

WHO WILL WATCH THE WATCHDOGS? HUMAN RIGHTS NONGOVERNMENTAL ORGANIZATIONS AND THE CASE FOR REGULATION

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—There is a widespread attitude that NGOs consist of altruistic people campaigning in the general public interest, while governments consist of self-serving politicians. On some issues, such as human rights, this may generally be valid and NGOs are ‘the conscience of the world’. Even so, such an attitude should not be adopted as an unchallenged assumption . . . NGOs do not automatically deserve support and governments are not necessarily in the wrong.¹

I. INTRODUCTION

Academics and activists alike attribute much of the momentum surrounding the study of human rights and its on-going entrenchment in the post-World War II international system to the human rights movement. In particular, these observers credit the work of an ever-growing assembly of non-governmental organizations (“NGOs”) whose sole purpose is monitoring, reporting and advocating in favor of human rights.² Much praise has been lavished upon these organizations for their tireless efforts, dedication to the justice and morality of their cause, and bravery in the face of adversity. Indeed, these traits have resulted in impressive accomplishments, including advancing the drafting and passage of international legal instruments designed to curtail human rights abuses, such as the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

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¹ P. Willetts, *Introduction to ‘THE CONSCIENCE OF THE WORLD’: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM I*, 11 (Peter Willetts, ed., 1996).

² For a taxonomy outlining the scope of the term NGO for the purposes of this paper, see *infra* Part II(C).

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or Punishment,³ and providing key evidence necessary for the prosecution of alleged war criminals including Slobodan Milosevic.⁴ Milestones such as these are a testament to the evolving role of human rights NGOs and underscore the sharp departure from their humble roots within the international system. Unquestionably, human rights organizations (HROs)⁵ in operation today enjoy amplified standing at the United Nations and other intergovernmental bodies, expanded mandates and networks scrutinizing a wider array of rights and international actors, and widespread dissemination of their message across a broad range of media outlets. Significantly, these dramatic transformations have emerged despite the fact that HROs lack any international legal personality,⁶ “formal jurisdiction over specified domains,”⁷ or a source of formal accountability within the international system or at international law.

The dearth of formal accountability and authority that characterizes NGOs is particularly troubling when one considers that HROs deal in a

³ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/39/51 at 197 (entered into force June 26, 1987). James Avery Joyce noted as early as 1978 that there “is no doubt that NGOs are playing a special role in promoting international guidelines to prevent torture.” J. A. JOYCE, *THE NEW POLITICS OF HUMAN RIGHTS* 85 (1978).

⁴ William Korey pays tribute to NGOs, particularly Human Rights Watch (HRW), for urging the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY) and for providing that body “with an endless flow of documentary evidence on the details of ethnic cleansing”, as well as invaluable public support regarding financing and ensuring that major NATO governments work to apprehend indicted war criminals. Korey also commends the work of Physicians for Human Rights, which “made available forensic scientists, who through exhumation of grave sites and examination of corpses provided the most essential type of evidence.” WILLIAM KOREY, *NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: “A CURIOUS GRAPEVINE”* 13 (1998). Indeed, the Tribunal itself commended HRW for “the research work [it conducted] on behalf of the Tribunal.” Chief Prosecutor Richard Goldstone also extolled HRW’s “invaluable” assistance concerning the provision of “testimony and other materials.” *Id.* at 326.

⁵ For the purposes of this essay, the terms “HRO” (human rights organization) and “human rights NGO” are used interchangeably. *See infra* Part II(C).

⁶ M. Noortmann, *Non-State Actors in International Law*, in *NON-STATE ACTORS IN INTERNATIONAL RELATIONS* 71 (B. Arts et al, eds., 2001).

⁷ J. Boli, *Conclusion: World Authority Structures and Legitimations*, in *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* 288-89 (J. Boli & G. Thomas, eds., 1999).

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unique commodity—“human rights”—which elicits instinctive support amongst the general public, yet is also easily subject to manipulation. Moreover, this absence of regulation is made even more unsettling given that the human rights NGO community at large boasts an imperfect track record regarding objectivity and accurate reporting, particularly when operating in conflict situations. Taken together, these factors alone would be sufficient to justify a case in favor of regulating the human rights NGO industry.⁸ However, this case grows even more urgent when considered against the backdrop of an environment in which the international community increasingly favors the articulation and enforcement of human rights norms, and consequently—albeit perhaps unwittingly—has placed an increased reliance on NGOs for the purpose of fact-finding, investigating and reporting human rights violations.⁹ Admittedly, any proposal for regulating the HRO sector may provoke vehement objection from the HRO community, a group known for fiercely safeguarding its independence,¹⁰ or worse yet, glee and endorsement from human rights violators. However, to paraphrase a relevant caveat invoked elsewhere, any violator of human rights who believes this essay sanctions his or her activities is profoundly mistaken, while any human rights activist who feels undermined or threatened equally has mis-

⁸ By regulation, I do not intend to mean government legislation but rather some formal set of standards that can be independently developed, implemented, monitored and enforced. This notion is discussed in greater detail. *See infra* Part V.

⁹ The end of the cold war facilitated the burgeoning of international and regional human rights mechanisms such as the UN human rights treaty bodies and the European, African and Inter-American human rights systems, as well as the establishment of international criminal tribunals in the former Yugoslavia and Rwanda. More recently, this trend has expanded with the entry into force of the Treaty of Rome establishing the International Criminal Court and the establishment of a Special Court for war crimes in Sierra Leone. Each of these examples confirms that the international community's interest in human rights enforcement appears durable and is unlikely to recede.

¹⁰ An example of this tendency may be seen in the strident opposition triggered by the launch of www.ngowatch.org, a website dedicated to monitoring NGO activities and funded by two U.S.-based conservative foundations. *See* R. Nader, *Has the American Enterprise Institute Lost Contact with Reality?*, available at <http://www.commondreams.org/views03/0613-01.htm> (June 13, 2003); Jim Lobe, *Bringing the War Home: Right Wing Think Tank Turns Wrath on NGOs*, available at <http://www.fpi.org/commentary/2003/0306antingo.html> (June 13, 2003); and Naomi Klein, *Bush to NGOs: Watch Your Mouths*, GLOBE & MAIL, available at <http://www.commondreams.org/views03/0620-06.htm>, last visited June 20, 2003.

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understood the argument I propose here.¹¹ This paper is not intended to undermine international human rights principles or the value of the NGOs that defend those rights; nor is it meant to provide a shield for regimes violating human rights or fodder for other groups critical of HROs. Rather, the case that is advanced here argues that professionalization, standardization and regulation of human rights NGOs are long overdue, and moreover, crucial to the responsible growth of HROs and the continued significance of human rights principles within the international system.

At first glance, such an undertaking may appear modest, perhaps even humble. However, a review of the literature surrounding human rights NGOs reveals that an objective and comprehensive critique of the industry is glaringly absent, with few, if any, proposals addressing the fundamental problems that threaten the entire enterprise of human rights NGOs. Instead, most observers have elected to heap praise on the role of NGOs within the international system without considering precisely what responsibility need be attached to their increasingly influential role.¹² Where criticism of NGOs is manifested, it is typically limited to the narrow questions of *internal* representativeness and accountability, or the perceived bias of NGOs in favor of western-style liberal rights.¹³ In essence, therefore, this article cuts a previously untraveled path by pulling together the various issues impinging the legitimacy and credibility of NGOs and scrutinizing their larger impact on the HRO industry as a whole in light of changing international circumstances. Ultimately, the need for formal regulation reflects the logical conclusion of this analysis, and it is intended that the latter part of this paper provide some ideas to stimulate a discussion of what approaches and models might be introduced to best enhance human rights NGO legitimacy and protect the development of international human rights law.

¹¹ C. Brown, *Universal Human Rights: A Critique*, in HUMAN RIGHTS IN GLOBAL POLITICS 104 (T. Dunne & N.J. Wheeler, eds., 1999).

¹² Indeed, some observers, such as Andrew Clapham, advance demands for even greater HRO influence at the UN where that influence already far surpasses anything formally provided at international law. See A. Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (P. Alston & J. Crawford, eds., 2000).

¹³ See, e.g., P.J. Simmons on internal accountability and Makau Mutua on the western-liberal domination of international non-governmental organizations (INGOs). P.J. Simmons, *Learning to Live with NGOs*, 112 FOREIGN POL'Y 82 (1998); and Makau Mutua, *Human Rights International NGOs: A Critical Evaluation*, in NGOs AND HUMAN RIGHTS: PROMISE AND PERFORMANCE (C.E. Welch, Jr., ed., 2001).

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To build the case for regulation, the first part of this essay sketches the historical foundation of modern international human rights and the initial role assigned to human rights NGOs therein. The paper then moves on to track the extraordinary growth experienced by human rights NGOs across all areas, from expansion in numbers and financing to expansion of activities and influence. With the benefit of this context, a critique of the existing informal tools used to ensure credibility and accountability within the HRO sector will reveal the ineffectiveness of these measures and underscore the shortcomings of arguments raised in defense of informal standards and unfettered NGO independence. It is this analysis that points to the need for dramatic—and formal—changes within the human rights industry, and ought to serve as a wakeup call for all those genuinely concerned with the future effectiveness of HROs and the value ascribed to international human rights principles. The final part of this paper introduces some ideas aimed at providing a baseline for standardizing performance and promoting greater legitimacy and accountability among HROs. These preliminary guidelines may underpin a new framework of independent regulation initiated by NGOs and are meant to answer basic questions and address potential arguments against instituting some formal regulatory tools. However, it is important to stress that these guidelines are not meant to reflect the sole possibility for reform, but rather to stimulate discussion and consideration of all meaningful and “doable” options. In any event, the arguments regarding the need for reform within the HRO industry reflect findings that are independently valid from the regulatory proposal advanced in the latter part of this paper. In other words, those who may contest the need for formal HRO regulation ought not disregard the fundamental nature of the problems disclosed in this paper which point to a serious dearth of standards and an over-reliance on informal—and ultimately ineffective—means of quality control within the NGO industry.

— *[Nongovernmental relations]. . . go far beyond the officially-sanctioned diplomatic networks and the narrowly-defined contacts implied by a legalistic approach. NGOs are based upon interpersonal ties and relationships among people with similar convictions, goals and interests. The result is a web of personal connections that do not fit within a formal, legal framework.*¹⁴

¹⁴ L. Gordenker & T.G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in *NGOs, THE UN, AND GLOBAL GOVERNANCE* 26 (T. G. Weiss & L. Gordenker, eds., 1996).

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II. THE EMERGENCE OF MODERN INTERNATIONAL HUMAN RIGHTS AND HUMAN RIGHTS NONGOVERNMENTAL ORGANIZATIONS

A. *Modern Human Rights Principles and Institutions*

The contemporary campaign for international human rights emerged from the ruins of the Second World War, embodying a concerted response to the unprecedented horror of Nazi death camps, fleeing refugees and tortured prisoners-of-war.¹⁵ While the roots of modern international human rights principles may be traced further back to the 19th century,¹⁶ the aspirations encompassed in the post-World War II *Zeitgeist* embodied an international spirit that soon came to be inscribed in the form of a universal declaration. Significantly, the *Universal Declaration of Human Rights* heralded the individual—not the state—as the “foundation of freedom, justice and peace in the world”, and sought to extend a protective umbrella of rights to these individuals “without distinction of any kind.”¹⁷ Yet, to be certain, the *Universal Declaration* was exactly that—a declara-

¹⁵ JOYCE, *supra* note 3, at 45.

¹⁶ For example, the *Convention for the Amelioration of the Condition of the Wounded on the Field of Battle* (22 August 1864) served as the precursor to the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (12 August 1949), commonly referred to as the First Geneva Convention. The main principles laid down in the 1864 Convention and preserved by the later Geneva Conventions include:

- relief to the wounded without any distinction as to nationality;
- neutrality (inviolability) of medical personnel and medical establishments and units; [and]
- the distinctive sign of the red cross on a white background.

See *Convention for the Amelioration of the Condition of the Wounded on the Field of Battle*, Aug. 22, 1864, available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>; and *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, available at http://www.unhcr.ch/html/menu3/b/q_genev1.htm, last visited December 21, 2004. From this perspective, the post-World War II human rights movement may also be viewed as a continuation of earlier efforts to entrench international norms respectful of basic human rights.

¹⁷ *Universal Declaration of Human Rights*, Dec. 10, 1948, U.N. Doc. A/811, pmb., art. 2, reprinted in *BASIC DOCUMENTS IN INTERNATIONAL LAW* 256 (I. Brownlie, ed., 4th ed. 1995). The *Universal Declaration* articulated a broad range of rights including fair trial (art. 10), freedom of movement (art. 13), the right to work (art. 23), and the right to education (art. 26). The Declaration also sought to enunciate protections against a number of practices including slavery (art. 4), torture (art. 5), and arbitrary arrest (art. 9).

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tory document adopted by the United Nations General Assembly and lacking any binding impact or legal enforceability.¹⁸ As Michael Ignatieff has observed, the parties to the *Universal Declaration* “never actually believed that it would constrain their behavior”, since the document “lacked any enforcement mechanism.”¹⁹ Indeed, the Declaration failed, at least initially, to dethrone the state as the primary, if not sole, actor at international law.

Even without legally binding obligations or formal enforcement mechanisms, the *Universal Declaration* did express international legal recognition for the rights of individuals²⁰ and the shared ideals and will of the nascent United Nations. Moreover, this instrument promised to “serve as the lodestar” for criticizing governments which failed to adhere to the human rights principles enunciated within the document.²¹ Indeed, the *Universal Declaration* served as “the point of departure for the concern and activism of nongovernmental organizations.”²² From this standpoint, the *Universal Declaration* effectively laid the foundation for the edifice of modern human rights, providing the blueprint that would serve to guide virtually all human rights developments from 1948 forward. Although initially these developments may have been slow in emerging, over time there would be no stopping the accumulated momentum derived from the idealism of the *Universal Declaration*.

Nearly twenty years after its historic adoption, the international community reached agreement concerning the first *legally binding* expression of some of the rights contained in the *Universal Declaration*. This significant breakthrough resulted in the *International Covenant on Civil and Political Rights* (ICCPR) and its counterpart, the *International Covenant on Economic and Social Rights* (ICESR).²³ These Covenants “laid down the

¹⁸ Brownlie notes that the Declaration is “not a legally binding instrument *as such*, and some of its provisions depart from existing and generally accepted rules.” Brownlie, *supra* note 17, at 255.

¹⁹ M. IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 8 (2001).

²⁰ *Id.* at 5.

²¹ KOREY, *supra* note 4, at 44.

²² *Id.* However, as Korey notes, “the Declaration itself [would not] ever have been conceived of. . . were it not preceded by the UN Charter, whose human rights provisions were products of NGO determination and persistent lobbying.” *Id.* at 2.

²³ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, UN Doc. A/6316, 6 I.L.M. 368 (entered into force Mar. 23, 1976), *reprinted in* Brownlie, *supra* note 17, at 276 [hereinafter ICCPR]; International Covenant on Economic and Social Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), UN Doc. A/6316 (entered into force Jan. 3, 1976), *reprinted in* Brownlie, *supra* note 17, at 263.

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legal foundation for a world order of human rights that had not existed before,”²⁴ such that even for non-parties to the treaties, the substance of the Covenants represented “authoritative evidence of the content of the concept of human rights.”²⁵ In sum, between the late 1940s and 1960s, a seismic shift rocked the international landscape, moving the notion of human rights from one of vague moral principles to legally binding norms. As a consequence of this dramatic change, the framework for addressing human rights soon demanded a burgeoning bureaucracy and other mechanisms designed to monitor and ensure compliance with legal obligations.

At their outset, the twin international covenants required “the erection of international institutions and procedures to give concrete expression” to its objectives.²⁶ Yet, the international covenants represented only the inaugural salvo of what would become a streak of successive international treaties that sought to entrench minimal guarantees for human rights protections. In sheer numbers, this emerging trend favoring the legalization of human rights norms would lead to the adoption of no less than seven major UN treaties with affiliated monitoring and enforcement bodies. In addition to the ICCPR’s Optional Protocol and Second Optional Protocol,²⁷ the UN implemented the following key treaty bodies:

- *The International Covenant on the Elimination of All Forms of Racial Discrimination* (CERD), and its enforcement body, the Committee for the Elimination of Racial Discrimination;²⁸
- *The Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), and its enforce-

²⁴ JOYCE, *supra* note 3, at 46.

²⁵ Brownlie, *supra* note 17, at 262.

²⁶ JOYCE, *supra* note 3, at 46 (quoting Moses Moskovitz).

²⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (1966) (entered into force Mar. 23, 1976), *reprinted in* Brownlie, *supra* note 17, at 298, and Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128 (1989) (entered into force July 11, 1991), *reprinted in* Brownlie, *supra* note 17, at 303. The First Optional Protocol permits individuals to communicate alleged human rights violations directly to the treaty’s Human Rights Committee. The Second Optional Protocol requires State Parties to the Protocol to abolish the death penalty within their respective jurisdictions.

²⁸ International Covenant on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 (XX) (entered into force Jan. 4, 1969), *reprinted in* Brownlie, *supra* note 17, at 310.

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ment body, the Committee on the Elimination of All Forms of Discrimination Against Women;²⁹

- *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and its enforcement body, the Committee Against Torture;³⁰
- *The Convention on the Rights of the Child*, and its enforcement body, the Committee on the Rights of the Child.³¹

In addition to these international conventions, the UN also spawned myriad declaratory statements on human rights issues ranging from the *Declaration on the Rights of Disabled Persons* to the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.³² All told, from the core *Universal Declaration*, the UN human rights framework—encompassing both political statements and legally enforceable rights—rapidly expanded to cover themes as diverse as cultural development, war crimes, marriage, family and youth. Moreover, the initiation of world conferences and working groups only served to further reinforce international public awareness and advocacy surrounding human rights.³³

Coupled with developments on the international level, the idea of enforceable human rights received another significant boost when the administration of US President James Carter announced that human rights “would be the ‘soul’ of its foreign policy.” This move confirmed “the new wave of interest in the issue and substantially increased the wave’s momen-

²⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, U.N. Doc. A/34/46, at 193 (entered into force Sept. 3, 1981).

³⁰ U.N. Convention Against Torture, *supra* note 3.

³¹ Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/49 at 166 (entered into force Sept. 2, 1990).

³² *Declaration on the Rights of Disabled Persons*, G.A. Res. 3447 (XXX), U.N. GAOR 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1975) and *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, Annex, 47 U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1993).

³³ The UN Commission on Human Rights maintains no less than eight working groups, dealing with issues such as the right to development and the preparation of a draft declaration on the rights of indigenous people. United Nations Commission on Human Rights, *available at* <http://www.unhchr.ch/html/menu2/2/chrwg.htm#standard>, last visited December 21, 2004.

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tum.”³⁴ Indeed, this interest had already washed across a number of regional fora, including the Council of Europe, the Organization of American States (OAS) and the Organization of African Unity (OAU). For example, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* reaffirmed the rights recognized in the *Universal Declaration* by enumerating a similar catalogue of civil and political rights and freedoms and establishing a mechanism for the enforcement of the obligations assumed by State Parties.³⁵ This Convention ultimately led to the establishment of a full-time European Court of Human Rights, boasting an expansive jurisdiction and the ability to bind parties to its judgments.³⁶ The European regional system further deepened its human rights regime by introducing additional human rights instruments including the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* and the *European Convention on the Exercise of Children’s Rights*.³⁷

³⁴ L.W. LIVEZEY, *NONGOVERNMENTAL ORGANIZATIONS AND THE IDEAS OF HUMAN RIGHTS* x-xi (1988). See also J. POWER, *AMNESTY INTERNATIONAL: THE HUMAN RIGHTS STORY* 19 (1981) and KOREY, *supra* note 4, at 7.

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³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, pmbl. (entered into force Sept. 3 1953), reprinted in Brownlie, *supra* note 17, at 328 and available at <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>, last visited December 21, 2004.

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³⁶ Protocol No. 11 to European Convention for the Protection of Human Rights and Fundamental Freedoms Restructuring the Control Machinery Established Thereby, May 11, 1994, Europe T.S. No. 155, arts. 32, 46 (entered into force Nov. 1, 1998), reprinted in Brownlie, *supra* note 17, at 372. Protocol No. 11 “replaced the existing, part-time Court and Commission [with] a single, full-time Court”, Protocol No. 2 conferred on the Court the power to give advisory opinions, and Protocol No. 9 boosted the Court’s jurisdiction to hear inter-State cases by enabling individual applicants, including NGOs, to bring their cases before the Court “subject to ratification by the respondent State and acceptance by a screening panel.” Registrar of the European Court of Human Rights, *The European Court of Human Rights: Historical Background, Organisation and Procedure*, available at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm>, last visited December 21, 2004.

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³⁷ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europe T.S. No. 126 (entered into force Feb. 1, 1989), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>; European Convention on the Exercise of Children’s Rights, Jan. 25, 1996 (entered into force July 1, 2000), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>, last visited December 21, 2004.

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Similarly, in 1969, the OAS adopted the *American Convention on Human Rights*, which established the Inter-American Court of Human Rights (IACHR).³⁸ Like its European counterpart, the IACHR enabled individual petitioners to directly file complaints with the Court alleging human rights violations by member States.³⁹ The OAS also produced a number of additional regional human rights conventions, including the *Inter-American Convention to Prevent and Punish Torture*⁴⁰ and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*.⁴¹ In Africa, likewise, the OAU's *African Charter on Human and Peoples' Rights* drew inspiration from the principles of the *Universal Declaration*,⁴² empowering the African Commission on Human and Peoples' Rights with a mandate that included, *inter alia*, the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms, and ensuring the protection of human and peoples' rights.⁴³ Finally, the Organization for Security and Cooperation in Europe (OSCE) also developed "human dimension" tools to "supervise the implementation of commitments undertaken [by participating States] in the field of human rights and democracy."⁴⁴ The Vienna Mechanism and its latter supplement, the Moscow Mechanism,⁴⁵ enable participating states to raise questions relating to the human dimension situa-

³⁸ American Convention on Human Rights (Pact of San Jose), Nov. 22, 1969, OASTS 36 (entered into force July 18, 1978), available at <http://www.cidh.oas.org/Basicos/basic3.htm>, last visited December 21, 2004.

³⁹ Inter-American Commission on Human Rights, *Form for Presenting Petitions on Human Rights*, available at <http://www.cidh.oas.org/denuncia.eng.htm>, last visited December 21, 2004.

⁴⁰ Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M. 519 (entered into force Feb. 28, 1987).

⁴¹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 3, 1995).

⁴² African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, 67, art. 60 (entered into force Oct. 21 1986).

⁴³ *Id.* at art. 45.

⁴⁴ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The OSCE Human Dimension Mechanism*, available at http://www.osce.org/odihr/human_rights/moscow_mechanism/, last visited December 21, 2003.

⁴⁵ Vienna Mechanism, Vienna 1989 ("Human Dimension of the CSCE", par. 1 to 4) and Moscow Mechanism, MOSCOW 1991 (Par. 1 to 16) as amended by ROME 1993 (Chapter IV, par. 5), reprinted in ODIHR, *Human Dimension Commitments: A Reference Guide* (Warsaw: ODIHR, 2001), available at <http://www.osce.org/odihr/documents/oscecommitments.pdf>, last visited December 21, 2003.

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tion in another OSCE state, create ad hoc missions to assist in the resolution of specific “human dimension” problems and, in exceptional circumstances, even order investigations into alleged human rights violations without the consent of the member state in question.⁴⁶

To be certain, the 1980s and 1990s were witness to “an unprecedented upsurge of human rights concerns and activities” and “the proliferation of international treaties and institutions,”⁴⁷ resulting most recently in the creation a UN High Commissioner for Human Rights,⁴⁸ an international treaty to ban anti-personnel mines,⁴⁹ and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.⁵⁰ Ultimately, this outpouring of new norms crisscrossing various levels of jurisdiction and enforceability through any number of overlapping conventions, protocols, declarations and working groups reflects a cascade that may be traced back directly to the result of early efforts to cultivate international human rights principles. Perhaps most significantly for the purpose of this paper, this web of human rights mechanisms—in large part, the creation “of NGOs, whether in the drafting process or the lobbying process⁵¹—reflects an ever-expanding framework thanks to the continuous

⁴⁶ Moscow Mechanism, *supra* note 45, at para. 9.

⁴⁷ A. Rosas, *State Sovereignty and Human Rights: Towards a Global Constitutional Project*, in David Beetham, ed., *POLITICS AND HUMAN RIGHTS* 62 (David Beetham, ed., 1995).

⁴⁸ The General Assembly created the post of High Commissioner under A/RES/48/141, adopted without vote Dec. 20, 1993. See <http://www.un.org/documents/ga/res/48/a48r141.htm>, last visited December 21, 2004. Korey reasons that the creation of the High Commissioner reflected “the most important” NGO initiative for creating “effective mechanisms for implementing the Universal Declaration of Human Rights.” KOREY, *supra* note 4, at 11.

⁴⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 UNTS 211 (entered into force Mar. 1, 1999), available at <http://untreaty.un.org/English/notpubl/26-5eng.htm>, last visited December 19, 2003.

⁵⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, G.A. 45/158, 30 I.L.M. 1517 (entered into force July 1, 2003). This treaty “provides a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving States.” United Nations Press Release, *Convention On Protection of Rights of Migrant Workers To Enter Into Force Next July*, Mar. 19, 2003, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B87E9E85C7147498C1256CEF00385E50?opendocument>, last visited December 21, 2004.

⁵¹ KOREY, *supra* note 4, at 4.

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flow of NGO information, lobbying and activism. As the following section explains, this revelation is even more surprising when considering that the origins of the human rights system never envisioned such a crucial and central role for NGOs.

B. An Inauspicious Foundation for Global NGO Activism: The Charter of the United Nations and ECOSOC Resolution 1296

The budding human rights principles alluded to in the *Charter of the United Nations* and made manifest in the *Universal Declaration* did not reflect solely the will of governments across the world. Rather, individual activists and public organizations alike converged on the issue of human rights following the Second World War. While this effort did not represent the first time public organizations sought to shape government action and policy to better reflect respect for morality and human dignity, it certainly did signal the most vigorous and focused effort of individuals to impact international affairs in a broad and durable manner.⁵²

In large part, the Federal Council of Churches and the American Jewish Committee, two US-based NGOs, are credited with initiating the main lobbying effort in favor of incorporating human rights principles into the UN *Charter* and later, the *Universal Declaration on Human Rights*.⁵³ Although details on the precise contribution of NGOs to the *Universal Declaration's* drafting are imprecise, a general consensus exists that NGOs actively contributed and were instrumental in embedding this dramatic new

⁵² While a detailed analysis of the precursor to modern human rights NGOs falls outside the scope of this paper, it is important to recognize that these organizations owe a debt to groups such as the Anti-Slavery Society, an NGO with roots extending back to the late 18th century and considered to be “the ‘prototype’ for all later NGOs.” *Id.* at 118. Ignatieff confirms that “extraterritorial moral activism” predated the *Universal Declaration* and manifested itself in “the campaigns to abolish the slave trade and then slavery itself.” Ignatieff, *supra* note 19, at 10. For a detailed account of this history, see Korey, *supra* note 4, and P.G. LAUREN, *THE EVOLUTION OF HUMAN RIGHTS: VISIONS SEEN* (1998).

⁵³ KOREY, *supra* note 4, at 33. The largest obstacle preventing the true incorporation of enforceable human rights into the UN *Charter* stemmed from the fact that the document was intended to become a binding treaty. *Id.* at 41. Willetts adds that the “first draft of the UN Charter did not make any mention of maintaining cooperation with private bodies.” Rather, it was the lobbying effort of a “variety of groups, mainly but not solely from the USA. . . [that rectified] this at the San Francisco conference, which established the UN in 1945.” Peter Willetts, *What is a Non-Governmental Organization?*, Jan. 4, 2002, available at <http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM>, last visited December 21, 2004 [hereinafter Willetts 2002].

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component in international affairs.⁵⁴ Along these lines, Leon Gordenker argues that NGOs “played a pivotal role in securing the inclusion of human rights language in the final draft of the UN Charter.”⁵⁵ More profoundly, according to Antonio Cassese, the principles espoused by the *Charter* and *Universal Declaration* ultimately served to consecrate NGOs “as agents for the promotion of human rights,” thus ensuring that they would “become a focus for public opinion” and “the mouthpiece of world conscience.”⁵⁶

In light of the modest window of opportunity open to NGOs as they struggled to impart some influence upon national policymakers and UN officials, it is difficult to conceive of how this miniscule movement could evolve to spawn today’s truly global human rights NGO community, which credits itself with the passage of numerous international human rights treaties and accounts for a multi-million dollar industry. Indeed, the humble roots and narrow scope of influence allotted to human rights NGOs following World War II becomes even clearer when one moves beyond the UN Charter’s sanguine words “we the peoples.”⁵⁷ In a treaty totaling 111 articles, the *Charter* acknowledges NGOs but once, at Article 71, thus deviating ever so slightly from the unqualified endorsement of states as the solitary rights-holders at the international level. If the drafters of Article 71 sought to expose international relations to the constructive influence of NGOs, the opening they provided represented a hairline crack at best. Article 71 provides the following:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within 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.⁵⁸

Significantly, by relegating NGOs to the lowly Economic and Social Council (ECOSOC), the *Charter* effectively barred NGOs from having any role in the UN’s more substantive organs—namely the General Assembly and the Security Council. Moreover, the permissive drafting of Article 71 “[did] not require the Economic and Social Council to make arrangements for consultation with NGOs.” Nevertheless, the inclusion of Article

⁵⁴ KOREY, *supra* note 4, at 45-46.

⁵⁵ Gordenker & Weiss, *supra* note 14, at 39-40.

⁵⁶ A. CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 173 (1990).

⁵⁷ U.N. CHARTER pmb.

⁵⁸ *Id.* at art. 71.

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71 in the *Charter* effectively “brought NGOs greater formal recognition than they had enjoyed previously with any other intergovernmental organization.”⁵⁹ Indeed, even from this inauspicious departure point, NGOs rapidly overcame the apparent limitations of the role proffered by the *Charter* and moved to assert a more influential—albeit informal—function within the international system and in the shaping of international human rights law. Accordingly, while Article 71 established a “formal relationship” between the UN and NGOs,⁶⁰ it ultimately spawned multiple *informal* channels of communication, each one serving to entrench and expand the function and centrality of human rights NGOs within the international system.

From the cue provided by Article 71, ECOSOC assumed responsibility for carving out a role for NGOs within the UN system. To this end, the Council subsequently determined, in accordance with its Resolution 1296, that recognition of an NGO’s consultative status would require formal approval, contingent on several key principles, including:

1. the aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations;⁶¹
2. the organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities;
3. the organization shall be of representative character and of recognized international standing; and
4. the organization shall be international in its structure.⁶²

Even after satisfying the criteria outlined by Resolution 1296, an NGO’s consultative status could be suspended or revoked in cases where:

- (a) . . . there exists substantiated evidence of secret governmental financial influence to induce an organization to

⁵⁹ E. A. BOCK, REPRESENTATION OF NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS 2 (1955).

⁶⁰ R. Brett, *The Role and Limits of Human Rights NGOs at the United Nations*, in POLITICS AND HUMAN RIGHTS, *supra* note 47, at 96.

⁶¹ That is, the NGO cannot advocate violence and must respect the principle of non-interference in the internal affairs of states.

⁶² *Arrangements for Consultation with Non-Governmental Organizations*, E.S.C. Res. 1296, U.N. ESCOR, 1520th plen. mtg. at arts. 1-9 (1968), available at <http://www.globalpolicy.org/ngos/ngo-un/info/res-1296.htm>, last visited December 21, 2004, and <http://habitat.igc.org/ngo-rev/1296.html>, last visited December 21, 2004.

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undertake acts contrary to the purposes and principles of the Charter of the United Nations;

- (b) . . . the organization clearly abuses its consultative status by systematically engaging in unsubstantiated or politically motivated acts against States Members of the United Nations contrary to and incompatible with the principles of the Charter; or
- (c) . . . an organization [fails to make] any positive or effective contribution to the work of the Council or its commissions or other subsidiary organs.⁶³

In addition to these general criteria, ECOSOC created two rigid categories of consultative status: Category I NGOs were required to be “concerned with most of the activities of the Council” and be able to demonstrate “that they have marked and sustained contributions to make” (i.e., broad economic and social interests and geographical scope). ECOSOC extended Category II status to organizations which demonstrated “a special competence in, and [were] concerned specifically with, only a few [of] the fields of activity covered by the Council, [and] which [were] known internationally within the fields for which they have or seek consultative status.”⁶⁴

Further curtailing the budding role of human rights NGOs specifically, Article 17 of Resolution 1296 established that:

Organizations accorded consultative status in category II because of their interest in the field of human rights should have a *general international concern with this matter, not restricted to the interests of a particular group of persons, a single nationality of the situation in a single State or restricted group of States*. Special consideration shall be given to the applications of organizations in this field whose aims place stress on combating colonialism, apartheid, racial intolerance and other gross violations of human rights and fundamental freedoms.⁶⁵

In essence, this provision restricted consultative status to human rights NGOs advancing broad goals of *international* human rights, except in a number of specifically defined exceptions. Thus, it effectively precluded the possibility that human rights groups having a national mandate could gain

⁶³ *Id.* at art. 36.

⁶⁴ *Id.* at art. 16(a) and (b).

⁶⁵ *Id.* at art. 17 (emphasis added).

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consultative status at the UN.⁶⁶ Moreover, the fact that Resolution 1296 relegated human rights NGOs to Category II placed these organizations at a further disadvantage by limiting their voice within the Council and its subsidiary organs on a number of levels. First, these NGOs, unlike their Category I counterparts, were unable to propose that “the Secretary-General . . . place items of special interest to the organizations on the provisional agenda of the Council.”⁶⁷ Second, Category II NGOs were handicapped by a 500-word limit on their written statements to the Council, in contrast to the 2,000 words extended to Category I NGOs. Third, with regard to oral hearings before the Council, Resolution 1296 provided additional rights to Category I NGOs while simultaneously restricting the participation of Category II NGOs.⁶⁸ These limitations on Category II organizations trickled down from relations on the Council level, and reproduced themselves on secondary and tertiary levels within the Council’s commissions and other subsidiary organs.⁶⁹

Article 71 of the UN Charter arguably “initiated a new experiment in linking private international voluntary organizations . . . with an inter-governmental organization.”⁷⁰ However, a close reading of Resolution 1296 reveals built-in safeguards designed to prevent too much NGO participation. Article 14 is typical of the resolution’s restrictive tendency, providing that:

[C]onsultative arrangements are to be made, on the one hand, for the purpose of *enabling the Council . . . to secure expert information* or advice from organizations having special competence. . . and, on the other hand, *to enable organizations which represent important elements of public opinion in a large number of countries to express their views.*⁷¹

⁶⁶ M.N. Posner, *The Establishment of the Right of Nongovernmental Human Rights Groups to Operate*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 410 (L. Henkin & J.L. Hargrove, eds., 1994).

⁶⁷ E.S.C. Res. 1296, *supra* note 62, at art. 21.

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⁶⁸ *Id.* at arts. 24-25.

⁶⁹ *Id.* at arts. 26-34.

⁷⁰ BOCK, *supra* note 59, at 1.

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⁷¹ E.S.C. Res. 1296, *supra* note 62, at art. 14 (emphasis added). The precursors to the principles set forth in Resolution 1296 are found in Resolution 288 B. See BOCK, *supra* note 59, at 3 (quoting E.S.C. Res. 288 B, U.N. ESCOR, 10th Sess., 1950).

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From this passage, it may be argued that the vision laid out in Resolution 1296 sought to create an exchange between ECOSOC and NGOs, whereby NGOs provided ECOSOC with expert information and ECOSOC furnished NGOs with a platform for expressing their views. Yet this potential platform is frustrated by two factors: First, the drafting of Article 14 points to an expectation that ECOSOC would listen to only NGOs representing public opinion “in a large number of countries,” that is, NGOs having an international presence and a focus on truly “international” issues. Second, the potential representative function held out by Article 14 is tempered by Article 13, which emphasizes that any communication between ECOSOC and NGOs “should not be such as to overburden the Council or transform it from a body for co-ordination of policy and action. . . *into a general forum for discussion.*”⁷² In other words, the ability of NGO to express views could be stifled either based on the fact that the opinions were not of a genuinely international character, or simply based on the catch-all need to preserve ECOSOC’s function as a policy body. Consequently, despite the promise of meaningful NGO participation in the UN system, Resolution 1296 ultimately preserved a bright-line distinction between NGOs and states. As the resolution plainly asserts:

[T]he arrangements for consultation should not be such as to accord to non-governmental organizations the same rights of participation as are accorded to States not members of the Council and to the specialized agencies brought into relationship with the United Nations.⁷³

The desire to manage, even control, the potential impact of NGOs and compartmentalize the extent of their role within the UN system is inherent in the text of Resolution 1296. Yet, however limiting this initial vision may have seemed, NGOs would soon capitalize on its flexibility and imprecision. While “it appeared that the officials at the headquarters of many NGOs did not fully understand the potentialities and responsibilities of consultative status,”⁷⁴ in the wake of Resolution 1296—and even prior to its passage—NGOs gradually clamored to secure consultative status and also expand their informal role. As Bock notes, even in the short period of nine years from the creation of the UN, developments were already slowly and informally broadening the framework for NGO participation, thus overtaking the establishment of formal rules.⁷⁵ Indeed, as will be seen below,

⁷² E.S.C. Res. 1296, *supra* note 62, at art. 13 (emphasis added).

⁷³ *Id.* at art. 12.

⁷⁴ Bock, *supra* note 59, at iv.

⁷⁵ *Id.* at 9-10.

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this expansion would continue despite the fact that the original ECOSOC guidelines remained unchanged for nearly 30 years, until the Council completed an extensive intergovernmental review that culminated in a new resolution expanding the formal role extended to NGOs at the UN.⁷⁶

C. An NGO Taxonomy and Survey of NGO Sources of Authority, Activities, Goals and Methodologies

i) Taxonomy

Before moving on to address questions related to the sources of authority, objectives and status of human rights NGOs within the international system, it is important to determine the precise meaning of a “non-governmental organization” and also establish the parameters for which type of NGOs will attract the primary focus of this paper. While the former task may be an elusive one, the latter is facilitated by reducing the number of players allowed onto the field. ECOSOC first introduced the term “non-governmental organization” or NGO, as a means of clarifying its relationship with organizations that had previously been labeled ‘private organizations,’ ‘international institutes,’ ‘international unions’ or simply ‘international organizations.’ The introduction of what was intended to be “precise legal jargon”⁷⁷ meant that, as far as the UN was concerned, use of the term NGO referred exclusively to those organizations having consultative status with the United Nations.⁷⁸ However, this technical terminology soon “passed into popular usage, particularly from the early 1970s onwards,”⁷⁹ to the extent that today, numerous organizations self-describe themselves as “nongovernmental”, regardless of not having secured UN consultative status. Consequently, the precise legal jargon coined by the UN has taken on a much more sweeping colloquial usage that encompasses a broad range of organizations working in what they perceive to be the public

⁷⁶ *Consultative Relationship Between the United Nations and Non-Governmental Organizations*, E.S.C. Res. 1996/31, U.N. ESCOR 49th plen. mtg. (1996), available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>, last visited December 21, 2004.

⁷⁷ P. Willetts, *Representation of Private Organizations in the Global Diplomacy of Economic Policy-Making*, in *PRIVATE ORGANIZATIONS IN GLOBAL POLITICS* 36 (K. Ronit & V. Schneider, eds., 2000).

⁷⁸ BOCK, *supra* note 59, at 1.

⁷⁹ Willetts 2002, *supra* note 53. As Willetts notes, the League of Nations officially referred to its “liaison with private organizations.”

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interest.⁸⁰ Thus, as Willetts remarks, there is “no generally accepted definition of an NGO and the term carries different connotations in different circumstances.”⁸¹

From this slippery starting point, Willetts goes on to identify some general features typically ascribed to NGOs. These features include:

- independence from the direct control of any government;
- no status as a political party;
- a non-profit-making structure; and
- a non-criminal—including non-violent—purpose.⁸²

According to Willetts, therefore, an NGO may be defined as “an independent voluntary association of people acting together on a continuous basis, for some common purpose, other than achieving government office, making money or illegal activities.”⁸³ These sweeping criteria both skirt the reality that the term NGO may be freely misappropriated by any number of individuals or organizations, and in any event, basically function to mirror the conditions already required for United Nations recognition. Thus, Willetts’ definition effectively does little to narrow the range of organizations that

⁸⁰ Still, the term raises the ire of some observers, who have deemed ‘nongovernmental organization’ “politically unacceptable,” since it “implies that government is the centre of society and people its periphery,” and leaves NGOs as “only marginal or auxiliary bodies.” These critics prefer the term “international people’s organizations” as more apt. See Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: a Prerequisite of Democracy*, in HUMAN RIGHTS FROM EXCLUSION TO INCLUSION; PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORK OF THEO VAN BOVEN 347 (Fons Coomans et al, eds., 2000).

⁸¹ Willetts 2002, *supra* note 53.

⁸² Willetts concedes that these features may not always be present, as “some NGOs may in practice be closely identified with a political party; many NGOs generate income from commercial activities, notably consultancy contracts or sales of publications; and a small number of NGOs may be associated with violent political protests.” *Id.*

⁸³ *Id.* Ultimately, the UN itself gradually adopted a sweeping interpretation, applying the NGO label to any “non profit entity whose members are citizens or associations of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members or of one or more communities with which the NGO cooperates.” W. Schoener, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537, 538 (1997).

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may merit or demand NGO status.⁸⁴ Indeed, a brief survey of organizations having consultative status with ECOSOC reveals a diverse list of organizations including the La Leche League International (LLLI), “a community-based nongovernmental organization. . .active. . .in breastfeeding promotion, protection and support,”⁸⁵ and the World’s Poultry Science Association (WPSA), a non-profit organization which “strives to advance knowledge and understanding of all aspects of poultry science and the poultry industry.”⁸⁶

While it may be argued that a case for regulation can or should be formulated vis a vis NGOs generally, by limiting the scope of this argument to those organizations whose primary concern is human rights, this paper is able to narrow the breadth and depth of the NGO field considerably and focus attention on a specific and pressing area in need of reform. Indeed, the fact that human rights NGOs have situated themselves at a powerful and influential junction and deal uniquely in the fragile and morally infused commodity of human rights makes the need for investigating their status and conduct doubly urgent. This said, even within the subset of human rights NGOs, many diverse practices and formal distinctions remain. First, human rights NGOs may operate on international, regional or national levels. Second, the activities of these organizations vary from international advocacy to pure fact-finding and research. Third, human rights NGOs may be membership-driven, or alternatively rely on foundational or corporate support to maintain operating budgets. Fourth, these organizations may use volunteers to undertake projects or insist on employing professional, paid staff members. Finally, the size of these organizations ranges from multi-million dollar international NGOs to small, one or two person operations with little or no real budget. Nevertheless, given that most of the problems uncovered by the analysis presented below cut across these differences, examining the spectrum of HROs in its entirety ultimately serves to strengthen the case in favor of regulation. For example, the risks to objectivity inherent in larger, better organized international human rights NGOs are passed onto—and perhaps further exacerbated among—smaller, national human

⁸⁴ As will be demonstrated in Part IV(A)(ii) below, any number of groups and individuals has co-opted the neutrality of the term NGO, including governments, donors and businesses. See *infra* note 305 for a brief discussion of these NGO subcategories.

⁸⁵ LA LECHE LEAGUE INTERNATIONAL, available at <http://www.lalecheleague.org/advocacy/whostatement.html>, last visited Mar. 11, 2004. LLLI obtained ECOSOC Roster status in 1979.

⁸⁶ WORLD’S POULTRY SCI. ASS’N, available at <http://www.wpsa.com/wpsa2/>, last visited December 21, 2004. WPSA is recognized by ECOSOC as a Roster C NGO.

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rights organizations which are typically less concerned with reputation and other informal, market-generated quality controls that may serve to enhance organizational independence. From this standpoint, therefore, the subset of human rights NGOs as a whole is particularly useful since it most immediately exposes the shortcomings of an unregulated NGO sector and arguably may also serve as a test case for formally regulating other NGO subgroups, such as those active in development, social services and health.

With the question of scope settled, several terms should also be defined for the purpose of clarity. The label NGO is used colloquially here and is therefore not intended to denote an organization with UN consultative status. In addition, the term INGO, or international NGO, is used to distinguish between a human rights NGO with international focus or presence and a nationally-oriented HRO, where such a distinction between the two is necessary or relevant. International NGOs include name-brand HROs such as Amnesty International and Human Rights Watch (HRW). Finally, the umbrella term human rights organization (HRO) is used here to denote both national and international NGOs engaged in human rights work.

ii) NGO Sources of Authority

In order to appreciate the exponential growth in the number and influence of human rights NGOs, it is important to understand the structure of these organizations and their sources of authority, activities, goals and methodology. Generally speaking, NGOs lack the conventional sources of influence and power attributed to states. Moreover, nowhere are the grounds for their authority established at international law. As noted, even within the UN, NGOs were relegated to bottom-feeder status and left without any institutional clout for influencing events at Turtle Bay. Consequently, it would appear that NGOs ought to have been unable to dominate policymaking or influence state parties in the conventional sense. Yet, despite these apparent limitations, according to the political science literature NGOs have increasingly acted:

[A]s if they were authorized in the strongest possible terms. They make rules and expect them to be followed; they plead their views with states. . .and express moral condemnation when their pleas go unheeded; they formulate codes of ethics and endow them with sufficient legitimacy to ensure that flagrant violators will lose standing in the relevant community.⁸⁷

⁸⁷ J. Boli & G. Thomas, *INGOs and the Organization of World Culture*, in *CONSTRUCTING WORLD CULTURE*, *supra* note 7, at 37.

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According to Boli, NGOs are able to assert this authority due to the power they derive from “the agency presumed to inhere in rational individuals organizing for purposive actions.” Boli sources this power in “the diffuse principles of world culture” since he concludes that it “does not flow from any legal-bureaucratic or supernatural source.”⁸⁸ In other words, NGO authority is informal and stems from cultural sources capable of triggering “powerful logics of compulsion that are masked by the theory of rational voluntarism.”⁸⁹ Unlike states, whose power is restrained by forces such as constitutions, the rule of law, and increasingly, intergovernmental arrangements and other international controls, nothing is established at law to delineate limits or boundaries on the wielding of NGO authority. Rather, according to Boli, persuasiveness amounting to authority flows from international (state and individual) identification with the elemental principles of morality, voluntarism and individual action.

Using this general notion as a springboard, Boli refines three more specific sources of NGO authority:

- 1) *autonomous authority*: where state efforts at control are negligible and NGOs are left to operate unfettered;
- 2) *collateral authority*: where inter-governmental agencies are central actors and NGOs share a secondary role; and
- 3) *penetrative authority*: where NGOs influence states or bypass states to influence local organizations directly.⁹⁰

According to Boli, the last category is most indicative of the type of authority sought and wielded by human rights NGOs. Effective cultivation of this authority “depends absolutely” on an NGO’s “moral fervor and political nonpartisanship, which combine with their rational voluntaristic character to make them a sort of ‘voice of humanity’ to which states must listen.”⁹¹ Stated differently, human rights NGOs harness authority from the power inherent in morality, objectivity and the spirit of voluntarism.

Boli is not alone in attempting to unpackage the riddle of NGO authority from a political science perspective. As part of her groundbreaking work on transnational actors, Kathryn Sikkink identifies four key sources of NGO authority: impartiality, reliability, representativeness, and

⁸⁸ *Id.*

⁸⁹ Boli, *supra* note 7, at 288-89.

⁹⁰ *Id.* at 289. This point underscores again the reliance of NGOs on appeals to world public opinion and the significance this influence holds.

⁹¹ *Id.* at 293.

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transparency.⁹² In discussing the significance of these markers, Sikkink notes that “few INGOs . . . meet [the] ideal of pristine autonomy” or impartiality that generates authority.⁹³ Moreover, she stresses the centrality of an NGO’s reliability insofar as its authority “is so linked to the power of information and the images they project, they are harmed by any suggestion that their information is less than accurate.”⁹⁴ While there is a great deal of overlap in these two conceptualizations of NGO authority, Sikkink’s approach serves as a broader and more concrete foundation for tracing the sources of NGO authority. Rather than be satisfied with Boli’s overly ambiguous notional cocktail of “rational voluntarism,” Sikkink rightly traces the concrete output of this phenomenon to the question of reliability. Boli’s thinking seems to engage an automatic conclusion based on the assumption that if efforts follow basic and rational principles and reflect a voluntary spirit, these efforts ought to generate veracity and reliability. Clearly, no guarantee for this outcome exists, and thus greater accuracy in pinpointing the source of authority may be achieved by focusing on the end product of reliability and coupling this with the persuasive function of transparency. Indeed, Boli subjects himself to an additional trap by attributing authoritative weight to the fuzzy notion of moral fervor and is thus faced with the difficult task of trying to measure such an intangible. Still, in this latter point, Sikkink falls into agreement, citing the work of Rodney Hall and concluding that moral authority (admittedly still distinct from Boli’s “moral fervor”) is a “power resource that gives [NGOs] influence beyond their limited material capacities.”⁹⁵

Although some significant distinctions may be drawn when contrasting the foundations of NGO authority offered by Boli and Sikkink, both

⁹² Clark mirrors Sikkink’s sources of authority, arguing that “it is the NGOs’ established history of accuracy, independence, and impartiality that will determine their credibility and authoritative power within international political and public arenas.” A.M. CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* 33 (2001).

⁹³ K. Sikkink, *Restructuring World Politics: The Limits and Asymmetries of Soft Power*, in S. Khagram, J.V. Riker, and K. Sikkink, eds., *RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS* 313 (S. Khagram et al. eds., 2002).

⁹⁴ *Id.* at 314. As will be seen, allegations of inaccuracy have served as a primary tool for criticism of NGOs. Yet, in addition to using the cloak of reliability as a shield to defend against these allegations, NGOs have also wielded the power of past reliability as a sword, to fend off insinuations that more formalized sources of accountability may be necessary within the industry.

⁹⁵ *Id.* at 312.

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approaches confirm that NGO authority hinges upon informal sources that are difficult to quantify and lacks any formal tools for measuring or scrutinizing its inevitable ebb and flow. Indeed, even Sikkink's expectation of impartiality, reliability, representativeness and transparency rings hollow when considering that these markers may simply be a question of what lies in the eye of the beholder rather than based on any objective test. For example, with regard to relying on something as seemingly straightforward as representativeness, Hurrell remarks that the "the lack of apparent means of . . . evaluating [NGO] representational authority" results in many NGOs being "little more than self-appointed and self-created lobbies, despite their pervasive rhetoric of authenticity."⁹⁶

For better or worse, a legal analysis does little to shed additional light or meaning on how NGOs have come to assert authority within the international system. As Math Noortmann has observed, NGOs lack any international legal personality that formally sets out its sources of authority.⁹⁷ Indeed, NGOs also lack legal personality under various regional instruments as well. For example, consider the dearth of formal guidelines that characterize NGO participation within the European Community. Despite the fact that "there is no legal basis in the Treaty [of Maastricht] for dialogue or consultation" with NGOs, a number of informal forums have been developed across a range of policy fields.⁹⁸ Ultimately, it is the creation of such informal arrangements that lend legitimacy and authority—however difficult to measure—to various NGO voices. Indeed, it is this very phenomenon that underscores "the contrast between the growing influence of NGOs in international decision- and law-making processes and their lack of formal accountability under international law." According to Noortmann, this situation will not resolve itself since "international accountability can only be required from NGOs in combination with recognised rights under international law."⁹⁹ As seemingly clear-sighted as this statement may appear, its logic is disingenuous, as it attempts to assert new legal rights for NGOs while at the same time denying the possibility

⁹⁶ A. Hurrell, *Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World*, in HUMAN RIGHTS IN GLOBAL POLITICS, *supra* note 11, at 289. R

⁹⁷ Noortmann, *supra* note 6, at 71. R

⁹⁸ European Commission, *The European Commission and Non-Governmental Organisations: Building a Stronger Partnership*, 52 TRANSNATIONAL ASSOCIATIONS 132 (2000) (originally published in French), reprinted in English at http://europa.eu.int/comm/secretariat_general/sgc/ong/docs/communication_en.pdf, last visited December 21, 2004 [hereinafter "Building a Stronger Partnership"].

⁹⁹ Noortmann, *supra* note 6, at 72. R

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that an expectation of NGO accountability might legitimately precede the acquisition of such rights. Simply put, Noortmann attempts to condition NGO accountability on the need for first securing legal rights at international law, which essentially places the proverbial cart in front of the horse.¹⁰⁰

Noortmann is not alone in advocating this line of reasoning. Peter Spiro similarly argues that the question of accountability may be “best answered by formally and fully recognizing NGO power in international institutional architectures.” Spiro contends that formalizing NGO participation in international decision-making would concretize NGO power, serve a transparency objective and also bind NGOs to institutional bargains.¹⁰¹ While this proposal may seem both reasonable and logical, it signals a much larger, long-term undertaking whose outcome is at best uncertain. The structure of international law is slow in changing, abstract in nature, and not prone to dramatic overhaul along the lines put forward by Noortmann and Spiro. Moreover, arguing in favor of the inclusion of NGOs as a player at international law may risk overstating their function within the international system and open the floodgates to a host of additional demands from truly peripheral “wannabe” non-state actors. Rather than advocating in favor of uprooting the traditional foundations of international law in the name of attaining accountability for NGOs, this paper reasons instead that formal constraints to enhance NGO accountability can be implemented without having to account for the mystique enshrouding the sources of their informal power. In this respect, the arguments advanced here reflect a less presumptuous approach that is infinitely more practical and imminently more doable in actual implementation.

In sum, where a vacuum exists in terms of defining a concrete legal source of authority for NGOs, we are left with the very fleeting and ephemeral sources of authority identified by the political scientists. To be certain, it is these sources of authority—weaved from the vague and informal cloth of moral fervor, rational voluntarism, impartiality and transparency—rather than any legal rights that have facilitated the propulsion of HROs into the international system as a pervasive and persuasive player. Yet, as will be demonstrated, it is also these same self-created sources of authority that

¹⁰⁰ The issue of NGO accountability is addressed at length in Part IV(A)(ii), below.

¹⁰¹ P.J. Spiro, *The Democratic Accountability of Non-Governmental Organizations*, 3 CHI. J. INT'L L. 161, 162. Isabelle Gunning also argues along these lines, reasoning that NGOs representative of a larger group ought to be given a legal role in the creation of international law. Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L. LAW 211.

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continue to facilitate the manipulation of human rights and may ultimately threaten the future viability of the entire HRO industry.¹⁰²

iii) The What and How of Human Rights Organizations (HROs): A Brief Survey of HRO Activities and Methodologies

As an outgrowth of the informal sources of authority described above, and specifically to the extent that NGOs ostensibly do not “represent the interests or official positions of governments,” they remain free of the constraints associated with diplomatic protocol or other policy considerations. Accordingly, HROs enjoy the ability to focus directly on human rights issues for their own sake, and consequently, can “be much more vocal, outspoken and fiercely critical of violations that occur.”¹⁰³ This freedom has enabled human rights NGOs to pursue activities that converge around the following areas:

- information gathering, evaluation and dissemination (documentation and education);
- monitoring and advocacy (enforcement);¹⁰⁴
- developing human rights norms (empowerment);¹⁰⁵ and
- legal and humanitarian assistance (democratization and development).¹⁰⁶

¹⁰² The notion of self-created authority is borrowed from David Weissbrodt, who confines use of the term to his study of NGO fact-finding missions: “The authority for NGO fact-finding . . . is usually self-created. NGOs define the scope of their study and legitimize it after the fact by the reliability of their findings.” D. Wiessbrodt & J. McCarthy, *Fact-Finding by Nongovernmental Organizations*, in INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 186, 193 (B.G. Ramcharan ed., 1982).

¹⁰³ LAUREN, *supra* note 52, at 287-88.

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¹⁰⁴ M.E. Winston, *Assessing the Effectiveness of International Human Rights NGOs: Amnesty International*, in NGOs AND HUMAN RIGHTS, *supra* note 13, at 43. Darren Hawkins explains that monitoring “is one of the most powerful tools . . . because the information can be used simultaneously to delegitimize the targeted regime and encourage international action against it. Impartial and verifiable monitoring promises moral authority, and explains how NGOs might influence public opinion, and the targeted regime.” D. Hawkins, *Human Rights Norms and Networks in Authoritarian Chile*, in RESTRUCTURING WORLD POLITICS, *supra* note 93, at 68.

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¹⁰⁵ Hurrell, *supra* note 96, at 288-89.

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¹⁰⁶ C.E. Welch Jr., *Introduction to NGOs AND HUMAN RIGHTS*, *supra* note 13, at 9. This essay is more concerned with the repercussions stemming from the first three NGO activities outlined above.

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Stated differently, human rights organizations typically “identify their primary goals as monitoring and reporting of government behaviour on human rights . . . building pressure and creating international machinery to end the violations and to hold governments accountable.”¹⁰⁷ One identifiable trend within this array of activities indicates that while major human rights INGOs carry out hundreds of studies each year, “advocacy activities are increasingly on the rise.”¹⁰⁸ That said, within this general overview of activities, additional grounds for differentiation among HROs may be identified based on “their formal mandates, geographical location and preferred means of action.”¹⁰⁹ It should be noted that most of these areas of activity only gradually opened themselves to NGO influence and participation. For example, prior to the establishment of the UN human rights treaty bodies, NGOs were unable dedicate their efforts to preparing human rights complaints or submitting shadow reports. Similarly, the UN has only recently begun to correct the initial sharp distinction it drew between international and national NGOs by taking steps to open new channels of communication with national NGOs, and particularly those from developing countries. What remains most important to stress at this stage is that no organization or individual is barred or hindered in any way from undertaking any of the NGO activities enumerated above. As Clark innocently remarks, fact-finding, for instance, “is an activity that an NGO *or any third party may undertake simply* by taking steps to investigate and publish reports on such departures from principles.”¹¹⁰ In short, no prerequisite or certification is required for pursuing classic HRO activities, and none is in place to distinguish or legitimize HROs from any other third party.

While the scope of activities undertaken by HROs has evolved into a truly wide-reaching enterprise that continues to grow, the essential methodology for advancing human rights has remained relatively unchanged. In a sentence, HRO work can be summed up as “promoting change by reporting facts.” To effectively pursue this goal, human rights NGOs must

- carefully document alleged abuses;
- clearly demonstrate state accountability for those abuses under international law; and

¹⁰⁷ F. Gaer, *Reality Check, in* NGOs, THE UN, AND GLOBAL GOVERNANCE, *supra* note 14, at 56.

¹⁰⁸ Welch Jr., *supra* note 106, at 10.

¹⁰⁹ Gaer, *supra* note 107, at 57.

¹¹⁰ CLARK, *supra* note 92, at 130 (emphasis added).

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- develop a mechanism for effectively exposing documented abuse nationally and internationally.¹¹¹

Documentation of human rights abuses is ideally intended to reflect “the result of long and sometimes extremely difficult research work” whereby “researchers receive newspapers and periodicals in a variety of languages, consult specialists in law and medicine, correspond with other NGOs and with private individuals . . . [and] undertake official missions to countries under investigation.”¹¹² Yet, the collection at one central office of information from many disparate sources, including “families and friends of human rights victims. . . political parties, released prisoners, and other repressed groups,” means that “sources of raw data [may be] of extremely diverse reliability.”¹¹³ Moreover, smaller HROs without adequate physical and financial resources may find it difficult to undertake large-scale investigative work such as field missions. Inevitably, therefore, these twin factors may operate to adversely impact the depth and quality of the research work put forward by a given HRO. Perhaps more problematically, while the actual collection and documentation of human rights data is a central HRO technique, it is “the *interpretation* of facts so that they elucidate normative concepts” which plays an even greater part in the emergence of human rights norms.¹¹⁴ In other words, beyond the constraints detracting from reliable fact-finding, the process of documentation may be further compromised by poor interpretation methods.

Keck and Sikkink also address the issue of how NGOs pursue their objectives, employing their own unique jargon to represent four models of NGO political action:

1. information politics: the rapid and credible production of politically usable information;
2. symbolic politics: the invocation of readily understandable symbols or terms to make more immediate sense of distant situations;
3. accountability politics: holding government accountable to stated policies; and

¹¹¹ D.Q. Thomas, *Holding Governments Accountable by Public Pressure*, in OURS BY RIGHT: WOMEN’S RIGHTS AS HUMAN RIGHTS 83 (J. Kerr, ed., 1993).

¹¹² JOYCE, *supra* note 3, at 81.

¹¹³ Weissbrodt & McCarthy, *supra* note 102, at 187. As Weissbrodt remarks, the veracity of these data may be enhanced by isolating bias, ensuring consistency and careful questioning and corroboration.

¹¹⁴ CLARK, *supra* note 92, at 16.

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290 BUFFALO HUMAN RIGHTS LAW REVIEW Vol. 10**4. leverage politics: affecting a situation through either material or moral leverage.¹¹⁵**

Aside from the addition of more descriptive labels, the Keck and Sikkink models are simply a reformulation of the classic NGO methodologies outlined above. Whereas the notions of information, accountability and leverage are implicit in those broader methodologies, “symbolic politics” may be viewed as a corollary to or elaboration of “information politics” insofar as it serves to facilitate the conveyance of information by using analogies or symbols. Overlap aside, the notion of “leverage politics” as an HRO methodology merits further exploration here, since it relates directly to one of the central powers ascribed to NGOs and also represents the linchpin for entrenching any settled interpretation of facts within the public domain.

The effective use of leverage politics, particularly moral leverage, hinges on the ability of HROs to use the media for disseminating its messages and exploiting the moral authority inherent in human rights rhetoric. As Keck and Sikkink add, while “NGO influence often depends on securing powerful allies, their credibility still depends in part on their ability to mobilize their own members and affect public opinion via the media.”¹¹⁶ Indeed, if NGOs are operating outside of any formal framework, harnessing the influence of public opinion becomes pivotal to introducing standards that governments, institutions, and corporations will be compelled to follow.¹¹⁷ Leverage politics is thus the trigger for what is commonly referred to as “mobilizing shame” against human rights violators. The mobilization of shame seeks to prevent or bring about a cessation of abuse and induce compliance with human rights norms¹¹⁸ by exposing the behavior of target states or individuals “to the light of international scrutiny.”¹¹⁹ In this way, HROs seek to modify behavior not with logic, but “by isolating or embarrassing the target,”¹²⁰ essentially turning either the state or individual into a pariah warranting the scorn of the civilized international commu-

¹¹⁵ ACTIVISTS BEYOND BORDERS 18-25 (M.E. Keck & K. Sikkink, eds., 1998).

¹¹⁶ *Id.* at 23.

¹¹⁷ Simmons, *supra* note 13, at 87.

¹¹⁸ L. Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 24 (S. Power & G. Allison, eds., 2000).

¹¹⁹ ACTIVISTS BEYOND BORDERS, *supra* note 115, at 22.

¹²⁰ T. Risse & K. Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction to THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 14 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds., 1999).

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nity.¹²¹ Many observers believe that the mobilization of shame is more effective for protecting against human rights abuses than any “bland expressions of concern over generic standards.”¹²² This methodology is considered so persuasive that Peter Baehr cites it as a key source of NGO power, reasoning that “all governments like to be known as civilized and as observing the international human rights standards which they themselves have helped to devise.”¹²³

To be certain, the mobilization of shame has led to numerous breakthroughs in human rights policies both on the international and national level. However, this practice has also been the target of much criticism given its reliance on the power of persuasion. For example, Human Rights Watch (HRW) has decried “the limitations of the public shaming process” and has “strenuously . . . urged the need for the international community to create effective international legal institutions to cope” with human rights violations.¹²⁴ Perhaps more immediately—and alarmingly—observers who argue that the mobilization of shame is the “only real weapon wielded by nongovernmental actors” have gone so far as to assert that even questionable, unverified allegations ought to be sanctioned as a basis for shaming “in urgent situations.”¹²⁵ The disturbing implication of this position is that the mobilization of shame—and consequently leverage politics generally—can be disconnected from the elemental need for verifiable evidence, a crucial prerequisite for any legitimate form of criticism.

—It is not really surprising . . . that it is the non-governmental groups who are steadily forming a global . . . movement of investigation, protest and reform. For it is the

¹²¹ *Id.* at 15.

¹²² Gaer, *supra* note 107, at 53.

¹²³ P.R. Baehr, Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs, Address before the UNU Public Forum on Human Rights and NGOs (Sept. 18, 1996), available at <http://www.globalpolicy.org/ngos/role/globdem/globgov/2000/1117.htm>, last visited December 21, 2004.

¹²⁴ KOREY, *supra* note 4, at 309. This signals a shift in the operations of HROs and points to a larger potential impact on the organs of international law.

¹²⁵ H. Hannum, *Implementing Human Rights: An Overview of NGO Strategies and Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 36 (Hurst Hannum, ed., 2d ed. 1992). Hannum qualifies this assertion by conceding that “maintaining the credibility of an individual NGO and the human rights movement in general does require competence and professionalism.”

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*world's sovereign governments who are now the criminals
in the dock!*¹²⁶

III. THE INFORMAL AND UNFETTERED RISE OF HROs IN THE INTERNATIONAL SYSTEM

A. *Growing Numbers, Budgets and Presence*

With an understanding of the limited role initially ascribed to NGOs in the post-World War II international system, HRO sources of authority and an overview of HRO activities and methodology, it is difficult to envision how NGOs successfully penetrated the guarded sanctum of international relations and positioned themselves to shape the course of international human rights. Yet, in the span of 60 years—and particularly since the end of the cold war—HROs specifically, and NGOs more broadly, experienced spectacular growth in terms of number, scope, power and influence,¹²⁷ their activities increasingly resonating with the collective conscience of international society. What makes a review of this growth all the more impressive is the fact that it continues without any formal checks or balances to regulate the quality or reliability of NGO work. Remarkably, some observers have concluded that these organizations are now capable of undertaking “political work once reserved for representatives of states”¹²⁸ and can no longer be relegated “to simple advisory or advocacy roles,” but rather must be “part of the way decisions have to be made.”¹²⁹ Indeed, others go so far as to reason that given failures of states and intergovernmental human rights mechanisms, “NGOs and social movements are the

¹²⁶ JOYCE, *supra* note 3, at 79. According to Joyce, this is because: 1) the state is no longer sufficient for ensuring the life and liberty of its citizens; 2) human rights is shifting from rhetoric to “an essential part of some tangible form of world authority”; and 3) there is a powerful linkage between peace and human rights. *Id.* at 80.

¹²⁷ This trend is confirmed across the literature. *See, e.g.*, D. Spar & J. Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations* 3 CHI. J. INT’L L. 171 (2002) (noting that in “the last decades of the twentieth century, the world witnessed an unprecedented surge in the number and scope of non-governmental organizations”). *See also* P. Wapner, *Defending Accountability In NGOs* 3 CHI. J. INT’L L. 197 (2002) (reasoning that the number of NGOs “has skyrocketed” and their “financial and territorial reach and capability. . .has grown so much that states. . .and other actors must take them seriously”).

¹²⁸ Gordenker & Weiss, *supra* note 14, at 17.

¹²⁹ Simmons, *supra* note 13, at 91 (quoting former Canadian Foreign Minister Lloyd Axworthy).

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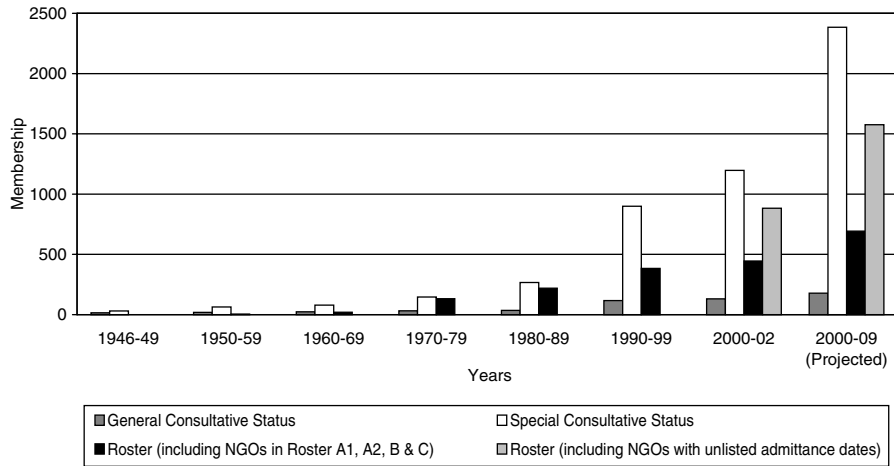
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most appropriate vehicle for fostering a transnational moral community,” as they represent the “only way of driving states towards radical reform of human rights procedures.”¹³⁰

The explosive growth of NGOs is made manifest simply by looking at the numbers. In 1948, the UN listed 41 NGOs with consultative status. By 1998, there were “more than 1,500 with varying degrees of participation and access,”¹³¹ and by 2004, the number of NGOs enjoying ECOSOC consultative status had skyrocketed to 2,531 (see chart below).¹³²

ECOSOC CONSULTATIVE STATUS MEMBERSHIP: 1946-2002



The growth in NGO numbers without ECOSOC status is even more staggering. A UN report estimates the number of international NGOs to be closing in on 40,000, a figure that represents a growth rate of nearly 20% in the short period of 10 years between 1990-2000 (see table below).¹³³ Similarly, NGOs registered in OECD countries rose from 1,600 in 1980 to 2,970

¹³⁰ Hurrell, *supra* note 96, at 289.

¹³¹ Simmons, *supra* note 13, at 83-84.

¹³² Non-Governmental Organizations Section, Department of Economic and Social Affairs, *NGO Related Frequently Asked Questions*, available at <http://www.un.org/esa/coordination/ngo/faq.htm>, last visited December 21, 2003.

¹³³ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 103 (2002), available at <http://hdr.undp.org/reports/global/2002/en>, last visited December 22, 2004. For the purpose of comparison, this report estimates that there were only 1,083 international NGOs in existence in 1914. *Id.* at 5.

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in 1993, while spending by these groups more than doubled from \$2.8 billion to \$5.7 billion.¹³⁴

INTERNATIONAL NGO GROWTH, 1990-2000

Purpose	1990	2000	Growth (percent)
Culture and recreation	2,169	2,733	26.0
Education	1,485	1,839	23.8
Research	7,675	8,467	10.3
Health	1,357	2,036	50.0
Social services	2,361	4,215	78.5
Environment	979	1,170	19.5
Economic development, infrastructure	9,582	9,614	0.3
Law, policy and advocacy	2,712	3,864	42.5
Religion	1,407	1,869	32.8
Defence	244	234	-4.1
Politics	1,275	1,240	-2.7
Total	31,246	37,281	19.3

This trend is reproduced even more dramatically on the local level, with most developing countries witnessing “an even sharper increase in the number of domestic NGOs and non-profits.”¹³⁵ In 1996, the largest-ever survey of non-profits identified more than one million NGOs in India and over 200,000 in Brazil. In Nepal for example, the number of registered NGOs grew from 220 in 1990 to 1,210 in 1993, while in Tunisia the number jumped from 1,886 in 1988 to 5,186 in 1991. Significantly, this growth in numbers has been facilitated by a flow of resources which has increased more than sevenfold in the past three decades.¹³⁶ Moreover, it appears that even the elusive definition of NGO itself underwent an expansive overhaul during this period. By 1994, the UN defined NGOs as any “non-profit entity whose members are citizens or associations of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members of one or more communities with which the NGO cooperates.”¹³⁷ Events within the Conference on Security and Cooperation in Europe (CSCE) revealed an identical trend. In considering the status to be granted to NGOs in its own proceedings, the

¹³⁴ Spar & Dail, *supra* note 127, at 171.

¹³⁵ HUMAN DEVELOPMENT REPORT 2002, *supra* note 133, at 5.

¹³⁶ *Id.* at 102.

¹³⁷ Simmons, *supra* note 13, at 83. *See also supra* Part II(C)(i) for a discussion surrounding the evolution of the term NGO.

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CSCE discarded any constraining definitions as initially adopted by ECOSOC, and instead recognized NGOs as any group “who declare themselves as such according to existing national procedures,” provided they do not condone violence or terrorism.¹³⁸

Three factors are central to understanding the parallel growth experienced by HROs during this period.¹³⁹ First, the implosion of the Soviet Union meant that high-pressure cold war politics receded from the international stage and facilitated the consideration of less existential issues unrelated to the formerly dominant US-USSR confrontation. Thus, state interest in and support for human rights increased dramatically, resulting for example in a significant jump in the number of countries ratifying the six key UN human rights treaties.¹⁴⁰ As an outgrowth of this shift in priority, NGOs that had previously languished in the background were quick to promote themselves by emphasizing their capacity and “advanced knowledge on issues including human rights,” which had previously been relegated to the policy backburner.¹⁴¹ Second, in tandem with revolutionary political changes within the international system, the 1990s also heralded a revolution in communication and information technology. This technology, “literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogative of nationalism.”¹⁴² Finally, a significant shift occurred in the financial support extended to the general NGO community. By 1994 “over 10% of public development aid (\$8 billion) was channeled through

¹³⁸ *Document from the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow*, at para. 43 (Sept. 10 – Oct. 15, 1991), available at <http://www.osce.org/docs/english/1990-1999/hd/mosc91e.htm>, last visited December 21, 2004. The CSCE is most recently known as the Organization for Security and Cooperation in Europe (OSCE).

¹³⁹ Kenneth Roth, executive director of HRW, incorporates some of these factors in his own historically compressed explanation for HRO growth, including: the human rights ideal, better communications technology, the press, the policies of influential governments, the development of international standards, the partnership between local and international human rights groups, and the growing professionalism of the human rights movement itself.” K. Roth, *Human Rights Organizations: A New Force for Social Change*, in *REALIZING HUMAN RIGHTS*, *supra* note 118, at 230. R

¹⁴⁰ Specifically, ratifications of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) grew from around 90 to nearly 150. *HUMAN DEVELOPMENT REPORT 2002*, *supra* note 133, at 10. R

¹⁴¹ Gordenker & Weiss, *supra* note 14, at 24. R

¹⁴² *Id.* at 25.

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NGOs, surpassing the volume of the combined UN system (\$6 billion) without the Washington-based financial institutions.”¹⁴³

The exponential growth in the financial support of NGOs repeated itself within the human rights NGO community, leading Ibrahima Fall, head of the UN Center for Human Rights, to bemoan as “clearly ridiculous” the fact that the Center had “less money and fewer resources than Amnesty International,” yet represented the UN’s arm for human rights.¹⁴⁴ Significantly, between 1973-1993 a single foundation—the Ford Foundation—provided nearly “half of international human rights funding provided by U.S. foundations,”¹⁴⁵ estimated at some \$100 million.¹⁴⁶ As a direct outgrowth of this financial backing, NGOs “once largely relegated to the hallways,”¹⁴⁷ soon became “able to push around even the largest governments.”¹⁴⁸

B. Expanding NGO Influence Within the UN System

i) NGOs Within ECOSOC, the Vienna World Conference on Human Rights and the Secretary General’s Panel of Eminent Persons on United Nations-Civil Society Relations

Many of the seeds of growth within the HRO community were already planted prior to the political and technological changes of the 1990s. A clear and concrete example of the growing influence these interest groups began exerting on the international level may be illustrated by returning to the United Nations. Although arguably the midwife of modern NGO power, as demonstrated in Part II above, the original intent of this intergovernmental body sought to provide NGOs with only a limited, albeit formalized, role. Yet, even in the face of a narrowly defined scope of operation, NGO influence quickly evolved and grew in a variety of informal ways. Almost immediately following the establishment of the UN, NGOs with consultative status created the Conference of Non-Governmental Organizations in Consultative Status (CONGO). While CONGO’s mandate does provide for taking positions on substantive matters, its work “to ensure that NGO

¹⁴³ *Id.*

¹⁴⁴ J.T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 53 (1997).

¹⁴⁵ Sikkink, *supra* note 93, at 307.

¹⁴⁶ Welch Jr., *supra* note 106, at 19.

¹⁴⁷ Mathews, *supra* note 144, at 55. Mathews credits negotiation of the 1992 global climate treaty at the Rio Earth Summit with promoting the shift in NGO perception and power.

¹⁴⁸ *Id.* at 53.

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voices are heard throughout the international arena”¹⁴⁹ underscores the “almost unprecedented establishment of formal relations between interest groups and an intergovernmental body.”¹⁵⁰ More directly, in 1968 CONGO played a central role in “mobilizing NGOs to form the first worldwide NGO forum on human rights,” thus deepening the participation of HROs in United Nations debates and decisions.¹⁵¹

As former UN Secretary General Boutros Boutros-Ghali has noted, even “a cursory examination of the participation of NGOs in the decision-making systems and operational activities of the United Nations shows without any doubt that NGO involvement. . .has far exceeded the original scope of” the legal provisions under Article 71 of the UN charter.¹⁵² Moving beyond the limits of the *Charter* has meant the creation of informal arrangements for incorporating NGO influence into UN affairs, resulting in much of the NGO input being made behind the scenes.¹⁵³ Consequently, it would be “altogether wrong . . . to measure the NGO contribution in terms of its formal volume just as it would be misleading to think that the most vocal NGOs are necessarily the most influential.”¹⁵⁴ Viewed from this perspective, it is evident that HROs have the proverbial ear of the UN, yet the full extent of this influence remains unclear and moreover, not formalized. Nevertheless, this influence has become pervasive enough to enable some to argue that the entire UN human rights system “would quite simply cease to function without the NGOs.”¹⁵⁵

To gain a more complete understanding of the extent of current NGO involvement at the UN, it is useful to consider several specific examples. First, a brief tracking of the events since Resolution 1296 reveals a steady increase in informal NGO influence. As noted in Part II above, the UN Charter mandates ECOSOC with the discretion to grant NGOs with consultative status. Even with the granting of such status, however, ECOSOC rules were designed to constrain NGO participation in the intergovernmental body. Despite these apparent limitations, the UN Commis-

¹⁴⁹ CONGO, *Who We Are*, available at <http://www.ngocongo.org/ngowhow/index.htm>, last visited December 21, 2004.

¹⁵⁰ Gordenker & Weiss, *supra* note 14, at 23.

¹⁵¹ CONGO, *supra* note 149.

¹⁵² *General Review of Arrangements for Consultations With Non-Governmental Organizations: Report of the Secretary General*, U.N. Doc. E/AC.70/1994/5, para. 40 (May 26, 1994).

¹⁵³ The role of NGOs in drafting the *Convention on the Rights of the Child* has been described as without parallel in history. Brett, *supra* note 60, at 101.

¹⁵⁴ *Id.* at 100.

¹⁵⁵ *Ibid.*

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sion on Human Rights soon “made exceptions in the issuance and circulation of documents containing communications from NGOs in consultative status,” thus turning the issuance of such documents from what was designed to be a confidential procedure into a public and established practice.¹⁵⁶ The Commission further facilitated public circulation of NGO communications by drawing a distinction between documents that simply presented information rather than issued “a complaint of alleged violations, specifically directed against a state.”¹⁵⁷ Similarly, by seizing upon a loose interpretation of Article 14 of ECOSOC Resolution 1296,¹⁵⁸ the Commission boosted the ability of NGOs to make oral statements alleging human rights violations, including even the most subjective and unsubstantiated “views” that arguably did not represent public opinion in a large number of countries. In this respect, the Commission retained the right “to decide whether to accept or to act on such information,” without any formal means for ascertaining the accuracy, veracity, or representativeness of these NGO views.¹⁵⁹ In practice therefore, exceptions to—and loose interpretations

¹⁵⁶ *Circulation of Written Statements: Opinion Dated 28 April, 1977 from the Office of Legal Affairs to the Under-Secretary-General for Political and General Assembly Affairs*, in *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL HUMAN RIGHTS INSTITUTIONS* 341 para. 16 (B.G. Ramcharan, ed., 1997). The Commission on Human Rights is composed of 53 States and meets annually for six weeks in Geneva. The Commission exercises country and thematic mechanisms to monitor and publicly report on specific human rights situations. These procedures and mechanisms are collectively referred to as the Special Procedures of the Commission on Human Rights. See *Commission on Human Rights*, available at <http://www.unhcr.ch/html/menu2/2/chr.htm>, last visited December 8, 2003. In contrast to the UN human rights treaty bodies, the Commission is political in nature, and its members are elected by ECOSOC without regard to expertise in the field of human rights. See *infra* Part IV(B)(ii).

¹⁵⁷ *Principles for the Issuance and Circulation of Written Statements by NGOs: Legal Analysis Dated May, 1977*, in *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL HUMAN RIGHTS INSTITUTIONS*, *supra* note 156, at 343 para. 1. According to the ECOSOC Committee on Non-Governmental Organizations sitting in 1946, restricting NGOs “would constitute a form of censorship more objectionable than the ill which it sought to cure.”

¹⁵⁸ Article 14 enables NGOs “which represent *important elements of public opinion in a large number of countries* to express their views” to the Council and its affiliated bodies (emphasis added). See *supra* Part II(B).

¹⁵⁹ *Oral Statements in the Commission on Human Rights: Legal Analysis*, in *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL HUMAN RIGHTS INSTITUTIONS*, *supra* note 156, at 350 para. 3.

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of—ECOSOC rules quickly emerged at the Commission, raising the voice and centrality of HROs on the international stage.¹⁶⁰

With time, practical application continued to dilute the original intent of other articles contained in Resolution 1296. For example, Article 36(b) calls upon NGOs with consultative status to avoid “systematically engaging in unsubstantiated or politically-motivated acts against Member States of the United Nations contrary and incompatible with the principles of the Charter.”¹⁶¹ While this article specifically outlines certain types of acts which would amount to abuse and result in revocation of an NGO’s consultative status, ECOSOC’s legal department concluded that the clause was inapplicable to NGOs which submitted “in good faith” written allegations of rights violations against specific countries, “since it is for the Commission to determine whether a statement is substantiated or not.”¹⁶² Thus, through practice, HROs continually overcame restrictions on the use of written and oral statements, ultimately heightening their status and role within the Commission.¹⁶³ Indeed, HROs are now responsible for bringing forward the majority of cases addressed by the Commission and its associated bodies. For example, in 1994, international NGOs filed 74% of the cases taken up by the Working Group on Arbitrary Detention. National NGOs communicated an additional 23% of cases, with the remaining 3% coming directly from families.¹⁶⁴

Another clear signal that NGOs had become central to international human rights developments came with the UN’s first World Conference on Human Rights, in Vienna from 14-25 June 1993.¹⁶⁵ Initially, a key proposal circulated within the Preparatory Committee for this conference sought to

¹⁶⁰ *Principles for the Issuance and Circulation of Written Statements by NGOs*, *supra* note 157, at para. 2.

¹⁶¹ E.S.C. Res. 1296, *supra* note 62, at art. 36(b). For several recent examples of invocation of this article, *see infra* note 192.

¹⁶² *Oral Statements in the Commission on Human Rights*, *supra* note 159, at para. 4.

¹⁶³ *The Participation of Non-Governmental Organizations in Meetings of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Legal Analysis Dated 2 September, 1982*, in *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL HUMAN RIGHTS INSTITUTIONS*, *supra* note 156, at 353.

¹⁶⁴ Gaer, *supra* note 107, at 55.

¹⁶⁵ Michael Posner cites the Vienna Conference as the second distinct stage in the international human rights movement, characterized by “the rapid development and growth of local human rights groups and advocates in every region of the world.” Posner, *supra* note 66, at 405.

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limit NGO presence to public sessions, where they might attend as ‘observers.’ The NGO community responded in a “vigorous and uncompromising” manner, producing a joint letter emphasizing the need for full NGO participation in conference deliberations and warning that without such participation, “the Conference risks becoming cut-off from reality and an empty exercise.”¹⁶⁶ This firm NGO stance produced an “unprecedented extension of the rules of procedure of the Preparatory Committee,” paving the way for significantly broadened participation in the Vienna Conference itself.¹⁶⁷ As Korey describes the Conference, “NGOs were everywhere lobbying government delegations, holding press conferences, coordinating their efforts and refusing to give up or abdicate even when the possibility of a significant advance was dim.”¹⁶⁸ Undoubtedly, with some “7,000 participants, including academics, treaty bodies, national institutions and representatives of more than 800 [NGOs]—two thirds of them at the grass-roots level—gathered in Vienna,”¹⁶⁹ admission criteria for this groundbreaking conference had been loosened beyond any recognizable limit. Indeed, as an outgrowth of expanded rules for participation, organizations in attendance at the Vienna Conference included “representatives of Kurdish, Palestinian, Basque, *Sendero Luminoso* and other armed opposition groups, all of whom clearly aim for political power,” and neither represent human rights NGOs, nor for that matter legitimate NGOs.¹⁷⁰

The World Conference concluded with representatives of 171 states adopting a Declaration and Program of Action by consensus.¹⁷¹ This official document confirmed “the promotion and protection of human rights” as “a matter of priority for the international community,”¹⁷² and further called upon “States and international organizations, *in cooperation with non-governmental organizations*, to create favourable conditions at the national, re-

¹⁶⁶ KOREY, *supra* note 4, at 278-79.

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¹⁶⁷ Schoener, *supra* note 83, at 551. See also KOREY, *supra* note 4, at 279.

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¹⁶⁸ KOREY, *supra* note 4, at 293.

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¹⁶⁹ Office of the High Commissioner for Human Rights, *World Conference on Human Rights*, available at <http://www.unhchr.ch/html/menu5/wchr.htm>, last visited September 20, 2004, excerpted from UN Doc. DPI/1394/Rev.1/HR-95-93241.

¹⁷⁰ Baehr, *supra* note 123. Other groups attending under the guise of NGO status included “representatives of the Christian Democratic and Liberal International groups, both of which have close ties with political parties of the same name.”

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¹⁷¹ *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument), last visited March 10, 2004. See also OHCHR World Conference, *supra* note 169.

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¹⁷² *Vienna Declaration*, *supra* note 171, at pmb1.

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gional and international levels to ensure the full and effective enjoyment of human rights.”¹⁷³ In addition, the Vienna Declaration recognized “the important role of non-governmental organizations in the promotion of all human rights . . . at national, regional and international levels . . . and to the . . . protection of all human rights and fundamental freedoms,” and further acknowledged the contribution of NGOs to the process of standard setting.¹⁷⁴ Thus, through this Declaration, the UN effectively ended the formal spurning of national NGOs and linked success in the struggle for human rights to cooperation with NGOs at all levels.

Significantly, the Vienna Conference also provided the international human rights treaty bodies with an opportunity to praise HROs and their invaluable assistance in the campaign for international human rights.¹⁷⁵ Accordingly, in a separate statement issued at Vienna, the international treaty bodies asserted that:

The active cooperation of non-governmental organizations is essential to enable the treaty bodies to function in an informed and effective manner. [Human rights NGOs] have important roles to play in: scrutinizing States party’s reports at the national level; providing information to treaty bodies; assisting in the dissemination of information; and contributing to the implementation of recommendations by the treaty bodies.¹⁷⁶

This endorsement of HRO activities is particularly significant insofar as it came from the leading expert bodies concerned with the legal ramifications of international human rights.

¹⁷³ *Id.* at art. 13 (emphasis added).

¹⁷⁴ *Id.* at art. 38.

¹⁷⁵ The international human rights treaty bodies include: The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee Against Torture, the Committee on the Rights of the Child, the African Commission on Human and Peoples’ Rights, the European Commission and the European Court of Human Rights, the European Committee for the Prevention of Torture, the Inter-American Commission and the Inter-American Court of Human Rights, and the ILO Committee on the Application of Conventions and Recommendations. *See* Vienna Statement of the International Human Rights Treaty Bodies, UN Doc. A/CONF.157/TBB/4, June 16, 1993, n.1.

¹⁷⁶ Recommendations For Enhancing the Effectiveness of United Nations Activities and Mechanisms, Vienna Statement, *supra* note 175.

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With these remarkable gains in place, two footnotes stemming from the Vienna Conference are worth adding here. First, governments in attendance openly recognized the potential for abuse of human rights principles for political purposes. Consequently, they qualified their endorsement of HROs by declaring that only those NGOs “*genuinely involved in the field of human rights*” should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of the national law.¹⁷⁷ This “highly problematic” reference remains a point of contention for many human rights activists,¹⁷⁸ especially those who believe that NGOs represent “the engine for virtually every advance made by the United Nations in the field of human rights since its founding.”¹⁷⁹ Nevertheless, the governmental action made manifest the reality that a growing number of non-state actors, hoping “to gain respectability . . . choose the theme of human rights to carry out international activities.”¹⁸⁰ Second, in the wake of divergent interests, NGOs “formally disbanded” the nascent NGO Liaison Committee (NLC) a mere two years after its creation at the Vienna Conference.¹⁸¹ This body, elected on the last day of the Vienna Conference’s NGO forum, was intended to become a permanent coordinative committee for NGO activities. Instead, its short lifespan serves as a testament to the fierce independence that characterizes HROs and their steadfast refusal to submit to any kind of oversight.

Perhaps the clearest signal that NGOs had attained a greater level of respect within the UN came with the revision of ECOSOC Resolution 1296, nearly 30 years after its initial enactment. Resolution 1996/31, the product of three years of “intensive, and sometimes acrimonious, debate” within an Open-Ended Working Group,¹⁸² updated the terms of the UN’s consultative relationship with NGOs. This new resolution deepened the formal role extended to NGOs—and particularly HROs—within the UN system. Most significantly, the resolution did away with the previous prohibition against bestowing consultative status upon HROs having only a national or regional

¹⁷⁷ *Vienna Declaration*, *supra* note 171, at art. 38 (emphasis added).

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¹⁷⁸ L.S. Wiseberg, *Resolution 1296 Revised: A Done Deal on Consultative Status—Not Ideal But a Major Improvement*, 3 HUMAN RIGHTS TRIBUNE 4, Aug-Sept 1996, available at <http://www.hri.ca/tribune/viewArticle.asp?ID=2306>, last visited November 19, 2004.

¹⁷⁹ Gaer, *supra* note 107, at 51.

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¹⁸⁰ A. Colonomos, *Non-State Actors as Moral Entrepreneurs: A Transnational Perspective on Ethics Networks*, in NON-STATE ACTORS IN WORLD POLITICS 79 (D. Josselin & W. Wallace, eds., 2001).

¹⁸¹ Baehr, *supra* note 123.

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¹⁸² Wiseberg, *supra* note 178.

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focus,¹⁸³ thus extending UN access to thousands of smaller, issue-specific organizations and particularly to NGOs from less developed countries and countries in economic transition.¹⁸⁴ Rather than continue to require “a general international concern” with human rights “not restricted to the interests of a particular group of persons, a single nationality of [sic] the situation in a single State or restricted group [of] States,”¹⁸⁵ ECOSOC Resolution 1996 opened “special consultative status” (the revised equivalent of Category II status)¹⁸⁶ to any HRO that pursued:

[T]he goals of promotion and protection of human rights in accordance with the spirit of the Charter of the United Nations, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action.¹⁸⁷

This dramatic shift in position resonates throughout the new resolution. Most notably, whereas Resolution 1296 only enabled “organizations which represent important elements of public opinion *in a large number of countries* to express their views,”¹⁸⁸ Resolution 1996/31 now allowed “international, regional, subregional and national organizations that represent important elements of public opinion to express their views.”¹⁸⁹ Similarly, under article 36 of the old resolution, suspension or withdrawal of an NGO’s consultative status was left to the sole discretion of the Council.¹⁹⁰ However, with the revised resolution, NGOs “shall now be given written reasons for that decision and shall have an opportunity to present its response for appropriate consideration” by ECOSOC’s NGO committee.¹⁹¹ Although there are several recent cases of NGOs having their status sus-

¹⁸³ E.S.C. Res. 1996/31, *supra* note 76, at art. 5.

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¹⁸⁴ *Id.* arts. 6-7. For example, “African-based NGOs now make up 11 per cent of the total—up from 4 per cent in 1996.” “Report of the Secretary-General in Response to the Report of the Panel of Eminent Persons on United Nations-Civil Society Relations,” UN Doc. A/59/354, 13 Sept. 2004, at 6, *available at* <http://www.un.org/reform/>, last visited November 18, 2004.

¹⁸⁵ E.S.C. Res. 1296, *supra* note 62, at art. 17.

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¹⁸⁶ With Resolution 1996, ECOSOC also approved cosmetic alterations to the consultative status labels. Accordingly, general consultative status replaced Category I status and special consultative status replaced Category II. E.S.C. Res. 1996/31, *supra* note 76, at arts. 22-23.

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¹⁸⁷ *Id.* at art 25.

¹⁸⁸ E.S.C. Res. 1296, *supra* note 62, at art. 14 (emphasis added).

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¹⁸⁹ E.S.C. Res. 1996/31 *supra* note 76, at art. 20.

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¹⁹⁰ *See supra* Part II(B).

¹⁹¹ E.S.C. Res. 1996/31, *supra* note 76, at art. 56.

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pendent,¹⁹² these incidents point more to the politicized nature of the Commission than to any objective assessment of clear abuse based on “a pattern of acts contrary to the purposes and principles of the Charter of the United Nations.”¹⁹³ In any event, NGOs now have a formal voice in any proceedings that threaten the suspension or withdrawal of their consultative status.

Further reinforcing the trend towards the expansion of NGO influence within the UN system, it should be noted that NGOs enhanced their access in two secondary, but still significant, ways. First, the number of NGOs having “association” status with the Department of Public Information (DPI) grew “from 200 in 1968 to about 1,400 in 2002.” This accreditation provides NGOs access to the UN, although it does not permit active participation in proceedings.¹⁹⁴ Second, the UN designed a new *ad hoc* process for accrediting NGOs to conferences and other one-time events. While this form of participation can permit considerable opportunities for interac-

¹⁹² On 26 October 1999, ECOSOC revoked the consultative status of Christian Solidarity International (CSI) by a 26 to 14 vote in response to a complaint by the government of Sudan, which had charged that the NGO’s actions constituted both a threat to the sovereignty and national security of Sudan. CSI had invited the Southern Sudanese rebel chief John Garang to speak out in front of the Commission against the Sudanese government’s drive to enslave non-Muslims in the Sudan. See B. Franceschi, *Lobbyists’ Role at UN Human Rights Talks Prompts Heated Debate*, AGENCE FRANCE PRESSE, Mar. 23 2001, available at <http://www.globalpolicy.org/ngos/access/2001/hrights.htm>, last visited November 20, 2004. See also J.C. Buhner, *NGOs Are Upsetting Things at the UN*, LE MONDE, Aug. 17, 2000, available at <http://www.globalpolicy.org/ngos/access/2000/1206.htm>, last visited November 20, 2004 (A. Baillat & J. Garred, trans.). In another case, ECOSOC decided, by a 25 to 18 vote, “to suspend, for a period of three years, the special consultative status of the International Council of the Associations for Peace in the Continents (ASOPAZCO).” According to the American delegate, although the International Council for the Association of Peace in the Continents had made statements critical of Cuba, it had not challenged the sovereignty of Member States nor gone beyond established norms. E.S.C., News Release, Doc. ECOSOC/5934, 46th mtg. (Oct. 18 2000), available at <http://www.un.org/News/Press/docs/2000/20001018.ecosoc5934.doc.html>, last visited November 20, 2004. and <http://www.globalpolicy.org/ngos/00deb/asopazco/pr5934.htm>, last visited November 20, 2004. See also T.R. Eddlem, *Conservatives Deceived by NGOs*, 15 NEW AMERICAN 17 (July 16, 2001), available at http://thenewamerican.com/tna/2001/07-16-2001/vol17no15_ngo.htm, last visited November 18, 2004.

¹⁹³ E.S.C. Res. 1996/31, *supra* note 76, at art. 57(a).

¹⁹⁴ United Nations, News Release, *UN-Civil Society Relations Panel Established by Secretary-General*, (Feb. 13, 2003), available at <http://www.globalpolicy.org/ngos/ngo-un/rest-un/2003/0213panel.htm>, last visited November 20, 2004.

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tion and lobbying in informal sessions, it “does not allow a continuing relationship with the UN.”¹⁹⁵

With all these newly created or enlarged points of entry for NGO participation, it is no surprise that Secretary General Kofi Anan would conclude that as a result of “explosive growth in [NGO] participation, the system that has evolved over several years . . . is showing signs of strain.” In the main, Anan drew attention to several issues: First, the UN’s inability to physically accommodate all NGOs requesting participation in United Nations conferences and meetings; second, inconsistencies in standards and procedures surrounding accreditation processes; third, rising wariness on the part of Member States concerning “the constant pressure to make more room” for NGOs in their deliberations; and finally, the continuing and “great imbalance” in numbers between NGOs from industrialized and developing countries, “with very few of the latter taking part in United Nations activities.”¹⁹⁶ As a consequence of these realities, the Secretary General appointed 12 individuals “affiliated with governments, non-governmental organizations, academia and/or the private sector” to a Panel of Eminent Persons on United Nations-Civil Society Relations, and tasked the group with examining “the modes of participation in UN processes of non-governmental organizations, as well as of other non-governmental actors such as the private sector and parliamentarians.”¹⁹⁷ The Panel’s final report (also referred to as the “Cardoso Report”), presented to the Secretary General on 7 June 2004, advanced 30 specific reform proposals, including:

- Enlarging the role of civil society organizations within General Assembly affairs, “since it no longer makes sense to restrict their involvement in the intergovernmental process to the Economic and Social Council”;
- Creating a single accreditation mechanism “under the authority of the General Assembly”;

¹⁹⁵ A. Baillat, *NGO Status at the UN*, available at <http://www.globalpolicy.org/ngos/ngo-un/info/status.htm>, last visited December 3, 2004. “The formal statuses accord very different rights to NGOs, but in practice active NGOs with lower status can gain greater access than less active NGOs with higher status.” For example, more than 3,500 NGOs were given formal accreditation to the World Summit on Sustainable Development. See *Strengthening of the United Nations: An Agenda for Further Change: Report of the Secretary-General*, U.N. Doc. A/57/387, at para. 138 (Sept. 9, 2002) [hereinafter, *An Agenda for Further Change*].

¹⁹⁶ *An Agenda for Further Change*, *supra* note 195, at para. 139.

¹⁹⁷ Former Brazilian President Fernando Henrique Cardoso is chair of this blue-ribbon panel. See *UN-Civil Society Relations Panel*, *supra* note 194.

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- Lessening the prominence of intergovernmental review, “which tends to overpoliticize the accreditation process”; and
- Leveling “the playing field between Northern and Southern civil society. . .to enable Southern civil society capacity to engage United Nations deliberative processes, operations and partnerships.”¹⁹⁸

In response to the Panel’s findings, the UN Secretariat agreed that increased involvement of NGOs should “become a regular component of the General Assembly’s work”, and that the Security Council should “find ways to strengthen further its relationship with civil society.”¹⁹⁹ The Secretary General also agreed to create a single trust fund to underwrite travel and accommodation expenses for NGO representatives from developing countries to attend intergovernmental meetings, and endorsed the idea of a single system for NGO accreditation.²⁰⁰ Not surprisingly however, NGO reaction to the Cardoso Report has bordered on hostile. According to Global Policy Forum, “the NGO community must oppose the report’s many negative ideas”, *inter alia*, because:

[T]he Cardoso Report does not fundamentally reflect what NGOs told panel members nor does it address many critical NGO concerns. The report says nothing about additional UN funds for NGO liaison and support. . . [or] about efforts by governments, North and South, to weaken, subordinate and control NGOs. Rather the report promotes problematic ideas about governance that most NGOs categorically reject. Indeed, the core ideas of the report are damaging to NGOs and to the future of the multilateral system.²⁰¹

Likewise, HROs including Amnesty International and Human Rights Watch, together with the Conference of Non-Governmental Organizations

¹⁹⁸ “We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations–Civil Society Relations,” UN Doc. A/58/817, June 11, 2004, at pp. 9-11. For detailed coverage of the Panel’s activities. See <http://www.un.org/reform/panel.htm>, last visited Sept. 18, 2004.

¹⁹⁹ “Report of the Secretary-General in Response to the Report of the Panel of Eminent Persons,” *supra* note 184, at p. 4.

²⁰⁰ *Id.* at pp. 6-7.

²⁰¹ J. Martens and J. Paul, “Comments by Global Policy Forum on the Cardoso Panel Report,” August 2004, at pp. 1-2, available at <http://www.globalpolicy.org/reform/initiatives/panels/cardoso/08gpf.pdf>, last visited November 15, 2004.

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in Consultative Relationship with the United Nations (CONGO), expressed their displeasure with the Cardoso Report's conclusions in letters addressed to the Secretary General. Ironically, one of the primary complaints contained in these letters expressed frustration at the potential that business entities might be encompassed in the term 'civil society', "*not least because of their frequent lack of accountability to society at large.*"²⁰²

Ultimately, as this and the following sections demonstrate, the Secretary General's effort to improve NGO modes of participation in UN processes—and the NGO reaction to that effort—confirm the increasingly assertive voice of NGOs and the undeniable trend towards a growing role for these organizations beyond the strict confines of ECOSOC.

ii) HROs & The UN Human Rights Treaty Bodies

Moving from developments specific to ECOSOC and the political arm of the United Nations, it is equally instructive to track the growing role of human rights NGOs within the UN human rights treaty body system. This system, consisting in the main of six major international human rights treaties, is more reflective of a legalistic approach to human rights. Indeed, the treaty bodies are envisioned to be made up of nonpartisan experts selected to serve based on their expertise rather than state affiliations.²⁰³ Generally speaking, the UN's international human rights treaties envisaged "no formal role . . . for NGOs in connection with the interpretation, implementation or monitoring" of the treaties. Rather, the treaties explicitly reserved these tasks for committees of experts set up in accordance with specific and predetermined terms.²⁰⁴ Indeed, the role of NGOs as the provider of alterna-

²⁰² Letter from Renate Bloem, President of CONGO, to Secretary General Kofi Anan, dated 27 August 2004, *available at* <http://www.globalpolicy.org/reform/initiatives/panels/cardoso/0827congo.pdf>, last visited November 18, 2004. This issue also is raised in a separate letter signed by Human Rights Watch and others, dated 1 September 2004, *available at* <http://www.globalpolicy.org/reform/initiatives/panels/cardoso/0901joint.pdf>, last visited Oct. 3, 2004. See also "Amnesty International's Letter on the Cardoso Panel's Report," August 31, 2004, *available at* <http://www.globalpolicy.org/reform/initiatives/panels/cardoso/0831amnesty.htm>, last visited November 10, 2004.

²⁰³ For example, the ICCPR calls for Committee members to be "persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience." ICCPR, *supra* note 23, at art. 28.

²⁰⁴ H. Cook, *Amnesty International at the United Nations, in THE CONSCIENCE OF THE WORLD*, *supra* note 1, at 204. It should be acknowledged that the *Convention on the Rights of the Child* is the only UN convention to formally and explicitly

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tive, independent information is not sanctioned by the text of *International Covenant on Civil and Political Rights* (ICCPR) nor addressed under the Human Rights Committee's rules of procedure. In fact, the term non-governmental organization simply does not appear in either of these instruments.²⁰⁵ Despite this apparently clear delineation of tasks and exclusion of NGO participation, the Secretary General of the UN recently declared that many "United Nations treaty bodies now routinely consider alternate reports from non-governmental organizations alongside the official reports from Governments." Moreover, in some cases, NGOS "have addressed plenary sessions of conferences and participated in formal, round-table discussions with governmental delegates."²⁰⁶ How then did HROs come to assert such a role?

During the drafting stage of the ICCPR and ICESR, "it was assumed that the Committee would base itself exclusively on the reports submitted by States parties."²⁰⁷ Observers differed on what role, if any, unofficial information should play in shaping the Human Rights Committee's (HRC) opinions. Egon Schwelb asserted that the Committee "was clearly not authorized to use such information." In contrast, Francesco Capotorti "pointed out that the nature of the examination would vary according to the elements of evaluation and comparison which the controlling body was permitted to use."²⁰⁸ Capotorti further reasoned that information other than the State party's official report was crucial for the Committee to

extend a function for NGOs within the text of the Convention itself. Under article 22, states are encouraged to cooperate "in any efforts by . . . non-governmental organizations. . . to protect and assist" children seeking refugee status. Furthermore, article 45 of the Convention enables the Committee on the Rights of the Child to "invite. . . other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention." According to the Committee's interpretation, NGOs fall within this definition. *Convention on the Rights of the Child*, G.A. Res. 44/25 (1989) (entered into force Sept. 2 1990). See M. Longford, *NGOs and the Rights of the Child*, in *THE CONSCIENCE OF THE WORLD*, *supra* note 1, at 235. See also Posner, *supra* note 66, at 417.

²⁰⁵ See ICCPR, *supra* note 23; *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev. 6 (Apr. 24, 2001) [hereinafter *HRC Rules of Procedure*]. The current version of the rules was adopted at the Committee's 1924th meeting during its seventy-first session.

²⁰⁶ *An Agenda for Further Change*, *supra* note 195, at para. 136.

²⁰⁷ I. Boerefijn, *Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure Under Article 40 of the Covenant on Civil and Political Rights*, 17 *HUM. RTS. Q.* 766, 782 (1995).

²⁰⁸ *Id.*

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fully verify information provided by governments. However, he also concluded that:

[T]he only source of information for the Committee would be the reports submitted by governments; the control organs had no direct investigative powers. With regard to [the Covenant on Economic, Social and Cultural Rights]. . . NGOs with consultative status could be allowed to intervene; *but there was no ground for such an intervention in the relevant clauses of the CCPR.*²⁰⁹

In spite of these views, the Human Rights Committee eventually went on to infer a point of entry for NGOs through Rule 67(2) of its own rules of procedure, which provides that:

The Committee may invite the specialized agencies to which the Secretary-General has transmitted parts of the reports to submit comments on those parts within such time limits as it may specify.²¹⁰

This move represented an intellectual leap and expansive reading of Rule 67(2) on the part of the Committee, especially given that the UN *Convention on the Privileges and Immunities of the Specialized Agencies* explicitly limits the definition of “specialized agencies” to a narrowly tailored list.²¹¹ In addition to these specific specialized agencies, the Convention extends the same status to “any other agency in relationship with the United Nations”²¹² provided it is “established by intergovernmental agreement,” has “wide international responsibilities. . . in economic, social, cultural, educa-

²⁰⁹ *Id.* at 783 (emphasis added).

²¹⁰ Rule 67(2), *HRC Rules of Procedure*, *supra* note 205.

²¹¹ According to the Convention, “The words ‘specialized agencies’ is limited to: (a) The International Labour Organization; (b) The Food and Agriculture Organization of the United Nations; (c) The United Nations Educational, Scientific and Cultural Organization; (d) The International Civil Aviation Organization; (e) The International Monetary Fund; (f) The International Bank for Reconstruction and Development; (g) The World Health Organization; (h) The Universal Postal Union; [and] (i) The International Telecommunication Union.” *Convention on the Privileges and Immunities of the Specialized Agencies*, G.A. Res. 179 (II), at art. I(ii) (1947), available at <http://www.icann.org/tlds/health1/annexes/convention.htm> and http://www.ifrance.com/cambodialaw/treaties/un/chap03/tr0304_text.htm, last visited November 10, 2004.

²¹² *Id.* at art. I(ii)(j).

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tional, health, and related fields,”²¹³ and such an agency enters into a cooperative agreement with the Economic and Social Council.²¹⁴ Clearly, many human rights NGOs, especially those operating uniquely on the national level, do not meet these strict criteria.

Notwithstanding this apparent constraint mitigating against active HRO participation in the proceedings of the Human Rights Committee, Committee members began incorporating from an early point in their deliberations, “information from the International Commission of Jurists, Amnesty International, and other private human rights organizations,” to bolster their understanding of state party reports.²¹⁵ Some state parties openly opposed this practice, arguing that referral to unofficial information fell outside the Committee’s mandate.²¹⁶ In fact, opposition to the use of such information from Eastern European members of the HRC forced other Committee members to “surreptitiously glance at documents submitted to them by NGOs, hiding them under their desks.”²¹⁷

The “unofficial and rather mild breakthrough” for human rights NGOs operating within the treaty body system may be traced to the mid 1980s. At this point, several NGOs began providing the HRC “with background information on individual countries prior to or during the time their human rights reports came up for review.”²¹⁸ The circumstances and exchanges were “totally informal and the experts, even when they used the NGO information, meticulously avoided any reference to an NGO.”²¹⁹ Even as late as 1988, “it was rare for committee members to acknowledge that they based questions on NGO information.”²²⁰ Yet, as the HRC continued its work into the 1990s, HRO information became “extremely welcome,” to the extent that materials were actively “solicited” without any hesitation or covertness.²²¹ Arguably, Committee members sought out NGO material

²¹³ U.N. CHARTER art. 57 (emphasis added).

²¹⁴ U.N. CHARTER art. 63. See also THE INTERNATIONAL LAW DICTIONARY available at <http://august1.com/pubs/dict/s.htm> (last visited Jan. 29, 2003). See also IOM’s Relationship with the United Nations System—Q & A, available at http://www.iom.int/en/PDF_Files/Other/IOM_UN_QA.pdf, last visited November 15, 2004.

²¹⁵ Boerefijn, *supra* note 207, at 784.

²¹⁶ *Id.* at 785.

²¹⁷ Baehr, *supra* note 123.

²¹⁸ KOREY, *supra* note 4, at 268.

²¹⁹ *Id.*

²²⁰ S. Colliver, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 125, at 176.

²²¹ KOREY, *supra* note 4, at 268.

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prior to a given country review, because it served to “make their questioning more precise, factual, and less abstract.”²²² However, this shift in protocol evolved without any formal changes to the ICCPR or the Committee’s rules of procedure. Indeed, even the mere “possibility of involving non-governmental information” germinated “without any explicit foundation on any rules of procedure.”²²³ Nevertheless, the Human Rights Committee gradually adopted the use of HRO information as an acceptable practice, and consequently blessed these organizations with the status of “unofficial researchers to committee members.”²²⁴

The growing—yet always informal—trend in favor of incorporating human rights NGO information is readily confirmed across all of the UN’s human rights treaty bodies. Even while lacking formal provisions accounting for NGO participation, these bodies quickly “established functioning informal arrangements for meeting with, and using information” provided by NGOs.²²⁵ And while these arrangements continue to expand and deepen to the point where NGO information is openly solicited, the bodies have remained reluctant to formalize any kind of procedure for this exchange:

It is generally left to the committee to ‘invite’ input rather than giving NGOs and others any right of initiative. Over time . . . informal practices established by NGOs themselves in regularly transmitting information to the committees have become a more accepted and regular aspect of their work.²²⁶

Indeed, over time, committee members have also “become increasingly inclined to refer specifically to their reliance upon NGOs.”²²⁷ Perhaps most indicative of this shift, a 1994 meeting of persons chairing the UN human rights treaty bodies recommended that each treaty body “examine the possibility of changing its working methods or amending its rules of

²²² Gaer, *supra* note 107, at 56.

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²²³ CHRIS INGELSE, *THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT* 142 (2001).

²²⁴ Gaer, *supra* note 107, at 56.

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²²⁵ M. Lempinen, *Consultative Relationship Between the United Nations and Non-Governmental Organizations*, at 34 (1999), available at http://www.abo.fi/institut/imr/norfa/miko_ngo.pdf, last visited November 5, 2004.

²²⁶ Cook, *supra* note 204, at 204-205.

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²²⁷ KOREY, *supra* note 4, at 269.

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procedure” to allow NGOs to participate more fully in its activities.²²⁸ In particular, suggestions for enhanced participation included allowing NGOs:

[T]o make oral interventions and to transmit information relevant to the monitoring of human rights provisions through formally established and well-structured procedures.²²⁹

Significantly, none of these formal arrangements have emerged. Members of the HRC have confirmed that interaction with HROs continues on an informal level with no documented formal guidelines governing the limits or nature of that interaction.²³⁰ In the meantime, the role of HROs at the UN has become so pervasive—and so integral to the operation of UN human rights mechanisms—that “UN treaty bodies, committee chairs, and the General Assembly have all affirmed that none of the actions involved in official human rights monitoring could work well without NGOs.”²³¹ Human rights organizations are relied upon especially for fact-finding operations, given their omnipresence and exclusive dedication to the cause of human rights. And it is the product of these operations that finds its way into the HRO briefings and documentation that is “extremely effective in guiding,” for example, the work of the Human Rights Committee.²³² With

²²⁸ *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments On Human Rights: Note By the Secretary-General*, UN Doc. A/49/537, Oct. 19, 1994, para. 41 [hereinafter *Effective Implementation of International Instruments*].

²²⁹ *Id.* The report also provided that attention should be given by treaty bodies and NGOs “to securing a stronger, more effective and coordinated participation of national non-governmental organizations in the consideration of States parties’ reports.”

²³⁰ Interviews with Martin Scheinin, UN Human Rights Committee member, Toronto, Can. (Jan. 8, 2003), and Cecilia Medina Quiroga, former UN Human Rights Committee Chairperson, Toronto, Can. (Jan. 29, 2003). Both these individuals also noted that it fell to the discretion of the Committee members to make determinations as to the veracity of human rights violations alleged by HROs against a given state party. Interestingly, discussions regarding the introduction of guidelines for NGO reports to the treaty bodies was met with concern on the part of HRO representatives, who noted “that it was up to the NGOs to decide what to submit to the committees.” *Report of the First Inter-Committee Meeting of the Human Rights Treaty Bodies*, U.N. Doc. HRI/ICM/2002/3, at para. 33 (2002), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/HRI.ICM.2002.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/HRI.ICM.2002.3.En?OpenDocument), last visited November 20, 2004.

²³¹ CLARK, *supra* note 92, at 16.

²³² KOREY, *supra* note 4, at 271.

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these dramatic developments in the open, many observers have concluded that without the input provided by human rights NGOs, UN treaty bodies today would find themselves “operating in a vacuum.”²³³

iii) HROs & The UN’s General Assembly and Security Council

Impressively, despite the constricted role established by UN Charter Article 71 and the narrow provisions of ECOSOC Resolution 1296, HROs have asserted themselves to become “by far the main providers of information to the UN human rights system,” to the extent that without their contribution of fieldwork, reports and lobbying, the system “would have ground to a halt long ago.”²³⁴ The centrality of HROs to the UN human rights system has been described as “the fuel and the lubricant which allow the machine to function and speed the working up.”²³⁵ According to Theo Van Boven, former director of the UN Center for Human Rights, HROs were responsible for 85 percent of the information provided to the Center: “We did not have the resources or staff to collect information ourselves, so we were dependent. They did a lot of work which we should do at the UN.”²³⁶ Yet, assuming that the viability of the entire UN human rights edifice rests upon the work of HROs, little serves to regulate their role in generating critical human rights reports, developing human rights norms or expanding human rights definitions. Every input is undertaken in an informal and unofficial capacity, where accountability is minimized and flexibility unfettered.

As a result of this flexibility and informality, the growth in power of HROs has not restricted itself to the confines of ECOSOC operations or even to the UN’s human rights treaty bodies. In fact, the expansion of influence has extended:

[T]o the point that many NGOs that have representatives in New York are now more active in the General Assembly than in the Economic and Social Council. In addition, several subsidiary bodies of the General Assembly have devised informal arrangements allowing NGOs to take the floor or circulate documentation. Similarly, NGOs have

²³³ INGELSE, *supra* note 223, at 112.

²³⁴ Cook, *supra* note 204, at 198.

²³⁵ *Id.*

²³⁶ ACTIVISTS BEYOND BORDERS, *supra* note 115, at 96.

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participated actively in hearings of special committees. . .or in special sessions of the General Assembly.²³⁷

Human Rights NGOs have also spurred the creation of new human rights mechanisms through the Commission on Human Rights, including “Working Groups on Disappearances and on Detention and Special Rapporteurs on such other themes as violence against women and race hatred.”²³⁸ Perhaps most revealingly, a coalition of NGOs including Amnesty International²³⁹ recently launched a campaign to secure passage of a General Assembly resolution that would extend NGO consultative status to that body. The draft resolution decides:

[I]n light of the experience gained through the arrangements for consultation between non-governmental organizations and the Economic and Social Council, to invite non-governmental organizations to participate in [the work of the General Assembly] and in the work of its Main Committees, Special Sessions and, as appropriate, subsidiary and ad hoc bodies.²⁴⁰

²³⁷ A. Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs*, in *NGOs, THE UN, AND GLOBAL GOVERNANCE*, *supra* note 14 at 85. The recommendations submitted by the Secretary-General’s Panel of Eminent Persons on Civil Society and UN Relationships signals an official recognition of this expansionary trend. *Supra*, note 198.

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²³⁸ KOREY, *supra* note 4, at 9.

²³⁹ Amnesty International circulated the letter internationally, endorsing the proposed resolution “as a practical first step in enhancing further collaboration between governments and NGOs.” Pierre Sané, *Open Letter From the Secretary-General of Amnesty International to All Ministers of Foreign Affairs*, available at <http://www.globalpolicy.org/ngos/ngo-un/ga/2001/amnesty.htm>, last visited November 18, 2004.

²⁴⁰ International NGO Task Group on Legal and Institutional Matters (INTGLIM), *General Assembly NGO Resolution (2000) on NGO participation in the United Nations General Assembly* (May 2000), available at <http://www.globalpolicy.org/ngos/ngo-un/ga/prop-res.htm#organisation> and http://www.worldfederalist.org/NGO/ngo_gareso.html, last visited November 18, 2004. In January 2001, INTGLIM circulated a memo to all UN member state ministers and UN officials, as well as NGOs working with the General Assembly, “calling upon all UN Member States to consider endorsing the proposed General Assembly NGO Resolution” and expressing hope that “governments will consider submitting the proposed resolution for adoption by the UNGA.” INTGLIM, *General Assembly NGO Resolution* (Jan. 2001), available at http://www.worldfederalist.org/NGO/action_ngo2001.html, last visited November 18, 2004.

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In tandem with these developments, HROs have actively sought to have their voice heard within the Security Council as well. One “innovative and creative” method employed to this end is the Arria formula. This practice allows NGOs “to give testimony to Security Council members in relation to specific crises, as well as on such issues as children in armed conflict,” outside of official Security Council meetings.²⁴¹ Arria meetings occur “virtually every month,” and attendance “is typically at a very high level.”²⁴² It is under this process that HRW presented the Council with a briefing on the human rights situation in Angola²⁴³ and Médecins sans Frontières more recently appealed to the Council concerning the situation in Darfur, Sudan.²⁴⁴ Significantly, meetings under the Arria formula “take place in conference halls or other places of public access, away from the Security Council’s suite of formal and informal meeting rooms.” Moreover, these meetings “are not listed in the daily United Nations Journal, and the organization keeps no official record of them.”²⁴⁵ It should be noted that given the potential of the Arria process to “frequently air information and opinions that nations have managed to keep out of the Security Council’s

²⁴¹ *An Agenda for Further Change*, *supra* note 195, at para. 137. The Arria formula is named after Ambassador Diego Arria of Venezuela. In 1993, the ambassador invited Council members to an out-of-council briefing by a Bosnian priest from Yugoslavia who shared his personal testimony of the crisis there. Arria chose this informal venue since “it was impossible to get the Council to agree to hear this testimony in its official sessions.” In this manner, the Arria formula filled an important gap in procedure since “under long standing Council practice, only delegations, high government officials . . . and United Nations officials could speak at regular Council meetings and consultations.” Although the practice remained closed to NGOs for some time, ad hoc events were staged in 1997 and, as of 2000, the Council has effectively opened the process to NGOs, as well as to other member states. J. Paul, *The Arria Formula* (Feb. 2001), available at <http://www.globalpolicy.org/security/mtgsetc/arria.htm>, last visited November 18, 2004.

²⁴² Paul, *supra* note 241.

²⁴³ *Human Rights Watch Angola Briefing Under the Arria Formula to the United Nations Security Council* (Mar. 5, 2002), available at <http://www.hrw.org/background/africa/angola/2002/angola060302.pdf>, last visited November 18, 2004.

²⁴⁴ Médecins Sans Frontières, “Statement by Ton Koene, Emergency Coordinator: The Humanitarian Situation in Darfur, Sudan”, United Nations Security Council “Arria Formula” Meeting, May 24, 2004, available at http://www.globalpolicy.org/security/mtgsetc/0424darfur_msf.pdf, last visited Sept. 20, 2004.

²⁴⁵ B. Crossette, *Keeping The Security Council Door Ajar* (Feb. 3, 2003), available at http://www.unfoundation.org/unwire/util/display_stories.asp?objid=31805 and <http://www.globalpolicy.org/security/mtgsetc/arriafuture.htm>, last visited November 18, 2004.

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purview, countries are now using diplomatic pressure to block or undermine Arria formula sessions.”²⁴⁶ Still, the Secretary General’s Panel of Eminent Persons on United Nations–Civil Society Relations recently encouraged this type of contact with NGOs by proposing that the Security Council improve “the planning and effectiveness of the Arria formula meetings by lengthening lead times and covering travel costs to increase the participation of actors from the field.”²⁴⁷

In addition to the Arria formula, NGOs also retain the ability to “actively lobby the Council and meet with individual missions on a continuous basis.”²⁴⁸ For example, the Working Group on the Security Council (WGSC), a coalition established in 1995, represents nearly 30 major NGOs and is dedicated to organizing “off-the-record briefings almost every week with one of the delegates on the Security Council.”²⁴⁹ In 2003, WGSC held close to fifty “private and off-the-record” meetings,²⁵⁰ prompting one observer to remark that:

[In] a relatively short time, the [WGSC] has become an influential forum at the United Nations. When it was founded in 1995, no one imagined that an NGO body could have an influential voice on Council-related issues.²⁵¹

The ability to operate informally at higher levels of the UN, coupled with maintaining an influential role within lower-level working groups, provides HROs with the best of both worlds. As one observer has remarked, “NGOs often act as full participants and sometimes as principal

²⁴⁶ *Id.*

²⁴⁷ “We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations–Civil Society Relations,” UN Doc. A/58/817, June 11, 2004, *supra* note 198, at p. 18.

²⁴⁸ Global Policy Forum, *Special Meetings Between NGOs and Security Council Members*, available at <http://www.globalpolicy.org/security/mtgsetc/brieindx.htm>, last visited Sept. 21, 2004.

²⁴⁹ As of November 2003, HRO members of the WGSC include Médecins Sans Frontières, International Service for Human Rights, Amnesty International and Human Rights Watch. Global Policy Forum, *NGO Working Group on the Security Council List of Members*, available at <http://www.globalpolicy.org/security/ngowkgrp/members.htm>, last visited November 15, 2004.

²⁵⁰ Global Policy Forum, “NGO Working Group on the Security Council Meeting Calendar 2003”, available at <http://www.globalpolicy.org/security/ngowkgrp/meetings/mtgcal03.htm>, last visited September 15, 2004.

²⁵¹ J. Paul, *A Short History of the NGO Working Group on the Security Council*, available at <http://www.globalpolicy.org/security/ngowkgrp/history.htm>, last visited November 10, 2004.

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actors” at the crucial working group level, which, while “low in the hierarchy of the UN machinery,” is “important in terms of legal expertise and technical skills.”²⁵² In this way, NGOs—and HROs in particular—have entrenched their presence throughout the UN system at all levels of operation. This presence is so pervasive, and backed by an assertiveness so unbound, that a number of NGO advocates are now lobbying to secure an NGO role at the International Court of Justice (ICJ).²⁵³ Yet even without access to the ICJ chamber, NGOs remain able to exert an impressive amount of influence and coordinate lobbying pressure across virtually all of the UN decision-making processes.

C. Growing HRO Mandates

In tandem with their numerical and financial growth, and increased influence within the UN system, HROs have sought to expand the scope of their activities. “Relative to the 1970’s, NGO’s mandates and agendas have become more diverse and diffuse. . . [mirroring] the expansion of the human rights movement as a whole to cover more state activities.”²⁵⁴ For example, consider the work of Amnesty International (AI). Originally conceived as an organization dedicated to the release of prisoners of conscience, Amnesty’s current mandate has expanded to include promoting fair trials, monitoring the international arms trade, and abolishing torture, extrajudicial executions and capital punishment.²⁵⁵ In 1991, AI undertook one of its “most important policy shifts,” determining to monitor human rights abuses committed by armed political opposition groups in addition to those

²⁵² Cook, *supra* note 204, at 192. See also Schoener, *supra* note 83, at 550. R

²⁵³ Dinah Shelton reasons that the ICJ could allow NGO input in contentious cases by amending the rule defining public international organizations to include NGOs. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L. L. 611 (1994). Similarly, Richard Bilder reasons that the ICJ should be opened to human rights actions brought by individuals and NGOs since “individuals and groups are those most directly affected by human rights violations, and consequently those most likely to diligently and effectively pursue them.” Richard B. Bilder, *Possibilities for Development of New International Judicial Mechanisms*, in Henkin & Hargrove, *supra* note 66, at 334. R

²⁵⁴ H.J. STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT* 8 (1991).

²⁵⁵ *Id.* at 11. See also POWER, *supra* note 34, at 41-42. R

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committed by states.²⁵⁶ Amnesty's aspiration to omnipresence is neatly summed up in the simple, if sweeping, mandate broadcast over the AI website: "working to protect human rights worldwide."²⁵⁷ In essence, Amnesty has become the one-stop Seven-Eleven of the HRO world, open 24/7 and protecting every right imaginable under the sun.²⁵⁸

This type of organizational evolution again underscores the growing scope of actors and actions that have fallen under the scrutiny of HROs. As one commentator has observed, while Amnesty "was not founded to work for general economic, social, and political justice—however much its individual members may wish to do so," this "above the fray" position "does not ring quite true in practice. . . . Amnesty does seem to be preoccupied with the general state of injustice."²⁵⁹ Certainly, AI's work surrounding the question of refugees and repatriation in the Great Lakes Region of Africa or in the former Yugoslavia testifies to this fact.²⁶⁰ One inevitable by-product of such mission sprawl is the tendency among HROs to seek out "sexier" spotlight issues rather than traditional prisoner of conscience style work. As Morton Winston notes, among Amnesty's rank and file, "frankly, the thrill is gone. It is not much fun to work for months or years on a disappearance case only to learn in the end that one's fears were correct and that the person in question is dead."²⁶¹ Instead, the ascendant tendency favors issues that attract greater media attention and greater financial support, even when these issues may not be backed by sufficient supporting evidence, corroboration or institutional expertise.

²⁵⁶ R. Thakur, *Human Rights: Amnesty International and the United Nations*, in *THE POLITICS OF GLOBAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS IN AN INTERDEPENDENT WORLD* 373 (P.F. Diehl, ed., 2001).

²⁵⁷ See <http://www.amnesty.org>, last visited Sept. 13, 2004.

²⁵⁸ Not to be outdone, effective January 2004, the Lawyer's Committee for Human Rights metamorphosed into Human Rights First "to undertake more public forms of engagement that mobilize a broader and more active group of supporters." See Human Rights First, "Human Rights First is the new name of the Lawyers Committee for Human Rights", available at http://www.humanrightsfirst.org/about_us/name_change/name_change.htm, last visited November 18, 2004.

²⁵⁹ POWER, *supra* note 34, at 14. Consider also that in 1989, Amnesty's "rather desultory approach to violations of women's rights" shifted with a newfound recognition of the importance of human rights violations against women, and a decision "to give this work a higher profile within its campaigns." J. Connors, *NGOs and the Human Rights of Women at the UN*, in *THE CONSCIENCE OF THE WORLD*, *supra* note 1, at 168.

²⁶⁰ D. Stubbings, *The Challenge of Protection and Monitoring: An NGO Perspective*, in *UNIVERSAL HUMAN RIGHTS?* 217 (R.G. Patman, ed., 2000).

²⁶¹ Winston, *supra* note 104, at 39.

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Amnesty's historical evolution is indicative of the larger story. While ECOSOC lately has made efforts to enhance the participation of NGOs within the UN, HROs have continually sought to fiercely protect their independence and avoid any pigeonholing or narrow operational conceptualization for their work. As Steiner observes, HRO activists find even the newly-expanded ECOSOC criteria for consultative status overly constraining.²⁶² These activists reason that qualifying as a human rights NGO ought not to require that an organization's criticism of human rights abuses be founded on international human rights law. Rather, the "nature of the claims made and the goals advanced by a group" should count for more than "the formal source of norms that [the NGO invokes] to criticize state conduct."²⁶³ Ironically, this translates into HROs identifying not only the violations, but also defining the norms against which these violations are judged. This pattern of activity dangerously treads away from not only established international human rights norms, but also from any touchstone of legitimacy.

According to some human rights activists, objective definitions and neutral mandates have no role in defining HROs. Instead, self-perception and self-definition represent the "only sensible method of identifying human rights organizations." These activists argue that any "attempt at an authoritative definition [of a human rights NGO] could block a natural and important growth of the human rights movement."²⁶⁴ Clearly, if this amorphous conception of a "human rights organization" is accepted, the end result risks a total and utter disconnect from the touchstone of international human rights law. More alarmingly still, hitching superfluous demands couched as "human rights" to the legitimate rights enumerated within the international system risks undermining the very authority of the norms they aspire to expand. As human rights NGOs have enjoyed an unfettered development, they have come to expect no limits or boundaries to the scope of their work or the demands they formulate. Without some kind of regulation, any group of people—or for that matter any individual—can "self-define" themselves as advocating in favor of what they identify to be a human right; it is this direction and expectation within the human rights NGO community which poses a grave risk to the inroads international human rights law has secured during the past 60 years. As Andrew Hurrell observes, this expansionist viewpoint argues "that we should keep pushing out the normative boat and keep asserting important sets of rights even if the chances of effective or consistent implementation remain slim," and even though "it is evi-

²⁶² See *supra* Part III(B)(i).

²⁶³ STEINER, *supra* note 254, at 5.

²⁶⁴ *Id.* at 7.

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dent that this expansion of the human rights agenda and the concurrent attempt to promote other liberal goals raises very serious difficulties.”²⁶⁵ Indeed, Steiner himself concedes that the more limited the role of HROs, “the more distinctive will be its contributions to the larger task, and the greater its credibility and legitimacy within this defined field of activity.”²⁶⁶ And yet, the mandates—and expectations—continue to expand unabated.

Perhaps ironically—or perhaps as a testament to their strong-willed commitment to what *they* identify as human rights issues—HROs have expanded their mandates to include not only states and private corporations, but also intergovernmental bodies, including the United Nations. For example, Amnesty International will rebuke the United Nations High Commissioner on Refugees (UNHCR) if it believes the agency has “failed in its mandated duty to protect refugees.”²⁶⁷ By increasingly taking up “cases where the abusers are non-state actors,” HROs are now applying *their* version of human rights “to protect and monitor in situations where businesses—especially multinationals—are employing private security companies, whose operatives behave in a manner which falls far short of the standards that would be expected from a police force or military unit.”²⁶⁸ Although human rights NGOs may exercise various techniques, including “relatively dull reports, or lively street protests,” by “creating new issues and placing them on the international and national agendas, providing crucial information to actors, and most importantly by creating and publicizing new norms and discourses,” these organizations are restructuring world politics on a broad scale.²⁶⁹ If this is indeed occurring, and all evidence points to the fact that it is, Steiner is right to ask what, if any, restraints exist to limit the causes being brought under the human rights umbrella. Furthermore, is it legitimate or reasonable to expect that the justification for these expanded mandates and definitions of human rights violations can be found within the corpus of human rights law?²⁷⁰ Underlining these questions remains the glaring reality that human rights NGOs continue to grow and increase their influence without addressing the dearth of formal standards or controls within the industry itself.²⁷¹

²⁶⁵ Hurrell, *supra* note 96, at 280.

²⁶⁶ STEINER, *supra* note 254, at 38.

²⁶⁷ Stubbings, *supra* note 260, at 217.

²⁶⁸ *Id.* at 223.

²⁶⁹ Sikkink, *supra* note 93, at 306.

²⁷⁰ STEINER, *supra* note 254, at 36.

²⁷¹ The problem of unregulated expansion of HRO mandates is addressed in further detail in Part IV(A)(i), below.

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—*Wherever power is exercised, questions of accountability are appropriately posed.*²⁷²

IV. RELYING ON INFORMAL CONTROLS TO REGULATE INCREASED HRO INFLUENCE AND POWER: A RECIPE FOR DISASTER

An examination of NGO research, fact-finding, reporting and fundraising techniques underscores the divergences in HRO objectivity and reliability levels. While it is true that no formal mechanisms are in place to regulate the output of human rights NGOs, activists will point to a number of informal controls to defend the accountability and reliability of industry agents. These informal restraints can be divided into two broad types: the first is internal to the NGO and thus subject to direct NGO control. In contrast, the second level of checks is external to the NGO and consequently outside its capacity to directly influence. This section will address the characteristics of each of these levels of control and demonstrate their inadequacy for ensuring responsible development of standard HRO practices within a growing industry. Ultimately, it is this lack of standards that threatens to downgrade the authority of the human rights NGO community and further risks undermining the legitimacy of recognized international human rights norms.

Remarkably, most of the academic writing addressing human rights NGOs remains largely favorable, or, as P.J. Simmons observes, filled with “breathless accounts about the growing power of NGOs.”²⁷³ Even the critical literature falls short of offering any meaningful assessment of the power currently wielded by a disparate group of organizations self-labeling themselves as “human rights organizations.” Moreover, most observers tend to accept the premise and reliability of informal accountability methods. It is this premise—and the reliability of these informal measures—that I intend to challenge here.

A. Internal Standards

Human rights organizations are typically viewed as grassroots organizations that represent their constituencies in a democratic fashion. Yet some of these organizations may be “decidedly undemocratic and unaccountable to the people they claim to represent.”²⁷⁴ This reality hints at the larger picture whereby a lack of concrete operating standards, coupled with a laissez-faire approach, leaves fulfillment of informal regulatory principles

²⁷² Spiro, *supra* note 101, at 162.

²⁷³ Simmons, *supra* note 13, at 82.

²⁷⁴ *Id.* at 83.

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to the NGOs themselves. The result is uneven at best, and at worst, points to a severe, looming crisis with respect to credibility and authority.

i) Flexible Operating Practices and Limitless Mandates

Some HROs employ internal standards to delineate limits regarding activities which fall within the purview of the organization. Typically, no independent body is charged with overseeing the implementation of these standards, and oftentimes, these standards are neglected or sidestepped for various reasons. The end result is that HROs are ultimately able to do what they want, regardless of principles expressed within operational guidelines or founding mandates. Interestingly, this practice can be traced back to the early days of the modern HRO revolution. For example, as early as 1977, Amnesty opted to violate its own self-imposed policy that members not investigate cases in their own country by dispatching “two leading members of the West German section of Amnesty” to visit Red Army Faction prisoners and prison officials in West Germany.²⁷⁵ Although touted as one of Amnesty’s core principles, the organization, even early on, felt comfortable enough—or compelled enough—to violate its own self-imposed operational principles to get the “scoop,” even at the expense of undermining the sacrosanct impartiality of its local West German chapter.²⁷⁶

Human rights NGOs are not only prone to violating their own self-proclaimed principles, but also have no timidity in departing from the objectives they set for themselves in their self-proclaimed mandates. As noted above, Amnesty has experienced significant mission creep over the years.²⁷⁷ However, other cases demonstrate that HROs are capable of completely disregarding their core functions as objective investigator and educator. For example, *B’Tselem*, the Israeli Information Center for Human Rights in the Occupied Territories—often identified as the leading and most reliable Israeli human rights group—claims that its mandate is:

[T]o document and educate the Israeli public and policy-makers about human rights violations in the Occupied Territories, combat the phenomenon of denial prevalent among

²⁷⁵ POWER, *supra* note 34, at 74.

²⁷⁶ This principle of local chapters abstaining from local human rights issues remains a core AI tenet in effect until today. For example, the website of AI’s Israel chapter declares that “following Amnesty International’s guidelines, the Israel Section does not act on cases of human rights violations within Israel, the Palestinian Authority or other neighboring countries in the Middle East.” See <http://www.amnesty.org.il/data/english.html>, last accessed November 20, 2004.

²⁷⁷ See *supra* Part III(C).

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the Israeli public, and help create a human rights culture in Israel.²⁷⁸

With this mandate in mind, in April 2002 the organization exercised a giant leap away from its stated mission, electing to act as a facilitator in surrender negotiations between Islamic Jihad fighters and the Israeli Defense Forces (IDF). As *B'Tselem* reports, the organization “received a call from a . . . group of armed Palestinians. . . in Jenin refugee camp” who requested that a *B'Tselem* representative be “present when they turn themselves in.” According to *B'Tselem*, the Palestinian fighters requested “mediation in order to ensure that no harm would come to them if they surrendered.” Pursuant to this request, *B'Tselem*, an HRO dedicated to education, brokered “lengthy overnight negotiations”²⁷⁹ and “conducted protracted mediation efforts,” leading to the surrender and arrest of the 29 Palestinian combatants holed up in the refugee camp.²⁸⁰

To be certain, *B'Tselem's* foray into the uncharted world of protracted negotiations and nighttime surrenders did not reflect an isolated incident or exceptional one-time expansion of mission statement. Instead, it appears that *B'Tselem* has incorporated mediation as a new plank in its human rights work. Since the April 2002 mediation, other Palestinians have taken to contacting *B'Tselem* for assistance when trapped in uncomfortable standoffs with the IDF. In November 2002, *B'Tselem* again responded to a request, this time from “Fatah officials asking for help” to ensure that Mohammed Naefe, a suspect wanted in connection with an earlier attack on Kibbutz Metzger that killed five including two children, would not be harmed if he surrendered. In this case, a *B'Tselem* spokesperson conveyed assurances that “the army agreed not to harm Naefe if he [came] out . . . unarmed.”²⁸¹

²⁷⁸ See *B'Tselem, About B'Tselem, available at* http://www.btselem.org/English/About_Btselem/Index.asp, last visited October 21, 2004.

²⁷⁹ *B'Tselem, B'Tselem Daily Update* (Apr. 11, 2002), *available at* http://www.btselem.org/english/press_releases/2002/updates/20020411.asp, last visited November 10, 2004.

²⁸⁰ *B'Tselem, B'Tselem Mediates Between the IDF and 29 Armed Palestinians in the Jenin Refugee Camp Requesting to Surrender* (Apr. 11, 2002), *available at* http://www.btselem.org/English/Press_Releases/2002/020411.asp, last visited November 10, 2004.

²⁸¹ WTOP News, <http://wtop.com/index.php?nid=105&sid=364>, last visited November 10, 2004. Print media also covered this story, but omitted *B'Tselem's* name, referring instead to an “Israeli human rights group.” See G. Myre, *Israelis Capture Suspect in Kibbutz Attack*, *GLOBE & MAIL*, Nov. 15, 2002, at A-14. Joel Greenberg writes that Naefe “tried to negotiate the terms of his surrender through

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Undertaking the task of negotiation and mediation between the Israeli army and other Palestinian forces—be they paramilitary or terrorist—raises disturbing questions, not only about *B'Tselem's* expertise in high-pressure negotiation situations, but more urgently, about *B'Tselem's* professed objectivity. To be certain, permitting a human rights organization to place itself at the center of a military standoff compromises not only the organization's credibility, but also its legitimacy as an HRO. As Steiner notes, the broader HRO goals become, and the more these organizations move from specificity to sweepingly defined mandates, the greater the risk that the distinctive position of the HRO as objective observer will be undermined or replaced by political objectives.²⁸² In Steiner's words, once an HRO "departs from the traditional work of monitoring and reporting violations, what special claim does it have to inspire among government officials or the public a confidence in its work or message?"²⁸³

A stark example of the linkage between broadened organizational goals and the infiltration of political objectives may be seen in the activities of the Egyptian Organization for Human Rights (EOHR). This national HRO recently communicated a press release welcoming the establishment of the International Criminal Court (ICC). The body of the text goes on to assert that the ICC sends:

[A] clear message to war criminals and those who commit crimes against humanity such as the Israeli occupation army [sic] who commit these crimes against the unarmed Palestinians civilians. This message is that the Israeli occu-

an Israeli human rights group." Joel Greenberg, *Israelis Say They Capture Man Behind Kibbutz Attack*, N.Y. TIMES, Nov. 14, 2002.

²⁸² STEINER, *supra* note 254, at 39.

²⁸³ *Id.* at 36. Another example of bendable mandates is reflected in the Palestinian Human Rights Monitoring Group's (PHRMG) interest in a criminal trial concerning the alleged assault of a foreign peace activist. According to a PHRMG electronic press release (on file with author), the HRO "succeeded in reopening the case of British citizen and peacemaker Angie Zelter who was attacked" in Hebron on 29 August 2001. PHRMG further declared that its lawyers would observe "the trial closely and [monitor] the performance of the [Israeli] prosecutor to ensure she represents Ms. Zelter zealously." According to its mission statement, PHRMG "documents *human rights violations committed against Palestinians* in the West Bank, Gaza Strip and East Jerusalem, regardless of who is responsible" (emphasis added). Ms. Zelter, as stated in PHRMG's e-mail alert, is a British citizen and in all likelihood not a Palestinian. In any event, it is difficult to discern a pressing "human rights" issue surrounding this case that would merit lawyer-observers in the courtroom to ensure a "zealous" state prosecution of the defendant.

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pation army headed by the Israeli Prime Minister Areal [sic] Sharon will not escape punishment from war crimes and crimes against humanity after forming the court body when it is proved that they had committed [sic] these crimes and they will be referred to the ICC without the protection of USA which is used to using the right of VETO to prevent the Security Council from the hearings of the war crimes [sic] committed by the Prime Ministers of Israeli [sic] and its army against the unarmed Palestinians.²⁸⁴

Given the rambling nature of this passage, one might simply brush off the EOHR as a fringe group or political puppet. However, within the human rights community, EOHR holds sufficient credibility to secure Michael Posner's support in the organization's campaign to gain official permission to operate in Egypt.²⁸⁵ Notably, EOHR describes itself as "a non-governmental organization working for the protection and promotion of human rights *in Egypt*."²⁸⁶

ii) Ineffective Accountability

Accountability may be defined as "being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations."²⁸⁷ Although recognized as "a desirable organizational characteristic, empirical studies commonly indicate that both leaders and subordinates in public and private organizations seek to avoid accountability." Consequently, in the absence of accountability, the "likelihood of ineffective or illegitimate actions by an organization" is heightened.²⁸⁸ With specific regard to NGOs, a study by Edwards and Hulme has identified the existence of "multiple accountabilities" which characterize the industry:

²⁸⁴ Egyptian Organization for Human Rights, News Release, "EOHR Welcomes Establishment of ICC" (11 April 2002). This press release was distributed over the Derechos listserv (on file with the author).

²⁸⁵ Posner, *supra* note 66, at 409.

²⁸⁶ Egyptian Organization for Human Rights, *The Egyptian Organization for Human Rights*, available at <http://www.eohr.org.eg/> (emphasis added), last visited November 10, 2004. See also *infra* note 473.

²⁸⁷ M. Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003).

²⁸⁸ M. Edwards & D. Hulme, *Introduction to BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD* 8 (M. Edwards & D. Hulme, eds., 1996).

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“‘downward’ to [NGO] partners, beneficiaries, staff, and supporters; and ‘upward’ to their trustees, donors, and host governments.”²⁸⁹

Accordingly, observers like Paul Wapner point to the fact that HROs are beholden to their membership and consequently, must continually ensure that their conduct remains within acceptable boundaries.²⁹⁰ This type of internal accountability is ineffective for a number of reasons. First, some human rights NGOs do not operate on a membership-based structure. For example, while Amnesty International members arguably have a direct say in the operation of the organization and can potentially threaten the NGO by “voting with their feet,” or ending their financial and moral support for the organization, Human Rights Watch (HRW) is immune from the effects of such a potential sanction since they are not a membership-based organization. Second, even if an organization is membership-based, in many cases, the failure “to democratize their own [internal] structures makes them less effective . . . and . . . poses a particular problem for ‘downward’ accountability to members and beneficiaries.”²⁹¹

With regard to democratic structures and accountability to staff members, many smaller HROs tend to be founded and driven by dominant individuals:

No study of NGOs can fail to note the importance of individuals with vision, or dedication to an ideal, or dogged determination, or all three, who identify with an objective, who refuse to accept discouragement and who have the charisma to inspire followers to continue the fight until the goal is achieved.²⁹²

However crucial this type of leadership may be to success in the world of NGOs, it comes at a steep price. The ensuing “cult of personality,” has resulted in a playing field where “few NGOs, despite the democratic aspirations in their work, are [being] run in a participatory way.”²⁹³ Sikkink labels this dearth of internal democracy an “internal asymmetry” and Brett observes that such personality cults, coupled with reluctance to cooperate with other NGOs, may frequently exacerbate other financial and personnel

²⁸⁹ *Id.* The editors of this study conclude that that they “can find no evidence that the contemporary accountability of NGOs is satisfactory.” *Id.* at 9

²⁹⁰ Wapner, *supra* note 127, at 201.

²⁹¹ Edwards & Hulme, *supra* note 288, at 6.

²⁹² J. Sankey, *Conclusions, in The CONSCIENCE OF THE WORLD*, *supra* note 1, at 274.

²⁹³ STEINER, *supra* note 254, at 77.

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limitations.²⁹⁴ Ironically—and perhaps alarmingly too—“the least participatory local movements may experience the greatest ease in winning foreign backing,” since charismatic leadership resonates with donors. Ultimately, this external support “will often strengthen a local leader’s position, reshaping the movement’s internal dynamics as well as its relations with opponents.”²⁹⁵

The ‘upwards accountability’ observed by Edwards and Hulme is also prone to criticism that diminishes the informal accountability effect of groups such as trustees, donors, and host governments.²⁹⁶ In the first instance, while Wapner also cites the use of a board of directors as a classic control for protecting the NGO’s long-term well-being,²⁹⁷ the reality is that many HROs choose either to avoid such independent controls altogether, or install individuals with kindred interests that may dilute the objective essence of the board.²⁹⁸ Consider for example the case of the Palestinian Soci-

²⁹⁴ Brett, *supra* note 60, at 105.

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²⁹⁵ Clifford Bob, *Merchants of Morality*, FOREIGN POL’Y, Mar.-Apr. 2002, at 44. For a more sanguine view, consider Boli: “Almost all INGOs originate and persist via voluntary action by individual actors. They have explicit, rationalized goals. They operate under strong norms of open membership and democratic decision-making. They seek, in a general sense, to spread ‘progress’ throughout the world.” Boli & Thomas, *supra* note 87, at 34. The contrast here may be that Boli speaks to INGOs generally, rather than human rights NGOs specifically. In any case, Boli’s view fails to take into account the HRW model, which sidesteps the issue of open membership, as well as the smaller national HRO that disregards democratic decision-making.

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²⁹⁶ Although ‘upwards accountability’ arguably spills over into the category of external controls addressed below, for the purpose of continuity, it is presented here instead.

²⁹⁷ Wapner, *supra* note 127, at 204.

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²⁹⁸ For example, consider the makeup of PHRMG’s founders. PHRMG boasts that the “political composition of its founders” includes members from the Palestinian Front for the Liberation of Palestine (PFLP), the Democratic Front for the Liberation of Palestine (DFLP), and Hamas (Islamic Resistance Movement). The U.S. government recognizes the PFLP and Hamas as designated foreign terrorist organizations responsible for or endorsing attacks against civilians. See PHRMG, *About the PHRMG*, available at <http://www.phrmg.org/profile.htm>, and Department of State, “Fact Sheet: Foreign Terrorist Organizations” Oct. 19, 2004, available at <http://www.state.gov/s/ct/rls/fs/2004/37191.htm>, last visited Nov. 23, 2004. The “Foreign Terrorist Organizations” list is compiled every two years by the Office of the Coordinator for Counterterrorism and is subject to judicial review. It should be emphasized again that in certain instances, an HRO may not even be required to set up a board of directors.

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ety for the Protection of Human Rights and the Environment (LAW).²⁹⁹ According to the findings of an Ernst & Young audit ordered by a group of LAW's institutional donors, LAW's founder, Khader Shkirat³⁰⁰ "orchestrated a system of false financial reports, including loans to family members and fictitious expenses" over a period of five years, embezzling a total of approximately \$4 million of \$10 million in donations earmarked for the HRO. The Ernst & Young report found that funds were diverted from the organization in collusion with LAW's auditors, with the knowledge of all project coordinators, and the sanctioning of erroneous reports by LAW's own board of directors.³⁰¹ In an attempt at crisis management in the wake of this scandal, LAW announced plans to propose "significant structural changes to avoid such mismanagement taking place in the future."³⁰² How-

²⁹⁹ LAW was regarded as the largest HRO operating out of the Palestinian Authority, with established activities in the West Bank and Gaza since 1990. A. Regular, *Veteran Palestinian NGO Suspected of Defrauding Donors*, HA'ARETZ, Mar. 25, 2003.

³⁰⁰ It should be noted that Shkirat was an invited participant at a recent retreat/conference for Arab human rights activists organized by Henry Steiner. *See infra* note 449.

³⁰¹ A. Regular, *Veteran Palestinian NGO Suspected of Defrauding Donors*, HA'ARETZ, Mar. 25, 2003. *supra* note 299. See also Edwin Black, "Audit of Palestinian Group Suggests Lax Funding Controls", Jewish Telegraphic Agency, 15 October 2003, *available at* http://www.jta.org/page_view_story.asp?intarticleid=1333&intcategoryid=6, last visited October 10, 2004.

³⁰² LAW News Release, *LAW Responds to Difficulties Caused by Previous Mismanagement* (Mar. 25, 2003) (on file with the author). Further to this, Jihad Sarhan, Khader Shkirat's replacement, also apologized for LAW's former management and stated "LAW would not engage in future agitation or name-calling, simply human rights advocacy." Black, *supra* note 301. Whatever promises were made, as this paper goes to press, emails to LAW—or the newly rebranded "Palestinian Law Association for Human Rights" are being bounced back to the sender and LAW's website (<http://www.lawsociety.org>) is no longer operational. Although a mirror or archive of LAW's site remains in place *available at* <http://www.law-society.org>, a brief review of the organization's most recent "Weekly Roundup", published months after Sarhan's October 2003 interview, falls far short of the promised pure human rights advocacy. The "Roundup" includes descriptions of Israeli soldiers "armed-to-the-teeth" and "shower[ing] schoolchildren with teargas grenades." LAW, "Law Society's Weekly Roundup," February 19-25, 2004, *available at* <http://www.law-society.org/new-docs/english/2004/Feb/26.2.04w.htm>, last visited November 10, 2004. In the wake of this scandal, European governmental aid agencies "filed a criminal complaint [with the Palestinian Authority] against Shkirat and some 27 other individuals" associated with the alleged misappropriation of LAW's funds. The Ford Foundation, also a LAW funder, pledged to "immediately. . .stop

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ever noble an attempt at damage control, the overarching reality remains that without some recognized tool to ensure transparent and standardized behavior across the board, ad hoc Band-Aid solutions will continue to be applied only following the discovery of violations of already lax regulations.

The accountability effect of host governments on NGOs is also flawed insofar as many HROs today conduct their operations on an international level, and are thus often based outside of the countries that are being criticized for human rights violations. The notion that an NGO might owe something to the government that is being criticized is thus diminished. Admittedly, national NGOs may be more beholden to their local governments, and there have been numerous attempts across the globe to curtail the freedom of such NGOs through domestic legislation.³⁰³ Nevertheless, on the whole, the accountability effect of host governments is insufficient for ensuring reliability and indeed points to a public need to know the precise conditions under which a local NGO may be operating. Moreover, this particular accountability effect is increasingly specious as governments progressively increase their funding of NGOs, national and international alike. Consequently, the more urgent inquiry appears to be whether the NGO, by way of government funding, is at risk of becoming a *de facto* mouthpiece of the government. As James Paul, Executive Director of Global Policy Forum has observed: "I don't believe in NGOs getting money from governments. . . I know that many of my colleagues do not have a problem with that. . . But frankly, when they do that, the capacity of NGOs to be monitors and to be independent is compromised."³⁰⁴

With respect to accountability via donors, the case of LAW discussed above underscores the inadequacy of existing informal financial

funding" the group. Edwin Black, "Ford Takes Steps to Reverse Funding for Anti-Israel Groups," Dec. 18, 2003, *available at* http://www.jta.org/page_view_story.asp?intarticleid=13589&intcategoryid=4, last visited November 10, 2004.

³⁰³ For example, consider India's move to blacklist over 800 NGOs for alleged links with separatist groups. S. Bhaumik, *India Blacklists 800 NGOs*, BBC NEWS, June 13, 2003, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/3001458.stm, last visited December 19, 2004. *See also infra* Part V(B).

³⁰⁴ T. Deen, "U.N. Plans to Boost NGOs Come Under Scrutiny," IPS-Inter Press Service, June 21, 2004, *available at* <http://ipsnews.net/interna.asp?idnews=24304> and <http://www.globalpolicy.org/reform/initiatives/panels/cardoso/0622boost.htm>, last visited November 20, 2004. Global Policy Forum's mission "is to monitor policy making at the United Nations, promote accountability of global decisions, educate and mobilize for global citizen participation, and advocate on vital issues of international peace and justice." *See* "About GPF," *available at* <http://www.globalpolicy.org/visitctr/about.htm>, last visited November 20, 2004.

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controls. However, the flaws intrinsic to informal upward accountability to donors multiply far beyond simply “cooking the books.” As noted above, governments are increasingly a leading source of financing for those NGOs willing to accept state funding.³⁰⁵ Consequently, some “formerly independent NGOs may become more beholden to national governments,”³⁰⁶ retaining their NGO status while potentially exposing to doubt their objectivity and credibility. Government sponsored funding arrangements represent a significant trend across the NGO industry and “now accounts for around 40 percent of NGO budgets versus only 1.5 percent in 1970.”³⁰⁷ Today, NGOs that obtain the bulk of their funding from government sources are sometimes designated as QUANGOs, or quasi-nongovernmental organizations. These groups include many Canadian NGOs as well as the International Commission of the Red Cross (ICRC).³⁰⁸ With regard to human rights NGOs specifically, Jackie G. Smith’s detailed statistical study points to over 50% of HROs relying in some manner on government or intergovernmental financial support.³⁰⁹

As a consequence of growing governmental and intergovernmental resources “being channeled through international NGOs, the issue of independence—or a willingness to bite the hand that feeds in order to make autonomous programmatic decisions in spite of donor pressures—assumes

³⁰⁵ This association is not a new one. NGOs have a checkered history of being used as a veil for advancing government interests. During the cold war, for example, government-organized NGOs, or GONGOs, were supported entirely by governments for political purposes. Gordenker & Weiss, *supra* note 14, at 21. More recently, AI has identified several other types of NGOs, including MANGOs (man controlled NGOs), BINGOs (business controlled), RINGO (reactionary controlled), TINGOs (tribal controlled) and DONGOs (donor-organized NGO). F. Halliday, *The Romance of Non-State Actors*, in NON-STATE ACTORS IN WORLD POLITICS, *supra* note 180, at 23. To be certain, these sub-categories only underscore the need for better tools to ensure greater public awareness of what influence or control may lurk behind the seeming neutrality of a given NGO.

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³⁰⁶ Simmons, *supra* note 13, at 94.

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³⁰⁷ *Id.*

³⁰⁸ In actuality, the ICRC identifies itself not as an NGO, but rather as an “inter-governmental institution established under Swiss law.” Halliday, *supra* note 305, at 26.

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³⁰⁹ J.G. Smith & R. Pagnucco, *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s* (1998) 20 HUM. RTS. Q. 379 (1998). For example, the Palestinian Human Rights Monitoring Group’s (PHRMG) publicized list of 10 donors includes at least five governmental sources of funding. See PHRMG, *Our Sponsors*, at <http://www.phrmg.org/profile.htm#Our%20Sponsors>, last visited November 20, 2004.

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greater saliency.”³¹⁰ In the same manner, “the willingness of NGOs to speak out on issues that are unpopular with governments will be diluted by their growing dependence on official aid.”³¹¹ If NGOs are increasingly subject to even the appearance of potential government influence, the public has little ability to discern the extent of that influence, since this would typically require seeking out financial disclosure documents, which may or may not be readily available. Furthermore, this type of financial support may just as easily reach the NGO via a third party, thus cloaking direct government influence. In any case, government influence is only the tip of the iceberg, since other donors—foundational or private—may also be tainted by specific political objectives that can adversely sway an NGO’s purported objectivity. As Brett notes:

[Not all] the organizations which address UN human rights bodies are ‘human rights NGOs’ thus defined. . .some of the allegations of bias, political motivation and covert funding by hostile governments are credible, which unfortunately detracts from the perceived impartiality and standing of all the NGOs.³¹²

Therefore, while the potential for upward accountability may exist in theory, several disturbing flaws obstruct its effectiveness. Increased reliance on government funding may operate to limit the independence of NGOs or, conversely, cause them to neglect their primary interests in reliability and objectivity. This dilemma is only exacerbated when one considers that donors not affiliated with the government may likewise seek to advance their political objectives via seemingly innocuous NGOs. In these cases too, an NGO potentially may constrain its scope of activities or tone down its outspokenness in the name of fiscal survival (and in accordance with the wishes of their financial backers), or simply discard the twin tenets of reliability and objectivity in the name of pure politics. Given these scenarios, systematic and standardized disclosure of financial support—including background information on donors—is key.

To be sure, the need for full disclosure—and the reality that donors may fail to operate as an effective agent of accountability—runs even deeper. Since many NGOs compete for “limited resources from a handful of

³¹⁰ Gordenker & Weiss, *supra* note 14, at 21.

³¹¹ Edwards & Hulme, *supra* note 288, at 7.

³¹² Brett, *supra* note 60, at 98. Brett attributes this phenomenon to the subjectivity of ECOSOC consultative status criteria, “compounded by the political nature of the decision-making on NGO status and the tendency of the governmental committee responsible not to give reasons for its decisions.”

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foundations, the priorities of a few key individuals within large foundations can shape the programmatic priorities of many NGOs.” This competition is potentially harmful to NGOs since each “must profile itself as exercising leadership and producing innovative new programs and solid results in order to position itself for future funding.”³¹³ In other words, each NGO must try to outdo the other, thus laying the foundation for an environment in which NGOs are constantly competing against one another to be the first to break a human right abuse story, focus on a particular region or issue at the expense of another more urgent case, or outdo one another by employing sensationalistic or loose reporting tactics that document “grave” abuses, “abhorrent” violations of human rights, “war crimes” and “crimes against humanity.”

Finally, while Edwards and Hulme call attention to ‘downward’ and ‘upward’ accountability, I would also add in the context of human rights NGOs that a third level of ‘outward’ accountability is owed to the public at large and to human rights norms already in place. By this I mean that human rights NGOs shoulder a virtual duty of care to the general public, which is derived from their packaging of ‘human rights’ issues as the common values of humankind, to act responsibly and take steps to ensure credibility within their industry.³¹⁴ This outward accountability is arguably absent in much of the work undertaken by HROs.

Yet such a duty of care is critical if these organizations hope to maintain any staying power or preserve credibility in the eyes of the public and at international law. Along this line of reasoning, it may be further argued that, given the damaging implications of a faulty human rights allegation, this HRO duty of care is equally owed to the very actors that HROs

³¹³ Sikkink, *supra* note 93, at 308. The damage from competition for grant money also “seems unlikely to foster the collaborative relationships on which effective policy alliances are built.” Edwards & Hulme, *supra* note 288, at 7. Moreover, this type of competition feeds into the emergence of “cult of personality” figures discussed in Part IV(A)(ii), above.

³¹⁴ Roth argues that HROs are accountable insofar as they “cannot stray far from the basic values of the human rights cause without . . . subjecting themselves to public criticism.” He further contends that this “highly public form of accountability is arguably stronger than the theoretical accountability exerted on a classic NGO by its members, many of whom may not have the time, inclination, or knowledge to scrutinize lower-profile activities.” Roth, *supra* note 139, at 237. It is perhaps even more difficult to imagine that the general public provided for in Roth’s formula is better equipped than HRO members themselves to understand the scope *and limitations* of the human rights cause. Indeed, it is as a consequence of the lack of human rights-specific knowledge held by the general public that the HRO duty of care discussed here arguably springs forth.

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criticize.³¹⁵ As Ignatieff points out, “every time a state is denounced for its human rights record, it becomes harder for it to secure international loans or political and military help when it is in danger. Naming and shaming for human rights abuses now have real consequences.”³¹⁶ Similarly, Risse declares that in today’s international environment, “words matter!” even “*if they are only rhetoric*. . .involving and entangling norm violating governments in an argumentative process which then becomes self-sustained, constitutes an externally powerful socializing tool.”³¹⁷ Consequently, HROs ought to be operating with an eye to developing their own *real* standards and an understanding that rhetoric-based self-sustaining arguments only endanger the viability of fact-based, objective arguments.³¹⁸ Without these realizations, HROs will remain, as Wapner concedes, “largely unelected, unmonitored, and thus. . .unanswerable to the so-called people of the world.”³¹⁹

iii) Inconsistent Fact-finding Standards

The act of fact-finding serves “as a means of producing an authoritative account and evaluation of a situation which almost invariably involves issues of major public interest.”³²⁰ Given that human rights NGOs are considered “unofficial ombudsmen safeguarding human rights against governmental infringement,”³²¹ for many HROs, fact-finding represents a central component of work upon which other activities, including press releases, diplomatic initiatives and testimony before the UN organs,³²² are reliant. Indeed, as Ramcharan confirms, fact-finding “is at the heart of human rights activity.” The uniqueness of fact-finding stems from its application “to specific circumstances and situations,” rather than *in abstracto*.³²³ Consequently, claims that human rights are being violated hinge on con-

³¹⁵ This trend may already be emerging, apparent in actions such as reports critical of suicide bombings, or acknowledging unique or specific situations which may cause human rights abuses to arise.

³¹⁶ IGNATIEFF, *supra* note 19, at 11-12.

³¹⁷ T. Risse & S. C. Ropp, *International Human Rights Norms and Domestic Change: Conclusions*, in POWER OF HUMAN RIGHTS, *supra* note 120, at 276.

³¹⁸ Risse and Ropp fail to consider any potential negative fallout that may result from grounding human rights claims in rhetorical argument alone.

³¹⁹ Wapner, *supra* note 127, at 204.

³²⁰ B.G. Ramcharan, *Introduction to INTERNATIONAL LAW AND FACT-FINDING*, *supra* note 102, at 1.

³²¹ Weissbrodt & McCarthy, *supra* note 102, at 186.

³²² *Id.* at 188.

³²³ Ramcharan, *supra* note 320, at 1.

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crete questions of fact. According to Steiner, it is these facts that serve as “the point of departure, the essential primary information, for any serious human rights work.”³²⁴ From this perspective, NGO fact-finding resembles investigative journalism with one significant difference: given the nature of human rights violations, HRO fact-finding exudes a “quasi-adjudicative” aura,³²⁵ as the human rights organizations seek to ascertain conclusions based on what are ostensibly factually demonstrable violations of recognized human rights norms.

Ideally, HRO fact-finding should retain a clear understanding that:

[Since the] truth or falsity of any given statement may be very difficult to know, human rights organizations. . . must pursue reliability by using well-accepted procedures and by establishing general confidence in the fairness, impartiality, and wisdom of the organization.³²⁶

Implementation of this clear understanding, however, is another matter. Human rights fact-finding has “been undertaken by various organizations and bodies in different contexts, and the methods used have not always been similar.”³²⁷ To be certain, not only HROs undertake fact-finding missions. The United Nations and other intergovernmental organizations (IGO) have also exercised fact-finding roles within the international system. However, IGO missions typically are authorized within an extensive procedural framework, whereas “[n]othing of the sort is true for fact-finding by NGOs.”³²⁸ Indeed, while the number, influence and scope of activity of HROs have consistently grown, no HRO effort to implement well-established procedures has been made. This pattern may be traced back to the early 1980s, when Thoolen and Verstappen’s pioneering study of NGO fact-finding identified that the growth of HRO fact-finding activities failed to be “accompanied by [the] due procedural accounting,” which had been either introduced or elaborated in IGO fact-finding missions.³²⁹ Twenty years later, NGO fact-finding missions remain *ad hoc* affairs that tend to operate fast and loose as far as procedural standards are concerned.

³²⁴ STEINER, *supra* note 254, at 35.

³²⁵ Weissbrodt & McCarthy, *supra* note 102, at 186.

³²⁶ *Id.* at 187.

³²⁷ N. Valticos, *Forward* to INTERNATIONAL LAW AND FACT-FINDING, *supra* note 102, at viii.

³²⁸ H. THOOLEN & B. VERSTAPPEN, HUMAN RIGHTS MISSIONS: A STUDY OF THE FACT-FINDING PRACTICE OF NON-GOVERNMENTAL ORGANIZATIONS 1 (1986).

³²⁹ *Id.* at 24.

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Thoolen and Verstappen's study is comprehensive, insightful and merits revisiting here. Their findings underscore the extreme difficulty in pinpointing "what a particular [NGO] mission to a particular country wanted to achieve."³³⁰ In the face of divergent NGO practices, Thoolen and Verstappen quickly discarded any hope of discerning "a set of rules. . . which could be made into a kind of manual for future missions."³³¹ Instead, they found that a majority of NGO reports lacked any statement "which could reasonably be called 'terms of reference,'"³³² and that few NGOs included any detailed description of a program or agenda for the mission, or any mention of "general selection procedures" used to pick members of the fact-finding mission.³³³ These shortcomings are alarming insofar as "fact-finding and the decision to establish fact-finding bodies and to decide upon the terms of reference of such bodies are in itself an important political action of international character."³³⁴ Thoolen and Verstappen also found that few reports contained "clear descriptions of the methods used for checking the information collected during on-site investigation."³³⁵ Typically, NGO fact-finders "often need to rely upon hearsay statements, documents which are not fully authenticated, and justifiable inference from indirect evidence."³³⁶ While the "advantage of a strict rule is clear—the facts can be stated with authority," an NGO mission consisting of a handful of staff and lasting a few days "cannot realistically acquire direct evidence concerning each charge."³³⁷ According to Weissbrodt, the "problem is not so much reliance on indirect evidence, as failure to distinguish in fact-finding reports between facts based on direct evidence and factual inferences from indirect evidence." To address this problem, he reasons that "NGOs

³³⁰ *Id.* at 2.

³³¹ *Id.*

³³² *Id.* at 129.

³³³ *Id.* at 130. Where criteria for selecting members actually is set forth, they "are usually not made public, and therefore are not subject to public scrutiny."

³³⁴ F. Ermacora, *The Competence and Functions of Fact-Finding Bodies*, in INTERNATIONAL LAW AND FACT-FINDING, *supra* note 102, at 93.

³³⁵ THOOLEN & VERSTAPPEN, *supra* note 328, at 134. Even Weissbrodt concedes that "it is impossible to tell to what extent [procedures governing the collection of evidence] are followed by NGO fact-finding commissions since details of this procedure are not spelled out either in reports or in organization handbooks. NGOs can be expected to be somewhat more informal than IGO commissions." Weissbrodt & McCarthy, *supra* note 102, at 201.

³³⁶ Weissbrodt & McCarthy, *supra* note 102, at 203.

³³⁷ *Id.* at 207.

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should clearly indicate that the basis of their conclusions lies in direct testimony or in other sorts of evidence.”³³⁸

A brief survey of current human rights fact-finding reports illustrates that few HROs take care to specify terms of reference, the basis for conclusions, or how testimony or evidence was collected. Yet, even if undertaken with an eye to informally ensuring the veracity and reliability of the evidence, or specifying upon what basis a given conclusion rests, these fact-finding practices point to a sweeping and overly broad approach to the fundamental question of admissibility. The reality remains that NGO fact-finding missions “rarely take sworn testimony from those whom they interview,” out of fear that the formality “might chill testimony from human rights victims.” Instead, they “generally rely upon polite probing, questioning, and cross-checking to assure the reliability of oral testimony.”³³⁹ For example, an Amnesty International mission dispatched to interview prisoners of war balked at the use of “sharp examination” techniques, since “it would not have been very reasonable. . .to conduct the kind of cross-examination in which the truthfulness of statements was seriously challenged.”³⁴⁰ To be certain, this approach reflects a coddling one whereby HROs willingly discard formal tools for evaluating the veracity of testimony and await—or worse, even encourage—tales of horror and abuse.³⁴¹

While Weissbrodt reasons that the burden of proof regarding evidence culled from fact-finding ultimately rests with NGOs—and they should be entitled to determine whether the burden should be measured against a reasonable doubt or less³⁴²—Thoolen and Verstappen point out that many NGOs apply normative standards for measuring mission findings and fail to cite “any explicit reference to the internationally recognized norms on which missions after all base their ‘legitimacy.’”³⁴³ Thoolen and Verstappen correctly reason that references to legal standards, particularly international human-rights norms:

[S]hould in fact be the basic normative framework for any human-rights mission. These should be stated in correct

³³⁸ *Id.*

³³⁹ *Id.* at 204.

³⁴⁰ From the findings of a 1975 Amnesty International mission to Israel and Syria investigating allegations of ill treatment and torture. *Id.* at 205-06.

³⁴¹ D. Kennedy, *Spring Break* 63 TEX. L. REV. 1377 (1985).

³⁴² Weissbrodt & McCarthy, *supra* note 102, at 210.

³⁴³ THOOLEN & VERSTAPPEN, *supra* note 328, at 134.

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and unequivocal language, and, where possible, refer to specific human-rights instruments.³⁴⁴

Finally, the Thoolen and Verstappen study found that less than half of the HRO reports examined offered conclusions and recommendations “clearly set apart from the rest of the text,” and that references “to dissenting opinions were but seldom found.”³⁴⁵ As the authors posit, “a clear distinction between the findings and conclusions of a mission . . . increases the credibility of the report considerably, and good reasons for not doing so are hard to find.” Moreover, they justly conclude that the “almost total absence of differences of opinion. . . contributes equally to a loss of credibility,” particularly “in cases where large and varied delegations visit a number of countries.”³⁴⁶

The blurring between findings and conclusions, coupled with the lack of differences of opinion, reveals how susceptible fact-finding missions may be to political agendas. While Weissbrodt explains this away by arguing that HRO missions tend to be smaller than IGO missions, and thus less prone to sharp disagreements,³⁴⁷ Hannum correctly reasons that objective and thorough fact-finding cannot proceed where HROs fail to “distinguish between facts relevant to human rights and broader political concerns.”³⁴⁸ In any event, the existence of these problems is only exacerbated when considered in light of the “cult of personality” that dominates smaller NGOs and the procedural allowance made within IGO fact-finding reports for the inclusion of minority opinions.³⁴⁹ The potential for subjectivity is further heightened by the vicissitudes of public attention paid to a given human rights crisis and by pressures from NGO membership to react to fluid situations. As Thoolen and Verstappen note, these pressures “may lead to quick decisions to engage in fact-finding missions without regard to existing reports and the impact of yet another mission on the overall balance.” In turn:

[Whatever] the explicit or hidden elements in the decision-making process may be, the overall impression remains that in quite a few instances the sending of a mission is determined not so much by the objectively assessed need of the

³⁴⁴ *Id.* at 135.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 136.

³⁴⁷ Weissbrodt & McCarthy, *supra* note 102, at 213.

³⁴⁸ Hannum, *supra* note 125, at 36.

³⁴⁹ For a discussion surrounding the impact of the “cult of personality,” see *supra* Part IV(A)(ii).

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human rights situation elsewhere as by home-generated considerations.³⁵⁰

The potential that political motives might infiltrate legitimate NGO fact-finding missions is brought into sharper focus when one examines the practice of *ad hoc* IGO fact-finding missions. As Ermacora notes, when the UN itself strikes *ad hoc* investigative committees, it is “quite clear that the mandate and the terms of reference of [such] committees . . . often *respond to political needs*” of the relevant principal organ of the United Nations.³⁵¹ In other words, whereas conventional IGO fact-finding bodies tend to be “independent of direct political interest,” non-conventional ones derive from a parliamentary style “right of enquête.”³⁵² The inherent problems associated with such *ad hoc* IGO fact-finding run deep, and their parallel with standard-less HRO practices is both manifest and worrisome:

[T]he evaluation of facts done by *ad hoc* bodies is poor. . . *Ad hoc* fact-finding bodies in general take note of the information submitted to them without really judging the veracity of the information and therefore the value of the information. Only statements of fact which are obviously inaccurate [sic] are not incorporated into reports of *ad hoc* fact-finding bodies.³⁵³

Still, other facts, “including those which seem to have political relevance, are generally incorporated in the report of fact-finding bodies.” Finally, while “it should be up to the parent body to evaluate the facts presented” in light of all the arguments made, “usually impartial evaluation of the facts never takes place.”³⁵⁴ In light of these realities, Ermacora concludes that “the function of *ad hoc* fact-finding bodies based on non-conventional norms has, so far, been *mainly a political one*.”³⁵⁵

With its formal, thorough and earnest analysis, the Thoolen and Verstappen study should have provided a wake up call for HROs to minimize the discretion—and consequently, the alarming amount of room for bias—inherent in their *ad hoc* approach to fact-finding. Yet, 20 years following the release of this landmark research, no comprehensive effort has succeeded in introducing meaningful standards to regulate the responsible

³⁵⁰ THOOLEN & VERSTAPPEN, *supra* note 328, at 138-39.

³⁵¹ Ermacora, *supra* note 334, at 88-89 (emphasis added).

³⁵² *Id.* at 89.

³⁵³ *Id.* at 90.

³⁵⁴ *Id.*

³⁵⁵ *Id.* (emphasis added).

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planning, execution, reporting and publicizing of NGO fact-finding missions. To be certain, this continuing situation remains the product of a persistent “diversity of practices and differences of opinion,” identified by Thoolen and Verstappen.³⁵⁶ However, this pattern also points to a deeper unwillingness among NGOs to introduce concrete rules and practices that may risk curtailing the independence they so fiercely covet. As Steiner notes, as an outgrowth of “egotistical struggles for power and for public recognition,” individual NGOs loathe coordination and prize their autonomy to the point that they refuse to be accountable “to others for their decisions, including decisions about what and where to investigate.”³⁵⁷ Although Steiner, with some romanticism, justifies this behavior as a feature of the decentralized, dynamic and evolving character of HROs, “and their influence on human rights thinking as a whole,”³⁵⁸ the rejection of generally accepted procedures necessarily detracts from each HRO’s ability to authoritatively ascertain truth or falsity with any degree of legitimacy, and moreover, from the industry as a whole.

The desire or need for HRO independence ought not to trump the need for recognized standards, since these standards provide the clarity and objectivity necessary for formulating legitimate allegations of human rights abuses. Without these standards, human rights allegations risk being compromised by rhetoric that varies from mission to mission, report to report, and political necessity to political necessity. It is this rhetoric that has introduced a bewildering collection of self-styled standards upon which tenuous conclusions are grounded. Thus, HROs are able to invoke the language of human rights violations in conclusions based on an array of half-standards such as ‘strong evidence,’ ‘received reports,’ a ‘belief that,’ or it being ‘clear’ or ‘apparent’ or ‘without doubt.’³⁵⁹ While Weissbrodt may applaud these terms of art as formulating a principled distinction between “facts

³⁵⁶ THOOLEN & VERSTAPPEN, *supra* note 328, at 1. It is significant to note that the findings of Thoolen and Verstappen demonstrate a clear lack of fact-finding standards within the HRO industry even while excluding smaller, inherently more problematic national NGOs from the scope of their study. R

³⁵⁷ STEINER, *supra* note 254, at 67. R

³⁵⁸ *Id.*

³⁵⁹ Weissbrodt & McCarthy, *supra* note 102, at 210. Weissbrodt points out that this descriptive language used in an Amnesty International report may or may not signal merely stylistic considerations. In any case, he concludes that “it is not imperative that any single standard be used in NGO fact-finding, but it is important that the standard for significant conclusions be clearly defined.” *Id.* The randomly generated “standards” of proof introduced by Amnesty remain in use today across the industry, and are even more rampant in daily HRO reporting—as distinguished R

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based on direct evidence and factual inferences from indirect evidence,”³⁶⁰ these distinctions are surely lost on the general public. In any case, such sophistic exercises only serve to erase the line that separates the reporting of precise allegations grounded in international human rights law and based on a preponderance of evidence from inaccurate or overstated allegations having political or other impetus.

Beyond the intense independence of HROs, proponents of unregulated HRO fact-finding activities also advance the equally simplistic argument that NGO missions are distinct from those undertaken by IGOs. For example, Weissbrodt rightly notes that “governments and NGOs may have quite different objectives which might undermine the application of government-created rules to NGOs.”³⁶¹ However, this argument against standards presumes that the rules would emanate from governments—a “perverse” option to be sure, but also a convenient assumption that effectively preempts the necessity for introducing standards and denies the possibility that meaningful standards might be advanced by the NGO community itself.³⁶²

In addition, Weissbrodt seems to reason that HROs should be held less accountable than IGOs insofar as they “have generally less prestige and less visibility than intergovernmental organizations and thus proportionately more difficulty getting press comment on their human rights findings.”³⁶³ Although this may have been a persuasive argument against standards in the 1980s, it is evident from the analysis above that NGO shortcomings in prestige and visibility are no longer relevant factors for lowering the accountability bar against which their performance ought to be measured. Today, HRO findings serve as the bedrock for human rights investigations, including those undertaken by IGOs like the UN.³⁶⁴ Bodies such as the UN

from more elaborate fact-finding mission—methodologies. *See infra* Part IV(A)(iv).

³⁶⁰ Weissbrodt & McCarthy, *supra* note 102, at 207.

³⁶¹ *Id.* at 191.

³⁶² Weissbrodt claims that “it would be perverse to permit governments to establish, even indirectly, the ground rules upon which NGOs may pursue their fact-finding work.” However, he fails to consider the simple proposition that these ground rules might emerge from within the human rights NGO community itself, as proposed herein. *Id.*

³⁶³ *Id.* at 215.

³⁶⁴ In assessing the influence of the International Campaign to Ban Landmines, Clark notes that the movement “depended on the . . . tactics that Amnesty . . . helped to develop.” She then lists publicity and marshaling citizen support from around the world as the leading elements of that strategy. CLARK, *supra* note 92, at 9.

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Human Rights Commission “often rely on NGO reports as the best source of information about states being investigated for violations.”³⁶⁵ Furthermore, HROs—from large INGOs to small national groups—are now easily able to free themselves from reliance on media attention by harnessing advances in communications technology. For example, HRW researchers “working in the refugee camps in Albania and Macedonia were able to send the results of their interviews with the refugees fleeing Kosovo directly to the Human Rights Watch staff in New York,” who in turn disseminated the information via listserv and the HRW website, which is viewable in a number of different languages.³⁶⁶

Another factor hampering the introduction of standards to regulate fact-finding missions stems from the reality that some HROs are simply “so devoid of expertise, time and resources, that they lack the ability to develop any regular procedures. Instead they live from press release to hastily drawn report, without time for methodology.”³⁶⁷ This phenomenon is especially problematic today, given that the global community has increasingly come to rely on HROs for monitoring and reporting human rights violations. While it may be argued that lack of expertise is a problem affecting only the smaller, national HROs, it is these very organizations—which ostensibly benefit from greater access to local facts and documentation—that are fast becoming so crucial to the fact-finding process and to the relaying of information to the international human rights community and the international community at large.³⁶⁸ As Steiner claims, international NGOs “are not

³⁶⁵ STEINER, *supra* note 254, at 35.

³⁶⁶ W. BROWN, *Human Rights Watch: An Overview*, in *NGOs AND HUMAN RIGHTS*, *supra* note 13, at 80. Similarly, in September 1998, HRW released a report on the political crackdown in Malaysia, “including information that was not widely available in the Malaysian press. In the next two weeks 28,000 people visited the page, mostly from Malaysia itself.” Roth, *supra* note 139, at 231. This again testifies to the immediate and direct connection human rights organizations are increasingly able to have with the public at large. Of course, the ability to communicate instantaneously, directly and independently with the public also raises other shortcomings linked to informal methods of external regulation, which are addressed in Part IV(B)(i), below.

³⁶⁷ Weissbrodt & McCarthy, *supra* note 102, at 189.

³⁶⁸ Consider that the fifth meeting of persons chairing the human rights treaty bodies remarked that attention “should be given by *treaty bodies and non-governmental organizations* to securing a stronger, more effective and coordinated participation of national non-governmental organizations.” *Effective Implementation of International Instruments on Human Rights*, *supra* note 228, at para. 41 (emphasis added). CONGO similarly “believes that there is general agreement on the desirability of further enhancing the participation of national non-governmental

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nearly as effective as [national] NGOs in investigating and reporting facts.”³⁶⁹ Yet, this mounting reliance on national HROs places INGOs in a position that risks discrediting their own established professionalism and legitimacy.

Ideally, the willingness of an INGO to rely on national HRO fact-finding ought to be supplemented by independent corroboration, or at a minimum, based on making an expert assessment of “the fact-finding methods used . . . and . . . the apparent objectivity of the [national] NGOs compiling the information.”³⁷⁰ However, even this latter criterion is not always applied. In these cases, INGOs simply parrot allegations on the basis of the national HROs past performance or some other indeterminate factor, such as membership in a human rights network. Without meaningful guidelines for obtaining corroborative evidence or approving fact-finding methodologies employed by the national HRO, INGOs risk bringing themselves, as well as the entire HRO edifice, into disrepute from below. But rather than address this grave dilemma, INGOs have instead invoked the notion of “early warning” as a trump card.³⁷¹

The “early warning” function associated with HROs enables them to easily mitigate exposure to the risks associated with reporting overstatements, inaccuracies and outright errors. Simply stated, the “early warning” justification reasons that exaggerated or inflated claims are acceptable if they serve to sound an alarm bell within the international community and call attention to a particular human rights problem. Even if the initial allegations are subsequently disproved or deemed inaccurate, the HRO has, in its view, fulfilled a legitimate task as an early warning system against *potential* human rights abuses. Yet “early warning” walks a fine line since it tempts HROs “to come up with hard conclusions from what is too often a shallow

organizations from all regions of the world in the activities of the United Nations.” CONGO, *General Review of Arrangements For Consultations With Non-Governmental Organizations* 1995, U.N. Doc. E/AC.70/1995/NGO/2, para. 11 (1995). This sentiment is reinforced by the recent recommendations of the Secretary-General’s Panel of Eminent Persons on Civil Society. However, it is interesting to note that CONGO expressed a critical view of the Panel’s final report. See discussion beginning at *supra* note 198 and see especially *supra* note 202.

³⁶⁹ STEINER, *supra* note 254, at 35.

³⁷⁰ *Ibid.* at 66.

³⁷¹ According to Boutros Boutros-Ghali, “In the field of preventative diplomacy and because of their familiarity with the situation on the ground, nongovernmental organizations are well placed to play a part in early warning by drawing the attention of governments to nascent crises and emerging conflicts.” Boutros Boutros-Ghali, *Forward to NGOs, THE UN AND GLOBAL GOVERNANCE*, *supra* note 14, at 9.

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research base.”³⁷² Consequently, an early warning paradox emerges: “is it better to keep quiet and wait until absolutely incontrovertible evidence arrives. . .or is not the more responsible course to come out with the reasonably watertight, but not perfect, case one has, and take the risk?”³⁷³ Willetts argues that HROs “cannot afford to make mistakes because thereafter their statements will not so readily be given credibility and references to mistakes will be continually thrown back at them.”³⁷⁴ However, invocation of the “early warning” function essentially enables HROs to fend off the potential fallout surrounding misleading or false reports and thus retain their credibility.

One example of early warning gone awry occurred in the spring of 2002. According to some HRO reports, a “massacre” had occurred in the Jenin refugee camp. As one Palestinian NGO fervently but erroneously avowed:

Slowly but surely, the extent of the Israeli army’s crimes in Jenin refugee camp are coming to light. Despite all the efforts to hide the size of the massacre, the whole world is beginning to learn about the true face of the occupation. *Gunshots, rockets, bombs, or simply bulldozers burying people alive killed hundreds of civilians.*³⁷⁵

³⁷² POWER, *supra* note 34, at 121.

³⁷³ *Ibid.*

³⁷⁴ P. Willetts, *The Impact of Promotional Pressure Groups in Global Politics*, in *PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS* 187 (P. Willetts, ed., 1982).

³⁷⁵ Dr. Eyad El-Sarraj, *Don’t Take Part in War Crimes: Boycott Israel Now*, available at http://www.gcmhp.net/File_files/PressApr222k2.html, last visited April 22, 2002 (emphasis added). “The Gaza Community Mental Health Programme (GCMHP) is a Palestinian, non-governmental, non-profit organization established in 1990 to provide comprehensive community mental health services to the population of the Gaza Strip including therapy, training and research.” The GCMHP statement also demonstrates how NGOs are prone to overstretch or ignore their own self-imposed mandates. For a discussion of this issue, see Part III(c) and Part IV(a)(i), above. Gaza Community Mental Health Programme, *About GCMHP*, available at http://www.gcmhp.net/File_files/GCMHPABOUT.html, last visited November 20, 2004. Defence for Children International/Palestine Section (DCI/PS) also called for an “immediate, independent investigation into the massacre in Jenin camp,” thus declaring it a *fait accompli*. DCI/PS News Release, *Misleading Claims of Israeli Withdrawal: Siege Continues Unabated Throughout the West Bank*, available at <http://www.dci-pal.org/press/19apr02.html> (Apr. 19, 2002). DCI-Pal-

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In a bizarre twist on the commonly held belief that national HROs have the inside track on local human rights violations, the Palestinian Society for the Protection of Human Rights and the Environment (LAW), itself a national HRO, initially reported that other third party “human rights organizations believe that Israeli forces have committed a massacre in Jenin.” Inexplicably and without further justification, LAW then upgraded the “belief” of these unnamed third party HROs into hard fact by announcing in the headline for their weekly update of 11 April 2002 that “Israeli Troops Continue to Conceal Jenin Refugee Camp Massacre.”³⁷⁶ Thus, in one fell swoop, LAW transformed the unattributed “belief” of anonymous HROs into a confirmed *fait accompli* and then doubled the stakes by further alleging that the Israelis were now trying to cover up the “massacre.” Acting in its capacity as an “early warning” beacon, LAW also relayed Palestinian eyewitness accounts of Israeli troops allegedly digging large pits inside Jenin refugee camp and in surrounding areas to bury those killed. To its credit, LAW conceded that it had no photographic evidence or documents proving the allegations because it was “too dangerous to enter the camp.”³⁷⁷ Unsubstantiated reports like those provided by LAW were widely circulated in the international media and lent unfounded credibility to the Palestinian leadership’s account that hundreds in the Jenin camp had been massacred.³⁷⁸ In fact, the reality on the ground proved far less deadly, and decidedly less about massacring civilians than about confronting armed

estine “is affiliated with the Geneva-based Defence for Children International” and “is dedicated to promoting and protecting the rights of Palestinian children in the West Bank and Gaza.” DCI/PS, *About DCI-Palestine Section*, available at <http://www.dci-pal.org/about/about.html>, last visited December 10, 2004.

³⁷⁶ LAW, *Weekly Roundup*, available at <http://www.lawsociety.org/Press/Preleases/2002/April/aprw3.html> (Apr. 11-17, 2002). Alarming, LAW’s allegations were rebroadcast verbatim on <http://www.reliefweb.int>, a project of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and remain posted there until today under the heading “Israeli Forces Commit Massacre in Jenin Refugee Camp.” See <http://www.reliefweb.int/w/rwb.nsf/0/460cf9d61138639585256b950067a901?OpenDocument>, last visited April 10, 2004. As discussed above, this case also serves as a classic example of INGOs parroting the statements of national HROs verbatim without seeking out any kind of independent corroboration.

³⁷⁷ *Israeli Army Denies Digging Mass Graves in Jenin*, DEUTSCHE PRESSE-AGENTUR, Apr. 11, 2002. AGENCE FRANCE PRESSE also carried the LAW report on its April 11, 2002 wire. See Claire Snegaroff, *After Battle in Jenin, Media War Begins*, AGENCE FRANCE PRESSE, Apr. 11, 2002.

³⁷⁸ G. Myre, *New Battle Over Jenin, on Television*, NEW YORK TIMES, Apr. 15, 2003, at A-8.

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combatants.³⁷⁹ More discouraging still, some observers have concluded that false reports of a massacre resulted in tempered outrage over other less dramatic, but no less real human rights abuses that allegedly transpired during the siege of the refugee camp.³⁸⁰

Anxious and overstated reports of a massacre in the Jenin refugee camp were not limited to Palestinian HROs. Amnesty treaded a thin line by implying a massacre, citing unattributed “reports” that the “Israeli armed forces have . . . killed scores of Palestinian civilians, and injured hundreds more.” Amnesty further ventured that “Many more will die unless the Israeli forces stop the attack and withdraw immediately.”³⁸¹ In addition, during the midst of the crisis, the Association for Civil Rights in Israel (ACRI) ran a large ad in *Ha’aretz*, a leading Israeli daily newspaper, the headline of which read: “Operation to Liquidate Human Rights.”³⁸²

Clearly, invocation of the “early warning” mechanism demands profound consideration of the issues and the devising of *clear standards* that will assist HROs in assuming the responsibility for navigating such

³⁷⁹ According to the UN Secretary General’s investigation into the confrontation, “Fifty-two Palestinian deaths [were] confirmed by the hospital in Jenin by the end of May 2002,” thus corroborating the figure estimated by the IDF. *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10*, U.N. GAOR 10th Emergency Special Sess., U.N. Doc. A/ES-10/186, 2002, at para. 56. Twenty-three Israeli soldiers also died in the fighting.

³⁸⁰ For example, one observer reasons that rapid loss of interest in events surrounding Jenin stemmed from “hasty claims that hundreds of Jenin’s inhabitants had been killed. Given the world’s inflated expectations, the talk of a massacre seemed grossly disproportionate once the camp was opened to scrutiny.” Arguably, therefore, misuse of the “early warning” function, may actually undermine reporting and follow up on less dramatic, but no less real violations of human rights. Jonathan Cook, *Massacre By Israelis at Jenin So Quickly Forgotten*, DAWN GROUP OF NEWSPAPERS, June 4, 2002, available at <http://www.hartford-hwp.com/archives/51a/040.html>, last visited November 20, 2004.

³⁸¹ Amnesty International, *Urgent Action: Fear for Safety*, available at <http://web.amnesty.org/library/Index/ENGMDE150382002> (Apr. 8, 2002). In response to AI’s final report on Operation Defensive Shield, former Israeli Foreign Minister Shimon Peres asserted that “Amnesty is an organization that tries to create . . . a better world, but they are not a court and not judges.” J. Algazy, *Peres Plays Down Amnesty Report Accusing Israel of War Crimes*, HA’ARETZ, Nov. 4, 2002. While this observation may be technically accurate, it impulsively downplays the rising significance of HRO reports and the very real impact these reports have on shaping international public opinion and perception as to which states violate human rights.

³⁸² The text of the ad asserted that dozens “of bodies are piled in houses and in the streets.” A. Lavie, *Uncivil Society*, HA’ARETZ, Jan. 19, 2003.

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sensitive and urgent situations. However, scanning the HRO landscape reveals no evidence of such an effort being made. Instead, the trend appears to be leaning towards preferring imperfect allegations over incontrovertible evidence.³⁸³ More worrisome is that across the literature, many observers continue to support the “early warning” function of HROs. Steiner reasons that the overriding necessity of stopping atrocities should cause NGOs to balk at social analysis and reform efforts: “Which groups would perform this function if NGOs deserted their missions and reports for deep think?”³⁸⁴ Similarly, Weissbrodt argues that in certain cases, “a quasi-judicial model of fact-finding should not hamstring NGO activity,” and that strict rules may “impede the NGO from acting as an early warning system” for human rights problems where the NGO “knows human rights violations are occurring, but cannot ‘prove’ them.”³⁸⁵ Furthermore, Weissbrodt asserts that any requisite imposition of procedural guidelines “might also establish a maximum scope of action” inappropriate for detecting potential rights violations.³⁸⁶

A less urgent and more studied approach to the issue reveals that Steiner’s dichotomy, however snappy, is at best an over-simplification of a genuinely nuanced, problematic dilemma. Clearly, a middle ground between over-standardization and no-standardization of the fact-finding process must exist. Similarly, Weissbrodt’s vision is a slippery one that conjures up scenarios and cases where neither general nor specific allegations can be proven with any precision but are put forward nonetheless. It is precisely in these murky situations—where a “quasi-judicial” approach might break down—that unambiguous operating procedures and standards are needed most to guide human rights activists. As Dermont Groome rightly points out, HROs “should be careful not to leave themselves open to charges of exaggeration or embellishment. [Reports] must be patently objective and devoid of any bias or unfounded opinions regarding the case.”³⁸⁷

³⁸³ As noted below, Amnesty has tried to generally “speed up and enliven its documents” and has reoriented its emphasis from “get it right” to “get it out and fast.” Disturbingly, this decision appears to have little to do with the necessity justification inherent in “early warning.” *See infra* note 422.

³⁸⁴ STEINER, *supra* note 254, at 35.

³⁸⁵ Weissbrodt & McCarthy, *supra* note 102, at 189.

³⁸⁶ *Id.* at 190.

³⁸⁷ D. GROOME, *THE HANDBOOK OF HUMAN RIGHTS INVESTIGATION: A COMPREHENSIVE GUIDE TO THE INVESTIGATION AND DOCUMENTATION OF VIOLENT HUMAN RIGHTS ABUSES* 255 (2001). For example, Groome suggests that references to the “victim” in any investigative report ought to use the word “complainant” instead, as it recognizes the fact or possibility that “some ‘victims’ file false complaints. Using

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Ultimately, a Jenin-type scenario effectively exposes the overarching flaw in Weissbrodt's paradigm, which posits that when the consequences are serious:

[A]n NGO should more closely follow the quasi-adjudicative procedures that ensure more accuracy and more respect. In descending the scale of the seriousness of the consequences of its actions, an NGO may effectively rely on less direct evidence and less rigorous procedures.³⁸⁸

The bottom line is that this operating principle leaves HROs as the sole arbiter of what evidentiary standard is to be applied. As witnessed by the Jenin case, even when the allegations are as serious as mass murder, some HROs choose to ignore the "seriousness of the consequences" and attendant need for "quasi-adjudicative procedures" in favor of political expediency and sensationalism. From this vantage point, it is unreasonable to rely on an NGO to make an objective determination without more concrete reporting obligations in place. Simply put, when confronted by situations like Jenin, the opportunity for political gain is too great and the cost too cheap for many HROs to turn down.³⁸⁹ As Groome comments, "speculation, exaggeration, claims unsupported by the evidence, or the failure to document all investigative actions taken," should never be excused regardless of the severity of the alleged abuses or exigent circumstances.³⁹⁰ To that end, HROs should be expected to reserve ultimate decisions "regarding whether or not the evidence is sufficient to prove a violation of local or international law" for a court rather than for its own investigators.³⁹¹

Enthusiastic endorsement of an "early warning" function for HROs notwithstanding, it appears that during the early 1980s, academic writing converged around a consensus that HRO fact-finding missions needed to abide by some basic principles, however informal. In his seminal article, Thomas Franck concluded that "if fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the ways the facts are

the word 'complainant' indicates the investigator is aware of this and has remained objective throughout the investigation process." *Id.* at 257.

³⁸⁸ Weissbrodt & McCarthy, *supra* note 102, at 192.

³⁸⁹ As noted above, there was little fallout from LAW's false allegations concerning the Jenin refugee camp and no shortage of media attention or INGO rebroadcasting. *See* discussion beginning at *supra* note 375.

³⁹⁰ GROOME, *supra* note 387, at 35.

³⁹¹ *Id.* at 41.

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established and what is done with them afterwards.”³⁹² To this end, he proposed five key areas where procedures could be introduced, “not merely [as] desirable but [as] a functional prerequisite.” These procedures revolved around regulating five core issues essential for ensuring impartiality: 1) choice of subject matter to be investigated; 2) choice of fact-finding mission members; 3) comprehensive terms of reference; 4) investigation procedures; and 5) utilization of the finished mission report.³⁹³

In a similar vein, the International Law Association promoted its own *Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions (The Belgrade Rules)*, which were designed to respond to “serious departures from fundamental principles of due process by some fact-finding missions.”³⁹⁴ These rules sought to “encourage the cooperation of states in the investigative process and to lend greater credibility to the conclusions of such fact-finding missions.”³⁹⁵ Notably, Thoolen and Verstappen’s approach criticized these schemes as being “completely based on IGO fact-finding rules and experiences,” and thus unworkable.³⁹⁶ Instead, they opted to endorse Weissbrodt’s approach, which proposed that procedural concerns related to a given HRO fact-finding mission simply be disclosed in the final report while retaining ultimate flexibility in the investigative and reporting methods critiqued above.³⁹⁷

Support for Weissbrodt’s informal approach is misguided for a number of reasons. First, the proposal fails to introduce any meaningful yardstick for ensuring HRO reliability. Rather than provide any kind of standard, Weissbrodt concludes that HROs can boost their reliability simply by applying “a few useful lessons” to their work.³⁹⁸ Although he does attribute value to HRO disclosure of methodologies and techniques used, Weissbrodt’s “useful lessons” fail to provide any authoritative measure of responsible fact-finding techniques or set any baseline against which performance can be measured.³⁹⁹ Second, even while backing Weissbrodt’s

³⁹² T. M. Franck and H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding By International Agencies* 74 AM. J. INT’L L. 308, 309 (1980).

³⁹³ *Id.* at 310.

³⁹⁴ GROOME, *supra* note 387, at 35.

³⁹⁵ *Id.*

³⁹⁶ THOOLEN & VERSTAPPEN, *supra* note 328, at 29.

³⁹⁷ *Id.* at 30.

³⁹⁸ Weissbrodt & McCarthy, *supra* note 102, at 215.

³⁹⁹ *Id.* at 216-17. Weissbrodt proposes that HROs disclose information including: methodology and procedures used; terms of reference; identity of mission members; whether any evidence was rejected; methods used for ensuring reliability of information; and legal norms applied to assess facts.

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model, Thoolen and Verstappen concede that procedural rules and guidelines “strengthen the probability that the fact-finding process will enjoy the confidence of the international community as well as that of the state concerned.”⁴⁰⁰ Finally, with the advantage of 20 years of hindsight, it becomes self-evident that Weissbrodt’s “useful lessons” have failed to take root within the HRO community as an effective means for improving the reliability of fact-finding missions.

In light of the problems and conclusions outlined above, it is clear that HROs need concrete rules beyond the informal “lessons” advocated by Weissbrodt to ensure a reasonable level of credibility. At the same time, it is equally clear that any envisioned standards ought not to reflect a simple mirroring of IGO procedures or be handed down by government. Rather, this paper reasons that formal fact-finding standards be generated and monitored by the HRO community itself, or failing that, by an independent agency established for that purpose. In this manner, a baseline of minimum standards can be created, against which all missions can be judged. As Groome notes, while “it is true that human rights investigation does present a number of unique obstacles to the investigator . . . this does not preclude a set of standards to which investigators should aspire.”⁴⁰¹ This set of standards should incorporate elements such as a “narrowly defined role for the human rights investigator” to ensure “the investigator’s objectivity and [enable] the investigator to more effectively accomplish his or her mission.”⁴⁰² In addition, reports should be required to list investigative teams, methodology applied, and mandate, including how witnesses were located and interviewed.⁴⁰³ Testimony from witnesses “should also contain the investigator’s assessment of the witness’s credibility and reliability,” as well as other facts “relevant to the witness’s credibility and reliability so that anyone reviewing the report can weigh the statements accordingly.”⁴⁰⁴ Finally, any report published should cover everything illuminated by an investigation, especially balancing factors that may exist or arise during the course of the

⁴⁰⁰ Thoolen and Verstappen, *supra* note 328, at 19.

⁴⁰¹ GROOME, *supra* note 387, at 35.

⁴⁰² *Id.* at 40.

⁴⁰³ With regard to interviews, Groome raises several key questions: Did the investigator undertake preliminary and/or comprehensive interviews; what steps were taken to ascertain the credibility and reliability of witnesses; did the investigator ensure separate interviews and maintain a “healthy suspicion” of witnesses; and finally, did the investigator not divulge specific facts about the case to the witness? *Id.* at 175. Most of these basic questions are absent from the sort of interviews Amnesty undertook in the case discussed at *supra* note 340.

⁴⁰⁴ GROOME, *supra* note 387, at 263.

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mission.⁴⁰⁵ Barring the introduction of such standards, methodologies will continue to wane, the institution of fact-finding will degenerate into the chimera predicted by Franck, and most damaging, respect for HRO allegations will be devalued among governments and the broader international community.

iv) Daily Human Rights Reporting

Quotidian reporting by human rights NGOs is prone to many of the same problems endemic to unregulated fact-finding missions. However, these difficulties are further exacerbated given that this type of reporting—which encompasses press releases and real-time updates “from the field”—lacks two moderating traits associated with genuine fact-finding missions. First, given the high volume and frequency of typical HRO reporting, the level of thoroughness associated with legitimate fact-finding missions is necessarily lost. Second, and perhaps more significantly, HRO daily reporting is free from the elaborate logistical planning and long-term vision of human rights associated with fact-finding missions. Moreover, the instantaneous and unfettered nature of communications in the Internet era means that HROs are now capable of disseminating a constant flow of reports instantaneously and directly, without moderation by third parties such as the media. This means that virtually any HRO can “report” on human rights situations while minimizing their investment in basic tools such as personnel, research, and media outreach.

The damage generated by false or misleading spontaneous HRO reporting can have far-reaching repercussions. For example, a false report publicized in the media can tarnish a government’s human rights record and even go so far as to provide ammunition for other states hostile to the impugned regime. Ultimately, erroneous HRO reports may take on a life of their own. Consider the case of Amnesty’s 1990 report accusing Iraqi soldiers of murdering Kuwaiti babies by removing them from their hospital incubators following the invasion of Kuwait in August 1990.⁴⁰⁶ In fact, this report was based on a story fabricated by an American PR firm, acting on behalf of the Kuwaiti regime, which sought to “influence world opinion as congressional decisions were being made” regarding the Gulf crisis. With the unquestioning assistance of Amnesty International—and as an immediate consequence of Amnesty’s failure to secure corroborating evidence of

⁴⁰⁵ *Ibid.* at 41.

⁴⁰⁶ KOREY, *supra* note 4, at 347.

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the allegations—this story quickly gained legitimacy and “became fodder for a rallying cry for swift action against Iraq.”⁴⁰⁷

This incident reveals the difficulty in ensuring NGO independence and credibility, particularly in fluid situations where HROs are relying solely on unconfirmed evidence and elect to act immediately without independent corroboration of allegations. Furthermore, this incident underscores the powerful moral influence intrinsic to HROs such as AI and the consequent responsibility they must shoulder to guard against manipulation of that influence. As Clark remarks, whether or not the ‘facts’ are correct, “once in public domain they will be employed by interested parties for their own purposes.”⁴⁰⁸ Indeed, as Clark further points out, five years after Amnesty disavowed the Kuwait report, former president George Bush continued to invoke the murders reported by Amnesty as justification for pursuing war against Iraq.⁴⁰⁹ An important corollary that must be added to Clark’s conclusion is that ‘facts,’ once in the public domain, tend to linger in the public domain—their impact resonates, forms opinions, and has a residual effect that even disavowals, no matter how sincere or timely, may not effectively correct. Thus, it behooves HROs to adopt a meaningful evidentiary baseline according to which daily reporting may be properly formulated. Moreover, NGOs should be required to step forward quickly and publicly retract erroneous statements when they occur, correct subsequent referrals to those statements, and also take action to prevent similar future recurrences by tracing the root of the error and modifying procedures accordingly.⁴¹⁰

The unfolding reality, however, stands in sharp contrast to HROs assuming greater responsibility for the quality and implications of their work. Instead, the rising tide of rapid-fire HRO reports is increasingly characterized by knee-jerk legal conclusions, political tirades, and even the wholesale rebroadcasting of unsubstantiated reports filed by dubious organizations claiming the title of national HRO. The implication of all these practices is an overall degradation in the meaning and authoritativeness at-

⁴⁰⁷ CLARK, *supra* note 92, at 132.

⁴⁰⁸ *Id.*

⁴⁰⁹ In the case of the Kuwaiti babies, the true story did not emerge until three months after Amnesty’s initial report, when *The Nation* revealed the allegation to be false. KOREY, *supra* note 4, at 575.

⁴¹⁰ This already may be happening, albeit informally. For example, according to Robert Bernstein, Founding Chair of HRW, as a direct result of AI’s erroneous reporting and failure to accept responsibility, HRW has positioned itself as willing to acknowledge errors, “to immediately admit it and change it and not try to defend it.” *Id.* at 346-47.

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tributed to genuine human rights principles recognized at international law. For example, writing in *Human Rights Quarterly*, Manfred Wiegandt observed that HRW's over-dramatization of the situation with reference to immigrants in Germany was "so out of proportion," it "cast doubt on the lack of bias in the whole. . . Report."⁴¹¹ In evaluating HRW's flawed report, Wiegandt was especially critical of the fact that HRW failed to "take into account the negative impact" of its faulty charges,⁴¹² and further drew attention to the fact that while HROs retain the ability to "speak out and arouse immediate international attention to a specific problem," that power should "not be compromised for cheap showmanship."⁴¹³

A less subtle form of reporting bias—or a more blatant example of showmanship—may be seen in a recent HRO report which asserted the following legal conclusions:

Israeli Occupation Forces (IOF) [sic] *murdered* eleven civilians in the Gaza Strip. Rachel Corey [sic], a 24-year-old peace activist from Washington US, was *murdered*.⁴¹⁴

This report disseminated by the Al Mezan Center for Human Rights, makes further findings of fact. For example, it asserts that Rachel Corrie "was clearly visible to the bulldozer driver as well as to the soldiers in the tank," although this account appears to stem from second-hand sources rather than any interview with the bulldozer operator or soldiers in the tank. Notably, this report was distributed over the Internet, thus conveying the message to thousands that premature legal findings are part and parcel of legitimate human rights work.⁴¹⁵ Ironically, one of Al Mezan's objectives is to "pro-

⁴¹¹ M. H. Wiegandt, *The Pitfalls of International Human Rights Monitoring: Some Critical Remarks on the 1995 Human Rights Watch/Helsinki Report on Xenophobia In Germany*, 18 HUM. RTS Q. 833, 835. Some of the specific problems Wiegandt cites include: HRW's failure to grasp the importance of Germany's federal structure for law enforcement, its advocacy of the enlargement of a federal intelligence service, and its use of a short-term fact-finding mission "which leaves no time for becoming familiar with all of the legal and political aspects of the subject." *Id.* at 837.

⁴¹² *Id.* at 837.

⁴¹³ *Id.* at 834.

⁴¹⁴ Al Mezan Center for Human Rights, *New Israeli Crimes in Gaza—IOF Kill Eleven People Including an American Peace Activist*, available at <http://www.mezan.org/2003.14.htm>, last visited March 17, 2003 (emphasis added).

⁴¹⁵ As of December 16, 2003, the Al Mezan Center for Human Rights website alone registered over 34,000 visits. See <http://www.mezan.org>. In addition, the report was also relayed via the Derechos Middle East human rights listserv, which has over 400 subscribers. As the list coordinator remarks, this number "is quite

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mote . . . the rule of law, transparency [sic], accountability and the role of NGO's [sic] in the Palestinian society." Al Mezan receives financial support from a number of leading international donors, including the Swiss Agency for Development and Cooperation (SDC), the Ford Foundation, the International Commission of Jurists (ICJ) and the UN High Commissioner for Human Rights.⁴¹⁶

The failure of some HROs—and their donors—to take effective measures to ensure accurate daily reporting techniques is further aggravated by the tendency to slip into political diatribes or invoke the use of myriad invented “standards” for reporting.⁴¹⁷ By using these tactics, HROs seek to avert accusations of reporting unsubstantiated allegations as fact. However, the end product reflects an abuse of the shared values inherent in human rights. For example, consider a recent press release by LAW, the Palestinian Society for the Protection of Human Rights and the Environment, wherein the HRO finds “strong evidence” of ill treatment and “believes that” certain measures amount to forced displacement.⁴¹⁸ Less subtle still, the Egyptian Organization for Human Rights (EOHR) recently asserted in one feverish press release that it:

[T]hinks that the Israeli crimes against humanity prove the sufferings of the Palestinians and the violations of the Humanitarian International Law by Israel. How many victims shall be killed to lead the Great Powers to stop having priorities for the political interests over the pains of the victims!!!⁴¹⁹

meaningless” given “the ease of re-distribution of the internet and other media.” For example, the list coordinator cites three accounts of emails being printed and redistributed on academic bulletin boards in Colombia, in group meetings in Sweden, and even read over the radio in Argentina. “These are, of course, just a few examples and ones we heard about . . . often times you don’t know what happens with your information.” Email correspondence with author, Apr. 10, 2003.

⁴¹⁶ Al Mezan Center for Human Rights, *About Mezan*, available at <http://www.mezan.org/aboutmezan.htm> and <http://web.archive.org/web/20040215002708/http://www.mezan.org/aboutmezan.htm>, last visited Sept. 20, 2004.

⁴¹⁷ See discussion regarding the range of conclusory terminology introduced by Amnesty, *supra* note 359.

⁴¹⁸ LAW, *Jenin Refugee Camp: Mass Arbitrary Arrest and Ill-Treatment*, available at <http://www.reliefweb.int/w/rwb.nsf/s/5EEB1B3AF871331185256BDE0067369C>, last visited September 20, 2004. LAW’s financial woes are recounted in Part IV(A)(ii), above.

⁴¹⁹ Egyptian Organization for Human Rights, *The Egyptian Organization for Human Rights (EOHR) Calls the International Community to Intervene to Protect*

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Finally, and perhaps most dubiously, the World Organization Against Torture (OMCT), a Geneva-based INGO, employs subtle qualifiers that effectively distance the organization from the dubious accuracy of the very HRO reports it rebroadcasts in whole across its 90,000-person network. Typically, OMCT redistributes national HRO reports verbatim without any effort to obtain corroborative evidence. Instead, it simply prefaces the allegations with stipulations such as: OMCT “has been informed by . . .” or “according to information received . . .” or “it is reported that”⁴²⁰ This practice not only underscores the appallingly low standards being employed within the industry for communicating human rights reports, but also confirms the dangerous pattern of national HROs uplinking their allegations to the mothership—the INGO—which proceeds to disseminate the data widely, freely and without any form of corroboration.⁴²¹

Alarming, increasing competition across the industry and the continued drive for public attention may further exacerbate the dearth of corroborating evidence in daily HRO reporting. Amnesty International, long the standard-bearer of credibility within the HRO community, has recently been exposed to mounting competition from upstart national NGOs and its ascendant international rival, Human Rights Watch. As a result, AI has tried to “speed up and enliven its documents,” thus dramatically reorienting its emphasis from “get it right” to “get it out and fast.”⁴²² This trend accentuates the problems associated with unregulated human rights reporting, where sensationalistic press releases may attract public attention and funders, but in the long run discredit international human rights norms and the HRO industry as a whole. As Groome notes, while “a reputation for accuracy, fairness and integrity can do much to bring human rights abuses the attention they deserve, a reputation for exaggerated, biased or inaccurate findings can result in serious, legitimate human rights complaints being ig-

the Palestinians and to Carry on Investigations in the Israeli War Crimes in Jenin and Gaza, available at <http://www.eohr.org/press/2002/07-23.htm> (July 23, 2002) (emphasis added). The use of the term “victim” here also underscores Groome’s point concerning HRO objectivity discussed at *supra* note 387.

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⁴²⁰ See e.g., OMCT, *Egypt: Hunger Strikes Launched to Protest Against the Detention and Torture of Demonstrators*, available at <http://www.omct.org> (Apr. 23, 2003), and OMCT, *Israel: Nine Extra-Judicial Executions of Palestinians, Including 2 Children*, available at <http://www.omct.org> (Feb. 19, 2002).

⁴²¹ See discussion in text and footnotes beginning at *supra* note 367.

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⁴²² C.E. Welch Jr., *Amnesty International and Human Rights Watch*, in Welch Jr., *supra* note 13, at 117 n.109. See also KOREY, *supra* note 4, at 304.

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nored.”⁴²³ Disturbingly, defense of Amnesty’s new operating practice is heard even at the apex of its governing structure. Former AI secretary general Pierre Sané declared that while he would prefer “a nice piece of research where everything is verified to death . . . if that corners us into inaction . . . then what’s the point?”⁴²⁴ Yet, it is precisely this “retooled” approach to human rights reporting, designed to make Amnesty “compete more effectively with the media and campaign successes of Human Right’s [sic] Watch,” that former top Amnesty staffers claim “has weakened the research review process.”⁴²⁵ According to former Director of Research Malcolm Smart, the “old values” of the organization, “including quality and accuracy of research,” were being “radically altered” as early as 1994.⁴²⁶

As Boli observes, the effectiveness of many of the most prominent HROs “depends on maintaining a high public profile,” which is typically achieved by courting controversy and conflict with states “for not conforming to world-cultural principles.”⁴²⁷ However, it is increasingly difficult for HROs to build awareness of their activities against the backdrop of a jaded press, already too familiar with reports of torture and other human rights violations. Arguably, “human rights reporting has become so common that some press outlets no longer consider many accounts of human rights abuse to be ‘newsworthy’ in themselves.”⁴²⁸ Typically, journalists now are confronted by editors who say “So? What else is new?”⁴²⁹ Consequently, HROs feel the pinch to break the reporting stalemate by devising dramatic new angles, uncovering even greater atrocities or simply seizing “on issues that seem designed more to promote their own image and fundraising efforts than to advance the public interest.”⁴³⁰

Yet, this drive to inspire—or force—newsworthiness comes at the price of potentially overstating or altogether fabricating abuses, in turn undermining the valuable inroads created by the HRO movement and violat-

⁴²³ GROOME, *supra* note 387, at 42. This may not always be the case. Amnesty suffered little, if any, negative publicity following the Kuwait debacle recounted at the beginning of this section. R

⁴²⁴ KOREY, *supra* note 4, at 304. R

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 305.

⁴²⁷ Boli & Thomas, *supra* note 87, at 43. R

⁴²⁸ Roth, *supra* note 139, at 232. R

⁴²⁹ A. Husarska, ‘Conscience Trigger’: *The Press and Human Rights*, in *REALIZING HUMAN RIGHTS*, *supra* note 118, at 343. R

⁴³⁰ Simmons, *supra* note 13, at 90. R

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ing public trust.⁴³¹ This trend further risks creating a vicious circle whereby HROs seek to outdo or race against one another for the sake of securing scarce media coverage, which remains pivotal to continued financial support from funders. Arguably, the Internet has empowered human rights NGOs “to communicate with and mobilize large numbers of people directly, without the need to operate through formal press channels.”⁴³² However, this evolution is a double-edged sword, since it effectively frees HROs from an external control that may in fact operate informally to filter tenuous reports and promote greater credibility in HRO reporting.⁴³³

As noted in the previous section, Peter Willetts, always an enthusiastic advocate of HROs, has argued that these organizations “cannot afford to make mistakes, because thereafter their . . . mistakes will continually be thrown back at them.”⁴³⁴ Given this presumption, Willetts reasons that NGOs “should often be regarded as being more reliable in presenting information than either journalists or government officials.”⁴³⁵ This defense of NGO reliability is faulty for a number of reasons. First, the aforementioned example relating to Amnesty and the Kuwaiti babies is a testament to the potential unwillingness of states to throw mistakes “back at them.” Indeed, some states prefer to see uncorroborated or inaccurate HRO reports stand where contentions contained therein are advantageous to their own political agendas. Second, given the identified HRO practice of “reporting” hearsay allegations rather than hard facts, the bright line delineating mistakes is blurred beyond recognition. Like the invocation of “early warning” as a

⁴³¹ This touches upon the notion of an HRO duty of care, as elaborated in Part IV(A)(ii) above and *supra* note 314.

⁴³² Roth, *supra* note 139, at 232.

⁴³³ For a discussion of the role of media as an informal external control on HRO operations, *see infra* Part IV(B)(i).

⁴³⁴ Willetts, *supra* note 374, at 187.

⁴³⁵ *Id.* Willetts contends that the difference between NGOs and the media is that the latter is generally not required to publicize their own mistakes. This statement is patently absurd, at least where the media is not government-controlled. All respected newspapers run story corrections on a daily basis. More specifically, when egregious reporting errors are detected, the media publicly acknowledges its failure to offer sufficiently accurate coverage. For example, in May 2004, the editors of the *New York Times* reviewed in detail that newspaper’s coverage of the lead up to war in Iraq and concluded that “coverage . . . was not as rigorous as it should have been.” Editors, *The Times and Iraq*, NEW YORK TIMES, May 26, 2004, available at http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html?ex=1095566400&en=cf01a372b63ad98f&ei=5070&8dpc, last visited December 10, 2004. *See also* <http://www.nytimes.com/ref/international/middleeast/20040526CRITIQUE.html>, last visited December 10, 2004.

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catchall defense against charges of misleading fact-finding, without the imposition of formal controls derived from recognized standards, HROs simply have too many ready excuses for failing to report objectively.

Admittedly, HROs may dispute the need for formal reporting standards by arguing that internal policies are in place to ensure accuracy in documents including daily press releases and research papers. However, experience demonstrates that as HRO size and scope of activities continue to grow, informal methods for ensuring reliability produce mixed results at best. For example, HRW's commitment to "absolute accuracy" served to be "of central importance in impacting upon the media" especially as the organization got underway.⁴³⁶ Yet, inevitably, "errors would creep into the most meticulously researched reports." To minimize the effect of faulty information, HRW instituted an "elaborate review procedure . . . to weed out the uncertain or speculative."⁴³⁷ Nevertheless, the organization's rapid and exponential growth "exposed grave inadequacies and liabilities that plunged it into a serious crisis." As Korey observes, "the very success of the Human Rights Watch had produced contradictions that threatened its very survival."⁴³⁸ Faced with an enlarged staff, the expansion of regional divisions and "the absence of any centralized bureaucratic procedure. . . the exercise of an effective kind of oversight and review" seriously declined, thus causing the organization's accuracy and credibility to suffer.⁴³⁹

To prevent the inclusion of speculation, conjecture and bias in HRO reports, the introduction of standards is crucial. As Groome rightly notes:

[Any] false or exaggerated report casts suspicion not only on a particular organization but also on human rights reporting in general. The gravity or exigency of a particular situation can never excuse a false or misleading report and can do much to set back both the individual case and the attention paid to other bona fide reports.⁴⁴⁰

With this in mind, Groome correctly stresses that each individual HRO staff member must be made to realize that each report, press release and investigation either contributes to the movement or detracts from it.⁴⁴¹ From the evidence presented above, it is evident that this critical message is not getting through.

⁴³⁶ KOREY, *supra* note 4, at 346.

⁴³⁷ *Id.*

⁴³⁸ *Id.* at 347.

⁴³⁹ *Id.*

⁴⁴⁰ GROOME, *supra* note 387, at 42-43.

⁴⁴¹ *Id.* at 42.

358 BUFFALO HUMAN RIGHTS LAW REVIEW Vol. 10**v) Overt Politicization**

Without any formal controls to ensure impartiality and professionalism within the NGO community, HROs risk being manipulated as political pawns or co-opting the language and moral value of human rights as a veil for partisan objectives. Some organizations, undaunted by the need for the appearance of balance, may advance political agendas in a variety of forms, ranging from the seemingly innocuous “selection of particular violators for concerted action,” to the blatantly hostile fabrication of rights violations.⁴⁴² These tendencies pose a grave threat to the stability and reliability of HROs as a whole, insofar as the infiltration of political bias undermines the credibility of the industry overall and diminishes its capacity to advance human rights norms in an authoritative manner.

Overtly political HROs and the use of HROs as a front for political objectives are not recent developments. In 1967, the *New York Times* reported that the CIA had secretly funded “several anti-communist NGOs,” triggering a reappraisal of the role of NGOs at the UN, driven in large part by the Communist bloc and African and Asia states.⁴⁴³ At the same time, governments have frequently leveled charges of bias and politicization against arguably independent HROs. For example, the USSR accused Amnesty International and other human rights NGOs of abusing “their consultative status [at the UN] by engaging in slander and political attacks on member states.”⁴⁴⁴ In a similar vein, Arab governments argued that U.S. based Jewish NGOs were:

[I]dentified with one Government which was hostile to other Member States and. . .had abused their consultative status by conducting systematic political campaigns against those Member States. They have used religion to hide their intentions.⁴⁴⁵

The charge of overt politicization can function as a useful catchall tool for governments seeking to defend themselves against critical HRO reports which expose human rights violations in their respective countries. Understandably, therefore, the international community ought to be wary of any government that actually adopts such a facile defensive posture. At the

⁴⁴² LIVEZEY, *supra* note 34, at 27.

⁴⁴³ P. Willetts, *Consultative Status for NGOs at the United Nations*, in *THE CONSCIENCE OF THE WORLD*, *supra* note 1, at 41.

⁴⁴⁴ Pei-heng Chiang, *NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS: IDENTITY, ROLE, AND FUNCTION* 189 (1981).

⁴⁴⁵ *Id.* at 177.

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same time, however, the potential for politicization is very real, especially given that the industry is not subject to any formal regulation. Without such standards, a situation has emerged whereby “unassailable human rights principles” act as “a kind of shield” for HROs, enabling them to “pursue independent action regardless of political alignments.”⁴⁴⁶ In other words, the fact that human rights NGOs ostensibly premise their actions on the unimpeachable principles of human rights provides these organizations with a level of incontrovertibility as to intent and motive that is simply without parallel. Yet, given the current activities of many HROs, it is quite clear that this shield may be wielded as a sword as well. As Fred Halliday rightly notes, “That which is separate from the state may well not be benign and liberal.”⁴⁴⁷

Politicization of HROs can transpire in a number of ways, and nothing in the structure of these organizations provides the necessary safeguards for preventing such an occurrence. In the first case, HROs can be established to advance the politicized objectives held by its founders or its financial backers. At present, the public at large—including the media and other consumers of HRO information—is ill informed regarding the back-story behind every HRO and its sources of financial support. Thus, at a Harvard University-sponsored roundtable that brought together Arab human rights activists, Ghanim Alnajjar acknowledged the need:

[T]o take seriously the question of whether the [HRO] movement, or its pioneers, are simply frustrated politicians who, having failed to forge a niche in their respective political parties, use the new discourse of human rights as a tool to promote their political visions outside the parties.⁴⁴⁸

The extent of this reality is confirmed by Khader Shkirat, who observes that many political party activists sought to establish human rights organizations outside of the political sphere: “they claimed not to have any political orien-

⁴⁴⁶ CLARK, *supra* note 92, at 12. AI aspires to maintain political impartiality by taking no stand on political questions. Interestingly, earlier on in its history, there was some suspicion that Amnesty had been infiltrated by British intelligence. An internal investigation examining the scandal surrounding an Amnesty study on British rule in Aden has remained closed. *Id.* at 15.

⁴⁴⁷ Halliday, *supra* note 305, at 25.

⁴⁴⁸ Ghanim Alnajjar, *in* INTERNATIONAL ASPECTS OF THE ARAB HUMAN RIGHTS MOVEMENT: AN INTERDISCIPLINARY DISCUSSION HELD IN CAIRO IN MARCH 1998, 18 (H.J. Steiner, ed., 2000).

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tation or affiliation. It was essentially untrue.”⁴⁴⁹ Yet, even with this recognition of how HROs may be created or manipulated for essentially political goals, no systematic process has emerged to require HROs to disclose this vital information in a formal and widespread manner.

The establishment of HROs as an alternative or addition to a political party is endemic particularly among nationally based organizations, which are often “viewed and behave as opponents to the government.” In many instances, human rights groups “will consist largely of or be dependent primarily upon, political opponents and exiles from a particular country.”⁴⁵⁰ Given the ever-expanding definition attributed to human rights, these organizations are able to represent agendas that encompass everything from political and civil rights to collective rights and self-determination, blurring the line between narrow HRO objectives and broader political ambitions. Even larger NGOs with a reputation for objectivity are increasingly vulnerable to the potential politicization that comes as HROs consider broadening their mandates. For example, the Association for Civil Rights in Israel (ACRI), one of Israel’s leading civil rights organizations, has become plagued by internal divisions indicative of how political ideology may operate to steer an HRO’s course. Essentially, more moderate voices in ACRI have claimed that opinions which do not “conform to the most radical left” dogma are being tagged as “fascist and . . . racist,” thus discrediting these views and stifling internal debate.⁴⁵¹ More alarmingly, since this struggle has occurred internally, far away from the public eye, it may result in ACRI politicizing its human rights reports while continuing to benefit from its previously accrued reputation for objectivity.

The desire to continually expand mandates results in many HROs increasingly venturing into activities and areas that represent a departure from the touchstone of human rights norms. This pattern signals another opening for politicization insofar as it results in a blurring of the distinction between what rightly ought to be labeled as a “human rights NGO” rather than a think tank or other lobbying or activist organization. As Steiner asks:

To the extent that NGOs base their prescriptions for society not solely on a body of human rights norms but on broader social analysis, how are they to be distinguished from other

⁴⁴⁹ INTERNATIONAL ASPECTS, *supra* note 448, at 19. For more on Shkirat’s illustrious HRO career, *see* discussion at *supra* note 300.

⁴⁵⁰ Gaer, *supra* note 107, at 57.

⁴⁵¹ Lavie, *supra* note 382.

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institutions in the vast and controverted world of social analysis?⁴⁵²

From this perspective, HROs would necessarily join the ranks of other partisan organizations and consequently be required to shed the purported objectivity they profess while reporting human rights violations. In this way, HROs might then “repel or enlist our sympathies” based on our own clear political choices,⁴⁵³ rather than by manipulating human rights principles and the shared values they impart.⁴⁵⁴ Understandably, human rights NGOs are loath to be tagged as political, since such a label degrades their ability to invoke objectivity as a basis for their work and deposes them from their prized pedestal above the fray of other policy groups and activists. To avoid such a categorization, many HROs which claim to be ‘non-political,’ have ascribed a “very narrow meaning” to the word. Thus, ‘non-political’ HRO status is achieved simply by forgoing any formal organizational or financial linkage “with any one political party within a country or with any one government within the global system.”⁴⁵⁵ This narrow interpretation enables HROs to convey a public image of non-partisanship while remaining free to advance political objectives falling short of explicit affiliation with a given political party.

Steiner has also reasoned that NGOs “are clearly ‘political’ in the sense that they are committed to action to vindicate moral and political principles that determine basic characteristics of a society.”⁴⁵⁶ However, this watered-down definition enables HROs to escape the very critical distinction between action grounded in principle and action based on political interests. As Hannum clearly states, allegations “of human rights violations must be legitimate in and of themselves and should not be used merely as a means to achieve larger political objectives.”⁴⁵⁷ In other words, so long as this practice is condoned by the industry, political agendas will continue to

⁴⁵² STEINER, *supra* note 254, at 36.

⁴⁵³ *Id.* at 37.

⁴⁵⁴ Halliday seconds this view, reasoning that there is “a need for a degree of ethical and democratic distance from the belief in NGOs. . . as a whole as the harbingers of a more liberal and benign world. Some do contribute to this, some do not.” Halliday, *supra* note 305, at 36.

⁴⁵⁵ Willetts, *supra* note 374, at 191. Even this seemingly simple task is increasingly difficult to achieve. As previously noted, over 50% of NGOs now rely in some manner on government or inter-governmental funding for operation. See Smith & Pagnucco, *supra* note 309.

⁴⁵⁶ STEINER, *supra* note 254, at 70.

⁴⁵⁷ Hannum, *supra* note 125, at 36. Hannum goes on to note that “human rights issues are commonly manipulated by both sides.”

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undermine the persuasive moral force and legitimacy attributed to human rights.

Nowhere is the problem of overt HRO politicization and expanded mandates made more evident than in the culmination of the UN's 2001 Durban World Conference Against Racism. Here, 3,000 NGOs adopted an NGO Forum Declaration, which branded the State of Israel a "racist, apartheid state"⁴⁵⁸ guilty of "systematic perpetration of racist crimes including war crimes, acts of genocide and ethnic cleansing."⁴⁵⁹ As U.S. Congressman Tom Lantos observed, perhaps the most disturbing fact about this action was that "many of America's top human rights leaders" participated in the Forum and its declaration while failing to speak out against the overtly "anti-Semitic atmosphere" of the conference.⁴⁶⁰ Faced with the controversy generated by Durban, Amnesty International released a disingenuous statement claiming on the one hand that it did not accept or condone "some of the language used within the NGO Declaration," but on the other, that it "accepts the declaration as a largely positive document which gives a voice to all the victims of racism wherever it occurs."⁴⁶¹ Human Rights Watch took a similarly sanguine outlook of the Conference and its final declaration, heralding in a press release that the anti-racism summit ended on a "hopeful note," albeit with progress amid controversy.⁴⁶²

What is perhaps most troubling about the "Durban debacle" is the ease with which generally respected human rights INGOs boasting international recognition and credibility comfortably slid into the blatantly political fray that was Durban. As Lantos observed, ostensibly reputable HROs "made no statements protesting the debasement of [UN] human rights mechanisms and terms taking place in front of their eyes."⁴⁶³ More alarming still, the intimation of a "radical [NGO] agenda," prompted Lantos to ex-

⁴⁵⁸ *World Conference Against Racism NGO Forum Declaration*, Sept. 3, 2001, at para. 162 [hereinafter WCAR NGO Declaration], available at <http://www.hri.ca/racism/major/ngodeclaration.shtml> and <http://www.racism.org.za/declaration.htm>, last visited November 10, 2004.

⁴⁵⁹ *Id.* at para.160.

⁴⁶⁰ T. Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 46 (2002).

⁴⁶¹ Amnesty International, *World Conference Against Racism Ends: Successes Must Not Be Overshadowed by Disputes*, Sept.7, 2001, available at <http://web.amnesty.org/library/index/ENGIOR410222001>, last visited October 10, 2004.

⁴⁶² Human Rights Watch, *Anti-Racism Summit Ends on Hopeful Note*, Sept. 10, 2001, available at <http://www.hrw.org/press/2001/09/wcar0910.htm>, last visited October 10, 2004.

⁴⁶³ Lantos, *supra* note 460, at 50.

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press apprehension over nothing less than an irreversible degradation of critical terms such as genocide, ethnic cleansing and crimes against humanity, and the “undercutting [of] progress in the global human rights struggle.”⁴⁶⁴

Even in the wake of the Conference, trusted international HROs continued to voice support for the NGO Declaration. Reed Brody, advocacy director for HRW, exclaimed that a “great achievement of [Durban] has been the unprecedented mobilization of victims of racism,” and identified the conference’s sole flaw to be “the media focus on the dispute over the Middle East.”⁴⁶⁵ By scapegoating the media for reporting on activities within the NGO forum, Brody sought to downplay the very real and very virulent one-sided fixation with Israel manifested by NGO delegates themselves.⁴⁶⁶ Six months after the NGO Forum Declaration, HRW continued to insist that the “real” Durban conference “was completely different from the one covered in American newspapers” and that HRW “played an important role in criticizing some of the inappropriate criticisms of Israel at the NGO Forum.”⁴⁶⁷ In addition to clashing with Congressman Lantos’ account of the proceedings, this version of HRW as the objective, levelheaded INGO is also irreconcilable with Canadian delegate Anne Bayefsky’s account. According to Bayefsky, HRW representatives “watched in silence as Jewish NGO voices were stilled and ‘Zionism is racism’ became the order of the day.”⁴⁶⁸ Interestingly, Bayefsky also calls attention to similar efforts on the part of Amnesty International to distance itself from the loaded content of the NGO Final Declaration in the months following the Durban Conference. But rather than acknowledge any error or failing on its part for endorsing—however tacitly—the blistering rhetoric and specific political agenda manifest in the NGO Declaration,⁴⁶⁹ AI’s Durban pledge is enveloped in the

⁴⁶⁴ *Id.* at 41.

⁴⁶⁵ *Anti-Racism Summit*, *supra* note 462. For insight into how INGOs at the Durban Conference “urged the media to move on to other issues,” see D. Matas, *Civil Society Smashes Up*, Sept. 2001, available at <http://www.hri.ca/racism/analyses/matas.shtml>, last visited December 15, 2004.

⁴⁶⁶ Anne Bayefsky, *Since Durban: An Entrenchment of Hatred*, JERUSALEM POST, Sept. 13, 2002, at A9.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ The NGO Forum Declaration calls, *inter alia*, for the “reinstitution of UN resolution 3379 determining the practices of Zionism as racist practices” and the imposition of “a policy of complete and total isolation of Israel as an apartheid state [including] the imposition of mandatory and comprehensive sanctions and embargoes.” WCAR NGO Declaration, *supra* note 458, at paras. 418, 424.

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sanitized wrapper of an objective promise only to “continue to campaign to ensure that governments do not forget their obligations to combat racism.”⁴⁷⁰

At Durban, leading international HROs spoke out of both sides of their mouths. In doing so, they degraded the standing of international human rights. In the wake of the conference, Leonard Rubenstein, executive director of Physicians for Human Rights, asserted that the “language of human rights has to be used precisely” while conceding that the “language on the Middle East in the NGO [Forum Declaration] is not used that way.” Similarly, Michael Posner, representing the Lawyer’s Committee for Human Rights, claimed to reject the ‘Zionist is racism’ language: “That language doesn’t have a place at this conference . . . But it’s time to move on.”⁴⁷¹ Yet, it is precisely this very language—welcomed with open arms at Durban—which INGOs failed to reject throughout the course of the Conference, and which ultimately navigated its way into perpetuity in the form of the NGO Forum Declaration. Therefore, if, in Posner’s words, it truly is “time to move on,” the cause of international human rights must now do so bearing the stigma of the Durban Declaration’s loaded political agenda.

In essence, Durban confirmed that the captains of the human rights industry are prepared to compromise fundamental principles for what they characterize as “part of an important long term process.”⁴⁷² More realistically, no amount of obfuscation or hair-splitting disclaimers can successfully reconcile the avowed objectivity and legitimacy of the international human rights movement with the blatantly political and subjective nature of the Forum Declaration. Although INGO leaders will argue, as demonstrated above, that it is possible to salvage the Declaration’s positive elements, one need look no further than the national NGO level to see how utterly mistaken this assumption is, and moreover, precisely which elements of the Declaration are being put into play on the ground. Consider, for example, the Egyptian Organization for Human Rights’ (EOHR) less nuanced, but infinitely more candid point of view, which heralds:

⁴⁷⁰ Amnesty International, *Introduction to ANNUAL REPORT 2002*, 6 (2002), available at <http://web.amnesty.org/web/ar2002.nsf/intro6/intro6?OpenDocument>, last visited December 10, 2004. See also *Entrenchment of Hatred*, *supra* note 466. This HRO unwillingness to admit fault tracks back to the discussion at Part IV(A)(iv), above. See also *supra* note 410.

⁴⁷¹ Posner also argued that the “zeal of one group on behalf of victims to make their point should not infringe on the rights of others.” Matas, *supra* note 465.

⁴⁷² *Id.*

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[The] important role [played by Egyptian NGOs] as an essential partner. . .in defending the rights of nations headed by the right of the Palestinian nation to self-determination, affirmed by [the] Durban Conference in South Africa. *These organizations have so far succeeded in mobilizing the international NGOs to condemn the Israeli policies and to describe it as a racist country.*⁴⁷³

Beyond demonstrating how overt political agendas are readily inserted into the work of individual HROs—and into the international human rights agenda as a whole—the NGO Forum Declaration serves as a powerful illustration of how the horse-trading so roundly condemned in political forums like the UN, has taken root within the NGO community. As Lantos confirms, “Durban demonstrates that we cannot always assume that all NGOs are focused on advancing universal standards of human rights . . . the NGO process can become as polluted as the intergovernmental process.”⁴⁷⁴ Indeed, if the NGO process is on this track, the introduction of standards against which NGO behavior can be measured becomes even more critical to the future of international human rights. As Brett rightly asks:

[I]s not the role of human rights NGOs indeed to address the human rights issues, while recognizing the causes, and leave other NGOs and pressure groups to address the political, economic and other underlying factors which go far beyond even the broadest definition of human rights?⁴⁷⁵

The inaction of presumably objective and professional international HROs like HRW and Amnesty in Durban may be attributed to a growing pressure within the NGO community to lend a greater voice to southern and national NGOs. Indeed, a vocal group of critics has sought to chastise western NGOs for dominating agenda setting and advancing liberalism at the expense of the needs of the developing world. Perhaps unintentionally, a leading critic from this school of thought indirectly supports a supplemental argument in favor of introducing standards as a means of better identifying politicized origins and behavior among HROs. Makau Mutua posits that a

⁴⁷³ Egyptian Organization for Human Rights, *The Egyptian NGOs Calls [sic] Upon a [sic] Democratic Legislation to Organize the Organizations of Civil Work in Egypt*, June 2, 2002 (on file with the author) (emphasis added). Recall that EOHR limited its self-defined mandate to “the protection of human rights in Egypt.” See discussion beginning at Part IV(A)(i) and especially *supra* note 286.

⁴⁷⁴ Lantos, *supra* note 460, at 50.

⁴⁷⁵ Brett, *supra* note 60, at 107.

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political bias preferring western, first generation civil and political rights over economic and social rights has emerged as a result of NGO founders being western white males. According to Mutua, this bias runs deep into the financial and political networks that support HRO activities: “This tapestry of social and business ties, drawn from leading Americans who believe in liberal values and their internationalization through the human rights regime, underlines the agenda of INGOs.”⁴⁷⁶

Mutua’s critique is not a new one, and can be traced back to Lowell Livezey’s study of American NGOs, which identified a ‘universal tendency’ among American HROs to promote world views that go far beyond the human rights issues themselves and reflect American beliefs regarding democracy and a broadly liberal political agenda.⁴⁷⁷ Mutua argues that this tendency to take cover “behind the international human rights instruments” enables INGOS “to fight for liberal values without appearing partisan, biased, or ideological.”⁴⁷⁸ Likewise, Richard Falk argues that western NGOs have maintained a narrow discourse, the scope of which “will not resonate with the peoples and representatives of many non-Western countries.”⁴⁷⁹ Yet, at the same time, Mutua is forced to acknowledge that the struggle against human rights violations is bound up with the struggle against tyranny. Consequently, he concludes that human rights NGOs should “openly acknowledge the inescapable and intrinsic linkage between human rights and democracy” and “immediately abandon” the “façade of neutrality, the fiction that INGOS do not seek the establishment of a particular political system.”⁴⁸⁰

⁴⁷⁶ Mutua, *supra* note 13, at 155.

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⁴⁷⁷ LIVEZEY, *supra* note 34, at 130.

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⁴⁷⁸ Mutua, *supra* note 13, at 157. This notion also reinforces my previous point about human rights being used as a sword rather than a shield. See discussion at *supra* notes 446 and 447.

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⁴⁷⁹ R. Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in GLOBALIZATION AND HUMAN RIGHTS 70 (A. Brysk, ed., 2002). Welch Jr., pointing to the prioritization of civil and political rights over economic and social rights in INGOs like Amnesty and HRW, also raises the possibility that a façade of neutrality masks a political agenda in favor of western norms. Welch Jr., *supra* note 106, at 16.

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⁴⁸⁰ Mutua, *supra* note 13, at 159. Western hesitancy in addressing social and economic rights arguably stems from the distinction between concerns surrounding corrective justice (first generation) and distributive justice (second generation). Accordingly, distributive justice is question of policy rather than principle. See *id.* at 162 n.23.

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With an appreciation of this mounting schism within the HRO community, it may be argued that western INGOs accepted the Forum Declaration at Durban—even while acknowledging that the document was replete with “language [they did not] agree with”⁴⁸¹—simply to stem mounting criticism against them as agents of western liberalism. Even if this assumption is accurate, the fact remains that all sides, southern and western, developing and developed, are susceptible to falling into the trap of politicizing HRO goals and objectives for myriad reasons. As mandates expand, competing “human rights” objectives increasingly abut against one another, resulting in divisions that promote the horse-trading intrinsic to intergovernmental negotiations. If, as Mutua posits, western NGOs should confess their affinity for democracy and liberalism, disclosure of the political preferences held by other, southern NGOs, also should be required as a matter of transparency. As Hurrell notes, the diversity of voices within the NGO movement is characterized by a “lack of apparent means of mediating between them or evaluating their representational authority . . . [to the extent that] many NGOs [are] little more than self-appointed and self-created lobbies, despite their pervasive rhetoric of authenticity.”⁴⁸² Consequently, the introduction of standards can serve the dual purpose of exposing political biases or agendas while also clarifying the urgent question regarding *what norms* and *whose norms* are being advanced by a given human rights NGO.⁴⁸³

B. External Controls

As demonstrated above, the informal internal tools for regulating NGO behavior are ineffective at best. As NGOs have asserted a growing role in the creation of international norms, no parallel effort has been undertaken to formalize fact-finding, reporting or internal accountability standards, to say nothing of weeding out overtly political actors from the HRO field. As Peter Spiro notes, HROs today are able to “use the system to advance their agendas, but are not answerable to the system. They can bring others to task, but themselves remain immune. NGOs have not been held

⁴⁸¹ Irene Kahn, Secretary General of Amnesty International, ultimately conceded that “there is language in the [NGO Durban Declaration] that AI doesn’t agree with.” Matas, *supra* note 465.

⁴⁸² Hurrell, *supra* note 96, at 289.

⁴⁸³ For example, in the case of its opposition to the death penalty, Amnesty is arguably not representative of universalism: “While no civilization or culture proclaims the virtues of torture, many countries have less compunction in defending the death penalty as an instrument of state policy.” Thakur, *supra* note 256, at 371.

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responsible for their conduct.”⁴⁸⁴ NGO activists may argue that even if internal controls are insufficient on their own, they are buttressed by a second tier of external, informal mechanisms that deter NGOs from acting in an irresponsible or political manner. A closer look at these external controls, however, reveals that the arguments marshaled in their support are outdated or no longer relevant on the playing field across which HROs are deployed today. Accordingly, the analysis set forth in the following section serves to round out the case in favor of developing a set of concrete, formal standards that can establish an authoritative baseline for the responsible and effective development of future human rights activities.

i) New Challenges to Media and Donors As External Watchdogs of HRO Legitimacy

1. Media

Media interest in human rights has been traced back to the Vietnam War era. During the course of that conflict, “much of the Western media transformed its dominant angle from one of communism versus capitalism, or West versus East, into the more pervasive theme of human rights, which could be used as a mirror to hold up to all combatants.”⁴⁸⁵ To be certain, NGOs played a critical role in enabling the media to uncover an abundance of these stories, and the ensuing result was a predictably symbiotic relationship between the two. In exchange for providing rich and plentiful access to a previously untapped angle of reportage, the media furnished HROs with a previously unprecedented means of broadcasting human rights news, thus vastly expanding the size of the audience traditionally exposed to such information. But the significance of the media ultimately goes beyond widely publicizing tales of human rights abuse. Baehr has estimated that:

Human rights NGOs would be hard put to have any impact if the media would not pay attention to their activities. The voluminous yearbooks of Amnesty International and other human rights organizations. . .are rarely read by government officials or the general public in their entirety. Their message is normally conveyed by accounts in the newspapers, on radio and television.⁴⁸⁶

⁴⁸⁴ Spiro, *supra* note 101, at 166.

⁴⁸⁵ R. Callick, *Human Rights, The New Universal Media Angle: Is it a Distorting Lens?*, in *UNIVERSAL HUMAN RIGHTS?*, *supra* note 260, at 100.

⁴⁸⁶ Baehr, *supra* note 123. See also C. Ritchie, “Coordinate? Cooperate? Harmonise? NGO Policy and Operational Coalitions,” in *NGOs, THE UN, AND GLOBAL GOVERNANCE*, *supra* note 14, at 186.

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Therefore, through the act of reporting on human rights, the media has functioned as a stamp of legitimacy for HROs, lending credibility and publicity to their allegations. The nexus between media attention and NGO success has led some observers to remark that the “importance of the *mass media* cannot be over-emphasized All successful human rights NGOs have developed good personal contacts with journalists, who . . . serve as a means of making NGO information public.”⁴⁸⁷ Yet the need for well-cultivated media relations has prompted many HROs to move beyond simply maintaining personal contacts, to the point where their human rights reports are being prepared specifically in a “media-friendly format.”⁴⁸⁸ This format sacrifices research and objectivity in the name of expediency and sensationalism—two elements favored by a mass media which covets speed and where “if it bleeds, it leads.”

As an outgrowth of this pattern, it is clear that the media does not function effectively to engender NGO objectivity, but on the contrary may cause NGOs to sacrifice their objectivity in the name of securing publicity and ensuing financial support from backers who view media attention as a measure of performance. As Clifford Bob has noted, this problem extends especially to smaller, local NGOs that may, in a bid for international attention, disengage from responsible practices:

In a context where marketing trumps justice, local challengers . . . face long odds. Not only do they jostle for attention among dozens of equally worthy competitors, but they also confront the pervasive indifference of international audiences Under pressure to sell their causes to the rest of the world, local leaders may end up undermining their original goals or alienating the domestic constituencies they ostensibly represent.⁴⁸⁹

Stated differently, the evolution of the media-HRO relationship has degraded to a point where the media is no longer adequately responsive or distanced to satisfactorily operate as an effective external watchdog of NGO behavior.

⁴⁸⁷ Hannum, *supra* note 125, at 23.

⁴⁸⁸ D. Stubbings, *supra* note 260, at 225. As noted above, this demand for timely information, coupled with the competition that emerged between NGOs for press attention, also led to reports being released without adequate fact checking and corroboration. See Welch Jr., *supra* note 422.

⁴⁸⁹ Bob, *supra* note 295, at 37. To overcome this marketing challenge, causes are pitched internationally and narrow demands and particularistic identities are universalized to enhance appeal.

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Even if the media still operates to filter out dubious HRO claims, other, more recent developments in communication technologies have emerged to enable NGOs to bypass the effectiveness of that filter. As Jessica Matthews has noted, new information technologies have disrupted hierarchies and spread power among more people and groups.⁴⁹⁰ Indeed, the advent of the Internet and its associated technologies has triggered a veritable revolution in NGO communication methods, freeing HROs from formal media outlets which dictated the scope of their audience and the content of their message. Harnessing the Internet and all its iterations, including email, listservs, FTP, bulletin boards and websites, has provided HROs with an unprecedented ability to disseminate their message directly and widely, without the moderating filter of journalists or editors constrained by concerns for objectivity or audience interest. Rather than being limited by local or wire service distribution numbers, or challenged by a reporter committed to securing evidence to corroborate or disprove HRO allegations, the Internet has effectively opened the floodgates to unfettered HRO communications and a virtually limitless international audience.

A closer look at the nature of the emerging information technologies reveals that the technologies themselves are prone to degrading HRO reliability by compressing time and breeding detrimental competition. Given the immediacy associated with cell phones, fax machines and the Internet:

[The] time required for gathering, processing, and distributing information is cut. But the speed 'arms race' complicates all organizations' efforts to avoid overreacting and making other kinds of errors, while acting fast enough to stay ahead of what rivals are doing.⁴⁹¹

Today, when Amnesty International learns that an individual has disappeared, it activates a longstanding "Urgent Action" network via the Internet. This network, which extends globally to over 50,000 activists, is now able "within hours of information reaching the international secretariat," to "swing into action with letters, faxes, and telegrams on behalf of the victim."⁴⁹² But the instantaneous nature of this activism may easily occur without allowing for the intervening time necessary to corroborate initial reports. Consequently, erroneous reports may be beamed across the globe to an unquestioning network which then acts upon them accordingly.

⁴⁹⁰ Matthews, *supra* note 144, at 52.

⁴⁹¹ S. Weyker, *The Ironies of Information Technology*, in GLOBALIZATION AND HUMAN RIGHTS, *supra* note 479, at 118.

⁴⁹² Thakur, *supra* note 256, at 381.

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This phenomenon may, to a certain extent, be tolerable where pressures of speed and competition generate minor omissions or misstatements. However, the expansion and quickening of the NGO communications network remains problematic insofar as it may be used to intentionally spread misrepresentations or outright fabrications, thus discrediting HROs and diminishing the legitimacy of human rights principles. One environmental activist has characterized this ability of any group “with a fax machine and a modem . . . to distort public debate” as the “rise of the global idiots.”⁴⁹³ But this behavior is not limited to the environmental field. Consider again the example of Al Mezan’s subjective and conclusory report on the death of Rachel Corrie in Gaza.⁴⁹⁴ By activating its Internet network, this small national HRO was able to distribute its message to thousands in an instant. More disturbingly still, Al Mezan’s ability to distort the public debate—or more specifically in this case, the principles of human rights and elementary criminal law—was facilitated by the fact that no controls exist to prevent erroneous or misleading reports from being forwarded and republished across the globe via human rights listservs and message boards. Indeed, a cursory examination of such services reveals posting guidelines so permissive that a disclaimer is appended to each message.⁴⁹⁵

It may be argued that these two examples fall under the “early warning” function discussed above.⁴⁹⁶ However, the newfound capacity of virtually every HRO to communicate instantaneously only redoubles the urgent need for these organizations to act responsibly and establish a more thoughtful and concrete approach to the question of when an “early warning” action ought to be invoked. The necessity of such guidelines is further underscored when one considers that the primary tactic employed by HROs to secure change is mobilizing shame against its target. With the pivotal role of the media as informal external authenticator of human rights allegations increasingly undermined by the Internet, the technique of “shaming” may be exercised free from independent corroboration or any minimal evidentiary standard. At this point, the damage is done to the government or other target of HRO advocacy directly via the Internet and associated communication tools. Retractions in the wake of patently false communiqués are generally not forthcoming, and because the forum is typically an informal one, repercussions to HRO reputations tend to be minimized or quickly

⁴⁹³ Simmons, *supra* note 13, at 90.

⁴⁹⁴ See *supra* note 414 and accompanying text.

⁴⁹⁵ For example, messages forwarded over the Derechos listserv system state that materials “by sources other than Derechos distributed in this mailing list do not necessarily imply the endorsement of Derechos.”

⁴⁹⁶ See *supra* Part IV(A)(iii).

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forgotten as yesterday's news. Furthermore, while it may be claimed that suing in tort can stem the tide of erroneous HRO reporting, this proposal falls short on two grounds: first, given the innovations introduced by Internet technologies, the law in this area is uncertain and still evolving;⁴⁹⁷ and second—and perhaps more importantly—such a course of action represents only a Band-Aid for what clearly requires a more overarching and reliable solution.⁴⁹⁸

2. Donors

Like the media, HRO donors—including governments, political parties, private foundations and an organization's individual supporters—also represent an imperfect instrument for providing informal, external regulation of NGOs. Admittedly, these organizations and individuals, which provide the lifeblood of HROs in the form of dollars and legitimacy, may be expected to have some moderating impact on NGOs. However, it is through this role that foundations and other donors are also capable of influencing the agenda of human rights NGOs. Funding from government sources raises questions about an HRO's independence. Similarly, an HRO's "reliance on funding from philanthropic organizations also raises questions of accountability and susceptibility to outside influence."⁴⁹⁹ Consequently, the problem remains that financial backers may be able to influence "which human rights issues are salient, and on which countries and regions" HRO attention will be focused.⁵⁰⁰ In other words, relying on donors to ensure credibility among HROs generates a dangerous situation whereby the fox is left to guard the henhouse.

At the same time, the information technology revolution has also undermined the potentially moderating influence of even the most credible foundations which extend support to HROs. Foundations have the ability to monitor HRO performance and then make determinations as to whether funding will be continued or halted. However, as technologies such as the Internet make HROs—or at least virtual HROs—increasingly less costly to

⁴⁹⁷ The Internet's basic lack of locality suggests the need for formulating new legal rules. However, it also raises practical problems concerning the global enforceability of any judgment that may be awarded by a national court. *See Dow Jones & Co., Inc. v. Gutnick*, (2002) 210 CLR 575, 619 (Austl.).

⁴⁹⁸ It also can be argued here that leaving resolution of this critical issue to the discretion of the courts may result in arbitrary or unfair restrictions being imposed on legitimate NGO work in certain jurisdictions.

⁴⁹⁹ J.S. Ovsiovitch, *Feeding the Watchdogs: Philanthropic Support for Human Rights NGOs*, 4 BUFF. HUM. RTS. L. REV. 341 at 344 (1998).

⁵⁰⁰ *Id.* at 341-42.

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operate, the external control furnished by philanthropic foundations may become irrelevant. Consequently, individuals interested in gaining a political leg up may increasingly turn to the useful cover of an HRO for advancing their agenda while forgoing the formality of securing funding and legitimacy from a foundational donor.

An examination of the state of Palestinian human rights NGOs provides at least some confirmation of the trend towards “fundless” or “virtual” HROs. Bassem Eid, director of the Palestinian Human Rights Monitoring Group has asserted that all NGOs should register with the Palestinian Authority (PA) to ensure their authenticity: “I have no problem in sending [the PA] our financial report and I reject [the allegation] that this campaign is just to limit the activities of human rights organizations. NGOs that don’t have a budget shouldn’t exist.”⁵⁰¹ In this single statement, Eid effectively confirms two things: first, the reality that some organizations are self-labeling themselves as HROs in name alone and lack the informal stamp of legitimacy associated with having external sources of funding; and second, that HROs remain loathe to submit to any form of oversight, however slight.

ii) Intergovernmental Organizations and International Tribunals

In arguing against the need for some form of regulation within the HRO industry, a claim may be made that intergovernmental organizations (IGOs) and international tribunals serve as the ultimate arbiter of fact regarding human rights violations. According to this line of reasoning, these bodies also play an informal external control role, ensuring that only credible HRO information is translated into meaningful findings at the level of international law. In reality, however, this argument falls short for a number of reasons. First, international human rights “law-making” does not occur primarily at the legislative or judicial level, but rather, is advanced by HROs that have asserted the role of expert advocate in creating these new norms and facilitating public and elite consensus regarding the need for them.⁵⁰² Second, for the reasons expanded upon below, the capacity of IGOs and international tribunals to act as final arbiter of facts is crippled in a number of critical ways that effectively diminishes their ability to promote credibility and accuracy within the HRO industry.

⁵⁰¹ B. Lynfield, *PA Review Puts NGOs on Defensive*, JERUSALEM POST, June 15, 1999, at 2.

⁵⁰² CLARK, *supra* note 92, at 133. As noted, HROs not only advocate in favor of the creation of new norms, but also lead the campaign for their enforcement.

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It is no secret that the discussions of the Commission on Human Rights—a non-expert UN body—often “reflect the balance of power that exists within the United Nations” rather than “illuminate problems that exist in the world.”⁵⁰³ This perspective is even confirmed by HROs, which have grown intimately familiar with the Commission’s inherent political nature and inability to produce objective and meaningful directives regarding international human rights. As the UN representative for Amnesty International has commented, the Commission “has always been a political body,” with Member States taking decisions based on “other issues and relationships, like economic interests.”⁵⁰⁴ Ironically, HROs have lambasted the Commission’s most recent iterations—chaired in 2003 by the Libyan Arab Jamahiriya and reelecting Sudan to another two-year term in 2004—especially for its failure to meaningfully address several critical human rights issues. According to Human Rights Watch, the Commission “has gradually been hijacked by members bent on squelching criticism.”⁵⁰⁵ Indeed, the absence of any expertise prerequisite for membership on the Commission has arguably created a body “in which many of the world’s worst human rights abusers sit in judgment.”⁵⁰⁶ Viewed from this perspective, it appears that the inroads secured by HROs at the Commission over the past 20 years now risk being undone simply based on the Commission’s current membership.⁵⁰⁷

Past HRO gains aside, given the overt political makeup and volatility of the Commission, it clearly cannot be relied upon to act as an effective filter against unsubstantiated HRO allegations. Moreover, since the Commission alone reserves the right to make determinations as to what it accepts as factual, any outcome it produces, as far as reliable human rights findings are concerned, is dubious at best. Indeed, this operating reality invites the possibility of the Commission welcoming or even endorsing inac-

⁵⁰³ J. Kirkpatrick, *UN Human Rights Panel Needs Some Entry Standards: A Scandal in Geneva*, INT. HERALD TRIB., May 14, 2003, available at <http://www.iht.com/articles/96161.html>, last visited December 10, 2003.

⁵⁰⁴ M. J. Jordan, *New Calls for Reform of UN Rights Commission*, CHRISTIAN SCI. MONITOR, May 7, 2003, available at <http://www.csmonitor.com/2003/0507/p07s02-wogi.htm>, last visited December 10, 2003.

⁵⁰⁵ *Id.* This turn of events at the Commission has resulted in HROs being increasingly shut out of the process and the passage of generally benign or “toothless” resolutions against states having support within the Commission.

⁵⁰⁶ Kirkpatrick, *supra* note 503.

⁵⁰⁷ For example, it was the Commission that first facilitated the expanded use of HRO tools such as written and oral statements. See *Participation of NGOs in Meetings of the Commission on Human Rights*, *supra* note 163.

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curate HRO allegations for the specific purpose of political gain or manipulation.

Beyond the overtly political forum of the UN Commission on Human Rights and its subsidiary organs,⁵⁰⁸ there are a number of other international fora that hold out the promise of a more balanced and judicious approach to human rights findings. While these bodies do offer the aura of greater objectivity, they nevertheless remain imperfect tools for the purpose of promoting HRO accuracy and accountability overall. It is evident that the international judicial system is not a mirror replica of its municipal counterparts. This means that courts and other *ad hoc* tribunals may lack the legal jurisdiction to hear any number of cases dealing with human rights violations. Perhaps even more significantly, beyond jurisdictional questions, these bodies also lack the technical capacity to operate in a timely and continuous manner. Consequently, international tribunals that are empowered to rule on the findings of HROs are incapable of correcting, at least with any degree of meaningfulness, the damage caused to a given party by misleading or faulty HRO allegations publicized in real time. For example, the increasing caseload at the European Court for Human Rights (ECHR) has generated an on-going debate surrounding the necessity for reform. Even following the changes brought about by Protocol No.11, which replaced the existing, part-time Court and Commission with a single, full-time Court, the ECHR's caseload continued to grow at an unprecedented rate. In the short period of five years, the number of applications to the Court grew a staggering 130%—from 5,979 in 1998 to 13,858 in 2001.⁵⁰⁹ At present, the Court is grappling with the need for additional urgent reforms that will address its inability to handle the growing volume of cases piling up at its doors.⁵¹⁰

In a similar vein, since many international bodies addressing human rights concerns meet on an annual basis, and then, only consider the human rights records of a pre-determined list of countries, it may be years before misleading human rights allegations are officially pronounced as such by a final international arbiter of fact. For example, the UN Human Rights Committee sits three times a year and is able to consider the human rights situa-

⁵⁰⁸ *Oral Statements in the Commission on Human Rights*, *supra* note 159, at para. 4. Given the credibility gap of the Commission, the objectivity it exercises in the selection of special rapporteurs and its determination of which themes and countries are scrutinized under its investigative mechanisms also must necessarily come into question.

⁵⁰⁹ *The European Court of Human Rights: Historical Background, Organisation and Procedure*, *supra* note 36, at para. 7.

⁵¹⁰ *Id.*

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tions of approximately 12 selected countries.⁵¹¹ Anne Bayefsky calculates that this type of scheduling works out to an “average consideration by each [UN] treaty body of a state for six or seven hours once every five years.”⁵¹² Given the detrimental time lag and intermittency associated with existing third party arbitration of HRO claims, it becomes clear that the watchdog capacity of international tribunals is significantly curtailed by their inability to scrutinize even a minimal number of the HRO allegations filed during the course of a given year.

Beyond the time lags, delays, and small number of total hearings associated with these international bodies, it also can be argued that even the more reputable, legalistic international human rights institutions remain vulnerable to some of the same political limitations that subvert the objectivity of bodies like the UN Commission on Human Rights. For example, the UN Human Rights Committee, designated as an expert body, is not immune to having its members appointed through horse-trading of votes between UN member states.⁵¹³ Consequently, not only may the information base presented to the HRC by HROs potentially be biased or inaccurate, but so too may a given Committee member’s own interpretation of that evidence. As Bayefsky notes, the UN “treaty bodies have been heavily dependent on information from NGOs in preparing for the dialogue with state parties . . . This dependence has led to a close working relationship between NGOs and most of the treaty bodies.”⁵¹⁴ In turn, this close relationship may exacerbate problems further, since a treaty body committee’s “holistic understanding of a country situation may be distorted by information coming from an active, but specialized, NGO which is focused on a very limited range of matters”⁵¹⁵ or from an NGO that knowingly distorts its findings in an attempt to sway the Committee’s direction. One of Bayefsky’s central recommendations aimed at preventing this distortion is that the treaty bodies “inform themselves about the sources and expertise of those making

⁵¹¹ Office of the High Commission on Human Rights, *Sessions of the Human Rights Committee*, available at <http://www.ohchr.org/english/bodies/hrc/sessions.htm>, last visited Nov. 23, 2004. In 2005, the Committee is scheduled to meet for a total of less than 60 days.

⁵¹² A. F. BAYEFSKY, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* xiv (2001).

⁵¹³ Interviews with Martin Scheinin, UN Human Rights Committee member, Toronto, Can. (Jan. 8, 2003), and Cecilia Medina Quiroga, former UN Human Rights Committee Chairperson, Toronto, Can. (Jan. 29, 2003).

⁵¹⁴ BAYEFSKY, *supra* note 512, at 42-43. The close working relationship is also noted at Gordenker & Weiss, *supra* note 14, at 29.

⁵¹⁵ BAYEFSKY, *supra* note 512, at 44.

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submissions as a part of their effort to ensure that conclusions are based on reliable information.”⁵¹⁶ To be certain, this recommendation is a step in the right direction for lifting the veil that may be cloaking the true intention of some HROs presenting materials to the treaty bodies. Still, it falls short of addressing the damage caused by the time lag between an NGO’s independent release of allegations and those allegations coming before the HRC, in all likelihood, several years later. Thus, similar to the shortcomings tied to an action in tort for inaccurate HRO reporting, relying upon the international bodies as an external control also fails to provide an effective check against unfettered HRO operations.

For an opposing perspective on this line of argumentation, it is worth examining Philip Alston’s defense of the treaty body system. Alston marshals four reasons why the process remains a valid one that effectively screens out disingenuous HRO claims: first, HRO submissions are “very often juxtaposed against” the submission of other HROs; second, the weight accorded by the Committee to the information provided “inevitably reflects the track record” previously accumulated by an HRO; third, governments are likely to refute any false allegations; and finally, the role of the Committee is to exercise informed judgment.⁵¹⁷ Admittedly, the Human Rights Committee retains the ability to juxtapose HRO reports against one another. However, this practice in no way guarantees that it will emerge with a reasonable picture of the human rights situation in a given country. Rather the objectivity of the baseline will only be as good as the HRO information presented to the Committee. In effect, the voice being communicated to the HRC is that of a specific subset of HROs that have the organizational savvy or political motivation to present their findings to the Committee. Ironically, even Alston concedes the existence of an urgent need “to remedy the current situation in which the great majority of . . . NGOs that are most active at the United Nations level pay little more than lip service to economic, social and cultural rights.”⁵¹⁸ This statement confirms the existence of a bias inherent in the overall HRO data being submitted to the HRC.

Alston’s second defense is subject to the common stock market caveat that past performance can never be a reliable indicator of future returns. That said, Alston’s third argument is accurate, if inadequate on two counts: first, the myriad other HRO allegations that the Committee fails to

⁵¹⁶ *Id.* at 46.

⁵¹⁷ P. Alston, *Beyond ‘Them’ and ‘Us’: Putting Treaty Body Reform Into Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 12, at 510.

⁵¹⁸ P. Alston, *Economic and Social Rights*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY*, *supra* note 66, at 159.

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address or discredit retain a lingering power in HRO press releases, web sites, and annual reports.⁵¹⁹ Second, given the infrequency of HRC hearings, it may be years before a government is able to secure an authoritative third party “ruling” refuting a given allegation. In the interim, this allegation may cause damages ranging from political sanction to the loss of revenue in trade and tourism. Alston’s last defense of the HRC process is tempered by the encroachment of political bargaining into the appointment process of Committee members. In the end, Alston concludes that the “exclusion or downgrading of NGO information would certainly not improve the process.”⁵²⁰ But what is equally clear from the analysis above is that relying on bodies like the HRC as an external control to weed out HRO misinformation equally falls short of adequately improving the process and ensuring credibility and reliability within the HRO industry as a whole.

Interestingly, even if the HRC and other treaty bodies are accepted as an effective check against overzealous HROs, it appears that HROs themselves are unwilling to tolerate them as a constraint upon their freedom of action. Indeed, an emerging pattern seems to testify to the fact that these UN bodies, which allow states a voice and employ legal tools for decision making, are being sloughed off by HROs in favor of more direct mechanisms that promise rapid action within the international arena with fewer procedural encumbrances. For instance, Gaer observes that the impact of NGOs:

[I]s now greatest as a source of independent information that triggers special mechanisms and engenders action by UN special rapporteurs. Human rights NGOs can so profoundly influence attentiveness to human rights . . . that an ongoing operational role in these areas ranks . . . as more significant than NGO speeches and representational activities at the Commission on Human Rights, even though such activities maintain public pressure on governments for action.⁵²¹

In other words, NGOs are quickly becoming savvy enough to sidestep the rigorous legal hurdles—or controls—demanded by the UN’s law-based treaty bodies in favor of advancing their agenda via the UN’s political organs. As discussed above, bodies like the Commission for Human Rights

⁵¹⁹ Consider again LAW’s enduring human rights reportage on the Jenin “massacre”. See *supra* Part IV(A)(iii).

⁵²⁰ Alston, *supra* note 517, at 510.

⁵²¹ Gaer, *supra* note 107, at 64.

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are more than eager to endorse the manipulation of HROs and human rights allegations provided it serves their own political objectives.

iii) Free Market

Perhaps the most basic argument that may be marshaled against regulating the HRO industry stems from the twin pillars of freedom of expression and a belief in free market forces. According to this position, NGOs should be permitted to express any viewpoint they want, and their relative success or failure will hinge on their ability to continually persuade donors and the general public as to the justice and credibility of their cause. NGOs that are incapable of maintaining this level of credibility will eventually assume an inconsequential position in the human rights arena. With this free market system in place, no formal intervention is needed or necessary; in fact, such interference may prove damaging to the industry or otherwise threaten the marketplace's representativeness. As each of the previous sections has illustrated, reliance on informal controls such as HRO accountability and operating procedures, the media, donors, or intergovernmental organizations are either ineffective or no longer adequate for guaranteeing that the market operate in a reliable and responsible manner. Sophisticated NGO operations, such as the Committee for the Liberation of Iraq, capable of tapping into a wealth of simpatico donors,⁵²² and the rise of "global idiots"⁵²³ operating out of their homes, or worse, out of Internet cafés, can and will undermine the fabric of international human rights by discrediting the human rights movement and generally damaging the overall reputation of HROs.

It is useful to examine the overarching free market argument in defense of the HRO industry and weigh, from a law and economics perspective, whether some kind of regulation of this industry may be justifiable. This exercise is valuable insofar as law and economics tends to favor the operation of free markets and informal controls, and only proposes formal regulation where persistent, fundamental problems exist within a given unregulated system. Accordingly, such an approach not only provides a novel and innovative method for analyzing the HRO sector, but more significantly, drives home the broader conclusion that given the nature of human rights principles, HROs cannot continue to operate free of formal regulations. As will be seen, submitting HROs to a law and economics analysis

⁵²² K. Nimmo, *The Committee for the Liberation of Iraq: PR Spinning the Bush Doctrine*, COUNTERPUNCH, Nov. 19, 2002, available at <http://www.globalpolicy.org/ngos/credib/2002/1119bush.htm>, last visited December 10, 2003.

⁵²³ Simmons, *supra* note 13, at 90.

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reveals a number of characteristics about the industry that would typically signal a need for government intervention in an otherwise free market. However, before advancing to this analysis, it is worthwhile to explore the freedom of expression foundation upon which HROs, and international civil society at large, have staked their camp.

Benedict Kingsbury argues that a set of informal principles emulating First Amendment liberalism “has been the de facto guide in the construction of international civil society.”⁵²⁴ These principles have encouraged the establishment of NGOs, which are “attracted by the notion in US public law that anyone should be free to form a group, to raise funds for it by any legal means, and to advocate through it virtually any nonviolent political or moral position.” As Kingsbury rightly points out, apart from some obligations with regard to the use of funds and occasional tort liability, this convenient formula generates very “little responsibility or accountability” on the part of putative NGOs.⁵²⁵ Indeed, the analysis undertaken in the previous sections confirms that this internationalized “First Amendment”—or more universally “freedom of expression”—code serves as a common foundation for HROs and informs the nature of their activities. Kingsbury’s conclusion is that this type of liberal international civil society:

[O]ffers few means of NGO accountability except via markets, and it tends to view demands for other forms of accountability with suspicion—as devices used to muzzle free expression or to introduce content regulation.⁵²⁶

This statement is revealing on a number of levels. First, it accepts the proposition that NGOs have enveloped themselves in an ideological blanket that resists accountability; second, it expresses the possibility that market forces might offer a sufficient means of imposing some form of informal control over NGOs; and finally, it confirms the fierce tendency of NGOs to reject calls for accountability by arguing that such demands constitute a threat to their fundamental right of freedom of expression. By falling back on a freedom of expression defense of their activities, HROs neglect the fact that their profession does not deal in ideas alone, but rather, in very legalistic notions of human rights which have repercussions that reach far beyond the simple expression of an idea. Given that human rights

⁵²⁴ Benedict Kingsbury, *The Democratic Accountability of Non-Governmental Organizations: First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT’L L. 183 (2002).

⁵²⁵ *Id.* at 184-85.

⁵²⁶ *Id.* at 186.

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principles comprise nothing less than the shared *über*-values of humankind, invoking their violation in the form of allegations against another party carries a weight beyond mere words. Indeed, the leveling of human rights violation charges represents a grave matter that bears implications not only for the target, but also for the body of international human rights law and for the HRO community at large. Perhaps most alarming, insofar as HROs have characterized any opposition to their activities as violative of freedom of expression rights—or worse, as outright antagonism to human rights—they have effectively curtailed any legitimate effort to introduce even minimal standards designed to enhance responsibility and credibility within the industry. In a perverse twist, the free expression rhetoric seized upon by HROs effectively squelches any close or sustained scrutiny of HRO activities intended to promote best practices or standards. As Kingsbury remarks:

The lack of other ideas about accountability suggests not only that First Amendment liberalism has been tacitly imported as the prevailing blueprint for NGO participation in international civil society, but also that it almost exhausts the field, so that few other principles of international constitutionalism bearing on accountability have been developed or invoked.⁵²⁷

Given the accountability problems inherent in NGO reliance on freedom of expression liberalism, Kingsbury argues in favor of broadening the role of other principles of international constitutionalism as a means of creating alternative opportunities for accountability. While this argument essentially promotes other “constitutional principles” as a means for increasing accountability and regulation within the HRO industry, it falls short inasmuch as it continues to favor *informal* methods of accountability.

In any event, Kingsbury was not the first to identify the shortcomings that may be endemic to an unregulated free market for ideas. Writing in the 1970s, Ronald Coase observed that the “normal treatment of governmental regulation of markets makes a sharp distinction between the ordinary market for goods and services and . . . ‘the market for ideas.’” According to Coase, conventional wisdom reasons that “in the market for goods, governmental regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly lim-

⁵²⁷ *Id.* To Kingsbury’s quote I would only add that given the existing state of affairs, no other principle of international constitutionalism *can* be invoked to promote accountability.

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ited.”⁵²⁸ Coase argued that this view stems from the fact that self-esteem and self-interest causes intellectuals “to magnify the importance of their own market” and work to ensure that “while others are regulated, regulation should not apply to them.”⁵²⁹ The prescience and ready applicability of this statement to HROs is made manifest when one considers that HROs today are hurriedly increasing their efforts to secure agreements with transnational corporations and IGOs regarding human rights standards,⁵³⁰ but have not yet proposed or sought to enforce effective standards for reporting their own activities.⁵³¹

Coase’s provocative piece, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, is a valuable one insofar as it calls attention to the potential problems which may arise when organized groups such as HROs are permitted to allege human rights violations without any authoritative standards and without comprehensive information available to the general public for reaching their own informed decisions regarding the veracity of those allegations. Coase argues that no fundamental distinction ought to exist between the market for goods and ideas: “In all markets, producers have some reasons for being honest and some for being dishonest; consumers have some information but are not fully informed or even able to digest the information they have.”⁵³² This line of reasoning brings to the forefront the potential for human rights principles to be manipulated for political ends, and moreover, the reality that consumers and other decision makers are being implored to act on these allegations having imperfect information at best. As Coase points out:

[I]t is hard to believe that the general public is in a better position to evaluate competing views on economic and social policy than to choose between different kinds of food. Yet there is support for regulation in the one case but not in the other.⁵³³

While there is certainly an impassioned plea to be made for an unfettered right to freedom of expression generally, this argument must necessarily be tempered in the context of HROs. As argued above, NGOs, like producers, have motivations for being both honest and dishonest. Similarly,

⁵²⁸ R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

⁵²⁹ *Id.* at 386.

⁵³⁰ Spiro, *supra* note 101, at 168.

⁵³¹ Spar & Dail, *supra* note 127, at 172.

⁵³² Coase, *supra* note 528, at 389.

⁵³³ *Id.* at 389-90.

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with regard to consumers, it is virtually impossible for the media or government officials—let alone the general public—to collect the perfect information necessary for effectively evaluating HRO claims in a timely and efficient manner.⁵³⁴ Yet, even beyond these basic arguments in favor of regulating the market of ideas generally, several additional factors, intrinsic to the HRO market, reinforce the need to intervene for the purpose of establishing some formal baseline of minimal standards. The persuasive power inherent in morally-infused human rights rhetoric, its legal implications, the communications revolution, and the prominence of HROs within the international community all underline the reality that the question of HRO regulation is not one of ham-fisted suppression of free speech, but rather of securing an industry against the manipulation of a set of principles designed to entrench humankind's fundamental rights at international law.

While Coase presents an argument in favor of regulating the marketplace of ideas—something that may be unpalatable for many—the case for regulating HROs becomes even more persuasive when their output—reports, allegations and press releases—are viewed not only as ideas, but as “products” or goods. These goods are introduced into a global marketplace and may ultimately impact both international and domestic legal systems, as well as shape the future development of human rights norms. By shifting the conceptualization of human rights output from “ideas” to “products,” the notion of regulation for the sake of consumer protection suddenly becomes more familiar and less of an intellectual leap. And it is from this perspective that a law and economics approach becomes immediately useful. Indeed, such an analysis of the HRO industry reveals the telltale signs of a marketplace ripe for consumer protection regulations.

As Michael Trebilcock proposes, an “essential first step in determining whether there is a consumer protection problem should be to characterize the market in question as either competitive, imperfectly competitive or non-competitive.”⁵³⁵ Antonio Donini's analysis of NGOs demonstrates that, in tandem with the emergence of fly-by-night, low budget or no budget national NGOs, there is a growing trend towards concentration of influence on the international level. This concentration is so transparent that Donini likens it to an oligopoly, with “eight major families or federations of inter-

⁵³⁴ The fact that HROs employ a bewildering collection of semantic qualifiers to shade their conclusions is but one practice that hinders this critical task. *See supra* Part IV(A)(iii).

⁵³⁵ G.D. Hadfield, R. House & M. J. Trebilcock, *Rethinking Consumer Protection Policy*, Aug. 28, 1996, available at <http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/en/ca00324e.html>, last visited December 10, 2003.

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national NGOs [controlling] almost half an \$8 billion market.”⁵³⁶ In addition to identifying a concentration of financial assets among a few select NGOs, Donini also has noted a parallel trend encouraging “homogenisation in the practices, management style, and activities of NGOs,”⁵³⁷ which Clifford Bob labels “a homogeneity of humanitarianism.”⁵³⁸ Against this background, it is evident that the HRO market reflects at best a situation of imperfect competition. However, the nature of the HRO market raises another warning flag insofar as the general public, having an automatic affinity with the notion of ‘human rights,’ has no obvious reason “to doubt their general expectation of safety,” or as in the case of human rights, their general expectation of the truth. Consequently, since “consumers” of HRO products exhibit no propensity for doubting the veracity of HRO claims, their expectation of truth “can easily be exploited.”⁵³⁹ According to Trebilcock, this second finding confirms that a consumer information problem may exist within a given marketplace.

One key tendency ascribed to free markets is that, given time, they “are likely to solve most information problems.” However, as noted above, the factor of timeliness is critical to preserving the integrity of human rights principles. Consequently, so long as HROs are permitted to operate in real-time without any effective checks, “many consumers may be prejudiced” until such a time as the market is able to correct itself.⁵⁴⁰ In other words, the ability of myriad HROs to disseminate any number of misleading or uncorroborated charges on a continual basis compromises the public’s ability to effectively separate legitimate allegations from illegitimate ones. Even if the market is able to correct itself over time, the inevitable time lag associated with this ability enables misleading allegations to be entrenched as factual, thus damaging an impugned party’s reputation within the international community.

⁵³⁶ Donini, *supra* note 237, at 91. According to Donini, the UN and the European Community have “facilitated, if not encouraged, this process of aggregation” since they find it “easier to do business with semi-structured large consortia than with atomised individual NGOs.” Indeed, both these IGOs have actively promoted the creation of networks and coalitions of issue-specific NGOs at the international level. Simmons confirms that the trend towards an NGO oligopoly “threatens to crowd out small players, especially local NGOs.” Simmons, *supra* note 13, at 88.

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⁵³⁷ Donini, *supra* note 237, at 92. As noted above, these practices are informal and wholly inadequate for fostering credibility across the HRO industry.

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⁵³⁸ Bob, *supra* note 295, at 44.

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⁵³⁹ Hadfield, House & Trebilcock, *supra* note 535.

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⁵⁴⁰ *Id.*

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Another important characteristic of a free market is the general expectation that “the more obvious a consumer protection problem has become the less of a problem it may come to be.”⁵⁴¹ This simply means that once consumers are alerted to a blatant or widespread problem with a given market, they will adjust their general expectation of related transactions and take steps to avoid the product in question. In this manner, consumer action serves to correct the perceived consumer protection problem. However, if the enormous growth within the HRO sector—in terms of sheer numbers and funding dollars—is any indication, no obvious consumer protection problem has been identified within the industry. Indeed, the analysis provided above points to a situation whereby HRO influence and numbers are growing at such a rate that fundamental problems like biased operations have become clouded by the overwhelming support extended to the sector as a whole. With the flaws discussed above so elaborately woven into the fabric of legitimate human rights work, it is nearly impossible to separate the source of the consumer protection problem. Consequently, the self-correcting influence of consumer expectations regarding elements such as truth, objectivity and accuracy is rendered ineffective.

While this preliminary exploration of consumer protection theory serves to underscore its relevancy to the HRO marketplace, additional findings are typically required before establishing a formal justification for consumer protection regulations. According to a checklist prepared by the Organization for Economic Co-operation and Development (OECD):

Government intervention should be based on clear evidence that a problem exists and that government action is justified, given: the values at stake. . .the likely benefits and costs of action. . .and alternative mechanisms for addressing the problem. Markets should always be considered as an alternative to government action, and the capacity of the private sector and individuals to deal with the problem should be assessed.⁵⁴²

⁵⁴¹ *Id.*

⁵⁴² Organization for Economic Co-Operation and Development, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation Including the OECD Reference Checklist For Regulatory Decision-Making and Background Note*, OECD Doc. No. OCDE/GD(95)95 (Mar. 9, 1995), available at [http://www.oilis.oecd.org/oilis/1995doc.nsf/LinkTo/OCDE-GD\(95\)95](http://www.oilis.oecd.org/oilis/1995doc.nsf/LinkTo/OCDE-GD(95)95), last visited December 10, 2004. It should be reaffirmed here that that the regulatory framework proposed by this paper in no way suggests that government should move to regulate HROs. Rather, this task should be undertaken by the industry itself.

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The mere identification of a problem, therefore, does not trigger “a presumption that government should regulate.”⁵⁴³ Rather, to establish that intervention is necessary, we must consider the values at stake, benefits of action, and alternative mechanisms available. In the case of HROs, it is clear that the values at stake are critical inasmuch as HROs deal in the loaded currency of human rights principles. In addition, the benefits of formal regulation promise greater clarity and standards within the HRO industry, a means of distinguishing between legitimate and illegitimate human rights actors, and the safeguarding of international human rights principles, away from the pressures of political manipulation. Finally, as this paper has demonstrated, the informal market-based controls within the HRO industry have fallen far short of providing any reasonable degree of consumer protection. Furthermore, since the proposal advanced here does not resort to government regulation, it already reflects an alternative “private sector” mechanism for addressing the root of the problem.

Trebilcock’s law and economics approach also favors relying on market-based solutions for remedying consumer protection problems. Indeed, he requires that government regulators explicitly answer why a market solution “will not emerge in a reasonably timely and effective form, or why that solution may be socially sub-optimal,” before acceding to regulatory intervention in a given marketplace.⁵⁴⁴ To reach such a determination, Trebilcock has developed a set of principles designed to identify conditions under which a market-based solution is unlikely to emerge. Testing these principles against the HRO sector is a useful method for confirming the necessity of a more formal response to the problems undermining this particular marketplace. Significantly, as demonstrated below, virtually all of Trebilcock’s conditions are readily established within the HRO sector, thus pointing to a breakdown of the free market system and to a pressing need to consider some form of regulation within the industry.

1. Repeat Transactions

Where opportunities for repeat transactions are rare, Trebilcock posits that the performance incentive generated by the promise of repeat customers is blunted, thus compromising the reliability of the market in question. Many HROs do rely on continued business from donors and the media, and recognize the potential of repeat transactions as an incentive for maintaining reliable performance. However, as this paper has argued, there is little in the way of controls to determine or limit which individuals or

⁵⁴³ Hadfield, House & Trebilcock, *supra* note 535.

⁵⁴⁴ *Id.*

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organizations are the source for these repeat transactions. In other words, a financial donor with a biased agenda may repeatedly underwrite the operations of an HRO as a tool for producing 'objective' opinions that lend legitimacy to its own subjective viewpoint. Similarly, a biased media outlet may rely on a specific HRO as an authoritative source for 'credible' information, thereby sustaining media attention on an organization that would otherwise not obtain repeat business from more objective "satisfied" customers.⁵⁴⁵ With the free market undermined by HROs whose survival is guaranteed by a particular set of repeat—albeit biased—customers, the public at large is forced to contend with a situation that makes distinguishing these HROs from their more reputable peers virtually impossible. As an outgrowth of these scenarios, evidence of the existence of repeat transactions within the HRO sector alone cannot signal a healthy marketplace.

In addition, it should be noted that given the growing trend towards human rights allegations being communicated cheaply and directly via the Internet, reliance on repeat transactions as an indicator of a healthy market may effectively be obviated. Global idiots with fax machines operating as HROs need not rely on repeat customers to disseminate their messages widely and continually. Indeed, new information technologies not only de-

⁵⁴⁵ For example, even after the UN confirmed as false allegations of a massacre in Jenin, LAW made no effort to retract its previous statements. In fact, the press releases remain accessible on the LAW website without any amendment or update. More importantly, LAW's international reputation remained untarnished. The HRO continued to maintain affiliate status with the International Commission of Jurists (ICJ), the World Organization Against Torture (OMCT) and the Euro-Mediterranean Human Rights Network (EMHRN). Significantly, these three organizations represent leading international human rights networks: The ICJ is "dedicated to the primacy, coherence and implementation of international law and principles that advance human rights," and distinguishes itself based on its "impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law." The OMCT is "the largest international coalition of NGOs fighting against torture . . . [and] has at its disposal a network . . . consisting of some 240 non-governmental organisations which act as sources of information. Its urgent interventions reach daily more than 90,000 governmental and intergovernmental institutions," as well as NGOs and other interest groups. Finally, the EMHRN "is a network of human rights organisations based in more than 20 countries from the Euro-Mediterranean region." See LAW, *About LAW*, available at <http://www.lawsociety.org/AboutL/Index.html>; International Commission of Jurists, *About Us*, at http://www.icj.org/rubrique.php3?id_rubrique=11&lang=EN; *World Organisation Against Torture*, at <http://www.omct.org/> (last visited Apr. 26, 2004); and *Euro-Mediterranean Human Rights Network*, available at <http://www.euromedrights.net/english/engelsk.html>, last visited December 21, 2004.

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grade the performance incentive provided by the promise of repeat transactions but completely sever the correlation between an NGO's ability to attract repeat business and its continued operation. In essence, by facilitating transactions free of charge 24/7, 365 days a year, the Internet—via list-servs and the World Wide Web—circumvents the performance incentive of repeat business, thus degrading the potential force of this market control.⁵⁴⁶

2. Entry and exit costs

According to Trebilcock, as the costs associated with entry and exit into a given industry decrease, the possibility of having a large number of fly-by-night operators with few sunk costs and only modest investments in reputational capital will increase. Clearly, this scenario describes precisely what is transpiring today within the HRO industry. With the benefits of inexpensive communications innovations and the automatic credibility capital ascribed to “nongovernmental organizations” and “human rights,” political objectives may be easily infused into the human rights discourse, thus undermining the authority of the entire system and making it virtually impossible to separate legitimate from illegitimate operators.

3. Extra-jurisdictional presence & minimal assets

Where a large number of sellers or producers are extra-jurisdictional, Trebilcock reasons that redress through private law becomes more difficult for consumers. Typically, this is the case within the HRO industry given the large number of INGOs and national HROs operating across the globe. Furthermore, as previously noted, even if judicial redress were considered a viable option, the heavy HRO reliance on the Internet to broadcast communications further exacerbates the jurisdictional uncertainty surrounding such action.⁵⁴⁷ Private law also falls short as a remedy against actors who have few assets against which a judgment may be enforced. In this respect, it is worth noting that many HROs, particularly smaller, national organizations, retain assets that likely would not even cover the expenses associated with a formal trial.⁵⁴⁸ Finally, even if a court ordered a retraction

⁵⁴⁶ For example, a Google.com search for “Palestinian Society for the Protection of” and “massacre” and “Jenin” conducted on May 29, 2003 returned over 300 individual hits. See <http://www.google.com>.

⁵⁴⁷ Arguably, a court operating outside of the United States could invoke US First Amendment law in a trial alleging defamation against a website hosted by servers outside of the United States.

⁵⁴⁸ Clearly, a formal trial for defamation is also complicated by freedom of expression issues.

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rather than monetary compensation, if the case of Amnesty's allegation regarding the Kuwaiti babies is any indicator, that remedial action too would in all likelihood prove ineffective at stemming the damage of the original allegation, preventing its continued dissemination, or even downgrading the HRO's reputation.⁵⁴⁹

4. Nature of transactions

Trebilcock points out that a market-based system may also falter where the costs to consumers of a "bad" transaction are delayed or potentially catastrophic. Such a situation makes *ex post* relief an inadequate or unsatisfactory solution. Moreover, in addition to delayed costs, Trebilcock reasons that small-sized transactions also create a significant disincentive for seeking *ex post* relief through the courts.⁵⁵⁰ This scenario clearly applies to the HRO industry. Human rights NGOs may present allegations as accurate at the time of their reporting, yet the public may only learn about errors or misrepresentations months later, if at all. In a similar manner, each HRO press release, communiqué, report, urgent action, and fact-finding mission represents a single, discrete, small-sized transaction. However, when considered cumulatively, they create a potentially much larger negative impact stemming from repeated misstatements, distortions, bias, poor reporting or faulty fact-corroboration. Ultimately, it is unrealistic to expect the target of such allegations to continually seek relief via the courts for these small-sized transactions, since they are undertaken hundreds of times a day by countless HROs across the globe. Indeed, HRO use of small-sized transactions highlights a central hazard of unregulated HRO reporting techniques, since it is through this practice that legitimate human rights principles risk being rhetorically diluted and stripped of their essential value.

According to Trebilcock, even if the four factors examined above point to the inadequacy of a market-based solution, government should only intervene to regulate where it remains "feasible and cost-effective to do so."⁵⁵¹ As the following section will demonstrate, the regulatory framework discussed here can be both those things, provided HROs embrace their role in devising and implementing meaningful standards across the industry.

⁵⁴⁹ It should be noted that Amnesty lost very little reputational capital in the wake of this incident, and that the myth of the Kuwaiti babies continued to be recounted long after Amnesty issued its formal retraction. *See also supra* text accompanying note 406.

⁵⁵⁰ Hadfield, House & Trebilcock, *supra* note 535.

⁵⁵¹ *Id.*

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V. REGULATING HUMAN RIGHTS NGOs: SOME PRELIMINARY GUIDELINES

As the previous sections of this paper have argued, fundamental problems exist in the way NGOs finance, conduct, report, and publicize their operations. These problems have been exacerbated by the unprecedented and unregulated growth of NGO numbers, issue-areas, financial contributions, influence and power within the international system. Furthermore, the informal controls typically cited in defense or preserve of unfettered HRO activity are demonstrably inadequate for effectively maintaining minimal industry standards, particularly in light of newfound communications abilities generated by recent technological advancements. Against this background, and with a desire to promote the continued progress of human rights norms, this paper argues that a self-initiated regulatory system provides the most effective and least intrusive means for promoting credibility, authoritativeness and transparency within the human rights NGO community.

Understandably, this conclusion may provoke the ire of many HRO activists and observers, as being heavy-handed, interventionist, or worse, detrimental to the promotion and enforcement of human rights. Sikkink agrees that NGOs “may need to think about mechanisms that other professions use to ensure accountability” if they want to safeguard “their role as social change professionals.” However, she remains ambivalent to “credentialing, monitoring the behavior of members, [or] setting standards for professional behavior,” since these prospects may “undermine what is unique about NGOs—their flexibility to respond rapidly, their gadfly quality, and the informality of the global networks.”⁵⁵² The arguments advanced here persuasively demonstrate that the alternative of doing nothing risks the undermining of recognized international human rights norms as well as the continued delegitimizing of the entire HRO sector.⁵⁵³ Moreover, inaction at this stage will only strengthen the resolve of critics already hostile to the function of HROs in the international system, who argue that the “time for dismantling these [organizations] and creating new, apolitical and profes-

⁵⁵² Sikkink, *supra* note 93, at 315.

⁵⁵³ For the purpose of illustration, consider the government of Canada’s recently announced report on immigration consultants, which identifies “the fact that certain consultants have abused the trust [of] their clients” as being “detrimental to the profession as a whole,” and a central justification for regulating the profession. B. Trister & R. Augenfeld, *Report of the Advisory Committee On Regulating Immigration Consultants 5* (2003), available at <http://www.cic.gc.ca/english/pdf/pub/regulate-consult.pdf>, last visited December 10, 2004.

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sional . . . agencies is long overdue.”⁵⁵⁴ Ultimately, given the gravity of the existing situation, it behooves committed and sincere HRO activists to finally acknowledge *and act upon* the need to get their own house in order before the edifice topples over and buries the just cause of international human rights in its rubble.

A. *What Does Regulation Mean?*

At this point, the most obvious question that arises is what does regulation mean exactly? The vision this paper proposes is a modest one, whereby regulation is sufficient to establish a level of objective standards and provide the tools necessary for encouraging all HROs to abide by them. According to Trebilcock, consumer protection regulation “is only likely to make consumers better off if it either a) improves consumer estimates of the value of information or b) reduces the cost of information to consumers (or both).”⁵⁵⁵ Therefore, regulation of HROs should serve to promote clarity with respect to how a given organization may label itself as a human rights organization, what activities fall within HRO mandates, and what guidelines are applied when collecting and disseminating information on human rights abuses. In this manner, by promoting better definition, enhanced credibility, and greater accountability, NGOs assuredly can improve consumer estimates of the value of their information.

B. *Who Would Regulate?*

One certainty in designing a regulatory framework is that governments would have no role to play in setting HRO standards. Nongovernmental organizations generally are uneasy about government intervention in their operations, and government track records with respect to NGO regulatory legislation justify this apprehension. For example, in 1994, the Suharto regime in Indonesia announced its intent to “regulate the formation, funding, operations, and dissolution of all Indonesian NGOs.” Although never

⁵⁵⁴ G. M. Steinberg, *The Dirty Politics of Humanitarian Aid*, JERUSALEM POST, Apr. 19, 2002, at A8. Steinberg argues, for example, that Human Rights Watch “is not a humanitarian agency, but another hostile political organization. If members of this group were allowed to enter the Palestinian areas. . . past behavior shows that they would use this opportunity to increase the volume of anti-Israeli propaganda that is used to justify more homicide bombings.” Steinberg also refers to Human Rights Watch as an “NGO superpower” eager “to join the Palestinian propaganda campaign to demonize Israel.” G. M. Steinberg, *Human “Wrongs”: Durban, Jenin, Gaza*, NAT’L REV. ONLINE, July 25, 2002, available at <http://www.nationalreview.com/comment/comment-steinberg072502.asp>, last visited December 10, 2003.

⁵⁵⁵ Hadfield, House & Trebilcock, *supra* note 535.

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implemented, the regulations allegedly stipulated that any NGO could be banned if it was found to be “undermining the authority [of the state,] discrediting the government . . . hindering the implementation of national development or engaged in other activity that upsets political stability and security.”⁵⁵⁶ More recently, Human Rights First (HRF) expressed its concern over a proposed NGO bill in Zimbabwe that “threatens the independence of nongovernmental organizations, in particular of those organizations that work to promote and protect basic human rights.” According to HRF, if passed, this legislation would “undermine the essential independence of NGOs” by requiring them “to submit applications for registration to a government-controlled council” and forbidding them “from receiving foreign funding.”⁵⁵⁷ There have been numerous additional cases of heavy-handed attempts at NGO regulations in countries such as India and Egypt, and by the Palestinian Authority.⁵⁵⁸

Any effort to develop HRO regulations therefore ought to be advanced by a representative consortium of leading HROs, working together with independent academic and judicial figures having expertise in international law, human rights and regulatory systems. The makeup of this working group will ensure that HROs are able to take ownership of the final product while ensuring that the provisions drafted are both sufficient and effective enough to boost the industry’s legitimacy and professionalism.⁵⁵⁹ Admittedly, this task is not a simple one. As noted above, NGOs are notorious for safeguarding their independence. According to one UN official, coordinating NGOs is “just like coordinating states, ‘like herding cats.’”⁵⁶⁰

⁵⁵⁶ J.V. Riker, *NGOs, Transnational Networks, International Donor Agencies, and the Prospects for Democratic Governance in Indonesia* in *RESTRUCTURING WORLD POLITICS*, *supra* note 93, at 194. Indonesian NGOs reacted by issuing a joint statement rejecting the regulations, yet protests triggered increased harassment of NGOs on the part of the Suharto government.

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⁵⁵⁷ Human Rights First, “Letter to Zimbabwean President Robert Mugabe” (Oct. 5, 2004), *available at* <http://www.humanrightsfirst.org/defenders/pdf/ngo-mugabe-100504.pdf>, last visited December 10, 2004. Human Rights First is the new name of the Lawyer’s Committee for Human Rights. *See supra* note 258.

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⁵⁵⁸ For example, the Egyptian Organization for Human Rights decried a recent draft Egyptian law aimed at regulating NGOs as evidence of “the hostile policy of the government,” since it allegedly “gives the executive authority an excessive power over NGOs, restricting and hindering their work,” *supra* note 473.

⁵⁵⁹ Baehr agrees with the essence of this approach, reasoning that NGOs themselves should “find the ways to organize their own international cooperation.” Baehr, *supra* note 123. *See also* Ritchie, *supra* note 486, at 186.

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⁵⁶⁰ Baehr, *supra* note 123.

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Nevertheless, the critical nature of this mission and an appreciation for the future status of human rights should help promote a spirit of cooperation and professionalism necessary to advance this momentous undertaking.

C. *What Would Regulations Cover?*

With an eye towards creating identifiable and objective standards for human rights NGOs, regulations ought to establish guidelines covering a broad array of issues including but not limited to:

- mandate delineation;
- professional staff and board membership criteria;
- financing and financial disclosure transparency;
- best practices for operations, including research, fact-finding, reporting and Internet communications;
- best practices for working with international and national HROs as well as during times of crisis and war;⁵⁶¹ and
- protocols for issuing public retractions and making amendments in the event of publication of erroneous or misleading materials.

In addition, the working group should consider developing supplemental regulations based on the specific nature of HRO work, such as advocacy, litigation, reporting, or education-intensive operations.

D. *How Would Standards Be Monitored or Enforced?*

A diverse range of regulatory solutions already exists across various industries and professions. For example, attorneys and physicians are typically beholden to their respective Bar or Medical Board and membership is a prerequisite to practice. In a similar manner, manufacturers of home appliances aspire to meet standards that will ensure their products obtain the Good Housekeeping Seal of Approval. Another model that may be considered for determining HRO credibility could follow along the lines of publications like *Consumer Reports*, which independently ranks the quality and value of consumer products. In the context of HROs, this type of publication would be disseminated to foundations, governments, the media and the general public, and provide an authoritative ranking of HROs based on factors such as transparency and accountability. This type of report

⁵⁶¹ For example, in the Sudan and Somalia, “NGOs have subsidized warring factions by making direct and indirect payments to gain access” for humanitarian purposes. Simmons, *supra* note 13, at 88.

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could also be used to expose HROs which remain unwilling to submit data or demonstrate substandard conduct.

Whether the optimal system for enforcing standards comes in the form of an independent monitoring agency, annual ratings measuring quality and reliability, or simply standardizing best practices for financial agreements and fact-finding missions,⁵⁶² should, as noted above, ideally be left to the working group. Still, it seems clear that something greater than experience rankings ought to be considered, as this option essentially endorses the use of past performance as an indicator of future performance. Similarly, non-binding best practices lack the teeth necessary to address the HRO crisis as it has been portrayed here. As Trebilcock notes, a third party monitoring body may effectively “generate mechanisms to provide information [to consumers] on the risk and value of transactions.”⁵⁶³ However, to function effectively, such a body would need legitimacy and authority that can only come from within the industry itself.

As the European Commission has reasoned:

The right of citizens to form associations to pursue a common purpose is a fundamental freedom in a democracy. Belonging to an association provides an opportunity for citizens to participate actively in new ways other than or in addition to involvement in political parties or trade unions.⁵⁶⁴

Accordingly, a basic assumption at this preliminary stage remains that any envisioned independent body would have its ability to carry out internal HRO audits or recommend penalties *strictly limited* to those organizations that voluntarily choose to accept the oversight of the independent body. In other words, this proposal does not seek to bind HROs that refuse or are otherwise unwilling to accept the relevant standards. That said, only HROs agreeing to independent oversight will benefit from the credibility and legitimacy dividend resulting from such a process. Thus, while individuals may remain free to establish fly-by-night HROs, recognized HROs will have an authoritative and objective tool that can be harnessed to credential themselves in the eyes of the media, governments, intergovernmental agencies, courts and the public at large.

The advantages associated with securing an external audit are already beginning to pierce the thick skin of NGO independence. For exam-

⁵⁶² These suggestions are borrowed from Hadfield, House & Trebilcock, *supra* note 535.

⁵⁶³ *Id.*

⁵⁶⁴ *Building a Stronger Partnership*, *supra* note 98.

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ple, although not an HRO, Montreal-based *Faites de la Musique* (FDM) is the first North American NGO to obtain a fiduciary rating that measures overall trustworthiness rather than simple credit worthiness. Significantly, FDM's decision to seek a fiduciary rating is evidence of a growing international trend that reflects a new approach to the NGO sector. RCP & Partners, the agency responsible for FDM's audit, has already "rated 70 non-governmental organizations in Europe, Asia and Latin America."⁵⁶⁵ Its rating methodology seeks to evaluate "the stability of an organization and its ability to fulfil the purpose of its mission and maintain the consistency of its services to beneficiaries."⁵⁶⁶ According to the chairman of FDM, the NGO had no other choice:

We had to make a serious show of diligence and transparency to assert our credibility in the market. If we are going to raise funds on the public market, we need to be more accountable and better managed.⁵⁶⁷

Unquestionably, the trend towards favoring external oversight within the NGO sector at large confirms the urgency and necessity of advancing a similar endeavor among HROs. Inevitably, the momentum associated with this trend will reach the guarded gates of the human rights community and proceed to expose the industry's credibility gap, resulting in a potentially catastrophic devaluation of HRO authority. Thus, against this backdrop, the most sensible decision available to the HRO community points to preempting the inevitable by adopting an independent regulatory framework designed to promote accountability, professionalism and respect for the principles of human rights.

One potential model for this type of independent regulatory system may be found in the European Union's Eco-Management and Audit Scheme (EMAS), "a voluntary initiative designed to improve companies' environmental performance."⁵⁶⁸ EMAS, the most demanding environmental management system to date, aims to identify and reward organizations "that

⁵⁶⁵ B. Critchley, *Credit Rating for NGO a First for North America*, FIN. POST, Dec. 6, 2002, available at <http://www.globalpolicy.org/ngos/credib/2002/1206credit.htm>, last visited December 10, 2004. Of the 70 NGOs rated by RCP & Partners to date, about one-third obtained a "good" rating.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ EMAS, *Introducing EMAS*, available at <http://www.emas.org.uk/aboutemas/intro.htm>, last visited May 28, 2003. Although EMAS is in actuality a European Union initiative operating under EU Regulation 761/2001, its structure could easily be adopted to function as an independent, non-governmental body.

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go beyond minimum legal compliance and continuously improve their environmental performance.” Significantly, this scheme requires participating companies to “regularly produce a public environmental statement that reports on their environmental performance.” The accuracy and reliability of these statements are then “independently checked by an environmental verifier,” which in turn lends member organizations “enhanced credibility and recognition.”⁵⁶⁹ Although EMAS concentrates on environmental regulation, it is easy to see how its operating principles could be exported to the HRO industry. In this way, HROs could benefit from advantages similar to those generated by EMAS, including:

- deriving a credibility dividend for having independently validated operating procedures;
- preempting growing expectations and pressures for verified human rights reporting;
- demonstrating a concrete commitment to the principles of international human rights and to the HRO industry in general;
- securing internal efficiencies and managing reporting risks; and
- accessing new sources of funding and media opportunities.⁵⁷⁰

Perhaps the most promising benefit of the EMAS model is that, in addition to benefiting member organizations, it actively protects its overall credibility with teeth. For example, if a firm with EMAS registration is found in breach of regulation, that firm’s status is revoked until the issue is completely rectified. Recently, EMAS suspended a British chemical firm, AH Marks, for breaching environmental regulations. Among the problems cited as cause for the suspension, an AH Marks plant demonstrated poor management and failed to properly train its staff.⁵⁷¹ Indeed, the rule that non-compliant organizations must be suspended is a key element differenti-

⁵⁶⁹ *Id.*

⁵⁷⁰ EMAS, *Why You Should Register*, available at <http://www.emas.org.uk/why/register/intro.htm>, last visited December 29, 2004.

⁵⁷¹ Anglo-Welsh Environment Agency, *Poor Management Leads to EMAS Suspension* (Mar. 7, 2003) available at <http://www.environment-agency.gov.uk/news>, last visited December 10, 2003. The issue of staff training is immediately relevant to the need for HRO standards discussed here.

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ating EMAS from other international environmental management standards, such as the International Organization for Standardization's ISO 14001.⁵⁷²

E. What Benefits Would Standards Create?

As discussed in the EMAS model outlined above, the introduction of regulations to govern HRO conduct promises a number of valuable benefits that will boost the accountability of human rights NGOs as well as safeguard the legitimacy of human rights principles. More specifically, reorganizing the HRO marketplace and providing a standard for meaningfully differentiating between HROs can minimize the impact of faulty or frivolous human rights claims, financial misdealings and politically motivated actions. Accredited HROs will be able to place governments on notice that their allegations carry the added weight of independent oversight, and pursuant to this, they likely will marshal greater influence and support on the international level. At the same time, the introduction of regulations will also empower HROs to confront swiftly and dispose of accusations of bias typically raised by actors seeking to downplay HRO charges of human rights violations. Simply stated, HROs agreeing to oversight will be invigorated by a newfound credibility that commands greater authority, while those organizations electing not to adopt—or unable to adopt—standards will be left behind, stripped of their ability to ride on the wave of credibility and authoritativeness traditionally associated with NGOs and human rights.

VI. CONCLUSION

In June 2003, as the original draft for this paper neared completion, the American Enterprise Institute (AEI), a Washington, DC-based conservative think-tank, launched NGOWatch.org, a website dedicated to tracking NGO agendas, sources of funding and levels of accountability. This move triggered a firestorm of protest among supporters of the NGO movement, who labeled the project nothing less than “a McCarthyite blacklist”⁵⁷³ and rhetorically wondered whether AEI had “lost contact with reality.”⁵⁷⁴ To be certain, the vociferous and combative response to the prospect of third party monitoring of NGO activities underscores the urgent need for a less knee-jerk reaction to the question of NGO—and specifically in this

⁵⁷² ENDS Environmental Data Services, *Europe's EMAS Scheme Shows Its Teeth*, ENDS ENVIRONMENT DAILY (Mar. 14, 2003), available at <http://www.environmentdaily.com/articles/index.cfm?action=article&ref=14054>, last visited December 10, 2003.

⁵⁷³ Klein, *supra* note 10.

⁵⁷⁴ Nader, *supra* note 10.

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context, HRO—accountability, making the arguments and ideas developed here even more relevant today. The move by AEI to establish a watchdog mechanism to monitor NGO activities is a clear indication that if NGOs fail to introduce tools to regulate their industry, other actors will not only retain a valid basis for critiquing NGO activities, but also may take steps to assume an oversight function themselves. More dishearteningly, the reaction of NGO supporters to the AEI initiative confirms the current inability of these activists to openly acknowledge the glaring shortcomings of the industry and the urgent need for some kind of reform directed at enhancing accountability.

If NGO activists truly are committed to defending the important role carved out by human rights organizations and advancing the cause of human rights, they must quickly set aside their traditional affinity for a stubborn brand of independence and embrace a plan for introducing formal regulations to protect their industry. As this paper has clearly demonstrated, reliance on traditional informal controls are no longer effective for ensuring quality within the industry, and moreover, risk exposing HROs to attacks regarding their relevancy and objectivity. At the same time, it is equally clear that any form of regulation cannot be imposed or enforced by government. This said, preservation of what Sikkink identifies as unique in NGOs—“their flexibility to respond rapidly, their gadfly quality, and the informality of the global networks”⁵⁷⁵—can no longer outweigh the need to safeguard their role as agents for social change. Simply put, the continued failure to develop a more comprehensive and thoughtful response to external critiques and efforts at oversight will result in HROs compromising their credibility and incrementally relegating their place on the pedestal as the darling of international society.

This paper has demonstrated that an alternative to the Manichean confrontation between NGO activists on one hand and putative third party regulators on the other is not only possible but necessary. By acknowledging the need for and legitimacy of standards and regulations, HROs can position themselves not only to reformulate their own activities, but also to take a lead role in how the NGO industry as a whole conducts its operations. Furthermore, by taking control of and responsibility for the regulatory process as proposed above—including how standards will manifest themselves—HROs can develop a convincing and comprehensive response to those who seek to challenge their legitimacy both from within and from without.

⁵⁷⁵ Sikkink, *supra* note 93, at 315.