

Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting

by Janet E. Lord

INTRODUCTION

States are routinely called to account for human rights violations against their own citizens and frame their response to such criticism in human rights terms, denying or justifying their conduct by explicit reference to their interpretation of international human rights standards. International governmental organizations responsible for overseeing the human rights systems are themselves subjected to “boomerang scrutiny” on the basis of the very international human rights standards upon which they assess state conduct. Such scrutiny extends to corporations urged to broaden and deepen their own accountability beyond the single calculus of profit to multiple indicators including social and environmental factors. It extends also to relief and development nongovernmental organizations (NGOs), whose measures of accountability and legitimacy increasingly reference performance principles reflecting human rights standards.¹ And, increasingly, core principles of human rights are held up like a mirror before the very NGOs that invoke them against states and other actors in their human rights practice, raising questions that bear ultimately upon now familiar issues of legitimacy and accountability.²

The pull to assess in detail questions of legitimacy and accountability for what NGOs *say and do* is in part a reflection of their success. Success in a sense refers to achieving a privileged position of influence in decision-making arenas, even against theoretical barriers posed by the hegemonic discourse of realist accounts or the practical barriers to participation relating to access. So successful have been the efforts among NGOs to win access to international decision making processes, it seems that dialogue has started to shift away from assessing whether and how NGOs “get in” and more towards assessing the legitimacy and accountability of their representational role *once they get there*. Caitlin Weisen applies the new discourse around issues of NGO legitimacy and accountability:

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[T]he currency of civil society as a critical actor in the global arena is based in no small part on the perception that it reflects the diversity of society and provides a voice for people who have been marginalized or excluded from the benefits of society. Formal recognition of civil society's role through representation in UN decision-making bodies would increase demands on civil society to be accountable to the constituencies and voices they are perceived to represent.³

While there is a burgeoning literature on the subject of NGO legitimacy and accountability, it has not, interestingly, tended to focus on issues of what Hugo Slim calls "voice accountability."⁴ Thus, it has not led to the critical analysis of social relationships occurring within, and in relation to, the actual processes of international standard setting.⁵ UN standard-setting processes, whether treaty negotiations or negotiations in relation to non-binding platforms of action or resolutions, are rich fields for social relationships and interaction where norms play crucial roles. Treaty processes command considerable NGO time and resources in their efforts to, in constructivist parlance, *constitute state interests and identities* in relation to a particular issue such as a human rights norm in the making, with "persuasion" and "socialization" playing key roles.⁶ While standard-setting processes offer opportunities to examine the way power is exercised between States, and between States and other actors, they also offer fertile ground for examining how NGOs work to exert influence within normative structures and the implications of such participation for assessing NGO accountability.

The vehicle for this analysis is a case study of NGO participation in the current UN effort to develop an international convention on the rights of persons with disabilities. My discussion begins with the case study, outlining in particular issues pertaining to NGO representation of interests and voice accountability in the negotiation process. I then turn to two sets of questions that arise in the literature on transnational advocacy networks and norm development: (i) how normative structures work to shape power relations among actors *within* international standard-setting processes; and (ii) how issues of downward accountability figure into such processes. Drawing on the case studies, my goal is to suggest avenues for approaching these questions that have thus far been overlooked by the literature.

CASE STUDY: THE PARTICIPATION OF NGOS IN DRAFTING A DISABILITY RIGHTS TREATY

In 2001, disability, long framed within international organizations (and elsewhere) as a medical issue to be "handled" by the medical establishment or "dealt with" by charitable groups, suddenly emerged as a serious human rights issue on the agenda of the United Nations.⁷ It was prompted in this instance not by disability activists, but by a developing country with an unimpressive human rights record. Suddenly, disability as a human rights issue was brought sharply into international focus by a single event. The fragmented momentum of an emerging global network of disability

activists seeking to reframe disability in the human rights context received an unexpected gift from the UN decision: a major treaty development process around which to coalesce.

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The current initiative to develop an international convention on the human rights of people with disabilities was initiated by Mexico in 2001, following its effort to include disability as part of the Platform of Action adopted at the World Conference against Racism in Durban, South Africa.⁸ Soon thereafter, Mexico put forward a proposal before the UN General Assembly that resulted in the adoption of a resolution on November 28, 2001, calling for the establishment of an Ad Hoc Committee mandated to elaborate “a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the field of social development, human rights and non-discrimination.”⁹ While there are some historical antecedents to the Mexican move to place disability on the international agenda, the initiative came virtually out of the blue, posing considerable challenges to a disparate and divided community of interested disability-focused NGOs.¹⁰

The early stages of the process centered on building the case for a convention specifically addressing the rights of people with disabilities. This debate occupied the entirety of the first session of the Ad Hoc Committee in 2002. At the outset of the second session of the Ad Hoc Committee (June 2003), the case was won for proceeding with the development of a new convention, and attention centered on the process by which the convention would be negotiated. Subsequent sessions of the Ad Hoc Committee (May/June 2004) and its Working Group (January 2004), have initiated the actual process of formulating a convention text.

NGOs Vying for Access

Securing NGO access to the process, and meaningful participation within it, has been an ongoing focus of NGO efforts, and represents one of the few principles on which NGOs as a whole have been able to agree. One of the core beliefs upon which the international disability rights movement rests is the principle of full inclusion in decision-making processes, hence the familiar refrain within the community, “nothing about us without us.”¹¹ Within the context of the UN process to develop an international convention, NGOs have taken active steps to define and develop avenues for their participation and to confer a sustained legitimacy on their individual and collective roles in the process and on their normative goals. NGOs have worked to promote internal and external norms governing the treaty-making process that broadly communicate standards for inclusion and meaningful participation *within* the process and among NGOs and affected individual and groups *beyond* the process.

For members of the international disability community, then, what Hugo Slim has termed “voice accountability”¹² becomes a central indicator of legitimacy for network activities. For Slim, “voice accountability” refers to two dimensions of NGO accountability, namely, the reliability and credibility of *what* they say and the *locus of their authority* for saying it.¹³ Of central concern among NGOs taking a lead role in the UN convention effort is the latter component of voice accountability.

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Given the placement of the meetings within an Ad Hoc Committee of the General Assembly, in contrast to the relative inclusiveness of treaty-related processes convened under the auspices of the UN Human Rights Commission or other UN bodies, NGO access was not a foregone conclusion. In the months leading up to the first Ad Hoc Committee meeting in July 2002, disability organizations lobbied hard to achieve access to the meeting. One week before the meeting was to commence, the UN General Assembly adopted a resolution that allowed access to all organizations enjoying consultative status with the Economic and Social Council and provided that other, non-accredited organizations could apply for accreditation for the meeting.¹⁴ The Ad Hoc Committee itself reached a further decision on the parameters of participation for accredited NGOs that allowed statements, receipt of official documents, and an allocation of space for NGO materials.¹⁵ These decisions notwithstanding, considerable discretion is left to the Chair of the Ad Hoc Committee, including the sequence and time allotment of NGO oral interventions, the manner of paper distribution (e.g., dissemination within or outside of the plenary conference room), and a host of other details that do impact the ability of NGOs to maximize their influence on the process.

Ironically, the woefully inadequate facilities of the United Nations posed major barriers to access for people with disabilities. During the first session of the Ad Hoc Committee in 2002, the gallery space of the chosen conference room was inaccessible for people using wheelchairs. A move to a larger conference room (now the designated conference room for the remainder of the process) with equally inaccessible space for observers, forced disability activists to find space among delegates on the actual floor of the committee itself. This conferred a major advantage on participant NGOs, however, as they found themselves dispersed alongside delegates and IGO representatives. A relaxation of strict rules has allowed NGOs to confer with delegates even during the course of plenary sessions, with NGOs approaching friendly governments to exert real-time influence as plenary readings of convention text proceeds.

Other accessibility accommodations did not find ready solutions. Participants with hearing impairments discovered conference facilities designed with technology dating back to the 1960s that is incompatible with modern hearing aid devices. No sign language interpretation or real-time transcription services were provided by the

United Nations. Documents were not available in alternative formats appropriate for people with visual impairments. While NGOs have been very active since the first session of the Ad Hoc Committee to ensure that UN facilities are adequately equipped to allow participation by people with disabilities, budgetary constraints continue to be invoked, and people with hearing impairments are forced to arrange for their own sign language interpretation or Computer-Aided Real-time Translation (CART).

NGO Representation on the Drafting Group

One illustration of the contest over representational roles and the implications that it has on shaping the treaty development dialogue concerns the struggle over the procedure by which the Ad Hoc Committee would draft the treaty text. In June 2003, at the second session of the Ad Hoc Committee, the bulk of the two-week meeting at the UN was devoted to deciding upon the form that a small body mandated to initiate the compilation of draft treaty text would take. Mexico and developing countries generally supported the establishment of a working group composed of Member States and NGOs, while the European Union, along with some other developed countries, supported the establishment of an independent expert working group.¹⁶ NGOs were in accord that they must have some role in whatever form emerged. There, however, the NGO consensus dissolved.

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The situation was complicated by the fact that only seven international disability groups worldwide enjoy ECOSOC consultative status, and those groups have enjoyed a privileged role on the Expert Panel established to monitor the implementation of the non-binding UN Standard Rules on the Equalization of all Forms of Opportunities for Persons with Disabilities.¹⁷ The core group of disabled persons organizations (DPO) representing the International Disability Alliance (IDA) remains an exclusive club of federations of membership groups. Some of the main players active in the disability convention process from the start, such as Landmine Survivors Network, Mental Disability Rights International, the European Disability Forum, and the Center for International Rehabilitation, are all relatively new organizations (founded within the last ten years) and do not hold such status. Their participation remained uncertain right up until the morning of the first Ad Hoc Committee in July 2002.¹⁸ The IDA stronghold would dramatically shape the structure and operation of NGO dialogue.

Early on during the second session of the Ad Hoc Committee (June 2002), Member State positions coalesced around the concept of establishing a working group to develop a text for negotiations at future meetings of the UN Ad Hoc

Committee, once the EU proposal for an independent expert group was rejected. Meanwhile, NGOs struggled *collectively* to ensure their access to the working group and *individually* to secure an organizational placeholder at the table. Early drafts of the resolution that Member States would send to the General Assembly for approval called for seven NGO places at the working group table. The role of the IDA seven was secured as the representatives of those groups met behind closed doors and later announced to some several dozen other NGOs that they would claim all seven seats. The role of other NGOs centrally involved in the process from the start was in doubt. Behind the scenes negotiations between interested NGOs and States ensued, with efforts made to break open the number of NGO spaces on the proposed working group. Ally States came through, increasing NGO placeholders on the proposed working group to twelve.

The definition of disability emerged as a central factor in the NGO debate.

NGOs in the Disability Caucus that had formed during the first, and again at the second, Ad Hoc Committee meeting were consumed with which groups would fill the spots on the proposed working group. Distinctions were drawn between membership and non-membership organizations, with membership governance structures being upheld in the Disability Caucus as badges of heightened accountability, and therefore privileged to fill a seat on the Working Group. In fact very few NGOs present actually met the ultimate test of legitimacy, defined as a global, grassroots membership organizations of people with disabilities. The majority of the IDA seven failed on one count or another, with few being able to claim global grassroots representation (all are based in the North, many have regional gaps in representation). Some were unable to fully claim DPO status because their membership included parents of children with disabilities or non-disabled professional service providers. Governance structures that did not factor into the calculus included board memberships inclusive of disability experience, or accountability structures to a grassroots base. Even non-membership organizations with a disabled employee majority were discounted. Additional distinctions were drawn between groups—whatever their governance structure—that provided services *for people with disabilities*, as opposed to “disability rights groups.” Hybrid organizations, disability rights advocacy capacity notwithstanding, were deemed service providers by the membership organizations, thereby further delegitimizing their representational role in the process. “Legitimacy defaults” invoked by the dominant membership organizations operated to elevate the status of some, while squeezing other groups out of contention.¹⁹

Further debate revolved around the precise identity of the person or persons who would actually fill the designated NGO seats at the Working Group. Here the definition of disability emerged as a central factor in the NGO debate, notwithstanding the complete failure to achieve consensus on the definition of disability as a matter of international law or policy. For the European Disability Forum, for example, a

person with a disability would include an individual with an indirect personal connection to disability, including the parent of a child with a disability. This positioning would enable Professor Gerard Quinn, a well-respected expert in both European and international disability law, to emerge as a chosen representative for one group. Other groups vehemently denied that such an individual would meet the proposed criteria for selection. Some suggested that the group held the seat and could fill it with any delegate or delegation that they chose. Others felt that the Caucus must approve all selected representatives of NGO seats. Some of the IDA organizations claimed that they would decide who among the regions would occupy the additional five seats, in effect giving their organizations extra seats at the Working Group table. The dispute over legitimacy, defined principally by expansive notions of voice accountability and irrespective of other indicators such as NGO credibility for experience and expertise, pushed States to pressure the NGO Disability Caucus to show that a process of selection was indeed possible among NGOs.

Ultimately, the NGOs reached a resolution with a method of allocating the remaining five of twelve NGO seats for the proposed Working Group. In so doing, they drew upon a familiar principle of equity in regional and geographic representation. This provided a persuasive argument. All of the seven IDA groups are Northern based NGOs, and all but one of their chosen head of NGO delegation was from the developed world. Although the effort to carve up the regions into five was contentious, it was resolved. UN methods for carving up the regions did not work, so a new regional structure was devised to account for the NGOs present. North American and Caribbean NGOs decided to forgo their seat in favor of a seat for the West Asia (Arab speaking) region, in a nod to the particularly active and effective participation of disabled activists from that region.²⁰ For the same group of NGOs for whom norms of participation and voice accountability led to unprecedented levels of access into a UN process by States, shared understandings about equitable geographic representation constituted a key element in resolving what at times looked like a hopeless power struggle. In the end, those individuals whose names were put forward and who served as NGO Working Group head of delegations had combined personal experience with disability, and a range of expertise from every region of the world.

Issue Ownership

The UN General Assembly endorsed the decision of the Ad Hoc Committee in June 2003 to establish a Working Group with the aim of preparing and presenting a draft text of a convention, which would be the basis for negotiation by Member States.²¹ The final composition of the Working Group included twenty-seven governments, twelve NGOs and one representative of a national human rights institution. The Working Group was tasked with considering all previous contributions submitted to the Ad Hoc Committee by States, observers, regional meetings, relevant United Nations bodies, entities and agencies, regional commissions and intergovernmental organizations, NGOs, national disability and human rights

institutions and independent experts. The Working Group held a ten-day meeting from January 15 to 16, 2004, and, during that time, drafted a twenty four article convention text which will be presented to the third meeting of the Ad Hoc Committee in May 2004.²² All members of the Working Group, government and non-governmental representatives alike, could fully participate in all of the Working Group sessions, both in plenary and in small working groups that took place in the morning, at lunchtime, and late into the night at the New Zealand Permanent Mission to the UN. No differentiation was drawn between groups insofar as the making of oral interventions or indeed in terms of facilitating small working groups.

Issues of voice accountability—and issue ownership—ultimately figured into the dialogue regarding the proposed content of the convention draft text. The moral authority of certain groups, particularly those NGOs representing the most marginalized of disabled people in society, served to elevate, and indeed amplify, the voice of particular organizations, thereby narrowing dialogue on particular issues. NGOs on the Working Group that were more cross-disability in their focus, along with other groups without a particular experience on certain disability issues, tended to defer to groups with a narrower identity on their issues. While this could play well into NGO strategy and coordination, among the very loose and ill-coordinated group it served to narrow the breadth of dialogue regarding particularly complex and contentious issues. The role played by the World Network of Users and Survivors of Psychiatry (WNUSP) is a particularly interesting example of this dynamic at work, particularly in the context of the Working Group.

For NGOs seeking to exert influence over international norm development, the framing and structuring of dialogue is a fundamental part of their strategic participation in standard-setting processes.

WNUSP has adopted, from the very beginning of the process, an advocacy approach that has as its chief objective the closure of psychiatric institutions and the banning of institutionalization and coercive treatment.²³ Groups with a more moderate position—for example, groups that advocate for the tightest of procedural safeguards attached to any process of involuntary commitment—have chosen to stay silent concerning the strongly held position of WNUSP. It is interesting to note that even within WNUSP, there are differences in opinion as to the strength of position regarding forced treatment. For those who identify themselves as “survivors of psychiatry,” all forced treatment should be prohibited—no exceptions. For those who identify with “users of psychiatry,” a more moderate stance is taken with regard to forced treatment, with exceptions permitted, though in carefully circumscribed situations (e.g., clear and imminent danger to self/others). The representation of WNUSP, however, has been driven exclusively by survivor-side representatives who take the strictest of positions and are solidly camped in the anti-psychiatry movement.

Interestingly, issues that will figure prominently in several articles of the new convention and which hold importance for WNUSP have received little breadth of dialogue within the NGO community and appear to have narrowed the terms of the debates among States as well. So effective has WNUSP been in elevating its voice on certain issues related to its constituency, the only existing UN standards relating to people with mental disabilities—the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care (MI Principles)²⁴—have been so fully discredited that they have been virtually invisible throughout the disability convention process. Though outmoded and problematic in many regards, the MI Principles still offer stronger legal protections for people with mental disabilities than the national legislation of the vast majority of UN Member States. The power to frame and structure debate around a particular issue is an example of the kind of indirect influence often wielded by both States and NGOs in international standard-setting processes, though it remains largely unexamined in the literature. The peddling of ideas by interested actors takes many forms and extends beyond direct inputs (e.g., the crafting of specific language) into the process to indirect forms of influence that are fundamental to shaping the parameters of debate.

ANALYSIS

This case study forces us to rethink some of the dominant literature on transnational advocacy networks and international networks. The illustrations drawn here are not readily explained by reference to traditional accounts of material power and influence exertion. As Keith Krause observes: “NGO influence can be exercised either directly as an input into a particular outcome (bargaining power), or indirectly as the power to frame or structure the debate around a particular issue (agenda-setting or structural power).”²⁵ For NGOs seeking to exert influence over international norm development, the framing and structuring of dialogue is a fundamental part of their strategic participation in standard-setting processes.

A second insight into NGO participation in such contexts relates to the depth of representation actually achieved as a result of ever-broadening access to sites of norm development. While issues of downward accountability have not figured prominently in examinations of NGO influence over international standard setting, the pull to probe more deeply into NGO representativeness suggests that such inquiries merit closer attention. The analysis that follows offers some preliminary observations in relation to how NGOs exercise power and, in light of such influence, identifies the challenges NGOs face in accounting for their privileged role to their constituents.

How Do NGOs Exercise Power Over Norm Development?

A principal contribution of constructivism in international relations theory is the acknowledgement that the international system is comprised of more than material structures such as military and economic power, subscribing to the view that the international system consists of social relationships.²⁶ This insight has challenged

long-held assumptions about the exclusive centrality of the state in international politics and the classic realist account of State behavior—promoting its own self-interest through the exercise of power.²⁷ It has, among other things, opened the door to consideration of the role of non-state actors in influencing what States perceive and demonstrate their interests to be and, more generally, to lines of inquiry that reveal how systems of shared ideas, beliefs, and values work to influence social and political action.²⁸ Actors in world politics are thus assumed to be “deeply social,” with actor identities being shaped by the institutionalized norms, values, and ideas of the social environment in which they act.²⁹

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In keeping with the constructivist orientation, international legal scholars, going back to Hugo Grotius, have long understood the international system as a social system.³⁰ Indeed, the view of law as a social process is the particular foundation upon which the highly influential New Haven School of international law rests.³¹ More recently, Michael Byers has worked to integrate the insights of both international relations and international law to reach a new level of analysis according to which law in the international system is seen as “performing the essentially social function of transforming applications of power into legal obligation, of turning ‘is’ into ‘ought.’”³² His work offers promise for broadening the constructivist realm of inquiry into the operation of existing normative structures on standing-setting processes. For Byers, “shared understandings of legal relevance...constitute a key element in the transformation of State practice into obligation in the form of customary process,”³³ a conclusion with equivalent currency for international treaty or soft-law negotiations. Byers’ integrated approach, drawing from both international law and international relations scholarship, shows the complex interaction of power and obligation within a law making process. This approach yields insights not only for inter-state power relationships in law-making, but also for the types of inquiries that animate the claims of constructivism (How do non-state actors influence state behavior?) and its detractors (Do legal norms really matter?).

Much of the leading analysis focuses upon transnational advocacy networks, and is principally concerned with the role of networks in influencing the interests and practices of *governmental* actors and privileges the *outcomes* of inter-governmental processes (i.e., the adoption of a norm) in assessing network influence.³⁴ While paying obeisance at some level to social relations within the international system, most of the transnational advocacy network literature ignores fundamental issues of relationships within and among networks in ways that actually limit and indeed undermine the very project of broadening and deepening democratic principles of participation and accountability in international processes. Scholars have upheld a

range of non-distinguishing factors, stunning in their variety, to support a finding of network success—such as the ultimate adoption of a particular standard. Primary emphasis is given to political outcomes in assessing network effectiveness such as shaping state and IGO positions in international declarations, influencing ratification of a treaty, or the adoption of a national legislation.³⁵

Networks are largely treated as unitary actors whose individual members seem remarkable for their ability to achieve consensus around shared ideas and values, not to mention core strategies, for the ultimate purpose of exerting political influence vis a vis states. However, as the case study of the disability treaty negotiations illustrates, networks are not unitary actors and the ways in which NGOs exert power within networks does not always depend upon the existence of shared ideas and values and the prevalence of core strategies. Single issue NGOs working in the absence of shared NGO consensus can wield influence by drawing on their particular experience and, more importantly, their moral authority to speak for a marginalized community.

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The analysis of transnational advocacy networks in the seminal work by Margaret Keck and Kathryn Sikkink, *Activists Across Borders*,³⁶ is a particularly salient illustration of how rich description and theorizing about NGO participation in norm development can nonetheless miss key elements at work in NGO activism. While providing some useful explanations of normative development, the analysis does not fully capture the complex social interrelations at work among States, NGOs, IGOs and other actors in norm development, maintenance, and change. In their account of the transnational advocacy network concerning violence against women, for example, a chronological tracking of activities is assembled to support network success in influencing norm formation.³⁷ Passing references are made to the ability of the network to overcome internal divisions and to coalesce around an apparently cross-constituency framing of the issue.³⁸ The primary focus of the analysis is the outcome of the women's rights campaign.³⁹ Left unaddressed, however, are issues that mattered most in the case study: (i) what groups had primary access to the fora within which decisions were made; (ii) how such groups worked within and among each other to exert influence on government decision makers; (iii) the extent to which one or another network actor assumed dominant roles within the process; and (iv) whether and how groups without access effectively channeled their voices into the processes (e.g., via representation through groups with privileged access).

In sum, the dominant analysis of transnational advocacy networks misses key questions of legitimacy and voice accountability within and among networks, exposing only in a more general sense the influence that such activities have on state actor

identities and interests. While influence is tracked and more or less established, their indicators do not speak to issues of performance and accountability, uncovering the dynamic of NGO roles. In this context, there can be no real response to the NGO backlash, nor practical ways of suggesting improvements to their performance and accountability that might reveal, as Paul Wapner has argued with persuasion, that NGOs are indeed accountable, but differently so.⁴⁰ Ignoring questions about legitimacy and voice accountability of the very groups that purport to represent global public interest in, for example, a human rights treaty negotiation, does nothing to expose weaknesses in the anti-democratic labeling against NGOs by those who are threatened by their success. Such an analysis is not responsive to the criticism launched against NGOs regarding the legitimacy of their function and may actually fuel the discontent increasingly expressed with the power and influence of unelected non-state actors.⁴¹ Much like the once held, but now vigorously challenged, assumption that the activities of humanitarian and development organizations deployed like “magic bullets” and sprayed in all directions can work to transform societies in transition,⁴² scholars have pointed to a myriad of transnational advocacy network activities⁴³ in support of triumphal, yet largely unsupported, sets of propositions about network influence. Far from demonstrating that transnational advocacy network activity yields penetrating and long-term influence in world politics through the shaping and (re)constituting of state identities and interests, the analysis that merely canvasses a broad landscape of activity without appreciable differentiation between and among different strategies and actors may do more to undermine than enlighten. Thus, time is ripe to deepen accounts of network influence and offer a more critical account of, among other things, precisely who within a network is wielding influence and the forms such influence takes.

What is the Role of Downward Accountability?

The time is also ripe to scrutinize accountability in NGO participation. Participation in standard-setting processes as discussed in the literature thus far draws a distinction between instrumentalist (process as a conveyor belt, swiftly moving actors in one direction toward the ultimate destination of interest—outcome) and more deeply social models (process as an end in and of itself).⁴⁴ International standard-setting as a form of global political process is governed according to fundamental rules intended to account for its global representational character. In a UN process, for example, all Member States may be represented and all have voting rights. IGOs are among other interested actors invited to attend as observers. NGOs with a particular interest or competence in the issues to be discussed are now routinely let through the door, though without voting rights, and without the particular indicators of representative government that support state participation. Accountability deficits have come to be associated with international forms of governance generally, and so too are NGOs challenged to meet “downward accountability” deficits as they are seen as acting and representing interests within international institutions and compromising or neglecting the interests of their constituency.⁴⁵

As the case study demonstrates, the challenges of advancing an international human rights agenda within an intergovernmental process are significant. Responding to downward accountability requires time, something that factors heavily into the fast-paced environment within which standard-setting processes are now negotiated. Some years ago, the Rights of the Child Convention, the UN Convention on the Law of the Sea, and other major multilateral agreements required a decade or more to negotiate. In recent years, even some of the more politically contentious treaties, including the Mine Ban Treaty and a host of complex international environmental treaties have been negotiated at record-setting pace. While NGO access to and participation in such processes has been enhanced quite dramatically, via formal procedural mechanisms for inclusion and as a result of deeper NGO engagement in general, such developments raise questions of strategy that may stretch capacities in ways that impact accountability and effective performance.

The challenges of advancing an international human rights agenda within an intergovernmental process are significant.

In the fast-paced, opportunistic environment of a treaty negotiation process, NGO strategists must decide between mobilizing a close knit group of well coordinated campaigners to further their effort to influence the progressive development of a treaty, versus building and mobilizing a broad grassroots base of support. Resources and time are highly relevant factors, internet communications notwithstanding. Jane Covey has posed the dilemma well: "The dual challenges of mobilising arguments as well as people are great. Arguments that gain the attention of policymakers call for 'expert' knowledge of both the issue and the decision-making process; while public outcry and protest actions that constrain decision makers' power call for an active and organized grassroots constituency."⁴⁶ The question is particularly salient for assessing the long-term effectiveness of a partial policy-influencing effort such as the drafting of an international convention. International human rights treaties are tools for national-level legislative reform and implementation. As the experience with the international disability treaty indicates, policy influence efforts that are geared to the development of a progressive treaty text may or may not foster the conditions for effective implementation at the national and local level, conditions that are generally understood to require broad-based, organized public participation. Indeed, the current environment within which international standard-setting processes operate may not be conducive to creating conditions that will ensure effective implementation. The work of both Jenkins and Covey point out that advocacy campaigns may take forms that strengthen grassroots level advocacy and the voice of grassroots constituents or, on the other hand, they may take a form of implementation that is carried out via intermediaries. The first can contribute to the building of a strong grassroots base while the latter can facilitate the growth of a civil society whose advocacy is

professionalized, thereby weakening the grassroots base.⁴⁷ NGOs must adequately address this dilemma if they are to meet expectations about their responsibility to account for their representational role in international processes.

CONCLUSION

International standard-setting processes have become significant expressions of broad community interests, helping to shape national legislative and policy agendas, including environmental protection, arms control, development, human rights, and health. NGO participation in human rights standard-setting processes reminds us that an understanding of the international system that confines assertions of a public interest onto government representatives (e.g., in international human rights treaty negotiations) or single individuals (e.g., before international human rights tribunals) is no longer current. Issues that relate to normative legitimacy⁴⁸—fairness of process, including voice accountability and a host of concepts implicated in frequently invoked appeals to “democratization” of the international system as a whole—give rise to penetrating questions regarding the vogue NGO actors in international standard setting. Brought to the fore are a series of questions raised frequently in literature regarding the “scaling up” of advocacy efforts in development organizations,⁴⁹ but largely unexamined in relation to accounts of NGOs participation: Whose interests—and what public(s)—do NGOs claim to represent? Do NGOs maintain a “special relationship” with those whose interests they seek to serve? With radical ideas about social transformation? With alternatives to the prescriptive agendas of the rich and powerful? How are they accountable to their constituents? How do multiple accountabilities play into accounting downward, to a grassroots base? Such questions can and should be similarly directed to NGOs seeking to shape the international human rights system and, in particular, the development of human rights standards in intergovernmental negotiating processes.⁵⁰ To put it another way, what are we to make of the claim by Keck and Sikkink that advocacy networks are “among the most important sources of new ideas, norms and identities in the international system” and hold responsibility for “open[ing] channels for bringing alternative visions and information into international debate?”⁵¹

The current effort to draft an international convention on the rights of people with disabilities provides a useful case study of issues around legitimacy and accountability, particularly questions relating to NGO participation in standard-setting processes. This paper suggests a review of the “social architecture” or structure of relationships between and among NGOs and other actors in standard setting may be in order. Understanding the complex roles played by States, NGOs and other actors in international standard setting compels a consideration of political, moral, *and* legal factors at work in such processes. It suggests ways in which UN standard-setting processes can be usefully examined through a constructivist lens to explore in further depth questions about who exercises power in international decision-making, how this power is sustained and how normative structures can work to support (or

constrain) dialogue among engaged actors. Drawing as it does from international relations and international law literature, the approach adopted here takes us farther down the road to understanding NGO accountability and legitimacy within human rights practice and, more broadly, the role of such organizations within world politics.

Notes

¹ See, e.g., Hugo Slim, "Future Imperatives: Quality, Standards and Human Rights," *Report of a Study to Explore Quality Standards for the British Overseas Aid Group*, (Oxford: Oxford Brookes University, October 1999).

² Claude E. Welch, Jr., ed., *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001).

³ Caitlin Wiesen, Geoffrey D. Prewitt, and Babar Sobhar, "Civil Society and Poverty: Whose Rights Count?" in *Civil Society at the Millennium* 137-152, 148 (CIVICUS, Kumarian Press, 1999).

⁴ Hugo Slim, *By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations* (Geneva: International Council on Human Rights Policy, 2002). Available at: <<http://www.ichrp.org.htm>>.

⁵ The term "international standard setting" as used here refers to multilateral decision-making processes geared towards achieving consensus on key issues of global concern, whether in the context of formal treaty negotiation leading to the adoption of a legally binding text, or a negotiation that results in the adoption of non-binding (though not legally irrelevant) text, such as a declaration or resolution.

⁶ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* 16 (Ithaca, New York: Cornell University Press, 1998).

⁷ For more on traditional models of disability, see Gareth Williams, *Theorizing Disability*, in *Disability Studies* 123 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., Sage Publications 2001).

⁸ In the Final Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, 31 August—8 September 2001, paragraph 179: "Invites the United Nations General Assembly to consider elaborating an integral and comprehensive international convention to protect and promote the rights and dignity of disabled people, including, especially, provisions that address the discriminatory practices and treatment affecting them." Available at: <http://www.hri.ca/racism/official/finalreport.shtml>.

⁹ *Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, Third Committee, 56 Sess., Agenda Item 119(b), U.N. Doc. A/C.3/56/L.67/Rev.1 (28 Nov. 2001).

¹⁰ There were two early efforts within the United Nations to build support for the drafting of an international treaty on the rights of people with disabilities. In 1987, the Global Meeting of Experts to review the Implementation of the World Programme of Action concerning Disabled Persons was convened at the mid-point of the UN Decade of Disabled Persons and recommended that the UN General Assembly convene a conference to draft an international convention on the elimination of all forms of discrimination against persons with disabilities. Draft agreements were in fact prepared by Italy (U.N. Doc. A/C.3/42/SR.16 (1987)) and Sweden (U.N. Doc. A/C.3/44/SR.16 (1989)) but were rejected by the UN General Assembly at its forty-second and forty-fourth sessions, respectively, mainly due to disinterest and treaty fatigue. For more on these efforts, see generally Bengt Lindqvist, *Standard Rules in the Disability Field*, in *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* 64-65 (Theresia Degener and Koster-Dreese, eds., 1995).

¹¹ For a book invoking this expression, see J.I. Charlton, *Nothing about Us without Us: Disability, oppression and empowerment* (Berkeley: University of California Press, 1998) (providing a theoretical framework for understanding disability oppression *not* as something that has come from the attitudes of people without disabilities, but because of systems and structures of oppression from which these attitudes stem).

¹² Hugo Slim, *By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations* (Geneva: International Council on Human Rights Policy, 2002). Available at: <<http://www.ichrp.org.htm>>. For more on this issue generally, see Lisa Jordan, "Political Responsibility in Transnational NGO Advocacy," *World Development*, 28, No. 1, 2051-65 (2000).

¹³ *Id.* at 5. Slim identifies an additional component of accountability, namely, “performance accountability” which he relates to NGO impact or outcome.

¹⁴ *Accreditation and Participation of Non-governmental Organizations in the Ad Hoc Committee to Consider proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UN GA Res. A/RES/56/510. Available at: <<http://www.un.org/esa/socdev/enable/rights/adhocngo82e.htm>>.

¹⁵ *Decision on the Modalities of the Participation of Accredited Non-Governmental Organizations in the Ad Hoc Committee to Consider proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, 2 August 2002. Available at: <<http://www.un.org/esa/socdev/enable/rights/adhocdecision2.htm>>.

¹⁶ For more information about this process generally, see <http://worldenable.net> and <http://rightsforall.org>.

¹⁷ Disabled persons organizations (DPOs) with ECOSOC consultative status include: Disabled Peoples' International, Rehabilitation International, World Blind Union, World federation of the Deaf, World Federation of the Deafblind, Inclusion International and World Network of Users and Survivors of Psychiatry.

¹⁸ For the relevant UN GA resolution concerning NGO participation in the process to draft a convention on the rights of people with disabilities, see *Accreditation and Participation of Non-governmental Organizations in the Ad Hoc Committee to Consider proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UN GA Res. A/RES/56/510. Available at: <<http://www.un.org/esa/socdev/enable/rights/adhocngo82e.htm>>. For the decision concerning the form of NGO participation, see *Decision on the Modalities of the Participation of Accredited Non-Governmental Organizations in the Ad Hoc Committee to Consider proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, 2 August 2002. Available at: <<http://www.un.org/esa/socdev/enable/rights/adhocdecision2.htm>>.

¹⁹ I am indebted to Katherine Guernsey who coined this term in discussions about this paper.

²⁰ For the final composition of the Working Group, see <http://www.un.org/esa/socdev/enable/rights/ahcwg.htm#membership>

²¹ See Report of the Ad hoc Committee, A/58/118 for the complete text of the decision. Available at: http://www.un.org/esa/socdev/enable/rights/a_58_118_e.htm

²² For the Working Group draft convention text, see <http://www.worldenable.net>.

²³ For an outline of the position of WNUSP on the disability convention, see <http://www.un.org/esa/socdev/enable/rights/contrib-wnusp.htm>.

²⁴ G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex at 188-192, U.N. Doc. A/46/49 (1991). For more on the MI Principles, see Eric Rosenthal and Leonard S. Rubenstein, *International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness'*, 16 Int'l J. L. & Psy. 257 (1993). For a copy of the WNUSP position paper on the MI Principles, see <http://www.wnusp.org/wnusp%20evas/Dokumenter/positionpaper.html>.

²⁵ Keith Krause, “Multilateral diplomacy, norm building, and UN conferences: the case of Small Arms and Light Weapons” (Review Essay), *Global Governance*, April 01, 2002.

²⁶ Alexander Wendt, “Constructing International Politics,” 20 *International Security* 71, 73 (1995/6)

²⁷ See, e.g., Edward Carr, *The Twenty Years' Crisis* (2d ed) (London: Macmillan) 85-8 (1946); Hans Morgenthau, *Politics Among Nations* 5-8 (2d ed.) (New York: Alfred A. Knopf, 1954).

²⁸ Christian Reus-Smit, “Constructivism” in *Theories of International Relations*, 217 (Scott Burchill et al., eds., New York: Palgrave, 2d ed., 2001).

²⁹ *Id.* at 219.

³⁰ Hugo Grotius, *De Jure Belli ac Pacis: Libre Tres* (1625) in *Classics of International Law* (J.B. Scott, ed.) (New York: Oxford University Press, 1925).

³¹ See, e.g., Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University press, 1961); Harold Lasswell and Myres McDougal, *Jurisprudence for a Free Society* (New Haven: New Haven Press, 1992).

³² Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

³³ *Id.* at 205.

³⁴ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, New York: Cornell University Press, 1998).

³⁵ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* 25, 192 (Ithaca, New York: Cornell University Press, 1998). The five stages of effectiveness put forward in Keck and Sikkink's account of assessing network effectiveness and influence ("(1) issue creation and agenda setting; (2) influence on discursive positions of states and international organizations; (3) influence on institutional procedures; (4) influence on policy change in "target actors"...; and (5) influence on state behavior") sets the foundation for an instrumentalist approach that leaves unexamined issues of legitimacy in relation to process. *Id.* at 25. The discussion of "issue characteristics" and "actor characteristics" that might give rise to deeper explorations of contestation and representatives within networks is not explored in any depth, rather, these additional parts of the argument are employed in the service of supporting propositions about network impact on political outcomes. *Id.* at pp. 26-29.

³⁶ *Id.*

³⁷ *Id.* at pp. 165-198.

³⁸ *Id.* at x.

³⁹ *Id.* at 186, 187.

⁴⁰ Paul Wapner, *Defending Accountability in NGOs*, Chicago J. of International Law vol. 3(1) (2002), p. 197. See also, Julie Mertus, "International Law and Social Movements: Towards Transformation," American Society of International Law Annual Proceedings, vol. 97, p. 295 (2003)(with excerpts of speeches by Wapner and Sikkink); Julie Mertus, "Human Rights and the Promise of Transnational Civil Society," in *The Future of International Human Rights*, Burns Weston and Stephen P. Marks, eds. (New York: Transaction, 1999).

⁴¹ A particularly troubling manifestation of this type of discord and backlash is the establishment of NGO Watch, a joint project of the American Enterprise Institute and the Federalist Society. See <http://www.ngowatch.org/>

⁴² For works contributing to the critical examination of the role of NGOs in development, see especially, David Hulme and Michael Edwards, "NGOS, States and Donors: An Overview," in *NGOs, States and Donors: Too Close for Comfort?* (David Hulme and Michael Edwards, eds. New York: St. Martin's Press, 1997).

⁴³ This is the advocacy typology adopted in Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, New York: Cornell University Press, 1998) and which informs much of the literature on transnational advocacy networks.

⁴⁴ Process plays a constitutive role not only in ordering all relationships, but in regulating whose voice is heard, when, how and to what effect. These approaches to participation and fair process are variously expressed by reference to the "intrinsic" or "inherent" values of decisional processes themselves or, as Mashaw prefers, "A concern for values inherent in or intrinsic to our common humanity." ðJerry Mashaw, "Administrative Due Process: The Quest for a Dignitary Theory," 61 Boston U. L. Rev. 885, 886 (1981).

⁴⁵ David Hulme and Michael Edwards, "NGOS, States and Donors: An Overview," in *NGOs, States and Donors: Too Close for Comfort?* 3 (David Hulme and Michael Edwards, eds. (New York: St. Martin's Press, 1997); Harry Blair, "Donors, Democratization and Civil Society: Relating Theory to Practice," in Edwards and Hulme at 23, 28.

⁴⁶ Jane Covey, "Accountability and Effectiveness in NGO Policy Alliances", in Michael Edwards and David Hulme, eds. *Non-Governmental Organizations—Performance and Accountability: Beyond the Magic Bullet* 167, 167 (London: Earthscan, 2002). J.C. Jenkins, "Non-Profit Organizations and Policy Advocacy", in WW Powell, *The Nonprofit Sector: A Research Handbook* (New Haven, Yale University Press, 1987).

⁴⁷ *Id.*

⁴⁸ Normative legitimacy as used here corresponds in part to the usage employed by Thomas Franck insofar as he considers legitimacy to be derived from the (right) processes of rule creation as well as additional factors and that of Michel Byers who, adopting a somewhat narrower conception, limits its application to the legitimizing effects of the customary international law process itself on transforming applications of power into normative (customary law) structures. Thomas Franck *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1999); Michael Byers, *Custom, Power and the Power of Rules: International relations and Customary International Law* 9-10 (Cambridge: Cambridge University Press, 1999).

⁴⁹ See especially, David Korten, *Getting into the 21st Century: Voluntary Action and the Global Agenda* (West Hartford: Kumarian Press, 1990); Thomas F. Carroll, *Intermediary NGOs: the Supporting Link in Grassroots Development* (West Hartford: Kumarian Press, 1992); David Hulme and Michael Edwards, "NGOS, States and Donors: An Overview," in *NGOs, States and Donors: Too Close for Comfort?* 3 (David Hulme and Michael Edwards, eds., New York: St. Martin's Press, 1997); Marc Lindenberg and Coralie Bryant, *Going Global: Transforming Relief and Development NGOs* (West Hartford: Kumarian Press, 2001); Michael Edwards and David Hulme, eds., *Non-Governmental Organizations—Performance and Accountability: Beyond the Magic Bullet* (London: Earthscan, 2002).

⁵⁰ David Hulme and Michael Edwards, "NGOS, States and Donors: An Overview," in *NGOs, States and Donors: Too Close for Comfort?* 3 (David Hulme and Michael Edwards, eds. New York: St. Martin's Press, 1997).

⁵¹ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* x (Ithaca, New York: Cornell University Press, 1998).