACTICES* 64 (2009).

116. See Evelyn Brody, *Accountability and the Public Trust*, in *THE STATE OF NONPROFIT AMERICA* 471, 486 (Lester M. Salamon ed., 2002) [hereinafter Brody, *Accountability and the Public Trust*] (citing and quoting Peter Dobkin Hall's concern about "professionalization of nonprofit managers as 'a sort of Trojan horse' [] tending to shift policymaking from the governing board to the staff").

117. See FREMONT-SMITH, *supra* note 95, at 328–29 (2004); see also Mary Grace Blasko, Curt S. Crossley, & David Lloyd, *Standing To Sue In The Charitable Sector*, 28 U.S.F. L. REV. 37 61–78 (1993) (describing the elements courts consider in granting or denying special interest standing).

118. See FREMONT-SMITH, *supra* note 95, at 329–34 (reviewing various cases, though noting the greater number of cases where claims were denied for lack of standing).

action as a relator<sup>119</sup> in those states where this status is available.<sup>120</sup> Of course, they could attempt to influence an NGO by informal or media pressure. But these groups suffer even more acutely the same collective action problems described with respect to members and donors above.

Aside from the lack of legal enforcement tools and practical resources needed for private external enforcers to police nonprofit mission accountability under U.S. law, each identified group suffers from a more fundamental problem in playing this role: bias. Donors, employees, partner organizations, beneficiaries, and the public (as well as members, where they exist) are all potentially legitimate stakeholders of an NGO. In order to responsibly steward its mission, a nonprofit's governing organ must consider and balance the concerns of its various constituencies, rather than favoring the desires of one individual or group.<sup>121</sup> This problem is not unique to the U.S. legal system, and is fundamental to creating a real response to mission accountability.

Thus, for an NGO to be truly accountable to mission, it must provide for a dialogue on that mission among an array of stakeholders. This dialogue is important in making various levels of decisions for the NGO, but is most vital if considering mission change. As noted earlier, nonprofits are deemed deserving of many of the special benefits they receive in large part because they can evolve over time to address changing needs. So, mission can and should legitimately be transformed over time. To transform mission legitimately, an NGO must activate the internal governance structures supplied by its organizational form, as well as other means, to enable a dialogue among stakeholders.<sup>122</sup> Looking to only one set of important NGO constituencies to make these decisions, just as looking to it to enforce mission accountability, is inherently biased and insufficient.

To summarize, mission accountability is fundamental to an NGO's legitimacy as an entity, but domestic nonprofit law provides relatively little content and external enforcement of this vital attribute. In the U.S., relatively weak public enforcement is, in part, an unintended consequence of the shape of regulators' authority and, in part, a deliberate attempt to separate the government and the nonprofit sector for constitutional and policy reasons. Some other nations are more willing to address mission accountability directly, but still cannot fully enforce mission accountabil-

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119. See *id.* at 325 (explaining that a relator is a member of the public who may be "authorized by the attorney general to bring [] suit" to enforce the obligations of a charity or its fiduciaries).

120. See *id.*; Blasko et al., *supra* note 117, at 49–50.

121. See Brakman Reiser, *Charity Law's Essentials*, *supra* note 96, at 11.

122. See *id.*



ity in a vibrant nonprofit sector. Monitoring mission at every turn would require regulators to devote vast resources and would diminish NGOs' ability to innovate in a sphere separate from government influence.<sup>123</sup> Some governments might effectively constrain deviation from mission by carving out only an extremely narrow space for NGOs to operate. This approach, however, undermines the ability of these organizations to achieve development, human rights, and harmonization goals. Furthermore, as just one stakeholder, regulators cannot be the sole voice in judging mission accountability.

Private enforcers are likewise unequipped by nonprofit law to police mission accountability from the outside. Many important nonprofit constituencies lack legal authority over an NGO's governing organ, suffer severe collective action problems, or both. Finally, again, a single empowered stakeholder group can never be a complete solution; authorizing any group to demand priority in accountability necessarily undermines other constituencies. A dialogue among stakeholders is necessary.

## 2. Organizational Accountability

The dialogue over mission accountability is partly structured by reference to the governance architecture an organizational form puts in place. Governance arrangements, of course, do more than provide a means to mission accountability. They are also instruments useful for maintaining financial accountability.<sup>124</sup> Moreover, close observation of governance structures has inherent value, by reinforcing an NGO's position as a legitimate organization, not merely some personal fiefdom of a donor or leader. Organizational accountability measures how fully an NGO utilizes its governance and operational structures and is of particular importance to NGOs seeking legitimacy as actors or representatives on the world stage.

Domestic nonprofit law provides significant guidance here. As discussed above, each organizational form offered to nonprofit organizations by a particular jurisdiction puts in place default structures for governance. For example, in the U.S., an incorporated NGO must have a board of directors, though it may and likely will be self-perpetuating.<sup>125</sup> The board must hold meetings composed of a quorum and vote on its

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123. Cf., Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-For-Service Charity And The Limits Of Autonomy* 18–20 (Notre Dame L. Sch., Legal Studies Research Paper No. 10–21, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1666421](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666421) (describing the importance of charitable autonomy to performing its valuable roles in the economy and society).

124. See *infra* Part II.B.3.

125. See, e.g., RMNCA §§ 6.03, 8.04.

decisions.<sup>126</sup> In their votes as in all other directorial actions, directors are bound by their fiduciary obligations.<sup>127</sup> Boards are also authorized to form committees, and to delegate certain matters to them.<sup>128</sup> In an NGO formed using one of the European associational forms, general meetings of members must be held, and certain decisions, including director elections, are made by these members.<sup>129</sup>

Of course, there are numerous rules and proposals that would make these structures more demanding. A few U.S. jurisdictions impose not only the requirement of a board for incorporated nonprofits, but that a majority of the directors serving on that board be “independent.”<sup>130</sup> A U.S. Senate committee’s staff recently proposed capping the number of directors, and commentators and best practice guides cite the need for an independent board of a workable size.<sup>131</sup> Critics also argue against control of a nonprofit by a single-member governing organ.<sup>132</sup> Several scholars warn against borrowing of fiduciary standards from the for-profit realm for nonprofit directors, regardless of whether those directors are independent. In one recent example, Professor Leslie argues that a nonprofit director should be allowed to deal with her organization only when the deal she provides is better, and not just equal, to what the nonprofit could obtain on the open market.<sup>133</sup> Some regulators press for greater

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126. See, e.g., RMNCA § 8.24.

127. See, e.g., RMNCA § 8.30.

128. See, e.g., RMNCA § 8.25.

129. See, e.g., Van der Ploeg, *Nonprofit organizations in the Netherlands*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83 at 244–45.

130. See, e.g., ME. REV. STAT. ANN. Tit. 13-B, § 713A(2) (2005) (allowing only forty-nine percent of a public benefit corporation’s board to be “financially interested persons”); N.H. REV. STAT. ANN. § 292:6a (requiring a minimum of a five-member board, none of which are related to each other); RMNCA § 8.13 (optional section, similar to Maine’s). For critiques of the independent director imperative, see Kathleen Boozang, *Does An Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83 (2007); Dana Brakman Reiser, *Director Independence in the Independent Sector*, 76 FORDHAM L. REV. 795 (2007).

131. STAFF OF S. FIN. COMM., 108TH CONG., STAFF DISCUSSION DRAFT 13, available at <http://finance.senate.gov/imo/media/doc/062204stfdis.pdf>; PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY GOVERNANCE ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 75–77 (2005) [hereinafter PANEL ON THE NONPROFIT SECTOR].

132. See PANEL ON THE NONPROFIT SECTOR, *supra* note 131, at 75–77; see also Evelyn Brody, *Charity Governance: What’s Trust Law Got To Do With It?*, 80 CHI.-KENT L. REV. 641, 672 (noting that “single-director and single-trusteed charities seem to invite failures of proper independence and protection of the public interest”).

133. Melanie B. Leslie, *The Wisdom Of Crowds? Groupthink and Nonprofit Governance*, 62 FLA. L. REV. 1179, 1224 (2010).

disclosure by nonprofits.<sup>134</sup> There is certainly room to argue about the proper content of governance requirements imposed on nonprofits. Indeed, the simple diversity of structures and standards applied across forms and jurisdictions suggests the variety of opinions on this matter, or perhaps the idea that the sector is too heterogeneous for a single form. That debate is beyond the scope of this Article. For present purposes, the fact remains that domestic nonprofit law has much to say about how an NGO should be governed and operated, and these organizations can and should be judged by their fidelity to those rules and standards.

This judgment may take place, however, only to a limited degree. Again, external enforcement is the key question, and enforcement of organizational accountability on its own is often limited. Consider again the U.S. example where public regulators have the authority to police organizational accountability. If an NGO's governing organ does not follow the structures of governance provided by state law, state AGs may sue for failure to obey the law, for breach of the fiduciary duty of care, or both.<sup>135</sup> Of course, state AGs have inadequate resources to pursue every nonprofit accountability lapse.<sup>136</sup> AGs must prioritize and do so in cases where failures to follow governance requirements leads to misuse of nonprofit funds or misleading donors. Remedying gaps in governance alone is like preventive medicine—important in the long run, but difficult to devote scant resources to in the short run. A few state AGs have taken laudable steps to train members of the nonprofit sector about the need for governance and other operational controls.<sup>137</sup> Still, public enforcement action for failure to observe these controls is rare when no charitable funds have been lost or donors disappointed.<sup>138</sup> The recent governance initiative by federal tax regulators could be a step in the di-

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134. See, e.g., Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559, 568–80 (2005) (reviewing disclosure focus of post-Sarbanes-Oxley nonprofit reform proposals).

135. See, e.g., RMNCA § 8.30.

136. See FREMONT-SMITH, *supra* note 95, at 352 (noting this lack of resources and collecting sources); see also Brody, *Accountability and the Public Trust*, *supra* note 116, at 479 (similarly noting this lack of resources and collecting sources); Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the 21st Century*, 85 CHI.-KENT L. REV. 479, 494–95 (describing lack of resources and other factors that motivate under-enforcement of charity governance regulations).

137. See FREMONT-SMITH, *supra* note 95, at 448.

138. See Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1440–42 (1998) (asserting that AGs infrequently prosecute lapses of care in cases without simultaneous lapses of loyalty).

rection of more organizational accountability enforcement for its own value;<sup>139</sup> time will tell.

Public regulators of other types in different jurisdictions may engage in more organizational accountability enforcement. The UK Charity Commission has the authority to remove members of the governing organ, to direct application of charity property, and to make inquiries regarding whether a nonprofit is meeting the public benefit requirement.<sup>140</sup> It also engages in substantial guidance, including publication of model documents, posting of outcomes in regulatory interventions, and answering questions for nonprofit fiduciaries and employees.<sup>141</sup> The Commission often takes a collaborative, rather than adversarial, tone toward its regulatory projects.<sup>142</sup> All of these efforts could lead to greater pure organizational accountability enforcement and provide guidance for nonprofit leaders on how to self-enforce in this area. Resources, though, remain limited. If pressed to choose between undertaking regulatory action against a charity whose organizational accountability lapses lead to losses of financial resources or donor confidence, or against a charity with disorganized operations but no current lapses in outcomes, even a regula-

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139. See James J. Fishman, *Stealth Preemption: The IRS' Corporate Governance Initiative*, 29 VA. TAX REV. 545, 558–78 (2010) [hereinafter Fishman, *Stealth Preemption*] (describing the various IRS initiatives aimed at improving exempt entities' corporate governance). Although beyond the scope of this Article, it is worthy of note that Professor Fishman subjects this initiative to serious criticism on federalism grounds, and the debate over its propriety is ongoing. See *id.*

140. See UK CHARITIES ACT 2006 §§ 2(1), 19–21; *Charities and Public Benefit*, UK CHARITIES COMM'N (Jan. 2008), [http://www.charitycommission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/public\\_benefit.aspx#h](http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx#h) (describing the Commission's enforcement of the public benefit requirement on new and existing charities); see also Picarda, *supra* note 83, at 194; Richard Fries, *The Charity Commission for England and Wales in COMPARATIVE CORPORATE GOVERNANCE*, *supra* note 83, at 908.

141. See *Providing Information, Advice and Legal Consent*, UK CHARITIES COMM'N, [http://www.charitycommission.gov.uk/About\\_us/Regulation/Providing\\_information\\_index.aspx](http://www.charitycommission.gov.uk/About_us/Regulation/Providing_information_index.aspx) (last visited Mar. 18, 2011) (“One of the key ways we [help charities function well] is by publishing general resources and guidance for charities, their advisers and the public in a variety of different formats.”); see also Fries, *supra* note 140, at 907–08 (noting the Commission's role in producing risk assessments, advice, and guidance material).

142. See THE CHARITY COMMISSION AND REGULATION, UK CHARITIES COMM'N (Jan. 2010), available at <http://www.charity-commission.gov.uk/Library/regstance.pdf> (explaining regulatory approach with substantial emphasis on educating charities and their leaders, providing guidance, and assisting them in compliance); Fries, *supra* note 140, at 907–08 (describing this advisory approach, but noting “the Commission's advice has considerable authority!”). But see Dawes, *supra* note 95, at 857 (noting Commission's use of “name and shame” tactics to ensure compliance).

tor dedicated to organizational accountability's preventive value will be hard pressed to choose the latter.<sup>143</sup>

When it comes to enforcing organizational accountability, private external enforcers again suffer from a lack of resources and authority, as well as collective action problems discussed above. There is at least, though, significant clarity of the substance of an NGO's obligations in the organizational accountability context, in contrast to the situation in mission accountability. If some NGO stakeholders can be activated to engage in enforcement here, their enforcement can substitute for that of others without the resources, authority, or collective will to do so. Donors, employees, and partner organizations are the most likely groups to do so. Beneficiaries and members of the public have little access to information suggesting governance and operational requirements have gone unfulfilled and, even with such information, have little authority to challenge such failures.

Donors, particularly large, repeat, or institutional donors, may understand or be educated to see the importance of organizational accountability to achieving mission, financial integrity, and legitimacy on the world stage. In the U.S., donors still do not have standing to bring a suit challenging organizational accountability failures as breaches of the fiduciary duty of care.<sup>144</sup> If they understand its importance, however, donors could add required procedures or milestones by contract, which could create enforceable contract obligations for an NGO to be organizationally accountable.<sup>145</sup> Practically, too, donors have obvious influence. If donors see an NGO failing to follow the governance roles or procedures required, they can curtail future contributions. Large contributions may secure a donor a board seat, which she can then use to ensure these roles and procedures are observed. In other jurisdictions, donors may have additional legal authority. For example, the founder of a German foundation is permitted to reserve rights in the organization's formative documents, allowing him to serve as a director or to appoint or discharge other directors, which secures additional enforcement authority over organi-

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143. See, e.g., Kaye Wiggins, *Charity Commission Shelves Public Benefit Assessments for Hospitals and Health Charities*, THIRD SECTOR (Aug. 31, 2010), <http://www.thirdsector.co.uk/News/DailyBulletin/1024971/Charity-Commission-shelves-public-benefit-assessments-hospitals-health-charities/5BACAA35E2B4AF66383C61BCBFBCEC5B/?DCMP=EMC-DailyBulletin> (reporting that continued public benefit assessments would be cancelled due to resource constraints).

144. See Mayer & Wilson, *supra* note 136, at 494.

145. Cf. Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1225 (noting courts traditionally, though not universally, hold that the terms of a restricted gift itself are not themselves a matter of contract law).

zational as well as other accountability failures.<sup>146</sup> Likewise, German donors may have contractual rights because gifts can at times be treated and remedied as contracts.<sup>147</sup>

An NGO's employees or partner organizations might also police organizational accountability. In the U.S., these groups generally lack special legal authority to challenge an entity's failure to follow the governance and operational structures that it has adopted. Yet, employees may be best able to perceive such failures and can act informally to pursue remedies. For example, an NGO's CFO would likely be aware if meetings of the Board's Finance Committee have not been held, and could call upon the relevant directors to revive it.<sup>148</sup> Partner organizations can also have significant practical influence. Consider an NGO pursuing accounting standard setting for developing countries, which partners with an NGO pursuing training in using business software for inhabitants of those same jurisdictions. The accounting standards NGO could refuse to continue the partnership unless the software group provided it with conflict of interest disclosures from its board members. Of course, employees and partnerships will not always be able to see organizational accountability failures or have the clout to demand remediation. It is also possible that these groups could be a source of organizational accountability failures. The NGO CFO described above could block meetings of the Finance Committee or fail to provide them with necessary information. The accounting standards NGO could encourage the software NGO's executive director to make major commitments without board approval. Thus, employees and partners are a potential enforcement resource, but standing alone, will not be sufficiently reliable and consistent monitors. Their potentially complementary role here is addressed in greater detail in Part III.

Domestic nonprofit law provides significant content regarding what an NGO must do to be organizationally accountable. It offers routes for setting up organizations with varying governance structures and roles and calls on individual entities to layer on additional content through their founding and operating documents.<sup>149</sup> Faithfully following these pre-

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146. See Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 218.

147. See *id.* at 219 (explaining this approach, though noting that claims under it are rarely brought).

148. See, e.g., *Stern v. Lucy Webb Hayes Sch. for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1015–16 (D.C.D.C. 1974) (failure to hold finance committee meetings was one of the fiduciary violations found by the court).

149. See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 635–37 (1985) (discussing laws on nonprofit structure and governance); RMNCA §§ 2.05, 2.06, 8.30 (1988).

scriptions is necessary for an organization to be able to articulate, track, and transform its mission legitimately. Likewise, as discussed below, these procedures are useful instruments for tracking, investing, and effectively deploying an NGO's financial assets.<sup>150</sup> Further, when the structures and processes demanded by domestic nonprofit law provide a legitimate process for collecting and representing the views of its various stakeholders, following them will have inherent value for an NGO. Providing a framework to demonstrate that an NGO is responsive to and representative of its relevant constituencies increases its legitimacy as a force in global regulation.

Neither public nor private regulators, however, have the incentives and resources to sufficiently enforce domestic law's organizational accountability mandates. In the U.S., litigation-focused and resource-constrained public regulators focused on preventing fraud and waste of nonprofit resources most often pursue organizational accountability failures when linked to these other substantive wrongs. They rarely enforce organizational accountability as a preventative measure. Jurisdictions with a more collaborative public enforcement regime may engage in more training and enforcement regarding organizational accountability, but public resources are nowhere sufficient to do this job alone. Private external enforcers like large, repeat, or institutional donors will at times contract for improvements of organizational accountability, or might be able to secure them through their formal or informal influence over an NGO's governance. Employees and partner organizations may make similar contributions, though not reliably and consistently. In fact, the problem of employee-capture in the nonprofit sector raises serious questions about the benefit of their influence here. Perhaps NGOs' global regulatory partners can complement the partial enforcement likely in the domestic nonprofit law context, a point to which we shall return in Part III. Doing so is key to preserving the legitimacy of NGOs as nonprofits and as participants in global regulation.

### 3. Financial Accountability

The final aspect of NGO accountability to be addressed here, financial accountability, is the strain on which domestic nonprofit law concentrates most of its attention.<sup>151</sup> Financial accountability looks to how an NGO handles its resources. An NGO must deploy its assets responsibly to achieve its mission, spending efficiently and for optimal impact, as

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150. See *infra* Part II.B.3.

151. See Brakman Reiser, *Enron.org*, *supra* note 71, at 207.

well as avoiding conferral of private benefits and diversion of assets.<sup>152</sup> It must develop financial resources effectively, soliciting donors genuinely, keeping its promises to them, and investing those assets it holds for future use in a portfolio designed to achieve appropriate income and growth goals over time.

The common and statutory law addressing organizational forms, as well as charitable solicitation and tax law, are replete with rules addressing the deployment, development, and investment of NGO assets. Again, looking to the U.S. example, trust and corporate law clearly place obligations on NGO fiduciaries, *inter alia*, to avoid unfair self-dealing<sup>153</sup> and to prudently invest assets.<sup>154</sup> In addition to the annual reports that nonprofits must submit to state AGs, state regulation of charitable solicitations almost always requires reporting on NGOs' assets and disbursements.<sup>155</sup> U.S. federal tax law imposes various penalties for an exempt NGO's payment of excessive benefits to its leaders, major donors, or their relatives<sup>156</sup> and limits an exempt NGO's ability to dedicate its funds to unrelated business activities.<sup>157</sup> It is impossible to generalize domestic nonprofit law across jurisdictions; however, the law regarding nonprofit forms elsewhere also requires care when NGO leaders manage their organizations' finances and often precludes or limits transactions between them.<sup>158</sup> Charitable solicitation may be publicly- or self-regulated,<sup>159</sup> and

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152. A nonprofit director or officer is held to a duty of care which includes avoiding "[f]raud, self dealing, misappropriation of corporate opportunities, improper diversions of corporate assets, and similar matters . . . ." Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers*, 23 J. CORP. L. 631, 646 (1998); see also Brakman Reiser, *Enron.org*, *supra* note 71, at 216–17.

153. See, e.g., RMNCA § 8.31; PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, § 330 (outlining conflict-of-interest transactions subject to good faith board approval).

154. See, e.g., UPMIFA § 3; RESTATEMENT (THIRD) OF TRUSTS § 77; PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 77, § 335.

155. See FREMONT-SMITH, *supra* note 95, at 315–17 (describing the breadth of laws requiring registration and financial reporting to attorneys general, as well as additional financial reports required to be made by those entities engaged in charitable solicitation); see also Brakman Reiser, *Enron.org*, *supra* note 71, at 235–37 & nn.97–104 (collecting statutory citations on charitable solicitor reporting requirements).

156. See I.R.C. § 4958; see also FREMONT-SMITH, *supra* note 95, at 252–64 (reviewing I.R.C. restrictions on excess benefit transactions).

157. See I.R.C. §§ 511–13; see also FREMONT-SMITH, *supra* note 95, at 289–95 (reviewing federal taxation of unrelated business income).

158. See THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH 91 (Klaus J. Hopt, W. Rainer Walz, Thomas Von Hippel, & Volker Then eds., 2006) [hereinafter THE EUROPEAN FOUNDATION] (describing duties of foundation governing organ members under the law of various European jurisdictions and finding "[t]he duty of care and (to a lesser extent) the duty of loyalty are recognized in all countries . . .").



compensation and unrelated business activity may or may not be restricted.<sup>160</sup>

In addition to setting strong financial accountability norms, domestic nonprofit law tends to focus its public enforcement resources in the financial area. Disclosure requirements focus on what is reportable and comparable across organizations, which often comes down to financial data. In the U.S, public regulators also emphasize financial accountability for various other reasons. The mandates of state AGs, as noted above, generally speak in terms of safeguarding charitable assets and donors, rather than more generally to steward the health and reputation of the nonprofit sector. When they seek remedies through litigation, they sue fiduciaries whose failures of care, loyalty, or both, have drained the nonprofit's assets, which the damages obtained through the litigation will repay.<sup>161</sup> Their litigation skills bias them toward enforcing financial failures.<sup>162</sup> Moreover, nothing plays in the press like a charity leader "stealing from orphans" and elected AGs, perhaps with their eyes on higher office, understandably will prioritize such splashy enforcement efforts.

Tax regulators are focused on remedying tax abuses, and the information and concerns they have will therefore often emphasize financial elements of an NGO's activity. Tax authorities police NGO accountability in order to avoid abuses of tax exemption, where entities or individuals obtaining tax benefits are, in fact, unworthy of them. Such abuses could occur because an NGO offers excessively beneficial financial

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159. See, e.g., CHARITIES AND FUNDRAISING, UK CHARITIES COMM'N 20–24 (June 2010), available at <http://www.charity-commission.gov.uk/Publications/cc20.aspx> (explaining the limited role of the Commission in regulating charitable solicitation, relying instead on self-regulation); Rene Bekkers, *Trust, Accreditation and Philanthropy in the Netherlands*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 596, 600–02 (2003) (describing self-regulation of charitable solicitation in the Netherlands); See generally Peter Luxton, *The Regulation of Fund-Raising by Charities and Voluntary Organizations in England and Wales*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, at 637–61 (analyzing England and Wales systems); Wino J.M. Van Veen, *Comparing Regulation of Fundraising: Self-Regulation or Governmental Regulation?*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83 (analyzing UK and Netherlands systems and comparing them with that of the U.S.).

160. See THE EUROPEAN FOUNDATION, *supra* note 158, at 146–48 (comparing European positions on remuneration of foundation directors); see also Thomas von Hippel, *Nonprofits in Germany*, *supra* note 89, at 222–24 (addressing German restrictions on unrelated business activity); Zoltán Csehi, *Nonprofit Organizations in Hungary*, in COMPARATIVE CORPORATE GOVERNANCE, *supra* note 83, 374–75 (addressing the Hungarian approach to restrictions on unrelated business activity).

161. Of course, other remedies such as structural changes can and do happen, but are unlikely without the catalyst of financial losses to spur an AG enforcement action.

162. See Brakman Reiser, *Enron.org*, *supra* note 71, at 221–22.

transactions to its insiders, thereby skimming off funds that could be used for pursuit of its mission.<sup>163</sup> They may also occur if an NGO provides benefits to donors in return for their “contributions,” the cost of which donors attempt to deduct when calculating their individual income tax liability.<sup>164</sup> In each case, policing a potential tax abuse will also show failures in how an NGO attends to its financial responsibilities. Of course, tax enforcement is not always perfectly aligned with policing financial accountability, but many tax enforcement priorities will simultaneously address an NGO’s financial failures.

There are also significant incentives for private parties to enforce NGOs’ financial accountability. Donors are understandably incensed by siphoning or waste of an NGO’s assets, as they may see those lost assets as precisely the funds that they donated. Likewise, employees and partner organizations should worry about failures of financial accountability, as these failures can threaten the existence of the NGO and thereby their positions and partnerships. Beneficiaries and the public in general also can easily understand the impact of financial losses to an NGO. For all of these parties, too, financial accountability failures can be relatively transparent from the disclosures that nonprofits must make to regulators, which in the U.S. are publicly available.<sup>165</sup> Information suggesting failures of mission or organizational accountability, while extremely serious and dangerous to an NGO’s success and survival, are less easily accessible and comprehensible even by sophisticated private external regulators.

For all of these reasons, financial accountability is the focus of external enforcement, though it still may not be optimally policed under domestic nonprofit law. Public regulators, despite their emphasis on financial issues, are chronically under-resourced and understaffed.<sup>166</sup> As such, not nearly every failure will be investigated or litigated. Donors, employees, and partner organizations have informal access to remedy these failures, and can make significant gains in this area. In the U.S., though, donors have only limited legal authority. Although donors do not have broad standing rights to police nonprofit fiduciaries, they are occasionally granted standing to challenge the misapplication of funds contributed to a

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163. See I.R.C. § 4958 (imposing penalty taxes on nonprofit insiders engaged in excess benefit transactions).

164. See I.R.C. § 170(f)(8) (imposing substantiation requirements for deductible charitable contributions).

165. See GUIDESTAR, [www.guidestar.org](http://www.guidestar.org) (last visited Mar. 6, 2011) (providing a searchable database of information on over 1.8 million U.S. nonprofits).

166. See *supra* note 136 and accompanying text (addressing lack of resources in AG offices).

charitable trust or as part of a restricted gift.<sup>167</sup> Employees may be protected by whistle-blowing statutes if they take their concerns to regulators,<sup>168</sup> but employees cannot take legal action on their own. Beneficiaries and the public lack even these enforcement resources, and, as discussed above, each of these external stakeholder groups will rarely have standing to mount a generic challenge to an NGO's financial practices.

Financial accountability is crucial for NGOs. To be effective, they will need funds to dedicate to their purpose now and in the future. A sham organization funneling donated funds to its leaders cannot make any legitimate claim to represent a cause or a set of beneficiaries. Domestic nonprofit law is an important tool for maintaining and improving this vital aspect of NGO accountability. Public external regulators can be counted upon to dedicate their, albeit limited, resources here, and other external stakeholders also have significant motivation and limited authority to remedy NGOs' financial failures. Of course, optimal enforcement is still only an aspiration. Perhaps international law, norms, and organizations can play a supplementary role in even further improving NGOs' financial accountability.

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NGOs are organized using a nonprofit legal form recognized by a domestic legal system. This system provides NGOs with an internal governance system and external resources for enforcing their accountability. However constructed, the internal governance structures tend to provide weak accountability enforcement. External enforcement by public regulators and private stakeholders is most effective to police financial accountability, a first step to ensuring an NGO's viability and thus its ability to impact international civil society. They provide less robust enforcement of organizational accountability, which will often be difficult to perceive or seem an unworthy use of limited enforcement resources. Mission accountability, though fundamental to an NGO's legitimacy, will rarely be enforced by domestic nonprofit law. Part III considers how

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167. See Brody, *Dead Hand or Living Dead*, *supra* note 105, at 1209–22; see also UNIFORM TRUST CODE § X (2005) (providing, in its most recent amendment, standing for the settlor of a charitable trust to “maintain a proceeding to enforce the trust”); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1143–44 (2005) (although noting some inroads on this position, recognizing that “[a]t common law, a donor who has made a completed charitable contribution has no standing to bring an action to enforce the terms of her gift unless she has expressly reserved the right to do so”).

168. See Fishman, *Stealth Preemption*, *supra* note 139, at 572 (noting the theoretical, but unlikely, application to nonprofit employees of federal whistleblower protections enacted under the Sarbanes-Oxley Act).

global regulators may complement this predictably limited accountability enforcement apparatus.

### III. NGOS AND GLOBAL REGULATORS

#### *A. Why NGO Accountability Gaps Matter to Global Regulators*

The gaps in nonprofit mission, organizational, and financial accountability enforcement by public regulators and private stakeholders affect the legitimacy of NGOs as NSRs and as contributors to other regulators in global governance. First, mission accountability failures call into question an NGO's ability to pursue normative goals as an NSR and undermine the ability of NGO participation to improve the output legitimacy of the global regulatory process. Second, organizational accountability failures suggest that an NGO may itself have insufficient input legitimacy to be a proper site for regulation as an NSR, or an effective way to boost the legitimacy of other regulators by contributing to global governance debates and processes. Lastly, although financial accountability will be better enforced at the domestic level as a relative matter, resource constraints will often mean that gaps in enforcement remain. Without adequate financial accountability, NGOs risk becoming ineffective or even sham organizations, which are inadequate to regulate or contribute to the work of other global regulators.

Mission accountability matters to NGO legitimacy in global governance both where NGOs act as regulators themselves and when they contribute to the efforts of other global regulators. In order for an NGO to appropriately undertake regulatory activity in either fashion, regulatory activities or contributions should relate to and further the organization's mission. For an NGO involvement to enhance the legitimacy of global governance, its mission must align with the global governance goals of an international regulator or the international community. Pursuing the NGOs' mission must also further the regulatory project. In many cases, these mission goals will align. In the case of an NGO, whose sole activity is acting as an NSR, evolution of the NGO's mission to better achieve regulatory goals is likely appropriate. For example, Transparency International fights global corruption through various initiatives.<sup>169</sup> Its work might evolve as corruption does. When NGOs contribute to the work of other NSRs, mission alignment may also be quite close. For example, Consumer International is a federation of consumer groups that seeks to

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169. See TRANSPARENCY INT'L, <http://www.transparency.org/> (last visited Mar. 6, 2011).

protect consumers.<sup>170</sup> It participated in the drafting of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* without any concern over a mission conflict.<sup>171</sup>

There are cases, however, where the goals of an NGO may diverge from those of an international regulatory project, or vice versa. For example, the Civil Society Mechanism ("CSM") is a coalition of civil society organizations representing NGO constituencies concerned with food insecurity.<sup>172</sup> While the CSM represents a range of civil society organizations, the principles espoused by some members of the coalition include a moratorium on genetically modified foods,<sup>173</sup> the rejection of agricultural intellectual property rights,<sup>174</sup> and restrictions on large agricultural foreign investment.<sup>175</sup> The CSM recently attained the right to facilitate NGO consultation and participation in the UN FAO Committee on World Food Security ("CFS").<sup>176</sup> The G8 and the G20 have endorsed the CFS' work while at the same time generally promoting trade liberalization that would conflict with some of the very principles espoused by various food security NGOs.<sup>177</sup> In such situations, to remain mission-

170. See *About Us*, CONSUMERS INT'L, <http://www.consumersinternational.org/who-we-are/about-us> (last visited Mar. 6, 2011).

171. Org. for Econ. Dev. & Cooperation [OECD], *Consumer Dispute Resolution and Redress in the Global Marketplace* 18 (2006), available at <http://www.oecd.org/dataoecd/26/61/36456184.pdf>.

172. See *Civil Society Mechanism*, CIVIL SOC'Y FOR THE COMM. ON WORLD FOOD SEC., <http://cso4cfs.org/who-we-are/civil-society-mechanism/> (last visited Mar. 18, 2011).

173. See Action Aid Int'l, *Power Hungry: Six Reasons to Regulate Global Food Corporations* 59 (2005) [hereinafter *Power Hungry*], available at [http://www.actionaid.org.uk/\\_content/documents/power\\_hungry.pdf](http://www.actionaid.org.uk/_content/documents/power_hungry.pdf); see also World Rural Forum, *WRF's Stance—Seminar on Biodiversity and the Right to Food* 1 (Mar. 2007) [hereinafter *WRF Seminar*], available at <http://www.ruralforum.net/documentos/ficha.asp?id=en&Ndocumen=230220375&Ncatego=10303&pag=1&Nfrm=1>.

174. See *WRF Seminar*, *supra* note 173, at 2.

175. See FoodFirst Information & Action Network [FIAN Int'l], *The World Doesn't Need More of the Same Medicine: Joint Declaration Addressed to Governments on World Food Crisis* 2 (2008), available at <http://www.fian.org/resources/documents/others/the-world-doesnt-need-more-of-the-same-medicine/pdf>; see also *Power Hungry*, *supra* note 173, at 59.

176. Governance Working Group, Int'l Planning Comm. for Food Sovereignty, Oxfam Int'l, & Action Aid Int'l, *Proposal for an International Food Security and Nutrition Civil Society Mechanism for Relations with the CFS Committee on World Food 2* (2010), available at <http://cso4cfs.files.wordpress.com/2010/06/cso-mechanism-zero-draft.pdf>.

177. See G8, *L'Aquila Joint Statement on Global Food Security*, *L'Aquila Food Security Initiative (AFSI)* 4 (2009), available at [http://www.g8italia2009.it/static/G8\\_Allegato/LAquila\\_Joint\\_Statement\\_on\\_Global\\_Foo](http://www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Foo)

accountable, each NGO involved must have a process to consider whether participation in the international regulatory project is consistent with its mission.<sup>178</sup> A global regulator also must be able to rely on such a process, to identify the mission that the NGO pursues, whether the regulator's legitimacy strategy in drawing in NGO participants is to gain expertise or to expand the diversity of viewpoints it considers.

Notably, too, when an NGO contributes to the regulatory projects of another NSR, the NGO may need to withstand pressure from the regulatory environment in order to stay mission-accountable. For example, Defence for Children International ("DCI") promotes children's rights<sup>179</sup> and closely aligns itself with the Convention on the Rights of the Child ("CRC").<sup>180</sup> Although the DCI supported ILO Convention No. 182 (1999) on the Worst Forms of Child Labour,<sup>181</sup> it felt that the Convention was too rigid in the categories of intolerable child labor and failed to emphasize a child's right to development, a tenet that the organization finds fundamental.<sup>182</sup> Faced with this situation, many outcomes are possible, but all require some mechanism for DCI to interrogate, reinforce, and potentially transform its mission. Perhaps continued involvement with the regulator would align with the NGO's mission, such as if DCI continued participation in the ILO to steer it toward a differing vision on child labor. Alternatively, an NGO might need to remove itself from the regulatory process to best pursue its mission, such as if DCI thought it best to turn to one of the ILO's regulatory competitors to secure a regula-

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d\_Security[1],0.pdf; G20, *The G20 Toronto Summit Declaration* 6, 24 (2010), available at [http://www.g20.utoronto.ca/2010/g20\\_declaration\\_en.pdf](http://www.g20.utoronto.ca/2010/g20_declaration_en.pdf); see also CHARLES E. HANRAHAN & MELISSA D. HO, CONG. RESEARCH SERV., THE U.S. GLOBAL FOOD SECURITY INITIATIVE: ISSUES FOR CONGRESS 5 (2009), available at <http://www.nationalaglawcenter.org/assets/crs/R40945.pdf>.

178. Cf. Robert Blitt, *Who Will Watch the Watchdogs? Human Rights and Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 322–24 (2005) (suggesting the failure of one human rights organizations to maintain or legitimately evolve its human rights missions when it became involved in facilitating surrender negotiations).

179. *The DCI Movement*, DEFENCE FOR CHILDREN INT'L, <http://www.defenceforchildren.org/about-us.html> (last visited May 16, 2011).

180. See *Reports from the Sessions of the Committee on the Rights of the Child on Juvenile Justice Issues*, DEFENCE FOR CHILDREN INT'L, <http://www.defenceforchildren.org/resources/crc-reports.html> (last visited May 16, 2011).

181. Defence for Children Int'l, *Position on Child Labour: A Contribution to Debate and Practice* 2 (2002), available at <http://www.crin.org/docs/resources/publications/NGOCRC/subgroup-childlabour/DCI-position.pdf>.

182. *Id.*

tory product more in line with DCI's goals.<sup>183</sup> Yet, another way mission conflict might develop is if the ILO broke off its relationship with DCI, finding its partnership with DCI no longer matched its regulatory goals. None of these paths are clear without DCI's ability to articulate and understand its children's rights mission and to evaluate its alignment with the mission of the ILO.

Of course, an NGO's stakeholders often differ with respect to the appropriate normative understanding of the group's mission and its legitimate evolution. This conflict mirrors that among international actors over the appropriate normative standards in global governance. In both contexts, however, debate and dialogue can help reconcile this conflict. Within an NGO, a deliberative and participatory process should be used to consider how best to pursue mission and when and how it should be altered. The dialogue should include various stakeholders, such as donors, employees, partner organizations, and beneficiaries. When this kind of inclusive dialogue is embedded in an NGO's structure or culture, it has created a method to track and enforce mission accountability. Then, the NGO can bring its considered and deliberated vision on normative matters to the global governance arena. Such mission-accountable NGOs can help improve global regulators' ability to work through normative conflict because their vision and contribution has garnered support in part through deliberation, debate, and persuasion. In contrast, if an NGO departs from or fails to carefully consider and reform its mission, or becomes co-opted by its involvement in a regulatory process, it abandons the fruit of that deliberation and is able to add much less to the legitimacy of global regulation.

Thus, for NGOs to enhance the legitimacy of global regulation meaningfully, mission accountability matters. Yet, enforcement of domestic nonprofit law will not sufficiently guard NGOs' mission accountability. If there is a desire to use NGOs to prop up the legitimacy of global governance, global regulators need to address this gap.

As the discussion of mission accountability already foreshadows, organizational accountability will also matter in enabling NGOs to improve the legitimacy of global governance. As a preliminary matter, organizational accountability is instrumental. Organizational integrity guards mission (and financial soundness). Thus, to the extent that mission (and financial) accountability matters to the legitimacy of global governance, so

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183. Laurence Helfer has identified and discussed examples where both NGOs as well as States shift their focus and efforts from one regime to another. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 26-53 (2004).

will organizational accountability. Moreover, organizational accountability matters independently. The integrity of the participants in a global governance process matters greatly. If a global governance regulator bases its claim to legitimacy on the input of a variety of views, the origin of those views plays into whether they actually enhance the diversity of voices and may also impact whether those views can be trusted. If a global governance regulator relies on an NGO that is understood to be little more than a front for a single faction that is already represented in the governance process, this participation does not add to the perceived legitimacy of the international regulation the body creates. In fact, it may actually undermine this legitimacy. The 2004 Cardoso Report notes criticisms of just this type when government NGOs, which merely parrot the desires of a particular government, are drawn into global governance processes.<sup>184</sup>

Although domestic laws provide governance structures that can promote organizational accountability, enforcement of these provisions is likely weak. Donors often lack information to identify organizational accountability problems, and employees may lack the incentive to do so. NGOs' partners are sometimes able to identify organizational failures, but many lack the clout to rectify them.<sup>185</sup> Gaps in organizational accountability, however, seriously undermine the ability of NGOs to help legitimate global governance. To be legitimate global regulators, NGOs operating as NSRs must be held to rigorous organizational accountability standards, which international law must find some way to enforce. In order for other global governance regulators to utilize NGO participation to enhance their own legitimacy, they must guard against inclusion of NGOs that lack sufficient organizational accountability.

Like organizational accountability, financial accountability is important in understanding NGO participation in global governance for instrumental and inherent reasons. To the extent that failures in financial accountability make an NGO incapable or ineffective in achieving its mission, this failure will likewise undermine the NGO's ability to contribute to global governance. But again, financial accountability also impacts the legitimacy of NGOs' involvement in global governance directly. The legitimacy of global governance relies vitally on perceptions. Thus, corruption or self-dealing within an NGO acting as an NSR or contributing importantly to the work of other regulators can undermine the perceived legitimacy of these global governance efforts. This problem of

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184. *Cardoso Report*, *supra* note 16, at 7.

185. As noted *supra* Part III.A., global regulators may be one category of NGO partners with sufficient clout to monitor and enforce organizational accountability.



perception can arise even if the financial harm resulting from abuses would not have been substantial enough to prevent the NGO from achieving its mission.

Domestic regulators and private stakeholders have more powerful tools and incentives to enforce financial accountability than the other strands discussed here. Thus, domestic law can be a useful tool for global regulators seeking to secure NGOs' roles in legitimating global governance. Due to resource constraints, though, even financial accountability will not be fully enforced in the domestic context. To safeguard the contributions of NGOs to global governance, international regulators and the international community may profitably take steps to monitor and enforce financial accountability as well.

*B. The Tools Global Regulators Use to Police NGO Accountability*

NGO accountability ensures NGO participation will enhance the legitimacy of global governance; but, domestic regulation of NGOs as non-profits will not sufficiently guard NGO accountability. Thus, it falls to global regulators to monitor and enforce the accountability of NGOs with whom they interact and upon whom they rely. The techniques for monitoring and enforcing NGO accountability will differ, importantly, depending upon whether the NGO is acting as a NSR itself, or if the NGO is participating in the process of some other NSR. This Subpart explores the range of tools currently in use by global regulators to police NGO accountability; the next Subpart addresses how these tools might be enhanced.

When an NGO serves as an NSR, internal governance structures keyed to accountability can be placed into the NGO itself, and mechanisms for accountability enforcement beyond domestic regulators and stakeholders can be devised. Founders of an NSR NGO can consider whether to use a self-perpetuating or elected governing organ and may provide for periodic mission statement review and revision, standing committees, or internal financial controls. For example, the ISO develops standards for use by businesses and other actors worldwide.<sup>186</sup> Its role in devising standards with such broad adoption makes the ISO an NSR. Its structure and organization suggests numerous attempts to safeguard its accountability, which in turn bolsters its legitimacy as an NSR. ISO is incorporated as a nonprofit in Switzerland<sup>187</sup> and has a member-elected governing organ.<sup>188</sup>

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186. See *ISO Standards*, INT'L ORG. FOR STANDARDIZATION, [http://www.iso.org/iso/iso\\_catalogue.htm](http://www.iso.org/iso/iso_catalogue.htm) (last visited Mar. 6, 2011).

187. See *About ISO*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/about.htm> (last visited Mar. 6, 2011).

Membership is composed of national standard-setting bodies, which together compose the general assembly, the ISO's ultimate authority.<sup>189</sup> Members are themselves often nonprofit organizations in their own jurisdictions, and they are entitled to vote on the ISO's 5-year strategic plan, and positions on the executive Council rotate among them.<sup>190</sup> The ISO also has adopted standing committees on finance and strategy.<sup>191</sup>

As internal governance structures will not be self-enforcing and public regulators and private stakeholders may insufficiently enforce them, accountability and, thereby, legitimacy of an NGO NSR can be enhanced by providing for additional enforcement resources. These might include state monitoring, self-regulatory certification,<sup>192</sup> the creation of internal or external ombudsmen,<sup>193</sup> or other mechanisms. For example, Julia Black cites Transparency International as an example of a NSR.<sup>194</sup> It sets standards regarding corruption and then assesses governments using those standards. Although it lacks coercive power over governments, its power to "name and shame" in effect regulates conduct.<sup>195</sup> Transparency International is also one of a handful of International NGOs that have signed the INGO Accountability Charter, committing them to good governance, transparency, and accountability.<sup>196</sup>

When NGOs do not operate as NSRs themselves, but rather participate in the work of other global governance regulators, NGO accountability

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188. See *Governance and Operations*, INT'L ORG. FOR STANDARDIZATION, [http://www.iso.org/iso/about/governance\\_and\\_operations.htm](http://www.iso.org/iso/about/governance_and_operations.htm) (last visited Mar. 6, 2011).

189. See *id.*

190. See *id.*

191. See *id.*

192. Cf., MICHAEL EDWARDS, NGO RIGHTS AND RESPONSIBILITIES 30–31 (2000) (advocating self-regulatory certification of NGOs working with international regulators); International NGO Accountability Charter [hereinafter INGO Accountability Charter], available at [http://www.ingoaccountabilitycharter.org/wp-content/uploads/INGO-Accountability-Charter\\_logo1.pdf](http://www.ingoaccountabilitycharter.org/wp-content/uploads/INGO-Accountability-Charter_logo1.pdf) (establishing a self-regulatory framework for reviewing accountability of international NGOs).

193. See, e.g., EDWARDS, *supra* note 192, at 30–31 (2000) (noting possible use of an ombudsman as part of proposed NGO certification scheme).

194. Black, *Competition for Regulatory Share*, *supra* note 5, at 7 (citing C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' 29 J. L. & Soc'y 56 (2002)).

195. Black, *Competition for Regulatory Share*, *supra* note 4, at 7 (noting that Transparency International is a good example of an organization that assesses governments' compliance with norms).

196. *NGOs Lead by Example: World's International NGOs Endorse Accountability Charter*, OXFAM INT'L (June 7, 2006), [http://www.oxfam.org/en/news/pressreleases2006/pr060606\\_ngo\\_charter](http://www.oxfam.org/en/news/pressreleases2006/pr060606_ngo_charter); INGO Accountability Charter, *supra* note 192.

still matters, but the routes to accomplishing it are necessarily indirect. Since global governance regulators cannot rely on the domestic context to comprehensively enforce NGO accountability, they should consider creating mechanisms that provide accountability assurances for those NGOs that they involve in their regulatory efforts.<sup>197</sup> Some NSRs have already adopted complex credentialing or accreditation mechanisms to pursue this task, though the content of these mechanisms could be improved to more carefully complement domestic enforcement and reinforce each NSR's particular legitimacy strategy. Unfortunately, many other global governance regulators who rely on NGO participation to enhance their legitimacy have not sufficiently attended to accountability issues. In these cases, weak application processes admit NGOs to the global governance process or no limits are placed on their involvement. This Subpart reviews the range of tools NSRs use to monitor and enforce the accountability of the NGOs they embrace.

The United Nations has been at the forefront in establishing NGO accreditation. In 1996, the UN Economic and Social Council ("ECOSOC"), pursuant to its authority under Article 71 of the UN Charter, adopted *Resolution 1996/31 on the Consultative Relationship between the United Nations and Non-Governmental Organizations*.<sup>198</sup> This Resolution establishes three types of relationships that NGOs may have with ECOSOC: general consultative status, special consultative status, and inclusion on the Roster.<sup>199</sup> Organizations granted general consultative status have the greatest rights to involvement with ECOSOC, including rights to propose issues to the Council on their own motion.<sup>200</sup> NGOs with general or special consultative status may also make written statements to the Council, subject to significant requirements of form and, for special consultative NGOs, only on the topic of their special competency.<sup>201</sup> NGOs on the "Roster" receive information about ECOSOC's activities and may attend

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197. Other commentators have suggested that NGOs themselves should pursue greater NGO accountability through self-regulation. See, e.g., EDWARDS, *supra* note 192, at 30–31 (advocating self-regulatory certification of NGOs working with international regulators); Blitt, *supra* note 178, at 390–97 (arguing that a self-regulatory system is necessary for NGOs to be perceived as legitimate actors in international law).

198. U.N. Econ. & Soc. Council [ECOSOC], *Consultative Relationship Between the United Nations and Nongovernmental Organizations*, Res. E/1996/31 (July 25, 1996) [hereinafter *Consultative Relationship*], available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

199. *Id.* Also, the 2004 Cardoso Report has suggested expanding these categories to include network partners, consultative partners, and programme support partners. See *Cardoso Report*, *supra* note 16, ¶ 138.

200. *Consultative Relationship*, *supra* note 198.

201. *Id.*

meetings, though their involvement is subject to greater Council discretion.<sup>202</sup> To obtain any of these relationships with the UN, however, an NGO must satisfy some basic criteria. They are worth quoting extensively here:

2. The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations . . . .

9. The organization shall be of recognized standing within the particular field of its competence or of a representative character. Where there exist a number of organizations with similar objectives, interests and basic views in a given field, they may, for the purposes of consultation with the Council, form a joint committee or other body authorized to carry on such consultation for the group as a whole.

10. The organization shall have an established headquarters, with an executive officer. It shall have a democratically adopted constitution, a copy of which shall be deposited with the Secretary-General of the United Nations, and which shall provide for the determination of policy by a conference, congress or other representative body, and for an executive organ responsible to the policy-making body.

11. The organization shall have authority to speak for its members through its authorized representatives. Evidence of this authority shall be presented, if requested.

12. The organization shall have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes. Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.

13. The basic resources of the organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. Where, however, the above criterion is not fulfilled and an organization is financed from other sources, it must explain to the satisfaction of the Committee its reasons for not meeting the requirements laid down in

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202. *Id.*

this paragraph. Any financial contribution or other support, direct or indirect, from a Government to the organization shall be openly declared to the Committee through the Secretary-General and fully recorded in the financial and other records of the organization and shall be devoted to purposes in accordance with the aims of the United Nations.

14. In considering the establishment of consultative relations with a non-governmental organization, the Council will take into account whether the field of activity of the organization is wholly or mainly within the field of a specialized agency, and whether or not it could be admitted when it has, or may have, a consultative arrangement with a specialized agency.<sup>203</sup>

ECOSOC's accreditation criteria reflect their dual purposes. On one level, these criteria seek to determine how well a particular NGO applicant matches with the needs, goals, and ethic of ECOSOC and the United Nations. The requirements that UN and NGO mission be aligned, that the NGO possesses relevant and useful expertise, and that the NGO be authorized to speak for its members look to justify reliance on the NGO's substantive expertise and most basic bona fides. The criteria considering the NGO's relationship with other UN bodies and allowing NGOs to pursue accreditation collaboratively are aimed at making NGO involvement with the UN more efficient.

In part, for the reasons explained in this Article, the ECOSOC requirements also explore the mission, organizational, and financial accountability of the applicant NGO. Mission accountability is clearly implicated by the consideration of an NGO's "aims and purposes" and by requiring the involvement of a representative body for determination of policy.<sup>204</sup> The criteria could be read to require applicant NGOs to use an organizational form with an elected governing organ, though they only specifically mandate that the governing organ remain responsible to some "representative body," and the use of voting or "other appropriate democratic and transparent decision-making processes."<sup>205</sup> These ideas of responsibility and transparency reflect organizational accountability concerns, as do the requirements of a written constitution, headquarters, executive officer, and executive organ. Even financial accountability is touched on by the criteria, as they require disclosures of sources of support, with a particular focus on support from government.

Of course, some of these requirements serve double duty, as the UN is concerned about preserving independent and sometimes legitimacy-

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203. *Consultative Relationship*, *supra* note 198, ¶ 14.

204. *Id.* ¶¶ 26, 29.

205. *Id.* ¶¶ 10, 12.

centered goals of its own through many of these requirements. The idea of consulting with NGOs is to bring in voices beyond those of the UN member states; thus, there is a justifiable concern that government involvement in NGOs will fail to increase the diversity of voices or over-represent already powerful actors. The lukewarm openness to government appointees and extensive demands around government donor disclosure reflect this concern. Similarly, the UN's ethic of representation may filter down into its focus on representativeness within consulting NGOs.

As written, the UN ECOSOC accreditation process exemplifies a quite comprehensive process currently used by a global governance regulator. Notably, however, commentary on these criteria suggests they may not be enforced as scrupulously as they are written. The United Nations 2004 Cardoso Report notes criticisms of the ECOSOC criteria as: driven by political concerns; too varied, confusing, and time-consuming; costly; fragmented, non-transparent, and non-responsive.<sup>206</sup> The Cardoso Report also notes the presence of government-sponsored NGOs as a particular problem.<sup>207</sup> The Cardoso Report makes a proposal for streamlining the accreditation process:

Proposal 19

The United Nations should realign accreditation with its original purpose namely, it should be an agreement between civil society actors and Member States based on the applicants' expertise, competence and skills. To achieve this, and to widen the access of civil society organizations beyond Economic and Social Council forums, Member States should agree to merge the current procedures at United Nations Headquarters for the Council, the Department of Public Information and conferences and their follow-up into a single United Nations accreditation process, with responsibility for accreditation assumed by an existing committee of the General Assembly.<sup>208</sup>

The Cardoso Report also recommends that the Secretariat take additional steps to "help it with selection and quality assurance" of civil society partners.<sup>209</sup> In particular, the Report suggests that networks of NGOs might provide additional "codes of conduct and self-policing mechanisms to heighten disciplines of quality, governance and balance."<sup>210</sup> In its response to the Report's recommendations, the Secretary General ex-

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206. *Cardoso Report*, *supra* note 16, ¶ 124.

207. *Id.* ¶ 127.

208. *Id.* ¶ 128.

209. *Id.* ¶ 142 (Proposal 23).

210. *Id.*

pands on these problems, noting that "there are currently large numbers of NGOs in consultative status with the United Nations that are not complying with the requirement to submit quadrennial reports on their activities and how they relate to the overall goals and objectives of the global community" and suggests that Member States engage in additional monitoring and enforcement.<sup>211</sup> The Report also proposes streamlining the application process through, *inter alia*, better use of technology and more coordinated efforts among UN bodies and members.<sup>212</sup>

Of course, accreditation is only a snapshot and accountability is dynamic. The ECOSOC approach to monitoring and enforcement of ongoing NGO accountability relies primarily on disclosure.

NGOs in general or special consultative status must submit quadrennial reports on their activities to a standing Committee on Nongovernmental Organizations.<sup>213</sup> Focusing little on the internal governance or functioning of the NGO, these reports are required to address "the [NGO's] activities, specifically as regards the support they have given to the work of the United Nations."<sup>214</sup> NGOs must provide the Committee with a structured disclosure. One field asks NGOs to report their "aims and purposes" and another asks for changes in an "organization's orientation, programme, or scope of work," which would include amendments to foundational documents or changes in funding.<sup>215</sup> The disclosure, however, has much more of a "what have you done for me lately" character. Other fields prompt responses regarding NGOs' work with UN fora, bodies, and actions in line with the Millennium Development goals. Based on these reports, the Committee may recommend that an NGO's consultative status or Roster listing be removed,<sup>216</sup> though critics argue that this

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211. U.N. Secretary-General, *Report of the Secretary-General in Response to the Report of the Panel of Eminent Persons on United Nations—Civil Society Relations*, ¶ 34, U.N. Doc. A/59/354 (Sept. 13, 2004).

212. See *Cardoso Report*, *supra* note 16, ¶ 133.

213. *Consultative Relationship*, *supra* note 198. These reports are due every four years. Peter van den Bossche, *Regulatory Legitimacy of the Role of NGOs in Global Governance: Legal Status and Accreditation*, in *NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY* 135, 163; *Consultative Relationship*, *supra* note 198, ¶ 61(c).

214. *Consultative Relationship*, *supra* note 198, ¶ 61(c).

215. *Quadrennial Reports: Guidelines for NGOs in General and Special Consultative Status with ECOSOC*, NGO BRANCH, U.N. DEP'T OF ECON. & SOC. AFFAIRS, <http://esango.un.org/paperless/Web?page=static&content=quads#4> (last visited May 16, 2011).

216. *Consultative Relationship*, *supra* note 198, ¶ 61.

rarely happens<sup>217</sup> or has become a disturbingly politicized process.<sup>218</sup> For example, Peter van den Bossche notes that “between 2000 and 2005 [there were] . . . five suspensions recommended to the Council by the NGO Committee.”<sup>219</sup> Thus, ongoing monitoring, while it exists, appears to do little to enforce NGO accountability.

Other UN bodies have similar provisions regarding NGO accreditation.<sup>220</sup> The United Nations Commission on Trade and Development (“UNCTAD”) adopted *Arrangements for the Participation of Non-governmental Organizations in the activities of the United Nations Conference on Trade and Development*.<sup>221</sup> It requires that NGOs shall be representative; shall articulate minority views if there are any; shall have an executive officer as well as a policy making body; shall be authorized to speak for their members; and shall be international and accord their members voting rights. Organizations must complete an application providing the required information along with a copy of its charter or constitution.<sup>222</sup> Once authorized through this process to participate as an UNCTAD observer, there is no provision for monitoring of the NGO’s ongoing compliance with these requirements or removal of its special status.<sup>223</sup>

The World Health Organization (“WHO”) allows observer NGOs to attend meetings, receive non-confidential documentation, and submit memoranda. It has regulated its interaction with NGOs through various resolutions.<sup>224</sup> Resolution WHA40.25, known as the *Principles Govern-*

217. Peter van den Bossche, *supra* note 213, at 146, 163. There is also the possibility of automatic withdrawal. However, the reasons for such withdrawal appear unrelated to reviewing the continuing existence of the bases for initial accreditation. *Consultative Relationship*, *supra* note 216, ¶ 61.

218. See Kamminga, *supra* note 73, at 191–93.

219. Peter van den Bossche, *supra* note 213, at 146, 164.

220. For a very helpful discussion of the various UN organs and their relationships with NGOs, see Peter van der Bossche, *supra* note 213, at 138–52.

221. U. N. Conference on Trade & Dev. [UNCTAD], *Arrangements for the Participation of Non-Governmental Organizations in the Activities of the United Nations Conference on Trade and Development, Board Decision 43 (VII)* (Sept. 20, 1968 ) [hereinafter *Arrangements for NGO Participation*], available at [http://www.unctad.org/sections/about/docs/dom\\_iaos\\_cso\\_decision43\\_vii\\_en.pdf](http://www.unctad.org/sections/about/docs/dom_iaos_cso_decision43_vii_en.pdf).

222. See UNCTAD, *Application for Observer Status with UNCTAD: NGO Application Questionnaire*, available at [http://www.unctad.org/sections/about/docs/dom\\_iaos\\_cso\\_application\\_en.pdf](http://www.unctad.org/sections/about/docs/dom_iaos_cso_application_en.pdf).

223. *Arrangements for NGO Participation*, *supra* note 221; see also Peter van den Bossche, *supra* note 213, at 166. Peter van den Bossche notes, however, that UNCTAD interacts with civil society in instances not accounted for by these criteria, such as in Civil Society Forums and Civil Society Hearings. See *id.* at 143.

224. Peter van den Bossche, *supra* note 213, at 146.



ing *Relations between WHO and Nongovernmental Organizations*, provides for "formal" relations between NGOs and the WHO.<sup>225</sup> NGOs seeking formal relations must not only focus on health, they must be free from "concerns which are primarily of a commercial or profit-making nature."<sup>226</sup> They should be international and represent a "substantial proportion of the persons globally organized for the purpose of participating in the particular field of interest in which it operates."<sup>227</sup> They should have a "constitution or other basic document" an established headquarters, a directing or governing body, an administrative structure at various levels of action, and authority to speak for members through authorized representatives.<sup>228</sup> An NGO's members "shall exercise voting rights in relation to its policies or action."<sup>229</sup> In addition, prior to obtaining "official relations," an NGO must have had "working relations"<sup>230</sup> status with the WHO for two years.<sup>231</sup> The process of obtaining official relations takes time, typically three to four years.<sup>232</sup> In 2004, after a period of study of its relations with NGOs, the WHO considered a proposal for a new policy to guide its relationship with NGOs.<sup>233</sup> The proposal would have required more stringent accreditation requirements, but its adoption was postponed.<sup>234</sup>

The WHO also provides for some monitoring and enforcement of accountability of its participating NGOs over time. NGOs are required to submit a "plan for collaboration" with the WHO as the basis for relations between it and the WHO.<sup>235</sup> The WHO Board of Directors maintains a Standing Committee on Nongovernmental Organizations, which reviews collaboration with NGOs every three years "and shall determine the de-

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225. 40th World Health Assembly [WHA], *Principles Governing Relations with Nongovernmental Organizations*, Res. WHA40.25 (1987) [hereinafter WHA, *Principles Governing Relations with NGOs*], available at [http://apps.who.int/gb/bd/PDF/bd46/e-bd46\\_p5.pdf](http://apps.who.int/gb/bd/PDF/bd46/e-bd46_p5.pdf).

226. *Id.*

227. *Id.* ¶ 3.2.

228. *Id.* ¶ 6.

229. *Id.*

230. See WHO, *Review Report: WHO's Interactions with Civil Society and Nongovernmental Organizations* 10, WHO/CSI/2002/WP6 (2002) [hereinafter WHO, *Review Report*], available at <http://www.who.int/civilsociety/documents/en/RevreportE.pdf>.

231. WHO, *Governing Relations with NGOs*, *supra* note 225, ¶ 3.6.

232. Peter van der Bossche, *supra* note 213, at 169.

233. *Civil Society Initiative: Status of Proposal for a New Policy to Guide WHO's Relations with NGOs*, WORLD HEALTH ORG., [http://www.who.int/civilsociety/relations/new\\_policy/en/index.html](http://www.who.int/civilsociety/relations/new_policy/en/index.html) (last visited May 16, 2011).

234. *Id.*

235. WHO, *Governing Relations with NGOs*, *supra* note 225, ¶ 4.5.

sirability of maintaining official relations.”<sup>236</sup> Relations may be discontinued if circumstance warrants or if the NGO no longer meets the requisite criteria.<sup>237</sup>

The Codex Alimentarius Commission is a standard-setting body established under the Joint Food Standards Program of the Food and Agricultural Organization of the United Nations and the WHO.<sup>238</sup> It sets standards regarding food safety<sup>239</sup> and its norms are widely adopted by States.<sup>240</sup> It allows NGOs to participate as observers.<sup>241</sup> The privileges of observer status include being able to attend proceedings, receive documents, and submit views and written comments.<sup>242</sup> An NGO that already has a status with the FAO, or WHO, may obtain status with the Codex Commission.<sup>243</sup> Other NGOs must be international (in structure and activity), representative, concerned with matters falling under the Codex’s field of activity, “have a permanent directing body and Secretariat, authorized representatives and systematic procedures and machinery for communicating with [their] membership in various countries.”<sup>244</sup> They must also allow members to express their views either through voting or some other mechanism.<sup>245</sup> Finally, an NGO must be established for at least three years before it can apply to the Codex for observer status.<sup>246</sup>

The Codex does not have specific protocols for review of observer status, however, the Director General may terminate observer status any time it finds that the NGO no longer meets the requisite criteria.<sup>247</sup> Observer status is automatically forfeited if an NGO fails to participate over a four year period.<sup>248</sup> This provision suggests that there may be NGOs who establish observer status without participating in a meaningful way.

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236. *Id.* ¶ 4.6.

237. *Id.* ¶ 4.7.

238. *Welcome*, CODEX ALIMENTARIUS (2011), [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp).

239. *Id.*

240. In fact, the Codex standards, while soft law, have been hardened by their inclusion as safe harbors in the World Trade Organization’s Sanitary and Phytosanitary Agreement.

241. *See NGO Participation: Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission*, CODEX ALIMENTARIUS, [http://www.codexalimentarius.net/web/ngo\\_participation.jsp](http://www.codexalimentarius.net/web/ngo_participation.jsp) (last visited May 16, 2011) [hereinafter *NGOs and Codex Alimentarius*].

242. *See id.*

243. *See id.*

244. *See id.* ¶ 3(iii)(d).

245. *See NGOs and Codex Alimentarius*, *supra* note 241.

246. *See id.*

247. *See id.*

248. *See id.*

One could imagine why an NGO might want to claim observer status to boost its own legitimacy with various communities, but might not expend the additional resources to engage in ongoing participation.

Both the World Bank and the International Monetary Fund ("IMF") have also developed principles for interacting with NGOs, but to date they do not have accreditation standards or monitoring or enforcement mechanisms in place.<sup>249</sup> The IMF Staff Guidelines say very little about which NGOs should be part of the IMF outreach, only that the Staff should consider a range of factors.<sup>250</sup> These factors focus not on the accountability of NGOs themselves, but seek to ensure the appropriateness and representativeness of the range of organizations with which the IMF works. The IMF and the Bank also host Civil Society Policy Forums together to facilitate dialogue with civil society on a broad range of topics.<sup>251</sup> Civil society organizations must be accredited by the Forum prior

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249. See, e.g., *The World Bank and Civil Society*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,pagePK:220469~theSitePK:228717,00.html> (last visited May 16, 2011); *IMF and Civil Society Organizations*, INT'L MONETARY FUND, <http://www.imf.org/external/np/exr/facts/civ.htm>; see also Peter van der Bossche, *supra* note 213, at 146 (noting that the lack of any accreditation standards at both the World Bank and the IMF is problematic).

250. "(a) Engage with diverse sectors of civil society.

(b) Aim to alternate the Fund's contacts between different CSOs, rather than always and only meeting the same organizations and individuals.

(c) Contact locally based associations as well as the local offices of transnational CSOs—the former are often less assertive in approaching the Fund. In particular, staff should not rely on North-based groups to speak on behalf of South-based stakeholders.

(d) Extend the Fund's dialogue with CSOs beyond elite circles. Contact small enterprise as well as big business, peasants as well as commercial farmers, poor people as well as the affluent, etc.

(e) Meet with CSOs across the political spectrum. Include critics as well as supporters of the IMF. Consider meeting opponents as well as backers of the current government of a country.

(f) Reach out beyond civil society circles that look familiar. Formally organized, western-type associations are not always representative of the mainstream in some cultural contexts. In any event, avoid inadvertent favoritism to English speakers in places where English is not the principal language."

IMF, *Guide for Staff Relations with Civil Society Organizations*, pt. IV.C.2 (Oct. 10, 2003), available at <http://www.imf.org/external/np/cso/eng/2003/101003.htm>.

251. See *Civil Society: Annual and Spring Meetings*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20094168~menuPK:220438~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited May 16, 2011).

to participation, but there are no published criteria on the basis for accreditation. According to the Bank officials, virtually any NGO that applies is accredited.<sup>252</sup>

The WTO, not a UN body, provides for interaction with NGOs in its *1994 Marrakesh Agreement Establishing the World Trade Organization*, allowing the General Council to make “appropriate arrangements” for “[c]onsultations and cooperation” with NGOs. But, as others have documented, the degree of NGO participation has been modest and this low level of NGO involvement is intentional and relatively transparent.<sup>253</sup> In its *Guidelines for Arrangements On Relations with Non-Governmental Organizations*,<sup>254</sup> the WTO calls for interaction with NGOs to be developed through various means, such as “symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.”<sup>255</sup> The WTO has no accreditation procedure for NGOs that wish to participate in these events. Indeed, it specifically states that NGOs should not work directly with the WTO, but rather through their national governments.<sup>256</sup> The WTO did issue guidelines for more specific NGO engagement in its dialogues, briefings, technical seminars, and workshops.<sup>257</sup> The organization provides few criteria for NGO participation, it notes only that the lunch time briefings should be open to NGOs that have published trade-related studies or reports,<sup>258</sup> and that outreach should be undertaken to include non-Geneva

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252. “The requests from individual CSO representatives are firstly reviewed by the External Affairs Department of the World Bank (“EXT”) and the External Relations Department of the IMF (“EXR”), and will then be submitted for approval by the office of the Executive Director (“ED”) of the World Bank or IMF representing the country from which the CSO request originates. There are hardly any rejections of accreditation requests except on the few occasion where we are unable to get complete information about the requester like email, telephone numbers, etc.” Correspondence with Bank officials (Aug. 6, 2010) (on file with authors).

253. Peter van der Bossche, *supra* note 213, at 153–54 (noting that the lack of any accreditation standards at both the World Bank and the IMF is problematic).

254. WTO Secretariat, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162, (adopted July 23, 1996) [hereinafter *Guidelines for Relations with NGOs*], available at [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).

255. *Id.* ¶ IV.

256. *Id.* ¶ VI.

257. See WTO Secretariat, *WTO Secretariat Activities with NGOs*, WT/INF/30 (Apr. 12, 2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_ngo\\_activ\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm).

258. See *id.*

based NGOs.<sup>259</sup> There is no means for ongoing monitoring or enforcement by the WTO of the accountability of the NGOs with whom it works.

The Basel Committee on Banking Supervision ("Basel") and the International Organization of Securities Commissions ("IOSCO") are trans-governmental networks that set international financial standards.<sup>260</sup> Although their standards are soft law, they are widely adopted by national regulators.<sup>261</sup> Neither has a mechanism to include NGOs in their standard-setting efforts.<sup>262</sup> They do, however, accept comments from the public, including NGOs, on their proposals.<sup>263</sup> They have no limiting criteria

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259. See *id.* In one dispute, *Shrimp Turtle*, the United States submitted amicus briefs of NGOs along with their own papers. Subsequently, in *EC-Asbestos* the Appellate Body adopted additional criteria for submissions fearing the high number of amicus briefs that would be submitted. Non-parties were required to apply for leave to file a submission. Upon review of the applications however, the Appellate Body denied all applicants leave. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 52–55, WT/DS135/AB/R (Mar. 12, 2001). At the next general council of the WTO the members discussed and decided it was unacceptable for the Appellate Body to consider amicus briefs. Then in *EC-Sardines* the Appellate Body said it had the authority to accept non-party briefs (whether from organizations or a WTO member) but was not required to consider them. See Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 164, 167, WT/DS231/AB/R (Sept. 26, 2002). According to the dispute settlement system training module, "the AB has never considered any unsolicited submission to be pertinent or useful, and thus, has never considered any that have been submitted." *Amicus Curiae Submissions*, in DISPUTE SETTLEMENT SYSTEM TRAINING MODULE: PARTICIPATION IN DISPUTE SETTLEMENT PROCEEDINGS ch. 9.3, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c9s3p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm) (last visited May 16, 2011).

260. See generally *About the Basel Committee*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/> (last visited May 16, 2011) (Basel provides a forum for regular cooperation on banking supervisory matters); INT'L ORG. OF SECURITIES COMM'NS, <http://www.iosco.org> (last visited May 16, 2011) (IOSCO is recognized as an authority on international standards for securities markets).

261. See Roberta Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 907 (2009) ("In adopting IOSCO's disclosure standards for foreign private issuers, the SEC significantly changed the form, although not the content, of previous disclosure standards.").

262. See generally *Organisation and Governance*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/about/orggov.htm> (last visited May 16, 2011); *Structure of the Organization*, INT'L ORG. OF SEC. COMM'NS, <http://www.iosco.org/about/index.cfm?section=structure> (last visited May 16, 2011).

263. See DANIEL K. TARULLO, *BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION* 99 (2008) (noting that, while anyone can comment, Basel seeks comments primarily from banks, which are eager to participate in the notice and comment process to protect their interests).

regarding who may submit comments and, therefore, no mechanisms for ongoing monitoring or enforcement.<sup>264</sup>

Historically, the OECD involved NGOs in its work through its relationships with the Business and Industry Advisory Committee to the OECD (“BIAC”), which consists of the industrial and employers’ associations of the OECD member countries and the Trade Union Advisory Committee to the OECD (“TUAC”), which consists of national trade union organizations from OECD countries.<sup>265</sup> These groups have acted as intermediaries for a portion of civil society for some time.<sup>266</sup>

The OECD has begun to reach out to civil society more broadly, concluding a number of projects using civil society input.<sup>267</sup> The level of civil society input varies from informal, periodic consultations to observer status and full participation in meetings.<sup>268</sup> The OECD has no accreditation criteria for civil society participation in any of these roles. It also lacks any monitoring or enforcement provisions with respect to participating NGOs.

As this summary of approaches demonstrates, the range of tools global regulators use to police NGO accountability varies greatly. Different

264. *See id.*

265. *On-Line Guide to OECD Intergovernmental Activity*, ORG. FOR ECON. CO-OPERATION & DEV., <http://webnet.oecd.org/OECDGROUPS/Bodies/ListByNameView.aspx> (last visited May 16, 2011) [hereinafter *OECD On-Line Guide*] (navigate the comprehensive database for the specific committees, members, actors, and their mandates).

266. The BIAC’s 37 policy groups participate in meetings, forums, and consultations with the OECD. The BIAC leadership structure includes a Chairman, Secretary General, and 11 Executive Board Vice Chairs. The BIAC Secretariat includes a 6 member policy and managerial staff and a 3 person administrative department (who are actually full time BIAC employees). Major business organizations in 32 OECD member countries are the BIAC. TUAC’s affiliates include some 58 national trade union centers which together represent approximately 66 million workers—it is they who finance TUAC activities, decide policy priorities, and elect the TUAC officers. The TUAC has a secretariat of 5 policy staff and 3 administrative staff. The formal decision making body, the Plenary Session, meets twice a year and all TUAC affiliates and representatives of the international trade union organizations are in attendance. *OECD On-Line Guide*, *supra* note 265.

267. The OECD cooperates with civil society through consultations with committee members, workshops, and forums in such areas as the multilateral trading system, the OECD Guidelines for Multinational Enterprises, corporate governance, fighting corruption, the environment, development, biotechnology, food and agriculture, information and communications, and territorial development. *Civil Society: About*, ORG. FOR ECON. CO-OPERATION & DEV., [http://www.oecd.org/about/0,3347,en\\_2649\\_34495\\_1\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,3347,en_2649_34495_1_1_1_1_1_1,00.html) (last visited May 16, 2011).

268. OECD, *Policy Brief: Civil Society and the OECD* 3 (Nov. 2005), available at <http://www.oecd.org/dataoecd/1/3/35744346.pdf>.

NSRs apply different criteria, to differing degrees, and some have no criteria at all. Generally speaking, UN organizations have gone the furthest in adopting minimum criteria for NGO accreditation, with only ECOSOC, the WHO, and the Codex engaging in any level of ongoing monitoring and enforcement. Other organizations and networks have yet to adopt accreditation mechanisms and thus have no means to monitor or enforce NGO accountability on an ongoing basis.

*C. Enhancing NSRs' Legitimacy by Improving their NGO Accountability Mechanisms*

NSRs have adopted accreditation, monitoring, and other nonprofit accountability mechanisms to varying degrees. To an important extent, these programs vary due to the roles that NGOs play in particular global regulatory contexts. When an NGO operates as an NSR itself, accreditation is not appropriate. Rather, accountability mechanisms must be built into the NGO's governance structure, perhaps with additional monitoring and enforcement capacity built up in the global regulatory community relying on the NSR. As discussed above, some NGOs have signed the NGO Accountability Charter, which is one route to such external enforcement of NGO NSRs.<sup>269</sup> When an NGO instead participates in the work of another NSR, accreditation, monitoring, and enforcement mechanisms become viable and potentially crucial. NSRs considering adopting such mechanisms or reforming existing ones should consider three important factors: (1) the role, if any, envisioned for NGOs in the NSR's legitimacy strategy, (2) the complementary enforcement mechanisms available under domestic nonprofit law, (3) and the ever-present considerations of cost.

1. The Role of NGOs in an NSR's Legitimacy Strategy

In cases of NGO participation in another NSR, the role of NGO involvement the regulator desires or permits is pivotal in designing appropriate accreditation, monitoring, and enforcement mechanisms. Increased reliance on the participation of NGOs as part of an NSR's own legitimacy strategy should compel it to consider and often to adopt these mechanisms for its participating NGOs. Without these mechanisms in place, an NSR risks self-sabotage. Of course, there are global regulators that have declined to cast NGOs as key players in their legitimacy strategies. For example, the WTO makes little use of NGOs to prop up its own legitimacy. This type of regulator, which makes no claim that it will truly en-

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269. *Charter Members, INGO ACCOUNTABILITY CHARTER ORG.*, <http://www.ingoaccountabilitycharter.org/list-of-signatories/> (last visited May 16, 2011).

gage NGOs in its regulatory project, may quite properly deem NGO accreditation, monitoring, and enforcement mechanisms unnecessary, if not a waste of valuable resources.

When an NSR does deploy NGO participation as a significant element of its legitimacy strategy, however, the manner in which it does so is also important. NSRs sometimes draw in NGO participants to boost output legitimacy by obtaining needed expertise. Other times, NSRs desire NGO participation to bolster input legitimacy, by increasing the diversity of voices contributing to their regulatory project. When enhanced output legitimacy is the goal, accreditation, monitoring, and enforcement mechanisms should focus more on mission alignment than when input legitimacy is sought. NSRs seeking expertise primarily seek information and technical assistance from their consulting and partner NGOs, rather than insights into differing views on the normative goals of regulation. Thus, for example, the WHO's accreditation requirements that provide that NGOs must be free from "concerns which are primarily of a commercial or profit-making nature"<sup>270</sup> screens out a number NGOs whose non-health interests might lead to a lack of mission alignment with the WHO.

If a desire for increased input legitimacy predominates, significant mission alignment becomes less important, even counterproductive. Confirming the representativeness and transparency of participating NGOs, however, is crucial. Currently, criteria for NGOs participating in the activities of the World Bank and IMF focus solely on the alignment of a given NGO's mission with that of the regulator. Furthermore, even these criteria appear to be quite loosely applied. Yet, both the World Bank and the IMF have recently touted the engagement of civil society in support of the input legitimacy of their regulatory projects. The IMF Civil Society web page touts its reliance on civil society for, *inter alia*, "the voice and representation of developing countries in the IMF and World Bank."<sup>271</sup> Likewise, the World Bank boasts a special website dedicated to civil society, and touts its active outreach "to civil society to share and discuss its policies, programs, studies, and projects."<sup>272</sup>

This level of engagement of NGOs in the work of the IMF and World Bank appears part of their legitimacy strategy to gain not only expertise, but also diversity of voice in their work, particularly when working with

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270. WHA, *Principles Governing Relations with NGOs*, *supra* note 225.

271. *Fact Sheet: The IMF and Civil Society Organizations*, INT'L MONETARY FUND (Mar. 31, 2011), <http://www.imf.org/external/np/exr/facts/civ.htm>.

272. *Civil Society: Frequently Asked Questions*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20093224~menuPK:225318~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited May, 16 2011).



developing countries. Accountability failures by the NGOs upon which the IMF and World Bank rely, however, would threaten the success of this legitimacy strategy. Rather than looking solely to mission alignment and accrediting virtually any organization mouthing the proper virtues, the IMF and World Bank should seriously consider a more robust accreditation process, particularly to review the internal organizational and mission accountability of consulting NGOs. Providing for some ongoing monitoring and enforcement of these issues, as well as financial accountability of consulting NGOs, would impart even greater protection for its legitimacy strategy.

Of course, global regulators may seek both input and output legitimacy from NGOs. The UN ECOSOC accreditation standards and ongoing monitoring of NGOs awarded general consultative status reinforce both types of legitimacy strategy. This system demands expertise, but requires a modest level of mission alignment, by seeking assurances that NGOs truly represent the particular fields in which they claim competence. Yet, they require only that an NGO's aims and purposes be in general conformity with those of the UN. In fact, the system encourages NGO participants to contribute to a normative dialogue, and to engage in such a dialogue internally, by obliging them to transmit minority views. Interestingly, however, in the context of ECOSOC's ongoing monitoring of NGOs in consultative status, mission alignment becomes more prominent. NGO quadrennial reports must catalogue their interactions with the UN and justify the UN's continued reliance on them as partners in a shared mission.

Whenever involving NGOs in global regulation is part of the legitimacy strategy of a global regulator, NGO accountability is important. Understanding how NGOs are deployed in a given NSR's legitimacy strategy can help create more effective accountability mechanisms.

## 2. The Complementary Role of Domestic Nonprofit Law

NSRs creating or revising their accreditation, monitoring, and enforcement mechanisms also should tailor them to complement domestic nonprofit regulatory environments. When accreditation criteria are serious and complementary, and monitoring and enforcement are genuine, NGO participation in NSRs can help fill domestic accountability gaps. As discussed above, NGOs need mission accountability to safeguard their own legitimacy, but domestic nonprofit law provides little enforcement of mission accountability.<sup>273</sup> Ideally, an ongoing dialogue among NGO stakeholders regarding mission will provide mission accountabil-

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273. See discussion *supra* Part II.B.1.

ity. NSR accreditation processes can spur just such a dialogue. For example, the WHO accreditation criteria focus on NGOs' development work in "health or health-related fields."<sup>274</sup> The requirement that the NGO submit a plan for collaboration focuses the NGO on mission as it relates to the WHO.<sup>275</sup> Thus, the NGO must consider what its mission is, to then answer the question whether its mission aligns with WHO's. This mission alignment exercise causes the NGO to discuss, consider, and reevaluate its mission. Even greater mission accountability could be gained if the WHO required this exercise to be done with input from the various stakeholders.

In this respect, the focus of the ECOSOC accreditation criteria on organizational accountability is instructive. Domestic nonprofit law provides relatively little enforcement of organizational accountability. But if an NGO wants to be recognized by the United Nations, and if it wants the legitimacy boost that comes from such an acknowledgement, it will need to demonstrate that it has achieved at least nominal organizational accountability. This emphasis is not only in line with the overall goals and ethic of the UN, but also allows NSR accreditation to serve a useful complementary role to domestic enforcement, which will typically focus to a greater degree on NGOs' financial accountability. The fact that the ECOSOC accreditation requirements say relatively little about financial accountability issues may not be damning, as it is here that domestic nonprofit regulation is most able and likely to enforce NGO accountability.

Other global regulatory systems for NGOs could be improved to focus more on this complementary role. When it comes to monitoring and enforcement of previously accredited NGOs, ECOSOC's focus on NGO accountability becomes weaker and less complementary to domestic regulation. The quadrennial reporting requirements do not consider with much depth how a reporting NGO is internally handling the challenges of mission, organizational, and financial accountability. As noted above, these reports strongly emphasize mission alignment. In addition, though the Council Committee on Nongovernmental Organizations is empowered to recommend removal of consultative status, it does not appear to be an aggressive enforcer.

Of course, it might be onerous for some NGOs to provide financial disclosures like an annual report or financial statement, and it might be reasonable for NSRs to rely on domestic enforcement to ensure the financial accountability of consulting NGOs. Thus, the ECOSOC process

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274. WHA, *Principles Governing Relations with NGOs*, *supra* note 225, ¶ 3.1.

275. *See id.* ¶ 4.

demands for quadrennial reports focused on funding changes, rather than the overall financial health of the reporting NGO, might be justified. With regard to organizational and mission accountability disclosures, though, the ECOSOC monitoring process could certainly be improved. Currently, NGOs' structures and governance are established as sufficient and *bona fide* in the accreditation process, and the quadrennial report must address changes to governance documents. Organizational accountability failures result, though, not from failure to enact governance structures, but from failure to use them. Without greatly expanding the required disclosures, the ECOSOC monitoring regime could ask how reporting NGOs have utilized their governance structures over the past four years, particularly with regard to policy initiatives or changes. Doing so would help educate NGOs about the importance of following the strictures of their organizational forms. So too would requiring the NGOs to report on how they engaged a process for reviewing mission and the steps they take to pursue it on a quadrennial basis. Careful scrutiny of reports on these measures, especially if there were real sanctions like loss of consultative status, would represent a significant enforcement gain over domestic nonprofit regulation and would better ensure the internal legitimacy of the NGOs on which the UN relies.

The WHO's monitoring and enforcement is in some respects more rigorous than ECOSOC's. The Standing Committee reviews collaboration every three years, forcing the WHO to focus on the relationship and on whether the criteria continue to be met, and whether the NGO has fulfilled its promises of collaboration.<sup>276</sup> Still, the stalled call for reform of the WHO accreditation procedures suggests that there might still be room for improvement.<sup>277</sup> The proposed reforms would have required biennial reporting<sup>278</sup> as well as automatic termination for the abuse of formal relations status.<sup>279</sup> A review of the WHO relations with civil society also suggests reform of the accreditation procedures to better distinguish public interest NGOs from those linked to commercial interest.<sup>280</sup>

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276. Peter van der Bossche, *supra* note 213, at 170.

277. See WHO, Note by the Director-General, *Policy for Relations with Nongovernmental Organizations*, A57/32 (Apr. 1, 2004) [hereinafter Note by the Director-General], available at [http://apps.who.int/gb/ebwha/pdf\\_files/WHA57/A57\\_32-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_32-en.pdf); see also WHO, *A Study of WHO's Official Relations System with Nongovernmental Organizations*, CSI/2002/WP4 (June 2002) (by Christophe Lanord).

278. See Note by the Director-General, *supra* note 277, ¶ 7.

279. See *id.* ¶ 13 (defined as "engaging in a pattern of acts that are not consistent with the Constitution or the policies of the Organization").

280. See WHO, *Review Report*, *supra* note 230, at 14.

### 3. The Ever-Present Question of Cost

Finally, it bears noting that we do not recommend that every global regulator adopt its own comprehensive accreditation, monitoring, and enforcement apparatus to apply to the NGOs with which it works. Accreditation, monitoring, and enforcement mechanisms can be costly. Any responsible NSR must weigh the costs of these strategies against the value they provide in safeguarding its legitimacy strategy and make a considered decision about design and implementation. This is not to say that there is nothing a resource-strapped NSR can do. The Codex has adopted an intriguing review provision from this perspective. Although Codex does not mandate review or provide any protocol for regular review, it does automatically terminate observer status any time it finds that the NGO fails to participate in person or by written comments over a four year period. Provision for automatic culling of the NGO rolls on grounds of nonparticipation may be a way to pursue both output and input legitimacy at little cost. NGOs that do not participate in the workings of a global regulator add little to its store of expertise. Likewise, any claims that their involvement with the global regulator enhances its input legitimacy ring hollow. Yet, removing long inactive NGOs from a list of observers takes much less effort than would a substantive monitoring and enforcement process. Perhaps this type of prophylactic measure could be used more broadly by global regulators without the resources to devote to significant NGO policing mechanisms.

Another means to curtail cost is the development of universal accountability standards. Harmonizing accountability standards would produce savings for NGOs and NSRs alike. As discussed above, the INGO Accountability Charter establishes some fundamental accountability provisions that could be used as the basis for a harmonized procedure.<sup>281</sup> The Charter requires that NGOs be accountable to their missions, have “clear processes for adopting public policy positions,” be transparent, and observe principles of good governance.<sup>282</sup> NSRs could require NGOs to

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281. For a review of the Charter and its founding, see Diana Hortsch, *Case Study: Defining Responsible Advocacy: The International NGO Accountability Charter* (Robert F. Wagner Sch. of Pub. Serv., Working Paper) (unpublished manuscript on file with author); see also Diana E. Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 COLUM. HUM. RTS. L. REV. 119 (2010) (analyzing nonprofit accountability mechanisms including the charter in the context of human rights lawyering).

282. INGO Accountability Charter, *supra* note 192. The Charter is relatively specific. For example in terms of good governance it requires: “Each organisation will have at least: A governing body which supervises and evaluates the chief executive, and oversee programme and budgetary matters. It will define overall strategy, consistent with the

sign and abide by the Accountability Charter as part of, or as a substitute for, individualized accreditation procedures.

In addition, the Charter Company has plans to undertake substantial monitoring and enforcement procedures, from which NSRs could also greatly benefit. Signatories must comprehensively report annually to the Charter Company through the INGO Secretariat<sup>283</sup> on their practices and structures using the Global Reporting Initiative's ("GRI") NGO Sector Supplement Framework.<sup>284</sup> The GRI's NGO Sector Supplement requires reporting on NGOs' compliance with stated values, governance, and effectiveness.<sup>285</sup> The Charter Company will review the reports annually.<sup>286</sup> The Accountability Charter is still in its infancy. In-depth review of its content and efficacy is an important project for future research. The value of an effective harmonized mechanism for certification, monitoring, and enforcement of NGO accountability is obvious and significant for NGOs themselves and for the global regulatory community.

The optimal level of investment in NGO accountability will vary by global regulatory institution and perhaps over time.<sup>287</sup> What is important, and the lesson of this Article, is that these costs must be considered by NSRs when they adopt legitimacy strategies relying on NGOs to increase their output, and especially input, legitimacy. Some of the costs of policing NGO accountability will be borne by domestic regulators and private stakeholders, but clearly not all. If some of this cost is not borne by the

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organisational mission, ensure that resources are used efficiently and appropriately, that performance is measured, that financial integrity is assured and that public trust is maintained; [w]ritten procedures covering the appointment, responsibilities and terms of members of the governing body, and preventing and managing conflicts of interest; [a] regular general meeting with authority to appoint and replace members of the governing body." *Id.*

283. The INGO Secretariat is housed in the Berlin Civil Society Center. *See* BERLIN CIVIL SOCIETY CENTER, <http://www.berlin-civil-society-center.org/>. The INGO Accountability Charter states that members are to report annually to the Charter (Secretariat). *See* INGO Accountability Charter, *supra* note 192.

284. SUSTAINABILITY REPORTING GUIDELINES & NGO SECTOR SUPPLEMENT (2001–2010), *available at* <http://www.globalreporting.org/NR/rdonlyres/19B9E00D-299D-4F3C-A5A7-6B9650EDC532/4263/ReportingGuidelinesNGOSectorSupplement1.pdf>.

285. *Id.* at 7.

286. In 2011 the Charter will also use an "Independent Review Panel, which consists of four independent personalities with experience from the civil society sector but also from the corporate and governmental sector. This group's task will be to review the members reports so that the right measures can be taken, should the reports be incomplete or not in line with the Charter." Correspondence with Berlin Civil Society Center (on file with authors).

287. As Steve Charnovitz notes, it will also depend on NGO functions. *See* Charnovitz, *supra* note 17, at 32.

NSRs that draft NGOs into their legitimacy strategies, the efforts to utilize NGOs to boost the legitimacy of global regulation will be undermined.

#### CONCLUSION

As the participation of civil society and NGOs in international affairs has increased in recent years, much of the ensuing debate has focused on questioning why these NGOs should be allowed special influence. The concerns over NGO participation also raise a separate question of the appropriate criteria needed for NGO participation in global governance. This question is best answered with a view to NGO accountability as core to global regulators' legitimacy strategies and as complementary to domestic regulation of NGOs as nonprofits. Some global regulators have already made significant steps in this direction; these efforts can be further improved by keying accountability enforcement regimes to the legitimacy enhancement goals of a particular NSR and by focusing on the complementary role that NSR enforcement can play in domestic regulation of NGOs. Global regulators that currently rely on NGO participation to prop up their own legitimacy but have not yet adopted these or other measures to track and ensure the accountability of the NGOs on which they rely, should act swiftly to remedy this considerable oversight.

# THE GRAY (GOODS) ELEPHANT IN THE ROOM: CHINA'S TROUBLING ATTITUDE TOWARD IP PROTECTION OF GRAY MARKET GOODS

## INTRODUCTION: HUNGRY FOR THE FIRST BITE OF THE APPLE

September 17, 2010: Apple's newest, hottest release, the iPad®, successfully debuted in China,<sup>1</sup> one of the world's largest markets. This was an achievement for Apple® after the disastrous launch of the Chinese iPhone® in 2009,<sup>2</sup> when the typically dynamic company could not move stock from the shelves.<sup>3</sup> The reason? Interested Chinese buyers had long owned iPhones®. Apple's iPhone® debut in China lagged nearly two years behind its introduction to the United States and Europe.<sup>4</sup> Many Chinese consumers ordered hacked and reprogrammed phones, shipped in from hubs like Prague and New York.<sup>5</sup> Some of the phones made an even shorter journey as they simply "leaked" into the market from the Chinese factories where they were produced.<sup>6</sup> Apple's global vision was no match for the dynamic gray market.

The gray market, or parallel market,<sup>7</sup> occurs when goods intended for one market are redirected, unauthorized, to another.<sup>8</sup> The goods literally

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1. Loretta Chao, *China Gets the iPad*, WALL ST. J. CHINA REAL TIME BLOG (Sept. 17, 2010, 5:30 AM), <http://blogs.wsj.com/digits/2010/09/17/china-gets-the-ipad/>.

2. *Id.*

3. *Id.*

4. Compare Matthew Honan, *Apple Unveils iPhone*, MACWORLD (Jan. 9, 2007), <http://www.macworld.com/article/54769/2007/01/iphone.html>, with Chao, *supra* note 1 (providing date of iPhone debut in China).

5. Peter Burrows, *Inside the iPhone Gray Market*, BLOOMBERG BUSINESSWEEK (Feb. 12, 2008), [http://www.businessweek.com/technology/content/feb2008/tc20080211\\_152894.htm](http://www.businessweek.com/technology/content/feb2008/tc20080211_152894.htm).

6. *Id.*

7. A "gray good" belonging in the "gray market," as defined by the United States, is "a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285 (1988). Thus, the phrase is technically very narrow. However, this concept has been extended and is often used interchangeably with similar provisions for patented and copyrighted materials, such as "parallel market," and need not be manufactured abroad. DAVID R. SUGDEN, *GRAY MARKETS: PREVENTION, DETECTION AND LITIGATION* 4 (2009); Stefan M. Miller, *Parallel Imports: Towards a Flexible Uniform International Rule*, 15 J. COM. BIOTECHNOLOGY 21, 22 (2009). In this Note, "gray good" and "gray market" are used as general terminology indicating products imported through unauthorized channels. However, "parallel import" refers to the verb, due to nuance. "Parallel import," referring to goods, is only used for clarity while mentioning both gray goods and the black market.

parallel those imported through the authorized channel. For example, "Business" authorizes ten units to be sold to a retailer in country A and five to be sold to a separate retailer in country B, pricing the same goods differently to target specific markets. Business is unaware that the retailer in B resells its units to stores in A and C. The stores in A and C have just engaged in parallel importation. Essentially, Business ends up competing with itself, as its lower priced goods destined for B compete against the higher priced goods in A's market. The purpose of this indirect importation is often to supply the product to a void, like the iPhone's initial China release, but more likely, it is to undersell the goods intended for that market.<sup>9</sup> Essentially, those who parallel import from cheaper nations can sell the same product at a lower price than those who use the authorized channel.

Americans today are familiar with the gray market as it affects them. Stores like Costco stock their shelves with affordably priced products often redirected from foreign locales.<sup>10</sup> Textbooks ordered from the internet arrive in College Hill by way of Hong Kong.<sup>11</sup> Westerners are comfortable importing goods on a whim from major developing countries like China. Seldom, however, do Westerners contemplate China's own massive economy and subsequent pull on the gray market.

Some may see parallel imports as a fair extension of the global marketplace.<sup>12</sup> This does, after all, allow companies to reach new markets.<sup>13</sup> However, the gray market expert David R. Sugden explained, "As the name aptly suggests, gray market goods reside in the murky area of law between legitimacy and illegality."<sup>14</sup> Many large companies distributing products globally find grounds to litigate,<sup>15</sup> and governments are concerned, too, as they miss out on potential sales tax revenue on the autho-

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8. Jorge Espinosa, *What is the Parallel Market?*, THE GRAY BLOG (last visited Sept. 30, 2010), [http://espinosaiplaw.com/wordpress/?page\\_id=5](http://espinosaiplaw.com/wordpress/?page_id=5).

9. For an illustration of this concept, see WARWICK A. ROTHNIE, *PARALLEL IMPORTS* 1 (1993).

10. Daniel Fisher, *Costco v. Omega Tests the Power of a Logo*, FORBES ON THE DOCKET BLOG (Apr. 19, 2010, 6:53 PM), <http://blogs.forbes.com/docket/2010/04/19/costco-v-omega-tests-power-of-a-logo>.

11. See Jeff Shelstad, *The Demise of the \$200 Textbook*, GOOD (July 8, 2010), <http://www.good.is/post/the-demise-of-the-200-textbook>.

12. See SUGDEN, *supra* note 7, at 30–31.

13. *Id.* at 60–62. Pricing appropriately for the destination ensures that an article has a better chance of selling in that new market. *Id.*

14. *Id.* at 4–5.

15. See SUGDEN, *supra* note 7, at 297–309 (describing approaches companies may pursue globally.)



alized product's higher price.<sup>16</sup> Additionally, governments are concerned about the lack of regulation of gray market goods—when unauthorized—products used or even ingested by consumers may be tampered with or of inferior quality.<sup>17</sup> Not only does the gray market pose risks and disrupt a company's profitability, it also poses problems for the entity's intellectual property rights ("IPR").<sup>18</sup>

Companies may have trademark, patent, and copyright claims from the unauthorized sale and importation of goods.<sup>19</sup> Trademarks help identify a company's products and services by distinguishing them from similar ones<sup>20</sup> with the purpose of establishing "goodwill."<sup>21</sup> They may be symbols, words, names, or devices, among other indicators.<sup>22</sup> Copyright protects expression of an idea through original works of authorship, be it a fine painting, video game, or logo design.<sup>23</sup> Concerned companies may defend products bearing copyrighted logos, copyrightable content, or a trademark through various intellectual property laws.

The Supreme Court's recent decision in *Costco v. Omega*<sup>24</sup> catapulted the gray market to the top of American and other Western countries' attention.<sup>25</sup> Following similar U.S. cases where trademark infringement

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16. For a discussion of the tax implications of black market goods, see *id.* at 56–59.

17. Lack of control over one's products opens parallel imports to typical black market problems. *Id.* at 5–6. However, quality control issues may arise from a manufacturer itself. For example, Tic Tacs intended for different markets feature different ingredients and Abercrombie sells lower quality clothing to foreign markets. *Id.* at 16–18. Consumers may be unaware that they are purchasing lesser goods imported through the parallel market.

18. Intellectual Property is the law of patents, copyrights, and trademarks (among others). It protects the intangible, and "the law creates the property by defining what will be protected from others." DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY 1–2 (1994). Essentially, it protects ideas and inventions, expression and works of authorship, good will and designations of origin. *Id.* at 2–4.

19. PARALLEL IMPORTS IN ASIA 1 (Christopher Heath ed., 2004) [hereinafter PARALLEL IMPORTS IN ASIA]. This should not distract from the fact that parallel import issues are mostly economic. ROTHNIE, *supra* note 9, at 3.

20. U.K. TRADE & INVESTMENT, U.K. INTELLECTUAL PROP. OFFICE., HUNTER RODWELL CONSULTING & ROUSE & CO. INT'L, INTELLECTUAL PROPERTY RIGHTS PRIMER FOR CHINA 9 (2008) [hereinafter CHINA IP PRIMER].

21. Michael A. Ugolini, *Gray Market Goods Under the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 12 TRANSNAT'L L. 451, 462 (1999).

22. GREGORY ET AL., *supra* note 18, at 81.

23. See *id.* at 4, 168–69. Logos typically fall under trademark protection but copyright may also be applicable. Compare *id.* at 186–87, with *id.* at 154. Patents protect inventions but are not discussed for purposes of this Note. *Id.* at 2.

24. *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010).

25. This case was highly visible as leading news outlets across the United States reported its developments. See *Court Ruling in Costco Case Could Affect Discount Retail-*

action was denied because the items in question were genuine, the Swiss watchmaker Omega sued Costco for purchasing and selling watches in the United States that were originally priced and distributed to cheaper markets.<sup>26</sup> Omega pursued this action through copyright protection, claiming that its copyrighted logo featured on the underside of the watch makes the entire watch protectable, and thus this sale violated Omega's exclusive control of its copyright.<sup>27</sup> The Ninth Circuit determined that the first sale doctrine, a limit on exclusive control after the first sale, only applied to goods "legally made" within the United States.<sup>28</sup> Since the watches were made in Switzerland, Omega could continue its control over the copyrighted material.<sup>29</sup> The Supreme Court granted certiorari, and businesses and consumers everywhere waited anxiously for clarification on the right to resell copyrighted material.<sup>30</sup> However, the Supreme Court's decision further confused matters by affirming Omega's right to control without establishing precedent,<sup>31</sup> leaving American resellers, consumers, and businesses without clear direction.

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ers, N.Y. TIMES, Nov. 9, 2010, at B11 [hereinafter *Court Ruling in Costco Case Could Affect Discount Retailers*].

26. Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 983–84 (9th Cir. 2008). As there were only nine words to the Supreme Court decision, this Note refers to the lower courts' discussion of the issues. For an explanation, see Jorge Espinosa, *Supreme Court Will Revisit Quality King Distributors, Inc v. L'Anza Research Int'l, Inc.*, THE GRAY BLOG, <http://espinosaiplaw.com/wordpress/?p=93> (last visited Oct. 18, 2010). For a possible reason for the split, see Fisher, *supra* note 10; Greg Stohr, *Elena Kagan, the Absent Supreme Court Justice*, BLOOMBERG BUSINESSWEEK (Sept. 23, 2010), [http://www.businessweek.com/magazine/content/10\\_40/b4197031526266.htm](http://www.businessweek.com/magazine/content/10_40/b4197031526266.htm).

27. David Kravets, *All Rise: Supreme Court's Geekiest Generation Begins*, WIRED (Oct. 1, 2010), <http://www.wired.com/threatlevel/2010/10/supreme-court-2010-2011-term>.

28. *Omega S.A.*, 541 F.3d at 900.

29. *Id.*

30. *Court Ruling in Costco Case Could Affect Discount Retailers*, *supra* note 25.

31. *Supreme Court's Tie Vote Sustains Swatch Against Costco*, N.Y. TIMES, Dec. 14, 2010, at B7. This decision revolved around the "first sale" doctrine, also known as "exhaustion," which says that copyrightable materials in the form of chattels (tangible objects) may only be controlled by the author during the first sale. Any subsequent reselling is beyond the author's control. See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 328–31 (2010). *Costco v. Omega* suggests that this could be limited to products within the United States, providing authors of copyrightable materials manufactured outside of the United States perpetual or at least greater control than those from within the United States. *Supreme Court Rebuffs Costco in Copyright Challenge*, FORBES FULL DISCLOSURE BLOG (Dec. 13, 2010, 1:31 PM), <http://blogs.forbes.com/danielfisher/2010/12/13/supreme-court-rebuffs-costco-in-copyright-challenge> [hereinafter *Supreme Court Rebuffs Costco in Copyright Challenge*].

This controversy is not unique to the United States. Regardless of American laws about the American market, large emerging economies are clamoring for the same goods as the rest of the world, but at lower prices. China, well known for its exports, is one of the world's largest economies<sup>32</sup> with the world's largest population,<sup>33</sup> and is thus naturally a dynamic importer.<sup>34</sup> Over 12% of its \$954.3 billion imports<sup>35</sup> come from Japan and another 7.66% from the United States.<sup>36</sup> China, as an extremely populous importer of expensive goods, is ripe for parallel importation issues.

Those attune to IPR around the world should carefully watch the issue of gray goods. China is already branded with a scarlet ©, as it is often labeled a "chronic and notorious abuser of IPR."<sup>37</sup> This is particularly important considering that China today is the third largest trading nation<sup>38</sup> and is obligated to protect IPR through a series of treaties.<sup>39</sup> Copyright and trademark laws with respect to trade are loosely enforced in China, and though improving, it is dubious whether China is ready to address IPR to the same degree as the developed world. This potentially poses problems for companies hoping to protect against parallel imports in China by asserting IPR claims.

China shed its Communist regime only a few decades ago, and a new capitalist market quickly sprung up in its void.<sup>40</sup> Although China became obligated to protect intellectual property upon joining the World Intellectual Property Organization ("WIPO") in 1980<sup>41</sup> and World Trade Organ-

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32. See GORDON C. K. CHEUNG, *INTELLECTUAL PROPERTY RIGHTS IN CHINA: POLITICS OF PIRACY, TRADE AND PROTECTION* 5 (2009).

33. As of July 2010, China's population was 1,330,141,295. CENTRAL INTELLIGENCE AGENCY (CIA), *THE WORLD FACTBOOK, EAST & SOUTHEAST ASIA: CHINA* (2010) [hereinafter *WORLD FACTBOOK*], available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (follow "Download Publication" hyperlink).

34. The CIA *World Fact Book* lists China as the third largest purchasing power and the sixth largest "real growth rate" in the world. *Id.*

35. 2009 estimate. *Id.*

36. *WORLD FACTBOOK*, *supra* note 34.

37. SUGDEN, *supra* note 7, at 306; see also Greg Creer, *The International Threat to Intellectual Property Rights Through Emerging Markets*, 22 *WIS. INT'L L.J.* 213, 218–19 (2004).

38. Susan Ariel Aaronson, *How Disciplining China Could Save the WTO*, VOXEU.ORG (Feb. 9, 2010), <http://www.voxeu.org/index.php?q=node/4581>.

39. PETER GANEA & THOMAS PATTLOCH, *INTELLECTUAL PROPERTY IN CHINA*, at xiii (Christopher Heath ed., 2005).

40. See Creer, *supra* note 37, at 213, 218.

41. *Treaties and Contracting Parties*, WORLD INTELLECTUAL PROP. ORG. [WIPO], [http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=35C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=35C) (last visited Nov. 10, 2010) [hereinafter *WIPO, Contracting Parties*]. The WIPO is a United Nations agency that

ization ("WTO") in 2001,<sup>42</sup> the concept of intellectual property itself may be incompatible to Chinese culture. Intellectual property's concept of the ownership of the intangible is often regarded as incompatible with socialism's discouragement of ownership, which still maintains a large Chinese allegiance.<sup>43</sup> Ownership itself may be an amoral concept under Eastern philosophy,<sup>44</sup> posing large problems for a Westernized nuanced argument against parallel importation.

This Note posits that China's protection of copyrights and trademarks for parallel goods will continue to be limited, as demonstrated by recent judicial decisions, even with the looming possibility of international action. This analysis must be addressed through the lens of Chinese IPR obligations and enforcement in addition to the gray market. Part I explores the emergence and ambiguous illegality of the gray market. Part II assesses China's legal obligations, both internationally and intranationally, to protect copyrights and trademarks, including potential policing of gray market goods. Part III analyzes China's erratic enforcement of IPR as illustrated by the recent *Shanghai Unilever Co. Ltd. v. Commercial Importing and Exporting Trading Co. of Guangzhou Economic Technology Developing District*, *Hui Zhong Fa Shi Chu Zi* and *Michelin Group v. Tan Guoqiang and Ou Can*<sup>45</sup> cases, among others. Part IV proposes a possible solution in the face of a world pushing for stricter protections from the gray market.

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seeks reasonable international intellectual property standards. *What is WIPO?*, WIPO, [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html) (last visited Dec. 21, 2010).

42. *Member Information: China and the WTO*, WORLD TRADE ORG. [WTO], [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited Oct. 18, 2010) [hereinafter WTO, *Member Information*]. The WTO is an international organization designed to facilitate trade negotiations and policies for member governments. *Understanding the WTO: What We Do*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_we\\_do\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm) (last visited Dec. 21, 2010).

43. Creer, *supra* note 37, at 220.

44. *See id.* (explaining that ownership "is suspect to possible illegalities and disgrace").

45. Most Chinese cases are not available in English, if they have been published at all. Few primary sources were available at the time of drafting this Note. The author relies on experts' (practicing attorneys, scholars, and professors) recounting of the decisions. This Note features the most complete case citations possible without actual access.

I. INTO THE DEEP GRAY OCEAN: AN IN-DEPTH DISCUSSION OF THE GRAY MARKET

“Globalization . . . is as old as ambition.”<sup>46</sup> Even though globalization is not novel, today it possesses a new instantaneous element, mostly due to the internet’s free flowing commerce.<sup>47</sup> Although technology transformed humankind’s ability to reach the corners of the world, international trade would not look as it does today without a recent shift in global political status. Only two decades ago, the world was divided by ideology and matching trade barriers. With the transformation of physical barriers, “the 1990s became a watershed decade of intangible barrier removal.”<sup>48</sup> In the span of twelve years, the Berlin Wall fell and China joined the WTO, opening previously quartered off areas of the world for trade with other nations.<sup>49</sup> From these new economies, fueled by technology, the gray market exploded.

Although the gray market’s channels were carved by shifting global policy and technological advancement, industry itself is instrumental in supplying the market with product.<sup>50</sup> Sugden asserts that by dumping inventory to meet short-term sales goals, companies undermine their long term plans.<sup>51</sup> Discount retailers like Marshalls and TJ Maxx then sell the same products as traditional retail outlets, at much lower prices.

Of more international concern is global pricing strategy. In order to penetrate international markets and achieve some level of sales success, companies will price goods to sell in a nation’s specific market.<sup>52</sup> However, this has unintended consequences. A company may price a bicycle for \$300 in the United States, but only \$250 in Brazil and \$180 in Mexico. Businesses in the United States will buy the bicycles from Mexico at \$180, incur the shipping costs, and still be able to sell the bikes for \$250 in the United States, underselling those bikes that were priced for the American market.

Controlling distribution channels prevents underselling as well as other harms. Black market goods, which may harm consumers and brands, often intermingle with parallel imports that are out of the brand’s control.<sup>53</sup> The term gray market itself reflects this possible contamination. Gray

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46. SUGDEN, *supra* note 7, at 29.

47. *Id.* at 32.

48. *Id.* at 37.

49. *Id.* at 37–38.

50. *See id.* at 40–41.

51. *Id.*

52. Espinosa, *supra* note 8.

53. For discussion of a case study on the intermingling and counterfeit baby formula, see SUGDEN, *supra* note 7, at 53.

market has many definitions including the traditionally illegal,<sup>54</sup> but most accurately refers to “goods diverted from a brand owners’ authorized sale channel.”<sup>55</sup> While industry numbers are disputed,<sup>56</sup> the impact of the parallel market is economically significant.

As discussed in the Introduction, in much of the world, parallel importation is not automatically illegal. In fact, it is in line with WTO free trade principles.<sup>57</sup> Additionally, industry continuously chooses to host production in countries that are notorious for leaks.<sup>58</sup> Companies’ willingness to provide this vulnerability paired with the concept of free trade creates rampant parallel importation. However, industry’s displeasure with international markets is substantial as well. Companies and their parent nations subsequently found a creative way to address this issue: intellectual property.

Intellectual property is an increasingly important barrier to the gray market, particularly trademark and copyright.<sup>59</sup> It may seem curious that companies attempting to crack down on parallel importation pursue intellectual property litigation. They are, after all, the same products by the very same companies, not counterfeit products. However, both trademark and copyright provide circuitous causes of action for parallel importation. By protecting creative content or a brand, companies may be able to

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54. *Id.* at 4.

55. *Id.* (quoting DAVID M. HOPKINS ET AL., COUNTERFEITING EXPOSED 10 (2003)).

56. Grant Gross, *US Panel Looks at Intellectual Property Violations in China*, PC WORLD (June 15, 2010), [http://www.pcworld.com/businesscenter/article/198901/us\\_panel\\_looks\\_at\\_intellectual\\_property\\_violations\\_in\\_china.html](http://www.pcworld.com/businesscenter/article/198901/us_panel_looks_at_intellectual_property_violations_in_china.html). Some have raised concern that consumers who purchase products at a fraction of the true price are not the same consumers that would buy the item at its original, elevated price. Peter Yu of Drake University recently suggested that these markets may even benefit Americans by further disseminating American democratic culture. Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 425 (2008) [hereinafter Yu, *Three Questions*].

57. Miller, *supra* note 7, at 24. Free trade principles refer to the WTO’s fair competition policy, which is reflected in its “system of rules dedicated to open, fair and undistorted competition.” *Basics: Principles of the Trading System*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Nov. 8, 2010) [hereinafter WTO, *Principles*]. There is a logical tension between free trade principles and the monopoly afforded to IPR holders, but protection stimulates investment. See ROTHNIE, *supra* note 9, at 8.

58. See SUGDEN, *supra* note 7, at 102–03.

59. *Id.* at 5. It is important to note that copyright and trademark are technical and intricate concepts, and vary among nations, although reciprocity is often available internationally. This brief overview is not intended to fully assess the facets of copyright and trademark, but instead this Note assumes that one has followed proper copyright or trademark procedures and has a claim regarding infringement.

prevent the sale of the underlying good and the corresponding financial blow.

Trademarks “associate a product with a particular [unique] source,”<sup>60</sup> developing consumer trust and loyalty.<sup>61</sup> Trademarks include logos, slogans, names, and even physical characteristics of the product.<sup>62</sup> Companies argue that the gray market undermines its trademark, and thus destroys public trust of the brand, through dilution<sup>63</sup> and harm to goodwill.<sup>64</sup> Avoidance of the authorized distribution channel can create vulnerabilities from lack of warranty or quality control,<sup>65</sup> which may actually make the same product materially different, and thus violative of a product’s trademark.<sup>66</sup>

Copyright in the United States and other nations is arguably more akin to traditional property rights than trademarks.<sup>67</sup> Copyright provides a (limited) right of distribution<sup>68</sup> and a right of performance,<sup>69</sup> among others, which are useful in two ways. First, copyright offers traditional protection to creative original works like books or software.<sup>70</sup> Publishers constantly struggle against the stream of books coming from external markets.<sup>71</sup> The second way copyright can be used to protect against gray goods is slightly less obvious, and arguably weak. Companies may liti-

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60. *Id.* at 242.

61. “The brand is a contract between a brand owner and its consumers.” *Id.* at 5. Since the gray market is often indistinguishable from the authorized, the stolen, and the counterfeited, weak brand control can destroy consumer confidence. *Id.* at 5–6.

62. CHINA IP PRIMER, *supra* note 20, at 9.

63. SUGDEN, *supra* note 7, at 244. Dilution can be either “tarnishment” or “blurring.” *Id.* at 244–45.

64. *See id.* at 257–59.

65. Donna K. Hintz, *Battling Gray Market Goods with Copyright Law*, 57 ALB. L. REV. 1187, 1189 (1994).

66. SUGDEN, *supra* note 7, at 260–81.

67. ROTHNIE, *supra* note 9, at 186.

68. *Basic Notions of Copyright and Related Rights*, WIPO Int’l Bureau, 6–7, WIPO/IPTK/MCT/02/INF/10 (Nov. 2001), available at [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf); see also Tan Leng Cheo & Partners, *Copyright Law and Parallel Imports* (Aug. 28, 2001), [http://www.accountlaw-tax.com.sg/Website\\_tlc/ws-parallel%20import.htm](http://www.accountlaw-tax.com.sg/Website_tlc/ws-parallel%20import.htm) (a discussion of this right and its possible infringement in the United States and Singapore, with a brief discussion of Australia as well).

69. INTRODUCTION TO INTELLECTUAL PROPERTY, THEORY AND PRACTICE 155 (WIPO ed., 1997). A right of performance creates exclusivity in the rights to “perform” video games, music, and other entertainment articles.

70. ROTHNIE, *supra* note 9, at 154.

71. *See* AUSTRAL. GOV’T PRODUCTIVITY COMM’N, RESTRICTIONS ON THE PARALLEL IMPORT OF BOOKS 1.1 (2009), available at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0004/90265/books.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0004/90265/books.pdf).

gate the sale of their goods based on a logo or other designed or written material attached to a product rather than the product itself.<sup>72</sup> However, countries are often uneasy about allowing trademark or logo protections to be employed in a manner that acts as a barrier to trade.<sup>73</sup>

The first sale doctrine is often a limit to IPR and may also be called “exhaustion of rights” or simply “exhaustion.” After the first sale of a trademark protected, patented,<sup>74</sup> or copyrighted good, the intellectual property holder’s rights are literally exhausted, and so the importer is free from this constraint.<sup>75</sup> While this doctrine and its application vary tremendously worldwide, it is often acknowledged on at least a regional level.<sup>76</sup> Application of this concept can legally facilitate the gray market.<sup>77</sup>

## II. CHINA’S IPR LAWS AND OBLIGATIONS

Understanding China’s domestic and international IPR obligations is essential for finding possible avenues to combat gray goods. IPR has largely been imposed on China by the Western world through a complex

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72. As mentioned above, this is the angle that Omega pursued in *Costco v. Omega*. See *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008).

73. See *Quality King Distrib. Inc. v. L’Anza Research Int’l, Inc.*, 523 U.S. 135, 153 (1998).

74. This Note focuses on trademark and copyright, as parallel importation of patented goods has received much attention due to the pharmaceutical industry. For information on this topic, see Bryan A. Liang, *Fade to Black: Importation and Counterfeit Drugs* 32 AM. J. L. & MED. 279, 287–88 (2006). For a different angle, see Ben Sihanya, *Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience in Kenya*, WTO, [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case19\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case19_e.htm) (last visited Mar. 3, 2011).

75. ROTHNIE, *supra* note 9, at 128, 237, 495.

76. For the defense as applied to trademark, see SUGDEN, *supra* note 7, at 282–84; copyright, *id.* at 218–32. As previously mentioned, the boundaries of this doctrine in the United States are unclear. The EU does not follow the first sale doctrine, but instead compensates authors for resale through the idea of “droit de suite.” The UK is waiting to see how this develops in the United States. For more on first sale internationally, see Theo Papadopoulos, *The First-Sale Doctrine in International Intellectual Property Law: Trade in Copyright Related Entertainment Products* 2 ENT. LAW 40, 50–59 (2003); see also LEAFFER, *supra* note 31, at 339 (for a discussion of droit de suite).

77. Exhaustion is multifaceted. It can be applied regionally, nationally, or even internationally. Thus, currently, one may resell intellectual property within the EU, but outside of the EU one may not resell that good without a continuation of the author’s rights. Miller, *supra* note 7, at 24, 36–37. For the purposes of this Note, which focuses on whether China meets its IP obligations in regard to the gray market, evidenced by the Chinese judiciary and options moving forward, the nuances are tangential. For in depth discussion, see *id.*



system of treaties.<sup>78</sup> Although China has made tremendous efforts to assimilate, it still lags behind in meeting widely accepted IPR standards.<sup>79</sup> As gray goods have tenebrous legal status in global treaties,<sup>80</sup> it is unlikely that treaties provide adequate foundation to pursue action against the gray market despite enhanced IPR standards. However, China potentially faces disputes over gray goods with large trading nations even despite consensus on parallel import legality in the Western world.

#### A. An Evolution

In 1903, China addressed Western IPR concerns for the first time by entering into a treaty with the United States providing foreigners with formal IPR protections.<sup>81</sup> Additional attempts to implement IPR protections continued throughout Chinese history, but these were not as successful as intended (from the Western perspective), partly due to “wars, warlordism, famines, revolutions, and political struggles.”<sup>82</sup> Efforts were further diminished in the communist post-World War II era when the Chinese Communist Party took control and nationalized commerce, effectively undermining the idea of private or exclusive rights, including expression.<sup>83</sup>

China emerged from communism to join the world market in 1978, eager to participate and “put IPRs as one of the priorities on its reform agenda.”<sup>84</sup> In a big step toward hallowing IPR, China joined the WIPO in

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78. CHEUNG, *supra* note 32, at 16.

79. For the specific example of software piracy, see Sewell Chan, *China Agrees to Intellectual Property Protections*, N.Y. TIMES, Dec. 15, 2010, at B4. For a broader look at the evolution of China’s intellectual property measures, see generally WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 1–8 (1995).

80. SUGDEN, *supra* note 7, at 298–99.

81. CHEUNG, *supra* note 32, at 32. The treaty “granted copyright, patent, and trademark protection to Americans in return for reciprocal protection to the Chinese.” Peter K. Yu, *The Second Coming of Intellectual Property Rights in China* 6 (Benjamin N. Cardozo Sch. of Law, Yeshiva Univ., Occasional Papers in Intellectual Property Law, No. 11, 2002) [hereinafter Yu, *Second Coming*], available at [www.peteryu.com/2dcoming.pdf](http://www.peteryu.com/2dcoming.pdf).

82. Yu, *Second Coming*, *supra* note 81, at 3. China introduced copyright law in 1910, patent law in 1912, and trademark law in 1923, all of which were reworked after Guomindang came to power in the late 1920s. *Id.* at 6–7. “Although these laws appeared on paper, they offered foreigners very limited intellectual property protection.” *Id.* at 6. This failure may be attributed to the government’s disappointment that China’s IPR protection “would not affect China’s semi-colonial status.” *Id.* at 7.

83. *Id.* at 7.

84. SHAHID ALIKHAN, *SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES* 64 (2000).

1980.<sup>85</sup> Over the next two decades, China joined the WIPO's Paris Convention,<sup>86</sup> the Madrid Agreement in 1989, and the Madrid Protocol in 1995.<sup>87</sup> Importantly, China joined the WIPO's Berne Convention in 1992.<sup>88</sup> The Berne Convention allows a member country to seize illegal and intellectual property infringing products when imported or found within its borders.<sup>89</sup> Foreign works are protectable under the Berne Convention and do not need to be registered with the nation to be recognized,<sup>90</sup> enhancing a foreign owner's ability to protect goods in member nations like China. Even though Berne "lacks any enforcement mechanism,"<sup>91</sup> the effect on China was immediate.<sup>92</sup> Approximately 60% of lite-

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85. WIPO, *Contracting Parties*, *supra* note 41.

86. The Paris Convention for the Protection of Industrial Property emerged in 1883 and protects industrial property like patents and trademarks. *WIPO Treaties—General Information*, WIPO, <http://www.wipo.int/treaties/en/general/> (last visited Nov. 10, 2010). China joined the convention in 1985. *Contracting Parties—China*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=C&country\\_id=38C](http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=C&country_id=38C) (last visited Nov. 10, 2010).

87. The Madrid Agreement Concerning the International Agreement on Marks, Apr 14, 1891, 828 U.N.T.S. 389; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, *adopted* June 27, 1989, WIPO Pub. No. 204(E) [hereinafter Madrid Protocol]. As of 2010, eighty-five countries are in the Madrid Protocol. Madrid Protocol, *supra*. The Madrid Protocol and Agreement are known collectively as the Madrid system, and create a multination trademark recognition system. *Summary of the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989)*, WIPO, [http://www.wipo.int/treaties/en/registration/madrid/summary\\_madrid.html](http://www.wipo.int/treaties/en/registration/madrid/summary_madrid.html) (last visited Nov. 10, 2010).

88. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 90 (2d ed. 2003). The Berne Convention emerged in 1886, when the world collectively addressed intellectual property rights. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 17 U.S.C. 104, 1 B.D.I.E.L. 715 [hereinafter Berne Convention]. The Berne Convention established an administrative body which became the World Intellectual Property Organization in 1967. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 (last amended Sept. 28, 1979). The United Nations later absorbed the organization in 1974. Agreement between the United Nations and the World Intellectual Property Organization, G.A. Res. 3346 (XXIX), U.N. Doc.A/RES/3346 (XXIX) (Dec. 17, 1974). With 164 signatories, the Berne Convention is accepted by most trading nations. *Contracting Parties—Berne Convention*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15) (last visited Nov. 10, 2010) [hereinafter *Contracting Parties—Berne Convention*].

89. Creer, *supra* note 37, at 214.

90. CHINA IP PRIMER, *supra* note 20, at 15. However, registration is often recommended as "proof." *Id.* The Berne Convention only requires "production" of enumerated expressions, leaving "legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form." Berne Convention, *supra* note 88, art. 2, ¶¶ 1–2.

91. Ugolini, *supra* note 21, at 453.

rature titles published in China in 1994 were new,<sup>93</sup> indicative of the effective incentive of IPR for innovation.

Regardless of China's improvements, the United States aggressively pursued IPR reform in China, with U.S.-Chinese disputes budding in the early 1990s.<sup>94</sup> This watch-dog attitude stems from the United States' tremendous interest in China's protection of IPR, as American sales of goods and services to the Chinese market was recently valued at 98.4 billion USD per year.<sup>95</sup> American rumblings gave way to trade tête-à-tête, punctuated by the United States' investigation and mutual sanctions,<sup>96</sup> with crisis averted at the last minute by the Sino-American Memorandum of Understanding on the Protection of Intellectual Property in 1992.<sup>97</sup> China promptly improved patent and trademark protections and upgraded its copyright provisions to satisfy the Berne Convention.<sup>98</sup> Over the next two years China and the United States negotiated twenty times,<sup>99</sup> repeating the same quarrel and, again, culminating in agreement (the Agreement Regarding Intellectual Property Rights) in February of 1995.<sup>100</sup> But tensions returned in 1996.<sup>101</sup>

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92. ALIKHAN, *supra* note 84, at 64.

93. *Id.*

94. CHEUNG, *supra* note 32, at 32–33. The United States pursued IPR protection against China in 1991, via Section 301 of the Trade Act of 1974. *Id.* at 33. Section 301 enables the President to “investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States’ economic interests.” Yu, *Second Coming*, *supra* note 81, at 9.

95. Figure from 2009 referring to multinational American companies engaging in business with China. Victoria Slind-Flor, *Volkswagen, Krka, Pink Floyd: Intellectual Property*, BLOOMBERG BUSINESSWEEK (Dec. 16, 2010), <http://www.businessweek.com/news/2010-12-16/volkswagen-krka-pink-floyd-intellectual-property.html>. While exact numbers are difficult to obtain due to the issue's complexity, intellectual property violations cost American businesses hundreds of millions, if not billions, of dollars per year. *See generally* U.S. INT'L TRADE COMM'N [USITC], CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY, at xiv–xvi (2010), available at <http://www.usitc.gov/publications/332/pub4199.pdf>. The ability of the U.S. to address these situations is substantial, as TRIPS itself was borne of U.S. complaints regarding the loss of \$50 billion from weak IPR enforcement. CHEUNG, *supra* note 32, at 12.

96. Yu, *Second Coming*, *supra* note 81, at 9.

97. CHEUNG, *supra* note 32, at 5.

98. Yu, *Second Coming*, *supra* note 81, at 10.

99. CHEUNG, *supra* note 32, at 33.

100. Yu, *Second Coming*, *supra* note 81, at 11.

101. CHEUNG, *supra* note 32, at 33.

In response to world expectations,<sup>102</sup> China finally joined the WTO on December 11, 2001.<sup>103</sup> In doing so, China agreed to follow the WTO's rules regarding trade,<sup>104</sup> as participation is hinged on its compliance.<sup>105</sup> Members of the WTO are subject to a set "scope" or "minimum standards" of IPR legal protection.<sup>106</sup> Through the WTO, China is bound to the important Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),<sup>107</sup> which structures intellectual property rights' protection with respect to trade globally.<sup>108</sup> TRIPS guidelines establish a skeleton for intellectual property as it overlaps with trade,<sup>109</sup> including incorporation of the Berne Convention's standards for copyright<sup>110</sup> and the Paris Convention's scope for trademarks.<sup>111</sup> Of particular relevance to China, TRIPS' creation under the General Agreement on Tariffs and

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102. GANEA, *supra* note 39, at xiii.

103. WTO, *Member Information*, *supra* note 42.

104. SUGDEN, *supra* note 7, at 307.

105. CHEUNG, *supra* note 32, at 12.

106. CHINA IP PRIMER, *supra* note 20, at 11. TRIPS emerged from the GATT's Uruguay Round, merging trade and intellectual property protection globally, and now exists as part of the WTO package. Beatrice Lindstrom, Note, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 923 (2010). TRIPS requires WTO nations to observe the Berne, Paris, Rome, International [for the Protection of Performers] Conventions, as well as the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty). Overview: *The TRIPS Agreement*, WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Dec. 22, 2010).

107. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

108. *Intellectual Property: Protection and Enforcement*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Dec. 21, 2010).

109. Notably, it establishes "most favored nation treatment" in Article 4, meaning no special incentives for a favorite trading nation. TRIPS Agreement, *supra* note 107, art. 4; see also WTO, *Principles*, *supra* note 57. The WTO explains that if you "[g]rant someone a special favour (such as a lower customs duty rate for one of their products) [] you have to do the same for all other WTO members." However, this is a limited concept. *Id.* Similarly, TRIPS requires "national treatment" in Article 3, meaning that each nation must treat the parties as it would its own nationals. TRIPS Agreement, *supra* note 107, art. 3; see also WTO, *Principles*, *supra* note 57. "Member countries may not discriminate against nationals of one country and in favor of nationals of other countries, whether those other countries are WTO members or not." Ugolini, *supra* note 21, at 455. However, these guidelines are not to be confused with one's IP rights being the same everywhere—in fact, they may not be recognized at all outside of one's home nation, under the concept of territoriality. CHINA IP PRIMER, *supra* note 20, at 11.

110. TRIPS Agreement, *supra* note 107, art. 9.

111. *Id.* art. 15.

Trade (“GATT”) also allows developing nations “to use bargaining power and secure trade-offs in negotiating favourable terms.”<sup>112</sup> In accordance with TRIPS, China greatly improved its intellectual property protections<sup>113</sup> and is technically in compliance with TRIPS standards.<sup>114</sup>

China claims that it is in compliance through its enforcement actions as well.<sup>115</sup> TRIPS features obligatory enforcement provisions.<sup>116</sup> It creates a duty to exercise “effective action against any act of infringement of intellectual property rights.”<sup>117</sup> The breadth of these enforcement provisions runs from civil to criminal, administrative to judicial, and even to border control.<sup>118</sup> TRIPS explains that administrative decisions may be subject to judicial review.<sup>119</sup> However, under TRIPS there is no “obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general,”<sup>120</sup> nor does it require redistribution of resources for IPR enforcement.<sup>121</sup> Thus, although diverse enforcement mechanisms are established in TRIPS, a nation does not have any substantive duty to fund enforcement beyond that which already exists. With no required funding obligations, improvements to enforcement risk being nominal only.

China’s legal opacity is in direct tension with its TRIPS obligations. TRIPS requires transparency for IPR enforcement as to “[l]aws and regulations, and final judicial decisions and administrative rulings of general application.”<sup>122</sup> China, however, only publishes a few of its judicial deci-

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112. CHEUNG, *supra* note 32, at 12–13; *see also* TRIPS Agreement, *supra* note 107, pmbl.

113. *See* Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting its IP Enforcement Obligations Under TRIPS*, 8 SAN DIEGO INT’L L.J. 523, 533–40 (2007). For details on China’s domestic intellectual property laws, *see infra* notes 157–81 and accompanying text.

114. CHINA IP PRIMER, *supra* note 20, at 15. *See infra* notes 157–81 and accompanying text.

115. Konstantina K. Athanasakou, *China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS*, 39 GEO. J. INT’L L. 217, 234 (2007).

116. Lindstrom, *supra* note 106, at 924.

117. TRIPS Agreement, *supra* note 107, art. 41, ¶ 1; *see also* Tobias Bender, *How to Cope with China’s (Alleged) Failure to Implement the TRIPS Obligations on Enforcement*, 9 J. WORLD INTELL. PROP. 230, 230 (2006).

118. TRIPS Agreement, *supra* note 107, pt. 3.

119. *Id.* at art. 41, ¶ 4.

120. *Id.* at art. 41, ¶ 5.

121. *Id.*

122. *Id.* art. 63, ¶ 1.

sions and shields its internal regulations from the public.<sup>123</sup> Nonetheless, China may claim exemption through a loophole. Confidential information may be omitted if it “would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.”<sup>124</sup> China could claim publishing judicial decisions regarding IPR violations would provide a roadmap for infringers. China’s adherence to transparency may be weak,<sup>125</sup> but arguably so is the actual obligation if it features such a large exemption.<sup>126</sup>

Even with enhanced enforcement provisions, TRIPS simply does not prohibit gray goods.<sup>127</sup> TRIPS does provide measures for suspension of IP violative goods before they enter a market,<sup>128</sup> but “does not require any WTO member to establish border measures for gray market goods, whether or not the goods are being imported from a country which is part of the same customs union as the country of importation.”<sup>129</sup> Additionally, Article 6 of TRIPS specifically addresses, or rather dodges, the doctrine of first sale or “exhaustion.” Regarding dispute settlements, TRIPS “shall [not] be used to address the issue of the exhaustion of intellectual property rights.”<sup>130</sup> China, with excuses from general IP enforcement and transparency, faces no specific barrier when it comes to gray goods under TRIPS, and thus its international obligations are likely impotent in the face of the gray market. Additionally, TRIPS’ avoidance of exhaustion suggests that the treaty as a whole is not applicable to parallel importation. Without specific provisions delineating TRIPS applicability, its obligations are not strong enough to change China’s gray market.

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123. For a discussion of court transparency, see MARTIN DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 106–08 (2009).

124. TRIPS Agreement, *supra* note 107, art. 63, ¶ 4.

125. Athanasakou, *supra* note 115, at 233.

126. China claims that its selected disclosures constitute important information and decisions, and thus it is in compliance. It claims that those decisions that remain undisclosed are not included under TRIPS’ transparency obligations. For more information, see *id.* Additionally, judicial decisions may be increasingly important in China, and thus transparency may be improving. DIMITROV, *supra* note 123, at 106–07.

127. Ugolini, *supra* note 21, at 461.

128. *Id.*

129. *Id.* at 465.

130. TRIPS Agreement, *supra* note 107, art. 6.

### B. International Scrutiny

China faces “severe scrutiny”<sup>131</sup> over its TRIPS and WTO Accession Protocol enforcement obligations,<sup>132</sup> which could evolve into formal action to curb parallel importation despite the aforementioned ambiguities. The United States, in particular, uses the WTO as a means of influencing China. For example, the Office of the United States Trade Representative creates an annual *Report to Congress on China’s WTO Compliance*.<sup>133</sup> The report from 2004 includes a proactive plan for IPR advancement in China, establishing goals of infringement reductions and more intense enforcement.<sup>134</sup> China took this commission seriously, perhaps acknowledging IPR’s gravity for the first time, and attacked rampant violations at the local level, a critical source of weakness in Chinese enforcement.<sup>135</sup> Although there was some progress from this collaboration, China still lacked the level of control desired by Western nations.<sup>136</sup>

China could face a WTO suit regarding parallel importation. China’s WTO status channels its bilateral disagreements through the WTO dispute settlement framework.<sup>137</sup> The Dispute Settlement Understanding (“DSU”) offers consultations, and if the issue remains unresolved, it then escalates into a panel review culminating in a report for the parties’ com-

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131. China again agreed to pursue transparency, most favored nation status, and national treatment in the WTO Accession Protocol. Athanasakou, *supra* note 115, at 230.

132. *Id.* at 217.

133. *Archives*, USTR.GOV, <http://www.ustr.gov/about-us/press-office/reports-and-publications/archives> (last visited Dec. 16, 2010).

134. CHEUNG, *supra* note 32, at 34. The agreement set out the following pertinent goals:

- (1) significantly reduce IPR infringement levels;
- (2) take steps by the end of 2004 to increase penalties of IPR violations . . .
- (3) crackdown on IPR violators by conducting nation-wide enforcement action and increasing customs enforcement actions . . .
- . . . .
- (5) launch a national IPR education campaign.”

*Id.*, (citing OFFICE OF THE U.S. TRADE REPRESENTATIVE (USTR), 2004 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 59 (2004)).

135. CHEUNG, *supra* note 32, at 34.

136. *Id.* at 35.

137. See *A Summary of the Final Act of the Uruguay Round*, WTO, [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#Understanding](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding) (last visited Dec. 20, 2010).

pliance.<sup>138</sup> The United States has pursued the WTO dispute settlement process against China eleven times since China joined the WTO, and another four times with the European Union.<sup>139</sup> The last case brought by the United States against China was decided in 2010,<sup>140</sup> demonstrating commitment to this method.

Although recent utilization of the DSU indicates that the U.S. has some faith in this method, decisions have been mixed and even unsuccessful for the United States. Most notably, the United States pursued DSU solutions with China in 2007<sup>141</sup> regarding China's disposal and penalty threshold for infringing goods, and IPR protection and enforcement.<sup>142</sup> The United States claimed China dodged TRIPS by having an impracticably high eligibility threshold in implementing criminal sanctions against pirates and IP violators.<sup>143</sup> China defended its enforcement system, dividing the infringements between high profile criminal cases and smaller administrative cases.<sup>144</sup> Agreeing mostly with China, the WTO did find that China's auctions of contraband essentially pushed the items into the stream of commerce again.<sup>145</sup> The United States cited another claim concerning China's lack of copyright protection for banned works. The WTO found that China violated TRIPS by denying copyright protection to certain works, even though China may prohibit the works.<sup>146</sup> Although the United States did not achieve its desired outcome, its small win in

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138. Parties also have the option to seek alternate settlement arrangements (arbitration, etc.) and there is an appellate process. *Id.*

139. *Disputes* by *Country/Territory*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Mar. 10, 2011). Compare this to India's four times and the United Kingdom's three times. *Id.*

140. This case was over car parts. *Id.*; see also Elizabeth Williamson & Tom Barkley, *U.S. Beats China in Tire Fight*, WALL ST. J., (Dec. 13, 2010), <http://online.wsj.com/article/SB10001424052748703727804576017473322868118.html>. This is not without irony, as one of the key cases in Chinese parallel importation is *Michelin* regarding tires. The United States also requested consultations three more times in 2010. *China – Measures Affecting Imports of Automobile Parts*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds340\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds340_e.htm) (last visited May 28, 2011).

141. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362 (Apr. 16, 2008); see also Athanasakou, *supra* note 115, at 236.

142. Athanasakou, *supra* note 115, at 218.

143. Peter K. Yu, *The US-China WTO Cases Explained*, MANAGING INTELL. PROP., Oct. 2009, available at [http://www.peteryu.com/managingip\\_362.pdf](http://www.peteryu.com/managingip_362.pdf).

144. *Id.*

145. *Id.*

146. *Id.*



this case and success in later ones suggest that it will likely pursue DSU under the WTO again.

The United States clearly takes China's treaty compliance seriously and uses WTO disputes as a way to mold China's intellectual property protection. The United States International Trade Commission continues to monitor China's intellectual property infringements and responses.<sup>147</sup> With *Costco v. Omega*'s stalemate further muddying the right of first sale in the United States,<sup>148</sup> the issue of parallel importation is about to explode.<sup>149</sup> A dissatisfied United States (or any other IPR rich nation)<sup>150</sup> could pursue WTO suit, despite TRIPS' explicit exclusion of exhaustion, under the veil of pure copyright or trademark law. In fact, the U.S. declared in the 2010 Special 301 Report<sup>151</sup> that it "will continue pursuing the resolution of WTO-related disputes announced in previous Special 301 reviews and determinations,"<sup>152</sup> which includes, of course, issues with China.

Beyond the WTO, China could also face sanctions from the United States, among others.<sup>153</sup> The United States' 2008–2009 Chamber of

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147. Gross, *supra* note 56.

148. *Supreme Court Rebuffs Costco in Copyright Challenge*, *supra* note 31.

149. For discussion of *Costco v. Omega*, see Samuel Brooks, Note, *Battling Gray Markets through Copyright Law: Omega, S.A. v. Costco Wholesale Corporation*, 2010 B.Y.U.L. REV. 19 (2010); Daniel Fisher, *Costco v. Omega is About Much More than Cheap Watches*, FORBES FULL DISCLOSURE BLOG (Nov. 5, 2010, 1:01 PM), <http://blogs.forbes.com/danielfisher/2010/11/05/costco-v-omega-is-about-much-more-than-cheap-watches>.

150. See Bender, *supra* note 117, at 240.

151. This report is prepared under the authorization of the Trade Act of 1974 §182, 19 U.S.C. 2242 (2010); see also JOHN T. MASTERSON, INTERNATIONAL TRADEMARKS AND COPYRIGHTS: ENFORCEMENT AND MANAGEMENT 18–19 (2004). The report identifies countries that "deny adequate and effective" IPR protection or "deny fair and equitable market access" to Americans with IPR of concern "priority foreign countries" including those with policies that have an "adverse impact (actual or potential)" on American goods. 19 U.S.C. § 2242 (2010). The 301 report operates under the blessing of the WTO, and the Uruguay Rounds Agreement Act even concluded that fully compliant members may rightfully be candidates for 301 reports. After IPR-threatening nations have been identified, an investigation must transpire under provided parameters. Upon the report's completion, an affirmative decision will be treated as the basis for potential retaliation. MASTERSON, *supra*, at 19–20.

152. AMBASSADOR RON KIRK, OFFICE OF THE USTR, 2010 SPECIAL 301 REPORT 16, [hereinafter USTR 2010 SPECIAL 301 REPORT], available at [http://bangkok.usembassy.gov/root/pdfs/2010\\_special\\_301\\_report.pdf](http://bangkok.usembassy.gov/root/pdfs/2010_special_301_report.pdf).

153. See *id.* The negative attention does not come exclusively from the United States, however. The European Union has been nearly as concerned, and Japan is afraid of the risk of "serious damage" posed by China's IPR laxness. Athanasakou, *supra* note 115, at 220–21. "TRIPS-plus" agreements, bilateral efforts to provide protection beyond TRIPS'

Commerce Report recommended that China be more vigilant on regional violative “hotspots,” allocate greater resources for IPR enforcement, launch criminal investigations focused on the wealthy and the powerful, and focus on “transborder cases” of violative goods (specific to gray goods) and “potentially dangerous products”<sup>154</sup> (arguably, unscreened tires that create peril for drivers). The Chamber of Commerce complained in this report that in spite of the Chinese government’s constant actions, very little has actually changed.<sup>155</sup> However, more aggressive steps from the United States and other countries may create significant and detrimental trade tensions.<sup>156</sup>

*C. Contemporary Chinese Law as is Pertinent to Parallel Importation*

While China has only had a few decades to absorb Western IPR, “[m]ost Western lawyers find the [Chinese] body of [intellectual property] law comprehensive, systematic and wholly familiar.”<sup>157</sup> Mainland China’s national laws do not ban nor restrict parallel importation.<sup>158</sup> However, pursuant to worldwide pressure, China developed a substantial IPR statutory scheme which may be used to support anti-gray market claims, notably the Trademark Law of the People’s Republic of China in 1982 and the Copyright Law of the People’s Republic of China in 1990.<sup>159</sup>

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boundaries, have sprouted in an effort to protect trade. Lindstrom, *supra* note 106, at 919. Many TRIPS-plus “preferential trade agreements” cater specifically to industry in the stronger country, including parallel importation problems. *Id.* at 918, 985–65. However, stricter agreements may stoke trade tensions as well. *Id.* at 965.

154. U.S. CHAMBER OF COMMERCE, CHINA’S WTO IMPLEMENTATION AND OTHER ISSUES OF IMPORTANCE TO AMERICAN BUSINESS IN THE U.S.-CHINA COMMERCIAL RELATIONSHIP 28 (2008–2009), available at <http://www.uschamber.com/sites/default/files/international/asia/china/files/chinawtosinglpages.pdf>.

155. *See id.* at 8.

156. Colpitts Hunter, *supra* note 113, at 548–51.

157. CHINA IP PRIMER, *supra* note 20, at 14.

158. Angela Wang & Co., *Parallel Importation of Goods in Hong Kong and Mainland China: Part II- Mainland China*, HG.ORG (Apr. 30, 2008), <http://www.hg.org/article.asp?id=5150>. Hong Kong, although increasingly absorbent of mainland China’s policies, has its own laws regarding parallel importation. *See* Alison L. Morr, Comment, *Hong Kong’s Copyright Ordinance: How the Ban on Parallel Imports Affects the U.S. Entertainment Industry and Hong Kong’s Free Market*, 21 HASTINGS COMM. & ENT. L.J. 393, 399 (1999).

159. CHEUNG, *supra* note 32, at 66. The Copyright Law was amended in 2001. *Id.* While contemporary Chinese trademark law originated in 1982, it was most recently updated in 2001 with implementing regulations in 2002. CHINA IP PRIMER, *supra* note 20, at 15. China has been revising this law since 2008. *EU-China Workshop on Revision of*

Chinese trademark law does not expressly prohibit parallel importation.<sup>160</sup> However, there are potential protections within the statutory text for those with trademarks registered in China, via Articles 50 and 52 of the Trademark Law of the People's Republic of China. Article 52(1) explains that trademark violations include "[using a mark] that is identical or similar to another's registered trademark on identical or similar goods, thereby misleading the public."<sup>161</sup> While it is not intuitive that one would be misled by authentic products, goods entering unauthorized channels may not go through traditional safety screening processes.<sup>162</sup>

Article 52 details the broad array of acts that could constitute an infringement:

- (1) Use of a trademark that is the same as or similar to a registered trademark for identical or similar goods without permission of the trademark registrant;
- (2) Sale of any goods that have infringed the exclusive right to use any registered trademark;
- ....
- (4) Change of any trademark of a registrant without the registrant's consent, and selling goods bearing such replaced trademark on the market; or
- (5) Other acts that have caused any other damage to another's exclusive right to use a registered trademark.<sup>163</sup>

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*the Trademark Law, Beijing (Oct. 27–29, 2010), NAT'L PEOPLE'S CONG.,* [http://www.ipr2.org/index.php?view=article&id=1292%3Aeu-china-workshop-on-revision-of-the-trademark-law&option=com\\_content&Itemid=235](http://www.ipr2.org/index.php?view=article&id=1292%3Aeu-china-workshop-on-revision-of-the-trademark-law&option=com_content&Itemid=235) (last visited May 29, 2011). The patent law was also added in 1984 as part of this statutory scheme. CHEUNG, *supra* note 32, at 66. For details on specific provisions, see GANEA, *supra* note 39.

160. Paul B. Birden, *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L.J. 431, 472 (1996). Chinese law prohibits any trademark use or registration if "a reproduction, imitation, or translation of another person's trademark not registered in China and likely to cause confusion." (emphasis added). CHINA IP PRIMER, *supra* note 20, at 18.

161. (中华人民共和国商标法实施条例) [Implementing Provisions for the Trademark Law of the People's Republic of China] (promulgated by the St. Council, Aug. 3, 2002, effective Sept. 23, 2002), art. 50(1).

162. For more on this, see *infra* notes 217–22 and accompanying text.

163. (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by Standing Comm. of the Fifth Nat'l People's Cong. Aug. 23, 1982, effective Dec. 1 2001), art. 52 [hereinafter Trademark Law (P.R.C.)]. Paragraph (1) of Article 52 has been used as the grant in the past, but (5) is curiously broad. See *Protection Against Parallel Imports in China*, VIVIEN CHAN & CO. CHINA NEWSL., July 2010,

Paragraph (4) explicitly prohibits rebranding a trademark, which is seen during parallel importation,<sup>164</sup> although commentators believe that this is only targeting “passing off” one brand as another.<sup>165</sup> While paragraphs (1) and (2) are straightforward, (5) provides a gaping opportunity to argue a nontraditional case of infringement; “damage,”<sup>166</sup> which is undefined, is sufficient to constitute infringement.<sup>167</sup> Arguably, lack of control over pricing and distribution channels may damage the interests of a trademark holder.<sup>168</sup> However, an investigation into the legislative intent of Article 52(5) has shown that the act did not include parallel importation as a type of infringement.<sup>169</sup> Without proof that it was deliberately excluded, though, 52(5) may still offer a cause of action.

Copyright protection is sometimes pursued for gray market mitigation, as trademark is often inadequate.<sup>170</sup> However, China’s copyright protections are no savior as they lack a general prohibition on importation of copyright infringing goods.<sup>171</sup> Although imperfect, it does provide a right of distribution,<sup>172</sup> which was the right used to pursue *Costco v. Omega* in the United States.<sup>173</sup> Another possible source of protection is §15(2) of

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[http://www.vcclawservices.com/sources/publications/vcc\\_newsletter\\_2010\\_04.pdf](http://www.vcclawservices.com/sources/publications/vcc_newsletter_2010_04.pdf) [hereinafter *Protection Against Parallel Imports in China*].

164. PARALLEL IMPORTS IN ASIA, *supra* note 19, at 28. This simply means affixing a new trademark on a protected good. *Id.*

165. *Id.* Passing off constitutes “selling goods of another produce with one’s own trade mark without consent.” *Id.* Thus, it is essentially marketing another’s product as one’s own.

166. Other translations have used the term “prejudice.” *Id.*

167. Laurie Self & Jason Ma, *Amending China’s Trademark Law*, IP WORLD, June 2009, at 20.

168. As previously discussed, trademark owners are representing a product to be a certain quality. Bypassing quality control tests, potential commingling with counterfeit products, and a possible lack of prestige by less expensive pricing, all potentially injure the trademark holder’s business. Additionally, forcing a business to compete against itself due to underselling may damage projected profits. See Hintz, *supra* note 65, at 1189–90, for more discussion.

169. PARALLEL IMPORTS IN ASIA, *supra* note 19, at 28.

170. SUGDEN, *supra* note 7, at 213. China’s copyright legislation is based on the 1990 law, updated in 2001, and implementing regulations in 2002. FENG, *supra* note 88, at lvii–lviii. It was most recently updated in 2010. 中华人民共和国著作权法 [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l Cong., Feb. 26, 2010, effective Apr. 1, 2010) [hereinafter Copyright Law (P.R.C.)].

171. Between Section 46’s eleven enumerated infringing acts and Section 47’s eight, parallel importation is not touched upon. PARALLEL IMPORTS IN ASIA, *supra* note 19, at 30.

172. “The right to make the original or reproduced version of a work available to the public by sale or donation” Copyright Law (P.R.C.), art. 10, ¶ 6.

173. *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 983–84 (9th Cir. 2008).

the Provisions on the Implementation of International Copyright Treaties, § 15(2), which states that a copyright holder may prohibit importation of his or her works if the originating country fails to offer protection.<sup>174</sup> Additionally, Article 4 states that “copyright owners shall not violate the . . . laws and shall not harm the public interest. The State shall supervise and administrate the publication or dissemination of works in accordance with the law.”<sup>175</sup> The phrase “public interest” could support its application to the gray market, but a look at the phrase’s evolution suggests that the legislature likely intended to address censorship, not parallel importation.<sup>176</sup> With no statutory acknowledgement of the gray market<sup>177</sup> or exhaustion,<sup>178</sup> and broad caveats for governmental discretion, copyright protections for parallel goods have no substantial inhibition. These fragments reflect how IPR protection for parallel importation in China is often a piecemeal, industry-by-industry method.

The trademark laws provide for civil remedy. With that, compensation or damages are available<sup>179</sup> and administrative agencies may seize and destroy infringing items and tools.<sup>180</sup> Similar procedures exist for copyright infringement. Courts and administrative agencies may confiscate items and tools of infringement, with “damages of up to RMB 500,000” and the possibility of preliminary injunction.<sup>181</sup>

In order to implement these laws, China created administrative bureaus and substantial penalties.<sup>182</sup> These administrative organizations help fill

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174. 实施国际著作权条约的规定 [Provisions on the Implementation of International Copyright Treaties] (promulgated Sept. 25, 1992, effective Sept. 30, 1992), art. 15, ¶ 2.

175. Copyright Law (P.R.C.), art. 4.

176. 1990’s version stated, “Works that are prohibited by law from publication and dissemination shall not be protected by this Law. A copyright owner in exercising his copyright shall not violate the Constitution or the law, nor injure public interest.” Copyright Law (P.R.C.), (promulgated by the Standing Comm. of the Seventh Nat’l People’s Cong. Sept. 7, 1990, effective June 1, 1991), art. 4. This evolved into “[w]orks that are prohibited from publication or dissemination, as specified by law, shall not be protected under this Law. In exercising copyrights, the owners thereof shall not violate the Constitution or any other laws, and shall not harm the public interest.” Copyright Law (P.R.C.), (promulgated by the Standing Comm. of the Seventh Nat’l People’s Cong. Oct. 27, 2001, effective Oct. 27, 2001), art. 4.

177. Angela Wang & Co., *supra* note 158.

178. Zhao Ye & Xu Jing, *Software Resale, A Copyright Puzzle*, IP BULLETIN (2008), available at <http://www.kingandwood.com/article.aspx?id=Software-Resale-A-Copyright-Puzzle&language=en>.

179. FENG, *supra* note 88, at 300.

180. Yu, *Second Coming*, *supra* note 81, at 28.

181. *Id.*

182. Athanasakou, *supra* note 115, at 222.

the gaps created by a “fledgling court system.”<sup>183</sup> In the odd web spun from a changing government and fractured governance with weight held by localities, it is not terribly surprising that these administrative offices are “subordinate to the local governments on the county level.”<sup>184</sup> This fragmentation is a significant hurdle for those pursuing claims. While there are statutory copyright and trademark protections that may be applicable to the gray market, Chinese enforcement is patchy at best.

### III. CHINA’S ENFORCEMENT FAILURE

Chinese IPR enforcement is lacking. Although China claims progress, 79% of counterfeit seizures at U.S. borders originate in China.<sup>185</sup> With timid and infrequent administrative fines, infringers see administrative actions as simply “a cost of doing business.”<sup>186</sup> Additionally, China imposes an extremely high financial and volume threshold before initiating criminal proceedings.<sup>187</sup> China must overcome several hurdles in order to improve enforcement of IPR, including geographical size, heterogeneous cultures, local protectionism, and decentralization.<sup>188</sup> Due to fragmentation and scale, the country faces “schizophrenic” and inconsistent local regulations.<sup>189</sup> China gestures at enforcement but has not yet adequately addressed the IPR disaster within its borders.<sup>190</sup> The judicial branch tracks the patterns of what little enforcement does exist. Copyright decisions uphold the idea of first sale while trademark decisions are patchy and inconsistent as to whether parallel importation of trademark protected goods will be seen as trademark infringement.

#### *A. China’s Recent Judicial Decisions Regarding the Gray Market*

Although judicial decisions may illuminate what truly occurs within China’s borders, it is important to note that China’s legal system is uniquely structured. Chinese case law has no formal weight, but “exemplary” decisions do guide lower courts.<sup>191</sup> Scholar Martin K. Dimitrov speculates that judicial precedent is increasingly important as China

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183. GANEA, *supra* note 39, at xiv. China’s judiciary was remodeled for WTO accession. Bender, *supra* note 117, at 235.

184. GANEA, *supra* note 39, at xiv.

185. Gross, *supra* note 56 (citing a statistic from The Business Software Alliance).

186. USTR, 2010 SPECIAL 301 REPORT, at 20–21 (2010).

187. *Id.* at 20.

188. Yu, *Three Questions*, *supra* note 56, at 421.

189. *Id.* at 423.

190. This is not to say that China has done absolutely nothing. The 2010 301 Report lauds the recent Chinese crackdown on piracy. USTR, *supra* note 186, at 19.

191. FENG, *supra* note 88, at 33.

grows.<sup>192</sup> By its nature, case law is reflective of China's true application of its statutes, a pure example of the state of enforcement. However, case law is typically not accessible.<sup>193</sup> This means that China essentially prevents those outside the court system from any clear view of enforcement of its statutes and international obligations, perhaps in violation of TRIPS transparency requirements.

Applicable copyright cases are scant.<sup>194</sup> However, in 2008, China decided a case regarding exhaustion and copyright within its borders. *Shanghai Shanjun Industrial Ltd. & Zheng Feng v. Shanghai Jiliang Software Technology Ltd.*<sup>195</sup> ("Zheng Feng") involved legally obtained software that was resold twice after its first sale. In a novel move, the Shanghai High People's Court applied the theory of exhaustion.<sup>196</sup> The court declared, "[o]nce the copyright work . . . [is] initially sold, or gifted to the public under the license of the copyright owner, the copyright owner will no longer enjoy the right to control further sale of the work or its copies."<sup>197</sup> This concept has also been put forth by Beijing's High People's Court,<sup>198</sup> implying consistency throughout China regarding ex-

192. DIMITROV, *supra* note 123, at 107.

193. Some cases are published in the *PRC Supreme People's Court Gazette*. *Id.* at 32.

194. At time of publication of this (cited) guide just six years ago, there were no decisions pertinent to the parallel market. PARALLEL IMPORTS IN ASIA, *supra* note 19, at 31. However, since then, it appears at least one has occurred.

195. Shanghai Shanjun Indust. Ltd. & Zheng Feng v. Shanghai Jiliang Software Tech. Ltd., (Shanghai Interm. People's Ct., May 14, 2008), [http://ipr.chinacourt.org/public/detail\\_sfws.php?id=18193](http://ipr.chinacourt.org/public/detail_sfws.php?id=18193). (This source is in Chinese.) As China does not publish many of its cases, the four important cases discussed in this Note have imperfect citations. As the details of the cases have been explained by experts, this Note uses the most formal names and citations used in the experts' discussions.

196. Zhao Ye & Xu Jing, *supra* note 178.

197. *Id.*

198. Answers of the Beijing High People's Court to Certain Questions Regarding the Trial of Cases Involving Copyright Disputes, Beijing High People's Court, Jing Gao Fa Fa [1996] No. 460.

18. Is a person who has purchased the reproductions of a work distributed upon authorization of the copyright owner allowed to resell such reproductions without the consent of the copyright owner?

Answer: Once a certain volume of reproductions of a work has been distributed upon authorization of the copyright owner, the copyright owner's sale right in such volume of reproductions of the work shall be deemed to have been used up and shall be prohibited from being used any longer. With respect to reproductions of the work distributed upon authorization of the copyright owner, others' resale of such reproductions purchased by them shall be exempted from consent of the copyright owner. *Id.*

haustion. However, future cases will be necessary to see if copyright exhaustion is truly emerging as Chinese policy.

Trademark, on the other hand, appears to be growing as a method of protection against parallel importation in China. *Shanghai Unilever Co. Ltd. v. Commercial Importing and Exporting Trading Co. of Guangzhou Economic Technology Developing District, Hui Zhong Fa Shi Chu Zi ("LUX")*<sup>199</sup> was the first parallel importation case ever tried in China, to mixed results.<sup>200</sup> LUX, a popular soap brand, faced parallel importation issues in mainland China. In September of 1997 and again in 1998, the plaintiff secured appropriate licensing with Unilever for use of the LUX trademark in China.<sup>201</sup> The plaintiff publicized its newly obtained license and filed with the State Trademark Office and General Administration of Customs.<sup>202</sup> In 1999, customs officials in Guangdong seized nearly 900 boxes of LUX soap created for the Thai market, en route to China from Thailand.<sup>203</sup> The plaintiff brought suit against the parallel importer, claiming that it violated the company's exclusive right to use its trademark, and asked for the court to enjoin the defendant from importing and selling LUX soap, apologize publically, and reimburse the plaintiff for its losses.<sup>204</sup>

The parallel importer claimed that since the soap truly was authentic, there could be no violation. Additionally, the parallel importer claimed that this case was a "typical" parallel import instance, with properly trademark protected goods intended for sale in Thailand.<sup>205</sup> The court rejected this argument, saying it lacked sufficient documentation of proper licensing for Thailand, much less China.<sup>206</sup> It held that because the trademark was published, it violated trademark law by failing to show that the product originated from the owner of the trademark or that such importation was approved by the trademark owner.<sup>207</sup> This lack of

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199. *Shanghai Unilever Co. Ltd. v. Commercial Imp. & Exp. Trading Co. of Guangzhou Econ. Tech. Developing Dist., Hui Zhong Fa Shi Chu Zi* (Guangzhou Interm. People's Ct., June 1999). A more developed citation was unavailable at the time this Note was drafted.

200. Yang Jinqi, *Trademark Infringement in Parallel Import*, 62 CHINA PATENTS AND TRADEMARKS (IP QUARTERLY), no. 3, July 2000, at 31; *see also* PARALLEL IMPORTS IN ASIA, *supra* note 19, at 28–30.

201. Jinqi, *supra* note 200.

202. *Id.*

203. *Id.*

204. Angela Wang & Co., *supra* note 158.

205. PARALLEL IMPORTS IN ASIA, *supra* note 19, at 29.

206. *Id.*

207. Jinqi, *supra* note 200, at 32.



authorization was fatal.<sup>208</sup> The court ordered three remedies: financial compensation of LUX's loss, an order to stop importation of LUX soap, and the court added that the defendant must issue a public apology in the regional newspaper.<sup>209</sup>

Critics of the decision were dissatisfied by the way the court dodged the question of whether parallel importation is illegal under trademark law.<sup>210</sup> By denying that this case was actual parallel importation, the court left ample room for maneuvering. The showmanship around the decision, namely the public apology, may indicate that the court wanted to make a grand public statement regarding Chinese enforcement.

However grand the *LUX* conclusion may have been, in 2000, the *Fahuayilin Trading Co. v. Beijing Century Hengyuan Tech. & Trading Ltd.*<sup>211</sup> ("An'ge") case deviated from its course.<sup>212</sup> The court in *An'ge* addressed similar arguments as in *LUX*, that the plaintiff's exclusive license was violated and that this constituted unfair competition. The court, instead of following the logic delineated by *LUX*, held that the defendants were just employing typical legal business operations, agreeing with the defendant's assertion that the parallel importer followed proper procedure.<sup>213</sup> The judge explained that a contract between two parties could not be imposed upon a third party.<sup>214</sup> Additionally, highlighting a loophole in the statutes, the judge stressed that nothing says that the people who buy the products "must be the direct consumers or users."<sup>215</sup> Essentially, Beijing's *An'Ge* authorized like situations only with respect to wholesale purchasers, not the full scope of parallel importation.<sup>216</sup>

The 2009 *Michelin*<sup>217</sup> decision created further discomfort in the treatment of trademark infringement by gray goods. The Michelin Group sued two tire dealers who were importing, without permission, real Mi-

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208. See *Protection Against Parallel Imports in China*, *supra* note 163.

209. Jinqi, *supra* note 200, at 32.

210. *Id.*

211. *Fahuayilin Trading Co. v. Beijing Century Hengyuan Tech. and Trading Ltd.* (Beijing, 2002). A more complete citation was unavailable at the time this Note was drafted. See also Grace Li, *China*, PHARMACEUTICAL TRADEMARKS 2009—A GLOBAL GUIDE 7, 8 (2009), available at <http://www.worldtrademarkreview.com/issues/Article.ashx?g=4e74f91e-6b26-44f0-a03f-286269affea5>.

212. *Protection Against Parallel Imports in China*, *supra* note 163.

213. *Id.*

214. *Id.*

215. *Id.*

216. Li, *supra* note 211.

217. *Michelin Grp v. Tan Guoqiang & Ou Ca* (Changsha Interm. People's Ct Apr. 24, 2009).

chelin tires.<sup>218</sup> The court held that, similarly to *LUX*, the trademark included right of importation. However, the decision turned on the fact that the Michelin trademark implied that the tires underwent official quality control testing.<sup>219</sup> The gray tires entered China indirectly and thus were never subject to government testing via the China Compulsory Product Certification (3C) system.<sup>220</sup> Without this quality control, these tires were essentially different products. The court pointed out that subsequently, the tires were technically illegal.<sup>221</sup> The court was concerned that unknowing consumers would then attribute any faulty tires to Michelin, thus damaging the trademark and company's reputation.<sup>222</sup>

*Michelin* seems to build further support for trademark protection as a barrier to the gray market. However, the logic of the decision may have created a significant loophole. If a product is not directly related to safety, and does not receive mandatory tests, it is unclear if it would face a similar barrier.

In the aftermath of these three trademark cases, it appears that the Chinese judiciary is trying to show some support for the protection of international trademarks. However, the quality loophole, legality of parallel goods, lack of judicial weight, and general unavailability of published cases make application of trademark law subject to whim. Additionally, *LUX*'s newspaper apology appears suspiciously cosmetic, publically announcing a rights holder's success. It is possible that China may just be diverting attention from an agenda of development and satisfying one of the world's largest economies. Paired with the apparent enforcement of exhaustion, it seems that gray goods face limited restrictions under intellectual property laws in China. Rights holders' success appears to be at the discretion of the judiciary.

*B. Potential Reasons for Weak IPR Enforcement and Disincentive to Prevent Parallel Imports*

Placing the above cases in context, China's relationship with IPR enforcement is tenuous for many reasons. Although development is often said to require IPR,<sup>223</sup> this may not be the case in China. Experts conflict

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218. *Protection Against Parallel Imports in China*, *supra* note 163; *see also* Fu Haiying, *Trademark Infringement in Parallel Importation*, CHINA LAW INSIGHT (Oct. 21 2010), <http://www.chinalawinsight.com/2010/10/articles/intellectual-property/trademark-infringement-in-parallel-importation>.

219. *Protection Against Parallel Imports in China*, *supra* note 163.

220. *Id.*

221. *Id.*

222. *Id.*

223. ALIKHAN, *supra* note 84, at 1.

on the value of such protections to developing economies. Innovation is a key element to a blossoming economy, and continued growth may rely on innovative advancements.<sup>224</sup> Contrary to the traditional belief that there exists a “positive correlation between high protection and [research and development] . . . Overprotective terms may actually limit innovation.”<sup>225</sup> With enormous resources and quick change, China has seen “various truncated, if not zigzag, ways of development.”<sup>226</sup> Thus, it is not surprising that it may experience growth without traditional IPR protections. However, this is not unique to China. The United States, arguably China’s biggest critic, did not sign the Berne Convention in 1886 with the rest of the Western world,<sup>227</sup> leaving famed authors like Charles Dickens underprotected by contemporary standards.<sup>228</sup> Instead, the United States protected its developing economy at the detriment of international IPR holders.<sup>229</sup> The United States officially joined the Berne convention over a century later in 1988, at that time with a ferocious and long dominant economy.<sup>230</sup>

Some argue that China will correct its IPR policies when the economy is stronger,<sup>231</sup> as the United States did. Primarily, large companies born of such a vibrant economy will require their own protections.<sup>232</sup> Perhaps China is already at this stage. After winning the opportunity to host the Chinese 2008 summer games, China created Olympics-specific laws, enabling criminal punishment for the unauthorized selling of products with the Olympics logo.<sup>233</sup> China finally had something to lose with lax IPR protections.<sup>234</sup> However, even with new protections, new laws were

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224. Lindstrom, *supra* note 106, at 921.

225. *Id.*

226. CHEUNG, *supra* note 32, at xiii.

227. Many nations signed the original, with official implementation in 1887. *Contracting Parties—Berne Convention*, *supra* note 88.

228. CHINA IP PRIMER, *supra* note 20, at 14.

229. SUGDEN, *supra* note 7, at 307.

230. Berne Convention Implementation Act of 1988, 17 U.S.C. § 101 (1989).

231. See CHEUNG, *supra* note 32, at 20–21.

232. SUGDEN, *supra* note 7, at 307.

233. Geoffrey Fowler, *China’s Logo Crackdown*, WALL ST. J., Nov. 4, 2005, at B1; see also Doris E. Long, *Protection in China, Post-Olympics*, NAT’L L.J. (N.Y.), Aug. 18, 2008, available at [http://www.jmls.edu/academics/ip\\_law/NLJ%20-%20Doris%20Long%20IP%20China%20Article%20Aug%2018%2008.pdf](http://www.jmls.edu/academics/ip_law/NLJ%20-%20Doris%20Long%20IP%20China%20Article%20Aug%2018%2008.pdf). China made “[a] significant advance in IP protection by broadening the potential administrative avenues for relief and providing a more rational basis for determining fines and penalties.” *Id.*

234. Elizabeth Ferrill, *Clearing the Swamp for Intellectual Property Harmonization: Understanding and Appreciating the Barriers to Full TRIPS Compliance for Industrializing and Non-Industrialized Countries*, 15 U. BALT. INTELL. PROP. L.J. 137, 169 (2007).

no match for China's "serious and entrenched"<sup>235</sup> IPR problems, and Olympic products were still counterfeited, although to a lesser degree.<sup>236</sup>

Regardless of the potential governmental changes ahead, China faces tremendous cultural roadblocks. Chinese communist rule imposed a moral and philosophical understanding that, "[a]uthors thus create literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves."<sup>237</sup> The sin of ownership paired with the Maoist suppression of independent thought and the criticism of the "intelligentsia"<sup>238</sup> created a notion of distrust and disrespect of the Western concept of ownership. In particular, all inventions that would be patentable by individuals in today's society belonged to the government during that era, and China recognized nominal trademark abilities and no copyright protection.<sup>239</sup>

Additionally, China's Confucian roots pose a far deeper stumbling block.<sup>240</sup> "Imitation and reproduction of ideas, art and scholarship are considered tokens of honor and respect . . .," thus, ". . . protection of intellectual property rights is not a concept that first easily into a Confucian society, where copying is often and integral part of the learning process."<sup>241</sup> Additionally, the remains of Confucianism may have created an "entrenched tradition of regarding laws as an inefficient, arbitrary, and cumbersome instrument for governance."<sup>242</sup> The Chinese culture that met

235. Yu, *Three Questions*, *supra* note 56, at 420–21.

236. Long, *supra* note 233.

237. Yu, *Second Coming*, *supra* note 81, at 18. "Maoist" refers to Mao Zedong, who led China as the Chairman of the People's Republic of China during the communist era. See JONATHAN CLEMENTS, MAO ZEDONG 91–93 (2006). "Intelligentsia" refers to the intellectual social class. See ALFORD, *supra* note 79, at 63–65.

238. Yu, *Second Coming*, *supra* note 81, at 18–19 (discussing ALFORD, *supra* note 79, at 63–64).

239. Ferrill, *supra* note 234, at 157.

240. Confucius, the philosopher, inspired Chinese lifestyle for "more than two millennia." *Confucianism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/132104/Confucianism>, (last visited Dec. 20, 2010). For a detailed discussion as it pertains to this Note, see ALFORD, *supra* note 79, at 19–28.

241. CHEUNG, *supra* note 32, at 20.

242. Yu, *Second Coming*, *supra* note 81, at 24. "The Chinese lived by the concept of *li* (rites), rather than the concept of *fa* (law)." *Id.* Under this conceptual perspective, laws are not "a detailed, comprehensive and self-containing rule system, justifiable on ideological as well as jurisprudential grounds, with coherent principles and well defined concepts." They also can be 'incomplete, incoherent, ideologically compromising, as well as broadly and vaguely termed pending further administrative and judicial experience in its implementation.'" *Id.* at 25 (quoting FENG, *supra* note 88, at 11). Additionally, laws are often flexible and can be ephemeral. *Id.*

the world just thirty-two years ago was bred to be intellectual property protection averse.

Another facet complicating Chinese compliance is that the Chinese economy is arguably too big,<sup>243</sup> with too much growth, too fast.<sup>244</sup> The most populous nation in the world is suddenly faced with consumerism transformative of “. . . China’s economic landscape as well as contest[ing] Chinese people’s acceptance and compliance of the global norms.”<sup>245</sup> Since China joined the market societies of the world, “and the call for ‘getting rich is glorious,’” it has been forced to partner its cultural norms (discussed above) with “the thrust of the ‘get rich first’ mentality.”<sup>246</sup> This economic momentum paired with traditional IPR averse values threatens Western IPR notions and protection.

Beyond the fact that China’s current stage of society may be incompatible with IPR protection, the Western world does not provide productive guidance on parallel importation. *Costco v. Omega* sent an unclear message about the United States’ position on parallel importation, shirking a declaration or disavowal of the international application of the first sale doctrine.<sup>247</sup> Additionally, as Peter Yu points out, between Canal Street’s knock-off watches and College Hill laptops playing illegally downloaded mp3s, the United States arguably doesn’t prioritize IPR enforcement itself.<sup>248</sup> Accordingly, IPR protection is low on the United States-China agenda, below nuclear nonproliferation and currency exchange, or “at the top of the second list.”<sup>249</sup> If IPR protection itself is secondary, parallel importation is tertiary despite economic interests. Logically, the quality of the U.S.’ persuasion on this topic is likely commensurate with its prioritization.<sup>250</sup>

Paired with jurisdictional confusion and decentralization,<sup>251</sup> Confucian and communist beliefs impede IPR protection. The nation’s rapid growth

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243. CHEUNG, *supra* note 32, at 21.

244. “The sheer scale of China’s growth, as her economy expands vigorously (at around 10 per cent a year), brings bad as well as good consequences.” CHINA IP PRIMER, *supra* note 20, at 14.

245. CHEUNG, *supra* note 32, at xiv.

246. *Id.* at 97.

247. *Supreme Court Rebuffs Costco in Copyright Challenge*, *supra* note 31.

248. Yu, *Three Questions*, *supra* note 56, at 416. “Even in the United States—or, for that matter, any other developed country—the protection of intellectual property rights is generally considered to be of lower priority than the resolution of such domestic problems as the prevention of murders, burglaries, robberies, thefts, arsons, assaults, and distribution of narcotics and child pornography.” *Id.*

249. *Id.* at 414–16.

250. *Id.* at 415.

251. DIMITROV, *supra* note 123, at 274.

further hinders IPR protection, but may eventually incentivize copyright and trademarks enforcement. Conflicting messages from the United States do not clarify the issue's importance. Thus, a new strategy is necessary.

#### IV. LOOKING FORWARD

The scarcity and inconsistent nature of China's published judicial decisions indicates that its IPR enforcement is still virtually nonexistent when compared to the number of violations. Thus, pragmatically, the problem of gray goods in China should be addressed directly. This requires a two pronged action: enhanced Chinese IPR enforcement and creation of a specific action for gray goods across borders.

There is a patchwork of suggested solutions throughout the international community. Some solutions focus on China's internal growth. Yu suggests increasing public awareness; however, there have already been significant advancements toward educating the public in China,<sup>252</sup> to little avail. Most suggestions require international involvement. Some have suggested establishing an international venue for disputes addressing intellectual property.<sup>253</sup> This may not be successful as many countries would have to "surrender" significant sovereignty.<sup>254</sup> Emerging and developing economies like China would likely not join for protectionist development reasons,<sup>255</sup> undermining the purpose. Other proposed solutions include taxing imports on all intellectual property to build a fund for enforcement,<sup>256</sup> but this penalizes creation and does not address cultural attitudes. Additionally, there will be difficulty convincing emerging economies to use this money for the sole purpose of IPR enforcement, when larger problems (infrastructure, energy, etc.) loom. It has also been suggested that the wealthy economies should subsidize enforcement of IPR in foreign nations,<sup>257</sup> a strange bedfellow of technology transfer. This would penalize Western creation in favor of developing nations' native IPR, and would face similar problems as the previous solutions.

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252. Peter K. Yu, *Conference-U.S.-China Trade: Opportunities and Challenges: Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMP. L. 143, 152 (2005).

253. Creer, *supra* note 37, at 242. Creer suggests that an international court would force emerging nations, like China, to be measured by the same standard as the rest of the world. *Id.*

254. *Id.*

255. See Lindstrom, *supra* note 106, at 921-22.

256. Creer, *supra* note 37, at 242.

257. *Id.* at 243.

Even if the nations of the world embraced such solutions, these ideas miss the essence of the problem: the gray market is not illegal as it exists without trademark or significant copyright violations, and thus needs to be targeted directly. The deliberate distance from the gray market in TRIPS arguably allows parallel importation. WTO member countries need not adopt border measures as to “goods put on the market in another country with the consent of the right holder.”<sup>258</sup> Additionally, TRIPS does not require members to “devote more resources to intellectual property enforcement than other areas of law enforcement.”<sup>259</sup> Without muscle from the strongest applicable treaty, China’s behavior is unlikely to change.

The logic is very simple: make parallel importation illegal globally. However, the simplicity of such an argument faces fatal hurdles. It is doubtful that the world will agree universally on all the facets of the parallel importation problem, as the United States has no clear official policy and international treaties deliberately sidestep the issue. Even if consensus is reached, it will take time to get the many trading nations of the world to literally “sign on” to such a treaty. Thus, it must be approached from a more creative angle.

Pragmatically, the United States and other nations need to be forthcoming about their concern regarding parallel products. As parallel imports mingle with black market goods in the gray market, the former are arguably less damaging than counterfeited goods, and thus may be prioritized below counterfeits. In the interim, however, major companies are losing significant sums of money. While this may just be the downside of a global economy, if the corporations of the United States, European Union, and others are so highly impacted, the parent nations must be proactive. Companies should be vigilant themselves, and proactively pursue existing enforcement mechanisms,<sup>260</sup> but further international trade negotiations must transpire.

To effectively address parallel importation, the United States, Japan, Australia, and China, or ideally all of the major trading nations (with essential Chinese participation), must create a treaty, targeting gray goods, through the avenue of trademark protection. This treaty must use explicit language, stating that such violations in pursuit of the gray market, in excess of an agreed amount, will be subject to a specific and uniform punitive trademark violation/parallel import tariff. With internationally

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258. Ugolini, *supra* note 21, at 461 (quoting TRIPS Agreement, *supra* note 107, art. 51, ¶ 13).

259. Yu, *Three Questions*, *supra* note 56, at 418 (citing TRIPS Agreement, *supra* note 107, art. 41, ¶ 5).

260. Long, *supra* note 233.

agreed price equalization, a limitation to right of first sale could be preserved if a nation so chooses, but governments could temper the effect of gray goods on industry. China will need to enforce this provision, seeking out violations and taxing gray goods. Unfortunately, this likely depends on China's emergence as a developed nation.

Given this time lag, reality will likely show that companies who benefit from globalization will have to accept the bad with the good. IPRs are only valid in the state in which they are granted,<sup>261</sup> and it is important to remember that even in the United States such rights are not absolute. These companies, who have been lobbying countries for protection and thus international action, may have to approach the market knowing the consequences and taking preventative measures that account for potential parallel importing, like dubbing films in the target language.<sup>262</sup>

#### CONCLUSION

While China has implemented an impressive, comprehensive written statutory system protecting intellectual property to Western standards, copyright and trademark claims from parallel importation are not gaining the traction seen in developed countries around the world. China's weak IPR enforcement pertaining to parallel imports is highlighted by its patchy judicial decisions. While it appears that the first sale doctrine exists to some degree, limiting copyright claims, trademark protection continues to compete with parallel importation. Although at least three cases have been decided on the topic, and the only clarification is that safety inspections of a product will alter the product's status. Instead, China seems to simply gesture to its international treaty obligations, but still hides behind its ability to grow its economy and cultural differences. While WTO action from the United States and European Union could follow, this process is proving impotent. Unless there is a specific pact and tariff, parallel importation will likely remain one of the negatives (from the corporate and developed nation perspective) of globalization. In order to compete globally, one must set prices to sell in each market, and the gray market is an undeniable side effect. While there is some legal protection in affluent developed countries, this issue may deepen the schism of development.

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261. Ugolini, *supra* note 21, at 453.

262. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 436 (2003).

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# HOSTING THE GAMES FOR ALL AND BY ALL: THE RIGHT TO ADEQUATE HOUSING IN OLYMPIC HOST CITIES

The Games remind us that the transient difficulties of life can be overcome through hard work and determination. The Games show that excellence, friendship and respect have no limits. That wars, economic downturns, natural disasters and violent attacks do not dissuade or dishearten humanity. Because while not all of us can be an Olympian, the simple joy of running faster, leaping higher or throwing further makes all of us equal, brings us together, and places each of us firmly in the world. Not apart from it.<sup>1</sup>

## INTRODUCTION

Every two years the Olympic Games<sup>2</sup> take the world stage and the global community gathers together to cheer for its national heroes,<sup>3</sup> share in the excitement of a close finish,<sup>4</sup> empathize with an athlete's challenging journey to the podium,<sup>5</sup> and sometimes even sympath-

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1. Dr. Jacques Rogge, President, Int'l Olympic Comm., Lecture for The Royal Society of Arts, Manufactures and Commerce: Advancing the Games: IOC, London 2010 and the Future of de Coubertin's Olympic Movement 10 (Nov. 24, 2008) (transcript available at [http://www.olympic.org/Documents/Reports/EN/fr\\_report\\_1383.pdf](http://www.olympic.org/Documents/Reports/EN/fr_report_1383.pdf)) [hereinafter Advancing the Games].

2. The Olympic Games, held either in the summer or winter, are a series of "competitions between athletes in individual or team events and not between countries." Int'l Olympic Comm. [IOC], Olympic Charter, r. 6, para. 1, at 19 (Feb. 11, 2010), available at [http://www.olympic.org/Documents/Olympic%20Charter/Charter\\_en\\_2010.pdf](http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf) [hereinafter Olympic Charter].

3. For example, while many remember the 2008 Beijing Olympics as the "Year of Michael Phelps," another national hero was born after winning just a single bronze medal in Taekwondo. Rohullah Nikpai, who learned Taekwondo while living in an Iranian refugee camp, won Afghanistan's first Olympic medal in Beijing. After his victory, Nikpai said, "My single Olympic medal has helped bring Afghans together and unite a wide variety of ethnic groups into one." Kevin Bishop, *Rohullah Nikpai: From Unknown to National Hero*, BBC SPORT (July 26, 2010), [http://news.bbc.co.uk/sport2/hi/olympic\\_games/world\\_olympic\\_dreams/8819420.stm](http://news.bbc.co.uk/sport2/hi/olympic_games/world_olympic_dreams/8819420.stm).

4. For example, in the 1980 Lake Placid Games, during the height of Cold War tensions, the U.S. Hockey Team "defied overwhelming odds and defeated the heavily favored Soviet Union, 4-3." This unexpected victory is now known as the "Miracle on Ice." David Hickey, *All We Needed Was a Miracle*, NAT'L REV. (Feb. 23, 2004), <http://www.lexisnexis.com/hotttopics/lnacademic/?verb=sr&csi=8406&sr=lni%284BSD-N8X0-00RH-Y3VF%29>.

5. For example, in the 2010 Vancouver Olympics, Canadian ice skater, Joannie Rochette, skated a remarkable short program just two days after her mother unexpectedly died. Her performance "will be remembered as one of the most stirring in Olympic figure skating history in terms of athleticism, artistry, emotion and challenges answered out of

ize with the tragic loss of a talented competitor.<sup>6</sup> For sixteen days,<sup>7</sup> “we,” as the united global community of Olympic spectators, athletes, and national governments, share in the thrill of the Games. This period of international cooperation and cohesion achieves the ideals of Olympism, when sport is used in “the service of the harmonious development of man” and in the promotion of a more peaceful society.<sup>8</sup> The Olympic Movement (“Movement”) is an international organization with the mission to “build a peaceful and better world by educating youth through sport practiced in accordance with Olympism and its values.”<sup>9</sup> The Movement is created and governed by the rules, regulations, and values of the Olympic Charter (“Charter”).<sup>10</sup> Under the terms of the Charter, the International Olympic Committee (“IOC”) leads the Movement with supreme authority.<sup>11</sup> The IOC’s most well known duty is to “ensure the regular celebration of the Olympic Games” in a manner that complies with the Charter and upholds the values of Olympism.<sup>12</sup> While the

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competitive fervor and aching sorrow.” Jere Longman, *Through Grief and Tears, a Triumph on the Ice*, N.Y. TIMES, Feb. 24, 2010, at B16.

6. For example, just hours before the commencement of the 2010 Vancouver Games, Nodar Kumaritashvili, a twenty-one year old Georgian luger, was killed during a practice run. At the Opening Ceremonies, the entire Olympic community shared its support for his fellow Georgian athletes. Donna De Varona, *Tragedy Hits at the Heart of the Olympics*, N.Y. TIMES RINGS BLOG (Feb. 13, 2010, 10:50 AM), <http://vancouver2010.blogs.nytimes.com/2010/02/13/tragedy-hits-at-heart-of-olympics/?scp=1&sq=olympic%20injury%20+%20tragedy&st=cse>.

7. See Olympic Charter, *supra* note 2, Bye-Law r. 33, at 71–72 (“The duration of the competitions of the Olympic Games shall not exceed sixteen days.”).

8. The values of “Olympism” form the core of the Olympic Movement. This term is used to define a “philosophy of life . . . based on the joy of effort, the educational value of good example and respect for universal fundamental ethical principles.” *Id.* at 11.

9. *Id.* r. 1, para. 1, at 13.

10. The Charter is the “codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee. It governs the organization, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games . . . [it is an] instrument of a constitutional nature . . . [and] also serves as statutes for the International Olympic Committee . . .” *Id.* at 9; see also WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW, § 21:1 (2d ed. 2004) (In addition to governing the Olympics, the Olympic Charter forms the basis of international sports law.).

11. The IOC “is registered under Swiss laws as a nonprofit, private society with legal status under tax and labor laws . . . . Under the IOC Charter, it has legal status under international law and perpetual succession.” CHAMPION, *supra* note 10, § 21:1; see also Olympic Charter, *supra* note 2, rr. 1–3, at 13–17 (“The mission of the IOC is to promote Olympism around the world and to lead the Olympic Movement.”).

12. Olympic Charter, *supra* note 2, r. 2, para. 3, at 14; see also, IOC, Code of Ethics, 1–2 (Oct. 25, 2010), *available at* [http://www.olympic.org/Documents/Reports/EN/IOC%20Code%20of%20Ethics%20\\_En](http://www.olympic.org/Documents/Reports/EN/IOC%20Code%20of%20Ethics%20_En)

Olympic Games are the Movement's most identifiable activity, this event is just one component in the Movement's "universal and permanent" mission to build a better and more peaceful world.<sup>13</sup>

If the Olympic Games truly bring nations together, as expressed in the imagery of the five interlaced rings,<sup>14</sup> and achieves the ideal of a unified international community,<sup>15</sup> then "we" should celebrate this accomplishment. However, before "we" rush to accolades, first "we" must scrutinize the Movement and its central governing body, the IOC, to ensure that the Olympics have, in fact, earned this commendation and its place on the humanitarian podium.<sup>16</sup> Specifically, "we" must ask whether the Movement upholds its promise to lead by "good example and respect for universal ethical principles."<sup>17</sup> At present, the Movement fails this inquiry.

The current rules and regulations for Olympic planning and construction do not protect the human right to adequate housing<sup>18</sup> for non-

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g.pdf [hereinafter Code of Ethics] (The Code of Ethics confirms the commitment of all Olympic governing members to an ethical structure of respect and cooperation to achieve the ideals of the Olympic Movement, including the general principles of "dignity," "integrity," and "good governance.").

13. Olympic Charter, *supra* note 2, r. 1, para. 1, at 13; *see also* Evgeny Markin, *Universality and Developing Countries: Present and Future*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS 599, 599–600 (2009) [hereinafter XIII OLYMPIC CONGRESS: CONTRIBUTIONS], *available at* [http://www.olympic.org/Documents/Congress\\_2009/XIII%20OLYMPIC%20CONGRESS%20-%20CONTRIBUTIONS.pdf](http://www.olympic.org/Documents/Congress_2009/XIII%20OLYMPIC%20CONGRESS%20-%20CONTRIBUTIONS.pdf) (The term "universal" refers to the universality of the Movement which strives to "exist everywhere and involve everyone.").

14. The five interlaced rings represent the union of the five continents and the meeting of athletes from throughout the world at the Games. The rings are an official symbol of the Movement. Olympic Charter, *supra* note 2, r. 8, at 21.

15. Though many celebrate the international cooperation of the Olympic Games, the idealism of the Olympics is not without its critics and its skeptics. *See* Drew Dernavich, *The Rings*, WORDS PICTURES HUMOR (Jan. 27, 2011, 12:59 PM), <http://www.wordspictureshumor.com> (cartoon parody of the Olympic rings); *see also* Richard Williams, *Trapped in a Dreamworld of Dishonest Self-Serving Clichés*, THE GUARDIAN: THE SPORTS BLOG (Aug. 12, 2008, 8:00 PM), <http://www.guardian.co.uk/sport/2008/aug/12/olympics20082> (arguing that the idealistic rhetoric and the symbolic ceremonies surrounding the celebration of the Olympic Games has been "hijacked by government" to "camouflage their sordid ambitions").

16. Special Rapporteur on Adequate Housing, *Annex 1 of the Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, delivered to the U.N. Human Rights Council*, ¶ 71, U.N. Doc. A/HRC/4/18 (Dec. 18, 2009) (by Raquel Rolnik) [hereinafter *Annex*] ("The international community bears an obligation to promote, protect and fulfill the human right to housing, land and property.").

17. Olympic Charter, *supra* note 2, at 11.

18. Though many international housing rights groups have promulgated definitions of adequate housing, this Note refers generally to the expectations enumerated by the U.N.

Olympians living in host cities.<sup>19</sup> The host city, its planning committee, the Organizing Committee for the Games (“OCOG”),<sup>20</sup> and the local affiliate of the IOC, the National Olympic Committee (“NOC”),<sup>21</sup> are bound<sup>22</sup> to uphold the Fundamental Principles of Olympism (“Principles”), the humanitarian values which define the mission of the Movement, codified in the Charter<sup>23</sup> and to follow IOC rules and regulations set out in the Host City Contract (“Contract”).<sup>24</sup> However, neither the Contract nor the Charter provides procedures for housing planning or protections from evictions.<sup>25</sup> As a result, housing rights, which are rec-

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See Office of the U.N. High Comm’r for Hum. Rights [OHCHR], U.N. Hum. Settlement Programme (U.N. HABITAT), *The Human Right to Adequate Housing*, 3–9, Factsheet No. 21 (Rev. 1) [hereinafter OHCHR Factsheet], available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

19. The host city is chosen by the IOC to bear the “honor and responsibility” of hosting the Games under IOC supervision. Olympic Charter, *supra* note 2, r. 33, para. 2, at 71.

20. The OCOG is established to lead the planning and preparations for the Olympics in the host city. Its members must include an IOC member or members in the Host Country, the President and the Secretary General of the NOC, an athlete having competed in the previous edition of the Olympic Games and at least one member chosen by the City. IOC, *Host City Contract: Games of the XXX Olympiad in 2012*, § 2 (Aug. 6, 2005) [hereinafter *Host City Contract*], available at <http://www.gamesmonitor.org.uk/files/Host%20City%20Contract.pdf>.

21. NOCs are administrative bodies that “develop, promote and protect” the Olympic Movement in their respective countries. Olympic Charter, *supra* note 2, r. 28, at 61–64.

22. These parties are bound to uphold all commitments with the IOC and are held jointly and severally liable in the event of a breach. *Id.* r. 37, para. 1, at 76; *Host City Contract*, *supra* note 20, §§ 4, 64.

23. Olympic Charter, *supra* note 2, at 11.

24. *Id.* Bye-law r. 34, sec. 3, para. 3.3, at 74.

25. See Ctr. on Housing Rights & Evictions [COHRE], FAIR PLAY FOR HOUSING RIGHTS: MEGA-EVENTS, OLYMPIC GAMES AND HOUSING RIGHTS, at 16 (2007) [hereinafter FAIR PLAY FOR HOUSING RIGHTS], available at [http://www.cohre.org/sites/default/files/fair\\_play\\_for\\_housing\\_rights\\_2007\\_0.pdf](http://www.cohre.org/sites/default/files/fair_play_for_housing_rights_2007_0.pdf).

At present, beyond the framework of international human rights law, there are no specific regulations, guidelines or procedures binding on cities organising the Olympic Games or other mega-events, requiring them to prevent forced evictions; protect against the rising cost of housing; ensure no reductions in social housing stock; cement a role for engagement with affected residents; or institutionalise non-discrimination in the effects that mega-event construction and related regeneration processes have upon communities and individuals. In the case study of the Olympic Games, no mechanisms or procedures are in place within the IOC to prevent or mitigate the negative impacts of hosting the Olympic Games, or to ensure a greater focus on using the Olympic Games to promote a positive housing legacy. This needs to change.

*Id.*

ognized in the Universal Declaration of Human Rights (“UDHR”),<sup>26</sup> the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>27</sup> as well as in domestic law and policy,<sup>28</sup> are often violated in the name of “the Games.”<sup>29</sup>

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26. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 25(1) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing . . .”). As a U.N. General Assembly resolution, the UDHR is not binding international law. However, many international law scholars argue that it is binding as customary international law. *E.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 11–15 (1982) (“Although the existence of the norms embodied in these documents [U.N. Charter, UDHR, ICESCR, and the International Covenant on Civil and Political Rights [ICCPR]] cannot be denied, controversy has been raging . . . about their binding character and practical effect. . . . The better view is that these documents have become a part of international customary law and, as such, are binding on all states.”).

27. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, art. 11 (Jan. 3, 1976) [hereinafter ICESCR] (“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right . . .”). As a U.N. General Assembly resolution, the ICESCR is not binding international law. However, the ICESCR currently has 160 parties and 6 signatories who have consented to be bound by it. In addition, international law scholars posit that together the ICESCR, the UDHR, and the ICCPR create an International Bill of Rights. *See, e.g.*, Sohn, *supra* note 26, at 21 (“[The ICESCR provisions] are broad enough in scope to surmount differences among various political, economic, and social systems, as well as among widely differing cultures and stages of development . . .”).

28. Under United States law, the Fifth Amendment of the U.S. Constitution protects the right against the unreasonable taking of property. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). Similar rules and regulations permeate domestic statutes around the globe. Although these housing or property provisions may take different forms and experience varying levels of enforcement, there is a growing consensus that housing is a right that deserves recognition and protection. *See generally*, Kyra Olds, *Role of Courts in Making the Right to Housing a Reality throughout Europe: Lessons from France and the Netherlands*, 28 WIS. INT’L L.J. 170, 170–99 (2010) (discussing the role of the courts in enforcing housing rights in Europe); Eric S. Tars & Caitlin Egleson, *Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States*, 17 GEO. J. ON POVERTY L. & POL’Y 187, 187–216 (2009) (discussing a recently enacted Scottish statute which extends housing rights protections, and this statute’s potential impact on U.S. housing jurisprudence).

29. *See* Special Rapporteur on Adequate Housing, *Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, delivered to the U.N. Human Rights Council*, ¶¶ 15–33, Doc. A/HRC/13/20 (Dec. 18, 2009) (by Raquel Rolnik) [hereinafter

International human rights organizations, such as the Centre on Housing Rights & Evictions (“COHRE”)<sup>30</sup> and Human Rights Watch (“HRW”),<sup>31</sup> have exposed the IOC’s persistent failure to protect housing rights. The COHRE and HRW reports drew the attention of the Special Rapporteur to the United Nations Human Rights Council (“HRC”),<sup>32</sup> currently Raquel Rolnik, a specialist in housing and human rights.<sup>33</sup> The Special Rapporteur’s investigation confirmed the allegations of housing rights violations and recommended the IOC engage in a comprehensive reform to infuse the Olympic governing documents with housing policies that comport with international standards of housing rights.<sup>34</sup> The Special Rapporteur’s recommendations are not legally binding.<sup>35</sup> Nevertheless, the recommendations are authoritative and carry two forms of legal influence: the institutional authority of the U.N.<sup>36</sup> and the social, moral weight of the HRC.<sup>37</sup>

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*Rep. of the Special Rapporteur*]; see also FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 79–188.

30. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 16, 79–188.

31. Human Rights Watch, *Integrating Human Rights in the Olympic Process*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 612–14 [hereinafter Human Rights Watch].

32. The Special Rapporteur is an expert appointed by the HRC and assigned a mandate with either a country situation or specific human rights theme. OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, paras. 6–7 (Aug. 2008) [hereinafter *Special Procedures Manual*], available at <http://www2.ohchr.org/english/bodies/hr/special/index.htm>.

33. *Rep. of the Special Rapporteur*, *supra* note 29, at 1, ¶ 1 (In 2008, Raquel Rolnik was appointed the “Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context.”); see also *Special Procedures Manual*, *supra* note 32, paras. 6, 9 (“The individual mandate-holders are selected on the basis of their expertise, experience, independence, impartiality, integrity and objectivity.”).

34. *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 32–92.

35. See *Special Procedures Manual*, *supra* note 32, para. 108 (The report for a thematic study provides “human rights input” which can lead to the formulation of policy.).

36. See Ramses A. Wessel & Jan Wouters, *The Phenomenon of Multilevel Regulation: Interaction between Global, EU and National Regulatory Spheres*, 4 INT’L ORG. L. REV. 259, 262–69 (2007) (discussing the growing authority of the rules and recommendations promulgated by international organizations, particularly U.N. organs and agencies).

37. The Special Rapporteur identified human rights violations and the IOC was effectively put on notice of its responsibilities to remedy the situation. Failing to comply with the Special Rapporteur’s recommendation may negatively impact the Movement’s standing as a human rights advocate. *Special Procedures Manual*, *supra* note 32, paras. 4–5, 106–07 (After a thorough investigation leading to the finding of an unresolved human rights issue, the Special Rapporteur has the authority to alert and/or activate the U.N. and potentially the greater international community, to address the specific situation or issue).

The Special Rapporteur's recommendations require the IOC to include provisions in the Olympic governing documents that force the host city, the NOC, and the OCOG to consider the impact on the right to adequate housing at each stage of Olympic planning.<sup>38</sup> However, these housing protection reforms will come at a cost. In particular, the IOC must consider the financial impact of requiring host cities to pay displaced residents "fair and just compensation" and resettlement costs (hereinafter collectively "compensation") as recommended by the Special Rapporteur.<sup>39</sup> Imposing these requirements without a financial safety net would disproportionately impact developing nations and effectively prohibit their cities from hosting future Games.<sup>40</sup> This conflicts with the Movement's stated goal of achieving a universal Games, one which exists everywhere and involves everyone.<sup>41</sup>

Thus, the IOC is confronted with the challenge of reconciling the need to uphold its international commitment to human rights, in particular the right to adequate housing, while also preserving its stated goal of universality. To do so, the IOC must formulate housing provisions with a financial safety net for host cities. This can be accomplished if the IOC, as part of a comprehensive housing reform, expands its authority to use the General Retention Fund ("Fund").<sup>42</sup> The Fund, created in the Contract, is a contingent account held and maintained by the IOC until the Games are complete.<sup>43</sup> Five percent of the sums and money payable to the OCOG, specifically the monies earned by the sale of all broadcasting rights and the international Olympic marketing program ("International Program"),<sup>44</sup> is deposited in the Fund.<sup>45</sup> If the OCOG complies with all IOC

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38. *Rep. of the Special Rapporteur, supra* note 29, ¶¶ 1, 33, 68.

39. If evictions are unavoidable then the host city must "ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property" in the amount "necessary for the promotion of the general welfare." In addition, one must factor in relocation compensation, which includes the additional, tangential costs that arise as a result of the eviction. *Annex, supra* note 16, ¶¶ 60–68.

40. Markin, *supra* note 13, at 599 (arguing that the Movement cannot achieve universality if the Olympic Games are too expensive for many developing countries to host).

41. *See id.* at 599.

42. *Host City Contract, supra* note 20, § 50(a) ("Five percent (5%) of the sum of money payable to the OCOG, in relation to the sale of all broadcasting rights and the International Programme . . . shall be paid into a general retention fund maintained and controlled by the IOC.").

43. *Id.*

44. The marketing program proceeds include all of the profits earned by the OCOG from the "worldwide suppliership" and licensing contracts. *Id.* § 48(e).

45. *Id.* § 50(a). From 2005–2008, the total revenue earned by the IOC from broadcast sales was US \$2,570,000,000. The total revenue earned from all marketing, licensing, and ticketing sources was \$5,450,000,000. Ten percent of these funds were used to pay IOC



requirements, then the Fund is released in full to the OCOG.<sup>46</sup> However, the IOC reserves the right to use or retain the monies in the Fund, if: (1) the Games do not take place in the host city,<sup>47</sup> (2) the City, the NOC, or the OCOG fail to comply with their obligations pursuant to the Contract,<sup>48</sup> or (3) the IOC incurs damages resulting from the non-compliance of the City, the NOC, or the OCOG.<sup>49</sup> The failure to compensate displaced residents should be explicitly included as a trigger for the IOC to withhold and to setoff the costs incurred by the IOC in insuring that compensation is provided to these residents. The IOC must amend future Contracts to (1) explicitly reserve its right to access the reserved profits

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expenses. The remaining ninety percent was distributed among the NOCs, IFs, and OCOGs. IOC, *Olympic Marketing Fact File*, at 6 (2010), available at [http://www.olympic.org/Documents/IOC\\_Marketing/IOC\\_Marketing\\_Fact\\_File\\_2010%20r.pdf](http://www.olympic.org/Documents/IOC_Marketing/IOC_Marketing_Fact_File_2010%20r.pdf); see also *id.* at 30–38 (providing a complete breakdown of the revenues earned from Broadcasting rights from 1932–2008).

46. *Host City Contract*, *supra* note 20, § 50(d).

47. *Id.* § 50(a).

[I]f, due to any cause directly or indirectly attributable to the City, the NOC or the OCOG in the performance or non-performance of their obligations pursuant to this Contract, the Games do not take place in the City as contemplated herein, any and all amounts held in the general retention fund, including interest, shall be kept by the IOC as liquidated damages without further notice.

*Id.*

48. *Id.* § 50(b).

[I]n the event of any non compliance by the City, the NOC or the OCOG of any of their obligations pursuant to this Contract, the IOC is entitled to withhold amounts from any payment due or grant to be made to the OCOG including the sums of money payable to the OCOG, in relation to the sale of all broadcasting rights and the International Programme . . . for so long as any non compliance has not been remedied in full, through compliance or damages . . . [and] to keep any and all amounts thus withheld as liquidated damages without further notice.

*Id.*

49. *Id.* § 50(c).

[T]he IOC shall be entitled to set-off any and all of its obligations pursuant to this Contract against any claim against either or all of the City, the NOC and/or the OCOG for any damages resulting from any above mentioned non compliance . . . . The IOC's right to set-off, set out above, may also be exercised against any sums held in the general retention fund set out in Paragraph (a) of Section 50 above or withheld pursuant to Paragraph (b) of Section 50 above.

*Id.*

in the Fund to pay emergency compensation costs<sup>50</sup> and (2) immediately refer any compensation disputes to arbitration for prompt resolution.<sup>51</sup>

Revising the IOC's access to the Fund to explicitly authorize its use to enforce housing rights has two benefits. First, the clause provides efficiency and clarity. Preliminary compensation funding would be available to be dispensed promptly to displaced residents.<sup>52</sup> In the event of a compensation-related dispute, arbitration can resolve the matter within a reasonable time frame.<sup>53</sup> While the monies in the Fund might not be sufficient to fully compensate all residents, it can provide necessary emergency funding. Secondly, the clause would impose a penalty on the host city, the NOC, and the OCOG for failing to adequately protect host city residents. By utilizing the Fund, the penalty is extracted from profits earned by the Games, rather than the host city budget.<sup>54</sup> Ideally, this structure

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50. *See id.* § 50.

51. *See* Olympic Charter, *supra* note 2, r. 59, at 104 ("Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Sports-Related Arbitration.").

The Court of Arbitration for Sport (CAS) was created and formally established in 1984 by the IOC for resolving disputes related to international sports . . . . The purpose of the CAS is to provide a central specialized authority to decide sports-related disputes . . . . The advantages of the CAS arbitral procedures have been described as confidentiality, specialization, flexibility, and simplicity of the procedure, speed, reduced costs and international effectiveness of the arbitration award. CAS awards are final and binding on the parties.

WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW § 21:6 (2d ed. Supp. 2010–11) [hereinafter SPORTS LAW SUPP.]; *see also* GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS, ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW 117–32 (2001) (providing a copy of the "CAS Arbitration Rules for the Olympic Games" as drafted for the Atlanta Games in 1996).

52. *See* RESTATEMENT (THIRD) OF FOREIGN REL. § 712(1) (1987) ("For compensation to be just . . . [it must] be paid at the time of taking, or within a reasonable time thereafter . . .").

53. *See* KAUFMANN-KOHLER, *supra* note 51, at 30–39 (discussing the arbitration procedures allowing the Olympic arbitration panels to resolve disputes with all due speed).

54. The use of an emergency fund as a remedy for the disparate financial capacities of nations was successful in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The drafters of this environmental treaty considered the individual capacities of states and provided financial support to developing states. Under Article 10 of the Protocol a Multilateral Fund was created to help developing nations become parties and comply with its obligations. The use of a contingency fund provides the safety net a developing nation needs to take the leap and participate in a global initiative. Whether it is fighting the depletion of the ozone layer or hosting the Olympic Games, greater inclusivity of nations should be encouraged, while also taking into consideration the financial challenges these global actions present. *See* Michael Faure & Jürgen Lefevere, *Com-*

will limit the added financial burden and prevent the escalation of costs from interfering with the universality of hosting opportunities.<sup>55</sup> The key for the IOC is to find the balance that ensures land acquisition actions are effected in compliance with the ideals of the Movement and with the international standards of housing rights.<sup>56</sup>

This Note explores the human rights violations arising in the absence of clear legal protections for residents of host cities displaced during Olympic Game construction. If the IOC adopts housing protection reforms, then the financial implications for prospective host cities must be taken into consideration. Therefore, this Note argues, as part of a comprehensive reform to infuse the Olympic governing documents with housing policies that comport with international standards for the right of adequate housing, an explicit compensation clause should be added to IOC's rights to access the Fund. This solution would ensure emergency assistance is available to displaced persons without creating unreasonable delays or imposing an insurmountable financial barrier for potential host cities in developing nations.

Part I of this Note explores the aspirations of the Olympic Movement, and the realities of IOC governance. Part II identifies the housing rights violations and discusses the recommendations for reform proposed by the Special Rapporteur. Part III argues, as part of a comprehensive housing protection reform, for the expansion of IOC authority to oversee compensation payments and to access the Fund to provide emergency compensation for displaced host city residents.

## I. REALITY V. IDEOLOGY: OLYMPISM, UNIVERSALITY AND THE IOC

### A. Olympic Governance and Host City Selection

The Charter defines the Movement's governing structure and creates its three main constituents: the IOC,<sup>57</sup> the International Federations

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*pliance with Global Environmental Policy*, in *THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW & POLICY* 138, 150–54 (Norman J. Vig & Regina S. Axelrod eds., 1999).

55. See IOC. Admin., *International Cooperation and Development: What Role, if Any, Does the Olympic Movement Have in International Development*, XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 719 [hereinafter *International Cooperation*] (“The oft-repeated mantra is that the Olympic Games are good for the host country, provided they are not allowed to grow too big, costs are controlled and white elephant structures are banished from construction plans . . . [with these adjustments, the Games] could even be great for developing countries.”).

56. See Olympic Charter, *supra* note 2, at 11; see also *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 38–41.

57. Olympic Charter, *supra* note 2, r. 2, at 14–15; see also *CHAMPION*, *supra* note 10, § 21:1.

(“IFs”),<sup>58</sup> and the NOCs.<sup>59</sup> The Charter outlines the powers and duties of each body,<sup>60</sup> which are bound to comply with all rules and regulations of the Charter, including the Principles.<sup>61</sup> In addition, the Charter outlines the role of the OCOG, which is formed each time a new host city is selected and is charged with the responsibility of preparing for and carrying out its assigned Games.<sup>62</sup> The final, and potentially most important piece of the puzzle, is the host city, which is selected at the IOC meeting held seven years prior to the Olympic Games in question.<sup>63</sup>

The IOC strives for universality in its selection of new host cities.<sup>64</sup> However, these aspirations are tempered by the realities of hosting a mega-event, which requires significant economic reserves and infrastructural investment.<sup>65</sup> The IOC employs a dual-phase selection process.<sup>66</sup> This process was created after the careful study of prior Games held in a

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58. International Federations are “international non-governmental organizations administering one or several sports at world level and encompassing organizations administering such sports at national level.” Olympic Charter, *supra* note 2, rr. 26–27, at 57–58.

59. *Id.* r. 28, at 61–63; *see also* CHAMPION, *supra* note 10, § 21:1.

60. Olympic Charter, *supra* note 2, r. 1, at 13–14.

61. *Id.* at 9.

62. *Id.* r. 36, Bye-law r. 36, at 75–76; *see also* *Host City Contract*, *supra* note 20, §§ 2–4.

63. Olympic Charter, *supra* note 2, r. 34, para. 2, at 72.

64. Juliet Macur, *Rio Wins 2016 Olympics in a First for South America*, N.Y. TIMES, Oct. 3, 2009, at A1 (“[The IOC] has a history of trying to effect change with its choices for bid cities. The committee awarded the 2008 Summer Games to Beijing, hoping to help open China to the world. In 1981, it gave the 1988 Summer Games to Seoul to help usher in a civilian government.”).

65. With the costs of hosting the games on the rise, these changes would add an additional expense to the ever-growing budgetary requirements. *See, e.g.*, Markin, *supra* note 13, at 599–600 (Universality is not always achieved by the Movement because the Games are an expensive event and not many developing countries can afford to serve as the host. He finds this reflected in the low number of developing countries bidding for the Games). Even host cities in developed countries are burdened by the excessive budget. *See, e.g.*, Peter Zimonjic, *The Recession Games: Hosting Olympics During an Economic Downturn is a Dubious Honor*, THE TORONTO SUN (Oct. 11, 2009) <http://new.torontosun.com/sports/vancouver2010/2009/10/11/11370011-sun.html> (addressing Vancouver’s challenge to raise money to host the 2010 Winter Olympic Games and the host city’s concern that “the 1976 Summer Olympiad in Montreal ran up about \$1.5 billion in debts that weren’t paid off until December 2006”).

66. In December of 1999 the IOC reformed the host city selection process. These reforms clarified the eligibility requirements to bid for the Games and the obligations of all parties involved in the process. IOC, *Factsheet: Host City Election Facts and Figures*, at 3 (July 2009) [hereinafter *Factsheet: Host City Election*], available at [http://www.olympic.org/Documents/Reference\\_documents\\_Factsheets/Host\\_city\\_election.pdf](http://www.olympic.org/Documents/Reference_documents_Factsheets/Host_city_election.pdf).

diverse set of host cities.<sup>67</sup> The new criteria help the IOC determine whether a city is prepared for “the size and complexity of the Olympic Games.”<sup>68</sup> The optimal result of IOC selection is to identify a city that is both capable of hosting the Games, and located in a country where the national government is amenable to the rules and Principles of the Charter.<sup>69</sup>

In the first phase, the local NOCs select applicant cities.<sup>70</sup> The NOC completes the host city application, which includes a legally binding statement from the national government of the country of the applicant city “by which said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter.”<sup>71</sup> The NOC submits the applicant city to the IOC working group.<sup>72</sup> The working group evaluates the city’s “potential to stage high-level, international, multi-sports events and their potential to organise

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67. The Games Study Commission compiles host city impact data. This data is analyzed and incorporated into revised rules and regulations for future host cities. The creation of the Games Study Commission demonstrates the IOC’s desire to adapt the Games to meet the evolving needs of the international community. IOC, *Technical Manual on Planning, Coordination & Management of the Olympic Games*, at 16 (2005) [hereinafter *Technical Manual: Planning*], [http://www.gamesmonitor.org.uk/files/Technical\\_Manual\\_on\\_Planning\\_Coordination\\_and\\_Management.pdf](http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Planning_Coordination_and_Management.pdf).

68. *Id.*; see, e.g., Advancing the Games, *supra* note 1, at 4–5.

Over the years, the IOC has learned a great deal about what it takes to create, manage and sustain a positive legacy. Host cities have been selected because their people and government have shown they have a passion for creating a positive legacy beyond the Games . . . . Every city that hosts the Olympic Games becomes a famous milestone in Olympic history and the temporary guardian of our values. For this reason, we at the IOC continue to fine-tune our legacy practices.

*Id.*

69. As a result of the feasibility requirements, developing nations are often prohibited from hosting the games. See e.g., Jessica Bin, *The Olympic Games: Opportunities for Everyone*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 219–20 (“‘Universality of the Games’ not only entails non-exclusivity in participation but also giving all countries the opportunity to host the Games . . . . By 2012, the Olympic Winter and Summer Games will have been hosted by 42 cities in 22 countries, but only seven times in cities outside North America and Europe and never in South America or Africa.”).

70. Olympic Charter, *supra* note 2, Bye-law r. 34, sec. 1, at 72–73.

71. *Id.* r. 34, para. 3, at 72.

72. The IOC working group is comprised of IOC administration members and external experts. *Factsheet: Host City Election*, *supra* note 66, at 1.

successfully the Olympic Games . . . .”<sup>73</sup> If the city meets the working group’s eleven criteria points, it is designated a “Candidate City.”<sup>74</sup>

In the second phase, the IOC Evaluation Commission reviews the Candidate City file, with particular attention to the city’s financial guarantees, and performs a site visit, with particular attention to the proposed event venues.<sup>75</sup> Then the Commission submits a written report for each Candidate City.<sup>76</sup> The IOC Executive Board reviews the Commission’s report and creates the final list of Candidate Cities.<sup>77</sup> The IOC members receive the Commission’s report for the remaining cities and listen to formal presentations by each city’s delegates.<sup>78</sup> Finally, the IOC members vote to select the host city.<sup>79</sup> Immediately upon the announcement of the selection, the IOC, host city, and the NOC of the selected country<sup>80</sup> enter into the Contract.<sup>81</sup>

The Contract binds the IOC, host city, NOC, and OCOG, defines each party’s obligations, the applicable code of conduct, and the sanctions for breaching these terms.<sup>82</sup> The host city, the NOC, and the OCOG are “jointly and severally liable” to the IOC for all commitments regarding

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73. *Id.*

74. *Id.* (The eleven technical criteria under review are: (1) Government support, legal issues and public opinion, (2) General infrastructure, (3) Sports Venues, (4) Olympic Village(s), (5) Environmental conditions and impact, (6) Accommodation, (7) Transport concept, (8) Safety and Security, (9) Experience from past sports events, (10) Finance, and (11) Overall project and legacy.).

75. *Id.*; Olympic Charter, *supra* note 2, Bye-law r. 34, sec. 2, paras. 2.2–2.3, at 73–74 (The Commission includes IOC members, representatives of the IFs, of the NOCs, of the Athletes’ Commission, and of the International Paralympic Committee. This Commission studies the “candidatures of all candidate cities, [and] inspect[s] the sites . . . .”).

76. Olympic Charter, *supra* note 2, Bye-law r. 34, sec. 2, at 73–74.

77. *Id.*

78. *Factsheet: Host City Election*, *supra* note 66, at 3; *see, e.g.*, Macur, *supra* note 64, at A1 (In 2009, U.S. President Barack Obama flew to the IOC Session in Copenhagen to campaign on behalf of Chicago’s bid for the 2016 Olympic Games. The US envoy was unsuccessful in its efforts and Rio de Janeiro, Brazil was selected as the host city.).

79. *Host City Contract*, *supra* note 20, § 3 (The terms of the contract bind the OCOG upon its formation. The Contract terms state, “The City and the NOC hereby undertake, within one month after the OCOG’s formation, to cause the OCOG to intervene as a party and adhere to this Contract to the effect that all terms and obligations . . . shall be legally binding upon the OCOGC as if it were a party hereto”); Olympic Charter, *supra* note 2, Bye-law r. 34, sec. 3, at 74; *Factsheet: Host City Election*, *supra* note 66, at 1.

80. After the 1999 reforms the NOC must sign the Contract. The IOC felt this would strengthen “the obligation of a National Olympic Committee to serve as a full partner.” *Factsheet: Host City Election*, *supra* note 66, at 3.

81. Olympic Charter, *supra* note 2, Bye-law r. 34, sec. 3, para. 3.3, at 74.

82. *Factsheet: Host City Election*, *supra* note 66, at 3 (The OCOG is constructively bound under the Contract.).

“the planning, organization and staging of the Games.”<sup>83</sup> Once the Contract is complete, the OCOG is formed and begins to plan the Games with the aid of the Technical Manuals. The Manuals are non-binding guidelines prepared by the IOC based on the advice and experience of previous OCOGs.<sup>84</sup> Throughout the planning phase, the OCOG, host city, and the NOC are required to prepare updates and reports to the IOC for periodic status meetings.<sup>85</sup>

The binding provisions in the Contract and Charter, the guidelines proposed by the Manuals, and the regular intervals of IOC meetings are all mechanisms to ensure the host city complies with IOC rules and regulations. The goal for this oversight is to ensure “host cities and residents are left with the best possible legacy in terms of venues, infrastructure, environment, expertise and experience.”<sup>86</sup> When the IOC is able to carefully oversee planning, it can diagnose problems early and compel compliance with the contractual obligations and the values of Olympism.

#### *B. The Mission behind the Movement*

Five interlaced rings embossed on the white flag and the golden torch burning brightly over the Olympic stadiums, these are the symbols of the “great sports festival.”<sup>87</sup> Yet the Movement is more than just sixteen days of athletic competition<sup>88</sup> and medal rankings.<sup>89</sup> The Movement serves a greater humanitarian mission outlined in the Principles and codified in

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83. *Host City Contract*, *supra* note 20, § 4 (In the event of a breach, the IOC reserves the right to pursue legal action against any of the parties to the Contract.).

84. The IOC promulgates a variety of Technical Manuals, which are compiled through careful analysis of prior Games and recommendations from prior Host Cities and OCOGs. The Manuals serve as guidelines to OCOGs but are not binding on the new host city. Examples of manuals include: the Technical Manual on Hospitality, Technical Manual on the Organization of the Election to the IOC Athletes' Commission, the Technical Manual on Ceremonies, and the Technical Manual on Language Services. *Id.* § 65.

85. *Id.* §§ 15–16, 25 (The Contract requires regular updates on the organization and planning process from the host city and OCOG. In addition, the OCOG must provide “oral and written reports in English and French on the progress of the preparation of the Games, including details on the financial situation regarding the planning, organizing and staging of the Games, whenever the IOC requests it to do so. Decisions taken by the IOC following such reports shall be acted upon immediately by the OCOG.”).

86. *Technical Manual: Planning*, *supra* note 67, at 16.

87. Olympic Charter, *supra* note 2, pmb., at 10–11.

88. *Id.* Bye-law r. 33, at 72.

89. See IOC, *Factsheet: Records and Medals Games of the Olympiad* (Oct. 2009), available at [http://www.olympic.org/Documents/Reference\\_documents\\_Factsheets/Records\\_and\\_medals\\_at\\_the\\_Games\\_Olympiad.pdf](http://www.olympic.org/Documents/Reference_documents_Factsheets/Records_and_medals_at_the_Games_Olympiad.pdf).

the Charter.<sup>90</sup> The Principles of Olympism guide the IOC in leading the Movement towards “building peace and understanding through sport.”<sup>91</sup> As the needs of the global society change, so too the IOC must evolve<sup>92</sup> to better serve its constituents<sup>93</sup> in compliance with the Principles. Two current IOC initiatives demonstrate the IOC’s commitment to uphold its humanitarian mission statement: Olympic Solidarity<sup>94</sup> and Agenda 21: Sport for Sustainable Development (“Agenda 21”).<sup>95</sup>

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90. Olympic Charter, *supra* note 2, at 11 (The principles relevant to this Note include: “(1) Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example and respect for universal fundamental ethical principles. (2) The goal of Olympism is to place sport at the service of the harmonious development of man, with a view of promoting a peaceful society concerned with the preservation of human dignity . . . (4) The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organization, administration and management of sport must be controlled by independent sports organizations. (5) Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging in the Olympic Movement . . .”).

91. IOC, *Factsheet: Human Development Through Sport*, at 1 (Aug. 2009), available at [http://www.olympic.org/Documents/Reference\\_documents\\_Factsheets/Human\\_development\\_through\\_sport.pdf](http://www.olympic.org/Documents/Reference_documents_Factsheets/Human_development_through_sport.pdf); see also *Advancing the Games*, *supra* note 1, at 4 (The IOC strives to create an Olympic Movement which is a “catalyst for social, urban and political change.”).

92. *Technical Manual: Planning*, *supra* note 67, at 13 (The Game Study Commission was created to keep the impacts associated with Games organization under reasonable control). The IOC also holds conferences with expert speakers who propose social reforms for the continued evolution of the Movement. For example, in May of 2011, the IOC hosted the Second Edition of the International Forum on Sport, Peace and Development in collaboration with the U.N. Secretary General on Sport and Development for Peace. See Press Release, U.N. Off. of Sport & Dev. for Peace (UNOSDP), 2nd International Forum on Sport, Peace and Development (May 10, 2011), available at [http://www.un.org/wcm/content/site/sport/home/newsandevents/events/template/events\\_item.jsp?cid=25344](http://www.un.org/wcm/content/site/sport/home/newsandevents/events/template/events_item.jsp?cid=25344).

93. The Movement’s main constituents are the IOC, the NOCs, and the IFs. Additionally, the Movement governs the OCOGs, the national associations, clubs and persons belonging to the IFs, and NOCs (which includes the athletes, judges, referees, coaches, and the other sports officials and technicians), and any other organizations and institutions recognized by the IOC. Olympic Charter, *supra* note 2, r. 1, paras. 2–3, at 13–14.

94. *Id.* Sam Ramsamy, Stakeholder Representative, *speech printed in XIII OLYMPIC CONGRESS: PROCEEDINGS* 103, 104 (2009), available at [http://www.olympic.org/Documents/Congress\\_2009/XIII%20OLYMPIC%20CONGRESS%20-%20PROCEEDINGS\\_WEB.pdf](http://www.olympic.org/Documents/Congress_2009/XIII%20OLYMPIC%20CONGRESS%20-%20PROCEEDINGS_WEB.pdf) (The Olympic Solidarity program was created in



The goal of Olympic Solidarity is to encourage and facilitate greater inclusion of developing nations and their athletes in the Games.<sup>96</sup> The IOC assists NOCs in these nations to prepare its athletes for the Games, to provide scholarships for athletes and coaches to improve technical athletic education, to train sports administrators, and to support the development of sport in general.<sup>97</sup>

Under Agenda 21, the Movement added poverty alleviation and integration of socially disadvantaged groups to its humanitarian objectives.<sup>98</sup> Included within this broad social strategy is the goal to reform Olympic construction to ensure “a viable model for human settlements” and support sport infrastructures that can be “harmoniously integrated into the local context, and that new construction boost local housing strategies.”<sup>99</sup> Agenda 21 is modeled after an agreement by the same name signed by the parties of the 1992 U.N. Conference on Environment and Development in Rio de Janeiro (the “Earth Summit”). In adopting the Earth Summit’s recommendations, the IOC stated,

The application of this concept of sustainable development is the responsibility of all individual and collective actors in every field that have a part to play in the areas of development and protection of the environment. In this connection, and in accordance with the philosophy of Olympism, the Olympic Charter and particularly its third and sixth Fundamental Principles, and in view of its universal nature, the Olympic Movement accepts that it has a social responsibility to share in the implementation of this consent of sustainable development.<sup>100</sup>

Here, the IOC acknowledges its responsibility as an international organization to work jointly with the U.N. to fulfill common social objectives.

However, Agenda 21 is “only a declaratory document” and therefore not “readily enforceable” under international law.<sup>101</sup> In order to fulfill its

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“1961 to assist countries, which had just gained independence from colonization . . . , [and] has greatly contributed to bridging the disparity.”).

95. See generally Sports & Env’t Comm’n, IOC, *Olympic Movement’s Agenda 21: Sport for Sustainable Development* (1999) [hereinafter *Agenda 21*], available at [http://multimedia.olympic.org/pdf/en\\_report\\_300.pdf](http://multimedia.olympic.org/pdf/en_report_300.pdf).

96. Through the work of Olympic Solidarity, more countries, represented by 204 NOCs, participated in the 2008 Beijing Games than ever before. In addition, a record number of women participated, eighty-seven countries won medals (more than ever before) and Afghanistan, Mauritius, Tajikistan, and Togo won medals for the first time. Advancing the Games, *supra* note 1, at 3.

97. Olympic Charter, *supra* note 2, r. 5, Bye-law r. 5, at 18–19.

98. *Agenda 21*, *supra* note 95, at 23.

99. *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 40.

100. *Agenda 21*, *supra* note 95, at 18.

101. *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 40–41.

promises under Agenda 21, the IOC must incorporate Agenda 21 provisions into its legally binding documents.<sup>102</sup> These revisions will reform substantive Olympic policies and bind all Movement constituents to uphold its commitments.<sup>103</sup> In addition, this will accomplish the IOC's goal for Agenda 21 to serve as a catalyst for domestic action by "governing bodies [in] areas in which sustainable development could be integrated into their policies" and individual action "to ensure that their sporting activities and their lives in general play a part in this sustainable development."<sup>104</sup> Both Agenda 21 and Olympic Solidarity demonstrate the IOC's commitment to its humanitarian mission and its desire to work with the U.N. to achieve its common social objectives.<sup>105</sup>

In practice, the IOC has not been consistent in upholding its public commitment to greater inclusivity and universality of the Games. In 2009, the IOC convened the XIII Olympic Congress, a meeting of all the Movement's constituents, which was held to address an agenda entitled "The Olympic Movement in Society."<sup>106</sup> At this meeting, the IOC accepted papers from, and listened to presentations by, all its constituents.<sup>107</sup> Repeatedly, constituents demanded renewed dedication to achieving the universality of the Games.<sup>108</sup> In addition, constituents proposed plans to increase global inclusivity by engaging developing nations<sup>109</sup> and expanding host city selection beyond the Americas and Eu-

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102. *See id.*

103. *See, e.g., Agenda 21, supra* note 95, at 21.

104. *Id.*

105. *See Rep. of the Special Rapporteur, supra* note 29, ¶¶ 40–41.

106. Jacques Rogge, *Message from the IOC President, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, supra* note 13, at 5 [hereinafter *Message from the IOC President*].

107. For the first time in 115 years, the IOC welcomed articles from the public. The President of the IOC explained, "[W]e were 'taking the pulse' of the Olympic Movement. We wanted the delegates in Copenhagen to hear what others had to say about each of the five main themes: the athletes, the Olympic Games, the structure of the Olympic Movement, Olympism and youth, and the digital revolution." *Id.*

108. *See Introduction, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, supra* note 13, at 13 (One of the central subtopics on the Olympic Congress agenda was "Universality and Developing Countries."); *see, e.g., Ramsamy, supra* note 94, at 104 ("The Olympic Movement is, in many ways, the greatest social force in the world. It has overcome innumerable barriers – be it political, socio-economic, religious, cultural or racial—because of its principle of universality. It will pursue this principle until universality in all its manifestations is accomplished.").

109. The articles submitted included a variety of solutions. *See, e.g., Colin Moynihan, Is Continental Rotation a Solution to Improving Universality, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, supra* note 13, at 238–40 (recommending selecting host cities through a continental rotation system); Richard W. Pound, *Eurocentricity Within the Olympic Movement, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, supra* note 13, at

rope.<sup>110</sup> Selecting cities such as Beijing, China, Sochi, Russia, and Rio de Janeiro, Brazil, as hosts was a step towards expanding the continental breadth of potential host cities.<sup>111</sup> However, these discrete examples are only small steps towards a greater effort. More work remains to be done before all nations are able to take advantage of the opportunities of participating in and hosting the Games.<sup>112</sup>

### C. *The Limits of Universality*

Despite procedures allowing for heightened IOC oversight, including the contractual obligations on host cities to comply with the Principles, improper land acquisition tactics, which displace host city residents without compensation, tarnish the legacy of the Games.<sup>113</sup> Often times, Olympic land acquisition serves two goals: (1) to meet “heightened demand for space to construct sports venues, accommodation and roads” but also (2) to create a “new international image for the cities.”<sup>114</sup> Under these circumstances, the host city uses the Games as an excuse to assert its own agenda. In particular, host cities have been criticized for the “removal of

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244 (criticizing the “Eurocentric” nature of the IOC and its leadership bodies and arguing for more globally representative governance).

110. Vitaly Smirnov, *Giving Developing Countries the Chance to Host the Olympic Games*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 249 (arguing for greater assistance to NOCs in developing countries and more modest requests for Olympic infrastructure if we want to see the Olympic Games held in Africa, Asia and South America); see also Shun-Ichiro Okano, *Universality and Developing Countries*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 240 (breaking down universality into three components: universality (1) in the selection of host cities, (2) in the participation of National Olympic Committees (NOCs), (3) in the participation of athletes, and arguing that the IOC has failed to achieve universality in selecting host cities); Markin, *supra* note 13, at 599–600.

111. In 2016, Rio de Janeiro, Brazil will be the first South American city to host the Olympics. Macur, *supra* note 64, at A1 (“During its presentation, the bid team showed a graphic of the world and marked all the places that have held an Olympics. South America was glaringly bare . . . . By choosing Rio, it [the IOC] could help the country develop faster and could bring an entire continent of people closer to the Olympic movement.”).

112. E.g., Smirnov, *supra* note 110, at 249; Okano, *supra* note 110, at 240; Bin, *supra* note 69, at 219; Markin, *supra* note 13 at 599–600.

113. *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 6 (“Displacement and forced evictions due to beautification and gentrification tend to affect low-income populations, ethnic minorities, migrants and the elderly . . . , [and policies to] ‘cleanse’ the city result in the removal of homeless persons, beggars, street vendors, sex workers and other marginalized groups from central areas and their relocation into special sites or outside the city.”).

114. *Id.* ¶ 16.

signs of poverty and underdevelopment through reurbanization projects that prioritize city beautification over the needs of local residents.”<sup>115</sup>

The most recent and notable example of host city housing rights abuse occurred in Beijing before the 2008 Olympics.<sup>116</sup> The Beijing Municipality and the Beijing Organising Committee for the Olympic Games (“BOCOG”) forcibly evicted an estimated 1.5 million residents.<sup>117</sup> Under the auspices of Olympic land acquisition, the municipality underwent an aggressive campaign of “poverty hiding,”<sup>118</sup> where officers harassed, repressed, and imprisoned residents and activists.<sup>119</sup> This included the “Re-education Through Labor” program, whereby alleged unlicensed taxis operators, street vendors, vagrants, and beggars were collected and subjected to a form of imprisonment without formal legal charges.<sup>120</sup> In addition, demolitions and evictions took place without prior notice, sometimes in the middle of the night, without the provision of adequate compensation sufficient to attain alternative accommodation and without access to legal recourse.<sup>121</sup> Reports of these human rights violations caused discontent among the international community and sparked violent protests during the torch relay.<sup>122</sup> Although these acts are most vivid in our memory, Beijing was neither the first nor the last host city to violate housing rights.

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115. *Id.*

116. COHRE, ONE WORLD, WHOSE DREAM? HOUSING RIGHTS VIOLATIONS AND THE BEIJING OLYMPIC GAMES, at 6–7 (2008) [hereinafter ONE WORLD, WHOSE DREAM?], available at [http://www.cohre.org/sites/default/files/mega\\_events\\_-\\_one\\_world\\_whose\\_dream\\_july\\_2008.pdf](http://www.cohre.org/sites/default/files/mega_events_-_one_world_whose_dream_july_2008.pdf); see also *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 18, 21 (In Beijing, nine venue-related projects, which covered over one million square meters, required the extensive relocation of residents. Allegations of “repression, harassment and arbitrary detention” were common, as well as reports of mass evictions, including evictions conducted by unidentified men in the middle of the night and without prior warning.).

117. ONE WORLD, WHOSE DREAM?, *supra* note 116, at 6; *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 21.

118. *Olympic Congress: Monitor Host Countries on Rights*, HUMAN RIGHTS WATCH (Oct. 1, 2009), <http://www.hrw.org/en/news/2009/10/01/olympic-congress-monitor-host-countries-rights> (“The world watched as China trampled on human rights, including throwing people in jail, in the name of preparing for the Beijing Games.”).

119. ONE WORLD, WHOSE DREAM, *supra* note 116, at 6–7.

120. *Id.*

121. *Id.* (Even when compensation was provided, most displaced residents were unable to retain the same standard of living and had to move further from sources of employment, community networks, schools and health care facilities.).

122. Katrin Bennhold & Keith Bradsher, *From Beijing to Battery Park, Activists Stress Causes*, N.Y. TIMES, Aug. 9, 2008, at A11.

In light of these concerns, the Centre on Housing Rights and Evictions ("COHRE"), the leading international human rights organization dedicated to promoting human rights and preventing forced evictions around the world,<sup>123</sup> coordinated an elite team of human rights scholars and advocates<sup>124</sup> to research the issue of "Mega-Events, Olympic Games and Housing Rights."<sup>125</sup> COHRE studied the impact of the Games on the housing rights of residents in seven past and future Olympic Host Cities, namely Seoul, Barcelona, Atlanta, Sydney, Athens, Beijing, and London.<sup>126</sup> COHRE found that little changed since the 1988 summer Olympic Games in Seoul, South Korea when 720,000 people were forcibly displaced.<sup>127</sup> In the last twenty years, the Games have displaced more than 2 million people.<sup>128</sup> Host cities' "cleaning operations" disproportionately target the city's most marginalized residents, traditionally the low-income earners, homeless, poor, Roma, and African-Americans.<sup>129</sup> These former residents are not only displaced, but also are frequently subjected to long-term or permanent homelessness or relocation outside the city limits.<sup>130</sup> The result of these actions includes post-Olympics gentrification,<sup>131</sup> homelessness,<sup>132</sup> and long-term displacement.<sup>133</sup> Upon the com-

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123. *About Us*, COHRE, <http://www.cohre.org/about-us> (last visited Feb. 10, 2011) ("COHRE [is] an independent, international, non-governmental, not-for-profit human rights organization whose mission is to ensure the full enjoyment of the human right to adequate housing for everyone, everywhere . . . . In 1999, COHRE was granted special consultative status with the Economic and Social Council of the U.N.").

124. COHRE worked with U.N.-HABITAT, the Special Advisor to the U.N. Secretary General on Sport for Development and Peace, the Graduate Institute of International Studies (IUHEI), the Geneva School of Architecture, the University of Toronto, the New York University Law School, and the University of Wisconsin-Madison. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 18.

125. *Id.* at 3.

126. *Id.* at 11, 15 (COHRE found, "In Barcelona the post-Games cost of housing rose so high that low income earners were forced to leave the city; In Atlanta 9,000 homeless (mainly African Americans) were given arrest citations in a 'clean the streets' campaign and approximately 30,000 people were displaced by Olympics gentrification; In Athens, hundreds of Roma were displaced during Olympic preparations.").

127. *Id.* at 11; *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 18 (Preparations for the 1988 Olympic Games resulted in the forcible eviction of fifteen percent of the population in Seoul and the demolition of 48,000 buildings.).

128. Press Release, COHRE + RUIG/GIAN Joint Media Statement, The Olympic Games Have Displaced More Than Two Million People in the Last 20 Years (2008), available at [http://tenant.net/alerts/mega-events/Olympics\\_Media\\_Release.pdf](http://tenant.net/alerts/mega-events/Olympics_Media_Release.pdf).

129. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 16, 38.

130. *See id.* at 24, 38.

131. *Id.* at 197; *see also Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 19–21. The Special Rapporteur found,

pletion of the project, COHRE published *Fair Play for Housing Rights*, a report documenting its evidentiary findings and proposing guidelines for all stakeholders in future host cities.<sup>134</sup> These guidelines are designed to provide a manual to facilitate a comprehensive revision of the current structure of mega-event planning.<sup>135</sup>

Although COHRE's recommendations are not binding on the IOC, this report served an important disclosure function. The results of the study drew international attention to the IOC's failure to uphold either basic human rights<sup>136</sup> or even its own Principles.<sup>137</sup> The unexpected findings exposed by the COHRE report sparked an inquiry by the U.N. Human

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In Seoul, apartment prices increased by 20.4 percent in the first eight months of 1988, and land prices soared by 27 percent in 1988, the steepest rise since 1978; In Barcelona, the increase in housing prices during the five-year period surrounding the Games was 1 percent, while in the rest of the country prices increased by 83 percent; in 1993, a year after the Olympics, house prices only rose by 2 percent; In Atlanta, around 15,000 low-income residents were forced out of the city as the annual rent increase rose from 0.4 percent in 1991 to 7.9 percent in 1996 in preparation for the 1996 Olympic Games; In Sydney, the increase in house pricing during the five-year period before the Games was 50 percent while in the rest of the country prices increased by 39 percent; In London, property prices in the areas surrounding the Olympic site increased by 1.4 percent to 4.6 percent after the announcement that the city had won the bid, while in the rest of the city prices were down by 0.2 percent.

*Id.*

132. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 15, at 11, 21–22; *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 27.

133. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 197; *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 16–18.

134. *See generally* FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25.

135. *Id.* at 16 (“[There are currently no] mechanisms or procedures in place within the IOC to prevent or mitigate the negative impacts of hosting the Olympic Games, or to ensure a greater focus on using the Olympic Games to promote a positive housing legacy.”).

136. *See* UDHR, *supra* note 26, art. 25(1); ICESCR, *supra* note 27, art. 11; *see also Rep. of the Special Rapporteur*, *supra* note 29, ¶ 32 (“Forced evictions are *prima facie* incompatible with the requirements of the International Covenant for Economic, Social and Cultural Rights and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”).

137. “COHRE took the Olympic Games as a case study because forced evictions, discrimination against racial minorities, targeting homeless persons . . . are in complete contradiction to the very spirit and ideals of the Olympic Movement, which aims to foster peace, solidarity and respect of universal fundamental principles.” FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 9.

Rights Council, whose Special Rapporteur chose to take the case under further consideration.<sup>138</sup>

## II. SHINING THE TORCH ON THE CRISIS: THE SPECIAL RAPPOREUR'S REPORT AND RECOMMENDATIONS FOR HOUSING RIGHT REFORM

In response to the growing pressure from COHRE and other international human rights groups, the Special Rapporteur chose to investigate the effect of international mega-events, including the Olympic Games, on the "realization of the right to adequate housing."<sup>139</sup> Special Rapporteur is a position created under the "special procedure" authority of the HRC to address a thematic or country-specific mandate.<sup>140</sup> The Special Rapporteur investigates issues arising under its mandate<sup>141</sup> and prepares a report detailing its findings and recommendations to rectify the human rights problem at issue.<sup>142</sup> Although these recommendations are not binding on the parties, the Special Rapporteur's findings are widely disseminated and contribute "to the overall body of knowledge in the field and to the understanding of complex problems and their possible solutions."<sup>143</sup> The ultimate goal for these mandates is to "raise awareness of particular problems and to shed light on the types of laws, policies and programs, which might best ensure the respect for human rights in such circumstances."<sup>144</sup> In 2000, HRC Resolution 6/27 created a new thematic

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138. *Rep. of the Special Rapporteur, supra* note 29, ¶ 1 (The COHRE report alleged violations to the human right to adequate housing, which fall within the Special Rapporteur's thematic mandate from the HRC to address international housing concerns.).

139. *Id.*; see also *Special Procedures Manual, supra* note 32, paras. 38–41, 75–76 (discussing the procedures for either HRC assignment or Special Rapporteur's selection of mandate-related investigations).

140. "Thematic Special Procedures are mandated by the HRC to investigate the situation of human rights in all parts of the world . . . . This requires them to take the measures necessary to monitor and respond quickly to allegations of human rights violations against individuals or groups, either globally or in a specific country or territory, and to report on their activities." *Special Procedures Manual, supra* note 32, para. 4.

141. The Special Rapporteur compiles information "emanating from Governments, inter-governmental organizations, international and national non-governmental organizations, national human rights institutions, the academic community, the victims of alleged human rights abuses, relatives of victims, and witnesses. Wherever feasible and appropriate mandate-holders should endeavor to consult and meet with such sources, and they should seek to cross-check information received to the best extent possible." *Id.* para. 23.

142. *Id.* paras. 78–80, 106–08.

143. *Id.* paras. 106–07 (The information is disseminated through press releases, conferences, presentations, meetings of relevant groups and available on the OHCHR website.).

144. *Id.* para. 108 ("Thematic studies can also be used to provide human rights input into the formulation of legislative, policy and other initiatives in the relevant fields.").

mandate to address housing rights, specifically, “adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.”<sup>145</sup>

In 2009, the Special Rapporteur issued a report discussing the “impact of major international sports events (mega-events) on the realization of the right to adequate housing, in particular, the positive and negative legacy of hosting the Olympic Games and the Football World Cup.”<sup>146</sup> The Special Rapporteur gathered information from the findings of previous mandate holders, “the findings of a workshop organized in June 2007 by the Centre on Housing Rights and Evictions” and IOC comments on earlier drafts of the Special Rapporteur’s report.<sup>147</sup> The Special Rapporteur’s report confirmed the allegations of housing rights violations and proposed recommendations for the IOC to better “protect the right to adequate housing in all stages of the mega-event process, from the initial bid phase through to the planning and preparation phases and the staging of the events, to the post-event legacy.”<sup>148</sup> The Special Rapporteur’s recommendations are not legally binding.<sup>149</sup> Nevertheless, these recommendations carry two forms of persuasive legal influence: the institutional authority of the U.N.<sup>150</sup> and the social, moral weight of the HRC.<sup>151</sup>

The Special Rapporteur’s recommendations are particularly timely<sup>152</sup> in light of the IOC’s recent reaffirmation of their commitment to work

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145. *Rep. of the Special Rapporteur, supra* note 29, at 1.

146. *Id.* ¶ 1 (The report was completed “in accordance with Human Rights Council resolution 6/27, and constitutes the second annual report submitted to the Council since.”).

147. *Id.* ¶ 1.

148. *Id.* ¶ 1; *see also id.* ¶¶ 45–50, 68. Not only did the Special Rapporteur confirm the COHRE’s evidentiary findings, but the recommendation for a comprehensive housing reform also closely tracks the COHRE’s recommendation. *Cf.* FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 62–64, 200–04.

149. *Special Procedures Manual, supra* note 32, para. 108 (The report for a thematic study provides “human rights input” which can lead to the formulation of policy.).

150. *See* Wessel & Wouters, *supra* note 36, at 262–69 (discussing the growing authority of the rules and recommendations promulgated by international organizations, particularly U.N. organs and agencies).

151. *Special Procedures Manual, supra* note 32, paras. 1, 4–7 (A Special Rapporteur is assigned to thematic mandates when the HRC is put on notice of a human rights violation. The Special Rapporteur investigates under the terms of its mandate to learn whether it needs to alert and/or activate the U.N. and potentially, the greater international community, to address the specific situation or issue.).

152. *See* FAIR PLAY FOR FAIR HOUSING, *supra* note 25, at 16.

One of the reasons why the Olympic Movement provides such a good case study for mega-events and housing is that in recent times there has been significant progress made within the Olympic Movement to understand the various



with the U.N. to achieve common human rights goals.<sup>153</sup> In October of 2009, the IOC was granted Observer Status at the U.N. General Assembly.<sup>154</sup> While the IOC cannot vote at the General Assembly meetings, it now has the privilege of taking the floor and participating in consultation meetings. When the IOC received this honor, U.N. Secretary General Ban Ki-Moon stated, "We look forward to further developing the close

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implications of the Olympic Games, including the long-term legacy created by the staging of this event. Increasing emphasis on the need for the Olympic Games to promote sustainable development and leave a positive post-Olympic legacy demonstrates how the Olympic Movement and the IOC are focused on addressing these concerns. The introduction of a level of transparency in the Host City election procedure is an example of efforts to address these concerns. These recent developments, including the inclusion of the environment as a third Olympic dimension, alongside sport and culture, illustrate the willingness and capacity of the Olympic Movement to engage in innovative progress. The increasing number of cooperation agreements between the UN and the IOC also indicate the significant parallels and increasing convergence between both organisations inspired by the same universal values and fundamental principles.

*Id.*

In addition, the IOC currently has the opportunity to use the momentum created by the upcoming 2012 London Olympics. London has promised to build a sustainable Games with a positive housing legacy. As these promises come into fruition, the IOC will have clear evidence that housing protections and sustainable development measures can be effectively incorporated into Olympic hosting. *See* London Organising Comm. of the Olympic & Paralympic Games Ltd. (LOCOG), LONDON 2012 SUSTAINABILITY PLAN: TOWARDS A ONE PLANET 2012 5 (2d ed. 2009) [hereinafter LONDON SUSTAINABILITY PLAN], available at <http://www.london2012.com/documents/locog-publications/london-2012-sustainability-plan.pdf>; *see also* Tom Porteous, *This is Britain's Chance to Uphold the Olympic Ideal*, HUMAN RIGHTS WATCH (Mar. 17, 2010), <http://www.hrw.org/en/news/2010/03/17/britain-s-chance-uphold-olympic-ideal>.

[T]he goal of Olympism is 'to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity.' Yet there is no mechanism to ensure that this lofty ideal is upheld. Now that the torch has passed from Vancouver to London, there's a unique opportunity for the UK to bequeath to the Olympic movement a simple means of ensuring that the Games do indeed contribute to 'the preservation of human dignity' through the protection of human rights.

*Id.*

153. Antoine Tardy, *U.N. Special Adviser Welcomes IOC's Observer Status at the U.N.*, SPORTANDDEV.ORG (Oct. 21, 2009), <http://www.sportanddev.org/newsviews/news/?1001/UN-Special-Adviser-welcomes-IOCs-Observer-Status-at-the-UN>; *Agenda 21*, *supra* note 95, at 18 (In 1999, the IOC publically confirmed its commitment to follow the goals set forth in Agenda 21, which is closely modeled off the Agenda 21 promulgated by the U.N. Conference on Environment and Development.).

154. Tardy, *supra* note 153.

relations between UNOSDP [U.N. Office for Sport Development and Peace], the whole UN family and the IOC based on our common value set.”<sup>155</sup> These common values include each organization’s commitment to achieve the eight Millennium Development Goals (“MDGs”)<sup>156</sup> and to “make the world a better and more peaceful place through sport.”<sup>157</sup> In light of this very recent affirmation of cooperation, it is likely the IOC will be more receptive to proposals from the U.N. organs and agencies. This is particularly true when the issue regards a human right, such as the right to adequate housing.<sup>158</sup> In order to maintain its goodwill with the U.N. and uphold its commitments to the MDGs, the IOC may be more likely to consider, and potentially adopt, the Special Rapporteur’s recommendations for a comprehensive housing policy reform.<sup>159</sup>

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155. *Id.*

156. Press Release, IOC, Sport Officially Recognized to Boost Millennium Development Goals (Sept. 23, 2010) [hereinafter U.N./IOC Press Release], available at <http://www.olympic.org/en/content/Media/?currentArticlesPageIPP=10&currentArticlesPage=4&articleNewsGroup=-1&articleId=101466>; see also *What are the Millennium Development Goals?*, U.N. DEV. PROGRAMME [UNDP], <http://www.undp.org/mdg/basics.shtml> (last visited Feb. 10, 2011) (Adopted by world leaders in the year 2000 and set to be achieved by 2015, the MDGs are both global and local, tailored by each country to suit specific development needs. They provide a framework for the entire international community to work together . . . making sure that human development reaches everyone, everywhere. Goal 1: Eradicate extreme poverty and hunger; Goal 2: Achieve universal primary education; Goal 3: Promote gender equality and empower women; Goal 4: Reduce child mortality; Goal 5: Improve maternal health; Goal 6: Combat HIV/AIDS, malaria and other diseases; Goal 7: Ensure environmental sustainability; Goal 8: Develop a Global Partnership for Development.”).

157. U.N./IOC Press Release, *supra* note 156 (“As the leader of the Olympic Movement, the IOC strives to act as a catalyst for collaboration with the ultimate objective of making the world a better and more peaceful place through sport. By using sport as a tool, the IOC and its partners implement various activities across the globe in fields such as humanitarian assistance, peace-building, education, gender equality, the environment and the fight against HIV/AIDS, hence contributing to the achievement of the U.N. Millennium Development Goals.”).

158. *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 32.

159. The Special Rapporteur’s recommendations do not have binding authority. However, the Special Rapporteur’s authority to “alert U.N. organs and agencies,” “advocate on behalf of victims of violations,” and “activate the international community to address particular human rights issues” has a normative effect. In order to maintain its legitimacy as a vehicle for the Movement, the IOC would be well advised to address the Special Rapporteur’s housing recommendations. *Special Procedures Manual*, *supra* note 32, para. 5; see, e.g., FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 16 (“The increasing number of cooperation agreements between the U.N. and the IOC also indicate the significant parallels and increasing convergence between both organizations inspired by the same universal values and fundamental principles.”).

While the IOC debates and negotiates a comprehensive housing strategy, it must first address the immediate impact of the Special Rapporteur's report on the on-going planning for Sochi, Russia, host city for the 2014 Olympic Games ("Sochi") and Rio de Janeiro, Brazil, host city for the 2016 Olympic Games ("Rio").<sup>160</sup> While the IOC cannot retroactively bind Sochi and Rio to new housing protection provisions, the IOC does have the authority to require housing plans and eviction disclosures.<sup>161</sup> Under the terms of the current Contract, the OCOG is bound to report to the IOC at periodic planning meetings and provide regular "updates, details and deliverables regarding the OCOG's general organization and planning process."<sup>162</sup> Updates might address the status of housing plans, potential eviction or displacement actions, and the projections for the future of the city's affordable housing stock.<sup>163</sup> Therefore, through its oversight authority, the IOC can ensure housing plans are a priority for the OCOG in Sochi and in Rio,<sup>164</sup> and that information released to the

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160. Under the terms of the Contract, the IOC reserves the right to amend the Technical Manuals, guidelines, and other directions. The City, the NOC, and the OCOG would be required to adopt its planning to accommodate any such changes. However, since the comprehensive housing reform would affect all the governing documents, including the Contract and the Charter, it is likely this "evolution of the content" would go beyond the scope IOC's reserved right. Since Sochi and Rio already signed their Contracts with the IOC, it is likely that the housing amendments, in particular an expanded use of the Fund, would not impact either host city. *See Host City Contract*, *supra* note 20, § 16; *see also Factsheet: Host City Election*, *supra* note 66, at 3; Macur, *supra* note 64, at A1.

161. Under the terms of the Contract, the OCOG is obligated to provide periodic updates to the IOC. In addition, the IOC reserves the right to demand updates at will. Since housing plans and eviction timelines directly relate to Olympic planning, the IOC can demand updates from the planners. *See Host City Contract*, *supra* note 20, §§ 16, 25 (The IOC is entitled to periodic updates from the host city and OCOG and has reserved the right to demand progress reports from the OCOG.).

162. *Id.* § 16.

163. For example, after a recent visit to Sochi, the IOC's Olympic Games Executive Director, Gilbert Felli, expressed concern about the progress of Olympic development. In particular, Felli felt Sochi was behind in the construction and expansion of hotels. At the time of his visit, the city need at least 19,000 more hotel rooms to meet the minimum requirement of 43,000 hotel rooms for the Games. However, at the same time, the IOC officially stated that Sochi's Olympic planning was "maintaining a very good pace." Mark Bisson, *IOC Identifies Challenges for Sochi at Halfway Point in Preparations*, *AROUND THE RINGS* (Oct. 14, 2010), <http://www.aroundtherings.com/articles/view.aspx?id=35752>. However, many media outlets are less convinced. *Cf.* Maria Antonova, *Sochi's Gamble: Olympic Construction Battles Nature and Time*, *RUSS. LIFE*, Mar.-Apr. 2010, at 7 (arguing that the planning is behind which puts the likelihood of a successful Olympics in Sochi in jeopardy).

164. Requiring these public disclosures will ensure that the OCOG formulates realistic and legal procedures for land acquisition and reduces the threat of secret "poverty hiding"

public is timely and accurate.<sup>165</sup> Requiring housing planning disclosures will provide protection by putting host city residents on notice.<sup>166</sup> As a result, residents will have the opportunity to respond, either through domestic courts, political action, or the microphone of the international media.<sup>167</sup> In light of the housing vulnerabilities exposed by international media and human rights groups, these small steps might be particularly important to Sochi and Rio residents.<sup>168</sup> Therefore, the IOC must act quickly to require the cities to disclose plans that address these potential

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tactics which were used in prior Olympics. See ONE WORLD, WHOSE DREAM?, *supra* note 116, at 6; *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 19–21.

165. The disclosures will ensure all relevant information is passed on to residents. In addition, this will uphold the Special Rapporteur's notice requirement for the effective and timely dissemination of relevant information from authorities to residents. See *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 34–35.

166. "Appropriate notice" of eviction plans and dialogue regarding alternative plans to protect residents' housing rights is a central requirement in the Special Rapporteur's recommendations. See *id.* ¶¶ 32–35; *Annex*, *supra* note 16, ¶¶ 37–42.

167. In addition to notice, residents must be allowed to voice opposition. According to the Special Rapporteur, residents must have "a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) the holding of public hearings providing affected persons and their advocates with an opportunity to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities." *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 35.

168. In both Sochi and Rio, international human rights groups have already identified potential housing rights vulnerabilities. See Letter from Allison Gill, Dir. Russ. HRW Office, & Minky Warden, HRW Media Dir., to Christophe De Kepper, Chief of Staff, IOC, Letter to the International Olympic Committee in Advance of May Visit to Sochi (May 7, 2009), available at <http://www.hrw.org/en/news/2009/05/03/letter-international-olympic-committee-human-rights-concerns-sochi> (Preliminary studies by HRW found potential human rights issues in the "lack of transparency around expropriations, and violations of the rights of workers involved in the construction of Olympics-related facilities."); Porteous, *supra* note 152 ("Quite apart from wider concerns about political repression in Russia, the potential for abuses directly related to the Sochi games is real. Human Rights Watch has already documented the suppression of peaceful protest during IOC visits."); see also *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 63 ("The Bid Book for the 2016 Rio Olympics anticipates the improvement and relocation of some settlements and the commitment to comply with national and international standards. Media reports refer, however, to threatened evictions in some settlements, with no information concerning resettlement or compensation."). But cf. Brasil Ministerio de Esporte, Governo de Rio de Janeiro, Rio Prefeitura, *Rio de Janeiro 2016*, 2 §9.9 CANDIDATE FILE FOR RIO DE JANEIRO TO HOST THE 2016 OLYMPIC AND PARALYMPIC GAMES 145, available at

[http://www.rio2016.org.br/sumarioexecutivo/sumario/English/Per%20Volume/Volume%202\\_eng.pdf](http://www.rio2016.org.br/sumarioexecutivo/sumario/English/Per%20Volume/Volume%202_eng.pdf) (Rio's bid application outlines the compensation plans and asserts its commitment to uphold international standards for effecting legal evictions).

vulnerabilities. This will ensure the upcoming Games in Rio and Sochi reflect the projected transition in the Movement to protect the human right to adequate housing.

Looking beyond the 2016 Olympics, the Special Rapporteur charges the IOC with the task of implementing housing rights reforms in all Olympic governing documents<sup>169</sup> and at each phase of planning,<sup>170</sup> starting with the IOC's host city selection process.<sup>171</sup> Questionnaires should be included in the Candidate City files to address initial housing plans and assess the impact on housing in the city.<sup>172</sup> If the city's housing protection procedures fail to meet international standards, or the city refuses to adapt to them, then the Candidate City should automatically be disqua-

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169. Since the housing provisions in Agenda 21 are not "readily enforceable," the IOC must amend its binding governing documents, such as the Charter and the Contract, to ensure housing standards are "addressed clearly in binding norms." *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 40–41; *see also* FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 62–71 (recommending that the IOC include housing standards, as well as mechanisms to monitor and evaluate compliance with these standards, in the Olympic "charter, statutes, codes of ethics, or rules of conduct").

170. *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 1, 45–50, 68.

171. While the success of the 2012 London Olympics' planning strategy has yet to be tested, its comprehensive housing strategy may serve as an example of the Special Rapporteur's recommendations in action. For example, when the city of London bid for the 2012 Olympic Games, it marketed itself as the "First Sustainable Olympic and Paralympic Games." London's application promised, and the London OCOG ("LOCOG") and the London Olympic Development Authority ("ODA") are now working to deliver, an Olympic Games with a sustainable legacy focused on the future growth and development of the city. Planners are accomplishing this goal by converting an old industrial zone into the Olympic Park. In the Park, the LOCOG will only build permanent venues and facilities if the structure has a long-term "after-use." If the venue or facility has no long-term use for London, then the LOCOG will only build a temporary structure. Thus the LOCOG will be able to meet the IOC's Olympic capacity requirements without wasting London's resources. LONDON SUSTAINABILITY PLAN, *supra* note 152, at 5–6, 61, 68–69. *Cf. Games Monitor: Debunking Olympic Myths*, <http://www.gamesmonitor.org.uk> (last visited Nov. 7, 2010) (London 2012 has not escaped all criticism. The Games Monitor is operated by a network of people with a desire to inform and monitor the Olympic process and the local impact. It utilizes the British freedom of information act to access planning documents and analyze LOCOG and ODA data first-hand.).

172. *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 48–49, 83 (The questionnaire must address a range of topics including: "(a) Strategies for monitoring the housing impact throughout the organization and after the event, (b) Procedures to investigate and sanction violations of the right to adequate housing and to offer redress to victims, (c) Regulations and procedures to enforce security of tenure, (d) Regulations and procedures to protect against forced evictions, discrimination and harassment against local populations in connection with the event, (e) Mechanisms to provide compensation and resettlement for affected persons.").

lified from bidding.<sup>173</sup> Once the host city is selected, housing rights, standards and mechanisms to enforce these standards, should be included in the terms of the Contract.<sup>174</sup> Through careful infusion of housing provisions, the IOC can ensure that construction decisions take into consideration the growth and future of the city and its citizens so that the Olympics serve as the “catalyst for a positive housing legacy.”<sup>175</sup>

The most basic housing protection reform, but also the most controversial, is the requirement of compensation for displaced persons.<sup>176</sup> In order for an eviction to comply with international human rights law, the evicting party should provide “adequate compensation for any real or personal property affected by the eviction.”<sup>177</sup> In the main text of the report, the Special Rapporteur broadly recommends the IOC require: “[m]echanisms to provide compensation and resettlement for affected persons.”<sup>178</sup> The report’s Annex, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, identifies the specific requirements for “fair and just compensation.”<sup>179</sup>

When evictions cannot be avoided, then “fair and just compensation” must be provided “for any losses of personal, real or other property or

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173. See *id.* ¶¶ 82, 84.

174. See *id.* ¶ 68 (“[I]t is essential that all relevant stakeholders adopt a responsible attitude concerning the impact of the Olympic Games . . . , on the right to adequate housing. Their consequences for the enjoyment of human rights must be duly considered at all stages of the event and by all actors involved.”).

175. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 202; see also *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 7–14.

176. Scholars and practitioners of housing policy and legal theory consistently debate the definitions of the qualifying terms: “reasonable,” “adequate,” or “fair and just compensation.” *E.g.*, RESTATEMENT (THIRD) OF FOREIGN REL. § 712 rep. n. 2 (1987) (discussing the various definitions and interpretations of compensation among countries and between international tribunals).

177. OHCHR Factsheet, *supra* note 18, at 5; see also *Annex*, *supra* note 16, ¶ 21 (International standards require that evictions be carried out only if they are “(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) *regulated so as to ensure full and fair compensation and rehabilitation*; and (f) carried out in accordance with the present guidelines. The protection provided by these procedural requirements applies to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law.”) (emphasis added).

178. *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 83(e). Ultimately, the decision of which factors to include in calculating just compensation is for the IOC. Ideally, this definition will be formulated in a working group, including representatives from other mega-event organizations. Together, the IOC and groups such as the International Association of Football Federations (responsible for the Football World Cup), can develop a uniform set of housing reforms to govern all international mega-events.

179. *Annex*, *supra* note 16, ¶¶ 59–63.

goods, including rights or interests in property in the amount necessary for the promotion of the general welfare.”<sup>180</sup> “Interests in property” includes interests of both tenants and owners,<sup>181</sup> and “such property” extends to “losses related to informal property, such as slum dwellings.”<sup>182</sup> The calculation for “fair and just compensation” includes:

Any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as: loss of life or limb; physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better

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To the extent not covered for relocation, the assessment of economic damage should take into consideration losses and costs, for example, of land plots and house structures; contents; infrastructure; mortgage or other debt penalties; interim housing; bureaucratic and legal fees; alternative housing; lost wages and incomes; lost educational opportunities; health and medical care; resettlement and transportation costs (especially in the case of relocation far from the source of livelihood). Where the home and land also provide a source of livelihood for the evicted inhabitants, impact and loss assessment must account for the value of business losses, equipment/inventory, livestock, land, trees/crops, and lost/decreased wages/income.<sup>183</sup>

The potential costs to be included in the calculation of “fair and just compensation” are far reaching. According to the Special Rapporteur, to the extent that evictions are “unavoidable,” the OCOG and the host city assume the responsibility to compensate residents for their “fair and just” losses.<sup>184</sup> This is not a novel concept, though the definition and calculation of just compensation varies widely.<sup>185</sup> Here the Special Rapporteur

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180. *Id.* ¶ 60; see also OHCHR Factsheet, *supra* note 18, at 3–9.

181. *Annex, supra* note 16, ¶ 61.

182. *Id.*

183. *Id.* ¶¶ 60, 63.

184. *See id.*

185. Specific compensation provisions are common in private international law when a multi-lateral corporation signs a contract to do business in a foreign country, or in bilateral agreements such as Friendship, Commerce and Navigation (“FCN”) treaties and Bila-

drafted the international standard for compensation with broad strokes.<sup>186</sup> However, the breadth of this proposed compensation package has potential to be more destructive to the Movement than protective to human rights.

As the costs of land acquisition rise, the compensation element may prohibit developing countries from amassing sufficient land to build the Olympic infrastructure. Even if land is readily available, the added cost of potentially large compensation packages may still deter developing nations from submitting bids to host.<sup>187</sup> Together these concerns will limit the pool of potential host cities.<sup>188</sup> Therefore, while broad compensation provisions seem ideal from a traditional human rights perspective, in practice, this reform may hinder a competing human rights goal, the universality of the Games.<sup>189</sup> Before the IOC adopts the Special Rapporteur's recommendations wholesale, it must consider the economic impact of these new requirements. The IOC must balance the protection of indi-

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teral Investment Treaties ("BITs"), which contain provisions protecting property rights. See RESTATEMENT (THIRD) OF FOREIGN REL. § 712 rep. n. 1 (1987). Despite the widespread nature of these clauses, the actual scope of compensation packages varies widely between agreements and among nations. For example, "[t]he United States Government has consistently taken the position in diplomatic exchanges and in international fora that under international law compensation must be 'prompt, adequate and effective' . . . . That formulation has met strong resistance from developing states and has not made its way into multilateral agreements or declarations or been universally utilized by international tribunals, but it has been incorporated into a substantial number of bilateral agreements negotiated by the United States as well as by other capital-exporting states both among themselves and with developing states." RESTATEMENT (THIRD) OF FOREIGN REL. § 712 cmt. c (1987).

186. See *Annex*, *supra* note 16, ¶¶ 60–63.

187. Whether a host city or its country earns a net benefit from hosting the Game is not clear. In an uncertain economy many developing nations are not able to take this gamble, and even if they are, we might ask whether they should be asked to. See *World Economy: Mega-events will Face Greater Skepticism*, ECON. INTELLIGENCE UNIT LTD., VIEWSWIRE (Oct. 5, 2010), [http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article\\_id=1677482152&VWNL=true](http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=1677482152&VWNL=true) (expressing skepticism about whether there is an economic benefit to hosting the Games and questioning whether hosting a mega-event is an "appropriate use of public funds" in a developing nation. The author notes that the host country leaves itself "open to the criticism that spending on a glitzy mega-event is inappropriate in a developing country where poverty alleviation and basic development are more urgent tasks.").

188. Under the proposed comprehensive reform, the host city must disclose its housing protection provisions in the bidding process and any nation not in compliance or unwilling to comply with IOC standards would be eliminated from candidature. See, e.g., *Rep. of the Special Rapporteur*, *supra* note 29, ¶¶ 49, 70–73, 82–85.

189. See *International Cooperation*, *supra* note 55, at 719; *Message from the IOC President*, *supra* note 106, at 5.



vidual human rights with the protection of international interests in providing a truly universal Olympic Games.<sup>190</sup>

### III. THE OLYMPICS FOR ALL AND BY ALL: PRESERVING THE UNIVERSALITY OF THE GAMES WITH THE GENERAL RETENTION FUND

Assuming the IOC is amenable to the comprehensive housing reforms, it must address the financial consequences of imposing legally binding checks on the host city's eviction procedures. Adding a compensation requirement without a financial safety net would disproportionately burden developing nations and potentially prohibit them from hosting the Games.<sup>191</sup> However, the IOC can address this concern by amending the possible uses of the portion of the profits held in the Fund.<sup>192</sup>

Incorporating housing protections within the Contract binds the host city to uphold its obligations to its residents.<sup>193</sup> If the host city breaches its Contract by failing to provide adequate compensation, then the IOC could exercise one of three forms of recourse:

- (1) Require specific performance of the obligation,
- (2) Impose actual damages for non-compliance, or

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190. Cf. Andre Travill, *Impact of Mega Sport Events in a Developmental Context*, in XIII OLYMPIC CONGRESS: CONTRIBUTIONS, *supra* note 13, at 571 (Developing nations, such as China, South Africa, and Brazil, often have specific objectives, which are distinct from the general concerns of image building and economic growth.). Developed nations with a long history of effective compensation legislation might also oppose these changes as an unreasonable imposition on national sovereignty. However, these conflicts can be resolved during the host city selection process. At this early stage, the Evaluation Committee will review the country's specific eviction compensation requirements and discuss potential conflicts with the bidding nation. As long as the nation's standards are equal to or greater than international standards, then the IOC can defer to the nation's statutory regulations. Cf. *Rep. of the Special Rapporteur*, *supra* note 29, at 17–18.

191. See, e.g., Christopher Gaffney, *Mega-events and Socio-spatial Dynamics in Rio de Janeiro, 1919–2016*, 9 J. LATIN AM. GEOGRAPHY, 7, 27 (2010) (“The mega-event city is shocked by years of construction projects, debt accumulation, the restructuring of the everyday, media campaigns, the arrival of hundreds of thousands of wealthy tourists, and the militarization of urban space. These shocks reverberate through time and space while the instruments of their implementation dissolve into memory.”).

192. See *Host City Contract*, *supra* note 20, § 50(a) (“The IOC shall determine the application of the general retention fund in relation to the organization of the Games and the obligations of the OCOG in respect thereof.”).

193. See *Rep. of the Special Rapporteur*, *supra* note 29, ¶ 89 (The Special Rapporteur recommends that the housing provisions be incorporated in all hosting agreements); cf. *Host City Contract*, *supra* note 20, § 4–7 (The terms of the Contract are binding on all signing parties and the IOC retains the authority to demand performance or exercise legal recourse if these conditions are not met.).

- (3) Retain the percentage of profits that are held in the Fund.<sup>194</sup>

Neither specific performance nor actual damages will provide an efficient remedy for the failure to pay compensation. In this context, both forms of recourse require the IOC to compel the host city to pay the residents. This is likely to create an administrative delay during the critical period immediately following an eviction.<sup>195</sup> For example, the IOC must learn of the deficiency, investigate the allegation, calculate the compensation, account for any damages for delayed performance, and finally, demand payment. Even after the IOC completes its due diligence, the host city may continue to delay. At which point, the IOC must either cancel the Olympics or negotiate with the host city representatives.<sup>196</sup> Each step is another delay in the distribution of compensation.

In addition to inefficiency concerns, neither special performance nor actual damages will achieve the IOC's ultimate goals to protect the rights of the displaced citizens and to execute a successful Olympic Games. If the failure to pay is due to an actual inability to pay, then specific performance or actual damages would only force cost-cuts in other areas<sup>197</sup> or add to an unsustainable financial burden.<sup>198</sup> Under either scenario the host city and the ultimate success of the Games are put in a perilous position. Either the host city is left with an unreasonable long-term Olympic debt, or the city initiates cost cutting measures which may lead to unsafe

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194. *Host City Contract*, *supra* note 20, § 50(a)–(c).

195. See *Annex*, *supra* note 16, ¶ 52 (Compensation and alternative accommodations must be provided immediately upon the eviction, except in cases of force majeure.); see also U.N. High Comm'r for Hum. Rts., U.N. Hum. Rts. Couns. [HRC], *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* 4, U.N. Doc. A/HRC/13/20/Add. 1 (Feb. 22, 2010) ("The Special Rapporteur reminds all states that eviction should never result in rendering people homeless and putting them in a vulnerable situation."); RESTATEMENT (THIRD) OF FOREIGN REL. § 712(1) (1987) ("For compensation to be just . . . [it must] be paid at the time of taking, or within a reasonable time thereafter . . .").

196. *Host City Contract*, *supra* note 20, § 50(a)–(c).

197. When Hosts are faced with these insurmountable budgetary challenges the human rights of the most vulnerable citizens are often the first sacrificed. See, e.g., FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 198–99.

198. Some academics argue that the projected financial benefits of hosting large sporting events are often exaggerated, and that the actual economic development impact is typically often much lower than expected. E.g., Victor A. Matheson, *Upon Further Review: An Examination of Sporting Event Economic Impact Studies*, 5 SPORTS J. 1 (2002), available at <http://www.thesportjournal.org/article/upon-further-review-examination-sporting-event-economic-impact-studies>.

construction, labor wage cuts, and/or general interference with the overall safe execution of the Games.<sup>199</sup>

The IOC's final option for recourse is to retain the proceeds held in the Fund.<sup>200</sup> The Fund contains five percent of OCOG earnings from the sale of broadcasting rights and the International Program.<sup>201</sup> This money is reserved to compensate the IOC in case:

- (1) The Games do not take place in the host city as planned,
- (2) The host city, the NOC or the OCOG do not comply with their obligations pursuant to the Contract,
- (3) The IOC needs to "set-off any and all of its obligations" from the Contract "for any damages resulting from any above mentioned non-compliance."<sup>202</sup>

The money is held in the Fund until the Games are complete and the OCOG has presented its final accounting forms.<sup>203</sup> If the OCOG, host city, and NOC uphold all contractual obligations then the IOC releases the sums in the Fund and any accrued interest to the OCOG.<sup>204</sup> However, the Contract terms are intentionally broad to allow the IOC to set-off incurred expenses in the event of any "non-compliance" or "damages."<sup>205</sup>

It is reasonable to conclude that if the Host fails to comply with the compensation requirements, then the IOC would be entitled to use the Fund to rectify the damages.<sup>206</sup> Under this understanding, we would find that the Fund already serves as a safety net for the compensation requirement. However, this position fails to account for the particular problem of interpretation that will likely arise around the term "compensation." Unlike the failure to build a venue according the specifications of IOC Technical Manuals, adequately protecting and compensating hous-

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199. As the costs to host the Games rise and squeeze out budgetary reserves, host cities will be forced to find areas to cut costs. If the housing provisions prevent "cheap" evictions, then other areas will, or perhaps the Games in its entirety could, be in jeopardy. *E.g.*, Cynthia Psarakis, *The Olympics That Weren't*, MSNBC NEWS (Feb. 18, 2010), <http://www.msnbc.msn.com/id/35441125> (In 1970 the IOC selected Denver to host the 1976 Winter Games. However, the city was ill-prepared and was forced to step down from its hosting obligations in 1972 after taxpayers passed an amendment refusing to pay the rising costs of Olympic preparations.).

200. *Host City Contract*, *supra* note 20, § 50.

201. *Id.* § 50(a).

202. *Id.* § 50(c).

203. *Id.* § 50(d).

204. *Id.* § 51.

205. *See id.* § 50(b)–(c).

206. *See id.* § 50 (c).

ing rights is hard to identify and to monetize.<sup>207</sup> Even if the IOC and the host city clearly define the scope of compensation in the governing documents, the implementation of the housing plan and the calculation of compensation is an inherently subjective act. As a result, the point of completion and the assurance of compliance are not easily defined.<sup>208</sup>

The Contract allows for withholding and liquidating funds for “non compliance” and “damages.”<sup>209</sup> What constitutes “non compliance” or “damages” in the housing compensation context is unclear, especially in the international community.<sup>210</sup> Therefore, the IOC’s attempt to exercise its setoff rights is likely to lead to a dispute regarding who is entitled to the proceeds of the Fund. This dispute will create an obstacle to the goal of an efficient dispensation of emergency compensation to displaced residents.

The IOC must amend future host city contracts to (1) explicitly reserve its right to access the reserved profits in the Fund to pay emergency compensation<sup>211</sup> and (2) immediately refer any compensation disputes to arbitration for prompt resolution.<sup>212</sup> Under these terms, a host city’s failure to pay compensation would trigger IOC intervention. The IOC would have express authority to demand payment of compensation. If the host city refuses to comply with IOC demands for compensation compliance,

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207. For example, the Special Rapporteur’s “fair and just compensation” requires a remedy for all “losses of personal, real or other property or goods, including rights or interests in property.” See *Annex, supra* note 16, ¶ 60. Calculating this compensation includes factors such as: “loss of life or limb; physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services and psychological and social services.” See *id.* Putting a fixed dollar amount on these compensation packages which the host city and the IOC both agree to be “fair and just” may be difficult in practice. See *id.*; see also RESTATEMENT (THIRD) OF FOREIGN REL. § 712 rep. n. 3 (1987) (“No formula defining just compensation can suit all circumstances.”).

208. See RESTATEMENT (THIRD) OF FOREIGN REL. § 712 cmt. d (1987) (“The elements constituting just compensation are not fixed or precise . . .”).

209. *Host City Contract, supra* note 20, § 50 (b)–(c).

210. See, e.g., RESTATEMENT (THIRD) OF FOREIGN REL. § 712 rep. note 2 (1987) (discussing the various definitions and interpretations of “compensation” across states and between international tribunals).

211. See *Host City Contract, supra* note 20, § 50.

212. See Olympic Charter, *supra* note 3, r. 59, at 104 (“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.”); see also SPORTS LAW SUPP., *supra* note 51, § 21:6.

then the IOC can refer the dispute to the Court of Arbitration for Sport ("CAS").<sup>213</sup>

The CAS was created by the IOC to serve as the "central specialized authority" to resolve Olympic disputes.<sup>214</sup> The CAS is uniquely prepared to handle these disputes because the arbiters are experts specializing in the particularities of Olympic law and policy, and the arbiters follow a strict procedure specially designed to produce prompt decisions.<sup>215</sup> In addition, these decisions are "final and binding on all parties."<sup>216</sup> If the CAS rules in favor of the IOC, then the Fund would be immediately available to provide emergency compensation. This solution would provide a clear procedure and a prompt resolution of compensation-related disputes.

While the compensation from the Fund may not reach the total monies necessary for "fair and just compensation,"<sup>217</sup> this provision would allow the IOC to react quickly to the needs of displaced residents and provide emergency compensation until a long-term solution can be reached. In order to preserve the right to adequate housing during the construction and preparation for the Games and maintain the integrity of the humanitarian mission of the Movement, the IOC should engage in a comprehensive reform to infuse housing policies in the Olympic governing documents, including, in particular, a provision in the host city contract to ensure IOC oversight in the payment of compensation to displaced residents of host cities.<sup>218</sup>

#### CONCLUSION

The history of improper land acquisition and long-term displacement of the host city residents without compensation<sup>219</sup> violates the human

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213. The Charter and the Contract require all Olympic parties to use the Court of Arbitration for Sport to arbitrate any Olympics-related disputes. *See* Olympic Charter, *supra* note 3, r. 59, at 104; *Host City Contract*, *supra* note 20, § 72.

214. SPORTS LAW SUPP., *supra* note 51, § 21:6.

215. *See* KAUFMANN-KOHLER, *supra* note 51, at 4–5, 30–39 (discussing the special needs and abilities of the Olympic arbitral panel and the rules and procedures followed by the CAS to ensure quick decision-making).

216. SPORTS LAW SUPP., *supra* note 51, § 21:6 ("CAS awards are final and binding on all parties. They can be enforced internationally by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.").

217. *Annex*, *supra* note 16, ¶¶ 60–68.

218. This solution aligns with the sentiments expressed by contributors to the XIII Olympic Congress. *E.g.*, *International Cooperation*, *supra* note 55, at 719; *see, e.g.*, Smirnov, *supra* note 110, at 249.

219. *See generally Rep. of the Special Rapporteur*, *supra* note 29; FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25; ONE WORLD, WHOSE DREAM?, *supra* note 116, at 6–7.

right to adequate housing<sup>220</sup> and the Fundamental Principles of Olympism.<sup>221</sup> Under the terms of the Charter, the IOC is bound to protect the integrity of the Games and to maintain its status as a symbol of the Movement and its Principles.<sup>222</sup> In addition, upon accepting the U.N. Observer Status and adopting Agenda 21, the IOC expressly committed itself to actively assist the U.N. in protecting and promoting human rights.<sup>223</sup> As long as the Games are the impetus for large-scale housing rights violations, the IOC is in breach of both its internal duties and external commitments.<sup>224</sup> The Special Rapporteur has taken the lead by demanding the IOC “adopt a responsible attitude concerning the impact of the Olympic Games . . . on the right to adequate housing. The[] consequences for the enjoyment of human rights must be duly considered at all stages of the event and by all actors involved.”<sup>225</sup> Now “we” as the constituents of the Movement, the individual spectators, athletes, and domestic governments around the world must ensure comprehensive housing reforms are enacted.<sup>226</sup>

In order for housing reforms to comport with the values of Olympism, the IOC must: (1) protect housing rights with procedures that uphold international standards, and (2) preserve the universality of the Olympics. The added costs of implementing an eviction compensation policy may interfere with universality. By increasing the costs for host cities, the reforms would severely impact the feasibility of developing nations hosting the Games.<sup>227</sup> However, the Fund can serve as a financial safety net to help mitigate this conflict. Therefore, the IOC must amend future host city contracts to (1) explicitly reserve its right to access the reserved profits in the Fund to pay emergency compensation<sup>228</sup> and (2) immediately refer any compensation-related disputes to arbitration for prompt reso-

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220. UDHR, *supra* note 26, art. 25(1); ICESCR, *supra* note 27, art. 11.

221. See Olympic Charter, *supra* note 3, at 11, r. 1 para. 1, at 13; see also Code of Ethics, *supra* note 12, at 1–2 (affirming the IOC's duty to uphold the Movement's ideals.).

222. Olympic Charter, *supra* note 3, r. 1, para. 1, at 13.

223. U.N./IOC Press Release, *supra* note 156; Agenda 21, *supra* note 95, at 18.

224. UDHR, *supra* note 26, art. 25(1); ICESCR, *supra* note 27, art. 11.

225. Rep. of the Special Rapporteur, *supra* note 29, ¶ 68.

226. FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 17 (“[O]nly if each party [governments, regional and local authorities, project partners, construction companies, corporate sponsors, athletes and spectators] involved in such events is cognisant of the effects that their involvement can potentially have, that we can begin to see changes for those whose housing rights are most negatively affected.”).

227. See, e.g., Markin, *supra* note 13, at 599–600; International Cooperation, *supra* note 54, at 719.

228. See Host City Contract, *supra* note 20, § 50.

lution.<sup>229</sup> This solution would ensure assistance is available to displaced persons without creating administrative delays or imposing an insurmountable financial barrier for potential host cities in developing nations.<sup>230</sup>

Under the Universal Declaration of Human Rights, the Movement is bound as an “organ of society” to “strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>231</sup> Thus, the IOC has the obligation to inform<sup>232</sup> prospective host cities and their national governments about the requirements they must fulfill to protect individual rights to adequate housing and to enforce the protection of these rights, at least within its contractual authority over the host city, OCOG, and NOC.<sup>233</sup> By doing so, the Olympics will more effectively fulfill its mission, as stated by IOC President, Jacques Rogge, to “make[] all of us equal, bring[] us together, and place[] each of us firmly in the world. Not apart from it.”<sup>234</sup>

*Elizabeth Hart Dahill\**

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229. See Olympic Charter, *supra* note 3, r. 59, at 104; SPORTS LAW SUPP., *supra* note 51, § 21:6; see also KAUFMANN-KOHLER, *supra* note 51, at 105–11, 117–32.

230. See Smirnov, *supra* note 110, at 249; Okano, *supra* note 110, at 249. See generally Markin, *supra* note 13, at 599. Cf. Faure & Lefevre, *supra* note 54.

231. UDHR, *supra* note 26, pmb.; FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 59 & n.272.

232. Even if an individual nation has not adopted the right to adequate housing in its domestic policy, the IOC, as an authoritative international organization, can draw attention to, and assert the priority of, this human rights norm as a standard of international law. See Wessel & Wouters, *supra* note 36, at 268. International norms do not always reach States’ domestic legal order directly; they may do so through international bodies.

While treaties and custom remain the primary sources of international law, we have seen above that decisions of international organizations are playing an ever larger part in the development of international law. As national governments have become increasingly dependent on international institutions, a large part of national policy is influenced by and dependent on international decisions.

*Id.* at 278.

233. The IOC can only enforce housing rights protections through private contractual agreements. However, if the IOC, as the leader of the Movement and a U.N. partner, chooses to revise its governing documents then it will help elevate the legitimacy of the right to adequate housing on the world stage. See *id.* at 262–91 (arguing that decisions and regulations by international organizations can have significant effects on shaping international law); see also FAIR PLAY FOR HOUSING RIGHTS, *supra* note 25, at 59.

234. Advancing the Games, *supra* note 1, at 10.

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# CYBERATTACK ATTRIBUTION MATTERS UNDER ARTICLE 51 OF THE U.N. CHARTER

“[N]onstate actors . . . are able to organize into . . . networks . . . more readily than [] traditional, hierarchical, state actors . . . . [W]hoever masters the network form stands to gain the advantage.”<sup>1</sup>

## INTRODUCTION

Day 1: An anonymous online group posts a message instructing the United States (“U.S.”) to close all overseas bases within six days or else suffer destruction of major U.S. infrastructure.

Day 6: Twenty-two hydroelectric dams and power plants along the West Coast are remotely shut down, severing electricity and phone service throughout the western United States. Thirty-five deaths are reported in one day, ranging from traffic accidents to heart attacks and heatstroke among the elderly. Reports emerge that an unpowered dam in California broke, killing thousands.

Day 9: The U.S. air-traffic control system is sabotaged, freezing radar screens and scrambling information among close-flying planes. After a midair collision kills almost 500 people, all commercial flights are grounded. Economic loss from the groundings amounts to billions daily.

Day 12: A computer-controlled chemical factory in Detroit blows up, destroying the eastern half of the city. After reviewing circumstantial evidence, the military suspects Russia and China are the masterminds. Both countries deny any involvement.

Day 20: The United States retaliates physically while covert cyberattacks shut down both Russian and Chinese power grids. Oil pipelines in both countries are disrupted. Transportation, financial and power systems are shut down, causing immeasurable economic damage. Reports indicate that the number of Russian and Chinese deaths far outnumber those suffered in the United States.

Day 25: After the attacks subside, U.S. Information Warfare Command obtains user identification data from the West Coast attacks. The data is traced back to civilian-led liberation groups in the Republic of Abkhazia. Attackers merely routed strikes through Russian and Chinese networks to provide the illusion of hostility toward the United States.

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1. Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Distributed Security*, 10 B.U. J. SCI. & TECH. L. 1, 76 (2004) [hereinafter Brenner, *Toward a Criminal Law*] (quoting David Ronfeldt & John Arquilla, *Networks, Netwars, and the Fight for the Future*, 6 FIRST MONDAY 10, Oct. 2001), available at <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/889/798>.

Day 26: In a public apology to Russia and China, the President says, "We are all victims." That may be, but it seems the people of both nations have paid a higher price for the United States' mistake.<sup>2</sup>

This is the new reality. Cyberattacks and information-systems warfare are no longer fictional concepts posing as a concern for some far-off generation.<sup>3</sup> Private, public, and military systems infrastructures are vulnerable to cyberattacks worldwide.<sup>4</sup> Attacks are not limited to the United States, as a great number of countries have been targeted.<sup>5</sup> Many of the

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2. John Arquilla, *The Great Cyberwar of 2002*, WIRED (Feb. 1998), [http://www.wired.com/wired/archive/6.02/cyberwar\\_pr.html](http://www.wired.com/wired/archive/6.02/cyberwar_pr.html).

3. Richard W. Aldrich, *How Do You Know You Are at War in the Information Age?*, 22 HOUS. J. INT'L L. 223, 226 (2000).

4. For example, Google's password system was the target of a cyberattack in January 2010 that resulted in the theft of Google's intellectual property. Jonathan Stempel, *Google Cyber Attack Hit Password System: Report*, REUTERS (Apr. 20, 2010), <http://www.reuters.com/article/idUSTRE63J0BO20100420>. In 2009, cyberspies infiltrated the U.S. electrical grid and implanted programs that could disrupt the system. Siobhan Gorman, *Electricity Grid in U.S. Penetrated by Spies*, WALL ST. J. (Apr. 8, 2009), <http://online.wsj.com/article/SB123914805204099085.html>. The United States' military network of "2.1 million computers and 10,000 local area networks (LANs) . . . are probed by outsiders about five hundred times a day." Aldrich, *supra* note 3, at 228–29 (citing Douglas Waller, *Onward Cyber Soldiers*, TIME, Aug. 21, 1995, at 38, 39).

5. See Robert Coalson, *Behind The Estonia Cyber Attacks*, RADIO FREE EUR. RADIO LIBERTY (Mar. 6, 2009), [http://www.rferl.org/content/Behind\\_The\\_Estonia\\_Cyber\\_attacks/1505613.html](http://www.rferl.org/content/Behind_The_Estonia_Cyber_attacks/1505613.html) (discussing the 2007 cyberattack that blocked Estonia's websites, paralyzing the country's Internet infrastructure and freezing bank cards and cellular phone networks); see also Associated Press, *A Look at Estonia's Cyber Attack in 2007* (July 8, 2009), <http://www.msnbc.msn.com/id/31801246> ("Experts said hundreds of thousands of computers were used in a coordinated attack against government agencies and banks."); Matthew Weaver, *Cyber Attackers Target South Korea and US*, GUARDIAN.CO.UK (July 8, 2009), <http://news.bbc.co.uk/2/hi/technology/8139821.stm> (discussing the cyberattack against South Korea's presidential Blue House, defense ministry, national assembly, Shinhan bank, and Korea Exchange bank); Dan Goodin, *Georgian Cyber Attacks Launched by Russian Crime Gangs*, THE REGISTER (Aug. 18, 2009), [http://www.theregister.co.uk/2009/08/18/georgian\\_cyber\\_attacks/](http://www.theregister.co.uk/2009/08/18/georgian_cyber_attacks/) (The cyberattack, which targeted e-commerce sites and Georgian government sites, "coincided with the Russian military's invasion of Georgia in August 2008."). It is not just the United States that fears cyberattacks from actors based in foreign countries. According to a 2009 McAfee survey, a plurality of global companies fear cyberattacks from U.S.-based actors more than foreign-based actors. See Robert Lemos, *Cyber Attacks from U.S. "Greatest Concern"*, SECURITYFOCUS (Jan. 28, 2010), <http://www.securityfocus.com/print/brief/1066> ("The survey found that 36 percent ranked network attacks from the United States as their "greatest concern," compared to 33 percent most concerned about attacks from China. Russia came in a distant third, with only 12 percent of those polled rating it the most concerning."). For the report based on the study, see Stewart Baker, Shaun Waterman & George Ivanov, *In the Crossfire: Critical Infrastructure in the Age of Cyber War*,

actors executing or participating in these attacks will be nonstate, and in extreme cases, stateless.<sup>6</sup>

Attribution is the means by which responsibility for illegal acts or omissions are attached to the state.<sup>7</sup> Vincent-Joël Proulx<sup>8</sup> described the need for eliminating the concept of international state attribution and holding a state strictly liable if it fails to prevent terrorists from launching an attack within its borders.<sup>9</sup> Although this seems contradictory to the United Nations (“U.N.”) Charter, Proulx argued that this notion is in fact supported by the international community’s objective of eradicating terrorism.<sup>10</sup>

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McAfee, <http://www.mcafee.com/us/resources/reports/rp-in-crossfire-critical-infrastructure-cyber-war.pdf> (last visited on Dec. 21, 2010).

6. Ronfeldt & Arquilla, *supra* note 1.

7. Amanda Tarzwell, Note, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OR. REV. INT’L L. 179, 192 (2009).

8. Proulx received LL.L. and LL.B. degrees from the University Ottawa and an LL.M. in International Legal Studies at New York University School of Law. *Former Clerks*, MCGILL CTR. FOR HUMAN RIGHTS & LEGAL PLURALISM, <http://www.mcgill.ca/humanrights/clinical/clerkships/formerclerks/> (last visited Dec. 21, 2010). Proulx is currently pursuing a doctoral degree in international law at McGill University. *Id.* Proulx’s dissertation surveys the relationship between international state responsibility and terrorism, with a focus on human rights and international relations. *Id.*

9. Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT’L L. 615, 643–53 (2005). It should be noted that there is no international agreement as to the definition of terrorism. *Id.* at 647; *see also* Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT’L L. REV. 1009, 1030–41 (2004) (discussing “terrorism” as having an international nature). Determining what constitutes cyber terrorism is particularly difficult. *See* Susan W. Brenner, “*At Light Speed*”: *Attribution and Response to Cybercrime/Terrorism/Warfare*, 97 J. CRIM. L. & CRIMINOLOGY 379, 382–405 (2007) [hereinafter Brenner, *Attribution and Response*]. Professor Brenner, in short, defines cybercrime and cyberterrorism as the use of computer technology to commit a crime or engage in terrorist activity, respectively. *Id.* at 382, 386. Although terrorism is thought of as a type of crime, Professor Brenner distinguishes those concepts in that “crime is personal while terrorism is political.” *Id.* at 387. She then distinguishes cyberterrorism from cyberwarfare in that terrorism is intended to “demoralize a civilian population,” while warfare is “not supposed to target civilians.” *Id.* at 387–88.

10. Proulx, *supra* note 9, at 643–53. On September 12, 2001, the U.N. General Assembly passed a resolution calling for “international cooperation to prevent and eradicate acts of terrorism” and holding “those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of such acts . . . accountable.” *Id.* (quoting G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg. U.N. Doc. A/Res/56/1 (2001)). The U.N. Charter is a treaty signed and ratified by 192 states with the express purposes of “main-  
tain[ing] international peace and security, . . . [and] develop[ing] friendly relations among nations based on respect for the principle of equal rights . . .” U.N. Charter art. 1, para.

Attributing responsibility to a state for an attack is guided by two diverging concepts—direct and indirect responsibility.<sup>11</sup> Under direct responsibility, a state may be held liable if its direct act or omission led to harm, if a group or actor acts as a state agent, or if a state has “control” over a nonstate actor.<sup>12</sup> Indirect responsibility is more opaque and appears when there is no underlying link between an actor and a state.<sup>13</sup> Assigning direct liability for an attack is difficult if a state has no ties to terrorist activities occurring in its territory.<sup>14</sup> As such, the indirect liability analysis shifts to a focus on the host-state’s duty to prevent terrorist attacks from emanating from within its territory.<sup>15</sup> A state’s apathy or disregard for terrorist activity within its territory triggers its responsibility as though it had directly participated in the attack.<sup>16</sup> Given the enorm-

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1, 2. Furthermore, the U.N. Charter requires members to “settle their international disputes by peaceful means in such a manner that international peace and security . . . are not endangered.” *Id.* art. 2, para. 3.

11. Proulx, *supra* note 9, at 623–26. Proulx refers to this as the “direct/indirect dichotomy.” *Id.* at 623.

12. *Id.* at 624; *see also* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua] (holding a state legally responsible for the acts of nonstate actors if it had “effective control” over them); Prosecutor v. Tadic, Case No. IT-94-I-A, I.C.T.Y. App. Ch., at 49 (July 15, 1999) [hereinafter Tadic] (holding a state legally responsible for the acts of organized armed groups when the state had “overall control” over them). As Professor Proulx points out, “the issues surrounding direct state responsibility are relatively clear and require no further discussion here.” Proulx, *supra* note 9, at 624.

13. *Id.* at 624. Professor Proulx’s notion of indirect responsibility is consistent with the concept of “vicarious responsibility.” *Id.* at n.43; *see also* Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 13 (2003) (“The difference between [direct] responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious acts, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act.”).

14. Proulx, *supra* note 9, at 624.

15. *Id.* The focus of the analysis is still whether the state breached an international obligation. However, under indirect responsibility the breach will likely consist of an omission, intentional or unintentional, as opposed to an act. *Id.*; *see, e.g.*, John Bellinger, Legal Advisor to the U.S. Sec’y of State, Legal Issues in the War on Terrorism, Address Before the London School of Economics (Oct. 31, 2006), in 8 GERMAN L.J. 735, 739 (2007) (“As a practical matter . . . a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.”).

16. Proulx, *supra* note 9, at 624; *see also* DANIEL BYMAN, DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM 219 (2005) (noting the “great[] contribution a state can make to a terrorist’s cause [by] not act[ing] against it”).

ous impact nonstate actors have on international peace, such a broadening of state responsibility is not unreasonable.<sup>17</sup>

State responsibility depends on attribution.<sup>18</sup> Attribution is not only a necessary factor in determining whether a state has violated international law, it is also used to determine whether a victim-state may take action against the perpetrating state.<sup>19</sup> Nonstate actors, whose nature and class place them outside the definition of a state, increasingly perform modern acts of aggression.<sup>20</sup> By expanding states' duties to monitor and restrain nonstate actors, the international community permits imposing liability on states for failing to prevent acts not traditionally attributable to them.<sup>21</sup>

This Note theorizes that, within the ambit of cyberattacks and cyberterrorism, the concept of state attribution must not be eliminated. Not only must cyberattack attribution remain in place, it should be reinforced and enhanced through increased state cooperation and collaboration. The Internet provides virtually everybody with the opportunity to disguise one's online persona, erase one's digital tracks, and transfer evidence onto innocent computers.<sup>22</sup> In order to ensure that it is not retaliating against an innocent state, a victim-state must correctly attribute an attack to the actual attacker. Identifying a cyberattacker is essential to determining the nature of an attack.<sup>23</sup> Determining the nature of an attack is generally the first step in developing a response, whether it is political, domestic, or military, to ensure that it does not violate Article 51 of the

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17. Graham H. Todd, *Armed Attack in Cyberspace: Detering Asymmetric Warfare with an Asymmetric Definition*, 64 A.F.L. REV. 65, 89 (2009); see also Anne Petitpierre, Vice-President, Int'l Comm. of the Red Cross, Opening Address at the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors (Oct. 30, 2002), available at <http://www.cicr.org/eng/resources/documents/misc/5f8jez.htm> ("In all areas of international relations—economics, ecology, politics, military affairs—non-State actors, be they infra- or supra-State, have assumed increasing importance and have asserted themselves as international players that cannot be ignored.").

18. Berglind Halldorsdottir Birkland, Note, *Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide*, 84 N.Y.U. L. REV. 1623, 1630 (2009).

19. *Id.* at 1630–31; see also Jorn Greibel & Milan Plucken, *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia*, 21 LEIDEN J. INT'L L. 601, 604 (2008) (explaining that state attribution leads to significant consequences, in particular, that "the victim state [may also] take measures in reaction to the violation").

20. Michael Anderson, Note, *Reconceptualizing Aggression*, 60 DUKE L.J. 411, 411 (2010).

21. Birkland, *supra* note 18, at 1626.

22. Meiring de Villers, *Reasonable Foreseeability in Information Security Law: A Forensic Analysis*, 30 HASTINGS COMM. & ENT. L.J. 419, 459–60 (2008).

23. Brenner, *Attribution and Response*, *supra* note 9, at 405.

U.N. Charter.<sup>24</sup> As such, attribution is an issue that should not be circumvented.

Part I of this Note examines Articles 2(4) and 51 of the U.N. Charter and the evolution of international jurisprudence attributing legal responsibility to a state for the acts of nonstate actors, as it is important to understand how states became responsible for the acts of nonstate actors. Part II will analyze the inherent difficulties in determining the identity and location of a cyberattacker, the nature of a cyberattack, and why state attribution in the cyberattack context is a necessary part of the analysis. Part III will consider increased state cooperation and collaboration as a means of reinforcing attribution.

#### I. THE U.N. CHARTER ON USE OF FORCE AND THE RIGHT TO SELF-DEFENSE

After World War II, world leaders created the U.N. in an attempt to fashion an international legal system that would foster enduring peace.<sup>25</sup> Article 2 of the U.N. Charter, the U.N.'s founding document, addresses the standards by which member states pursue international peace and security.<sup>26</sup> In particular, Article 2(4) completely limits a state's ability to use unilateral force,<sup>27</sup> stating "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>28</sup> This seemingly total repudiation of force, however, is balanced by an important exception, the well-settled principle of the right of self-defense.<sup>29</sup>

##### *A. The Self-Defense Doctrine under Article 51*

Article 51 provides that "[n]othing contained in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."<sup>30</sup> Although Article 51 permits individual self-

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24. *Id.*

25. Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L. 207, 215 (2002).

26. *Id.* at 216.

27. *Id.*

28. U.N. Charter art. 2, para. 4.

29. Jensen, *supra* note 25, at 216. Another important exception exists to Article 2(4)'s repudiation of force: collective military action authorized by the U.N. Security Council. *Id.* This exception is outside the scope of this Note and will not be discussed.

30. U.N. Charter art. 51.

defense, it is limited by the principles of necessity and proportionality.<sup>31</sup> Necessity refers to the requirement of self-defense under the circumstances because settlement or resolution could not be acquired by peaceful means.<sup>32</sup> On the other hand, proportionality limits self-defense actions to “the amount of force necessary to defeat an ongoing attack or to deter future aggression.”<sup>33</sup> The doctrines of necessity and proportionality are considered to be customary standards that states responding in self-defense need to abide by.<sup>34</sup>

The self-defense doctrine’s core principle is that a state may only act in self-defense in response to an “armed attack.”<sup>35</sup> This concept is a widely accepted foundation in international law. However, the quantity and

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31. Jensen, *supra* note 25, at 218 (citing Nicaragua, *supra* note 12).

32. Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyber Attacks: A Justification for the Use of Active Defenses Against States who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 32 (2009) (citing YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 87, 237 (4th ed. 2005)); see also Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counterterrorism*, 43 COLUM. J. TRANSNAT’L L. 337 (2005).

33. Sklerov, *supra* note 32, at 32–33 (citing Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 532 (2003)).

34. Gina Heathcote, *Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law*, 12 TEX. WESLEYAN L. REV. 131, 135 (2005). The concept of proportionality requires that defensive actions are limited to the region of the armed attack and not beyond the termination of conflict. *Id.* Proportionality should be viewed in terms of the defensive military campaign as a whole, rather than in terms of the difference of hostilities. *Id.* at 136.

35. Sklerov, *supra* note 32, at 31. Whether a cyberattack can constitute an “armed attack” is an issue beyond the scope of this Note, but is important enough to warrant a brief discussion. In order to determine what constituted an international armed conflict under Common Article 2 of the 1949 Geneva Conventions, Jean Pictet determined force of “sufficient scope, duration, and intensity” is deemed an armed attack. David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT’L SECURITY L. & POL’Y 87, 90 (2010) (internal quotation marks omitted). As international law has evolved, three models have arisen that apply Pictet’s criteria to modern uses of force. *Id.* at 91. The first is an “instrument-based approach” which assesses whether the harm produced by the cyberattack could only have been previously caused by a physical attack. *Id.* (internal quotation marks omitted). The second is an “effects-based approach” which only considers the overall effect of the cyberattack on the victim state. *Id.* (internal quotation marks omitted). Relation to a physical attack is not considered at all in the effects-based approach. *Id.* The third approach is one of “strict liability” which automatically deems any cyberattack against “critical national infrastructure” as an armed attack. *Id.* (internal quotation marks omitted). While these various approaches have been widely debated, all three models agree with the conclusion that a cyberattack can be deemed as an armed attack. *Id.* at 91–92; see also Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT’L L.J. 179, 185–87 (2006).

quality of force required to constitute an armed attack has been the subject of ongoing debate.<sup>36</sup> This classification problem is likely exacerbated by the fact that neither the U.N. Charter nor the U.N.'s Definition of Aggression resolution<sup>37</sup> actually defines armed attacks.<sup>38</sup> This debate becomes quite nuanced as it pertains to cyberattacks, which are often viewed as "a use of force short of armed force."<sup>39</sup>

Although the definition of armed attacks under Article 51 is open to debate, it is clear that states invoking the doctrine of self-defense have prepared for armed attack by states, not nonstate or private actors, since the drafting of the Charter.<sup>40</sup> Article I of the Definition of Aggression<sup>41</sup>

36. Sklerov, *supra* note 32, at 31. See generally Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41 (2002).

37. Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (Dec. 14, 1974). An express purpose of the U.N. Charter is to "take . . . effective . . . measures for the suppression of acts of aggression or other breaches of peace." U.N. Charter art. 1, para. 1. The 1974 Definition of Aggression was an attempt by the U.N. General Assembly to provide normative guidance to the U.N. Security Council as to what constitutes an act of aggression. Sergey Sayapin, *A Great Unknown: The Definition of Aggression Revisited*, 17 MICH. ST. J. INT'L L. 377, 377–78 (2009). However, the definition was not binding on U.N. Member States and had no apparent impact on the Security Council. *Id.* at 378. Recently, the International Criminal Court ("ICC") was given jurisdiction over the undefined crime of aggression provided that the definition is consistent with the norms of the U.N. Charter. *Id.*

38. Sklerov, *supra* note 32, at 52–54.

39. *Id.* at 31. Information warfare creates serious problems in the distinction between use of force and mere coercion under Article 2(4). Jason Barkham, *Information Warfare and International Law on the Use of Force*, 34 N.Y.U. J. INT'L L. & POL. 57, 84 (2001). Including all types of information warfare and cyberattacks would require an enormous expansion of Article 2(4). *Id.* Such an expansion would require international law to determine whether electronic incursions that may not necessarily create physical damage, but have significant economic and political effects, are substantial enough to constitute a use of force. *Id.* at 84–85. Professor Michael Schmitt proposed a framework that attempts to answer the question of whether cyberattacks constitute armed force or simply mere coercion. *Id.* at 85. Professor Schmitt believes we should evaluate the cyberattack using six criteria: severity, immediacy, indirectness, invasiveness, measurability, and presumptive legitimacy. *Id.*; see also Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 929–32 (1999). Once a cyberattack is determined to be an armed attack, the right to self-defense under Article 51 would be triggered. Barkham, *supra* note 39, at 85.

40. This scope of planning persisted since the drafting of the Charter. Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081, 1087 (2002).

41. "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." Definition of Ag-



provides that aggression can only derive from a state.<sup>42</sup> Within the traditional *jus ad bellum* framework, the international community did not anticipate that nonstate actors would ascend to the level of a state capable of initiating an armed attack against another state.<sup>43</sup>

### *B. The Evolution of Attributing State Responsibility to Private Acts*

Prior to the paradigm shift spurred by 9/11, states were not held legally responsible for the acts of nonstate or private actors.<sup>44</sup> Only acts by branches or entities of a state were held attributable to that state.<sup>45</sup> International law, however, did recognize the principle that a state can be bound by the actions of private persons, but only if those persons qualify as “agents” of the state.<sup>46</sup> International jurisprudence evolved to hold a state responsible for the acts of nonstate actors if the state exercised effective or overall control over the actors, then advanced to hold a state indirectly responsible if the state failed to prevent attacks from originating within its territory.

#### 1. The “Effective Control” Test

In the *Nicaragua* case, the International Court of Justice (“ICJ”) addressed whether the United States was responsible for the financing and support of contras operating in the Nicaragua-El Salvador conflict.<sup>47</sup>

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gression, G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (Dec. 14, 1974).

42. Aria-Takahashi, *supra* note 36, at 1087.

43. *Id.* The law of armed force is governed by two bodies of law: *just ad bellum*, the law governing recourse to force, and *just in bello*, the law governing conduct of hostilities. Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 AM U. INT’L L. REV. 311, 311 (2008). Both principles are based in the moral justification for warfare and are intertwined with the just or unjust cause of recourse of force. *Id.* at 346.

44. Proulx, *supra* note 9, at 619.

45. *Id.* at 619–20.

46. *Id.* at 620. “Since the publication of Professor Bowett’s *Reprisals Involving Recourse to Armed Force*, international courts have formally adopted this concept of attribution.” *Id.*; see also D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1 (1972).

47. René Värk, *State Responsibility for Private Armed Groups in the Context of Terrorism*, JURIDICA INT’L XI 184, 188 (2006), available at [http://www.juridicainternational.eu/public/pdf/ji\\_2006\\_1\\_184.pdf](http://www.juridicainternational.eu/public/pdf/ji_2006_1_184.pdf). The U.S. consistently opposed Nicaragua’s Sandinista government, a leftist political party with “close relations with the Soviet Union and Cuba,” in Nicaragua. Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia’s Folly in Tadic*, 18 FLA. J. INT’L L. 843, 850 (2006). The U.S. used various methods to undermine the regime, including cutting off aid, starting a trade embargo, and financing and supporting counter-revolutionary forces, including contras. *Id.* The

Even though it was clear that the rebels were a "proxy army" of the United States, and at times were "completely dependent on the United States' support,"<sup>48</sup> the ICJ refused to attribute responsibility to the United States.<sup>49</sup> The ICJ determined that:

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying or equipping of the contras, the selection of . . . targets, and the planning of the whole of its operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the contras . . . . For this conduct to give rise to legal personality of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>50</sup>

In order to establish state responsibility under the Nicaragua decision, one must prove that state agents "participated in the planning, direction, support[,] and execution" of armed operations.<sup>51</sup> Thus, it became customary to analyze the level of effective control exercised by the agents of one state over the private actors of another state in order to determine the level of responsibility to attribute to the host-state.<sup>52</sup>

## 2. The "Overall Control" Test

Over a decade after the *Nicaragua* decision, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber faced a similar issue in *Prosecutor v. Tadic*.<sup>53</sup> Tadic, a Bosnian Serb, participated in "ethnic cleansing" of Bosnian Muslims in 1992.<sup>54</sup> The issue in Tadic's appeal was whether "Bosnian Serbs constitute[d] a State" or whether

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Nicaraguan government opposed the U.S. support of contras and argued that they were de facto agents of the U.S. *Id.*

48. Proulx, *supra* note 9, at 620.

49. Värk, *supra* note 47, at 188.

50. *Id.* (quoting *Nicaragua*, *supra* note 12).

51. Värk, *supra* note 47, at 189 (quoting *Nicaragua*, *supra* note 11).

52. Proulx, *supra* note 9, at 621.

53. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, I.C.T.Y. App. Ch., at 49 (July 15, 1999).

54. Marco Sassoli & Laura M. Olson, *Prosecutor v. Tadic (Judgement)*, 94, 3 AM. J. INT'L L. 571, 571 (2000). Tadic was a former café owner who became involved in Serb Nationalism. Tyner, *supra* note 47, at 854. During the war in the Balkan Islands, Tadic reportedly ran a prison camp where he allegedly beat and murdered several prisoners. *Id.* The ICTY prosecuted Tadic as an agent of the state and convicted him of several offenses, including crimes against humanity and grave breaches of the Geneva Conventions. *Id.*

“[they] were organs or agents of the Federal Republic of Yugoslavia.”<sup>55</sup> In rejecting the ICJ’s effective control test, the Appeals Chamber ruled that overall control of a military organization is adequate to attribute state responsibility to “all acts of the organization.”<sup>56</sup>

The *Tadic* court made an important distinction between military organized groups and non-military organized groups.<sup>57</sup> The former has a structure, chain of command, strict sets of rules to which members must conform, and is subject to the authority of the group’s leader.<sup>58</sup> Thus to attribute responsibility to the host-state, the state would have to wield control of the group overall by equipping, financing, and coordinating or helping in the planning of its military activity.<sup>59</sup> For non-military groups, the threshold was even higher, requiring “specific instructions” to be delivered from the state to the group.<sup>60</sup>

The key difference between the *Nicaragua* and *Tadic* cases is degree of control—that is, the ICTY requires control beyond financing and equipping forces and should, but does not necessarily, include planning and supervision of military operations.<sup>61</sup> Importantly, the ICTY in *Tadic* focused on individual responsibility, distinguishing the case from *Nicaragua*, which focused on state responsibility.<sup>62</sup> After all, the *Tadic* court believed state responsibility should be based on a “realistic concept of responsibility.”<sup>63</sup>

### 3. Other International Jurisprudence and the Shift towards Indirect Responsibility

Although *Nicaragua* and *Tadic* are the seminal cases evidencing the shift towards state responsibility over private action, other international jurisprudence can be instructional as well. *Nicaragua* and *Tadic* focus on the concept of direct responsibility—where a militarized group acts as an agent of the state or where the state retroactively endorses the act.<sup>64</sup> The

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55. Sassoli & Olson, *supra* note 54, at 572. The issue in *Tadic* was whether international human rights law applied, not state responsibility. James Crawford, *Human Rights and State Responsibility* 1, 5 (12th Raymond & Beverly Sackler Distinguished Lecture Series, Univ. of Conn., 2009).

56. Sassoli & Olson, *supra* note 54, at 572.

57. Proulx, *supra* note 9, at 621.

58. *Id.*

59. *Id.*

60. *Id.* Alternatively, the non-military group standard could be met if the host-state approved of or endorsed the act *ex post facto*. *Id.* at 621–22.

61. Värk, *supra* note 47, at 189.

62. Crawford, *supra* note 55, at 5.

63. Värk, *supra* note 47, at 189 (internal quotation marks omitted).

64. Proulx, *supra* note 9, at 624.

issue becomes more complicated when there is no causal link between the host-state and the actor—where states have no knowledge or control over organizations within their boundaries.<sup>65</sup> The only link between the two entities is that they both happen to operate in the same territory.<sup>66</sup>

1923's *Tellini* incident foreshadowed the trend away from the traditional *jus ad bellum* framework towards the notion of indirect state responsibility for internal private actors.<sup>67</sup> While overseeing the delineation of the Greek-Albanian border, several members of an international commission were assassinated on Greek territory.<sup>68</sup> Although the League of Nations did not hold Greece legally responsible for the assassination,<sup>69</sup> it opined that "responsibility of a State is only involved by the commission in its territory of a political crime against . . . foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal."<sup>70</sup>

*United States v. Iran* (the "Tehran Hostages Case") takes the concept of *Tellini* and indirect state responsibility one step further.<sup>71</sup> In 1979, a militant group attacked a U.S. Embassy in Tehran, Iran. Despite several requests for help, no Iranian forces intervened.<sup>72</sup> The Embassy was eventually invaded and the consular, staff, and visitors were taken hostage.<sup>73</sup> Somewhat foreshadowing *Tadic*, the ICJ asked whether "the militants acted on behalf of the State, having been charged by [an] organ of the Iranian State to carry out a specific operation."<sup>74</sup> Finding no direct involvement, the ICJ then considered indirect involvement.<sup>75</sup> The Court believed "the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion."<sup>76</sup>

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65. *Id.* at 624, 627.

66. *Id.* at 627.

67. *Id.* Following the assassination, the League of Nations formed a special committee to address the legal matters raised by the incident.

68. Crawford, *supra* note 55, at 4.

69. Proulx, *supra* note 9, at 627.

70. Crawford, *supra* note 55, at 4 (internal citation omitted).

71. See *Tehran Hostages Case* (U.S. v. Iran), 1980 I.C.J. 64 (May 24) [hereinafter *Tehran*].

72. Leo Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74, 2 AM. J. INT'L L. 395, 395 (1980).

73. *Id.*

74. Proulx, *supra* note 9, at 627.

75. *Id.* at 627–28.

76. *Id.* at 628 (quoting *Tehran*).

The *Tehran* decision drew a clear boundary between direct responsibility and indirect responsibility.<sup>77</sup>

#### 4. United Nations Security Council Resolution 1373

The events of 9/11 served as a pivotal point in the development of contemporary indirect state responsibility.<sup>78</sup> International law would not support a military reprisal in Afghanistan solely against al Qaeda, as the terrorist group was not the same as a state.<sup>79</sup> The United States “sought to impute al Qaeda’s conduct to Afghanistan simply because the Taliban had harbored and supported the group.”<sup>80</sup> After the events of 9/11, the United States seemingly eliminated the distinction between direct and indirect state responsibility.<sup>81</sup>

More than two weeks after 9/11, the U.N. Security Council adopted Resolution 1373.<sup>82</sup> The resolution provides that “all States shall . . . [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, . . . prevent the commission of terrorist acts, . . . [and] deny safe haven to those who . . . support[] or commit terrorist acts.”<sup>83</sup> The United States made a case against the Tali-

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77. Proulx, *supra* note 9, at 628. After the decision, it became clear that the initial focus of the direct responsibility standard hinges on the individuals or groups involved instead of the actions of the host-state. *Id.* The objective became establishing whether the unlawful act or omission of the person or group was directly attributable to the state. *Id.*

78. *Id.* at 634. On September 11, 2001, nineteen terrorists hijacked four commercial aircrafts, flew two into the World Trade Center, one into the Pentagon, and the last crashed in a Pennsylvania field. Sean D. Murphy, *Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT’L L. 237, 237 (2002). Approximately three thousand people were killed in the incidents, the worst casualties the U.S. has experienced in a single day since the American Civil War. *Id.* After the attacks, the U.S. suspected that the hijackers were funded by a Saudi Arabian expatriate, Osama Bin Laden, and based in Afghanistan working through his terrorist network, al Qaeda. *Id.* at 238.

79. Proulx, *supra* note 9, at 635.

80. Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 89 (2003).

81. Proulx, *supra* note 9, at 636; *see also* TAL BECKER, *TERRORISM AND THE STATE; RETHINKING THE RULES OF STATE RESPONSIBILITY* 218 (2006) (“Operation Enduring Freedom was explicitly justified on the contentious claim that the act of harbouring terrorists is legally indistinguishable from the actual perpetration of terrorist acts.”).

82. Michael Wood, *The Law on the Use of Force: Current Challenges*, 11 SYBIL 1, 6 (2007); *see also* S.C. Res. 1373, U.N. SCOR, 4385th Mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

83. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001). For more implications of Resolution 1373 and cyberwarfare, *see* Toby L. Friesen, *Resolving Tomorrow’s Conflicts Today: How New Developments Within the U.N. Security Council can be Used to Combat Cyberwarfare*, 58 NAVAL. L. REV. 89 (2009); *see also* Sumon Dantiki, *Power Through Process: An Administrative Law Framework For United Na-*

ban, claiming that it failed to prevent a terrorist attack that originated within its boundaries and harbored al Qaeda members.<sup>84</sup> Both the resolution and U.S. practice reinforced the international community's new commitment to fighting terrorism.<sup>85</sup> As a result, the indirect responsibility standard has become the prevailing view in the area of attribution.<sup>86</sup>

## II. ATTRIBUTION—GETTING IT RIGHT IN THE SELF-DEFENSE ANALYSIS IS OF EXTREME IMPORTANCE

This section examines why attribution is a necessary part of the Article 51 right of self-defense analysis, despite the inherent difficulties of on-line attribution. Once an attack, online or kinetic, qualifies as an armed attack, it seemingly gives the injured state the right to act in self-defense. The issue of attributing responsibility of private actors to a state is a complex issue within the realm of kinetic terrorism, but the nuances of the doctrine become even more pronounced when an attack is strictly electronic.

The relatively new standard of imputing state responsibility over private actors imposes a greater amount of force on states' affirmative duty to prevent their territory from becoming attackers' sanctuaries.<sup>87</sup> Traditionally, states were obligated to use due diligence to prevent criminal acts within their territories directed at other nations.<sup>88</sup> However, after the events of 9/11 and the imposition of obligations within Resolution 1373, states have a continual duty to prevent terrorist attacks from originating

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tions *Legislative Resolutions*, 40 GEO. J. INT'L L. 655, 655 (2009) (arguing that Resolution 1373 created a binding obligation on states to reform domestic law in order to more effectively fight international terrorism). Under Article 39 of the U.N. Charter, the Security Council can impose binding resolutions on member states if necessary to maintain peace and security. Peter Hulsroj, *The Legal Function of the Security Council*, 1 CHINESE J. INT'L L. 59, 60 (2002). *But see* Lorraine Finlay, *Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions*, 18 TUL. J. INT'L & COMP. L. 477 (2010) (discussing the implications of Security Council resolutions being subject to judicial review).

84. Proulx, *supra* note 9, at 638.

85. *Id.* at 637–38.

86. *Id.* at 638. On Sept. 12, 2001, the Security Council adopted Resolution 1368 (2001) recognizing “the inherent right of individual and collective self-defence in accordance with the Charter.” Wood, *supra* note 82, at 6. More than two weeks later, the Security Council adopted Resolution 1373 (2001), which again reaffirmed “the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations.” *Id.*

87. Graham, *supra* note 35, at 90.

88. Sklerov, *supra* note 32, at 42 (citing *In re S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10, 4, 88 (Moore, J., dissenting)).

within their respective national boundaries.<sup>89</sup> Thus, a state that has the ability to prevent attacks and fails to do so ultimately fails to fulfill its duty.<sup>90</sup>

In his 1995 article, Vincent-Joël Proulx advocates doing away with the trans-substantive rule of attribution and shifting the entire model towards strict liability.<sup>91</sup> Proulx supports his argument largely on the basis international community's intent on eliminating terrorism, the Security Council's condemnation of terrorism, and its determination to "eliminate threats to peace and security 'by all necessary means.'"<sup>92</sup> Proulx also argues that because the evidentiary standards required for attribution present insurmountable barriers for injured states, strict liability should be imposed on states that either did not or could not prevent a terrorist attack from emanating within its borders.<sup>93</sup> As such, Proulx believes that circumventing the rule of attribution better serves the international com-

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89. Graham, *supra* note 35, at 93. The duty generally consists of: (1) the enactment of laws criminalizing international cyber attacks from within the national territory, (2) conducting thorough investigations into cyberattacks, (3) prosecuting those who have participated in international cyberattacks, and (4) cooperating with victim-states' investigations and prosecutions of those involved. *Id.* at 93–94.

90. Sklerov, *supra* note 32, at 43 (internal citations omitted).

91. Proulx, *supra* note 9, at 643–56. It should be noted that Proulx's theory of state strict liability does not impose immediate absolute liability. *Id.* at 656. In order to avoid abuse of weaker states, that is, developing countries that may not have the capabilities to combat terrorism, Proulx would implement a two-tiered strict liability system. *Id.* Once responsibility has been established on the host-state and the focus has shifted onto it, the state will have an opportunity to prove how it has exhausted all available means to thwart the terrorist attack. *Id.* at 657.

92. *Id.* at 643; see also Rob McLaughlin, *The Legal Regime Applicable to Use of Lethal Force When Operating Under a United Nations Security Council Chapter VII Mandate Authorising 'All Necessary Means'*, 12 J. CONFLICT & SECURITY L. 389 (2007) (examining the use of lethal force under an "all necessary means" resolution). It is important to note that Proulx's argument of circumventing attribution is largely grounded in policy. He does not discuss the practical difficulties associated with circumventing the rule. He does, however, analogize his theory of state strict liability to the domestic U.S. law of products liability. Proulx, *supra* note 9, at 652–54. Within domestic products liability, manufacturers are often found strictly liable because public policy requires that manufacturers be held accountable for their products' quality. *Id.* at 653 (citing *Escola v. Coca Cola Bottling Company*, 150 P.2d 436 (Cal. 1944)). Referring to a state's duty to prevent, Proulx believes that governments are in a better position to thwart terrorist attacks from originating within their territory, just as manufacturers are more aware of potentially hazardous products than the unwary consumer. Proulx, *supra* note 9, at 653. "As with the Coke bottle manufacturer who has exclusive knowledge over the manufacturing process, the host-state is better positioned than the injured state to know, for example, what logistical, intelligence, police, and military means are at its disposal to eliminate the threat." *Id.* at 655.

93. *Id.* at 643–57.

munity's interest in eradicating terrorism.<sup>94</sup> While potential effectiveness of circumventing attribution is not the focus of this Note, it is clear that such a method is untenable within the rapidly growing realm of cyberattacks and cyberterrorism.

#### *A. Attribution in the Cyberattack Context*

Although states are under a continual, affirmative obligation to prevent attacks from emanating from within their territory, the effectiveness of prevention is limited as cyberattacks are extremely difficult to prevent.<sup>95</sup> Attribution of an attack and characterizing the type of attack are imperative in the context of cyberattacks.<sup>96</sup> Fundamentally, attribution ensures that an injured state responding in self-defense does not target innocent people or states.<sup>97</sup> Attribution also plays a critical role in determining the nature and character of an attack, which is the first step in developing a lawful response, whether offensive or defensive.<sup>98</sup> Attribution in the online context involves two issues: "attacker-attribution"—who is responsible for an attack—and "attack-attribution"—characterizing what kind of attack it was.<sup>99</sup>

#### *B. Attacker-Attribution: "Who Dun It?"*

Identifying an online attacker is problematic because the methods we use to identify kinetic attackers implicitly assume physically-based activity in the tangible world.<sup>100</sup> Cyberattacks do not take place in the tangible world, and as such, they do not display the characteristics common to

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94. *Id.* at 643. Although outside the scope of this Note, it is interesting to note that in his discussion of the strict liability model, it appears that Proulx appears to easily dismiss the notion of infringing upon state sovereignty. *Id.* at 658–59. Proulx states that it is "desirable and more efficient" to sacrifice some sovereignty than fail to prevent widespread death and terror. *Id.* at 659. For further discussion of the state sovereignty in the information age, see Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1 (2004); Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192 (2009). "Despite the importance of state sovereignty, governments in the nineteenth century began to see the benefits of sacrificing some sovereignty in exchange for increased predictability." Jensen, *supra* note 25, at 214 (internal citation omitted).

95. Barkham, *supra* note 39, at 83; *see also supra* Part I.B.4.

96. Sean M. Condon, *Getting It Right: Protecting American Critical Infrastructure in Cyberspace*, 20 HARV. J.L. & TECH. 403, 414 (2007).

97. *Id.*

98. Brenner, *Attribution and Response*, *supra* note 9, at 405.

99. *Id.*

100. *Id.* at 409.



their physical counterparts.<sup>101</sup> In the physical world, determining attacker liability often turns on a “place” where an attack emanated from or occurred.<sup>102</sup> Places, however, tend to be much less conclusive in the context of cyberattacks and online attribution.<sup>103</sup>

Determinations of attack origin are less conclusive in cyberattacks because the server location of an attack does not likely reflect the true location of origin.<sup>104</sup> Cyberattackers commonly use “stepping stones”—computers used by the cyberattacker but owned by ignorant parties—in their attacks.<sup>105</sup> While these stepping stones can be physically located anywhere in the world, their physical location is irrelevant in cyberspace.<sup>106</sup> For example, the use of Chinese servers in a cyberattack could mean the attacks originated in China, or that the attackers were located in Russia, Brazil, Pakistan, or anywhere else in the world and deliberately used Chinese servers to mask the true origination point of the attack.<sup>107</sup> Until investigators can reliably establish attack origination in real-space,

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101. *Id.* In the physical world, attacker-attribution is far less problematic. *Id.* at 406. In warfare, military attackers often wear distinct uniforms indicating their national affiliation and speak the language of their country of origin. *Id.* Criminal investigations often focus on finding evidence at a physical crime scene. *Id.* at 407. For example, witnesses may be able to identify the attacker and physical evidence, like DNA, can be traced to a particular individual. *Id.* This method assumes that the attacker or perpetrator was, and still is, physically located in the geographical area. *Id.* Terrorism occupies some middle ground in between warfare and criminal investigations, with regard to attacker-attribution. *Id.* Terrorists often identify themselves as representatives of a particular group, generally so the group can take credit for the attack. *Id.* at 408; see also KIM CRAGIN & SARA A. DALY, *THE DYNAMIC TERRORIST THREAT*, 37–38 (2004) (explaining that the Real Irish Republican Army and Hamas generally take credit for attacks, while the Revolutionary Armed Forces of Columbia and al Qaeda do not). Sponsoring terrorist groups often take credit for attacks in messages online or on videotapes delivered to the media. Brenner, *Attribution and Response*, *supra* note 9, at 408. In addition, terrorist attacks may be attributed to a particular group based on the structure and style of the attack. *Id.*

102. Brenner, *Attribution and Response*, *supra* note 9, at 409.

103. *Id.*

104. *Id.*

105. *Id.* The concept of geographical places is further distorted by “packet switching,” in which packets of data travel the shortest electronic route to their destination. Condrón, *supra* note 96, at 409. The shortest electronic route, however, does not necessarily correspond to the shortest geographical route. *Id.* Data transfer relies on “existing network traffic loads,” and therefore “shortest” corresponds more to time than geographic distance. *Id.*

106. Brenner, *Attribution and Response*, *supra* note 9, at 409.

107. *Id.* at 409–10; see, e.g., Nathan Thornburgh, *The Invasion of the Chinese Cyberspies*, *TIME*, Sept. 5, 2005, at 34, 34 (“In the world of cyberspying, locating the attackers’ country of origin is rare. China, in particular, is known for having poorly defended servers that outsiders from around the world commandeer as their unwitting launchpads.”).

attacker-attribution is predicated on mere inferences.<sup>108</sup> Even if cyberattacks are repeated over long periods of time, attacker-attribution would still have to be drawn from inferences of what would appear to be the same point of origin.<sup>109</sup>

Relying on inferences to identify the point of origin in cyberattacks introduces an element of ambiguity into the response calculus.<sup>110</sup> Further, an identified cyberattack origination point may be inconclusive, as essentially anyone has the ability to launch an anonymous transnational cyberattack.<sup>111</sup> At most, inferential data regarding point of attack origin serve merely as clues to attacker-attribution.<sup>112</sup> Cyberspace eliminates law enforcement's default assumption that an attacker is insular.<sup>113</sup> It breaks a crime scene into debris, making it extremely difficult to identify the point of attack origin and link it to the attacker.<sup>114</sup> At the very least, it may re-

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108. Brenner, *Attribution and Response*, *supra* note 9, at 410; *see also* Howard F. Lipson, *Tracking and Tracing Cyber-Attacks: Technical Challenges and Global Policy Issues*, CARNEGIE MELLON SOFTWARE ENGINEERING INST. (Nov., 2002), [www.cert.org/archive/pdf/02sr009.pdf](http://www.cert.org/archive/pdf/02sr009.pdf) (discussing that the Internet was neither designed for tracking and tracing users nor designed to resist untrustworthy users, and how today's high-threat environment far exceeds the Internet's design parameters).

109. Brenner, *Attribution and Response*, *supra* note 9, at 410; *see, e.g.*, Eric Filiol, *Operational Aspects of Cyberwarfare or Cyber-Terrorist Attacks: What a Truly Devastating Attack Could Do*, ESIEA—OPERATIONAL VIROLOGY & CRYPTOLOGY LABORATORY (2009), <http://www.esiea-recherche.eu/data/eciw09.pdf> (discussing the main characteristics of a cyberattack: "not only the true origin of the attack must remain hidden, but also must be possible to wrongly frame an innocent party (another country or group) as the perpetrator of the attack (fooling the digital evidence). From a military perspective, the main interest is to avoid or to delay the target reaction by misleading it.").

110. Brenner, *Attribution and Response*, *supra* note 9, at 412.

111. *Id.*

112. *Id.* at 414. However, as terrorism migrates online, the point of origin may gain more importance in attacker-attribution. For example, in 1994, employees at the Rome Air Development Center, the U.S. Air Force's R&D facility in upstate New York, discovered that their computer systems had been hacked. *Id.* The Air Force, Secret Service, and FBI found that the attackers routed their attacks through several computers in multiple countries. *Id.* at 414–15. With the assistance of Scotland Yard, the investigators identified two adolescents as the attackers. *Id.* at 415; *see also* RICHARD POWER, *TANGLED WEB: TALES OF DIGITAL CRIME FROM THE SHADOWS OF CYBERSPACE* 65–75 (2000) (detailing the events of the Rome Labs scenario and what led to the capture of the teen cyberattackers—Datastream Cowboy and Kuji).

113. Brenner, *Attribution and Response*, *supra* note 9, at 415. In real-space crime and terrorism, a localized crime scene becomes the focus of the investigation. *Id.* at 417. Evidence, witnesses, and connections give the scene a comprehensible focus and make it a manageable task. *Id.* In cyberspace, however, anyone can anonymously launch an attack from any point connected to the Internet and repeat the attacks with a frequency not possible in the real-world. *Id.* at 418.

114. *Id.*

sult in false positives, leading the investigators to assume that an intermediary stepping stone is the originating point of a cyberattack.<sup>115</sup>

The issue of attacker-attribution remains the same even if the origination point is traced back to a state that sponsors terrorism.<sup>116</sup> A point of attack origin located in terrorist state would still be inconclusive—the state may or may not have participated in the attack.<sup>117</sup> On the other hand, the fact that a cyberattack does not originate from a terrorist state does not mean that the state was not involved in the attack.<sup>118</sup> While it may be tempting, perhaps even convenient, to implicate a terrorist state from the mere appearance that it launched a cyberattack, they are no exception to the lack of clarity in attacker-attribution.

Ultimately, the mere fact that an extraterritorial cyberattack appears to have been launched from a particular state cannot support the conclusion that either state or nonstate actors launched the attack from within that state.<sup>119</sup> The physical limitations of the real world make it reasonable to draw inferences to link an attack to an attacker.<sup>120</sup> The absence of those limitations on the Internet makes it exceedingly difficult to predicate similar inferences to a cyberattack.<sup>121</sup> As such, any inferences made from the point of attack origin or from the victim-state cannot sustain a conclusion of direct or indirect state responsibility.<sup>122</sup>

### C. Attack-Attribution: “What Is It?”

Determining the identity of a cyberattacker or cyberterrorist will likely be closely associated with determining the nature of an attack, or “attack-

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115. *Id.* This could have happened in the Rome Labs example. *Id.* Investigators originally tracked the hackers to an ISP in New York City and to a group of hackers whose members were convicted of unlawful intrusion crimes in years earlier. *Id.* Given their geographical connection to the hackers, it would have been logical for the investigators to assume that the ISP was the point of attack origin. *Id.* at 418–19. In addition, it is important to note that the investigators were unable to track the hackers back to the point of attack origin through online or electronic means. *Id.* at 419. They did it the old fashioned way—with informants. *Id.*

116. *Id.* at 423.

117. *Id.*

118. *Id.*

119. *Id.* at 427.

120. *Id.* at 428. For example, an attacker gaining entry to a house protected by an alarm system by using the correct alarm code suggests that the attacker knew the victim. *Id.* A burgled jewelry store or bank with an uncompromised safe suggests that the perpetrator was an employee, former employee, or someone who the employee shared the safe’s code with. *Id.* In both cases, investigators can infer with a high degree of certainty as to who performed the attack and where. *Id.*

121. *Id.*

122. *Id.* at 429.

attribution.”<sup>123</sup> Like attacker-attribution, online attack-attribution is inherently more problematic than real-world attack-attribution.<sup>124</sup> However, identifying the nature or character of a cyberattack is the first step in evaluating whether it qualifies as an armed attack under Article 51 and ensuring that any response functions within the limitations of necessity and proportionality.<sup>125</sup> The overarching problem with online attack-attribution is that it is difficult to determine the nature of the attack because the indicators we must rely on—point of attack origin, point of occurrence, and motive—develop an inherent ambiguity not present in the real-world.<sup>126</sup> This is because cyberspace makes it possible for anyone with an Internet connection to launch an attack on another computer in another country.<sup>127</sup>

A response strategy is predicated on the premise that a state can know, or quickly determine, what kind of attack it was subject to and what is needed to neutralize the attackers.<sup>128</sup> This is complicated by states' general allocation of response authority for crime and terrorism to law en-

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123. *Id.*

124. *Id.* at 433–34. According to Professor Brenner, real-world attacks fall into two categories: crime/terrorism and warfare. *Id.* at 431. Crime usually involves civilians inflicting certain types of harm on each other—for example, murder, rape, assault, fraud—and is generally limited in scale due to the constraints of physical reality. *Id.* For example, a mugger robs one victim, a rapist assaults one victim, a murder kills one person; in each case, the victimization is limited. *Id.* at 432. Although terrorism is considered a crime, it is distinguished from crime in that it seems irrational, in that it lacks obvious motive, and the scale with which it is committed is much larger than crime. *Id.* at 431. For example, the World Trade Center attacks were irrational in that they did not result in financial gain or redress personal grievances. *Id.* Terrorism does not develop from personal matters, but from ideology. *Id.* at 432. Furthermore, terrorists differ from criminals in that terrorists aim to cause as much death and injury as possible. *Id.* The harm inflicted by a terrorist will almost certainly surpass harm attributable to any individual crime, as terrorists often inflict generalized harm. *Id.* at 432–33. Real-world warfare is generally easier than crime or terrorism to identify. *Id.* at 433. A state's military launching an attack on another state's territory indicates that we have entered the theater of war. *Id.*

125. Graham, *supra* note 35, at 100–01 (“[A] state may lawfully resort to force when acting in self-defense against an armed attack, provided it conforms to the customary international law concepts of necessity and proportionality.”).

126. Brenner, *Attribution and Response*, *supra* note 9, at 435. For example, figuring out where an attack was launched from in the physical world is much more conclusive. *Id.* The fact that a victim-state believes a cyberattack was launched from a particular state is a consideration, but it carries much less weight online than it does in the physical world. *Id.*

127. *Id.*

128. *Id.* at 436.

forcement and warfare to the military.<sup>129</sup> One issue this separation presents is that the response process may be delayed while respective decision-makers attempt to determine the nature of a cyberattack.<sup>130</sup> Decision-makers may also misunderstand the nature of an attack.<sup>131</sup>

The real-world indicators we rely on to determine the nature of an attack—point of attack origin, point of occurrence, and motive for an attack—are often lacking or unreliable in cyberattacks.<sup>132</sup> Motive is a particularly distinguishing factor for cyberattacks.<sup>133</sup> The problem arises with a state's ability to determine the motive behind a particular attack,<sup>134</sup> and becomes especially challenging when no obvious motive exists.<sup>135</sup>

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129. *Id.* This distribution of responsibility is generally carefully adhered to: “[c]ivilian law enforcement does not respond to war and the military does not respond to crime.” *Id.*

130. *Id.*

131. *Id.* Misunderstanding the nature of a cyberattack stems from both partitioned responsibility and because we generally assume that crime is a “localized phenomenon.” *Id.* at 437. For example, a cyberattack targeting a corporate computer system may be inferred to be cybercrime, as we tend to assume that criminals target civilians. *Id.* at 436. This conclusion would further be supported if the attackers’ behavior conformed to what we expect to be criminal—extracting funds or personal information from corporate databases—and, as such, would likely be responded to by civilian law enforcement. *Id.* Those inferences, however, could be wrong. The attack could just as easily be cyberwarfare. *Id.* at 437. For example, China’s warfare strategy specifically focuses on attacking civilian entities, including financial entities and infrastructure. *Id.*; see also U.S.-CHINA ECON. & SEC. REVIEW COMM’N, 109th Cong. (2006), available at [http://www.uscc.gov/annual\\_report/2006/annual\\_report\\_full\\_06.pdf](http://www.uscc.gov/annual_report/2006/annual_report_full_06.pdf) (“China is actively improving its non-traditional military capabilities . . . . China’s approach to exploiting the technological vulnerabilities of adversaries extends beyond destroying or crippling military targets. Chinese military writings refer to attacking key civilian targets such as financial systems.”). Indeed, if we continue with the “civilian-attacks-are-crime” misinterpretation, we may begin to see serious consequences resulting from damage to financial systems or infrastructure. Brenner, *Attribution and Response*, *supra* note 9, at 437. The same could be said of cyberterrorism and cyberwarfare. *Id.* Cyberterrorist attacks usually occur as a sequence of attacks which may be spatially and temporally separated. *Id.* As a result, law enforcement may not consider that each attack is part of a larger, broader attack. *Id.* Thus, a response would likely be uncoordinated and isolated, with officers in various locations responding differently to a large, singular threat. *Id.*

132. *Id.* at 437–38. As seen above, the importance of point of origination and point of occurrence generally erode as attacks are launched online. *Id.* at 438.

133. *Id.* For example, profit is a likely motive for most cybercrime, ideology for cyberterrorism, and state enmity for cyberwarfare. *Id.*

134. *Id.* An example of this is the Titan Rain and Moonlight Maze cyberattacks. *Id.* Titan Rain is the U.S. government’s designation for a series of coordinated cyberattacks on American systems from 2003 to 2005. Thornburgh, *supra* note 107. The attacks were tracked back to routers in China, but the identity of the hackers was never discovered. *Id.* The hackers gained access to several sensitive U.S. networks including those at Lockheed Martin, NASA, Redstone National, and Sandia National Laboratories. *Id.* Moonlight Maze refers to a 1998 “incident in which U.S. officials accidentally discovered a pattern

The scenario in which we will be unable to determine if a cyberattack is a mere crime, a terrorist attack, or warfare presents the greatest challenges for the current response model under Article 51, and therefore presents the greatest risks of unlawful retaliation for the injured state.<sup>136</sup> Countries that partition response authority between civilian law enforcement and military agencies, like the United States,<sup>137</sup> are particularly vulnerable to these risks.<sup>138</sup> If responders cannot determine what kind of

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of probing of computer systems at the Pentagon, NASA, Energy Department, private universities, and research labs . . . .” *Cyberwar!*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/cyberwar/warnings/> (last visited Mar. 1, 2011). The cyberattack was traced back to the Soviet Union but the identity of the attackers was never discovered. *Id.* In both *Titan Rain* and *Moonlight Maze* we know what the attackers did, but have not determined why they did it. Brenner, *Attribution and Response*, *supra* note 9, at 438.

135. Brenner, *Attribution and Response*, *supra* note 9, at 439. The motives behind most cybercrime attacks are usually apparent—profit or revenge. *Id.* at 438. Cyberterrorists, however, in an effort to fund their real-world kinetic attacks have introduced us to “mixed motive” scenarios: where the motive for a cybercrime is to profit, but the motive for achieving financing is to engage in terrorism. *Id.* This scenario has very few implications in the development of a response and attack-attribution because civilian law enforcement is responsible for both crime and terrorism. *Id.*

136. *Id.* at 439.

137. Several federal U.S. statutes prohibit the comingling of partitioned authority. *See* Nathan Alexander Sales, *Mending Walls: Information Sharing After the USA Patriot Act*, 88 TEX. L. REV. 1795, 1797–98 (2010). For example, the National Security Act of 1947 prohibits the CIA from employing “police, subpoena, or law enforcement powers” or engaging in “internal security functions.” *Id.* at 1797 (citing 50 U.S.C. § 403–4a(d)(1) (2006)). The Posse Comitatus Act of 1878 generally criminalizes using the military for law enforcement functions. *Id.* at 1797–98 (citing 18 U.S.C. § 1385 (2006)). The 1878 Act even reflects the idea that the military must remain subordinate to civilian law enforcement. *Id.* at 1798. In addition, the Privacy Act of 1974 promotes freedom from government inspection and the ability to monitor information about oneself. *Id.* However, a narrow reading of the Act could even prevent federal civilian law enforcement agencies from cooperating. *Id.*

138. Brenner, *Attribution and Response*, *supra* note 9, at 439. This discussion is implicitly based on the United States’ current response authority model. *Id.* at n.277. This author is most familiar with the U.S. response model, which is considered the most extreme model of partitioned response responsibility. *Id.* Response authority between law enforcement and the military is not as rigidly divided in some other countries. *Id.*; *see also* DONALD E. SCHULZ, *THE UNITED STATES AND LATIN AMERICA: SHAPING AN ELUSIVE FUTURE* 37 (2000) (“As matters now stand, many governments feel they have no choice but to bring the armed forces into law enforcement. The alternative is rampant criminality and national insecurity.”). *But see* DANIELLA ASHKENAZY, *THE MILITARY IN THE SERVICE OF SOCIETY AND DEMOCRACY: THE CHALLENGE OF THE DUAL-ROLE MILITARY* 5 (Daniella Ashkenazy ed., 1994) (“[T]he military in democratic societies ha[s] not been assigned a role as a domestic law enforcement agency, with the exception of extreme circumstances of insurrection or collapse of domestic public order beyond the capabilities of civilian

cyberattack occurred or the severity of the effects,<sup>139</sup> they may not be able to correctly assume or assign responsibility to respond.<sup>140</sup> This leaves open the possibility that no response will result.<sup>141</sup>

Ultimately, the United States and countries with similarly segmented response models could be targets of cyberterrorism or cyberwarfare, potentially facing dispersed attacks. Such nations may not realize the nature of the attacks until extensive damage has incurred.<sup>142</sup> Local law enforcement would likely focus on each separate, seemingly localized attack, without appreciating the attack's role as a small part of a larger attack.<sup>143</sup> The possibility that the United States and similar countries could be subject to erratic and concerted cyberattacks by one or more organized groups of nonstate actors is all too real.<sup>144</sup> While the damage and loss of

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police . . ."). While militaries take on different roles at various times as perceived threats change, armed forces in democracies are often defensive by nature. *Id.*

139. See, e.g., Barkham, *supra* note 39, at 84–93 (discussing cyberattacks and the distinction between use of force under Article 2(4) and mere coercion).

140. Brenner, *Attribution and Response*, *supra* note 9, at 439. An example of this would be a scenario in which intermittent, small-scale cyberattacks exploit the gap between Articles 2(4) and 51. Barkham, *supra* note 39, at 83. For instance, consider a scenario in which cyberattackers launched small-scale attacks in New York, Los Angeles, Chicago, and Las Vegas. If the effects of the attacks were noticed, local law enforcement would respond to each individual attack. The cyberattacks might appear as separate, uncoordinated attacks and each individual local law enforcement agency might not share information or coordinate their responses. Local law enforcement would deal discretely with each separate attack, unaware that they were responding to part of a larger attack. Brenner, *Attribution and Response*, *supra* note 9, at 439–40. Thus, where the intermittent, small-scale cyberattacks might be sufficient to constitute an armed attack if viewed in the aggregate, because of partitioned response responsibility, larger-scale Article 51 response would not result. *Id.*

141. *Id.*; see also Jill R. Aitoro, *Simulation Shows Government Lacks Policies Needed to Respond to Cyberattack*, NEXTGOV.COM (Feb. 16, 2010), [http://www.nextgov.com/nextgov/ng\\_20100216\\_5378.php](http://www.nextgov.com/nextgov/ng_20100216_5378.php) (simulation of a cyberattack against the U.S.'s critical infrastructure demonstrated how the cascading effects can cripple networks and illustrated the government's difficulty in responding). "As bandwidth was overwhelmed, millions of infected cell phones were shut down, the Internet slowed to a crawl and portions of the electric grid shut down as cyberattackers targeted a fictitious Web application electric utilities use to exchange bulk power service according to demand. Transportation systems, the Stock Exchange and financial institutions were also affected as networks failed." *Id.* Panelist discussions included whether the federal government could declare the cyberattack an act of war, whether the president's administration would be forced to respond by imposing martial law, and demanding that other countries cooperate with investigations. *Id.*

142. Brenner, *Attribution and Response*, *supra* note 9, at 439.

143. *Id.* at 439–40; see Arquilla, *supra* note 2 (fictional, but realistic, scenario of the world's first cyberwar launched by anonymous nonstate actors).

144. Brenner, *Attribution and Response*, *supra* note 9, at 440.

life might not be as immediate as kinetic terrorism on a 9/11 scale, cyberattacks of these sort could be just as, if not more, devastating, especially if recurring.<sup>145</sup>

The possibility of concerted cyberattacks by nonstate actors highlights the problem with states' segmented internal response authority in attack-attribution.<sup>146</sup> Civilian law enforcement and military personnel are extremely limited in their ability to collaborate in responding to attacks.<sup>147</sup> States assume they will be able to maintain internal order with civilian law enforcement and external stability with the military.<sup>148</sup> We have seen, however, that cyberspace erodes the validity of our real-world assumptions.<sup>149</sup>

#### *D. Attribution Matters*

Admittedly, determining attacker- and attack-attribution for cyberattack is a very difficult task.<sup>150</sup> While prevention is permitted, its effectiveness is limited.<sup>151</sup> Even with increased computer security, there is little that a potential target can do to stop an assault coming in from beyond its borders.<sup>152</sup> Nonetheless, the United States and other U.N. Member States have a continuing obligation to abide by the U.N. Charter with "entire good faith and scrupulous care."<sup>153</sup> This allows victim-states to retaliate only against states that have breached Article 2(4) by either directly attacking the victim-state, exercising control over nonstate actors

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145. *Id.*

146. *Id.*

147. *Id.* Professor Brenner attributes this to the "persistence of the internal-external threat dichotomy." *Id.* at 440. Historically, rules that are designed to maintain internal order have not been implicated in a state's efforts to resist external threats. Brenner, *Toward a Criminal Law*, *supra* note 1, at 45. Internal rules are simply not applicable to the character and source of the outside threats. *Id.* Such rules are significant as they determine how a state will be able to use its resources on an external threat. *Id.* If a state is experiencing internal disorder and devastation, it will likely be unable to focus such resources on fighting external threats. *Id.*

148. Brenner, *Attribution and Response*, *supra* note 9, at 440; Brenner, *Toward a Criminal Law*, *supra* note 1, at 65–76.

149. Brenner, *Attribution and Response*, *supra* note 9, at 440. Physical proximity and environment constraints, scale or number of "crimes" a person can commit in a given period, and patterns of crime in the real-world are not applicable in cyberspace. Brenner, *Toward a Criminal Law*, *supra* note 1, at 65–75.

150. Christopher E. Lentz, *A State's Duty to Prevent and Respond to Cyberterrorist Acts*, 10 CHI. J. INT'L L. 799, 813–16 (2010) (discussing "[a]ttribution and [i]ts [i]mpossibly [h]igh [h]urdle").

151. Barkham, *supra* note 39, at 83.

152. *Id.* at 83–84.

153. John R. Kennel, 48 C.J.S. *International Law* § 63 (2010).



that have attacked the victim-state, or breaching their duty to prevent nonstate actors from launching attacks within their territory.<sup>154</sup> It also requires that states limit their responses to fit within the principles of necessity and proportionality.<sup>155</sup>

While some types of cyberattacks will fit easily within the structure of Articles 2(4) and 51,<sup>156</sup> evaluating whether localized but widespread cyberattacks trigger the right to self-defense depends on the attacks' effects and frequency.<sup>157</sup> Allowing states to respond without determining attacker- or attack-attribution might permit acts that would weaken the U.N. Charter's prohibition on the use of force.<sup>158</sup> Circumventing the rule of attribution would allow beleaguered states too much autonomy in determining the scope and intensity of an appropriate response.<sup>159</sup> Such practice would surely erode Article 51's purpose of limiting the frequency and scale of forceful self-defense to those rare times where it would be appropriate.<sup>160</sup>

This applies with particular force to cyberattacks as the scope of the attack and the identity of the attacker are usually unknown or uncertain. In the context of Article 51 self-defense, uncertainty is troublesome. Unless a victim-state is able to conclusively determine attacker-attribution—that is, which state is liable for failing to prevent an attack from being launched within its territory—it may very well retaliate against an innocent state, resulting in unwarranted death and destruction.<sup>161</sup> Furthermore, unless a state has fully determined the damage and effects inflicted

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154. See discussion *infra* Part I.

155. Jensen, *supra* note 25, at 218 (citing Nicaragua, *supra* note 12).

156. Barkham, *supra* note 39, at 80. Attacks in which an enemy state's obvious objective is complete and utter network debilitation; launching an evident all-out war resulting in extensive destruction and significant loss of life; or a cyberattack that was a preliminary part of a kinetic attack would all likely be examples of armed attacks under Article 2(4) sufficient to trigger a right to self-defense under Article 51. *Id.* Note, however, that while these examples are obvious enough to satisfy attack-attribution, attacker-attribution remains unanswered.

157. *Id.* at 81.

158. *Id.* at 82. For example, states may attempt to justify the use of force on the grounds that cyberattacks by an enemy state are constantly looming. *Id.* This justification would seemingly allow for forceful self-defense at any time if the threat were always impending. This runs contrary to the U.N. Charter's express purpose of "maintain[ing] international peace and security." U.N. Charter.

159. Barkham, *supra* note 39, at 82.

160. *Id.*

161. Brenner, *Attribution and Response*, *supra* note 9, at 409. The widespread availability of computers and Internet access and the ability of cyberattackers to hide, disguise their online personas, and use "stepping stones" make this especially true. Villers, *supra* note 22, at 459–60.

upon it by a cyberattack, any response based on uncertain or incomplete information could result in disproportionate collateral damage or innocent civilian death.<sup>162</sup> In either case, retaliation based on imperfect information or without conclusive attribution will likely result in a violation of Article 51.

Attribution is not only necessary to prevent unlawful responses; it is necessary to ensure that some sort of response follows. Intermittent, small-scale cyberattacks could take advantage of the gap between Articles 2(4) and 51.<sup>163</sup> If cyberattacks are small enough, they might be considered a use of force but not an armed attack significant enough to

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162. Barkham, *supra* note 39, at 82. This applies to both kinetic and electronic responses. *Id.* An example of this occurred in 1988, in which an Iranian Airbus was accidentally shot down because it was believed to be a military plane, resulting in 290 civilian deaths. *Id.* at 82–83; see also George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1179 (2000). Active defenses—electronic measures used to trace an attack back to its source and “disrupt it”—are commonly considered the most appropriate use of force against cyberattacks because they employ only necessary force and cause less disproportionate collateral damage. Sklerov, *supra* note 32, at 79–80. The problem with active defenses is that they are often engaged while a cyberattack is in progress. Barkham, *supra* note 39, at 82. A targeted state may have responded in self-defense without first determining the nature, scope, frequency, or effects of the attack. Thus, because the state did not determine attack-attribution, it does not know whether the initial cyberattack qualifies as an armed attack under Article 51. Furthermore, active defenses that shut down attacking computers could have unpredictable, cascading effects. *Id.* at 83. For example, if an active defense counterattacked an attacking system, it could penetrate an unmapped system. *Id.* Without mapping a system and knowing its contours, the operator might not be able to distinguish military targets from civilian targets. *Id.* Thus, without fully determining attack-attribution, the originally-targeted state could violate Article 51 and the principles of necessity and proportionality. See Ruth Wedgwood, *Proportionality, Cyberwar, and the Law of War*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 219, 227–30 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (arguing that it is more difficult to restrict the effects of active defenses than with kinetic weapons because connections from a target computer to the civilian infrastructure it controls are less evident; also arguing that there is insufficient time to map attacking systems when using active defenses, which could result in broad, unintended consequences). But see Michael Schmitt, *Wired Warfare: Computer Network Attack and the Jus in Bello*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 187, 204–05 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (arguing that active defenses merely shut down attacking computer systems for a brief time, rather than using kinetic weapons which cause widespread destruction to attain their objectives).

163. Barkham, *supra* note 39, at 83. In the previous section, there was discussion of local law enforcement responding to local cyberattacks which are ultimately part of a larger, coordinated attack. This is the other side of that coin—that is, uncoordinated cyberattacks insufficient in scope or character to qualify as an armed attack.

trigger the victim's right of self-defense under Article 51.<sup>164</sup> In contrast, a series of small-scale attacks might constitute an armed attack under Article 51, but local law enforcement might treat each attack as a separate incident rather than parts of a larger attack.<sup>165</sup> Although self-defense may be appropriate in the latter example, no response would ensue as no one would be aware of the larger attack.<sup>166</sup> Therefore, in the context of cyberattacks and cyberterrorism, attribution matters. Attributing the origin of a cyberattack and effects of an attack to a state are vital in complying with the requirements of self-defense under international law. The pervasiveness of nonstate actors on the Internet and their ability to disguise their tracks requires that the concept of attribution not only remain in place, but be reinforced. Thus, in order to prevent innocent deaths and collateral damage, "getting it right" is of extreme importance.

### III. REINFORCEMENT OF ONLINE ATTRIBUTION

The main problems regarding online attribution are the lack of conclusive information and the need for absolute certainty. The anonymity of the Internet and the ability to disguise one's online persona create inherent difficulties in determining which state failed in its duty to prevent an attack from being launched within its borders.<sup>167</sup> Bifurcated response authority makes it difficult for military and civilian law enforcement to contemporaneously determine attack-attribution and coordinate a synchronized response.<sup>168</sup> However, online state attribution is of such importance that it must not be circumvented. Instead of getting rid of state attribution, measures should be taken to reinforce or ease the process of attributing a cyberattack to a state through increased cooperation and sharing of information, externally among states and internally among military and law enforcement personnel.<sup>169</sup>

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164. *Id.* at 81. For example, if a series of small-scale incursions occur in another state's computer systems, causing few disruptions and minor damage, such incursions might not constitute an armed attack. *Id.* It may be likened to a state sending its troops across another state's border without causing any significant damage. *Id.*

165. Brenner, *Attribution and Response*, *supra* note 9, at 439.

166. *Id.*

167. Villers, *supra* note 22, at 459–60.

168. Brenner, *Attribution and Response*, *supra* note 9, at 441. Bifurcated response authority requires military personnel to respond to external threats, including acts of war, and law enforcement personnel to respond to internal threats, including crime and terrorism. *Id.* Further, civilians have no role in responding to crime or terrorism. *Id.* This response authority seems like a logical system probably because "it is all we know." *Id.*

169. While this Note proposes that states should be required to share information with other states and domestic law enforcement should share information with the military, Susan Brenner takes this concept one step further. *Id.* at 465–74. Professor Brenner pro-

While there is no silver bullet to solve the problems of online attribution, many different solutions have been proposed.<sup>170</sup> Requiring states to share information to conclusively determine attacker-attribution is consistent with the legal and practical limitations of state sovereignty, as the duty to cooperate can be found in several sources.<sup>171</sup> U.N. Member States are already under an obligation “[t]o achieve international co-operation in solving international problems . . . .”<sup>172</sup> Multilateral informal cooperation between states would not require any additional treaty processes and is crucial to the development of international cyberlaw.<sup>173</sup> Thus, states would not have any additional obligations placed on them; only reinforcement of an obligation that already exists.

A policy requiring internal state entities to cooperate and share information is consistent with legal and pragmatic constraints of the institutional separation of the military and law enforcement.<sup>174</sup> Specifically, law enforcement’s contribution to the military would be providing informa-

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poses integration of civilians, the military, and law enforcement personnel. *Id.* at 465. She suggests a voluntary organization to train and coordinate civilians in an attempt to support military and law enforcement efforts against cyberattacks. *Id.* at 469.

170. *Planning for the Future of Cyber Attack Attribution: Hearing Before the H. Comm. on Sci. & Tech.*, 111th Cong. (2010) (statement of Edward J. Giorgio, President, Ponte Technologies) [hereinafter *Planning for the Future*]; see also Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet Against Cyberterrorism and Using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT’L L. 57 (2010) (discussing giving every state universal jurisdiction to prosecute cyberterrorists as a means of deterrence); Jeffrey Hunker, *U.S. International Policy for Cybersecurity: Five Issues That Won’t Go Away*, 4 J. NAT’L SECURITY L. & POL’Y 197 (2010) (discussing improving the governance structure of the Internet, building norms for online behavior for states and individual users, and expanding multilateral cooperation against cybercrime).

171. Robert Uerpman-Witzack, *Principles of International Internet Law*, 11 GERMAN L.J. 1245, 1259–60 (2010) (discussing the existing “[p]rinciple of [i]nterstate [c]ooperation” in the context of internet law). For example, the duty of cooperation among states is found in the U.N. Charter, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the Convention on the Rights of the Child, and the Convention on Cybercrime of 2001, to name a few. *Id.* at 1259.

172. U.N. Charter art. 1, para. 3.

173. Hunker, *supra* note 170, at 200; see, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess. Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970) (U.N. General Assembly Resolution reinforcing the principles of cooperation among states for the furtherance of international peace and security).

174. Brenner, *Attribution and Response*, *supra* note 9, at 469.

tion about incidents that might constitute cyberwar, while the military would provide law enforcement about cybercrime and cyberterrorism.<sup>175</sup>

While states should be required to share information to assist one another in determining attacker- and attack-attribution, the rapidly evolving nature of technology may even render that obligation obsolete. The trend in technology is moving towards embedding identification and location tags deep into infrastructure, which will be difficult to circumvent.<sup>176</sup> Eventually, the infrastructure will provide authentication of the person at the other end of the signal rather than the person operating it.<sup>177</sup> However, until then, cyberattack attribution must remain in place.

#### CONCLUSION

This Note has explored the necessity of retaining the concept of attribution in the context of cyberattacks and cyberterrorism, even though some have called for its abolition.<sup>178</sup> The proliferation and abundance of computers and computer-related technologies has changed the safety and legal landscapes in unprecedented ways.<sup>179</sup> The widespread availability of computers and Internet access provides an unparalleled number of nonstate actors with the ability to launch cyberattacks on private, public, and military systems anywhere in the world.<sup>180</sup> International law, however, has evolved to hold states legally responsible for the acts of nonstate actors.<sup>181</sup> After the events of 9/11, international law grew to hold states indirectly responsible if they provide any support to persons involved in terrorist acts, including failure to prevent the launch of an attack.<sup>182</sup>

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175. *Id.* The U.S. implemented the Homeland Security Act of 2002, which authorizes the Department of Homeland Security to share cyber security information with state and local governments, as well as private entities that maintain critical systems. Benjamin R. Davis, Comment, *Ending the Cyber Jihad: Combating Terrorist Exploitation on the Internet with the Rule of Law and Improved Tools for Cyber Governance*, 15 *COMMLAW CONSPPECTUS* 119, 154 (2006).

176. *Planning for the Future*, *supra* note 170. New Internet protocols may also embed characteristics such as personal identity, hardware identity, location, and institutional affiliation. *Id.* A tag is a form of metadata, or a record of information, which captures the basic characteristics of data, resources, and the user. *Geospatial Metadata*, FED. GEOGRAPHIC DATA COMM., <http://www.fgdc.gov/metadata> (last visited Dec. 21, 2010).

177. *Planning for the Future*, *supra* note 170.

178. Proulx, *supra* note 9, at 643–53.

179. Brenner, *Attribution and Response*, *supra* note 9, at 474.

180. Villers, *supra* note 22, at 459–60.

181. Proulx, *supra* note 9, at 634–35.

182. Dantiki, *supra* note 83, at 655 (arguing that Resolution 1373 created a binding obligation on states to reform domestic law in order to more appropriately fight international terrorism).

Once an attack qualifies as an armed attack under Article 51 of the U.N. Charter, a victim-state is permitted to retaliate in self-defense, provided that the response conforms to the principles of necessity and proportionality.<sup>183</sup> Attribution in this context ensures that a victim-state responding in self-defense does not target innocent people or states and determines that the response is proportionate to the original attack.<sup>184</sup> The primary difficulty of attributing a cyberattack to a particular state is that the characteristics of an online attack do not hold the same significance as the characteristics of a kinetic attack.<sup>185</sup> In particular, places do not have any real value in online attacks because, although an attack may have been routed through a particular location, it does not mean the attack originated from that location.<sup>186</sup> Essentially anyone has the ability to launch an anonymous transnational cyberattack.<sup>187</sup> Determining the nature of an attack—and thus ensuring the response is proportional—is difficult because the indicators we rely on in real-world attacks—motive, location of attack, physical evidence—do not always exist in cyberattacks.<sup>188</sup> Bifurcated response authority and the ability of attackers to launch small-scale attacks, which may create communication and coordination problems among the military and law enforcement, further complicate the issue.<sup>189</sup>

The inherent difficulty in cyberattack attribution highlights why the concept of attribution is of extreme importance. The need for legal certainty requires that states attribute cyberattacks to the accurate state to prevent innocent deaths and unnecessary collateral damage. As such, the concept of online attribution should be reinforced through increased state collaboration and sharing of information. Such a requirement does not create any additional obligations on states. It is merely a reinforcement of an existing obligation of cooperation. Eventually, the technology will catch up with the law. Until then, the concept of cyberattack attribution must endure.

*Levi Grosswald\**

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183. Jensen, *supra* note 25, at 218.

184. Brenner, *Attribution and Response*, *supra* note 9, at 405.

185. *Id.* at 409.

186. *Id.*

187. *Id.* at 412.

188. *Id.* at 435.

189. *Id.* at 438.

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# THE MOST DANGEROUS GAME: U.S. OPPOSITION TO THE CULTURAL EXCEPTION

## INTRODUCTION

In the 2004 documentary film *Mondovino*, filmmaker Jonathan Lasiter explored a raging conflict in the increasingly globalized wine industry.<sup>1</sup> At the heart of the conflict is the concept of *terroir*, which refers to the distinct tastes and aromas that result from the particular soil, climate, and growing methods of the different regions in which wine is made.<sup>2</sup> These particularized attributes are critical in maintaining the diversity of wines that occur throughout the world.<sup>3</sup> In their absence, wines from Napa will become indistinguishable from those of Bordeaux.<sup>4</sup>

The local growers and wine aficionados interviewed in the film see two major threats to the continued existence of their cherished *terroir*.<sup>5</sup> First, as multinational wine companies have accumulated vineyards throughout the world's wine-growing regions, they have streamlined growing procedures.<sup>6</sup> Second, a handful of figures have come to hold enormous influence in the global wine industry, and their tastes and preferences have increasingly dictated the growing methods of winemakers all around the world.<sup>7</sup> For example, an incredibly influential critic's fondness for oak has led winemakers to store their wine in oak barrels, thus drowning out the local characteristics of wines that developed over the course of centuries.<sup>8</sup>

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1. MONDOVINO (THINKFilm 2004). For a review, see A.O. Scott, *Amid the Globalization of Wine, A Plea for Its Individuality and Expression of History*, N.Y. TIMES, Mar. 23, 2005, at E5.

2. MONDOVINO, *supra* note 1. Writing about the global industry of wine, Sid Perkins noted, "Today's diversity—from Bordeaux to merlot, from champagne to chardonnay—reflects the complex interactions between a region's soil, topography, climate, grape varieties, agricultural practices, and wine-making techniques, all of which can inextricably link particular wines to particular places. Little wonder, then, that wine sometimes is referred to as 'liquid geography.'" Sid Perkins, *Global Vineyard: Can Technology Take On a Warming Climate?*, SCIENCE NEWS, May 29, 2004, at 347.

3. MONDOVINO, *supra* note 1.

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *Id.* While the critic in question is American, not all of the divisions fall neatly on an American/rest of the world axis. Another prominent subject of the film, a wine consultant who advises wineries on how to market their wine on the global marketplace, is actually French.



These figures see these trends not just as a threat to local products, but as an assault on their cultural identity.<sup>9</sup> Because cultural identities have become so intertwined with nationalism, any threat to the customs or cultural products by which a nation has come to define itself can actually be seen as a threat to the nation itself.<sup>10</sup> As Neal Rosenthal, a New York wine importer, said of the battle between the forces of globalization, "It's not the traditionalists versus the modernists. It's the collaborators against the resistance."<sup>11</sup> Under this view, when civilization is at stake, all political avenues should be pursued, including the suspension of free trade rules.<sup>12</sup> When threatened with the prospect of an American corporation purchasing a large vineyard in Bordeaux, a French city elected a Communist mayor who successfully thwarted the bid.<sup>13</sup>

However, those at the forefront of the globalization of the wine industry view the ferocious response mainly as a result of jealousy on behalf of growers who are losing out in the competition for the global marketplace.<sup>14</sup> In their view, it is the consumers who are driving the changes in the industry, and they see themselves as democratizing forces in the once-aristocratic world of wine.<sup>15</sup> In dismissing their objections, a Bordeaux executive referred to the local growers and aficionados as the "ayatollahs of *terroir*."<sup>16</sup>

The ferocity of the debate mainly results from the pitting of culture and commerce, two dominant forces of the modern world, in direct opposition to each other.<sup>17</sup> Nations have come to define themselves by their respective cultures, and when culture is threatened, many people feel that the suspension of free trade laws seems like a small price to pay for its

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9. See *id.* Many of the French growers in the film discuss how the growing methods in their locales have remained remarkably constant since the Middle Ages.

10. See Judith Beth Prowda, *U.S. Dominance in the "Marketplace of Culture" and the French "Cultural Exception"*, 29 N.Y.U. J. INT'L L. & POL. 193, 199–200 (1997).

11. MONDOVINO, *supra* note 1.

12. See *id.*

13. *Id.* Obviously, with existing free trade agreements between France and the U.S., a corporation would normally have the right to purchase any business it would like.

14. *Id.* The critic, Robert Parker, seems to take particular pride in the idea of French wine families, whose involvement in the industry sometimes dates over centuries, trying to cater to his American tastes.

15. See *id.*

16. *Id.*

17. See *id.* As Judith Beth Prowda noted, "The debate over the 'cultural exception' juxtaposes the European notion of the necessity for some form of cultural protectionism and the profound American belief in freedom of expression, choice, and what Justice Oliver Wendell Holmes termed the 'free trade in ideas.' Justice Holmes' theory is based on the notion that the First Amendment prohibits suppression of ideas. 'The marketplace of ideas' will determine the truth of any competing idea." Prowda, *supra* note 10, at 208.

preservation.<sup>18</sup> On the other hand, free traders see anti-protectionist trade laws as the backbone of modern peace and prosperity, and that while lifting tariffs and other restrictive measures may harm domestic industries, allowing exceptions for particular fields could threaten to swallow all international trade law.<sup>19</sup>

The United States has injected itself into this fierce debate by becoming the foremost opponent in the world of the “cultural exception.”<sup>20</sup> Generally speaking, the “cultural exception” refers to the exception to the national treatment principle in international trade law, under which states can enact protectionist trade policies to protect domestic cultural products when those protectionist measures would otherwise be held illegal under international trade law.<sup>21</sup>

The U.S. government, with lobbying from the entertainment industry, has adopted the policy of fiercely resisting any recognition of the cultural exception in international law and fighting for the application of free trade principles to all cultural products.<sup>22</sup> It was in response to the push by the U.S. to include cultural products in the free trade provisions of the General Agreement on Trade in Services (“GATS”) Agreement, part of the main framework of the World Trade Organization (“WTO”), that the cultural exception was born.<sup>23</sup> Even despite that failure, the U.S. continued to fight cultural protectionist measures through the WTO dispute resolution process.<sup>24</sup> Simultaneously, the U.S. has continued to push for the inclusion of cultural products in the negotiation of bilateral trade

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18. See MONDOVINO, *supra* note 1. Some parallels can be made with Michael Walzer’s “supreme emergency” doctrine. MICHAEL WALZER, *JUST AND UNJUST WARS* 251–268 (3d ed. 2000). Essentially, Walzer argues that when the continued existence of nations are truly in peril, those nations can suspend observance of international laws regarding the indiscriminate bombing of cities and targeting of civilians. See *id.*

19. See MONDOVINO, *supra* note 1.

20. See Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade on Cultural Products*, 40 N.Y.U. J. INT’L L. & POL. 351 (2007).

21. See Daisuke Beppu, *When Cultural Value Justifies Protectionism: Interpreting The Language Of The GATT To Find A Limited Cultural Exception To The National Treatment Principle*, 29 CARDOZO L. REV. 1765, 1767 (2008). While many early disputes have focused on film and television, there are many proponents for including products that are inextricably linked with their regions, such as wine and cheese, within the scope of the cultural exception. *Id.*

22. See C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1358 (2000).

23. See W. Ming Shao, *Is There No Business Like Show Business?: Free Trade and Cultural Protectionism*, 20 YALE J. INT’L L. 105, 106–07 (1995).

24. See Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT’L ECON. L. 515, 529–30 (2007).

agreements with smaller nations.<sup>25</sup> The U.S. also fiercely resisted the adoption of the UNESCO Convention, which loudly proclaims the principles of state sovereignty over all cultural matters.<sup>26</sup>

In line with this policy, the U.S. filed a WTO complaint against China in 2007, alleging that certain Chinese laws placed restrictions on trading and distribution rights of American companies hoping to sell cultural products, such as books, films, and music, and that these restrictions were violations of China's obligations under international law.<sup>27</sup> In *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the WTO Panel ruled in favor of the U.S., finding that China could not require American businesses to go through a middleman, normally a state-owned company, when seeking to distribute cultural products to the Chinese market.<sup>28</sup> After China appealed the ruling, the WTO Appellate Body upheld the vast majority of the Panel's findings.<sup>29</sup>

Key figures in Washington hailed the decision, seeing it as a major vindication of U.S. policy.<sup>30</sup> Ron Kirk, the U.S. trade representative, claimed the WTO decision as a major victory, saying, "These findings are an important step toward ensuring market access for legitimate U.S. products in the Chinese market, as well as ensuring market access for U.S. exporters and distributors of those products."<sup>31</sup> He then vowed to continue U.S. policy, stating, "We will work tirelessly so that American companies and workers can fully realize the market opening benefits that this decision signals."<sup>32</sup>

Hollywood executives echoed the government's praise of the decision.<sup>33</sup> Dan Glickman of the Motion Picture Association of America expressed his belief that the decision would further open up the Chinese market.<sup>34</sup> When speaking of a Chinese quota of foreign films that was not

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25. See Bruner, *supra* note 20, at 376.

26. *Id.* at 397–400.

27. See Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 1.1, WT/DS363/R (Aug. 12, 2009) [hereinafter China Panel Report].

28. See *id.* ¶¶ 4.4–4.5, 8.1, 8.2.

29. See WTO Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 414, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter China Appellate Report].

30. See Keith Bradsher, *W.T.O. Rules Against China's Limits on Imports*, N.Y. TIMES, Aug. 12, 2009, at A1.

31. See *id.*

32. *Id.*

33. See *id.*

34. See *id.*

at issue in the WTO panel decision, Glickman stated, "It's hard for me to believe that the import quota, which has been in effect for 10 years, will be there in perpetuity with this decision."<sup>35</sup> Glickman saw the decision as a stepping-stone towards the eventual abolition of film quotas and other regulations placed on cultural products.<sup>36</sup> Proponents of U.S. policy thus see the decision as a major breakthrough, and believe that continued resistance to any recognition of the rights of states to regulate culture will eventually culminate in the total extinction of the cultural exception.<sup>37</sup>

This Note argues that despite the ruling in its favor, the U.S. policy of full-fledged opposition to the cultural exception is misguided. There is an inherent difficulty in both defining and valuating the concept of culture in a legal framework, and these difficulties make further litigation regarding cultural matters incredibly risky. The WTO decision itself suggests that proponents of the cultural exception may have the upper hand in future cases.<sup>38</sup> First, the decision suggests that the UNESCO Convention may actually alter some rights and obligations of WTO members.<sup>39</sup> Second, China's invocation of a "public morals" defense, while unsuccessful in this case, may prove to be an avenue in the future for states to regulate culture consistently with their WTO obligations.<sup>40</sup>

In light of the inherent risk of litigating culture, the U.S. should instead negotiate with the international community to codify a limited version of the cultural exception at the WTO. In exchange for recognizing the exception, the U.S. should push for a medium-based definition of the term, in which the applicability of the exception depends on the medium in which cultural products are displayed to consumers, and not on an analysis of the cultural value of the goods and products. Such an approach would place clear limits on the scope of the cultural exception, and would prevent the more radical provisions of the UNESCO Convention<sup>41</sup> from affecting international trade law.

Part I of this Note explores the origins of the cultural exception, and analyzes a prior WTO decision which displays the body's previous unwillingness to consider the cultural value of products in their legal anal-

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35. *Id.* Glickman did note that he did not think the decision would have a major impact in the immediate future. *Id.*

36. *Id.*

37. *See id.*

38. *See* China Panel Report, *supra* note 27.

39. *See id.* ¶ 7.751.

40. *See id.* ¶ 7.863.

41. *See* Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversite-Cult. Rev., available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [hereinafter UNESCO Convention].

yses. Part II examines the UNESCO Convention, a 2005 treaty which seeks to counteract the lack of recognition of the cultural exception at the WTO, and discusses its possible effects on WTO rights and obligations. Part III looks at the WTO's *China* decision in detail, with particular emphasis on China's invocation of the UNESCO Convention and its "public morals" defense.

## I. PRODUCTS OR CULTURE?: THE WTO AND THE CULTURAL EXCEPTION

### A. Culture and the National Treatment Principle

The National Treatment principle is one of two foundational principles that apply across the WTO regime<sup>42</sup> and it is crucial in understanding the cultural exception. The General Agreement on Tariffs and Trade 1947 ("GATT 1947") provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."<sup>43</sup> The National Treatment principle prohibits a member from discriminating against other members in favor of its own goods and services.<sup>44</sup> This principle requires that once goods have cleared customs, members must treat foreign goods no less favorably than like domestic goods.<sup>45</sup>

The cultural exception first arose in the attempts of the U.S. to extend the national treatment principle to services as well as products.<sup>46</sup> The GATT 1947 only governs goods, which essentially means products that contain a distinct physical presence.<sup>47</sup> In contrast, GATS governs services, meaning products that lack physical, tangible properties.<sup>48</sup> While neither the GATT nor GATS explicitly contain a cultural exception, the

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42. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 143 (2008). The other core principle is The Most Favored Nation principle, which essentially means that WTO members must give equal treatment concerning trade advantages to all other members. No member of the WTO can discriminate in favor of or against any other member. The Most Favored Nation and National Treatment principles first appeared in GATT 1947, but they are now featured in the WTO through GATT 1994, GATS, and TRIPS. *Id.*

43. General Agreement on Tariffs and Trade art. III(2), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

44. CHOW & SCHOENBAUM, *supra* note 42, at 143.

45. *Id.* at 159.

46. See Hahn, *supra* note 24, at 515–16.

47. *Id.* at 525.

48. *Id.*

different natures of the treaties have important consequences.<sup>49</sup> The GATT automatically applies its national treatments principle to all goods, unless there is an express provision explicitly exempting the product from the treaty.<sup>50</sup> GATS, on the other hand, creates obligations much more modest in scope,<sup>51</sup> as its national treatment principles are only granted if and to the extent that states have made specific commitments to liberalize trade in that particular industry.<sup>52</sup>

During the Uruguay Round negotiations that led to the ratification of GATS in the early 1990s, the U.S. pushed hard to include specific commitments to liberalize the entertainment industry as part of the treaty.<sup>53</sup> In response, the French government pushed for the complete exclusion of the industry.<sup>54</sup> Ultimately, in an uneasy compromise, the sides essentially agreed to disagree, not formally excluding the audiovisual sector from GATS, but allowing states to decline to make commitments to liberalize trade in the sector, with the understanding that parties would resume negotiations within five years.<sup>55</sup> However, in the ensuing years, very few Member States have made commitments with regards to cultural products.<sup>56</sup>

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49. *Id.*

50. *Id.* For example, weapons are exempted from the GATT under Article XXI. One of the original exceptions of GATT 1947 also shows that the original drafters of the GATT were aware of the need for sometimes treating cultural products differently. Article IV permitted national screen quotas for foreign films, limiting the quotas to those existing in October 1947. The exception was limited to movie theaters, however, and was subject to further negotiations as to further limitations or their eliminations. The exception was a response to the huge number of American films that were flooding the European market as a result of the disruption of trade caused by the war. Chi Carmody argues that the prominent placement of the exception in the text of GATT displays that the cinema exception was important to the drafters, and that the exception was consistent with the drafters' awareness that one state's domination of the film industry could pose problems for international trade. The recognition of this exception for movie theaters may seem quite limited, but it seems to reflect a recognition of the need to sometimes address culture differently in international trade law, even at a time when the world was much more parochial, before globalization transformed so many cultures. Chi Carmody, *When "Cultural Identity Was Not At Issue": Thinking About Canada—Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 255 (1999).

51. See Hahn, *supra* note 24, at 531–33.

52. See *id.* at 526.

53. See Shao, *supra* note 23, at 106–08.

54. *Id.*

55. *Id.*

56. Hahn, *supra* note 24, at 526.

The French government celebrated this cultural exception from GATS as a major victory for the preservation of French culture,<sup>57</sup> but the standing of the cultural exception in international trade law remained very tenuous.<sup>58</sup> In ensuing years, the classification of a product as a good or service became integral to the ability of states to enact protectionist measures against cultural products.<sup>59</sup> When a cultural product was recognized as a service, it was likely to fall within the scope of GATS, but when recognized as a good, it would likely be engulfed by the all-encompassing nature of GATT.<sup>60</sup>

This situation is further complicated by the fact that products do not fall exclusively under either GATT or GATS.<sup>61</sup> For instance, while the production of a film is considered a service, the physical reel which is projected on screens is actually considered a good.<sup>62</sup> Thus, even though the entertainment industry is not specifically included in GATS, a cultural product may still fall within the scope of GATT even if a party can successfully argue that the product constitutes a service.<sup>63</sup> Under this legal regime, an analysis known as the “like products” test became incredibly important in determining whether states have the right to impose protectionist measures in a given cultural industry.<sup>64</sup>

#### *B. Cultural Valuation in the “Like Products” Analysis*

In *Canada—Certain Measures Concerning Periodicals*, the WTO Panel assessed whether Canada violated national treatment principles by imposing a total ban and excise taxes on split-run editions of U.S. magazines.<sup>65</sup> In the 1960s, U.S. publishers began to distribute Canadian edi-

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57. See Alan Riding, *The World Trade Agreement: The French Strategy*, N.Y. TIMES, Dec. 15, 1993, at D19. Communications Minister Alain Carignon stated, “This is a great and beautiful victory for Europe and for French culture.” *Id.* However, Jack Lang, the former Minister of Culture, phrased the victory in different terms, stating, “It’s not a victory of one country over another. It’s a victory for art and artists over the commercialization of culture.” *Id.* It should be noted that while much of the press coverage at the time focused on the French role in negotiations, the backing of the French by other members of the European Community was crucial in the establishment of the cultural exception. *Id.* See also Julian Nundy, *The GATT Deal: France Sees Itself as Gallant Defender*, THE INDEPENDENT, Dec. 15, 1993, at 7.

58. See Bruner, *supra* note 20, at 374–76.

59. See Hahn, *supra* note 24, at 531–33.

60. *Id.*

61. *Id.* at 526–27.

62. *Id.* at 527.

63. See *id.*

64. See *id.*

65. See Panel Report, *Canada—Certain Measures Concerning Periodicals*, ¶¶ 3.3–3.4, WT/DS31/R (Mar. 14, 1997) [hereinafter Canada Panel Report].

tions of their magazines containing the same editorial content as U.S. editions but with advertisements specifically targeted to the Canadian market.<sup>66</sup> These U.S. editions threatened the advertising revenue of Canadian periodicals, which in turn led to the collapse of several Canadian magazines.<sup>67</sup> Fearing the impact of a collapse of the Canadian publishing industry on national identity,<sup>68</sup> the Canadian government imposed a heavy tariff on imported periodicals that contained advertisements directed specifically to the Canadian market.<sup>69</sup> In response to an attempt by *Sports Illustrated* in 1993 to get around the tariff by printing the split-run editions in Canada, the Canadian government placed an excise tax of eighty percent on magazines with more than twenty percent of the same editorial content as their home editions and with advertising that did not appear in non-Canadian editions of the magazine.<sup>70</sup> In assessing whether

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66. See *id.* ¶ 2.2.

67. See Carmody, *supra* note 50, at 279–80. While American publications had been attracting Canadian readers for many years, in the 1960s, U.S. periodicals began to introduce split-run editions in Canada in an attempt to increase their advertising revenue. Advertisers looking to market specifically to Canadian consumers could now buy space in popular American magazines, thus threatening the traditional stream of revenue that was so vital to the continued existence of Canadian periodicals. *Id.*

68. In 1961, a government commission stated, “[T]he communications of a nation are as vital to its life as its defences, and should receive at least as great a measure of national protection.” Carmody, *supra* note 50, at 280. Despite close ties with the U.S., Canada has long struggled to maintain its cultural identity in the shadow of its enormous neighbor to the south. Describing this problem, Chi Carmody writes:

Due to its proximity and sheer size, the United States also looms large in everyday Canadian thinking. A shared border, common language, parallel history, and the largest trading relationship in the world mean that Canadians are well aware of U.S. current events. The same cannot be said for many Americans about Canada. Their ignorance annoys Canadians, who often perceive it as a sign of arrogance and a reason to be suspicious of the United States. Moreover such unidirectional cultural permeability makes it exceedingly difficult for Canadians to assert their own cultural autonomy. Not only must Canadians struggle to define who they are in the face of constant competition from cultural imagery that is not their own, but Canadian culture does not pose any comparable threat to, and hence cannot be leveraged against, the United States. The overwhelming one-way flow of products, ideas, and interest has served at times to sharpen the perception of cultural invasion among Canadians.

*Id.* at 278–79.

69. *Id.* at 280–81. Tariff Code 9958 effectively implemented a total ban on the importation of periodicals which contained advertisements that targeted Canadian audiences and did not appear in all editions distributed in the periodical’s home market. See *id.*

70. See Canada Panel Report, *supra* note 65, ¶¶ 2.6–2.7.



the excise tax violated the national treatment principle, the Panel conducted a "like product" analysis.<sup>71</sup>

Canada argued that the intellectual content of a magazine must be considered its prime characteristic, and that the "like product" analysis must be conducted in terms of its intellectual content rather than its physical characteristics.<sup>72</sup> The Canadian government intended for the excise tax to create original content by putting news and events through a uniquely Canadian filter.<sup>73</sup> Canada argued that it was untenable to equate U.S. periodicals, which virtually ignored Canadian topics, with Canadian periodicals, which had a strong focus on Canadian affairs and a distinctly Canadian outlook on international affairs, as "like products."<sup>74</sup>

The U.S. countered that Canada had created artificial distinctions between otherwise like products based on factors such as the location of production, and that these factors were irrelevant in assessing the nature of the good.<sup>75</sup> The U.S. argued that editorial content was just one of many factors that should be assessed when making the "like product" comparison.<sup>76</sup> The U.S. further suggested that Canada imposed the measures mainly to protect its own advertising industry.<sup>77</sup>

In an unusual legal analysis, the Panel examined the case of a hypothetical magazine<sup>78</sup> and reasoned that there could conceivably be a U.S. edition and a Canadian edition of a home and gardening magazine that would share a common end use and similar physical properties, natures, and qualities.<sup>79</sup> In rejecting the Canadian argument, the Panel found that editorial content and advertising content, the factors of the excise tax definition, were external to the Canadian market and did not relate to any inherently Canadian quality of the periodical.<sup>80</sup> In analyzing the decision, one author noted that the Panel insisted on a degree of specificity that culture could simply never provide.<sup>81</sup> The Panel refused to engage in the analysis needed to recognize the inherent value of particular cultures and thus found the different editions of the magazines to be like products.<sup>82</sup>

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71. *See id.* ¶ 3.60.

72. *See id.* ¶ 3.61.

73. *See id.* ¶ 3.59. An analogy can be made here with the concept of *terroir*.

74. *See id.* ¶ 3.62.

75. *See id.* ¶ 3.60.

76. *See id.*

77. *See id.* ¶ 3.72.

78. *Id.* ¶¶ 5.25–5.26. This particular bizarre aspect of the Panel's opinion should be attributed to the difficulty inherent in legally analyzing culture.

79. *See id.* ¶ 5.25.

80. *See id.* ¶ 5.24.

81. Carmody, *supra* note 50, at 295–96.

82. *See id.*

Canada appealed the Panel's findings on the excise tax to the Appellate Body of the WTO.<sup>83</sup> While the Appellate Body also ruled in favor of the U.S., it did so under a completely different analysis, looking at the substitutability of the different editions of magazines.<sup>84</sup> In finding that imported split-run periodicals and domestic split-run periodicals were directly substitutable, the Appellate Body looked to see whether they were in competition with each other in the relevant market. The Appellate Body noted that while certain periodicals may not be directly substitutable because of a difference in topic, whether or not a magazine had Canadian content was not relevant in assessing whether a periodical is substitutable.<sup>85</sup>

Because of the WTO's purely economic focus, its panels refused to take non-economic considerations into account in their legal analyses of whether states were violating national treatment principles.<sup>86</sup> Thus, many measures states traditionally took to protect their local cultural industries might not survive the WTO dispute resolution process.<sup>87</sup> While many ambiguities remained in defining culture, it seemed quite clear that arguments about the cultural values of products under the "like products" analysis were doomed to fail.<sup>88</sup> Because many states felt that the WTO was ignoring the cultural value of products that were so important to their respective national and cultural identities, these states turned to the United Nations in 2005 in an attempt to reassert their sovereignty over cultural matters.<sup>89</sup>

## II. THE UNESCO CONVENTION

While France had been inextricably linked with the cultural exception during the Uruguay Rounds negotiations, the ratification process of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was a world-wide phenomenon.<sup>90</sup> With its overwhelming popularity, the world community negotiated and ratified the treaty with remarkable speed.<sup>91</sup> Despite its nearly complete isolation, the

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83. WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R, (June 30, 1997), at 2 [hereinafter Canada Appellate Report].

84. *See id.* at 29.

85. *See id.* at 28.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See Bruner, supra* note 20, at 357.

90. *See Alan Riding, Entr'acte: Next Lone U.S. Dissent: Cultural Diversity Pact*, N.Y. TIMES, Oct. 12, 2005.

91. *See id.*

U.S. still opposed the treaty in its entirety and fought hard against its ratification.<sup>92</sup>

France and Canada, the original sponsors of the convention, aimed to remove all cultural trade disputes from the jurisdiction of the World Trade Organization and to create a dispute resolution process under UNESCO.<sup>93</sup> In a partial victory, the U.S. managed to fend off this movement, successfully pushing for the inclusion of a provision that states that the convention "cannot modify rights and obligations of the parties under any other treaties to which they are parties."<sup>94</sup> While its standing under international law remains unclear, the Convention is clearly an endorsement by states of their sovereignty over cultural matters.<sup>95</sup>

After being adopted by the UNESCO General Conference on October 20, 2005, the Convention provoked a broad array of reactions, ranging from indifference, to over the top excitement,<sup>96</sup> to fierce resistance.<sup>97</sup> These varied reactions can be attributed to the Convention's many substantive and procedural contradictions.<sup>98</sup> The Convention appears at first sight to be nothing more than a litany of vague platitudes about the inherent value of cultural diversity.<sup>99</sup> Yet to others, the Convention represents a treaty fully recognized in international law, and while perhaps having little impact upon clear existing international obligations, contains the potential to transform the recognition of the cultural exception under international law.<sup>100</sup> This Section examines both the provisions of the Convention and its impact upon international law, arguing that despite the provisions limiting its applicability, it still has many implications for the obligations and rights of its parties.

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92. *See id.*

93. *See id.*

94. *See id.*

95. Alison James, *Gaul Wall Won't Stall Hollywood Anytime Soon*, VARIETY, Oct. 31, 2005, at 8.

96. *See* Bruner, *supra* note 20, at 400–02. For example, a Canadian government minister described the Convention as "on an equal footing with other international treaties," and called it "a great day for the cultural community." *Id.*

97. *Id.* at 400–03.

98. *See* UNESCO Convention, *supra* note 41.

99. *See id.* art. 1.

100. One such provision of the Convention states, "Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples, and nations . . ." *Id.* pmbl.

### *A. A Proclamation of Sovereignty*

Throughout its text, the Convention announces and reaffirms an incredibly broad mandate for state sovereignty over the regulation and subsidization of cultural industries.<sup>101</sup> One of the stated objectives of the Convention is “to reaffirm the sovereign rights of States to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”<sup>102</sup> The Convention announces “the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory” to be one of its eight guiding principles.<sup>103</sup> This language gives a broad mandate to governments to enact any protectionist measures it deems necessary, as long as the measures relate to the cultural sphere.<sup>104</sup> This assertion of sovereignty, considering the enormous difficulties in defining culture and the seeming authorization of states to define culture themselves, must be seen as a rejection of WTO free trade principles in cultural industries.<sup>105</sup>

### *B. Defining Culture*

The Convention attempts to create an incredibly broad notion of culture based on the inherent cultural value of things,<sup>106</sup> but does not provide a working definition of “culture.”<sup>107</sup> The Convention circularly defines “cultural content” as referring “to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”<sup>108</sup> This definition does not limit cultural content to products traditionally recognized as cultural, such as books, films, or music,<sup>109</sup> and would seem to allow for the inclusion of national and regional food products, such as wine and cheese.<sup>110</sup>

The Convention also seeks to remove the distinction between goods and services that is so important at the WTO.<sup>111</sup> The Convention defines “cultural activities, goods and services” to be

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101. *See id.*

102. *Id.* art. 1(h).

103. *Id.* art. 2(2).

104. *See id.*

105. *See id.*

106. *See id.* art. 4(2).

107. *See id.* art. 4.

108. *Id.* art. 4(2).

109. *See id.*

110. *See id.*

111. *See id.* art 4(4).

those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.<sup>112</sup>

This language seems to reject any separate legal analysis for the production of cultural products.<sup>113</sup>

### *C. The Means for Protecting Culture*

The Convention provides a broad mandate for states to take measures that they deem important for protecting culture.<sup>114</sup> Included in such measures are "regulatory measures aimed at protecting and promoting diversity of cultural expressions."<sup>115</sup> Because of the Convention's broad definition of culture, almost any measure could conceivably fit into this provision.<sup>116</sup>

The Convention then provides a non-exclusive list of specific measures that are acceptable.<sup>117</sup> The list includes such relatively uncontroversial measures as the creation and funding of public institutions to support culture<sup>118</sup> and public broadcasting.<sup>119</sup> The Convention endorses

measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services.<sup>120</sup>

The broad language of this provision seems to explicitly endorse the use of quotas and other regulations designed to protect the market for domestic productions, and it does not set any limits upon its use.<sup>121</sup> The Convention further endorses the use of subsidies to promote cultural goods,

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112. *Id.*

113. *See id.*

114. *See id.* art. 6(1).

115. *Id.* art. 6(2)(a).

116. *See id.*

117. *Id.* art. 6(2).

118. *Id.* art. 6(2)(f). Article 6(2)(e) also allows measures to encourage non-profit organizations, which likely would include public subsidies for such organizations. *Id.* art. 6(2)(e).

119. *See id.* art. 6(2)(h).

120. *Id.* art. 6(2)(b).

121. *See id.*

services, and activities.<sup>122</sup> The text of the UNESCO Convention provides incredibly broad powers to states when regulating culture and explicitly authorizes many measures that would likely violate WTO obligations.<sup>123</sup>

#### *D. Rights, Obligations, and Article 20*

However, the UNESCO Convention, although binding,<sup>124</sup> imposes very few obligations on its parties.<sup>125</sup> Instead, the Convention formulates an extensive list of measures that parties have the right to take when protecting and promoting cultural diversity.<sup>126</sup> When a right conflicts with an existing obligation arising from another instrument of international law, the obligation will generally take precedence.<sup>127</sup> This aspect of the Convention has made commentators dismiss its importance, finding that its affirmation of state sovereignty over cultural matters, while sounding revolutionary, actually rings hollow.<sup>128</sup>

The Convention also seems to negate any impact it may have on international law with one provision.<sup>129</sup> Article 20(2) states, “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”<sup>130</sup> This provision seems to validate any previous treaties or trade agreements ratified before the Convention, such as the WTO regime, in which states agreed to cede their sovereign rights to impose protectionist measures.<sup>131</sup> Considering that most states are parties to the WTO, and that most WTO

122. *Id.* art. 6(2)(d).

123. *See id.* art. 6.

124. Mira Burri-Nenova, *Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12 J. INT’L ECON. L. 17, 27. Despite any confusion caused by the use of the word “convention,” the UNESCO Convention is a treaty and is binding under international law. *Id.*

125. *Id.* at 22.

126. *Id.* at 23.

127. *See* Bruner, *supra* note 20, at 405.

128. *See* Burri-Nenova, *supra* note 124, at 22–25. Burri-Nenova writes, “Thus, whereas the Parties could do many things, they are not obligated to undertake any concrete and specific action.” *Id.* at 22. After noting that the only punishment for non-compliance with the Convention envisaged is a state being criticized by the Intergovernmental Committee or Conference of Parties, Burri-Nenova writes, “[W]hile such reporting exercises have proven advantageous in different settings, they are unlikely to have any value here, since . . . there exist neither any implementation criteria, nor any threat of sanctions.” *Id.* at 23.

129. *See* UNESCO Convention, *supra* note 41, art. 20.

130. *Id.* art. 20(2).

131. *See id.* Writing in 2006, Michael Hahn stated, “This article shows that the *Diversity Convention*, while an important step towards the recognition of cultural diversity as an internationally recognized public choice of states, does not affect their rights and obligations as such under WTO law.” Hahn, *supra* note 24, at 517.

case law seems to indicate that cultural products will not be treated differently than other products.<sup>132</sup> Article 20(2) seems to completely negate the Convention's bold calls for state sovereignty.<sup>133</sup> While declarations of the inherent value of cultural diversity may sound appealing, domestic cultural industries would be just as vulnerable to international competition as any industry in a WTO jurisdiction.<sup>134</sup>

However, another provision in Article 20 also claims that the Convention should not be subordinated to any other treaty.<sup>135</sup> Article 20(1) states, "[W]hen interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention."<sup>136</sup> How can these two seemingly contradictory provisions of Article 20 be reconciled?

One commentator argues that the Culture Convention is best understood not as altering existing obligations under international trade law, but as enhancing the negotiating positions of states as they enter into future trade agreements.<sup>137</sup> Under his reading of Article 20, with respect to pre-existing international obligations, the Convention requires only that parties to the Convention make a good faith effort to comply with their obligations.<sup>138</sup> When an existing obligation arising under the WTO (or any other trade regime or treaty, for that matter) conflicts directly with obligations under the Convention, the WTO obligation will prevail, and the party will not violate its duty to make a good faith effort to comply with the Convention.<sup>139</sup> However, the importance of the Convention comes into play when states enter into agreements with new international obligations.<sup>140</sup> By asserting their duty to make a good effort to comply

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132. See Bruner, *supra* note 20, at 407.

133. See UNESCO Convention, *supra* note 41, art. 20(2).

134. See Bruner, *supra* note 20, at 376–78. As the author notes, because of the relative ease of negotiating a bilateral agreement, as opposed to a multilateral agreement, the United States has focused on negotiating the liberalization of cultural markets in bilateral treaties, often with smaller nations with little bargaining power. *Id.*

135. UNESCO Convention, *supra* note 41, art. 20(1).

136. *Id.* art. 20(1)(b).

137. Bruner, *supra* note 20, at 405.

138. *Id.* at 405–06.

139. *Id.* at 406–07. In support of his contention, Bruner notes the similarities in wording between Article 20(2) of the Convention and Article 30(2) of the Vienna Convention on the Law of Treaties, which provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." *Id.* at 406.

140. *Id.* at 407. Bruner notes that while Article XIX of GATS requires that parties enter into successive rounds of negotiations to achieve a progressively higher level of liberalization, it also contains a limiting provision which recognizes national policy ob-

with the Convention, smaller states can enhance their bargaining position with larger states.<sup>141</sup> Thus, the Convention can be interpreted as being most influential in areas of international trade law where states have not yet made commitments.<sup>142</sup>

This Note argues that the Convention may also prove to be highly influential when the exact scope of states' obligations remains uncertain, particularly with regards to the WTO's rarely used "public morals" defense. While Article 20 does place important limitations on the applicability of the UNESCO Convention, the Convention's broad definition of culture and its bold call for sovereignty over cultural matters can still transform the recognition of state sovereignty over cultural matters in international law.<sup>143</sup>

### III. THE UNESCO CONVENTION AND THE PUBLIC MORALS DEFENSE AT THE WTO

Despite its ruling in favor of the U.S., the WTO analysis in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* strongly suggests that U.S. policy regarding the cultural exception remains extremely risky.<sup>144</sup> In its report, the WTO Panel found that the Chinese government had violated international trade rules by limiting the importation of books, films, and music.<sup>145</sup> China had placed restrictions on foreign companies hoping to distribute these types of cultural products within China, forcing them to distribute their products through a limited number of corporations, many of which were state-owned.<sup>146</sup> The Panel found

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jectives as justifying an exemption from the process of liberalization, and the Convention endorses the recognition of cultural policies as national policy objectives. *Id.* at 407–08.

141. *See id.*

142. *See id.*

143. *See* UNESCO Convention, *supra* note 41.

144. *See* China Panel Report, *supra* note 27, ¶¶ 4.4–4.7, 7.863, 8.1, 8.2. Because the Appellate Body largely upheld the Panel's findings with respect to the application of the public morals exception, this Section focuses mostly on the Panel Report. *See* China Appellate Report, *supra* note 29, ¶¶ 336–37. Reference is made to the Appellate Body's conclusions or analysis whenever they differ in any material respect from the Panel Report.

145. Bradsher, *supra* note 30.

146. *See* China Panel Report, *supra* note 27, ¶¶ 7.751–7.755, 8.2. A film executive claimed that China Film Group Corp. took an enormous cut of box office receipts, and charged film studios high distribution fees, thus limiting the profitability of American studios to a small percentage of the Chinese box office. The film executive hoped this ruling would increase competition in the distribution of films, allowing studios to take a larger percentage of the box office in China. John W. Miller, Peter Fritsch & Lauren A.E.



that these restrictions violated China's obligations under GATT, GATS, and under their Accession Protocol,<sup>147</sup> and may mean that foreign movie studios, publishers, and record companies will have an increased chance to sell more directly to Chinese consumers.<sup>148</sup>

In its response to the allegations, China did not invoke its rights arising under the UNESCO Convention as a direct defense.<sup>149</sup> The language of Article 20 clearly seems to preclude parties from invoking rights under the Convention as a defense against a breach of obligations arising under existing international law,<sup>150</sup> and China's decision not to invoke the Convention as a direct defense seems to indicate that Article 20 will dissuade states from even attempting to argue that the Convention overrides clear and existing obligations when they are in conflict.<sup>151</sup>

However, China's response to the allegations and the Panel's decision suggests that the UNESCO Convention may still alter the rights and obligations of parties to the WTO when the scope of those rights and obligations are unclear.<sup>152</sup> In response to the claims that China violated trade obligations arising under the Accession Protocol, China raised Article XX(a) of the GATT 1994 as a defense.<sup>153</sup> Article XX(a) provides that, "nothing in this Agreement shall be construed to prevent the adoption or endorsement by any contracting party of measures: (a) necessary to protect public morals."<sup>154</sup>

China argued that the regulations being challenged by the U.S. were actually part of a content review system performed on imported cultural products that was designed to prevent the dissemination of products that could have a negative impact on public morals.<sup>155</sup> As part of this system, China only allowed entities which were capable of conducting the con-

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Schuker, *Hollywood Upstages Beijing: WTO Hands China Its Biggest Defeat in Trade Battle Over Movies, Music, Books*, WALL ST. J., Aug. 13, 2009, at A1.

147. See China Panel Report, *supra* note 27, ¶ 8.2. In line with earlier decisions, China did not focus on the "like products" analysis when making its arguments. However, this may be because this case focused on the restrictions China placed on foreign companies, and not on restrictions directly placed on the products. See *id.*

148. See Bradsher, *supra* note 30.

149. See China Panel Report, *supra* note 27, ¶ 7.758 n.538.

150. *Id.* ¶ 4.207. As the Panel noted in a footnote, "We observe in this respect that China has not invoked the *Declaration* as a defence to its breaches of trading rights commitments under the Accession Protocol." *Id.* ¶ 7.758.

151. See *id.* It remains unclear whether other forums of international law, such as the International Court of Justice, would be more receptive to a direct invocation of the UNESCO Convention.

152. See *id.* ¶¶ 4.108–4.112, 4.207, 7.751–7.755.

153. See *id.* ¶¶ 7.708–7.709.

154. See *id.*

155. See *id.* ¶¶ 4.277–4.278.

tent review to import cultural goods, and only a limited number of importation entities had the appropriate organizational structure and geographical coverage, as well as reliable and qualified personnel, necessary to conduct the content review.<sup>156</sup> Despite its codification in GATT 1994, the “public morals” defense had previously been invoked by a state only once at the WTO,<sup>157</sup> and thus, its exact scope remains unclear. In making its arguments, China attempted to invoke the language and spirit of the UNESCO Convention to broaden the scope of the previously dormant defense.<sup>158</sup>

When states invoke the protection of public morals as a defense, they must actually show that there is a link between the policy objective behind the challenged measures and the protection of public morals.<sup>159</sup> In *US—Gambling*, the sole invocation of the public morals defense, the Panel first analyzed whether the policy objectives behind various internet gambling statutes in the U.S. fell within the scope of the protection of public morals.<sup>160</sup> The Panel eventually did accept the U.S.’s arguments that the laws in dispute were actually measures to protect “public morals

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156. See *id.* ¶¶ 4.278–4.279. The United States responded, “Restricting trading rights to only a single, or a select few, Chinese state-owned importers is nowhere near ‘indispensable’ to content review, and thus the restrictions on trading rights are not ‘necessary’ under Article XX(a).” *Id.* ¶ 4.318.

157. Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L ECON. L. 43, 44–45. As Diebold notes, the defense was unsuccessfully invoked by the United States in *US—Gambling*, but writing in March 2008, Diebold accurately predicted that China was likely to invoke the defense in the current case. *Id.*

158. See China Panel Report, *supra* note 27, ¶¶ 4.108–4.109.

159. See *id.* ¶¶ 7.762–7.763. Writing before the China Panel Report was issued, Diebold said that WTO dispute settlement practice applied a two tier test to determine whether Article XX (or the similar Article XIV of GATS) is available as a defense. First, states must show that the measure at stake is designed to pursue a policy objective that falls within the scope of one of the public interests set out in Article XX, and the measures are necessary to achieve the policy objective. Second, states must show that they satisfy the good faith requirements set forth by the general exception clause. Diebold, *supra* note 157, at 46–47. However, when analyzing the general exceptions clause, WTO panels sometimes do not even mention some elements, either because different elements can be so closely linked or so obvious that they are not even worth mentioning. *Id.* at 47. This can make analysis of the Panel’s decision confusing, to say the least.

160. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S. Gambling Panel Report]. The Panel did find that the concerns which the various statutes sought to address did fall within the scope of public morals, but found that the measures were not necessary to protect public morals. *Id.*

or public order.”<sup>161</sup> However, as Antigua wisely noted, because of the wide availability of gambling and the active role of federal and state governments in the promotion of gambling, the U.S. could not credibly argue that gambling itself was contrary to public morals and public order.<sup>162</sup> Instead, in order to make this link, the U.S. had to identify secondary concerns that the various statutes were addressing, such as organized crime, money laundering, fraud, the risks of children gambling, and pathological gambling.<sup>163</sup> They then had the burden of providing evidence, such as legislative history, that showed that these various statutes were actually enacted for the purpose of addressing these specific concerns.<sup>164</sup>

Yet, in its attempt to show that its intended policy objectives fell within scope of the protection of public morals, China mostly ignored any specific concerns it had with the cultural products being reviewed, and instead explicitly invoked the Convention to proclaim that cultural goods necessarily have an effect on public and individual morals.<sup>165</sup> In its oral statement at the First Substantive Meeting of the Panel, China further elaborated

As vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. Cultural goods may have a negative impact on public morals, such as the depiction or vindication of violence or pornography, against which minors must be specifically protected.<sup>166</sup>

Although China does not explicitly cite it, the language clearly references another UNESCO instrument, the Universal Declaration of Cultur-

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161. *Id.* ¶ 6.481. The Appellate Body, without much analysis, upheld the Panel’s finding that the challenged measures fell within the scope of “public morals” or “public order.” Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296–299, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter U.S. Gambling Appellate Report].

162. U.S. Gambling Panel Report, *supra* note 160, ¶ 3.290.

163. The suppression of these activities would constitute the policy objective.

164. *See id.* Diebold listed various means of proving whether specific policy objectives fall within the scope of public morals, including international practice and consensus, national laws and international agreements, and possibly religious texts. Diebold, *supra* note 157, at 64–66.

165. *See* China Panel Report, *supra* note 27, ¶¶ 4.108–4.109. China argued, “The cultural goods have a major impact on societal and individual morals as emphasized in particular in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.” *Id.*

166. *See id.* ¶ 4.276.

al Diversity (“the UNESCO Declaration”).<sup>167</sup> The UNESCO Declaration describes “cultural goods and services” as “vectors of identity, values, and meaning,” and that they “must not be treated as mere commodities or consumer goods.”<sup>168</sup>

China further argued,

Considering the potential impact of cultural goods on public morals, China’s longstanding policy has been to implement a high level of protection which is reflected in a complete prohibition of cultural goods with inappropriate content and a high level of protection against the possible dissemination of cultural goods with a content that could have a negative impact on public morals.<sup>169</sup>

In declining to elaborate on its specific concerns regarding the content of the cultural goods subject to the challenged measures, failing to describe how this content threatened public morals, and speaking only in an incredibly broad sense about the effect of cultural goods on public morals, China implicitly invoked the themes of sovereignty over cultural matters that permeate throughout the UNESCO Convention.<sup>170</sup>

Both the responses of the U.S. and of the Panel to China’s arguments seem to indicate that future WTO panels will not question the link between cultural products and public morals.<sup>171</sup> It is notable that the U.S., unlike Antigua and Barbuda in *US—Gambling*, did not even contest the link between the content of the cultural goods and the protection of public morals.<sup>172</sup> While Antigua and Barbuda were able to make the credible argument that the significant consumption of gambling and betting services within the nation raised the question of whether internet gambling was actually contrary to public morals in the U.S.,<sup>173</sup> the U.S. chose not to dispute whether all of China’s content prohibitions actually protected public morals in China.<sup>174</sup>

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167. See Universal Declaration of Cultural Diversity, Nov. 2, 2001, UNESCO Doc. 31C/RES/25, available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

168. *Id.* art. 8. Although there is language similar to this in the Convention, China may have chosen to cite the UNESCO Declaration because the United States had adopted the Declaration, but not the Convention.

169. China Panel Report, *supra* note 27, ¶ 4.277.

170. See *id.* ¶¶ 4.108–4.109, 4.276–4.277.

171. See *id.* ¶ 7.763.

172. See *id.* ¶¶ 7.756, 7.762. As the Panel noted, “The United States does not specifically argue that the measures at issue are not measures to protect public morals. The United States is challenging the means China has chosen to achieve its objective of protecting public morals.” *Id.* ¶ 7.756.

173. *Id.* ¶ 7.762.

174. *Id.*

Yet, some of the types of content prohibited under the Chinese regulations in dispute are incredibly broad.<sup>175</sup> Under the *Publications Regulations*, China's main statute laying forth how it applies content review to reading materials, China did put forth some specific content that its content review system prevented from entering the marketplace that would be unlikely to raise many objections, such as depictions of violence and pornography.<sup>176</sup> However, other provisions strongly suggest that China could apply protectionist measures protecting culture under the guise of the public morals defense.<sup>177</sup> Objectionable content includes content that: "jeopardizes the solidarity, sovereignty and territorial integrity of the nation," "incites hatred or discrimination of the nationalities, undermines the solidarity of the nationalities or infringes upon customs and habits of the nationalities," and "jeopardizes social morality or fine cultural traditions of the nationalities."<sup>178</sup> These provisions define content not by objective measures,<sup>179</sup> but rather by the effect it may have on individuals or the nation as a whole.<sup>180</sup> In defining prohibited content in such a circular manner, China could plausibly argue that any American cultural product that threatened the market share of Chinese cultural products "jeopardizes the solidarity" of the nation, or "threatens the cultural traditions of the nationalities."<sup>181</sup>

Because the Panel found that China's measures did not satisfy the necessity test of Article XX, they chose to proceed with their analysis on the assumption that each of the prohibited types of content could have a negative impact on "public morals" in China.<sup>182</sup> While this decision may be partially based on the strategic decision not to specifically contest the provisions detailing the prohibited content, the Panel also noted that the content and scope of the concept of "public morals" played a role in their decision.<sup>183</sup>

The Panel accepted the interpretation of public morals, laid out in *US—Gambling*, that "the term 'public morals' denotes standards of right and

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175. See China Panel Report, *supra* note 27, ¶¶ 7.760–7.761.

176. See *id.* ¶ 7.760. However, this is not to suggest that states might not object to discriminatory applications of those provisions against foreign materials.

177. See *id.*

178. See *id.*

179. While there may be some obvious difficulties in demarcating the exact point where depictions of nudity or sexual intercourse become pornographic, any analysis would at least be based on the actual content of the cultural product.

180. See *id.*

181. See *id.*

182. See *id.* ¶ 7.763.

183. *Id.* ¶ 7.763.

wrong conduct maintained by or on behalf of a community or nation,”<sup>184</sup> and that these concepts can vary throughout time and in different places, depending on factors such as prevailing social, cultural, ethical, and religious values.<sup>185</sup> Most importantly, the Panel noted that when applying the public morals concept and other similar societal concepts, member states “should be given some scope to define and apply for themselves the concepts of public morals . . . in their respective territories, according to their own systems and scales of values.”<sup>186</sup> The implicit recognition of state sovereignty over matters of public morals echoes the themes of the UNESCO Convention and seems to suggest that future WTO panels would be extremely reluctant to question a state’s assessment of its own public morals.<sup>187</sup>

The cultural value of a product may also have an impact on a WTO panel’s analysis of the necessity test. Once the panel determines that the challenged measures are designed to protect public morals, the challenged measures must still be determined to be “necessary” to protect public morals.<sup>188</sup> In *US—Gambling*, the Panel looked to three factors to determine whether the challenged measures met this standard: (1) the importance of the interests or values that these Acts are intended to protect; (2) the extent to which these Acts contribute to the realization of the end respectively pursued by these Acts; and (3) the respective trade impact of these Acts.<sup>189</sup>

The idea of state sovereignty over cultural products underlying the UNESCO Convention may have an important impact upon the first of these factors: the importance of the interests or values that the Acts are intended to protect.<sup>190</sup> With only a brief discussion, the panel embraced China’s position that the preservation of public morals represents a crucial policy objective for states, and that it forms “a central element of social cohesion and the capacity of communities to live together.”<sup>191</sup> The Panel also noted that the U.S. did not indicate any objection to China’s position regarding the importance of public morals as a state interest.<sup>192</sup> The Panel concluded,

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184. *See id.* ¶ 7.759.

185. *See id.*

186. *See id.*

187. *See* UNESCO Convention, *supra* note 41.

188. U.S. Gambling Panel Report, *supra* note 160, ¶ 6.479.

189. *See id.* ¶ 6.488.

190. *See* UNESCO Convention, *supra* note 41.

191. China Panel Report, *supra* note 27, ¶¶ 7.815–7.817.

192. *Id.* ¶ 7.817.

In our view, it is undoubtedly the case that the protections of public morals ranks among the most important values of or interests pursued by Members as a matter of public policy. We do not consider it simply accident that the exception relating to 'public moral' is the first exception identified in the ten sub-paragraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest.<sup>193</sup>

Because the WTO approach includes weighing and balancing the assessment of the relative importance of the interests pursued by the state against other factors,<sup>194</sup> the Panel's strong language regarding public morals may be an important factor in future disputes.

Even in rejecting China's particular plan for protecting public morals, the Panel endorsed state sovereignty over cultural matters.<sup>195</sup> When invoking the public morals defense, WTO members are obliged to consider all reasonably available alternatives that are WTO-consistent before imposing a WTO-inconsistent measure.<sup>196</sup> The Panel accepted the U.S. proposal that the Chinese government could perform the content review themselves instead of the import companies.<sup>197</sup> The Panel stated, "We see no reason to believe that the alternative in question would be inherently WTO-inconsistent or that it could not be implemented by China in a WTO-consistent manner."<sup>198</sup> This suggests that it is only China's restrictions on which entities are legally allowed to import cultural goods that are inconsistent with China's WTO obligations.<sup>199</sup> An exhaustive content review performed by the Chinese government would seem to be consistent with WTO law.<sup>200</sup>

Because WTO members are given great latitude in defining and applying the concept of public morals,<sup>201</sup> this decision seems to grant vast powers to states to regulate cultural goods. While the inherent difficulty of analyzing culture worked to the advantage of the U.S. in cases in which panels performed a "like products" analysis, this case suggests that it will work to the advantage of states seeking to invoke the public morals defense of Article XX.<sup>202</sup>

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193. *See id.* ¶ 7.817.

194. China Appellate Report, *supra* note 29, ¶ 240.

195. *See* China Panel Report, *supra* note 27, ¶¶ 7.848–7.849, 7.913–7.917, 8.2.

196. U.S. Gambling Panel Report, *supra* note 160, ¶ 6.526.

197. China Panel Report, *supra* note 27, ¶¶ 7.907–7.909.

198. *Id.* ¶ 7.907.

199. *See id.*

200. *See id.* ¶¶ 7.908–7.909.

201. Diebold, *supra* note 157, at 50.

202. *See* China Panel Report, *supra* note 27, ¶¶ 7.907–7.914.

## CONCLUSION

The analysis of the interplay between the UNESCO Convention and WTO case law is certainly not meant to suggest that trade obligations have been rendered moot by the UNESCO Convention. WTO case law and interpretation is extraordinarily complex, and each individual case involves so many variables that making specific predictions with regards to the development of trade law is impossible. Rather, this Note argues that the very complexity of WTO case law makes the current U.S. policy of resisting any possible recognition of the cultural exception incredibly risky.

The interests of the U.S. would be better served by dropping its fierce resistance to the cultural exception. The U.S. should engage with the international community to develop a WTO provision that clearly defines when the cultural exception is applicable and, when applicable, what acceptable measures states may take to protect domestic culture. Continuing its quixotic battle would only needlessly antagonize the global community, and in light of the overwhelming worldwide popularity of the cultural exception, any victory the U.S. might win at the WTO could damage the trade regime's legitimacy.

In exchange for supporting the codification of the cultural exception at the WTO, the U.S. should press for a cultural exception with a limited scope, based solely on the medium by which the product is transmitted and without regard to the cultural value of the product. The U.S. should propose that international trade law make a distinction between content that is publicly displayed and content that is consumed individually. Publicly displayed content would be defined as content that is communicated to multiple people simultaneously. This would include films at movie theaters, which are projected to consumers in a public place; television programming, which is broadcast to many viewers simultaneously; radio programming, likewise broadcast over the airwaves; and any live performance. For content that is publicly displayed, states should be allowed both to subsidize production and to place limited quotas on the amount of non-domestic productions. For example, states would be allowed to place a quota on the amount of foreign films that can be shown in theaters, but that quota may not be placed any higher than fifty percent. Such measures would allow states to ensure the continued production of domestic cultural content, but would not exclude foreign productions from the marketplace.

For content that is consumed individually, there should be fewer WTO acceptable restrictions. This would include CDs, DVDs, and content transmitted over the internet. Since the actual content would often overlap within these two categories, states would still be able to subsidize the



production of content for this category. However, the ability to exclude content from the marketplace would be greatly diminished under international law. For instance, while states would be able to place quotas on the amount of foreign films that can be released in theaters, they would not be able to place such a restriction on the availability of foreign films for downloading over the internet or in multimedia stores. This would protect the ability of consumers to seek out particular foreign content.

The U.S. could better achieve its policy objectives of opening the global marketplace for its entertainment industry by engaging with the international community to codify a limited version of the cultural exception in the WTO agreements. Current U.S. policy, while showing some signs of success in WTO litigation, carries far too much risk. When a policy isolates a nation from its friends as well as enemies and fails to achieve its objectives, it may be wise to rethink that policy. The time has come for the U.S. to recognize the cultural exception.

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