Accounting for NGOs

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I. INTRODUCTION

Non-governmental organizations have enjoyed a phenomenally rapid rise on the world scene. Only a decade ago, few were familiar with the acronym "NGO." Today, it is on the way to becoming one of those few short-hands that has achieved nearly universal recognition. Although NGOs are hardly new to this era, as several recent histories attest,\(^1\) the end of the Cold War and the advent of globalization have empowered NGOs. The same developments that have dethroned the nation-state from its centuries-long near-monopoly on international relations have worked to enhance NGO capacities. Among other features of globalization, the communications revolution, the diminished threat of unrestrained armed conflict among states, and the increasing fluidity of national boundaries have compressed the relative powers of states and non-state actors, making the latter's rise appear all the more dramatic. It might be a bit of an exaggeration to tag this the age of non-state actors, but their rise is among the central features of contemporary global affairs.\(^2\)

In the wake of this newfound power, commentators are coming increasingly to question the legitimacy of NGOs and the influence they now exert at the international level.\(^3\) This response is unsurprising, given the general perception (not

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2. Reflecting the rise of non-state actors, the academic and policy literature on NGOs has itself exploded. For a useful annotated bibliography, see Ann M. Florini, ed, The Third Force: The Rise of Transnational Civil Society 241–76 (Carnegie Endowment for International Peace 2000).
all that well founded) of NGOs as working to advance progressive agendas. For those for whom national sovereignty has emerged as a rallying call, NGOs are now being lumped together with faceless bureaucrats in Geneva as the bugaboos of global governance. In this view, NGOs have mounted a sort of free-form coup against international institutions, representing nothing more than themselves.

Those who resist the assertion of NGO power are perhaps most resistant to their participation in formal international decisionmaking. That seems to me exactly the wrong answer to the NGO challenge. Wherever power is exercised, questions of accountability are appropriately posed. One can never assume that power will be deployed in a responsible manner; indeed, where power-shifts have not yet been reflected in the decisionmaking architecture, one can assume the opportunity for abuse. NGOs now garner power independent of states and other entities; international law and international institutions, however, are still largely premised on a world in which states have the last word. Some who question NGO legitimacy would simply wish a return to the old world in which states aggregately held most associational power. That would, indeed, take care of the issue of NGO accountability. But that seems an unrealistic response. Insofar as NGO power is beyond the control of states and their intergovernmental creatures, it cannot be reversed by the policymakers.

Rather, in what might be called the inclusion paradox, the accountability challenge may be better answered by formally and fully recognizing NGO power in international institutional architectures. Formal NGO participation in international decisionmaking would have the effect of outing NGO power and advancing a transparency objective. It would also hold NGOs, as repeat players, accountable to institutional bargains. NGOs now participate in international negotiations in hallways or through state surrogates. But because their participation is informal, they are free subsequently to reject results not to their liking. That threatens to keep the international lawmaking process unstable at a crucial juncture in its evolution.

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Casey, The Rocky Shoals of International Law, 62 Natl Interest 35, 37 (2000-01) ("NGOs are not elected, not accountable to any body politic"); John Micklethwait and Adrian Wooldridge, The Globalization Backlash, Foreign Pol 16, 24 (Sept/Oct 2001) ("NGOs claim to represent global civil society. But nobody elects them").

II. UNPACKING ACCOUNTABILITY: TO CONSTITUENCIES AND TO PROCESS

The accountability card often conflates two types of accountability: internal and external. Internal accountability confronts the agency problem of representation of memberships by a necessarily limited numbers of leaders. External accountability addresses the responsiveness of organizations to larger systems of which they are a part. As deployed against NGOs, the first problem is exaggerated, and the second is better answered by elevating, not suppressing, the status of NGOs in the international context.

A. INTERNAL ACCOUNTABILITY

There is no doubt that NGO staffs have wide discretion in representing their members or other less formal constituencies, in many cases wider than that enjoyed by governmental representatives. In the category of membership organizations, with a few notable exceptions (Amnesty International and the Sierra Club among them), the leaderships of most NGOs are not formally elected or otherwise directly answerable to individual members. The vast majority of such individual members, safe to say, are passive, with a material commitment that may not exceed nominal annual dues. Individual members are unlikely to monitor complete organizational agendas; insofar as they do engage in such monitoring, they are unlikely to take NGO leaderships to task on particular issues. NGO executive directorates have membership dues and other funds at their disposal, with few strings attached, and can claim to speak for thousands, sometimes millions, of members who, as a practical matter, exercise little scrutiny of their representatives. The problem may be aggravated in the context of non-membership organizations whose staffs more neatly fit the “free agent” description, arguably advancing no agenda beyond their own.

But these problematizations of internal NGO accountability seem unable to address at least two possible objections. First, they discount the possibility of competition among NGOs as a form of discipline. Unlike citizens vis-à-vis states, the costs of exit for members of NGOs are relatively low. No NGO (at least as defined as an advocacy group) has a monopoly in any particular issue context. Assuming some basic level of monitoring, now often facilitated by the mainstream media, one can simply let a membership lapse in the wake of a disagreement with an NGO’s policy or tactics, and turn those dollars or other forms of commitment over to another group instead. If nothing else, a group that is ineffective or unresponsive will lose members and other sources of support; in no model where choice is available will a loser sustain

5. See, for example, Moisés Naim, Lori’s War, Foreign Pol 28, 39 (Spring 2000) (quoting Public Citizen executive director Lori Wallach, “[t]he times that we’ve gone off on issues that they [members] didn’t find important or valuable, they stopped being members”).
support over the long-term. It is true that some groups (Amnesty International and Greenpeace, for example) have achieved something approaching primacy in their areas, to the point that market failure becomes a risk. But even Amnesty International and Greenpeace do not have free rein. Amnesty International’s leadership is checked by a strict internal governance structure, which appears to have minimized internal organization difficulties. Greenpeace, by contrast, has suffered periods of internal strife, which demonstrates that members do pay attention when it comes to the broader policy orientation of an NGO behemoth. Non-member groups are kept on a tighter leash by sophisticated funders (especially foundations), nor can they wave around membership rolls by way of attempting to enhance their influence. If a non-membership group does not show results or follow a funder’s directive, discipline can be swift and effective.

The second response to charges of internal unaccountability highlights the fetishization of other forms of associations. In this context the democratic state is implicitly idealized on the accountability metric, especially by virtue of periodic elections. But accountability is a relative, not an absolute, quantity, and the franchise is itself a crude tool for keeping governmental authorities in line. This is true even in the legislative context, where multiple issues will afford representatives wide discretion, even against collective constituent preferences. (Of course, it may be more difficult to buck the interests of financial contributors, but that feature of modern democracy is rarely held up as a systemic virtue.) This phenomenon is more characteristic of the foreign policy realm. Here, the relevant decisionmaker is typically the executive branch. Particular foreign policy decisions, on anything but the most grave issues of national security, are unlikely to be scrutinized by the average voter (leaving aside the large numbers who do not bother to vote at all). Only a tiny minority will be aware of governmental positions in fora such as the Convention on the Law of the Sea, Commission on Sustainable Development, or the Human Rights Committee, much less determine their votes on that basis. Governments can get away with an awful lot before having to answer to their memberships, and yet of course that has supplied no argument against their participation in international institutions.

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6. Not that Amnesty International has not witnessed deep internal divisions, as was the case with respect to advocating rights based on sexual orientation. See James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 Hastings Int'l & Comp L Rev 1, 72 (1994) (describing controversy surrounding interpretation of the group’s mandate to include those imprisoned on the basis of sexual orientation as ‘prisoners of conscience’). But these disagreements have been institutionally channeled so as to minimize organizational disruption.


8. Even today, of course, democracy is not a precondition for international recognition in the context of governments. That makes the idealization of state accountability more stark. Iraq’s seat in the
Indeed, insofar as NGOs tend to be focused on a limited set of issues, their members will be in a better position to monitor and discipline leaderships than are voters with respect to governmental representation. Unlike in the NGO context, the costs of exit from states are quite high. Assume that both Democrats and Republicans (who have together effectively captured the governance market in the United States, and have long foreclosed the efficacy of third parties) have the same position on a particular global policy issue. A US citizen might in theory be able to change her citizenship in disagreement, but such a response would be improbable. The contrast to NGOs is clear.

NGOs are perhaps more appropriately compared to corporations for accountability purposes. (Of course, corporations are also non-state actors, with recently unleashed international capacities.) In the corporate context, shareholders play the role of NGO members; shareholders may control the corporation as a formal matter, but as a practical one, they are often powerless (in the face of high monitoring costs and collective action problems) to control directors and management. That is not to say, however, that corporations are unaccountable. In most cases shareholders enjoy the exit options of selling their shares, in rather the same way that NGO members can decline to renew their memberships. Accountability and agency problems are central to corporate law, but are confronted as a challenge amenable to at least incremental amelioration. One does not argue against the legitimacy of corporations vel non because the agency puzzles will never be fully solved. That should inform a similar orientation with respect to the internal accountability of NGOs. There is surely room for enhancing the discipline of NGO representatives, made all the more important in the wake of their new global prominence. In the end, however, this is a question of international not-for-profit law. It may be more than technical, and will in fact require creative thinking, parallel to the demands globalization poses in

9. And entrance is often involuntary, insofar as most individuals acquire citizenship by birth. Leaving aside NGOs purporting to represent ascriptive groups exclusively (as in the case of indigenous peoples), see Benedict Kingsbury, First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society, 3 Chi J Intl L 183 (2002), membership in NGOs is more typically the result of individual choice.

10. This line of reasoning also explains in part the source of NGO power. NGOs represent an alternate channel of representation for dissenters from governmental positions. Even assuming perfect democratic representation by governments, minority elements may be left without a voice at the international level. In this respect, NGOs are part of the answer to another accountability problem—that of governments. NGOs supply issue-specific, partial exit options for individuals for purposes of global policy that will help discipline governments through a mechanism other than the ballot box.
the corporate law context. But there is no strong argument here against NGO participation in international institutions.

B. EXTERNAL ACCOUNTABILITY

Issues of external accountability are more submerged and challenging, insofar as they are usually taken as prior. The question here is how to keep NGOs accountable to the system in which they are exercising power. Before the end of the Cold War and the advent of globalization, NGOs worked through states and had little independent influence; in that context, there was no need to address the issue. Today, the problem is potentially serious. NGOs are significant, independent players in the global system, and yet the system does not recognize them as such. As a result, NGOs comprise a potentially destabilizing force. They can 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 responsible for their conduct; they cannot violate international law or agreements. That was fine as long as NGOs remained under the control of another entity who was held responsible for their conduct—namely, the state—but as that control has eroded, NGOs have been able to play the role of policy potentates. NGOs participate in international standard-setting in institutional settings, by influencing state parties to formal negotiations, in some cases through delegation capture. At environmental negotiations, Greenpeace and other powerful NGOs pull more influence than do many states. This participation is rarely formal, or at least formal participation is subordinated, consistent with traditional conceptions of international law under which NGOs have no legal personality.

This lack of standing can work to NGO advantage. Because the participation in international decisionmaking is informal, NGOs have no obligation to respect decisionmaking results. They first work inside the halls of power, securing what they can in formal and institutionalized results (conventions, for example). What they don't get on the inside, however, they can try to secure through other means, rejecting those elements of institutional bargains not to their liking. Insofar as NGOs garner independent power, that rejection can be consequential. By mobilizing consumer constituencies, most notably, NGOs can set regulatory-like standards even where formal regulation would be beyond reach. They enjoy many of the advantages of participation rights without the downside of having to abide by agreements that will inevitably reflect compromise and other interests.¹¹

This leads to what might be called the inclusion paradox. States resist enhancing the formal status of non-state actors in international decisionmaking for fear that it will further fuel the rise of NGOs and threaten the monopoly of states over

¹¹ For more discussion, see Spiro, 18 Cardozo L. Rev at 962–63 (cited in note 4).
international lawmaking. But the formal inclusion of non-state actors in international decisionmaking might act more as a restraint on NGO power than an accelerant. Major NGO players already effectively have a seat at the table. Formal and direct participation would not add much to their influence, but it would increase their external accountability. No longer could NGOs opt out of bargains to which they had attached their names. As ongoing institutional participants, they would have a greater incentive to facilitate institutional success. Advocacy groups would no longer be able to launder their influence through pliant front-states or backroom lobbying. In that respect, formal inclusion would also enhance transparency, as well as accountability, among NGOs. Major NGO players would have to answer to their lesser counterparts were they to enjoy rights to represent broad non-state interests in international decisionmaking.

As a matter of international legal doctrine, the upshot would be formal legal personality for non-state actors, with the rights and responsibilities that such status entails. Rights would apply primarily in matters of participation. The modalities here may be complex and institutionally variable. Selecting participants from among a potentially infinite number of eligible NGOs would present one notable question. In some contexts that challenge appears to have been overcome, for instance, in composing "liaison" committees between non-state and governmental forums at the world summits on women, population and development, human rights, and other subjects. The International Labor Organization, in which employers and unions are directly represented along with states, demonstrates the efficacy of formal non-state participation. Waystation possibilities include advisory committees, as already innovated by the World Bank and the Organization for Economic Cooperation and Development. In judicial-type tribunals, standing to bring suit and to participate in amicus capacities present logical end-points. Here the domestic models translate more easily, as gate-keeping is more easily undertaken. The European Court of Justice now accepts NGO submissions, and NGO amicus participation in the World Trade Organization appears inevitable.

On the responsibilities side, one could begin to speak of international law violations by entities other than states. Symmetrical to rights of participation would be obligations to respect negotiated results. In most cases, it would be difficult to speak of NGO "compliance," insofar as NGO conduct is typically not the object of regulatory regimes. Amnesty International, for example, is itself not the target of human rights norms; it is not the sort of organization that can engage in torture, undertake detentions, or suppress public speech. But NGOs could nonetheless be

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12. One can imagine some norms that would be entity-applicable to NGOs; for instance, non-discrimination principles with respect to membership. Corporations, of course, comprise a category of non-state actor which would lend itself to such compliance models. This is clearly the case in the environmental context, where corporations are typically the ultimate object of regulation. There
meaningfully held to the bargains that they have entered into in standard-setting processes, so that they could not undertake extra-institutional action to undermine such bargains. If formally accountable to the process, Greenpeace could not launch a boycott seeking to advance protective standards different from those negotiated among relevant international actors (corporations included). In this respect, formal recognition of NGOs would enhance their external accountability.

III. ACCOUNTABILITY AND PROCESS STABILITY IN INTERNATIONAL LAW

External accountability is already being innovated outside of public international institutions. Advocacy NGOs and transnational corporations have been negotiating agreements to govern corporate conduct on such issues as labor rights and environmental protection. Some of these agreements are being elaborated into refined codes of conduct, complete with comprehensive monitoring schemes. For big corporations, these arrangements are “voluntary” in name only, and the standards they set are beginning to look like law. Corporations participate because such schemes insure the external accountability of the counterpart NGOs and enhance regime certainty. NGOs participate because it gives them unmediated power. 13

But the code of conduct model poses its own set of accountability concerns. NGO representation and relations between the various actors will be more difficult to monitor than in a public institutional process. The North-South divide among NGOs may be less vigilantly confronted (with deals struck between NGO executive directors and their corporate CEO Manhattan neighbors, with no voice from the developing world). The risk of conflicts of interest is also magnified in the private sphere. How, for instance, will those regimes police corporate contributions to their supposed NGO guardians? In these early stages, some of these problems can be mitigated through a form of competition among private codes, as is now occurring in the labor rights context. 14 In the long run, however, the barriers to entry will be

13. On codes of conduct, see, for example, Adelle Blackett, Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct, 8 Ind J Global Legal Stud 401 (2001); Ratner, 111 Yale L J at 531-36 (cited in note 12). On global governance beyond public institutions generally, see, for example, A. Claire Cutler, Virginia Haufler, and Tony Porter, eds, Private Authority and International Affairs (SUNY 1999).

14. The currency of this competition is in the number and importance of adherents to particular codes. In the labor context (involving codes of conduct on such issues as child labor, minimum wages, and working conditions), the frontrunner codes are operated on the one hand by the Fair Labor Association, which claims the support of many major apparel manufacturers and prominent human rights organizations (such as the Lawyers Committee for Human Rights and Human Rights...
formidable for initiating new regimes, and this check will be effective only against sustained misfeasance.

Hence the possible virtues of migrating such standard-setting to public institutions. Public institutions focus attention, are more likely to achieve universality of coverage, should facilitate monitoring and enforcement, and are ultimately more likely to promote the legitimacy of international law. Enhanced NGO participation is a necessary condition to the stability of standards established in public institutional contexts. Of course, one could not force NGOs to participate. But if major institutions extended meaningful formal channels for participation, there would be powerful competitive incentives (in terms of attracting members and funding) for particular NGOs to sign on.

This leaves us with an answer that transcends the question posed here. The formal inclusion of non-state actors in institutional decisionmaking will not only advance the accountability of NGOs to the system but will also advance the system itself. Non-state power is a fact of the new world. International law will need to be accountable to that power if it is to emerge as the governor of global affairs into the future.

Watch); on the other, by the Worker Rights Consortium, backed by unions and many prominent American educational institutions. See, for example, Steven Greenhouse, Banishing the Dickensian Factor, NY Times § 4 at 5 (July 9, 2000) (describing competing private initiatives for combating sweatshop labor). See also Gary Gereffi, Ronie Garcia-Johnson, and Erika Sasser, The NGO-Industrial Complex, Foreign Pol 56 (July/Aug 2001) (describing other certification schemes).