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Nongovernmental Organizations and the Forces Against Them: Lessons on the Anti-NGO Movement

Garry W. Jenkins

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NONGOVERNMENTAL ORGANIZATIONS AND THE FORCES AGAINST THEM: LESSONS OF THE ANTI-NGO MOVEMENT

*Garry W. Jenkins**

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INTRODUCTION

By all outward appearances, times have never been better for non-profit organizations, especially for international and foreign-based entities operating around the globe, frequently referred to as nongovern-

* Associate Dean for Academic Affairs and Associate Professor of Law, The Ohio State University Moritz College of Law. The author would like to thank Martha Chamallas, Amy Cohen, and Donald Tobin for their invaluable comments on early drafts of this Article, Dean Alan Michaels for his ongoing support and encouragement, and Jessica Kim and Ryan Lett for their excellent research assistance. Also a debt of gratitude to Susan Azyndar of the Moritz Library for her great work. Finally, additional thanks to Professors Dana Brakman Reiser and Claire Kelly at Brooklyn Law School for organizing the conference on “Governing Civil Society” and the Editorial Board of the Brooklyn Journal of International Law.

mental organizations (“NGOs”). In recent decades the number, size, and impact of international NGOs have expanded greatly.¹ Private voluntary entities regularly work collaboratively with individuals, key government policymakers, multinational corporations, and major intergovernmental institutions on issues of importance to the organization, including emergency humanitarian relief, conflict resolution, economic and social development, environmental protection and sustainability, political consciousness-raising about human and civil rights, and monitoring national and transnational actors.² Although NGOs do not have the law-making authority of the state, their ability to generate what scholars call “soft” law, through campaigning, mobilization, advocacy, lobbying, agenda-setting, and negotiation, is widely acknowledged and put to effective use.³ In some instances, certain societal challenges are left almost entirely to the charitable sector to resolve because neither governments nor private businesses are able or willing to act.⁴ As a result, NGOs have become a powerful force in global governance.⁵ According to President Bill Clinton:

The impact of . . . three trends—the growth of civil society in the developing world, the vast pool of new wealth available for giving, and the rising influence of small donors—has been reinforced by the proven ability of NGOs of all sizes and missions to have a positive effect on problems at home and abroad, often in partnership with governments and local NGOs in developing countries.⁶

1. ETHICAL QUESTIONS AND INTERNATIONAL NGOS: AN EXCHANGE BETWEEN PHILOSOPHERS AND NGOS 1 (Keith Horton & Chris Roche eds., 2010).

2. See Shamima Ahmed, *The Impact of NGOs on International Organizations: Complexities and Considerations*, 36 BROOK. J. INT'L L. 817, 817 (2011).

3. See Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 166, 166–69 (Thomas J. Biersteker et al. eds., 2007); Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1013 (2011); see generally Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 795–96 (2010).

4. Cf. Richard Steinberg, *Economic Theories of Nonprofit Organizations*, in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, 117, 119–25 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (summarizing economics literature explaining nonprofits as a response to market and government failures); Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1121 (2007) (“Nonprofit organizations occupy a critical space between society’s private and public spheres.”).

5. See Alyssa A. Dirusso, *American Nonprofit Law In Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39, 40 (2011).

6. BILL CLINTON, *GIVING: HOW EACH OF US CAN CHANGE THE WORLD* 11 (2007).

Yet critical voices from both the left and the right, private organization “watch” projects, and governments are actively seeking to curb the growing power of nonprofit organizations.⁷ International nonprofits, often criticized for a lack of accountability and legitimacy, are increasingly under attack.⁸

This Article examines the rise of the growing anti-NGO movement. Still modest in size and scope, this movement receives little systematic study and academic attention. This Article thus takes a closer look at the nature and validity of the critiques directed at NGOs. In doing so, it considers the emergent dynamics between two different types of nonprofit organizations: larger donor organizations primarily located in the Global North (i.e., industrialized countries, primarily in Europe and North America) and smaller, grant-receiving “Southern NGOs,” a term used for organizations operating in less-developed countries (whether in the southern hemisphere or not) that usually work on international development issues. Although some of the critiques around NGO representativeness and voice may have poignancy, the typically proposed solution—greater accountability—actually exacerbates the problem. Ironically, as Northern funders attempt to exert control over grantmaking activities to enhance their own accountability, they may also unwittingly weaken the accountability and legitimacy claims of the NGOs they fund. Furthermore, this destructive cycle dilutes the transformative potential of localized civic action and civil society.

Sometimes referred to as the “independent sector,” “nonprofit sector,” “charitable sector,” or “third sector,” nonprofit entities are, in many ways, hybrids of their public- and private-sector counterparts. In some respects nonprofits resemble for-profit corporate entities to the extent that nonprofits are “private, independent, autonomous enterprises,”⁹ but also resemble public sector organizations in their commitment and dedication (in both a moral and legal sense) to advancing the public good (as the supporters may define it).

One critical difference, however, is that nonprofit organizations exist without clear lines of accountability. Corporate and government power each have clear and formal measures of accountability. Corporate power is constrained by shareholders who own equity in the companies. Gov-

7. See *infra* Part II.

8. See, e.g., Mari Fitzduff & Cheyanne Church, *Stepping Up to the Table: NGO Strategies for Influencing Policy on Conflict Issues*, in *NGOS AT THE TABLE* 1, 10–12 (Mari Fitzduff & Cheyanne Church eds., 2004).

9. Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 *CHI.-KENT L. REV.* 571, 573 (2010).

ernment power, at least in the case of democratically controlled governments, is held to account through voting of the collective citizenry. The nonprofit sector, however, lacks equivalent accountability mechanisms.¹⁰ This absence of formal accountability contributes to anxiety about or mistrust of the third sector, especially when its activities begin to cross national borders.

Much has been written examining the rise, risks, claims, and lessons of the anti-globalization¹¹ and anti-corporate movements.¹² Yet less prominent is the parallel criticism about societal threats stemming from the role and influence of humanitarian and international NGOs. The existence of such critics may be especially surprising because Northern NGOs have gained significant recognition for their effective work,¹³ are

10. See PETER FRUMKIN, ON BEING NONPROFIT 5–6 (2002); Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 489 (1996); Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1, 82–85 (2005); see also Dana Brakman Reiser, *Director Independence in the Independent Sector*, 76 FORDHAM L. REV. 795, 813 (2007) [hereinafter, Brakman Reiser, *Director Independence*] (noting that the nonprofit context lacks “clear lines of accountability”).

11. See, e.g., DAVID HELD & ANTHONY MCGREW, GLOBALIZATION/ANTI-GLOBALIZATION: BEYOND THE GREAT DIVIDE (2d ed. 2007); Evan E. Hillebrand, *Deglobalization Scenarios: Who Wins? Who Loses?*, 10 GLOBAL ECON. J. 1, 5 (2010) (describing anti-globalization efforts and suggesting such efforts are the product of nations and powerful economic groups seeking to protect domestic interests); Erika George, *See No Evil? Revisiting Early Visions of the Social Responsibility of Business: Adolf A. Berle's Contribution to Contemporary Conversations*, 33 SEATTLE U. L. REV. 965, 979 (2010) (suggesting corporations must become champions of societal good in response to the growing anti-globalization movement against corporate expansion).

12. See, e.g., EVAN OSBORNE, THE RISE OF THE ANTI-CORPORATE MOVEMENT (2007); Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 86 (2010); see also Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 525–34 (2010) (tracing the history of anti-corporate sentiment in colonial America and Europe).

13. See, e.g., Lisa Schenck, *Climate Change “Crisis”—Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 319, 355 (2008) (discussing NGO contributions in the area of international environmental law); Charles Trueheart, *Medical Aid Group Wins Nobel Prize; Doctors Without Borders Treats Victims, Pushes Peace*, WASH. POST, Oct. 16, 1999, at A1 (noting that the international relief agency which is officially known by its French name, *Médecins Sans Frontières*, won the Nobel Peace Prize in 1999); Felice D. Gaer, *Foreword to SUBCONTRACTING PEACE: THE CHALLENGES OF NGO PEACEBUILDING*, at xv (Oliver P. Richmond & Henry F. Carey eds., 2005) (“Non-governmental organizations and other local actors have conducted some of their most valuable and effective work over the years in the area of peacebuilding . . . This was not always the case.”).

acknowledged as important contributors to civil society,¹⁴ have expanded their global reach, and have become more widely known among the general public.¹⁵ Indeed, public opinion data show that NGOs are widely respected and trusted. In an annual worldwide survey of opinion shapers, NGOs are regularly found to command the highest levels of trust among major institutions.¹⁶

Despite, or perhaps because of, the new visibility of NGOs, they also have been the subject of intense criticism. The rise in anti-NGO rhetoric and activity would be of little interest if it represented a fringe view. However, the critics are also found in the mainstream: public officials have expressed concerns about NGO influence,¹⁷ development scholars have questioned the value of foreign aid and the value of the work conducted by nonprofit organizations,¹⁸ and influential journalists also raised

14. See Nina J. Crimm, *The Moral Hazard of Anti-Terrorism Financing Measures: A Potential To Compromise Civil Societies and National Interests*, 43 WAKE FOREST L. REV. 577, 579 (2008); Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 291 (2004); Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 789 (2007) [hereinafter Jenkins, *Soft Power*].

15. See James McGann & Mary Johnstone, *The Power Shift and the NGO Credibility Crisis*, 11 BROWN J. WORLD AFF. 159, 160; Jim Bencivenga, *Critical Mass*, CHRISTIAN SCI. MONITOR, Feb. 3, 2000, at 15.

16. See Latraviette Smith, *2011 Edelman Trust Barometer Findings*, EDELMAN 11 (2011), <http://www.edelman.com/trust/2011/uploads/Edelman%20Trust%20Barometer%20Global%20Deck.pdf> [hereinafter EDELMAN] (noting that, in the firm's annual survey gauging attitudes about the state of trust, NGOs are the most trusted institution in comparison to business, government, and media across twenty-three countries from 2008–2011).

17. See, e.g., Elaine L. Chao, U.S. Sec'y of Labor, Address at the Federalist Society's National Lawyers Convention Sessions (Nov. 14, 2003), available at http://www.fed-soc.org/doclib/20070924_Chao2003NLC.pdf (“[S]pecial interest agendas [of NGOs] tend to reflect a narrow rather than a broad spectrum of public opinion” and “transparency and accountability are more important than ever before in international organizations”); see also Steve Charnovitz, *Accountability of Non-Governmental Organizations in Global Governance*, in NGO ACCOUNTABILITY: POLITICS, PRINCIPLES, & INNOVATIONS 21, 24–25 (Lisa Jordan & Peter Van Tuijl eds., 2006) (discussing John Bolton's statements—made while serving as Senior Vice President for the American Enterprise Institute—that claim NGOs “see [themselves] as beyond national politics . . . [which has] profoundly anti-democratic implications” and compare the NGO system to fascism by suggesting “Mussolini would smile on the Forum of Civil Society.”).

18. See generally WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006) (criticizing Western aid to the developing world as ineffective at best and harmful at worst); Amy J. Cohen, *Thinking With Culture in Law and Development*, 57 BUFF. L. REV. 511, 571 (2009); Paul Wapner, *Democracy and Social Movements*, 97 AM. SOC'Y INT'L L. PROC. 305, 306 (2003) (discussing criticism of NGOs by scholars).

alarms about NGOs and their work.¹⁹ Further, some evidence suggests that despite the goodwill toward NGOs,²⁰ support may be softening.²¹

The anti-NGO movement is emerging as a force with which to be reckoned. What does this movement mean for those concerned about civil society and for those who value the unique contributions of the nonprofit sector? To begin to answer this question, it is important to understand the various arguments against nonprofit organizations and the creation of pockets of resistance to nonprofit organizations and where they might lead. By beginning to fill in the gap in literature about the growing opposition to nonprofit organizations and their role in global governance, this Article hopes to shed light on debates about nonprofit accountability and legitimacy. Another aim of this Article is to mine the critiques for insights and to suggest ways government policy makers and foundation trustees and managers can establish regulations and implement international philanthropy in ways that support NGOs without emboldening their critics.

This Article proceeds in three parts. Part I introduces the history and background of NGOs, discussing what a nongovernmental organization is and why it is being criticized. It also addresses the concept of accountability as applied to NGOs and attempts to unravel the term's many different meanings and strands. Part II describes the wide range of anti-NGO activities and voices and the typical claims leveled against such organizations. This part examines organized public relations campaigns led by the political right, academic dissent on the left, and anti-NGO lawmaking and political activity by governments on several continents that have sought to limit NGO involvement in policy matters. In sifting through the various arguments and critiques of NGOs, a troubling concern emerges: how to ensure that NGOs formed to reflect the participation, authenticity, and voice of a wide range of interested peoples actually do so, rather than becoming beholden to global elites or outside experts. Part III discusses the implications for the future. In particular, the

19. See, e.g., William Booth, *International Charities Fall Short in Haiti*, WASH. POST, Feb. 2, 2011, at A6 (suggesting that NGOs have become "hobbled by poor coordination, high turnover and a lack of transparency" and "[c]harity groups have been working in Haiti for decades . . . but the country is worse off economically than it was during the dark days of dictator[ship]."); Editorial, *Holding Civic Groups Accountable*, N.Y. TIMES, July 21, 2003, at A18 ("[NGOs] owe it to the public to be accountable and transparent themselves."); Mary Beth Sheridan, *In Aid for Plan for Haiti, U.S. to Rebuild from Government Outward; New Approach Relies more on Statecraft, Less on Web of NGOs*, WASH. POST, Mar. 31, 2010, at A8 (claiming the dependence of Haiti on NGO-provided aid has led to an "atrophied central government").

20. Cf. EDELMAN, *supra* note 16, at 11 and accompanying text.

21. See *infra* text accompanying notes 94–99.

insights gained from a deeper understanding of the anti-NGO fears and criticisms suggest that law, public policy, and governance pressures might presently be working to exacerbate, rather than to alleviate, some of the concerns.

Although I question much of the criticism, disagree with the conclusions, and reject the policy prescriptions of the anti-NGO movement, I appreciate the effort to expose conflicts that arise when philanthropy becomes more about serving funders and less about encouraging self-development. One clear message emerges from this critical examination: it is a mistake to ignore the anti-NGO critics and their arguments. For supporters of NGOs, the weight of the anti-NGO discourse and lawmaking will neither discredit international nonprofit activity nor lead participants to disengage. Rather, it may lead to productive reform. For example some large funders and operating charities may reconsider how their own behavior—especially their aggressive control over programming and policies—may threaten the independence of smaller nonprofits and citizens' groups. Ironically, much of the anti-NGO discourse may end up serving to remind Northern NGOs that if their support is to have a transformative impact, they must empower those closest to the problems. Moreover, reconsideration of grantmaking practices and behaviors that reinforce the dominance of Northern funders over the subservience of Southern NGOs may take on a new sense of urgency in light of a looming anti-NGO threat.

I. UNDERSTANDING NGOS

Over the past decade and a half, NGOs have risen in the public consciousness, and are now a part of everyday conversation. Today an idealistic young person who seeks to change the world often wants to work for an NGO. Despite such visibility and ubiquity, the term “nongovernmental organization” is still confusing to some, lacking a consistent and settled definition.²²

Nonprofit organizations are critically important contributors to civil society.²³ NGOs generally represent people apart from, and sometimes against, the state. In addition to the traditional roles associated with

22. See SHAMIMA AHMED & DAVID M. POTTER, NGOs IN INTERNATIONAL POLITICS 8–9 (2006).

23. See Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 571–78 (1998); Lakshman Guruswamy, *State Responsibility in Promoting Environmental Corporate Accountability*, 21 FORDHAM ENVTL. L. REV. 209, 231 (2010); Jenkins, *Soft Power*, *supra* note 14, at 789; Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 830–31, 867–74 (2003).

cross-border and locally-based organizations in the developing world such as basic disaster relief, the work of the modern NGO also may include economic and social development,²⁴ political advocacy,²⁵ public education and awareness,²⁶ agenda setting,²⁷ political representation and enforcement,²⁸ and corporate monitoring and reporting,²⁹ among other activities. In contrast to corporations that represent business interests, NGOs have been described as “people’s organizations.”³⁰

Although there may be a tendency to think of NGOs as a monolithic collective, individual organizations vary considerably. The interests of NGOs vary widely. For instance, NGOs may provide direct basic services, organize communities to formulate solutions to problems, or advocate the implementation of particular policies.³¹ They focus on a wide range of activities and differ in their organizational structures and sources of support. Most NGOs receive funding from one or more sources, including donations, grants, contracts, fees for services, product sales, and membership dues.³² They may be centrally organized or loose-

24. See HELMUT K. ANHEIER & LESTER M. SALAMON, *THE NONPROFIT SECTOR IN THE DEVELOPING WORLD 2* (1998); Jenkins, *Soft Power*, *supra* note 14, at 790.

25. See MARC LINDENBERG & CORALIE BRYANT, *GOING GLOBAL: TRANSFORMING RELIEF AND DEVELOPMENT NGOS* 173–206 (2001).

26. See David Moore, *Safeguarding Civil Society in Politically Complex Environments*, *INT'L J. NOT-FOR-PROFIT L.*, June 2007, at 3, 7–11.

27. See Masudul K. Biswas, *Developmental Issues in News Media: NGO-Media Interaction in Bangladesh*, *INT'L J. NOT-FOR-PROFIT L.*, June 2007, at 77, 85–86; Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 *LAW & INEQ.* 467, 482–83 (2007).

28. See, e.g., Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 *BROOK. J. INT'L L.* 911 (2011) (analyzing NGOs' human rights enforcement activities via the European Court of Human Rights, Inter-American Human Rights Commission, Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights).

29. See Gerald Keim, *Nongovernmental Organizations and Business-Government Relations: The Importance of Institutions*, in *GLOBALIZATION AND NGOS* 19, 19 (Jonathan P. Doh & Hildy Teegeen eds., 2003).

30. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 312 (2000) (citation omitted); Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case For Regulation*, 10 *BUFF. HUM. RTS. L. REV.* 261, 280 n.80 (2004) [hereinafter Blitt, *Who Will Watch the Watchdogs?*] (discussing the use of the term the term “international people’s organizations”).

31. See Sarah Ben Néfissa, *Introduction: NGOs and Governance in the Arab World: A Question of Democracy* to *NGOS AND GOVERNANCE IN THE ARAB WORLD* 1, 31 (Sarah Ben Néfissa et al. eds., 2005).

32. See Elizabeth T. Boris & C. Eugene Steuerle, *Scope and Dimensions of the Non-profit Sector*, in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK*, *supra* note 4, at 66, 74–75 (describing common revenue sources in the nonprofit sector).

ly affiliated through federation structures. In general, this large and diverse universe of organizations operates at local, national, and international levels.

A. Overview and Terminology

Nongovernmental organizations have existed for centuries and have held a celebrated place in history,³³ but the term NGO is relatively young. Many academics trace the origin of the term “nongovernmental organization” to shortly after World War II.³⁴ Most significantly, the United Nations adopted the term in 1945 when it referred to “non-governmental organizations” in its Charter³⁵ to describe “a vast range of international and national citizens organizations, trade unions, voluntary associations, research institutes, public policy centers, private government agencies, business and trade associations, foundations and charitable endeavors.”³⁶ Specifically, the Charter delegated the responsibility for making “suitable arrangements for consultation with non-governmental organizations” to the U.N. Economic and Social Council.³⁷

Today, “NGO” continues to be an expansive term that refers to a formal organization that is neither a government nor a corporate institution, but rather a voluntary association within civil society.³⁸ As Professor Thomas Kelley observed, “Global North actors consider NGOs as either

33. See, e.g., 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489, 492 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840).

34. See, e.g., Kerstin Martens, *Mission Impossible? Defining Nongovernmental Organizations*, 13 *VOLUNTAS: INT’L J. VOLUNTARY & NONPROFIT ORG.* 271, 271 (2002). But see Charnovitz, *supra* note 17, at 22 (suggesting the term was used as early as 1920, after the negotiation of international labor treaties, to describe the groups that were excluded from negotiations).

35. See Martens, *supra* note 34, at 271; U.N. Charter art. 71; SERGEY RIPINSKY & PETER VAN DEN BOSSCHE, *NGO INVOLVEMENT IN INTERNATIONAL ORGANIZATIONS: A LEGAL ANALYSIS* 5 (2007) (recognizing that the United Nations introduced the term “non-governmental organization” in its Charter).

36. Angus Archer, *Methods of Multilateral Management: The Interrelationships of International Organizations and NGOs*, in *THE US, THE UN, AND THE MANAGEMENT OF GLOBAL CHANGE* 303, 303 (Toby Trister Gati ed., 1983).

37. U.N. Charter art. 71. It is important to note that entities similar to NGOs—such as associations of individuals that fought for the abolition of slavery in the United States—existed before this formal recognition, but were not labeled as “NGOs.”

38. See generally ANN C. HUDOCK, *NGOS AND CIVIL SOCIETY* 1 (1999) (“[NGOs are] those organizations outside the realm of government, and distinct from the business community.”); Martens, *supra* note 34 (analyzing the term “NGO” from a legal and sociological perspective in an attempt to arrive at a holistic definition).

essential to or the alter ego of civil society.”³⁹ Of course, as Professor Kelley accurately notes, civil society is a “flexible” and “malleable” concept.⁴⁰ From my perspective, civil society represents a capacious framework of civic values encompassing the space, the set of institutions, the organizations, the networks, and the behaviors situated between the state, the business world, and the family. Civil society facilitates exchanges among citizens, enables communication channels between citizens and the state, promotes civic action, and advances common interests based on civility.

As a subset of civil society organizations,⁴¹ NGOs are private and voluntary, practicing self-governance, and are organized around a common mission. Characterized by their voluntary status, NGOs may function on a small scale, with a primary focus on domestic concerns or on a global scale with transnational operations.

In the United States, although the terms “nonprofit organization” and “nongovernmental organization” are virtually synonymous, the term “nonprofit” is usually used to indicate a domestic organization. By contrast, the term NGO is used to refer to organizations in either the Global North or South that work in less-developed, aid-receiving countries. In contrast, the term “nonprofit” is usually used for domestic entities. For example, the League of Women Voters or Harvard University are predominantly thought of as nonprofits, whereas Human Rights Watch or BRAC⁴² would receive the moniker NGO. Additionally, organizations such as Amnesty International, CARE USA, Oxfam, and Doctors Without Borders/Médecins Sans Frontières (hereinafter “MSF”) have made NGO a household word. But the many small, community-based or local organizations operating in the developing world are also referred to and conceived as NGOs. Entities with multinational operations are sometimes referred to as “international nongovernmental organizations” (“INGOs”).

39. Thomas Kelley, *Wait! That's Not What We Meant By Civil Society!: Questioning the NGO Orthodoxy in West Africa*, 36 BROOK. J. INT'L L. 993, 999 (2011).

40. *Id.* at 997.

41. NGOs represent one type of “civil society organization;” other types may include informal social groups, sports clubs, labor unions, cultural associations, faith-based organizations, and professional associations. See THOMAS CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA* 64–65 (1996) [hereinafter CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*].

42. “BRAC” is a well-respected development NGO that was originally founded as the Bangladesh Rehabilitation Assistance Committee then renamed the Bangladesh Rural Advancement Committee and is now simply called BRAC. See A. Mushtaque R. Chowdhury & Abbas Bhuiya, *The Wider Impacts of BRAC Poverty Alleviation Programme in Bangladesh*, 16 J. INT'L DEV. 369, 371 (2004).

Globalization enables locally based, grass roots organizations to extend their reach into national and international domains. One academic thus recently defined NGO to include “[any] non-profit, voluntary citizens’ group which is organized at a local, national, or international level, and is locally, nationally, or internationally active.”⁴³ Another suggested that the term encompasses all “formal . . . independent societal organizations whose primary aim is to promote common goals at the national or international level.”⁴⁴ Interestingly, however, NGOs do not have any uniformly recognized international legal personality; they are governed only by relevant national regulation where they are located.

B. Origins and Growth

The roots and foundational practices of NGOs can be traced back centuries. For example, multiple societies (as they were then called) were established in the United States, England, and France to advocate for the abolition of slavery and the international slave trade in the eighteenth and nineteenth centuries.⁴⁵ Organizations such as the Society for the Relief of Free Negroes Unlawfully Held in Bondage (founded in the United States in 1775),⁴⁶ the Pennsylvania Society for Promoting the Abolition of Slavery (founded in 1787), the Society for Effecting the Abolition of Slave Trade (founded in England in 1787), and the Société des Amis des Noirs (founded in France in 1788)⁴⁷ exchanged information, coordinated efforts (sending freed slaves on speaking tours), and employed shared tactics.⁴⁸ Collectively, this group of organizations might aptly be considered the world’s “first transnational advocacy network.” Beginning in 1815, a range and number of peace societies (another early incarnation of globalized NGOs) emerged in the United States and Europe, and grew to

43. Anton Vedder, *Questioning the Legitimacy of Non-Governmental Organizations*, in *NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY* 1, 2 (Anton Vedder ed., 2007).

44. Martens, *supra* note 34, at 282.

45. See MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 224 (2004); Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT’L L.* 183, 191–92 (1997) [hereinafter Charnovitz, *Two Centuries of Participation*].

46. See George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 19 *MICH. ST. J. INT’L L.* 165, 170 n.10 (2010).

47. See KARNS & MINGST, *supra* note 45, at 420; Charnovitz, *Two Centuries of Participation*, *supra* note 45, at 192.

48. See KARNS & MINGST, *supra* note 45, at 428.

more than 400 in number by the turn of the century.⁴⁹ These “peace societies had a significant influence on international organization and law,”⁵⁰ most notably, in connection with the development of international arbitration and mediation.

At the beginning of the twentieth century, NGOs continued to make a mark on world affairs, but during the 1930s and 1940s, NGO influence seemed to wane. In describing NGO influence during the first half of the twentieth century, political scientists Margaret Karns and Karen Mingst note that:

In the twentieth century, peace groups . . . developed the ideas that shaped the League of Nations and later the United Nations The League of Nations also invited NGOs to participate in meetings [and conferences] Many NGOs established offices in Geneva to facilitate contacts with the league Between 1930 and 1945, NGOs’ influence diminished, in large part because governments were preoccupied with rising security threats and economic crisis and the league’s role declined.⁵¹

Several of today’s most prominent Northern NGOs were founded in the twentieth century. In the aftermath of World War I and the Russian Revolution, Save the Children was founded in the United Kingdom in 1919.⁵² It addressed the needs of orphaned children in Austria and Eastern Europe after the war, and it quickly became an advocate for the rights of children worldwide.⁵³ Although Oxfam International, an organization focused on global poverty relief, was technically formed in 1995 (through a combination of independent groups), its origins date back to Britain in 1942 and the Oxford Committee for Famine Relief, founded to relieve famine in Nazi-occupied Greece.⁵⁴ Amnesty International and Human Rights Watch, two renowned human rights-focused NGOs, were born in the 1960s and 1970s, respectively.⁵⁵ MSF, the international medical humanitarian organization, was formally established in France in 1971, then joined by sister organizations in Belgium, Switzerland, and the Netherlands in the early 1980s, later expanding throughout Europe,

49. See Charnovitz, *Two Centuries of Participation*, *supra* note 45, at 192–93.

50. *Id.* at 193.

51. KARNS & MINGST, *supra* note 45, at 225.

52. See LINDENBERG & BRYANT, *supra* note 25, at 13.

53. See *id.*; *History*, SAVE THE CHILDREN, <http://www.savethechildren.org.uk/about-us/history#begining> (last visited Feb. 3, 2012).

54. See LINDENBERG & BRYANT, *supra* note 25, at 13–15.

55. See Naz K. Modirzadeh, *Taking Islamic Law Seriously: INGOs and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 197 n.16 (2006).

North America, Australia, and Hong Kong.⁵⁶ Originally, MSF started as a response to the Nigerian-Biafra War and the unwillingness of other humanitarian services to intervene without government approval; today it continues to provide emergency medical assistance to human populations in danger.⁵⁷

Over the past two decades, the number of NGOs operating globally has grown dramatically.⁵⁸ From established Northern NGOs based in the developed countries of Europe, North America, and parts of Asia to Southern NGOs operating in the developing countries of Africa, Asia, and Latin America, both the numerical growth and the increase in institutional influence of NGOs are profound. For example, “in the United States alone the number of internationally active NGOs formally registered with U.S. Agency for International Development (USAID) and their revenues grew much faster than both U.S. total giving to charities and the U.S. gross domestic product (GDP).”⁵⁹ Similar trends also are reflected at the local level with many developing countries witnessing significant increases in the number of NGOs operating on the ground.⁶⁰

56. See *About Us—Timeline*, MÉDECINS SANS FRONTIÈRES/DOCTORS WITHOUT BORDERS, <http://www.doctorswithoutborders.org/aboutus/timeline.cfm> (last visited Feb. 3, 2012).

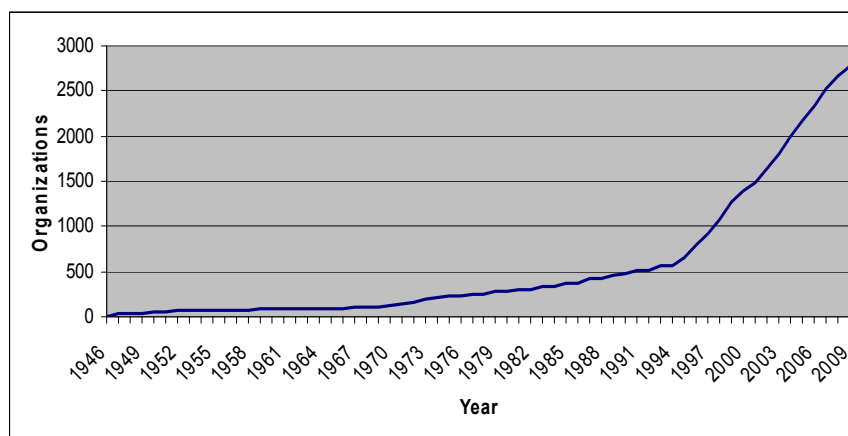
57. See LINDENBERG & BRYANT, *supra* note 25, at 14.

58. See, e.g., *id.* at 3.

59. *Id.* at 3.

60. See, e.g., Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment For “Grassroots” NGOs in China Today*, 26 B.U. INT’L L.J. 29, 38–42 (2008) (discussing growth in China); Blitt, *Who Will Watch the Watchdogs?*, *supra* note 30, at 294 (discussing growth in India, Brazil, Nepal, and Tunisia); Janice H. Lam, Note, *The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities*, 38 GEO. WASH. INT’L L. REV. 101, 104 (2006) (discussing growth in Bangladesh).

FIGURE 1. Total Number of U.N. Recognized NGOs by Year, 1946-2009



Source: United Nations Economic and Social Council, List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2009, available at <http://esango.un.org/paperless/content/E2009INF4.pdf>

Although estimates of the total number of NGOs active around the world vary widely, the number of NGOs recognized by the United Nations rose sharply over the past six decades. FIGURE 1 displays the increase in total number of NGOs recognized by the United Nations with consultative status at the Economic and Social Council (“ECOSOC”).⁶¹ From 1946 through the early 1970s, fewer than two hundred organizations had consultative status compared to more than 2,700 organizations with such status today. The first major growth phase occurred from 1970 to 1993. FIGURE 2 shows the number of newly recognized NGOs granted consultative status in four-year periods from 1946 to 2009. The number of new entrants saw a modest but consistent uptick from the early 1970s through the mid-1990s.⁶²

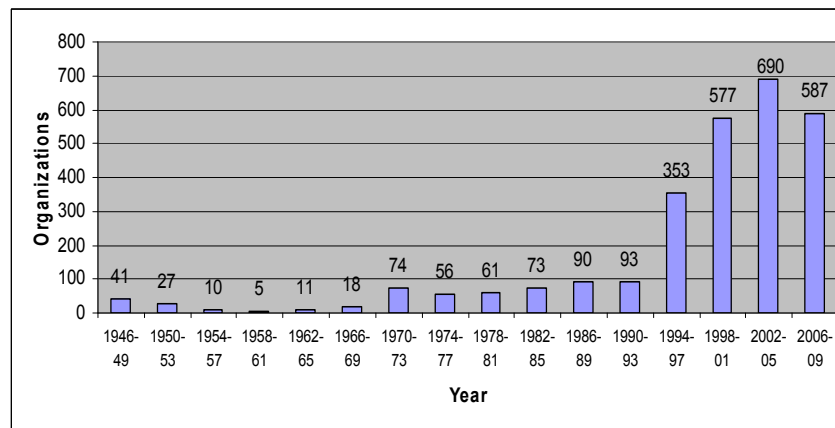
FIGURE 1 shows a second inflection point beginning in the 1990s when the total number of U.N.-recognized NGOs began a second dramatic rise.

61. Consultative status permits organizations to “propose agenda items, send observers to all meetings, and submit brief written statements.” Ahmed, *supra* note 2, at 824. It also offers certain security clearances providing access to buildings and spaces used by diplomats. *Id.* In addition, NGO engagement with the UN has included involvement with the General Assembly, the Security Council, the UN Secretariat, and other agencies. See Chadwick F. Alger, *Expanding Involvement of NGOs in Emerging Global Governance, in SUBCONTRACTING PEACE: THE CHALLENGES OF NGO PEACEBUILDING*, *supra* note 13, at 3, 6–8; Ahmed, *supra* note 2, at 826.

62. Cf. LIDENBERG & BRYANT, *supra* note 25, at 3 (“The international nonprofit sector’s growth took off in the 1970s and accelerated in the 1980s and 1990s.”).

In 1994, about five hundred NGOs had participatory rights at ECOSOC; by 1998, nearly one thousand organizations enjoyed consultative status. Hence the total number of U.N.-recognized organizations increased by more than 100% in just four years. In other words, in the span of four years, the U.N. recognized as many organizations as it had during its entire fifty year history. By 2009, the number mushroomed to about 2,750. FIGURE 2 displays a sharp jump in the number of newly recognized NGOs from 1994 to 1997 that reached new levels sustained for each four-year period thereafter.

FIGURE 2. Number of New NGOs Granted Consultative Status by U.N. by Year, 1946-2009



Source: United Nations Economic and Social Council, List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2009, available at <http://esango.un.org/paperless/content/E2009INF4.pdf>

A series of major global conferences and summits held through the early 1990s played a significant role in driving the expansion of U.N.-NGO relationships.⁶³ The Earth Summit (formally known as United Nations Conference on Environment and Development) in Rio de Janeiro (1992) was followed by the World Conference on Human Rights in Vienna (1993), the International Conference on Population and Development in Cairo (1994), the World Summit for Social Development in Copenhagen (1995), and the Beijing Conference on Women (1995).⁶⁴ As

63. See Kim D. Reimann, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45, 58 (2006).

64. See *Major Conferences and Summits*, DEP'T OF ECON. & SOC. AFF., <http://www.un.org/en/development/desa/about/conferences.shtml> (last visited Feb. 3, 2012); Peter Willets, *From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN*, 6 GLOBAL GOVERNANCE 191, 195 tbl.1 (2000).

U.N. conferences increasingly became open to a larger number of NGOs, their meaningful participation created incentives for more NGO participation (and specific interest in some form of U.N. recognition),⁶⁵ especially among national and local organizations that were previously excluded.⁶⁶

Looking beyond the growth in number of NGOs with U.N. consultative status, the proliferation of nonprofit organizations is widespread and well-documented in many countries. In his book on civil society, Don Eberly summarizes the global nature of this phenomenon:

[Nonprofit scholars Lester Salamon and Helmut Anheier] have found that civil society has become a major force in many countries over the past decade, its presence “far more widespread than typically thought.” In one recent year, 60,000 nonprofits were created. In Germany, the number of associations tripled over ten years. Sweden, known for its extensive welfare state, showed some of the highest participation rates in civil society One of the largest surveys of the nonprofit sector ever conducted, covering twenty-two countries, found over one million such organizations operating in India, 210,000 in Brazil, 17,500 in Egypt, and 15,000 in Thailand. One in twelve jobs in the countries surveyed were supplied by nonprofits.⁶⁷

Accurate estimates of NGOs on a global scale are notoriously difficult to tally. But, the NGO origins run deep and their numbers are growing. Today, there are few places in the world where NGOs do not operate.

C. Explaining the NGO Explosion

A variety of different forces contributed to the increase in the number of NGOs operating around the world over the past decades. First, a series of significant cultural and political policy shifts occurred during this period altering the background conditions affecting the NGO landscape. Second, a series of specific societal developments also stand out: the

65. Organizations may qualify for general consultative status, special consultative status, or roster status. Each category has a slightly different set of criteria and accompanying rights. The great majority of NGOs recognized by the U.N. have special consultative status. See U.N. Secretary-General, *List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as of 1 September 2010: Note by the Secretary-General*, U.N. Doc. E/2010/INF/4 (Sept. 1, 2010) [hereinafter *Note of the U.N. Secretary-General*], available at <http://esango.un.org/paperless/reports/E2010INF4.pdf>.

66. See KARNs & MINGST, *supra* note 45, at 227; Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 26 (1997); Willets, *supra* note 64, at 193–96.

67. DON EBERLY, *THE RISE OF GLOBAL CIVIL SOCIETY: BUILDING COMMUNITIES AND NATIONS FROM THE BOTTOM UP* 18 (2008).

growth of private philanthropy and wealth, globalization, and the explosion of communications technologies.

The first of these relevant policy shifts came during the 1980s as democracy promotion became a priority of the Reagan administration.⁶⁸ An increased emphasis on foreign aid as a means to promote democracy abroad included support for NGOs as part of its core strategy. A new wave of democracy aid programs was created as part of the response to the heightened anticommunism sentiment of the time.⁶⁹ For example, U.S. Agency for International Development (“USAID”) officials recast human rights assistance projects from the 1970s as democracy projects to continue and expand their efforts.⁷⁰ Although initially concentrated on Latin America and Asia,⁷¹ democracy aid expanded through the early and mid-1990s into the former Soviet Union and neighboring Eastern Europe, sub-Saharan Africa, and the Middle East.⁷² A key element of the democracy aid initiative included the delivery of money and training to support locally-based NGOs abroad. In describing the core strategy of the period, Thomas Carothers describes a democracy template:

The template’s third category is civil society. The template ideal is a diverse, active, and independent civil society that articulates the interests of citizens and holds government accountable to citizens. U.S. democracy promoters often highlight nongovernmental organizations (NGOs) involved in public interest advocacy, such as human rights or women’s issues, as a vital form of civil society.⁷³

As a result, the promotion of the NGO sector became part of the standard aid and technical assistance package of democracy solutions offered to transitional countries.⁷⁴ Aid programs explicitly targeting NGO support “have grown more and more common, and are now part of U.S. democracy aid portfolios in most countries. The United States is scarcely alone in this regard. Many other donor countries, as well as private aid organizations, have embraced the concept.”⁷⁵ In parts of the world where

68. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 29 (1999) [hereinafter CAROTHERS, *AIDING DEMOCRACY ABROAD*].

69. *See id.*

70. *See id.* at 36.

71. *See id.* at 29.

72. *See id.* at 40.

73. *Id.* at 87.

74. *See id.* at 90.

75. *Id.* at 207; *see also* CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE*, *supra* note 41, at 2 (noting financial support from Canada, Great Britain, Germany, Holland, Denmark, and Sweden as well as multilateral organizations such as the U.N., the European

there had been few independent NGOs operating before the 1990s—such as Eastern Europe and sub-Saharan Africa—aid from the Global North fueled an NGO boom.⁷⁶

Another important policy development that converged with the NGO explosion was the heightened influence of Washington Consensus economic development policies in the early 1980s.⁷⁷ The Washington Consensus describes a set of ideas and policies pursued by the International Monetary Fund, the World Bank, the Inter-American Development Bank, think tanks, and other policy makers during this period.⁷⁸ It is often understood as a “reaction against . . . extensive [government] interventionism” in favor of neo-liberal policies, emphasizing instead greater reliance on market forces.⁷⁹ Accordingly, with funding scaled back, many social services previously carried out by governments were either eliminated or turned over to the nonprofit sector.⁸⁰ Thus, new opportunities emerged for the private philanthropic sector to grow and to provide services left in the void generated by the new development policies.⁸¹

After a decade or so, the Washington Consensus began to break down as international financial institutions themselves began to question the effectiveness of the approach. “Towards the end of the 1980s, the opposition to such policies had been gathering strength through observing how they had neglected the consequences for what has become known as ‘adjustment with a human face.’”⁸² Thus the post-Washington Consensus emphasized the social goals of development. Interestingly, this new focus also contributed to the growth of the nonprofit sector, this time be-

Union, the Organization for Security and Cooperation in Europe, the Organization of American States, and the Organization of African Unity).

76. See CAROTHERS, *AIDING DEMOCRACY ABROAD*, *supra* note 68, at 215.

77. See John Weeks & Howard Stein, *Washington Consensus*, in *THE ELGAR COMPANION TO DEVELOPMENT STUDIES* 676, 676 (David Alexander Clark ed., 2006) (“The Consensus reigned hegemonic in international development policy from the early 1980s to the mid-1990s.”); Robin Broad & John Cavanagh, *The Death of the Washington Consensus?*, 16 *WORLD POL’Y J.* 79, 80 (“The power of the Washington Consensus over development theory and practice in the 1980s and 1990s is hard to overstate.”).

78. See BEN FINE, *SOCIAL CAPITAL VERSUS SOCIAL THEORY* 132 (2001).

79. See *id.* at 134.

80. See LESTER M. SALAMON & ALAN J. ABRAMSON, *THE NONPROFIT SECTOR PROJECT, THE FEDERAL BUDGET AND THE NONPROFIT SECTOR* 3 (1982); Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law*, 73 *FORDHAM L. REV.* 2437, 2461 (2005).

81. See KATHARINE NEILSON RANKIN, *THE CULTURAL POLITICS OF MARKETS: ECONOMIC LIBERALIZATION AND SOCIAL CHANGE IN NEPAL* 22 (2004) (noting that civil society organizations sought to “fill the vacuum left by the restructuring of the welfare state mandated by economic liberalization processes in countries around the world”).

82. FINE, *supra* note 78, at 135.

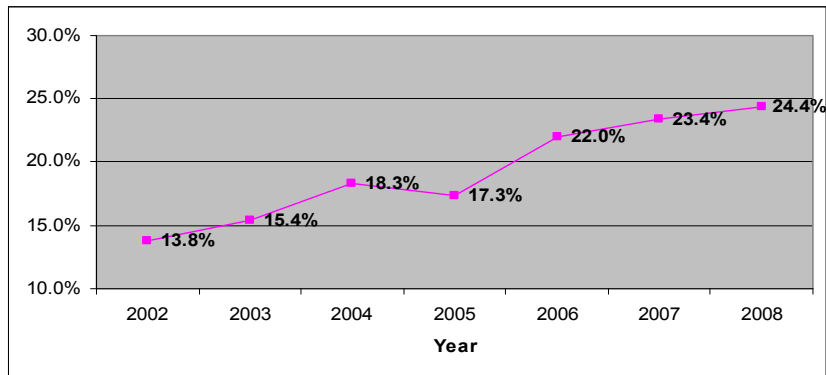
cause the funding institutions and donor agencies realized that NGOs could be powerful development partners. As a result, as commentators today observe:

Nongovernmental organizations (NGOs) have become key mediators of political, economic, and social change in the post-Washington Consensus era. While development experts have lauded NGOs as efficient conduits for aid, and pointed to the NGO “boom” as an indicator of democratizing civil societies, anthropologists have focused on the myriad ways NGOs help to remake forms of social organization and government.⁸³

In addition to the aforementioned social and political factors, several other forces also may have contributed to the accelerated growth of NGOs and their networks. During the past two decades, the world has experienced dramatic increases in private philanthropy due to extensive expansion of private wealth, unprecedented globalization, and a spread of communications technologies that have spurred the growth of global NGOs.

83. Analiese M. Richard, *Mediating Dilemmas: Local NGOs and Rural Development in Neoliberal Mexico*, 32 POL. & LEGAL ANTHROPOLOGY REV. 166, 166 (2009).

FIGURE 3. Percentage of Major U.S. Foundation Grants Allocated to International Giving⁸⁴



Notably, private wealth and private philanthropy have both greatly expanded and become more globalized.⁸⁵ Accordingly, as wealthy donors devoted new and more resources to the nonprofit sector, support for international NGOs and organizations in the developing world increased correspondingly. For example, FIGURE 3 shows the growth in international giving by the largest foundations in the United States.⁸⁶ According

84. These data are drawn from the following sources: STEVEN LAWRENCE & REINA MUKAI, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 26 (2010) [hereinafter FOUNDATION GIVING TRENDS 2010]; STEVEN LAWRENCE ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 26 (2009) [hereinafter FOUNDATION GIVING TRENDS 2009]; JOSEFINA ATIENZA & REINA MUKAI, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 20 (2008) [hereinafter FOUNDATION GIVING TRENDS 2008]; JOSEFINA ATIENZA ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 20 (2007); JOSEFINA ATIENZA & ASHLEY BAILEY, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 25 (2006); JOSEFINA ATIENZA & JENNIE ALTMAN, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 19 (2005); JOSEFINA ATIENZA & LESLIE MARINO, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 19 (2004).

85. See EBERLY, *supra* note 67, at 16 (noting increases in families with assets over \$30 million, the growth rate of billionaires, and the geographic distribution of the super-wealthy); Garry W. Jenkins, *Who's Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 763 (2011) [hereinafter Jenkins, *Who's Afraid of Philanthrocapitalism?*].

86. The Foundation Center's annual study is based on a sample of large foundations. For example, the 2008 sampling base included more than 800 of the 1000 largest foundations and the fifteen largest foundations in nearly every state, ranked by total grant giving and a sampling of other foundations. Consequently, the sample is not a stratified random sample of the nation's full set of private foundations. In addition, the composition of the set varies from year to year. See FOUNDATION GIVING TRENDS 2010, *supra* note 84, at 39–40.

to the Foundation Center's annual study of foundation giving trends, approximately 14% of grant dollars were allocated to international giving in 2002. That figure rose to almost 25% in 2008. As global civil society scholar Don Eberly explains, "Fueling the growth in the nonprofit sector is a burgeoning private philanthropy, arising from unprecedented new wealth in America and from tax code incentives to channel portions of that wealth toward the social good. The number of private foundations has tripled since the early 1990s."⁸⁷

Globalization and improved communications technologies also have helped propel NGO growth. Many commentators have discussed how the rapidly evolving global marketplace has changed commerce and culture. Philanthropy is similarly affected. Heightened awareness of global human needs and a growing sense of interconnectivity among peoples across national borders have led to increased interaction, information, and access to funding for international NGOs and locally-based NGOs operating overseas.⁸⁸ Improvements in communications technologies "helped transform the world of NGOs."⁸⁹ The widespread diffusion of knowledge and information through facsimile machines, telecommunications, and the Internet over the past two decades permitted smaller organizations to flourish, facilitated collaborations, and provided means for organizations to communicate their messages without intermediaries or government restrictions.⁹⁰ This "advent of cheap and instant communications" enabled NGOs to become effective focal points for mobilizing people.⁹¹

II. THE ANTI-NGO MOVEMENT

For many, the paradigmatic nonprofit organization is a tireless advocate addressing important social issues such as human rights, economic development and poverty reduction, environmental justice, housing inequality, health disparities, women's rights, and racial discrimination, among others. In the United States, nonprofits are frequently considered positive forces that promote the public good, prompt and monitor gov-

87. *Id.*

88. See KARNs & MINGST, *supra* note 45, at 226 (discussing globalization has a contributing factor to NGO growth).

89. McGann & Johnstone, *supra* note 15, at 164.

90. See *id.* at 164-65.

91. Hildy Teegen & Jonathan P. Doh, *Conclusion: Globalization and the Future of NGO Influence*, in GLOBALIZATION AND NGOS, *supra* note 29, at 203, 214.

ernment, and provide important connections between local, national, or international citizens.⁹²

It is interesting that anti-NGO criticism is not limited to just one traditional ideological camp. To the degree that the left/right political continuum (in the way those terms are used in the United States) is a useful construct to categorize criticisms, the most vocal and organized anti-NGO forces are associated with the right. Elements on the left, however, have also expressed serious concerns about NGOs.

Given the rapid growth and the enthusiastic promotion of NGOs, it should not be surprising that critics have emerged attempting to de-halo the nonprofit sector. Although the anti-NGO view is not widely shared, careful analysis of opinion data may not be entirely comforting to nonprofit advocates. The introduction of this Article noted some good news for nonprofits drawn from public opinion survey data: nonprofit organizations are among society's most trusted institutions.⁹³ Unfortunately, there is some worrisome data from public opinion surveys as well.

In the United States, the aforementioned critical views also may reflect a broader disquiet among the general public about confidence in the entire charitable sector. A survey of Americans, released in April 2008 by the Brookings Institution and the Organizational Performance Initiative at New York University's Robert F. Wagner Graduate School of Public Service, found that public confidence in nonprofits was at contemporary lows.⁹⁴ Thirty-four percent expressed "not too much" confidence or "none at all."⁹⁵ These figures are within the percentage of the margin of error of the record lows of 2002 (37%) covering the seven years in which data on that measure has been collected.⁹⁶ Moreover, the survey found that since 2003, the majority of Americans rated the nonprofit sector "somewhat good" or worse with regard to performance in "helping people."⁹⁷ As nonprofit scholar Paul Light, the author of the Brookings study, highlights in his report, "somewhat good" is not an encouraging rating. He writes, "[f]ew Americans believe that 'somewhat good' is a

92. See FRUMKIN, *supra* note 10, at 2 ("In the United States, nonprofit and voluntary organizations are seen as playing a central role in generating, organizing, and emboldening political opposition, working through national networks and building international linkages.").

93. See EDELMAN, *supra* note 16, at 11 and accompanying text.

94. See PAUL C. LIGHT, BROOKINGS INST., HOW AMERICANS VIEW CHARITIES: A REPORT ON CHARITABLE CONFIDENCE 3 (2008), available at http://www.brookings.edu/~media/Files/rc/papers/2008/04_nonprofits_light/04_nonprofits_light.pdf.

95. See *id.* at 3.

96. See *id.* at 1 (noting a margin of error of +/- 3%).

97. See *id.* at 4.

positive rating in other areas of their lives—e.g., somewhat good surgery, somewhat good food, or somewhat good airplanes.”⁹⁸ In fact, the number of respondents indicating the sector has done a “very good” job steadily declined from more than one third of the sample population in 2003 to a quarter in 2008.⁹⁹

To be fair, general survey results should not be mistaken for widespread acceptance of anti-NGO viewpoints. But the data suggest that the reservoir of goodwill assumed to exist for nonprofit organizations is vulnerable. Accordingly, NGO critics may be able to tap into an existing undercurrent of skepticism that will further fuel an anti-nonprofit sentiment. In addition, the results demonstrate that the more vocal critics are not extreme outliers and suggest that critiques are unlikely to fade in the near future.

Of course there is no homogeneous set of NGO institutions. NGOs are characterized by their diversity and bring a wide range of perspectives and voices into the public discourse.¹⁰⁰ Yet many critics of NGOs do not see the benefits of such diversity and pluralism. Instead they see threats.

Of the vocal critics, the right seems to be focused on the largest and best-established nonprofits with political views often deemed “liberal.”¹⁰¹ Generally, the right is concerned that these progressive NGOs are given too much credence and taken too seriously by governments, media, corporations, and others. In contrast, the left is skeptical of the organizational power of nonprofits. They view the growth and reliance on nonprofits as a means of advancing the privatization of political affairs and as a system controlled and manipulated by the wealthy to advance moderate solutions at the expense of radical social change. Under this view, the dominant network of international foundations and NGOs operating at the

98. *Id.* at 4.

99. *See id.* at 4.

100. *See* JEM BENDELL, *DEBATING NGO ACCOUNTABILITY* 33 (U.N. Gov’t Liaison Serv. 2006) (listing NGO benefits to include “participation and deliberation [and] pluralizing power beyond governments”); RIPINSKY & VAN DEN BOSSCHE, *supra* note 35, at 11 (“NGOs provide information, arguments and perspectives that governments do not bring forward.”); *see also* Brody & Tyler, *supra* note 9, at 591 (“[D]iversity of the charitable sector is viewed as desirable . . . Nonprofits can and do form on all sides of a contentious issue”); Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1097–98 (2001) (discussing pluralism); David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 559–60 (2006) (suggesting that nonprofit activity creates involvement by more individuals and generates pluralism of ideas).

101. *See, e.g.*, Jeremy Rabkin, Paper Delivered at an American Enterprise Institute Conference: Why the Left Dominates NGO Advocacy Networks (June 11, 2003), *available at* http://www.aei.org/files/2003/06/11/20040402_20030611_Rabkin.pdf.

highest levels has been disparagingly referred to as the “non-profit industrial complex.”¹⁰² Finally, many government leaders have expressed hostility toward NGOs and a fear of undue international interference. Government bodies, particularly states that are targeted by NGO human rights and environmental policy campaigns, have denounced NGOs and pursued new legal restrictions aimed at curtailing their activities, discrediting their motives, or silencing their voices.

A. Critics from the Right

For the anti-neoliberal globalization movement that protested domestic and multinational corporations, the dramatic rallies held outside the World Trade Organization in November 1999 in Seattle¹⁰³ represent the key moment in that particular counter-mobilization effort. For the right’s nascent protest against NGOs, if there was a single galvanizing moment it may have been a staid academic conference held in Washington, D.C., during the summer of 2003. This conference was organized by the American Enterprise Institute (“AEI”), a powerful Washington think tank with ties to the right, and the Institute of Public Affairs, a similarly conservative Australian think tank.¹⁰⁴ The program criticized NGOs as unaccountable and undermining government sovereignty.¹⁰⁵ Out of that conference, AEI introduced a collaborative initiative with the Federalist Society for Law and Public Policy Studies called “NGO Watch.”¹⁰⁶

NGO Watch is a political campaign and website designed to monitor and critique international nonprofit organizations.¹⁰⁷ The primary focus of the NGO Watch project appears to be the activities of large, estab-

102. Dylan Rodríguez, *The Political Logic of the Non-Profit Industrial Complex*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 21, 21 (INCITE! Women of Color Against Violence ed., 2007).

103. See John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST, Dec. 1, 1999, at A1; Sam Howe Verhovek & Steven Greenhouse, *National Guard Is Called to Quell Trade-Talk Protests—Seattle Is Under Curfew After Disruptions*, N.Y. TIMES, Dec. 1, 2009, at A1.

104. See JAMES G. MCGANN & ERIK C. JOHNSON, *COMPARATIVE THINK TANKS, POLITICS AND PUBLIC POLICY* 171 (2005) (noting that Institute of Public Affairs is one of Australia’s oldest and leading think tanks).

105. See Danielle Pletka, Roger Bate & Jon Entine, *We’re Not from the Government, but We’re Here to Help You*, AM. ENTER. INST. FOR PUB. POLICY RES. (June 11, 2003), <http://www.aei.org/article/foreign-and-defense-policy/international-organizations/were-not-from-the-government-but-were-here-to-help-you-event/> (last visited Jan. 10, 2012).

106. See Anwar Iqbal, *Analysis: Are NGOs Accountable?*, UNITED PRESS INT’L (June 11, 2003, 8:13 PM), http://www.upi.com/Business_News/Security-Industry/2003/06/11/Analysis-Are-NGOs-accountable/UPI-54551055376812/.

107. See *NGO Watch*, GLOBAL GOVERNANCE WATCH, http://www.globalgovernancewatch.org/ngo_watch/ (last visited Jan. 10, 2012).

lished, “liberal” institutions focused on international matters, such as Human Rights Watch, Amnesty International, the International Committee of the Red Cross, and the World Wildlife Fund.¹⁰⁸ Originally launched as its own program in 2003, NGO Watch has since rebranded and expanded into a broader Global Governance Watch initiative, covering the United Nations, NGOs, and other entities with influence over international law and policy.¹⁰⁹

In explaining the rationale for the project, NGO Watch highlights accountability concerns. Its original mission statement contemptuously asks, “What is their [NGOs] agenda? . . . And to whom are they accountable?”¹¹⁰ Additionally, in explaining the roots of NGO Watch, AEI’s Danielle Pletka, Vice President for Foreign and Defense Policy studies, stated that the need arose from the conviction that influential “NGOs are not accountable . . . not transparent. NGOs are not elected.”¹¹¹

The project’s founding mission statement presents the “growth,” “power,” and “influence” of NGOs as a cause of concern.¹¹² The statement alleges that “[m]any [NGO] groups have strayed beyond their original mandates and assumed quasi-governmental roles. Increasingly, non-governmental organizations are not just accredited observers at international organizations, they are full-fledged decision-makers.”¹¹³ This statement suggests that the sponsors of NGO Watch regard more limited, modest NGO goals and activities as acceptable and proper (i.e., their

108. See, e.g., Esther Kaplan, *Follow The Money: Bush Has Revived the Christian Right Through Direct Federal Largesse*, NATION, Nov. 1, 2004, at 20 (identifying such organizations as the American Civil Liberties Union (ACLU), Human Rights Watch, the Audubon Society, and Planned Parenthood as targets of NGO Watch); Philip Mendes, Editorial, *The Hidden Agenda of the NGO Wars*, CANBERRA TIMES (Australia) Mar. 4, 2005, at A11 (discussing NGO Watch, AEI, and IPA and their attacks on international NGOs, including Greenpeace, Amnesty International, and the World Wildlife Fund).

109. See *Keeping an Eye on National Sovereignty*, AEI NEWSL. (Am. Enter. Inst. for Pub. Policy Research, Wash. D.C.), June 1, 2008 [hereinafter *Keeping an Eye*], available at <http://www.aei.org/article/28080>.

110. *NGO Watch Mission Statement*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, http://www.aei.org/files/2003/06/11/20030612_NGOWATCHannouncement.pdf (last visited Jan. 12, 2012) (on file with author).

111. *Keeping an Eye*, *supra* note 109 (quoting Danielle Pletka of AEI).

112. See *NGO Watch Mission Statement*, *supra* note 110 (“Recent years have seen an unprecedented growth in the power and influence of non-governmental organizations (NGOs). While it is true that many NGOs remain true to grassroots authenticity conjured up in images of protest and sacrifice, it is also true that non-governmental organizations are now serious business.”).

113. *Id.*

“original mandates”), but sponsors see an inappropriate shift by certain nonprofits in their sense of organizational mission and scope of activity.

AEI, the primary funder of NGO Watch, has deep ties to the business community. Initially formed as a small business group in 1938 called the American Enterprise Association, the organization moved to Washington in 1943.¹¹⁴ Over the years, AEI has become an influential conservative think tank, promoting free-market capitalism, deregulation, and other neoconservative ideas.¹¹⁵ With assets in excess of \$135 million, AEI has substantial resources to deploy,¹¹⁶ numerous conservative backers,¹¹⁷ and close ties to the Republican establishment.¹¹⁸ Today its board of trustees consists primarily of businessmen¹¹⁹ from the corporate and financial sectors, including senior executives from prominent multinational corporations (e.g., International Paper Company, MeadWestvaco Corporation) and investment firms (e.g., The Carlyle Group, Greenhill & Co., Inc.).¹²⁰

114. See *History of AEI*, AM. ENTERPRISE INST., <http://www.aei.org/about/history/> (last visited Jan. 12, 2012).

115. See Christopher Demuth, *American Enterprise Institute*, in THINK TANKS AND POLICY ADVICE IN THE UNITED STATES 78 (2007) (description of AEI written by Christopher Demuth, President of AEI); Dana Milbank, *White House Hopes Gas Up a Think Tank—For Center-Right AEI, Bush Means Business*, WASH. POST, Dec. 8, 2000, at A39; see also Marin Cogan, *Blowing Sunshine*, NEW REPUBLIC, Mar. 27, 2009, at 5 (noting that the annual AEI black-tie gala is commonly referred to as the “neocon prom”).

116. See Return of Organization Exempt from Income Tax (Form 990), AM. ENTER. INST. FOR PUB. POLICY RES. 1 (Feb. 10, 2011), http://dynamodata.fdncenter.org/990_pdf_archive/530/530218495/530218495_201006_990.pdf.

117. See JAMES G. MCGANN, THINK TANKS AND POLICY ADVICE IN THE UNITED STATES, *supra* note 115, at 63, 113 (noting a history of substantial support for AEI from the conservative John M. Olin Foundation); see also John Cavanagh, *Institute for Policy Studies*, in THINK TANKS AND POLICY ADVICE IN THE UNITED STATES, *supra* note 115, at 113 (noting the Olin Foundation “spent roughly \$20 million a year for the generation of big ideas through the American Enterprise Institute”).

118. See Edward P. Djerejian, *James A. Baker III Institute for Public Policy*, in THINK TANKS AND POLICY ADVICE IN THE UNITED STATES, *supra* note 115, at 80 (“Scholars at the AEI helped make the Reagan revolution.”); Robert Pear, *Medicare Chief To Leave Agency*, *Paper Reports*, N.Y. TIMES, Sept. 4, 2006, at A10 (describing AEI as “a research organization with Republican ties”); see also *History of AEI*, *supra* note 114 (discussing AEI’s historic connections to Robert Bork, Gerald Ford, Irving Kristol, Jeane Kirkpatrick, Laurence Silberman, Antonin Scalia, and John Snow, among others).

119. The term “businessmen” is purposefully used in this context because twenty-six of the twenty-seven members of the Board of Trustees are male. AM. ENTERPRISE INST., 2010 ANNUAL REPORT (2011), available at <http://www.aei.org/files/1969/12/31/2010-Annual-Report.pdf>.

120. See *id.*

Several observers consider the NGO Watch campaign an orchestrated effort to silence and marginalize NGOs. For example, Canadian journalist Naomi Klein writes that:

[t]he war on NGOs is being fought on two clear fronts. One buys the silence and complicity of mainstream humanitarian and religious groups by offering lucrative reconstruction contracts. The other marginalizes and criminalizes more independent-minded NGOs by claiming that their work is a threat to democracy. The U.S. Agency for International Development (USAID) is in charge of handing out the carrots, while the American Enterprise Institute, the most powerful think tank in Washington, D.C., is wielding the sticks.”¹²¹

In addition to NGO Watch, other organizations adopted similar approaches or launched coordinated campaigns. For instance, Australia’s Institute of Public Affairs has published several critiques of NGOs.¹²² The Capital Research Center (“CRC”), a right-leaning Washington, D.C.-based research institute,¹²³ has also launched a nonprofit watch campaign. CRC’s GreenWatch targets nonprofits working on environmental issues, homing in on EarthJustice (formerly known as the Sierra Club Legal Defense Fund), the Environmental Defense Fund, Greenpeace, the Natural Resources Defense Council, and the Sierra Club, among others.¹²⁴

The most substantive criticisms from the right contend that NGOs undermine national sovereignty, question NGO representativeness with respect to the constituencies they aim to help, and claim NGOs are opposed to free markets and capitalism. As political scientist Kim Reimann explains, “[a]ccording to these [politically conservative and right-of-

121. Naomi Klein, Op.-Ed., *Bush to NGOs: Watch Your Mouths*, GLOBE & MAIL (Can.), June 20, 2003, at A15.

122. See, e.g., Gary Johns, *NGO’s: Lazy Activism*, AUST. FIN. REV. (Dec. 6, 1999), <http://www.ipa.org.au/news/615/ngo's-lazy-activism> (suggesting that the “democratic mechanism is being eroded by the status afforded NGO’s . . . [t]heir claim to a moral superiority is baseless”); Don D’Cruz, *NGO’s: Chasing the Corporate Dollar*, IPA REV. 28 (Sept. 2003), available at <http://www.ipa.org.au/library/Review553%20NGOS%20chasing.pdf> (alleging that corporate donors use nonprofit donations to protect their reputations from attack by NGOs).

123. CRC was “established in 1984 to study non-profit organizations, with a special focus on reviving the American traditions of charity, philanthropy, and voluntarism.” *About the Capital Research Center*, CAPITAL RES. CTR., <http://www.capitalresearch.org/about/> (last visited Feb. 3, 2012).

124. See GreenWatch Org., *Gang Green*, CAPITAL RES. CTR., http://www.capitalresearch.org/gw/gang_green/index.html (last visited Jan. 3, 2011) (on file with author) (a listing of what CRC considers “the worst environmental groups”).

center] critics, NGOs and their rising influence in national and international politics threaten democracy, capitalism and sovereignty of the nation-state."¹²⁵ This viewpoint is common across many conservative critics of NGOs.

Many conservatives believe that NGOs undermine democratic practices and national sovereignty.¹²⁶ In this view, NGOs exert pressure and exercise influence outside of established institutional political systems, thereby permitting special interest groups to thwart the will of the people acting through their legitimate governmental leaders.¹²⁷ Ultimately, this is seen as part of a threat to the nation-state system, promoting a system of "global governance" in conjunction with the United Nations and international law.¹²⁸ These same critics are generally hostile to the United Nations and international treaties that limit sovereignty. Connections between the U.N. and NGOs, international standards, and other constraints of global governance are viewed as a "conspiracy to promote liberal internationalism"¹²⁹ at the expense of the will of the people as a whole (represented by sovereign governments).¹³⁰ Generally, such charges challenge the perceived legitimacy of NGOs to *participate* in domestic and international politics.

A secondary critique questions the legitimacy of NGO *representativeness* to adequately express positions on public issues or advocate on behalf of others. This line of assault focuses on the voice of the NGOs, most often when those organizations advocate on behalf of a constituency or geographic area, typically one that may be poor, subordinated, or otherwise considered less powerful. Specifically, in these instances, NGOs are often derided as self-appointed guardians that advocate on

125. Kim D. Reimann, *Up to No Good? Recent Critics and Critiques of NGOs*, in SUBCONTRACTING PEACE: THE CHALLENGES OF NGO PEACEBUILDING, *supra* note 13, at 37, 48.

126. See Jon Frandsen, *The Right Takes Aim at NGOs*, 68 CQ WEEKLY, no. 22, May 30, 2005, at 1417.

127. See *id.* (quoting an official with the CRC); see Gary Johns, Paper Delivered at an American Enterprise Institute Conference: The NGO Challenge: Whose Democracy Is It Anyway? 3 (June 11, 2003, Wash. D.C.), available at http://www.aei.org/files/2003/06/11/20040402_20030611_Johns.pdf.

128. See Marguerite A. Peeters, Paper Delivered at an American Enterprise Institute Conference: The Principle of Participatory Democracy in the New Europe: A Critical Analysis (June 11, 2003, Wash. D.C.), available at http://www.aei.org/files/2003/06/11/20040402_20030611_Peeters.pdf; Rabkin, *supra* note 101, at 3.

129. See Reimann, *supra* note 125, at 48.

130. See Gary Johns, *Protocols With NGOs: The Need To Know*, 13 IPA BACKGROUNDER, Nov. 2001, at 1, 1, available at <http://www.ipa.org.au/library/.svn/text-base/IPABackgrounder13-1.pdf.svn-base>.

behalf of special interests and are unrepresentative of the general public or those they claim to represent.¹³¹ This concern is heightened when distant charitable organizations or funders, usually in the Global North, are seen to be influencing or speaking for peoples or problems in the Global South.

Finally, right-wing critics claim that NGOs are opposed to corporations and undermine capitalism and free markets.¹³² In this view the promotion of corporate social responsibility efforts by international NGOs is detrimental and insidious. In particular, these critics believe that NGO advocacy campaigns aimed at corporations “cause[] reputational damage to corporations . . . [and] hamper[] capitalism by creating unrealistic expectations for what corporations are responsible for and by misinforming the public of the various misdeeds committed by corporations.”¹³³

Clearly, critics on the right are uncomfortable with NGOs and civil society serving as a potent counterweight to the power of government and the private sector. The real fear of the right is that government-like power will expand the influence of NGOs. Cloaked in the neutral language of accountability, the attacks on NGOs reveal hostility to private collective action that is not animated by profit. The right posits a democratically-elected government that is accountable to voters and a free-market economic system that is accountable to shareholders as the only legitimate sources of power in a society. Accordingly, NGO Watch and similar efforts represent a subtle assault on civil society, a campaign orchestrated to limit the effectiveness of “liberal” organizations and cabin the strength of organized independent voices represented through nonprofit corporate forms.

B. Critics from the Left

Those on the political left also voice skepticism about the role of NGOs and their increased influence in the modern world. Interestingly, a

131. See, e.g., John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 245–46 (2003) (stating “NGOs are essentially transnational factions”).

132. See Jon Entine, Paper Delivered at an American Enterprise Institute Conference: Capitalism’s Trojan Horse: Social Investment and Anti-Free Market NGOs 2 (June 11, 2003, Wash. D.C.), available at http://www.aei.org/files/2003/06/11/200404022_20030611_entine.pdf; Jarol B. Manheim, Paper Delivered at an American Enterprise Institute Conference: Biz-War: Foundation-NGO Network Warfare on Corporations in the United States (June 11, 2003, Wash. D.C.), available at http://www.aei.org/files/2003/06/11/20040402_20030611_Manheim.pdf.

133. Reimann, *supra* note 125, at 48.

large part of the left-wing criticisms of NGOs have been grounded in attacks of accountability, similar to the right-wing critique. The ideological criticisms from the left can be divided into four general themes: questions about who benefits; questions about the value of local expertise; neocolonialism; and the deleterious impact of NGOs on individual citizens, governments, and the relationships between the two.

Where right-wing critics worry that NGOs diminish corporate power, left-wing critics argue the opposite, asserting that NGOs serve as agents furthering Western capitalist interests. Moreover, liberal critics suggest that the tax-exempt status of NGO donations wrongfully shifts decision-making regarding resource allocation and distribution away from public processes and places such determinations in the hands of private corporations and individuals. Finally, the international NGOs have been criticized for usurping decision-making authority from the domestic governments of the countries that receive aid.

The first accountability concern of the left is the question of who benefits. Specifically, the concern is that NGOs are not adequately accountable to the citizens NGOs claim to serve. The left's view of accountability differs somewhat from the right's concerns, which focus on sham representativeness and organizational structures in NGOs.¹³⁴ Instead, the left is primarily afraid that NGOs reflect a false representativeness that privileges self-serving interests or specialized expertise at the expense of genuine grassroots interests and voices in the countries in which they operate.¹³⁵ Some critics believe there is a "worrying disconnection" between the policies international NGOs propound and the best interests of the people that the groups proclaim to serve.¹³⁶ Thus, critics charge that NGOs push their own agendas, ignore indigenous individuals' input when formulating goals and, as a result, often advocate for policies that are not in a country's best interests.¹³⁷ A Brazilian activist has similarly

134. See *supra* Part II.A.

135. See RIPINSKY & VAN DEN BOSSCHE, *supra* note 35, at 12 ("NGOs . . . regularly take positions that developing countries consider to be inimical to their (short- and medium-term) interests.").

136. See Hetty Kovach, *Addressing Accountability at the Global Level: The Challenges Facing International NGOs*, in NGO ACCOUNTABILITY: POLITICS, PRINCIPLES, & INNOVATIONS, *supra* note 17, at 195, 199–200 ("The absence of effective accountability mechanisms at the global level has produced a worrying disconnection between global organizations and the individuals they impact.").

137. See Reimann, *supra* note 125, at 47 ("The proliferation of NGOs in developing countries in response to international funding opportunities, for example, has led to numerous, sometimes competing, small local projects that fragment poor communities into sectoral groupings and undermine their ability to see the larger, more systemic causes of their poverty and underdevelopment.").

argued—on the subject of professional women in NGOs—that they “want[] to control the agenda . . . and [want] to confine the struggle to exclusively feminist issues These . . . NGO professionals are authoritarian and with a colonialist mentality; they have nobody behind them except their wealthy outside backers.”¹³⁸

Another increasingly common criticism of NGOs raised by the left is that NGOs protect the interests of corporate and government donors. Specifically, some critics, recognizing that NGOs increasingly depend on donations from wealthy entities and governments to fund their activities, have observed that NGO policies are more responsive to donors than to those the organizations seek to serve.¹³⁹ Of course, this is somewhat ironic because being responsive to financial backers is often viewed as a form of accountability.¹⁴⁰ But there are many alternative forms of accountability and groups to which a nonprofit organization may be accountable.

Other critics worry that when the interests of financial backers take a front seat, accountability to the marginalized people served by NGOs may suffer, creating an accountability paradox. A stronger version of this critique argues that corporate donations are motivated by the desire to enhance a corporation’s public image, achieve policy development that benefits the corporation, or both.¹⁴¹

These twin motivations—corporate donors’ motivation to seek benefit and NGOs motivation to obtain funding—create a system in which NGOs are really advancing, or are perceived to advance, policies that benefit the interests of wealthy corporate donors.¹⁴² In doing so, funding pressures may compromise NGO autonomy and limit their ability to pur-

138. Adjoa Florência Jones de Almeida, *Radical Social Change: Searching for a New Foundation*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, *supra* note 102, at 185, 191 (citation omitted).

139. *See id.* at 187.

140. *See, e.g.*, M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market For Altruism*, 109 *COLUM. L. REV.* 571, 599 (2009) (noting that “[t]here is widespread criticism of the accountability of nonprofits to donors”).

141. *See* BENDELL, *supra* note 100, at 67 (“If we look more closely at the way donors provide finances, it becomes apparent that some funding is more of an exchange, through which donors actually purchase services or an enhanced profile . . . to try and attain policy changes from the recipient.”).

142. *See* Christine E. Ahn, *Democratizing American Philanthropy*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, *supra* note 102, at 63, 68–70; *see also id.* at 71–72 (describing a project funded by the Rockefeller Foundation to fight hunger in Mexico as an attempt to protect corporate interests in Mexico against a potential communist revolt).

sue radical social change.¹⁴³ As mentioned earlier, one activist argues that corporations grow wealthy by exploiting workers while they simultaneously receive benefits from making “charitable” donations, calling the system the “non-profit industrial complex.”¹⁴⁴

Additionally, left-wing critics claim that the growing number of well-established international NGOs with staffed professionals only exacerbates this problem. Donors tend to favor high-profile NGOs that are driven by the views and interests of policy experts in their respective fields.¹⁴⁵ These subject-matter experts, however, often have no connection to the communities for which these experts advocate, do not attempt to build grassroots support for their policies, and fail to establish meaningful relationships with the citizenry on the ground.¹⁴⁶ As a result, Western expertise may be privileged and may ultimately frustrate the voice of indigenous communities in the political development of their regions.

These concerns about NGO accountability are echoed by scholars and activists in developing nations. The neocolonialism criticisms contend that NGOs are advancing “a new era of Western economic and political imperialism.”¹⁴⁷ Tamsin Bradley, in his analysis of NGO activity in South Asia, writes “The NGO operates as a government institution and exercises its might by marginalizing the developing world Individuals within target communities are therefore treated as passive subjects and are denied the agency to shape their own futures.”¹⁴⁸ Bradley contends that NGOs may advocate only those policies that fit within dominant Western ideology.¹⁴⁹ He argues that the promotion of limited Western viewpoints restricts the communities served by NGOs to what the Western world traditionally considers to be “development,” thereby im-

143. de Almeida, *supra* note 138, at 186.

144. Andrea Smith, *Introduction: The Revolution Will Not Be Funded* to *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, *supra* note 102, at 1, 8–9; *see also* de Almeida, *supra* note 138, at 186 (noting that “there is a very fine line between ‘milking the system’ and being milked by the system.”).

145. Smith, *supra* note 144, at 10.

146. *See id.* at 10 (“these purported experts are generally not part of the communities they advocate for and hence do not contribute to building grassroots leadership”); *see also* TAMSIN BRADLEY, *CHALLENGING THE NGOS* 4 (2006) (“[t]hose targeted to receive aid are not involved in the decision-making . . . instead Western constructions of knowledge determine who is qualified to know and act [This] creates the development ‘expert’ (typically white, middle/upper-class and educated).”).

147. Reimann, *supra* note 123, at 47 (describing neocolonialism critiques of NGOs).

148. BRADLEY, *supra* note 146, at 6–7.

149. *See id.* at 3.

posing another form of colonialism through charity.¹⁵⁰ Additionally, scholars analyzing the impact of NGOs in the Arab world suggest that Arab nations often view NGOs as “elitist and corrupt organizations with no accountability . . . [that] promot[e] western agendas.”¹⁵¹ These are merely a few illustrations of a sizable concern that NGOs subvert the true interests of the communities they claim to serve in favor of their own agendas.¹⁵²

Critics on the left also voice concerns about the negative impact of NGOs on state power and on the relationship between the citizen and the state. First, some regard the shift toward reliance on NGO-based aid models with suspicion because NGOs may be used as tools for advancing neoliberalism, a conservative ideology that promotes a hegemonic anti-state, private-oriented, capitalist system.¹⁵³ Michael Hardt and Antonio Negri explain that:

Some critics assert that NGOs, since they are outside and often in conflict with state power, are compatible with and serve the neoliberal project of global capital. While global capital attacks the powers of the nation-state from above, they argue, the NGOs function as a ‘parallel strategy from below’ and present the ‘community face’ of neoliberalism.¹⁵⁴

Second, other critics have complained that NGOs ease what otherwise might be considered government burdens, thereby removing public pres-

150. *Id.* at 3 (“The West requires proof that the developing country is competent in the task of changing itself in line with the Western model of modernization.”).

151. Nicola Pratt, *Hegemony and Counter-hegemony in Egypt: Advocacy NGOs, Civil Society, and the State*, in *NGOS AND GOVERNANCE IN THE ARAB WORLD*, *supra* note 31, at 123, 124.

152. See generally Jenkins, *Who’s Afraid of Philanthrocapitalism?*, *supra* note 85, at 799, 807–08 (discussing pressures of modern philanthropy that limits community-based, bottom-up problem solving); Julia Paley, *The Paradox of Participation: Civil Society and Democracy in Chile*, 24 *POL. & LEGAL ANTHROPOLOGY REV.* no. 1, 2001, at 1 (documenting the rise of civil society—including NGOs—in Chile and suggesting that advocacy by these private groups often had a deleterious effect on the democratic participation of community members).

153. See Reimann, *supra* note 125, at 47 (describing a common left critique that NGOs are an important component of the neoliberal model); see also David Rieff, *The False Dawn of Civil Society*, *NATION*, Feb. 22, 1999, at 11, 12 (“[T]he idea of civil society begins to look less like a way of fostering democratic rights and responsive governments and more like part of the dominant ideology of the post-cold war period: liberal market capitalism.”).

154. HARDT & NEGRI, *supra* note 30, at 312–13 (quoting James Petras, *Imperialism and NGOs in Latin America*, *MONTHLY REV.*, Dec. 1997, at 10–27) (internal quotation marks omitted).

sure and support to devote public resources to address social problems.¹⁵⁵ In other words, shifting decision-making regarding societal problems to private decision-makers undermines opportunities for collective problem-solving.

Third, critics also argue that “were it not for charitable deductions allowed by tax laws, [the amount of the tax benefit] would have become public funds to be allocated through the governmental process under the controlling power of the electorate as a whole.”¹⁵⁶ Thus, the argument goes, NGO strength systematically weakens and “decapitates” governments.¹⁵⁷ Moreover, a concern here is that corporate donors and wealthy individuals, who direct tax-privileged monies to NGOs of their choice, are not representative of the general public.¹⁵⁸

C. Government Responses

The accountability arguments—from the left and the right—that NGOs exercise independent power (either as a handmaiden of or a challenge to corporate interests) are not lost on governments. As a result, governments have proposed and pursued a range of strategies to regulate, manage, limit, and even co-opt NGOs. Although not all NGOs perceive

155. See Christopher Collier, *NGOs, the Poor, and Local Government*, 6 DEV. IN PRAC. 244, 248 (1996) (“Projects in which NGOs use their own resources to deliver goods and services—which local government should be delivering but is not—lead the population to reduce its expectations of what local government can or should be doing for it.”); Issa G. Shivji, *Reflections on NGOs in Tanzania: What We Are, What We Are Not, and What We Ought to Be*, 14 DEV. PRAC. 689, 691 (2004) (“NGOs let the government off the hook as it abdicates its own responsibility.”); Brendan Martin, *New Leaf or Fig Leaf?: The Challenge of the New Washington Consensus*, PUB. WORLD 16 (2000), <http://www.publicworld.org/files/newleaf.pdf> (“Societies which depend on [NGO and development] largess to meet their basic health and education needs are neither sustainable, democratic nor equitable.”). Cf. *Sins of the Secular Missionaries*, ECONOMIST, Jan. 29, 2000, at 25, 26 (“Larger NGOs have pledged not to act as ‘instruments of government foreign policy.’ But at times they are seen as just that. Governments are more willing to pay groups to deliver humanitarian aid to a war zone than to deliver it themselves.”).

156. Ahn, *supra* note 142, at 65.

157. See ERICA BORNSTEIN, *THE SPIRIT OF DEVELOPMENT: PROTESTANT NGOS, MORALITY, AND ECONOMICS IN ZIMBABWE* 16–17 (2003); Joseph Hanlon, *An ‘Ambitious and Extensive Political Agenda’: The Role of NGOs and the AID Industry*, in GLOBAL INSTITUTIONS AND LOCAL EMPOWERMENT 132, 138 (Kendall Stiles ed., 2000).

158. See Ahn, *supra* note 142, at 64–66 (documenting the difference in demographic composition between corporate board of directors and the public as a whole). It is interesting to note that this argument implicitly assumes government decision-making is preferable to that of wealthy interests for distributing aid. Because critics of the left have heavily criticized governments for donating to NGOs based on political motivations, however, this assumption may be questionable.

themselves to be engaged with politics, their activities are always an expression of values.¹⁵⁹ As a result, national governments have long been “cautious about the possibility of NGOs becoming a separate political force and influencing existing partisan politics.”¹⁶⁰ In addition, as discussed in Part I above, in both the developed and developing world, NGOs can pressure local governments, insert themselves into business-government relationships,¹⁶¹ and exert influence over significant portions of some countries gross domestic product through “relief donations and trade sanctions.”¹⁶²

Accordingly, around the world some governments and their most senior officials are openly hostile to or critical of NGOs. For instance, John Bolton, who would go on to serve as United States Ambassador to the United Nations during the George W. Bush administration, compared NGO involvement in international affairs to fascism. He argued:

[I]t is precisely the detachment from governments that makes international civil society so troubling, at least for democracies Indeed, the civil society idea actually suggests a “corporatist” approach to international decision-making that is dramatically troubling for democratic theory Mussolini would smile on the Forum of Civil Society. Americanists do not.¹⁶³

More than just offering criticisms, a range of governments, including some in democratic societies, have adopted or proposed anti-NGO laws that create complex and burdensome registration requirements, impose

159. See David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 24 (2006); Nina J. Crimm, *An Explanation of The Federal Income Tax Exemption For Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 (1998); Evelyn A. Lewis, *Charitable Waste: Consideration of a “Waste Not, Want Not” Tax*, 30 VA. TAX REV. 39, 68 (2010).

160. Jude L. Fernando & Alan W. Heston, *The Role of NGOs: Charity and Empowerment: NGOs Between States, Markets, and Civil Society*, 554 ANNALS 8, 13 (1997). Cf. Jenkins, *Soft Power*, *supra* note 14, at 790–801 (discussing international philanthropy—including that from the United States—as a supportive element of public diplomacy and a source of soft power).

161. See generally Jonathan P. Doh, *Nongovernmental Organizations, Corporate Strategy, and Public Policy: NGOs as Agents of Change*, in GLOBALIZATION AND NGOS, *supra* note 29, at 1, 4–12 (discussing the multiple roles NGOs play in business-government interface).

162. See Jone L. Pearce, *Foreword* to GLOBALIZATION AND NGOS, *supra* note 29, at xi, xiii (“NGOs . . . can influence the direction of 10 or even 30 percent of the country’s gross domestic product.”).

163. John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 217–18 (2000).

intrusive and invasive oversight, or restrict associational rights, freedom of speech, or access to financial support. In fact, “[i]n the ten years since the U.N. Declaration on Human Rights Defenders was adopted, at least twenty countries have adopted laws imposing legal and regulatory restraints on NGOs.”¹⁶⁴ In one extreme case, the government of Ethiopia—in an effort to reduce foreign influence—passed a law in 2009 banning NGOs with more than 10% of international funding from engaging “in any activities relating to democracy, justice, or human rights.”¹⁶⁵ In Australia, the “neo-liberal and neoconservative politics of the [John] Howard government (while in power from 1996–2007) recast the idealism of NGO charters as socially unfashionable and naïve, while the Howard government’s policies sought to undermine their effectiveness.”¹⁶⁶ Scholars have accused the Howard government of attempting to “silence dissent” through denigration, bullying, public criticism, and defunding of NGOs.¹⁶⁷

Government efforts to impede NGOs through legal, regulatory, and extralegal channels demonstrate the precarious political climate and the power of anti-NGO sentiment in some countries. Governments have used a variety of strategies to attack NGOs, including expulsion, control of activities, attempts to overwhelm through bureaucracy, and co-optation. This is not an exhaustive list of strategies, but rather a set of examples. Drawn from a wide range of countries around the world, the following cases provide examples of government efforts hostile to nonprofit entities.

1. Expulsion of NGOs

For many years, Sudan—Africa’s largest country—has been beset by conflict. Sudan has been ravaged by two waves of civil war. The first brutal round took 1.5 million lives, the second (and familiar Darfur conflict) resulted in the deaths of over 200,000 and 2 million fled their

164. Jennifer M. Gleason & Elizabeth Mitchell, *Will the Confluence between Human Rights and the Environment Continue to Flow? Threats to the Rights of Environmental Defenders to Collaborate and Speak Out*, 11 OR. REV. INT’L L. 267, 274 (2009).

165. See U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2010, at 63 (2010), available at http://hdr.undp.org/en/media/HDR_2010_EN_Chapter3_reprint.pdf.

166. James Arvanitakis, *Surviving Neo-Liberalism: NGOs under the Howard Years*, 6 NEBULA, no. 3, 2009, at 53, 54, available at <http://www.nobleworld.biz/images/4Arvanitakis.pdf>.

167. *Id.* at 59–64; see also Sarah Maddison & Clive Hamilton, *Non-government Organisations*, in SILENCING DISSENT: HOW THE AUSTRALIAN GOVERNMENT IS CONTROLLING PUBLIC OPINION AND STIFLING DEBATE 78–100 (Clive Hamilton & Sarah Maddison eds., 2007).

homes.¹⁶⁸ Sudan, notorious for its human rights abuses,¹⁶⁹ has drawn intense international criticism, particularly from humanitarian NGOs.¹⁷⁰ It

168. See *Sudan Profile*, BBC NEWS (Nov. 29, 2011), http://news.bbc.co.uk/2/hi/africa/country_profiles/820864.stm#media; see also Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823, 828 ("Sudan's postcolonial history is marked by bloodshed."); *Sudan*, N.Y. TIMES (Nov. 11, 2011), <http://topics.nytimes.com/top/news/international/countriesandterritories/sudan/index.html?scp=1-spot&sq=sudan&st=cse> (then follow "Read More . . ." hyperlink) (estimating that Africa's longest-running civil war, between north and south Sudan, killed approximately 2.2 million people, and describing the Darfur conflict as "one of the world's worst humanitarian crises").

169. See *Darfur Tops U.S. List of Worst Human Rights Abuses*, USA TODAY (Mar. 6, 2007), http://www.usatoday.com/news/washington/2007-03-06-human-rights_N.htm?csp=34&loc=interstitialskip.

170. See, e.g., Nicholas D. Kristof, *A Darfur Envoy*, N.Y. TIMES ON THE GROUND (Apr. 16, 2006, 7:34 PM), <http://kristof.blogs.nytimes.com/2006/04/16/a-darfur-envoy/?scp=20&sq=darfur%20campaign&st=cse>. According to the United States Department of State's 2009 Human Rights Report on Sudan, many human rights abuses occurred in Sudan:

The following human rights abuses occurred in Sudan: abridgement of citizens' right to change their government; extrajudicial and other unlawful killings by government forces and other government-aligned groups throughout the country; torture, beatings, rape, and other cruel, inhumane treatment or punishment by security forces; harsh prison conditions; arbitrary arrest and detention, incommunicado detention of suspected government opponents, and prolonged pretrial detention; executive interference with the judiciary and denial of due process; obstruction of the delivery of humanitarian assistance and the expulsion of humanitarian NGOs; restrictions on privacy; restrictions on freedom of speech; restrictions on the press, including direct censorship; restrictions on freedoms of assembly, association, religion, and movement; harassment of IDPs; harassment and closure of human rights organizations; violence and discrimination against women, including female genital mutilation (FGM); child abuse, including sexual violence and recruitment of child soldiers, particularly in Darfur; preventing international human rights observers from traveling to/within Sudan; trafficking in persons; discrimination and violence against ethnic minorities; denial of workers' rights; and forced and child labor.

U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: SUDAN (Mar. 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135978.htm> [hereinafter 2009 HUMAN RIGHTS REPORT: SUDAN]; see also Sheryl Gay Stolberg, *Bush Signs Bill Allowing Sudan Divestment*, N.Y. TIMES, Jan. 1, 2008, at A7 (describing Sudan Accountability and Divestment Act and its "aim[] at pressur[ing] Sudan to end violence in Darfur region"). See generally Joyce Apsel, *On Our Watch: The Genocide Convention and the Deadly, Ongoing Case of Darfur and Sudan*, 61 RUTGERS L. REV. 53 (2008); Jamie A. Mathew, *The Darfur Debate: Whether the ICC Should Determine that the Atrocities in Darfur Constitute Genocide*, 18 FLA. J. INT'L L. 517 (2006); William A. Schabas, *Genocide, Crimes against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703 (2006); Mary Deutsch Schneider, *About Women, War and Dar-*

is estimated that more than seventy-five international NGOs work within the Darfur region of Sudan alone.¹⁷¹

Not surprisingly, with much of the blame for the conflict in the region placed on the government, the government has been critical of and hostile to NGO assistance.¹⁷² For example, in March 2009, after the International Criminal Court (“ICC”) issued an arrest warrant for Sudanese President Omar Hassan al-Bashir as a result of atrocities committed in Darfur,¹⁷³ Sudanese officials expelled several international humanitarian NGOs from the country.¹⁷⁴ To justify the expulsions, the government

fur: The Continuing Quest for Gender Violence Justice, 83 N.D. L. REV. 915, 958–87 (2007).

171. *Sudan Vows to Expel Foreign NGOs from Darfur*, GOOGLE NEWS (Mar. 16, 2009), <http://www.google.com/hostednews/afp/article/ALeqM5iqdYZGXF13sxbQoAZo8FGuoeWQyg> (noting, as of March 2009, there were eighty-three NGOs in Darfur before thirteen were expelled). However, “[a]rmed conflict, poor transport infrastructure, and lack of government support have chronically obstructed the provision of humanitarian assistance to affected populations.” *The World Factbook: Sudan*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last updated Sept. 27, 2011).

172. See Public Statement, Amnesty Int’l, Sudan: Continuing Blockade of Humanitarian Aid (Apr. 4, 2006), available at <http://www.amnesty.org/en/library/asset/AFR54/010/2006/en/273ef57a-fa09-11dd-b1b0-c961f7df9c35/af540102006en.pdf> (providing examples of actions by the Sudanese government to obstruct humanitarian aid in the country, including refusing to renew NGOs’ mandates and suspending and expelling NGOs).

173. See Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan’s Leader*, N.Y. TIMES, Mar. 4, 2009, at A6 [hereinafter Simons & MacFarquhar, *Court Issues Arrest Warrant for Sudan’s Leader*]; *ICC Issues Arrest Warrant for Sudan’s President*, HUMAN RIGHTS WATCH (Apr. 20, 2009), <http://www.hrw.org/en/news/2009/04/20/icc-issues-arrest-warrant-sudan-s-president>.

[T]he ICC issued an arrest warrant for President Bashir as an indirect perpetrator or as an indirect co-perpetrator of five counts of crimes against humanity—murder, extermination, forcible transfer, torture, rape—and two counts of war crimes—intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities and pillaging in Darfur between March 2003 and July 2008.

2009 HUMAN RIGHTS REPORT: SUDAN, *supra* note 170. See generally John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT’L L. REV. 367 (2009) (discussing the arrest warrant for President Bashir and the international response).

174. *Sudan Vows to Expel Foreign NGOs from Darfur*, *supra* note 171; see also Nicholas D. Kristof, Op-Ed, *A President, a Boy and Genocide*, N.Y. TIMES, Mar. 5, 2009, at A31.

used general criticisms of NGO credibility and accountability, and accused the aid groups of having ulterior motives and serving as agents for the ICC.¹⁷⁵ Almost immediately after the warrant was announced, the Sudanese government summoned several NGOs to a meeting at which they were ordered to leave the country or curb their work.¹⁷⁶ The government then expelled thirteen international NGOs and revoked the licenses of three NGOs to operate, and ordered them to hand over their assets (including computers, vehicles, and other equipment).¹⁷⁷ The affected NGOs denied the charges, stressing their independence from formal government entities and lack of ties with the ICC in particular.¹⁷⁸

One of Mr. Bashir's first actions after the [ICC] arrest warrant was to undertake yet another crime against humanity: He expelled major international aid groups . . . in effect, he is now preparing to massacre the Darfuri people in still another way, for Darfuris are living in camps and depend on aid workers for food, water and health care.

Id.

175. See Neil MacFarquhar & Marlise Simons, *Bashir Defies War Crime Arrest Order*, N.Y. TIMES (Mar. 5, 2009), <http://www.nytimes.com/2009/03/06/world/africa/06sudan.html> [hereinafter MacFarquhar & Simons, *Bashir Defies War Crime Arrest Order*]; Louis Charbonneau, *Sudan Expulsions of NGOs Leave Aid Gap—UN*, REUTERS (Mar. 9, 2009), <http://www.reuters.com/article/idUSN09481219>. Confirming the expulsion of the NGOs, Sudanese Vice President Ali Osman Taha stated, "Whenever an organization takes humanitarian aid as a cover to achieve a political agenda that affects the security of the [country] and its stability, measures are to be taken by law to protect the country and its interests." *Sudan Expels 10 Aid NGOs and Dissolves 2 Local Groups*, SUDAN TRIB. (Mar. 4, 2009), <http://www.sudantribune.com/Sudan-expels-10-aid-NGOs-and,30382> [hereinafter *Sudan Expels NGOs*].

176. See Simons & MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, *supra* note 173.

177. See *Health Fears as Sudan Expels NGOs*, ALJAZEERA (Mar. 5, 2009), <http://english.aljazeera.net/news/africa/2009/03/200935174114968814.html> [hereinafter *Health Fears*]; *Sudan Vows to Expel Foreign NGOs from Darfur*, *supra* note 171. Among the international NGOs expelled were: Oxfam, Doctors Without Borders (Dutch and French branches), CARE, Mercy Corps, Save the Children, the Norwegian Refugee Council, the International Rescue Committee, Action Contre la Faim, Solidarites, CHF International, the Khartoum Centre for Human Rights, Development and Environment, and Amal Centre for Rehabilitation of Victims of Violence. See MacFarquhar & Simons, *Bashir Defies War Crime Arrest Order*, *supra* note 175 (explaining that the affected aid agencies represent about 40% of the 6,500 international and local aid workers in Darfur); *Sudan Vows to Expel Foreign NGOs from Darfur*, *supra* note 171; *Sudan Expels Aid Groups in Response to Warrant*, MSNBC.COM (Mar. 4, 2009), http://www.msnbc.msn.com/id/29492637/ns/world_news-africa/t/sudan-expels-aid-groups-response-warrant/#.TpILVHLLKCM.

178. See, e.g., *Sudan Expels NGOs*, *supra* note 175; *Health Fears*, *supra* note 177.

The expulsions were plainly retaliatory, as one aid official stated, “[i]t happened right after the announcement [t]he connection was clear.”¹⁷⁹

Although the Sudanese government’s expulsion of the NGOs was strongly condemned,¹⁸⁰ the decision was not reconsidered. The Sudanese government promised to cover the work of the expelled NGOs,¹⁸¹ but the void left by the absence of extensive charitable aid operations remained.¹⁸² According to reports, the NGO “expulsions reduced the access of 1.5 million persons to healthcare; 1.16 million to water, sanitation, and hygiene; and 1.1 million to food aid.”¹⁸³ The United Nations warned, “[i]t is not possible, in any reasonable timeframe, to replace the capacity and expertise these [NGOs] have provided over an extended period of time.”¹⁸⁴

179. Simons & MacFarquhar, *Court Issues Arrest Warrant for Sudan’s Leader*, *supra* note 173 (quoting a charity official).

180. Urging the government to urgently reconsider its decision to shut down aid groups, United Nations Secretary-General Ban Ki Moon stated that the decision would cause “irrevocable damage” to humanitarian efforts in Sudan if not reversed. *Health Fears*, *supra* note 177. Similarly, the United States and other countries urged Sudan to reconsider its expulsion decision. *See, e.g.*, Peter Baker, *Obama Urges Sudan to Allow Aid Groups Back Into the Country*, N.Y. TIMES, Mar. 30, 2009, at A12; Neil MacFarquhar, *U.N. Official Says Darfur Continues to Crumble*, N.Y. TIMES, Mar. 21, 2009, at A8 [hereinafter MacFarquhar, *U.N. Official Says Darfur Continues to Crumble*] (all fifteen members of the United Nations Security Council expressed concern about the fate of affected Darfur civilians, and “[e]ven friends and neighbors of Sudan, like China, Uganda and Libya, which support a deferral of the court’s indictment, expressed concern about the impact of the expulsions.”).

181. Government spokesman Kamal Ibaid claimed that “[w]hat had been provided by those organisations to people in Darfur could simply be provided by national organisations.” *Sudan: NGO Expulsion to Hit Darfur’s Displaced*, IRIN NEWS (Mar. 9, 2009), <http://www.irinnews.org/report.aspx?reportid=83370> [hereinafter *Sudan: NGO Expulsion*] (referring to expelled NGOs).

182. *See, e.g.*, Neil MacFarquhar, *U.N. Official Calls Darfur Aid Tenuous*, N.Y. TIMES, Mar. 25, 2009, at A12 (explaining how stopgap measures by United Nations agencies kept aid flowing to Darfur but described them as “Band-Aid solutions, not long-term solutions”); MacFarquhar, *U.N. Official Says Darfur Continues to Crumble*, *supra* note 180 (describing continuing deterioration of humanitarian situation in Darfur in wake of Sudanese “government’s decision to expel major foreign aid organizations from the country”).

183. 2009 HUMAN RIGHTS REPORT: SUDAN, *supra* note 170. Mercy Corps President Nancy Lindborg stated that the Sudanese government’s decision was “a devastating blow to the many people of Sudan who rely upon NGOs for both immediate survival, and help in building more prosperous and stable futures for their families.” *Sudan Expels NGOs*, *supra* note 175.

184. *Sudan: NGO Expulsion*, *supra* note 181.

The above demonstrates that NGOs—especially the active international humanitarian organizations—and critiques against them are used as a political tool. Although Sudan's actions were clearly retaliatory in nature, the expulsion of international NGOs represents an extreme form of government attack on the sector grounded, at least ostensibly, in NGO accountability and legitimacy concerns.

2. Control of NGO Activities

The Egyptian government, prior to the Arab Spring, was widely considered an opponent of human rights and liberal democracy in the Middle East. In its annual report rating countries from one (“most free”) to seven (“least free”), Freedom House International gave Egypt a political rights score of six, a civil liberties score of five, and an overall rating of “not free” for 2010.¹⁸⁵ Although Egypt boasts one of the largest NGO communities in the Southern global community¹⁸⁶—including the rest of the Arab world—Egyptian civil society has faced increasingly strict government regulation.¹⁸⁷ Egypt adopted anti-NGO laws limiting the freedom and ability of NGOs to operate in the country.

The “Egyptian government [first] . . . entertain[ed] the idea of a law [regulating] NGOs” in 1999, when it purported to invite civil society or-

185. *Freedom in the World 2010—Egypt*, FREEDOM HOUSE (May 2010), <http://www.unhcr.org/refworld/docid/4c0ceaf5c.html>. The *Freedom in the World* survey provides an annual evaluation of the state of global freedom as experienced by individuals. The ratings process is based on a checklist of ten political rights questions and fifteen civil liberties questions. A rating of one represents “most free,” while a rating of seven means “least free.” Each pair of political rights and civil liberties ratings is averaged to determine an overall status of “Free,” “Partly Free,” or “Not Free.” Those whose ratings average 1.0 to 2.5 are considered “Free,” 3.0 to 5.0 “Partly Free,” and 5.5 to 7.0 “Not Free.” More information regarding the survey’s methodology can be accessed at *Methodology*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world-2012/methodology> (last visited Feb. 5, 2012).

186. In 1997, Egypt had 14,000–15,000 private non-profit organizations, in addition to many more youth clubs, professional syndicates, and trade unions. See Robert J. La-Towsky, *Egypt’s NGO Sector: A Briefing Paper* 1, 6 (Educ. for Dev. Occasional Papers Ser. 1, No. 4, 1997), available at <http://www.eric.ed.gov/PDFS/ED412412.pdf>. However, approximately 25% of the NGOs then registered with the Ministry of Social Affairs were inactive. *Id.* at 10; see also James G. McGann, *Pushback Against NGOs in Egypt*, INT’L J. NOT-FOR-PROFIT L., Aug. 2008, at 29, 32–34.

187. See McGann, *supra* note 186, at 31 (“[A]lthough Egyptian society shows many cultural indicators of philanthropy and is demonstrably committed to the founding of NGOs, official registration, long-term development, and the growth of NGOs is significantly limited under current political conditions.”).

ganizations to discuss a draft of a new law, Law No. 153 (“Law 153”).¹⁸⁸ However, the government solely crafted the draft of the law, which was sent to Parliament for approval “without [any] direct consultation [with] civil society [organizations].”¹⁸⁹ Once approved, the law received widespread criticism¹⁹⁰ and was ultimately repealed on procedural grounds in 2000 by the Supreme Constitutional Court.¹⁹¹ “Though repealed, this law laid the groundwork for [its successor] Law 84/2002” (“Law 84”).¹⁹²

Similar in content to Law 153, Law 84 was quietly issued and quickly passed by both houses of Parliament in 2002, again with no consultation from civil society organizations.¹⁹³ Generally broad in scope, the law provides the Egyptian government with substantial control over NGO operations.¹⁹⁴ The law grants the government an extraordinary amount of “power and discretion to grant or deny registration to an NGO, [to] interfere in the operations and fundraising of an [NGO], and to order [an involuntary] dissolution.”¹⁹⁵

Law 84 imposes strict registration requirements, creating substantial obstacles for NGOs from their inception.¹⁹⁶ The state regulatory authority has the ability to reject NGO applications under Article 11 of the law, which vaguely outlines prohibited NGO activities.¹⁹⁷ Most notably, Article 11 permits rejecting an application based on governmental determina-

188. *Id.* at 35; see Mohamed Agati, *Undermining Standards of Good Governance: Egypt's NGO Laws and Its Impact on the Transparency and Accountability of CSOs*, INT'L J. NOT-FOR-PROFIT L., Apr. 2007, at 56, 60.

189. McGann, *supra* note 186, at 35; see Agati, *supra* note 188, at 60.

190. See *Defending Civil Society*, INT'L J. NOT-FOR-PROFIT L., Apr. 2008, at 30, 65 (describing how the United Nations Committee on Economic, Social, and Cultural Rights expressed “deep concern” with Law No. 153 of 1999).

191. See Agati, *supra* note 188, at 60; McGann, *supra* note 186, at 35.

192. McGann, *supra* note 186, at 35.

193. See Agati, *supra* note 188, at 61 (“Law No. 84 did not emerge from a dialogue between the government and society. Rather, it is seen as a tool for the governing elite to control CSOs [civil society organizations].”) (emphasis added); see also McGann, *supra* note 186, at 35 (noting that Law 84 was “quietly passed”).

194. See McGann, *supra* note 186, at 35; see also Agati, *supra* note 188, at 62–63 (discussing the legal analysis of Law No. 84).

195. Agati, *supra* note 188, at 63; see also McGann, *supra* note 186, at 35 (“Law 84 allows the government to undermine efforts of the political opposition by regulating out of existence NGOs that question state authority, through regulations during the registration stage, the ability to deny the legal foundations of an NGO, and the power to refuse access to procured funding.”).

196. See Gleason & Mitchell, *supra* note 164, at 276 (explaining that “only seven of thirty organizations successfully navigated [through] the country’s NGO registration requirements” in 2005).

197. See *Egypt: Margins of Repression*, HUMAN RIGHTS WATCH (July 3, 2005), <http://www.hrw.org/en/node/11675/section/7> [hereinafter *Egypt: Margins of Repression*].

tion that the organization “threaten[s] national unity or [violates] public order or morals.”¹⁹⁸ Rejections can also be based on disapproval of an organization’s founding members or on any provisions of an association’s articles of incorporation determined to violate the law.¹⁹⁹ The law is regularly used as a tool to ban organizations whose behavior or goals are not favored by the state.²⁰⁰

Even if successful in overcoming the challenges of registration, NGOs face obtrusive oversight of their activities, “with the threat of dissolution always looming in the background.”²⁰¹ Law 84 permits the state to send representatives to an organization’s meetings and to call meetings of the organization’s general assembly.²⁰² Moreover, NGOs must provide the government with minutes within thirty days of each meeting.²⁰³ The law grants the state extraordinary power to regulate the composition of individual NGO boards.²⁰⁴

Law 84 also provides the Egyptian government with a means of control over the funding of NGOs. Under Article 17, an NGO may not accept foreign funding without explicit authorization from the state.²⁰⁵ Although the law provides that the state regulatory authority must give its final decision within sixty days, because NGOs are not permitted to ac-

198. McGann, *supra* note 186, at 36 (“At least five human rights NGOs had been denied registration as of June 2005 due to ‘security concerns’ or other Article 11 considerations.”) (citation omitted); *see also* Justin Shore, Ctr. for Human Rights & Humanitarian Law, *Human Rights Council Periodic Review Prompts Egypt to Promise NGO Reform*, HUM. RTS. BRIEF (Mar. 24, 2010), <http://hrbrief.org/2010/03/human-rights-council-universal-periodic-review-prompts-egypt-to-promise-ngo-reform/> (noting that Law 84 allows Egyptian government to “dissolve NGOs or imprison workers for any political activity or threat to ‘national unity.’”).

199. *See* McGann, *supra* note 186, at 35; *see also* Agati, *supra* note 188, at 63.

200. *See Egypt: Margins of Repression*, *supra* note 197; McGann, *supra* note 186, at 36.

201. McGann, *supra* note 186, at 36.

202. *See* Agati, *supra* note 188, at 64; McGann, *supra* note 186, at 36.

203. *See* McGann, *supra* note 186, at 36.

204. Specifically, Law 84 requires NGOs to submit nominated board members for pre-approval by the state regulatory authority sixty days prior to board elections. *See Egypt: Margins of Repression*, *supra* note 197. Board nominees can be removed by the state regulatory authority for “non-fulfillment of nomination requirements.” McGann, *supra* note 186, at 36 (citation omitted); *see also* Agati, *supra* note 188, at 64 (“The board of directors must provide a list of board nominees to the Ministry of Social Affairs within a day of their nomination.”).

205. *See* Mohamed ElAgati, *Egypt*, INT’L J. NOT-FOR-PROFIT L., May 2010, at 9, 10; *see also* Agati, *supra* note 188, at 65 (“This provision undermines the sustainability of many organizations. Foreign funding is the most essential financial source for civil human rights and development associations, especially because financing from Egypt’s private sector for such organizations does not exist.”).

cess any of the funds during the waiting period, that period can drive NGOs into insolvency.²⁰⁶ Additionally, NGOs must provide state officials with detailed accounting reports of expenses and revenues, including the sources of donations.²⁰⁷

Violations of Law 84 can result in criminal penalties, including fines or imprisonment, or even in dissolution of the NGO.²⁰⁸ However, because activities prohibited in Article 11 are so vaguely defined, the government has great discretion in determining whether a violation has occurred.²⁰⁹ As a result, many NGOs become “subject to penalty without being clearly forewarned of their illegal activity.”²¹⁰

Egypt’s Law 84 illustrates a second strategy that governments have used to curb nonprofit influence. By involving the government directly in the efforts of nongovernmental organizations, the government may systematically interfere in an NGO’s associational and advocacy activities as a method of state control.

Even after the Arab Spring and the removal of President Hosni Mubarak earlier in February 2011, Egyptian security forces have raided, harassed, and otherwise inhibited NGOs.²¹¹ Recent media reports describe coordinated raids by the Supreme Council of the Armed Forces on ten to seventeen organizations that closed offices and detained staff.²¹² The reports indicate that the military officers “provided no warrants or explanations” but state news media indicated the focus was on “illegal foreign funding.”²¹³ The military rulers have taken inconsistent positions both pledging to halt such raids²¹⁴ and vigorously defending the crack-

206. One local NGO official noted: “The sixty days are an issue—of course the government will take longer, and we won’t be able to touch it. Our operational funding is vital. It is essential we get it in time, and it’s the hardest to find. The electricity [bill] must be paid.” *Egypt: Margins of Repression*, *supra* note 197; *see also* McGann, *supra* note 186, at 37 (“Many organizations that had experienced trouble with registration find that gaining permission to use their foreign-donated funds can be equally trying.”).

207. *See* Agati, *supra* note 188, at 65.

208. *See id.* at 65; McGann, *supra* note 186, at 37.

209. *See* Agati, *supra* note 188, at 65 (“For example, activities are prohibited if they are deemed to threaten national unity or violate the public order or *morals*. All political activities are prohibited as well.”) (emphasis in original).

210. *See* McGann, *supra* note 186, at 37.

211. *See* Rebecca Collard & Dan Murphy, *US “Deeply Concerned” After Egypt Raids NGO Offices*, *CHRISTIAN SCI. MONITOR*, Dec. 29, 2011, at 1.

212. *See id.*

213. David D. Kirkpatrick & Steven Lee Myers, *Egyptian Forces Raid and Shut Civic Groups, Drawing Sharp U.S. Response*, *N.Y. TIMES*, Dec. 30, 2011, at A4.

214. *See* Steven Lee Myers & David D. Kirkpatrick, *After International Outcry, Egypt Vows to End Crackdown on Nonprofits*, *N.Y. TIMES*, Dec. 31, 2011, at A4.

downs.²¹⁵ Accordingly, “a tremor of fear” has been sent through the network of civil society organizations.²¹⁶

3. Bureaucratic Barriers

Russia has an active civil society with more than 220,000 noncommercial organizations and public associations.²¹⁷ However, the NGOs operate under conditions of significant government regulation, particularly the enactment of the January 2006 Russian Federation Law, On Introducing Amendments into Certain Legislative Acts of the Russian Federation (“2006 Russian NGO Law”), under then-President Vladimir Putin’s administration.²¹⁸ The law aimed “to regulate the activities of non-governmental and non-commercial organizations operating in the Russian Federation and . . . [introduced] new registration procedures and stricter monitoring of NGO activities, financial contributions, and budgets.”²¹⁹ In addition to significantly expanding government control over NGOs, the law “considerably restrict[ed] the right to association and right to privacy of NGOs and NGO members.”²²⁰

215. See David D. Kirkpatrick, *Undercutting Vow of Softer Stance, Egypt Again Defends Office Raids*, N.Y. TIMES, Jan. 2, 2012, at A7.

216. *Id.*

217. *NGO Law Monitor: Russia*, INT’L CTR. FOR NOT-FOR-PROFIT LAW [ICNL], <http://www.icnl.org/research/monitor/russia.pdf> (last updated Nov. 16, 2011) [hereinafter *NGO Law Monitor: Russia*].

218. See Federal Law of the Russian Federation on Introducing Amendments into Certain Legislative Acts of the Russian Federation, SABRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Collection of Legislation] 2006, No. 18-FZ, available at <http://www.unhcr.org/refworld/docid/44363d654.html>.

219. Michael P. Maxwell, Comment, *NGOs in Russia: Is the Recent Russian NGO Legislation the End of Civil Society in Russia?*, 15 TUL. J. INT’L & COMP. L. 235, 236 (2006) (quoting Igor Khrestin, *New NGO Law in Russia: The Implementation Matters More Than Substance*, AM. ENTER. INST. (Feb. 28, 2006), <http://www.aei.org/article/23965>).

220. Alison Kamhi, *The Russian NGO Law: Potential Conflicts with International, National, and Foreign Legislation*, 9 INT’L J. NOT-FOR-PROFIT L. 34, 34 (2006) (describing review of the draft of the law by the Council of Europe, which declared many of the law’s provisions as “problematic”); see also HUMAN RIGHTS WATCH, *Choking on Bureaucracy* 2 (Feb. 2008) [hereinafter HUMAN RIGHTS WATCH, *Choking on Bureaucracy*], available at <http://www.hrw.org/en/node/62400/section/1>:

[I]n order to be compatible with protections under international law for freedom of expression and association, these restrictions must be proportionate, necessary for a democratic society, and must pursue a legitimate aim. The restrictions must also be sufficiently clear so that those subject to them can reasonably know how to comply *The restrictions in the 2006 law do not meet these tests.*

However, this law is contested by civil society activists. Many critics have noted that the law was partly aimed at foreign NGOs operating in Russia, which are perceived as soft power tools advancing Western interests to promote regime changes in Russia and its neighbors.²²¹ In particular, with elections approaching, government leaders were cognizant of the perception that international NGOs played a key role in stoking the 2003 Rose Revolution in Georgia and the similar Orange Revolution in Ukraine a year later.²²²

The law imposed onerous and stringent registration and reporting requirements on NGOs—especially with respect to foreign sources of funding—with severe penalties for noncompliance.²²³ For example, the law required organizations to fill out approximately one hundred pages of documents, listing detailed personal information about each founder and each member.²²⁴ A single mistake or misstep in the paperwork could serve as “grounds for denial of registration, essentially providing the government with another excuse to dissolve—or refuse to recognize le-

(emphasis added). “The U.S. Commission on International Religious Freedom (USCIRF) reported that actions and statements by Russian officials ‘indicate a declining level of tolerance for unfettered NGO activity, particularly for those NGOs receiving foreign funding.’” Robert C. Blitt, “*Babushka Said Two Things—It Will Either Rain or Snow; It Either Will or Will Not*”: An Analysis of the Provisions and Human Rights Implications of Russia’s New Law on Non-Governmental Organizations As Told Through Eleven Russian Proverbs, 40 GEO. WASH. INT’L. L. REV. 1, 5 (2008) (quoting U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *Challenge to Civil Society: Russia’s Amended Law on Noncommercial Organizations* 6 (2007), available at http://www.uscirf.gov/images/stories/pdf/russia_ngo_report_final_march5.pdf).

221. See Maxwell, *supra* note 219, at 237 (“[T]he new law [the 2006 Russian NGO Law] comes in the wake of several recent events that seem to indicate this is just another example of President Putin attempting to gain effective control over the entire political system.”); see also Gregory L. White, *West Hits a Wall With Putin—Despite Rising Doubts, Leaders Are Reluctant to Alienate Moscow*, WALL ST. J., Jan. 12, 2006, at A11 (noting the law was “publicly criticized by a number of Western officials.”).

222. See Rebecca B. Vernon, *Closing the Door on Aid*, 11 INT’L J. NOT-FOR-PROFIT L. 5, 11 (2009); see also George Melloan, *Putin’s KGB Instincts Serve Russia Badly*, WALL ST. J., Feb. 14, 2006, at A23.

223. See HUMAN RIGHTS WATCH, *Choking on Bureaucracy*, *supra* note 220, at 2. The law “gives the [government] unlimited discretion to request documents for inspection and [interpretation] . . . including for compliance with the constitution, laws, and ‘interests’ of Russia in the broadest terms. In several cases, Human Rights Watch found that Russian government officials had made burdensome requests for documents, including [requests] for confidential records and communications with clients.” *Id.*; see also Gleason & Mitchell, *supra* note 164, at 275 (describing how Russia’s NGO law imposes burdensome registration requirements that “substantially infringe on the right of association.”).

224. See Kamhi, *supra* note 220, at 35. In addition, “[i]f any of the founders are deceased, the organization must provide death certifications.” *Id.*

gally—organizations.”²²⁵ For several months, Human Rights Watch, Amnesty International, the Danish Refugee Council, two branches of Doctors Without Borders, and other major international NGOs were temporarily forced to stop their activities for allegedly failing to comply with the law and its registration requirements.²²⁶

The 2006 Russian NGO Law also restricts the formation of, participation, and membership in an NGO to individuals domiciled in Russia, thereby prohibiting foreign nationals or stateless persons or entities from effective organization.²²⁷ All foreign NGOs operating in Russia must inform the government about their projects for the upcoming year and the approximate amount of money allocated to each project; the government then has the discretion to ban projects (or even parts of projects) on vague basis.²²⁸ Moreover, the law also authorizes state officials to conduct intrusive annual inspections of NGOs.²²⁹

The election of President Dmitry Medvedev in 2008 fueled hope that the legal framework regulating civil society in Russia might liberalize.²³⁰

225. *Id.*

As of June 29, 2006, forty foreign NGOs had applied for official registration under the [2006 Russian NGO Law]—and not a single one was successful The fact that all forty were denied registration indicates how complicated the new requirements are and confirms NGOs’ fears that this law can be used to harass NGOs, creating unnecessary work for them and excuses for the government to deny organizations registration.

Id.; see also Anastasia Kornya, *Non-Governmental Organizations Fail the Test*, VEDOMOSTI (June 29, 2006), reprinted in NAT’L CONF. ON SOVIET JEWRY WKLY. NEWS BRIEF, June 30, 2006, at 9 (A. Ignatkin trans.), available at www.ncsj.org/AuxPages/Wkly060630.pdf (noting that “forty foreign non-governmental organizations have tried to obtain official registration in Russia since the new legislation” and “[n]ot one of them has been successful”).

226. Kamhi, *supra* note 220, at 35; see also *Politics & Economics: Russia Eases Stance Toward Foreign NGOs*, WALL ST. J., Nov. 13, 2006, at A6 (noting that foreign governmental organizations were “forced to suspend operations” in Russia); Charles Digges, *Amnesty International, Human Rights Watch, and Others Temporarily Halted by Russian NGO Law*, BELLONA (Oct. 19, 2006), http://www.bellona.org/articles/articles_2006/Rejected_NGOs.

227. Kamhi, *supra* note 220, at 37.

228. See HUMAN RIGHTS WATCH, *Choking on Bureaucracy*, *supra* note 220, at 3.

229. See *id.* at 2.

230. See, e.g., Nikolaus von Twickel, *Kremlin Takes Small Step to Ease NGO Law*, MOSCOW TIMES (May 28, 2009), <http://www.cdi.org/russia/johnson/2009-99-17.cfm> (“Russia’s stifling NGO law has been labeled a hallmark of former President Vladimir Putin’s heavy-handed approach to civil liberties. Likewise, President Dmitry Medvedev’s recent promise to review the law has been praised as a sign of his liberalism.”); Peter Finn, *Putin’s Chosen Successor, Medvedev, Elected in Russia—Power-Sharing is Main*

In the spring of 2009, after meeting with NGO leaders and hearing their complaints, President Medvedev promised to review Russia's NGO law, stating that "improvements to NGO legislation were possible and also necessary."²³¹ By June 2009, the Russian Duma amended the 2006 NGO law, attempting to "liberalise the legal position of NGOs"²³² and "bring the restrictive law . . . into line with Russia's international human rights obligations."²³³ Drafted by a presidential working group including representatives of the administration, the Justice Ministry, the Russian Duma, the Federation Council, and civil society organizations,²³⁴ the amendments eased the previously stringent registration requirements for NGOs.²³⁵ Under the amendments, incomplete or incorrect registrations and re-registrations of NGOs no longer result in automatic denials of reg-

Focus After a Crushing Win, WASH. POST, Mar. 3, 2008, at A11 (describing the ability of Medvedev to "chart a new course for Russia," including "increasing personal freedoms . . . and a less confrontational stance abroad"). The hope for improvement in Russia's civil society continues to increase, as 2011 is a pre-election year in Russia. See Mikhail Gorbachev, Op-Ed, *President Medvedev, Russia Needs a New Agenda*, INT'L HERALD TRIB., Dec. 13, 2010, at 8 (promoting the argument that President Medvedev has the ability to shape the new agenda for Russia, which includes consideration of the movement in which grassroots organizing is becoming deeper and stronger in Russian society—a movement which civil society groups are at the forefront).

231. Eberhard Schneider, *Russian Domestic Policy*, EU-RUSSIA CENTRE WEEKLY COLUMN (EU-Russ. Ctr., Brussels, Belg.) (July 20, 2009), available at <http://www.eurussiacentre.org/our-publications/column/russian-domestic-policy.html>; see also *Russia: Revise NGO Law to Protect Rights*, HUMAN RIGHTS WATCH (May 13, 2009), <http://www.hrw.org/news/2009/05/13/russia-revise-ngo-law-protect-rights> ("Medvedev acknowledged the difficulties faced by NGOs, including restrictions 'without sufficient justification,' and the fact that many government officials view NGOs as a threat."); Charles Digges, *Medvedev Suggests Amendments to Russia's NGO Law—Human Rights Activists Suggest More*, BELLONA (June 18, 2009), http://www.bellona.org/articles/articles_2009/medvedev_ngo_amendments (noting that "Medvedev proposed . . . amendments relaxing laws on NGOs."); von Twickel, *supra* note 230 (noting "Medvedev promised to enact changes . . .").

232. Schneider, *supra* note 231 (paraphrasing Garri Minch, President Medvedev's representative in the Duma). The Russian Duma adopted amendments to Russian Federal Law No. 7-FZ of January 12, 1996, "On Non-Commercial Organizations," which came into force on August 1, 2009. See *id.*

233. *Russia: Revise NGO Law to Protect Rights*, *supra* note 231. "Human Rights Watch, the Moscow Helsinki Group, AGORA, the Youth Human Rights Movement, and the Human Rights Resource Center [all] submitted a list of proposed reforms for [Russia's] NGO law to the Ministry of Justice in April [2009] and to the Presidential Council for Civil Society Organizations and Human Rights in early May [2009]." *Id.*

234. See von Twickel, *supra* note 230.

235. See Clifford J. Levy, *Russia: Fewer Hurdles for Nonprofit Organizations*, N.Y. TIMES, June 17, 2009, at A8 (explaining the new legislation as "eas[ing] some of the regulatory burdens on nonprofit groups.").

istration; rather, the registration process “may be suspended for up to three months until the applicant completes or corrects the application.”²³⁶ Furthermore, mandatory government audits of NGOs will occur every three years as opposed to annually.²³⁷ In addition, the provision allowing the government to refuse to register NGOs when the organization is deemed to threaten Russia’s “unique character, cultural heritage, or national interests of the Russian federation” was removed.²³⁸

Thus, while the amended version of Russia’s NGO law is less draconian than the law was under the Putin administration, the Russian government’s aggressive approach to regulating NGOs demonstrates significant hostility toward civil society, particularly toward those NGOs perceived to be closely associated with foreign support, expertise, or influence.

4. Co-optation

Civil society organizations have enjoyed a long tradition in Venezuela. The 1999 Venezuelan Constitution purports to “seek to promote and protect human rights and citizens’ right to participate as the foundation of democratic coexistence and social peace.”²³⁹ However, recently the Venezuelan government has imposed restrictive laws and practices aimed at NGOs.²⁴⁰

236. See *NGO Law Monitor: Russia*, *supra* note 217; see also von Twickel, *supra* note 230.

237. See *NGO Law Monitor: Russia*, *supra* note 217.

238. See *id.*

239. *NGO Law Monitor: Venezuela*, INT’L CTR. FOR NOT-FOR-PROFIT LAW, <http://www.icnl.org/research/monitor/venezuela.pdf> (last updated Dec. 31, 2011).

240. The Inter-American Commission on Human Rights (“IACHR”) report, *Democracy and Human Rights in Venezuela*, describes a series of state actions and statements by high-ranking public officials aimed at undermining the legitimacy of domestic and international human rights NGOs in Venezuela. The report identifies a trend of opening unfounded judicial investigations or criminal proceedings against human rights defenders in order to intimidate them, particularly when they have been critical of the Venezuelan government. The report also describes cases where judicial proceedings have been brought against NGOs and human rights defenders for alleged offenses such as, *inter alia*, conspiracy to destroy the republican form of government, criminal association, and defamation. Inter-Am. Comm’n on Human Rights, *Rep., Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II, Doc. 54 (Dec. 30, 2009), available at <http://cidh.org/pdf%20files/VENEZUELA%202009%20ENG.pdf>; see also 2009 HUMAN RIGHTS REPORT: VENEZUELA, U.S. DEP’T OF STATE (Mar. 11, 2010), available at <http://www.state.gov/j/drl/rls/hrrpt/2009/wha/136130.htm> (describing how a variety of independent domestic and international human rights groups operated with some government restrictions and how many domestic NGOs reported threats, physical attacks, and harassment).

In December 2010, Venezuela enacted the Law for Protection of Political Liberty and National Self-determination. The law specifically targets NGOs dedicated to the “defense of political rights” or other “political objectives.”²⁴¹ Moreover, the law precludes such organizations from holding assets or receiving financial support from foreign sources.²⁴² In addition, government officials continue to debate that the draft *Ley de Cooperación Internacional* (“Law on International Cooperation”)²⁴³ threatens the “continued existence and independence of NGOs,” as well as drastically infringes upon the right of freedom of association.²⁴⁴ The proposed Law on International Cooperation, which was approved on its first reading,²⁴⁵ gives the Venezuelan government unprecedented authority to control, organize, and direct all “activities of international cooperation,” including, transfers of resources and skills.²⁴⁶ The legislature has not yet taken further action needed to enact the Law on International Cooperation despite calls by government officials to do so.²⁴⁷

Most significantly, the law requires all foreign funds to be routed through a government-administered Fund for International Cooperation and Assistance, which would place substantial discretion and control in the government with regard to which NGOs receive funds and resources.²⁴⁸ Effectively, the fund would create a new level of dependency between NGOs and the Venezuelan government, and the government

241. See *NGO Law Monitor: Venezuela*, *supra* note 239.

242. See Int'l Ctr. for Not-for-Profit Law, *Wave of Constraint: Recent Developments in Venezuela, Ecuador, Honduras, Iran, Bahrain, and Cambodia 2* (2010), available at <http://www.icnl.org/research/trends/trends2-2.pdf>.

243. See Alexandra Freitas, *Commentary Regarding Venezuela's Proposed Law on International Cooperation*, ACCESS INITIATIVE BLOG (July 22, 2009), <http://www.accessinitiative.org/blog/2009/07/commentary-regarding-venezuela-s-proposed-law-international-cooperation>.

244. Freitas, *supra* note 243.

245. See *NGO Law Monitor: Venezuela*, *supra* note 239.

246. See *Venezuela's NGOs Fear New Law Will Stifle Civil Society, Curb Freedom of Expression*, DEMOCRACY DIGEST BLOG (Dec. 6, 2010), <http://www.demdigest.net/blog/2010/12/venezuelas-ngos-fear-new-law-will-stifle-civil-society-curb-freedom-of-expression/>.

247. See *NGO Law Monitor: Venezuela*, *supra* note 239.

248. See generally Marcos Carrillo, *Venezuela*, 12 INT'L J. NOT-FOR-PROFIT L. 41 (2010) (discussing the law's prohibitions against foreign funding and routing funding through the government); see also Freitas, *supra* note 243; Christopher Toothaker, *NGOs Warn of Restrictions in Pending Venezuela Law*, GUARDIAN (U.K.) (May 7, 2009), <http://www.guardian.co.uk/world/feedarticle/8495746> (noting that the new Venezuela law would direct foreign funds into “a government-controlled fund”).

would have the power to stifle or starve the activities of NGOs not aligned with its interests.²⁴⁹

Many experts believe it is very likely that the draft Law on International Cooperation will be approved in the near future.²⁵⁰ This should be particularly worrisome to the nonprofit sector because Venezuela's proposed international cooperation law has influenced other Latin America countries, such as Bolivia, Peru, and Mexico, to propose similar laws.²⁵¹

This type of bill demonstrates that NGOs and particularly foreign funding have become lightning rods.²⁵² By controlling or limiting access to financial support, governments are attempting to discipline—through the regulation of NGOs—civil society into falling in line.

III. LESSONS FOR THE PHILANTHROPIC COMMUNITY

This Article raises some fundamental questions about anti-NGO thought, activism, and policies. Beyond a review of the damning critiques of NGOs leveled by others, this Article considers the varieties of resistance and where they may lead. Are there lessons to be learned from

249. See *NGOs Warn of Restrictions in Pending Venezuela Law*, *supra* note 248.

250. Some activities, however, have proven effective in challenging the Law. Examples include:

[a] group of NGOs . . . develop[ing] a national and international lobbying campaign . . . to raise awareness of the consequences of the [Law] . . . ; seminars [being] staged . . . to inform . . . NGOs and . . . NGO beneficiaries of the consequences of the [Law].

Carrillo, *supra* note 248, at 50–51. Carrillo also suggests “responsive strategies” should the law be ultimately passed, such as “[c]hallenging the [Law] as unconstitutional before the Constitutional Chamber of the Tribunal Supremo de Justicia . . . [and the] Inter-American Commission on Human Rights.” *Id.* (arguing that the Judiciary in Venezuela is “clearly biased in favor of the [Venezuelan] Government.”)

251. See INT’L CTR. FOR NOT-FOR-PROFIT L., RESTRICTIONS ON EXCHANGES OF KNOWLEDGE, CAPACITY, AND EXPERTISE 10–11 (2009) (also noting that Nicaragua and Indonesia have also begun to consider international cooperation laws similar to Venezuela’s).

252. The term “international cooperation law” suggests that such a law may require foreign funding to be channeled via a government fund. See *NGO Law Monitor: Venezuela*, *supra* note 239. The Venezuelan government has previously accused the United States and other countries of illegally funding NGOs, charities, and businesses in Venezuela as part of a “dirty campaign” to remove Venezuelan President Hugo Chávez from office. *Id.* Chávez accused the United States of “playing a role in a failed 2002 coup,” an accusation that the U.S. has consistently denied. See Dan Molinski, *In Venezuela, Accusations Against Ronald McDonald House, Among Other U.S. Charities*, WALL ST. J., Aug. 25, 2010, at A12 (describing how the Chávez government filed complaints against “many Venezuelan NGOs as well as local chapters of international organizations,” such as the Ronald McDonald House Charities).

these critiques? Can or should individuals and institutions aligned with or supportive of NGOs do more to support them and better position them against such attacks? This Article suggests that serious consideration of anti-NGO arguments and criticisms should lead to critical reevaluations of the power dynamics between Northern funders and Southern NGO grant recipients. In particular, I argue that there may be an inverse relationship between efforts to increase the accountability of Northern nonprofit funders and the legitimacy of Southern NGOs receiving support from Western nonprofit organizations.

A. Accountability

Accountability is at the center of nonprofit discourse today. The notion that nonprofits need to improve their levels of accountability is conventional wisdom among students of civil society and philanthropy. As used by a variety of critics and scholars of NGOs, “accountability” appears to have several different meanings, some of which are inconsistent. These inconsistencies or contradictions remain unnoticed, are not regularly discussed, and create conceptual confusion. Notably, skeptics of NGOs on the right, critics of nonprofits from the left, and governments seeking to discredit the work of NGOs all use the trope of “accountability” as a sword to attack nonprofit organizations. The ambiguity surrounding the meaning of the term raises questions—rather than sheds light—on the role of NGOs in civil society.

The accountability concerns of anti-NGO activists are frequently presented as institutional, efficient, and apolitical critiques of nonprofit behavior. But accountability has several different meanings and uses. It can refer to financial accountability (i.e., the ability of an organization to effectively safeguard and manage its financial resources), organizational accountability (i.e., emphasizing the internal governance of nonprofit organizations and their use of legitimate and transparent processes), mission accountability (i.e., the ability to effectively carry out activities to advance the primary purposes or mission of the organization), upward stakeholder accountability (i.e., responsiveness to key individual, corporate, private foundation, and/or government donors that provide essential funding to finance ongoing operations), and downward stakeholder accountability (i.e., responsiveness to the beneficiaries or constituents served by the organization).²⁵³ Other important measures of and procedures to achieve accountability also exist.²⁵⁴

253. See generally Evelyn Brody, *Accountability and the Public Trust*, in THE STATE OF NONPROFIT AMERICA 471, 475–76 (Lester M. Salamon ed., 2002) (explaining that accountability has four meanings: financial probity, good governance, adherence to donor

Due to the complexity and multiple uses of accountability, it is not always clear what criticisms of NGOs cloaked in accountability mean. This assortment of varying conceptions of accountability limits the term's utility. In some cases, accountability means so many different things that the term may not actually mean much of anything at all.

As noted earlier, accountability in the corporate and public sectors is often conceived of in strict, formal terms.²⁵⁵ In the corporate model, accountability usually focuses on ownership lines and emphasizes direct relationships between owners/shareholders (the principals) and the directors they elect and officers they appoint (their agents). Similarly, in the public context, accountability is established through the ballot box when voters consider discrete issues or elect agents, thereby tethering government to individuals. Although quite limited in their own ways, these particular lines of accountability do share the virtue of being clear. Of course in practice, we may question whether deeply accountable relationships genuinely exist in the corporate and public sectors.

Regardless, the application of a singular primary principal model of accountability used in the business and government sectors, however, is inapplicable in the nonprofit context. Rather than relying on direct formal ties, nonprofit accountability in an abstract sense²⁵⁶ is, to borrow the phrase of Mary Kay Gugerty and Aseem Prakash, a narrative process.²⁵⁷ Thus this creates what I term "thin" and "thick" conceptions of accountability: the former being clear, formal, and objective but limited in scope, and the latter being indirect, capacious, and subjective in an effort to be comprehensive and inclusive.

direction and mission, and effectiveness and public trust); James J. Fishman, *The Non-profit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 311–12 (2006) (discussing financial and mission accountability); Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 209–19 (2004) [hereinafter Brakman Reiser, *Enron.org*] (discussing financial, purposive, and organizational accountability).

254. For example, voluntary membership in associations (that may carry prestige or credibility) can set minimum standards that provide a basis for nonprofit accountability. See generally VOLUNTARY REGULATION OF NGOS AND NONPROFITS: AN ACCOUNTABILITY CLUB FRAMEWORK (Mary Kay Gugerty & Aseem Prakash eds., 2010) [hereinafter VOLUNTARY REGULATION].

255. See *supra* text accompanying note 10.

256. However, some of the more specialized treatments of accountability, e.g., financial accountability, are more amenable to a thin application that can be assigned to a clearly identified source.

257. Mary Kay Gugerty & Aseem Prakash, *Voluntary Regulation of NGOs and Nonprofits: An Introduction to the Club Framework*, in VOLUNTARY REGULATION OF NGOS AND NONPROFITS: AN ACCOUNTABILITY CLUB FRAMEWORK, *supra* note 254, at 3, 6.

Critics advocate a thin model when they apply ideas of accountability familiar in public contexts, such as voting, or private contexts, such as shareholder meetings, to NGOs. This model presumes clearly identifiable stakeholders. Managers of a corporation are accountable to shareholders; politicians to voting public—there is no confusion about the source to whom one may be accountable. But this model is also formal and limited in scope. It is formal because shareholders and voters are given only the binary option to accept or reject what is placed before them. It is limited in scope because they are asked either to respond to policy matters that have already been defined and narrowed or more often only to accept or reject the representative herself.

While sharing in critics' desire for heightened accountability, I would argue that a thick model is more appropriate for NGOs. NGOs, rather than answer to one set of clearly identifiable constituents, should strive to be far more capacious and inclusive. They should look to multiple audiences—upward to donors of different types and downward to a range of beneficiaries to judge them on performance. Likewise, rather than offer stakeholders only formal binary options to respond to limited prefabricated choices, NGOs instead should strive to be substantive and comprehensive—that is, NGO accountability should include genuine efforts to engage constituent stakeholders in broad-ranging substantive discussion and dialogue to formulate policy choices themselves.

Indeed, a thick nonprofit accountability model is far more difficult to implement and much harder to measure than a thin one, but such a model supports the values and the goals of the nonprofit sector and is something NGOs should aspire to. External and upward accountability approaches should be combined with internal and downward accountability to local communities to achieve long-term impact on social ills.²⁵⁸ Genuine accountability will not be achieved in a thin, top-down model. Real accountability must allow the grass roots to speak up, place marginalized people at the center of their own story, authorize individuals to pursue the collective common good (as they see and define it), and create room for beneficiaries to generate and execute their own transformational vision.²⁵⁹

This distinction in accountability perspectives is not just an academic one; it also affects policy and substantive choices. I worry that if the nonprofit sector were to select a principal subject of accountability, akin

258. See ALNOOR EBRAHIM, *NGOS AND ORGANIZATIONAL CHANGE* 159 (2003).

259. Cf. Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 796–99, 807–08 (discussing the value of participatory bottom-up problem-solving for social change).

to the voter or the shareholder, that would likely be donors. Of course, donors are already important nonprofit principals because most nonprofits must seek to secure the financial resources necessary to conduct their activities. But a donor primacy accountability model would discount other important constituencies and demographics, most notably charitable beneficiaries often made up of relatively powerless or subordinated groups and/or communities that are frequently served by nonprofit organizations. Ironically, the adoption of a thin NGO-funder accountability model may strengthen the arguments of critics and further expose the nonprofit sector, especially foreign NGOs, to some of the lines of assault already being used against them. For instance, critiques focusing on representativeness (right), neocolonialism (left), and foreign influence (lodged by governments) would only be enhanced.

Moreover, if donors were to be relied on as the primary means to keep nonprofits accountable, many NGO critics still would be dissatisfied. Especially to the degree that the largest and most influential donors are institutional ones—particularly private foundations with endowments—many of the same questions could be recycled: to whom then are the foundations accountable? Because the very nature of an endowed private foundation (which is created to exercise private control and by definition lacks the broad-based public support of other charitable organizations)²⁶⁰ presents its own accountability challenges,²⁶¹ reliance on NGO-donor

260. The Internal Revenue Service classifies all section 501(c)(3) organizations as private foundations or non-private foundations (more commonly referred to as public charities) in accordance with section 509. Private foundations are generally funded by a very small number of donors, typically by person, members of a family, or single institution. Because of the greater funder control and lack of public involvement, private foundations are treated less favorably and are subject to more restrictions under the Code. In contrast, public charities are treated more favorably because of their engagement in certain favored activities or the fact that it must continually draw support from a broad cross-section of funders, thought, perhaps, to offer greater accountability. See I.R.C. §§ 509(a)(1), 170(b)(1)(A)(i)–(vi) (2006); MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 3–4 (2004); John F. Coverdale, *Legislating in the Dark: How Congress Regulates Tax-Exempt Organizations in Ignorance*, 44 U. RICH. L. REV. 809, 812–13 (2010) (discussing control as an element of attraction to the private foundation form for funders); Susan N. Gary, *The Problems With Donor Intent: Interpretation, Enforcement, and Doing The Right Thing*, 85 CHI.-KENT L. REV. 977, 1013 (2010) (similar).

261. See Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 771 (noting private foundation accountability challenges); Sarah E. Waldeck, *The Coming Showdown Over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1814 (2009) (“Because private foundations typically are funded by a single individual or family, they are far less accountable than colleges and universities This lack of accounta-

system of accountability would seem only to offer a partial solution. Those worried that NGOs serve no single defined master may not be satisfied with a principal master being another form of nonprofit entity that serves no single defined master. Accordingly, we need a thicker take on accountability for the nonprofit sector.

In reflecting on the nature of the major anti-NGO criticisms described in Part II, which often come packaged as accountability concerns, the critiques are, at bottom, actually grounded in concerns about NGO power and effectiveness and NGO authenticity and voice. I am not particularly concerned about the strength of the former criticisms, but I am concerned about the latter.

Generally, I find NGO power relatively less worrisome for three reasons. First, in comparison with other societal segments, nonprofits do not seem to have disproportionate power and, if anything, recent increases in their numbers²⁶² may prove to be an equalizing trend. Some of the discomfort with NGO power appears to be prompted by broader fears of power shifts toward nonprofits due to the policies they might promote, or simply a greater sense of comfort with power resting in the hands of private interests (individual or corporate) or governments. To the extent that anti-NGO sentiments are driven by a sense that NGOs are, in many ways, simply too effective, too capable of executing and achieving their missions and making an impact, the thicker conception of accountability is not undermined. In other words, much of the attack on the “power” of NGOs charges that people are listening, NGOs are reaching their targeted audiences, and people and institutions with resources are taking NGOs and their arguments seriously.²⁶³

Yet many nonprofit scholars would argue that this is exactly what we want of nonprofit organizations, that organizational effectiveness is, indeed, a form of accountability (i.e., mission accountability). Furthermore, international businesses and other financial interests have long attempted to influence public policy, so NGOs may simply be offering a countervailing perspective. As other sectors become more globalized and transnational, it is understandable that philanthropy too will be transformed, with nonprofit and public interest associations widening their geographic scope, with new entities emerging with cross-border concerns or interna-

bility magnifies the risk that a private foundation will serve the private, and not the public, good.”).

262. See *supra* Part I.B.

263. See, e.g., *NGO Watch Mission Statement*, *supra* note 110 (indicting NGOs “power and influence” and bemoaning the fact that “NGO officials and their activities are widely cited in the media and relied upon in congressional testimony; corporations regularly consult with NGOs prior to major investments”).

tional reach at the core of their organizational identity. Accordingly, these power shifts may remedy past disparities in which other non-state actors, usually representing private financial interests, could operate without effective competition to influence international and transnational policy matters.

Second, concerns about NGO power may be somewhat overstated, especially with respect to local foreign-based NGOs. In her book, *Undermining Development: The Absence of Power Among Local NGOs in Africa*, Sarah Michael addresses this issue.²⁶⁴ She concludes that local NGOs active in Africa lack substantial power, which she defines as “the ability . . . to set their own priorities, define their own agendas and exert their influence on the international development community, even in the face of opposition from government, donors, international NGOs and other development actors.”²⁶⁵ Although power has many different definitions, the ability to control ends or control others is usually considered an essential marker.²⁶⁶ Governments thus have intrinsic power that others, such as corporations, individuals, and civil society groups, may only seek to manipulate using or reacting to government power.²⁶⁷ Even with respect to large international NGOs, there may be some exaggeration at play. Certainly some NGOs are large and influential—but the revenues, assets, and annual budgets of the large international nonprofits are considerably smaller than many governments, state-owned oil companies, sovereign wealth funds, Fortune 500 companies, and other multinational private businesses.²⁶⁸

264. See SARAH MICHAEL, *UNDERMINING DEVELOPMENT: THE ABSENCE OF POWER AMONG LOCAL NGOS IN AFRICA* (2004).

265. *Id.* at 18.

266. See Jenkins, *Soft Power*, *supra* note 14, at 796 n.85 (providing definitions of power).

267. See OSBORNE, *supra* note 12, at 97. But see Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 656, 658 (2011) (describing how charities exert “economic and political power over others”).

268. Here is but one set of examples. The smallest of the Fortune 500 list of the World’s Largest Corporations was Bristol-Myers Squibb. *The World’s Largest Corporations*, FORTUNE, July 25, 2011, at F-5, available at http://money.cnn.com/magazines/fortune/global500/2011/full_list/index.html. According to Bristol-Myers Squibb’s most recent annual report, the company has total assets of \$31,076,000,000. BRISTOL-MYERS SQUIBB, 2010 ANNUAL REPORT 41 (2011), available at <http://investor.bms.com/phoenix.zhtml?c=106664&p=irol-reportsannual>. The Sovereign Wealth Fund Institute lists the largest sovereign wealth funds, with assets in billions. *Fund Rankings*, SOVEREIGN WEALTH FUND INST., <http://www.swfinstitute.org/fund-rankings/> (last visited Feb. 5, 2012). All but thirteen identify assets as one billion or more. *Id.* The World Bank lists 2010 GDPs for 194 countries; of these, only twenty total less than one billion dollars. *Gross Domestic Product 2010*, WORLD DEV. INDICATORS

Third, the power NGOs wield is earned soft power. Professor Joseph Nye of the Harvard Kennedy School describes power as “the ability to get the outcomes you want, and to affect the behavior of others to make this happen.”²⁶⁹ He distinguishes between hard power (coercion) and soft power (co-optation).²⁷⁰ To the degree that power is regularly exercised by NGOs, generally it is soft power at work. Nonprofits lack hard power; they cannot force governments to do things through command, force of law, significant economic might, or military force. NGOs rely primarily on the tools of soft power: co-option, attracting people and institutions to their values, and engendering cooperation. Looking at power in these terms, lessens the concern about the power of nonprofits because any (soft) power that might be used by international, domestic, or local NGOs has likely been earned through expertise, credibility, persuasion, and effective communication.

The point is not that nonprofit organizations lack power or that they have not misused power in alarming ways. They do and they have. In

(Dec. 15, 2011), <http://databank.worldbank.org/databank/download/GDP.pdf>. The assets of even major nonprofits are significantly smaller. The top nonprofit on the Philanthropy 400 of 2011 was United Way Worldwide. *Philanthropy 400 Data*, CHRONICLE OF PHILANTHROPY, <http://philanthropy.com/section/Philanthropy-400/237/> (follow “Full List” hyperlink) (last visited May 18, 2012). In its annual report of 2010, this nonprofit listed total assets of a comparatively small \$101,144,000. 2010 ANNUAL REPORT, UNITED WAY WORLDWIDE 27 (2011), http://unway.3cdn.net/a27979675739418693_mlbrwv193.pdf. Other multinational nonprofits, while larger than United Way, are still dwarfed by the other categories listed above. As the Philanthropy 400 focuses on American nonprofits, it is useful to include some large multinational nonprofits as well, all of which show similarly small asset figures. Save the Children states that its total net assets are \$179.24 million. 2010 ANNUAL REPORT, SAVE THE CHILDREN 14 (2011), <http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/RESULTS-FOR-CHILDREN-Q1Q2-2011.PDF>. Doctors Without Borders lists net assets of \$154,615,348. 2010 ANNUAL REPORT, DOCTORS WITHOUT BORDERS/MÉDECINS SANS FRONTIÈRES 63 (2011), <http://www.doctorswithoutborders.org/publications/ar/MSF%202010%20Annual%20Report.Final.pdf>. Greenpeace lists net assets of \$9,126,710. 2010/2011 ANNUAL REPORT, GREENPEACE 27 (2011), http://www.greenpeace.org/usa/Global/usa/planet3/PDFs/ANNUAL_REPORT2010-11.pdf. Oxfam International lists its total assets at €607 million, or about \$787.8 million. 2010-11 ANNUAL REPORT, OXFAM 42 (2011), <http://www.oxfam.org/sites/www.oxfam.org/files/oxfam-annual-report-2010-11.pdf>.

269. Joseph S. Nye, Jr., *Hard Power, Soft Power, and “The War on Terrorism,”* in *AMERICAN POWER IN THE TWENTY-FIRST CENTURY* 114, 117 (David Held & Mathias Koenig-Archibugi eds., 2004).

270. See JOSEPH S. NYE JR., *THE POWERS TO LEAD* 37-44 (2008); see also Jenkins, *Soft Power*, *supra* note 14, at 800 (discussing hard and soft power theory).

fact, some of my prior work has been highly critical of certain exercises of power in the charitable sector.²⁷¹ Ultimately, critiques about power require elaboration and framing. Rather than bemoaning the power of any group (for-profit or nonprofit), a more enlightened conversation would focus on how NGO power is manufactured, how it operates on the ground, and what are its normative ends. For this Article, reflections on the second of those issues,²⁷² particularly the transparency and inclusivity of NGO power, has led to conclusions about thick accountability discussed in this Part and donor control discussed below.²⁷³

B. Rethinking the Exercise of Donor Control

What remains unsettling in the anti-NGO critiques are the concerns expressed about authenticity and voice. Whether the argument comes in the form of challenges to claims of representativeness by people on the right asking who is really behind those NGOs; or by those on the left expressing concern about poor and other marginalized citizens being silenced or ill-represented by professionalized, Northern-dominated NGOs, and questioning whether colonial philanthropy serves Southern or Northern interests; or by governments that attack or resent the claims of some NGOs to speak on behalf of citizens yet appear to be predominantly responsive to foreign donors. Beneath all these criticisms and questions lies a common set of concerns about the authenticity and voice of NGOs. And there may well be something to these criticisms.

Of particular concern, the controlling approach of Northern funders may be a threat to the authenticity and voice of Southern NGOs.²⁷⁴ As I have written extensively about elsewhere, the practice of philanthropy has undergone a problematic shift toward an assertive, donor-controlled approach to grantmaking.²⁷⁵ Increasingly over the past fifteen years or so, wealthy philanthropic foundations have focused on responding to legitimate questions and criticisms regarding their own accountability.²⁷⁶

271. See, e.g., Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 818–20 (criticizing private foundations for interfering with a major local government political appointment by conditioning millions of dollars in grant funding on a specific appointee in a written grant agreement).

272. Some of my previous work touches upon how nonprofits manufacture power. See Jenkins, *Soft Power*, *supra* note 14, at 795–801 (discussing nonprofit soft power).

273. See *infra* Part III.B.

274. See EBRAHIM, *supra* note 258, at 15 (“A considerable literature on North-South relations has noted how demands of funders constrain NGO action.”).

275. See Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 761–71 (describing the growth and expansion of funder control in philanthropy).

276. See PANEL ON THE NONPROFIT SECTOR: STRENGTHENING TRANSPARENCY GOVERNANCE ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 15–18 (2005); see also

Driven in part by a desire to prove that they are strategic and accountable, foundations have turned to more muscular approaches to philanthropy marked by high engagement, heavy intervention in grantee affairs, and extensive demands on grantees.²⁷⁷ These practices have all led to a pervading sense of donor control over grantee activities.²⁷⁸ This move toward a more directive and instrumentalist approach to grantmaking is transforming grant recipients into subordinates who answer to their manager's control or subcontractors who execute the foundation's vision.²⁷⁹

Donors also have begun to widely employ metrics, assessment, and other business principles more commonly used in the for-profit world.²⁸⁰ Although measurement can be used effectively in the social sector, many are concerned that funders' overemphasis on metrics is becoming widespread, distorting organizational priorities, and undermining productive grantor-grantee partnerships.²⁸¹ Foundations have gone from hoping for results to partnering for results to demanding results, landing on an all-too-common carrot-and-stick approach. In recent years, philanthropy has become a one-way relationship controlled more and more by funders.²⁸²

If donors start taking anti-NGO concerns about authenticity and voice seriously, it might lead foundation trustees and managers to reconsider certain practices and policies, especially with respect to the current state of interactions between funder and grant-recipient NGOs. This is especially important in light of the cultural and social divide between Northern funders and Southern NGO grant recipients. Perhaps funders should begin by asking themselves how their behaviors undermine the grassroots voices and representativeness of NGOs. In particular, those Northern foundations exerting excessive control over grantees, directing activities, and turning Southern NGOs into subcontractors might reconsider

Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1132 (2001); Brakman Reiser, *Enron.org*, *supra* note 253, at 272.

277. See Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 795–97.

278. See *id.*

279. See *id.* at 769–70.

280. See *id.* at 787–88.

281. See *id.* at 788–92.

282. See *id.* at 758–59, 772 (discussing trends in increases of donor control in philanthropic grantor-grantee relationships); Susan A. Ostrander, *The Growth of Donor Control: Revisiting the Social Relations of Philanthropy*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 356, 359 (2007); see also Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case For An Independent Trust Fund For Victims*, 28 WIS. INT'L L.J. 234, 287 (2010) (noting “the demand among donors for control over the impact of their donations”).

their approach if they understood that those activities contribute to attacks on the global nonprofit sector.

Concerns about national sovereignty²⁸³ and foreign influence in domestic affairs²⁸⁴ will never be completely alleviated, but the perception—and reality—of excessive outside donor influence only reinforces those particular fears in cross-border contexts. As donors engage in grantmaking practices that “plac[e] themselves in the driver’s seat to control the agenda of nonprofit-sector projects,”²⁸⁵ they may diminish the voice of grant-recipient organizations and the local communities and peoples they serve. Furthermore, “[t]o the extent that [Northern funders] treat grantees as subcontractors and dominate”²⁸⁶ local-based NGOs, they create the appearance of the Global North speaking for the Global South in particularly troubling ways that lack authenticity and transparency. As a result, donor control lends support to anti-NGO critiques about foreign influence and national sovereignty. Those same behaviors also may support charges of false representativeness, accusations of neocolonialism, and claims that international philanthropy supports elite donor interests (e.g., culture, values, policy formulation).

Exposing the link between donor control and anti-NGO criticisms reveals an inverse relationship between the donor’s own accountability pressures and donee accountability. The roots of this new phenomenon lie in the desire of funders, especially private foundations importing business principles and standards into philanthropy, to demonstrate their own mission accountability. In fact, the desire for accountability and impact has provided much of the stated justification for grantmakers to eschew general operating support grants in favor of inflexible, limited-purpose program support²⁸⁷ and to restrict funding to foundation-initiated grantmaking initiatives.²⁸⁸ Thus, the prescriptive giving that has become the hallmark of the strategic philanthropy and philanthrocapitalism movements is intrinsically linked to the broader new “accountability environment” gripping the social sector.²⁸⁹ Efforts to enhance the accounta-

283. See *supra* text accompanying notes 126–30.

284. See *supra* text described in Part II.C.

285. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, *supra* note 85, at 786.

286. *Id.* at 816.

287. See *id.* at 777 n.96.

288. See *id.* at 779 n.101.

289. See LESTER M. SALAMON, *THE RESILIENT SECTOR: THE STATE OF NONPROFIT AMERICA* 25 (2003) (describing a challenging “accountability environment” for nonprofit organizations); Jenkins, *Who’s Afraid of Philanthrocapitalism?*, *supra* note 85, at 771 (“The philanthrocapitalism movement and the broader reinvention of the institution of philanthropy have implications for lawyering and governance. These shifts in grantmaking practices are in response to a variety of pressures and criticisms of traditional philan-

bility of private foundations and other funders in the Global North may have the effect of weakening the accountability and legitimacy of Southern NGOs. Northern zeal for funder accountability (which has led to top-down, prescriptive, controlling grantmaking) may directly undermine efforts of grant-recipient NGOs to generate their own accountability (i.e., downward) and legitimacy (both real and perceived). Although advice and expertise from the top can be welcome and beneficial, social transformation requires the full participation of citizens and communities, with philanthropy providing supportive assistance rather than control.

I am not naïve enough to believe that criticism of NGOs or government action designed to curb NGOs would cease around the world if only donors were to loosen the reins of control. They will not. Moreover, philanthropy's recent emphasis on exerting extensive donor control through directive grantmaking shows no signs of abating.²⁹⁰ Both anecdotal evidence²⁹¹ and my own empirical research²⁹² suggest that foundation-centered and directive models of and practices in philanthropy are on the rise. Thus, it seems unlikely that foundations will begin to relinquish control in the short term. However, by giving serious consideration to the implications of the anti-NGO criticisms, perhaps more forward-thinking foundations will come to understand that insistence on controlling the ways in which social problems are solved is deeply problematic. Besides undermining community-based bottom-up action and silencing important sources of social innovation,²⁹³ foundation efforts to micromanage social problem-solving may hurt grantee recipients. As foundations prioritize their own efforts to prove their own mission accountability and effectiveness, it may come at the expense of their grantees. My

thropy. Thus, philanthrocapitalism and strategic philanthropy have roots . . . in calls for accountability.”).

290. Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 767–69 (discussing the spread of philanthrocapitalism and strategic grantmaking ideas and approaches in charitable giving).

291. See MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM 57–59 (2008); Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 765–66; TOM DAVID, THE CAL. WELLNESS FOUND., REFLECTIONS ON STRATEGIC GRANTMAKING 2–3 (2000), available at <http://www.calwellness.org/assets/docs/reflections/nov2000.pdf> (presenting typical comments from nonprofit leaders conveying the “growing gulf between the largest foundations with the most grant dollars to offer and front-line agencies charged with directly meeting community needs”).

292. See Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 772–86 (documenting widespread grantmaking trends suggestive of “a more foundation-centric approach to problem solving that muffles the voices of nonprofit organizations working in the field”).

293. See *id.* at 796 (arguing that public charities operating on the ground offer rich sites for social innovation).

call is for funders to appreciate their opportunity to engage with grant-recipient organizations, including foreign NGOs, in ways that strengthen NGOs and their international standing, instead of inadvertently handing the critics more ammunition.

C. U.S.-Based International Programs vs. Overseas Recipients

International philanthropy may be supported in a variety of different ways. Private foundations may choose to engage in international programming either by making direct cross-border grants to foreign-based organizations or through indirect support delivered to U.S.-based entities with operations abroad. Some foundations, seeking fewer administrative requirements driven by U.S. law, choose the indirect route—providing “international” support through grants to U.S.-recognized or U.S.-based charities that conduct their activities outside the United States.²⁹⁴

Anti-NGO concerns about authenticity and voice may encourage foundation trustees and managers to reconsider some of the ways in which they implement international philanthropy. Specifically, they may reconsider whether to achieve their philanthropic objectives through direct support of foreign organizations or by channeling funding through U.S.-based entities that may or may not work with local partner organizations.

For U.S. private foundations, the burdens of law regulating nonprofit organizations and the pressures of the anti-terrorist financing regulatory environment have created disincentives for direct funding of foreign organizations.²⁹⁵ Under Internal Revenue Code section 4942, a private foundation is required to distribute a minimum percentage of the fair market value of non-charitable use assets in order to avoid certain federal excise taxes.²⁹⁶ This is often referred to as the 5% payout requirement. Foreign grants are considered “qualifying distributions” if they are made for charitable purposes and the grantor follows one of two detailed and rigorous procedural processes: equivalency determination or expenditure responsibility.²⁹⁷ In addition to federal tax requirements, criminal and civil penalties can be imposed if charitable contributions to foreign charities are used to support or engage in terrorism. Most notably, Executive

294. See Jenkins, *Soft Power*, *supra* note 14, at 804.

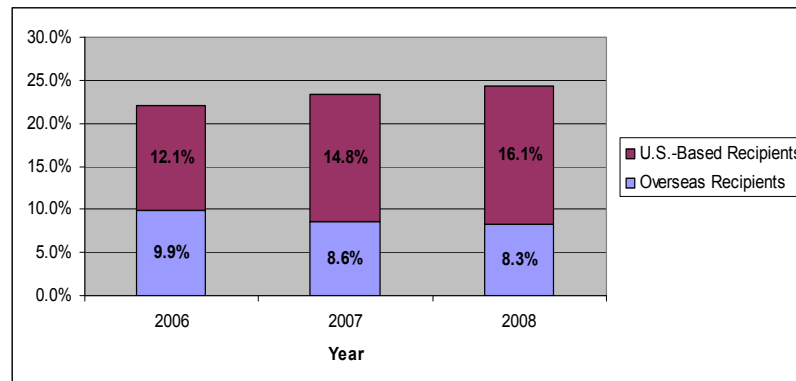
295. For a full discussion of the implications of and incentives for U.S. foundations to prefer funneling “international-related” grants through U.S.-based intermediary organizations instead of making grants directly to foreign-based NGOs, see Jenkins, *Soft Power*, *supra* note 14, at 831–33.

296. See I.R.C. § 4942 (2006).

297. See Jenkins, *Soft Power*, *supra* note 14, at 805–07 (describing equivalency determination and expenditure responsibility requirements).

Order 13,324,²⁹⁸ the USA Patriot Act,²⁹⁹ and the U.S. Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities³⁰⁰ have contributed to the sense in the foundation world that direct foreign giving carries greater administrative burdens, cost, and risk.

FIGURE 4. International Giving to U.S.-Based and Overseas Recipients as a Percentage of All Giving in Grant Dollars, 2006-2008³⁰¹



Foundation reliance on U.S. intermediary funders may be efficient for U.S. funders but it may have the unintended consequence of widening the distance between the professional cadre of NGOs in the field and the citizens those organizations serve. An analysis of major grantmaking expenditures revealed that between 2007 and 2008, support for international giving increased 21.4%.³⁰² The strong growth, however, principally benefited U.S.-based recipients with international programs (a 27% increase) in comparison with direct support to foreign charities, which

298. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also Jenkins, *Soft Power*, *supra* note 14, at 808–09 (discussing Executive Order 13,324).

299. See 18 U.S.C. § 2339A(a) (2006); see also Jenkins, *Soft Power*, *supra* note 14, at 809–11.

300. U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES (2006), available at http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf; see also Jenkins, *Soft Power*, *supra* note 14, at 811–14 (discussing the *U.S. Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*).

301. These data are drawn from the following sources: FOUNDATION GIVING TRENDS 2010, *supra* note 84, at 26; FOUNDATION GIVING TRENDS 2009, *supra* note 84, at 26; FOUNDATION GIVING TRENDS 2008, *supra* note 84, at 20.

302. See FOUNDATION GIVING TRENDS 2010, *supra* note 84, at 26.

grew at less than half that rate (a 12.3% increase).³⁰³ FIGURE 4 shows that between 2006 and 2008, the most recent three years for which data are available, the share of overall grant dollars directed to international purposes increased from 22% to a record 24%. The share of grant dollars allocated to U.S.-based recipients increased by approximately one-third, from 12.1% to 16.1%. In contrast, the portion of grant dollars given directly to overseas charities declined by nearly one-sixth, from a record high of 9.9% down to 8.3%.

Direct cross-border funding by private foundations and by the large international NGOs that choose to partner with (via direct funding to) local organizations on the ground can help build the capacity of local, sustainable civil organizations abroad, generate social capital, and develop civil society.³⁰⁴ Political scientist Chip Gagnon has argued that international NGOs that encourage local actors and local NGOs to determine priorities and projects and that rely on local expertise are more effective. He writes:

A review of [international NGO] work suggests that the most effective international NGOs are those that see their work as a two-way process, wherein the international agencies help local NGOs to determine their priorities, and personnel of the international agencies see locals as equal partners. The most effective strategies are those that integrate concrete projects and an inclusive decision-making process to build community and civil society locally, a strategy that allows local actors, communities, and NGOs to determine priorities, projects, and directions. This seems especially important for international NGOs that are seeking to strengthen local actors and networks as participants in civil society.³⁰⁵

Direct overseas grantmaking that is relatively unencumbered can provide local NGOs with the support they need to grow.³⁰⁶ Through thoughtful foreign funding strategies and approaches, perhaps matching funds that attract local monies, encouraging organizations to develop their own

303. *See id.*

304. *See Jenkins, Soft Power, supra* note 14, at 832 (arguing that direct grants to local foreign NGOs offer advantages with respect to institution-building, social capital, and civil society).

305. V.P. Gagnon Jr., *International NGOs in Bosnia-Herzegovina: Attempting to Build Civil Society*, in *THE POWER AND LIMITS OF NGOS* 207, 208 (Sarah E. Mendelson & John K. Glenn eds., 2002).

306. *See HUDOCK, supra* note 38, at 16 (arguing that assistance to Southern NGOs only strengthens civil society when Southern NGOs build organizational capacity at the grass-roots level, involve marginalized and weak populations, and empower citizens) (citation omitted).

local capacity, shifting mindset so that they are responsive to Southern NGOs, Northern funders can assist Southern NGOs in ways that do not jeopardize their autonomy and credibility.³⁰⁷ Funders can either choose to help create flourishing, self-sufficient non-Western NGOs less susceptible to many of the more stinging anti-NGO critiques or not.

D. Focusing on the Practice of Philanthropy

Foundations devote few resources and seem to pay little attention to the practice of philanthropy (i.e., the way foundation grantmaking is conducted and its effects). Rather, they tend to focus on the execution of their “core” substantive programs (i.e., their subject-matter priority fields). With few exceptions,³⁰⁸ most large foundations do not seem to think that supporting the development of the nonprofit sector should be a giving priority. This is unfortunate. Another potential lesson from the rise of the anti-NGO movement is the need to focus on the nonprofit sector infrastructure and to advocate for and defend the sector and its players from attacks.

Individual organizations simply do not have the tools or the resources to respond to sector-wide critiques or to compete effectively against governments. Although American public trust and support of the nonprofit sector remains high,³⁰⁹ a close examination of opinion data reveals some potential weaknesses³¹⁰ causing concern among supporters of the sector. An earlier section of this Article discussed the organized, well-financed efforts underway to discredit nonprofit organizations through public campaigns.³¹¹ In Australia, for example, many of the right-wing criticisms of nonprofits were shared by the conservative government of

307. *See id.* at 38.

308. For example, the Charles Stewart Mott Foundation (MI), the Surdna Foundation (NY), and The William and Flora Hewlett Foundation maintain active grantmaking portfolios to build a vibrant and independent philanthropic and nonprofit sector. *See* CHARLES STEWART MOTT FOUND., 2009 ANNUAL REPORT: BLINDED BY PESSIMISM OR SEEING POSSIBILITIES 32–37 (2010), *available at* <http://www.mott.org/~media/pdfs/Publications/AnnualReport/AR2009PDF.ashx>; SURDNA FOUND., 2010 ANNUAL REPORT 9 (2011) *available at* http://www.surdna.org/images/stories/content_img/2010-surdna_annual_report.pdf; THE WILLIAM & FLORA HEWLETT FOUND., 2009 ANNUAL REPORT (2009), *available at* http://www.hewlett.org/uploads/files/annual_report/2009_Philanthropy_Program_Report_to_the_Board.pdf.

309. *See* EDELMAN, *supra* note 16, at 11.

310. *See supra* text accompanying notes 94–99.

311. *See supra* text accompanying notes 107–24 (discussing AEI’s NGO Watch and other projects).

Prime Minister John Howard,³¹² who served from 1996 to 2007.³¹³ In addition, governments have used various strategies aimed at weakening NGOs.³¹⁴ Many of these challenges and criticisms have targeted the non-profit sector as a whole. Yet individual NGOs are usually focused on specific, substantive issues in their specialized area of focus. Therefore, they are less well-positioned to engage in public diplomacy campaigns at the macro level.

FIGURE 5. Percentage of Grant Dollars Allocated to Philanthropy and Voluntarism by Year, 2004-2008³¹⁵

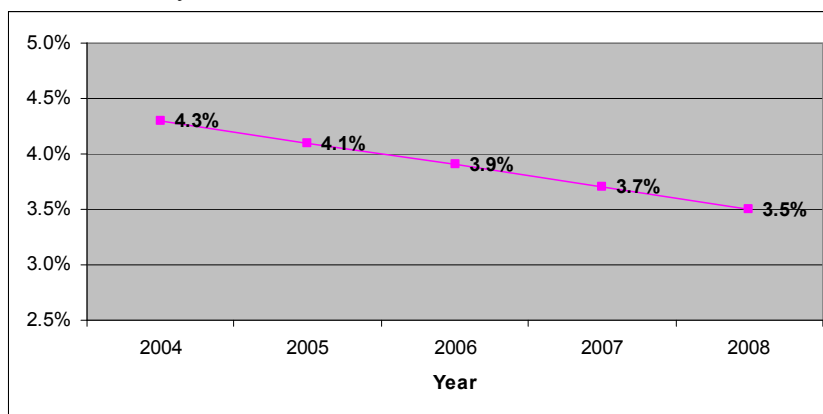


FIGURE 5 demonstrates that from 2004 to 2008 the largest U.S. funders have steadily reduced—as a percentage of overall giving—their grantmaking support for philanthropy and voluntarism.³¹⁶ Of course there are many competing societal needs for charitable grant dollars, e.g., education, health, the environment, etc. Moreover, this category may be too broad to draw precise conclusions about the nature of foundation support for the sector's infrastructure. This five-year downward trend, however, suggests that the philanthropic sector should pay more attention to the resources it allocates to developing the health of the sector as a whole.

312. See Peter Ellis, *The Ethics of Taking Sides*, in *ETHICAL QUESTIONS AND INTERNATIONAL NGOS: AN EXCHANGE BETWEEN PHILOSOPHERS AND NGOS*, *supra* note 1, at 65, 69–70 (discussing the prominent, right-wing attacks on NGOs in the Howard government).

313. See *Australia's Prime Ministers—John Howard*, NAT'L ARCHIVES OF AUSTL., <http://primeministers.naa.gov.au/primeministers/howard> (last visited Feb. 5, 2012).

314. See *supra* Part II.C.

315. These data are drawn from *FOUNDATION GIVING TRENDS 2010*, *supra* note 84, at 4.

316. I note, however, that the total value in raw dollars in this particular category has increased because the total pool of grantmaking dollars (the denominator) has increased by nearly two-thirds during this period.

Such support might include resources to defend domestic nonprofits, international organizations, and foreign NGOs from criticism; to educate and mobilize public opinion in support of NGOs; and to support research, critical self-evaluation, and stakeholder conversations that might further strengthen the sector and civil society, even if it requires changes to current institutional arrangements, processes, and norms.

CONCLUSION

I support charitable giving, private foundations, and the global nonprofit sector as forces for positive change. The world needs strong nonprofit institutions, at all levels and all around the globe, for social transformation and to provide organized groups through which aggregate individual voices, views, and interests can be represented.³¹⁷ What I describe as the anti-NGO movement, a confluence of criticisms from the right and the left as well as government intrusions and strategies used to undermine the sector, exposes some of the sector's vulnerabilities and challenges. These efforts to de-halo the nonprofit sector threaten the public trust on which the nonprofit sector ultimately depends and are too important to ignore.

Certainly, some critics conceive of the rise of NGO activity as a threat or a crisis. Although I do not share that view, some of the arguments raise legitimate questions worthy of critical examination. NGO funders should pay careful attention to such concerns and, more important, consider how their own behavior may be contributing to the state of affairs. Ultimately, private philanthropy (as a form of private action) contributes to the public good by enhancing problem-solving capacity. But philanthropy does not operate in a vacuum. Private foundations are part of the civil society ecosystem. Thus NGO concerns are not just the responsibility or the fault of the NGOs themselves. Foundations and other nonprofit sector donors need to be mindful of how their actions support or undermine their grantees, the ultimate beneficiaries, and the charitable sector they inhabit. Lately, foundations have been involved in a self-reinvention project that has gone terribly awry, becoming divorced from the processes of successful social innovation.³¹⁸ This Article concludes that these moves may be unintentionally weakening the standing of global NGOs and giving credence to anti-NGO critiques.

What I take from the anti-NGO movement is not that we should ignore NGOs, nor that we should not engage in cross-border support. Instead

317. See Jenkins, *Who's Afraid of Philanthrocapitalism?*, *supra* note 85, at 817.

318. See *id.* at 754–61 (critiquing philanthrocapitalism and the recent trends embracing business-like, market-driven charitable grantmaking).

this Article concludes that true NGO accountability is about more than just responsiveness to funders. It is about being mindful of the fragility of NGO authenticity and voice, about Northern funders using their wealth and power to support—not control—social change, and about the need for the sector to improve public understanding of the “special qualities that make nonprofit organizations worth protecting.”³¹⁹

Although the “NGO” acronym emphasizes an existence apart from government, civil society is valuable because it prioritizes collective action, not because it is separate from government. Business is apart from government, but it does not contribute to civil society. However, if NGOs are merely subcontractors for Northern funders then they are not galvanizing citizens in a collaborative endeavor. The anti-NGO movement raises deep and important questions of governance for foundations and international NGOs that fund foreign-based local NGOs.

Perhaps foundation engagement with and against the anti-NGO movement can help facilitate new sensitivities, understanding, and practices leading to more autonomy and flexibility for civil society groups and the citizens working through them. Grantor-grantee relationships have always been complicated, and the politics of North-South NGO add new dimensions of complexity. As foundation assets and interest in international philanthropy grow, the anti-NGO movement will grow as well, unless Northern funders address the problem and their own responsibility for its creation.

319. SALAMON, *supra* note 289, at 82.