Agency Costs in International Human Rights

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Agency Costs in International Human Rights

DAVID H. MOORE*

This Article asserts that the international human rights system supported by the United Nations can be viewed productively as a network of agency relationships between individuals, whose interests the system is designed to safeguard, and three main agents: states, the United Nations, and non-governmental organizations. Each of these agency relationships imposes costs, as each agent has interests that conflict with those of individuals and possesses greater information than do individuals. Applying an agency perspective helps identify agency costs and suggests ways in which they might be reduced. An agency perspective also offers a new paradigm for viewing the human rights system, in which the interests of individuals assume a more central role. As a result, an agency perspective makes both conceptual and practical contributions to international human rights.

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* Assistant Professor, University of Kentucky College of Law. I would like to thank Richard Epstein, Jack Goldsmith, Roberta Harding, Michael Healy, Natalie Moore, The Honorable John Rogers, and Peter Spiro for their helpful comments regarding earlier drafts of this Article. I also wish to thank Richard Wilkins for observations regarding the operation of non-governmental organizations and Amy Osborne and Alec Moeser for valuable research assistance. Finally, I wish to thank the John M. Olin Foundation and the University of Chicago Law School for their generous support which allowed me to begin this project while an Olin Fellow at the University of Chicago Law School. This Article is dedicated to David Scott Moore, who was born during its preparation.
I. INTRODUCTION

Violations of international human rights are disturbingly commonplace. Reflexively, the weakness of the international human rights system might be blamed on the absence of an international government that can effectively monitor and enforce human rights compliance. While international standard setting has been highly successful, international monitoring and enforcement remain relatively weak. When evaluated against the standard of domestic governments, the international human rights system supported by the U.N. is likely to be characterized as a fledgling government at best. The General Assembly provides a type of legislative body, as do U.N. treaty-drafting conferences. Yet, the General Assembly’s enactments

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1. Louis Henkin has noted that “international law is often described as ‘primitive’” as it tends to rely on consent rather than authoritative regulation, and that enforcement of human rights is often perceived, though perhaps wrongly, as particularly primitive. Louis Henkin, Human Rights and State “Sovereignty,” 25 GA. J. INT’L & COMP. L. 31, 35, 41-43 (1995/1996). Although the influence of the international human rights system continues to grow, the system nonetheless lacks the compulsory authority that domestic governments tend to possess, rendering the system amenable to the criticism that its shortcomings derive from this lack of compulsory power.

2. See Anthony D’Amato, The Concept of Human Rights in International Law, 82 COLUM. L. REV. 1110, 1119, 1120, 1122 (1982) (conceding that while “the international legal system is not devoid of courts” or enforcement through retaliation, “there is a ‘lack of enforcement mechanisms of the hierarchical type’”) (citation omitted). This is not to suggest that traditional government is the only way the human rights system might exert influence. The U.N. human rights system can facilitate global governance without becoming a traditional government. Cf. Anne-Marie Slaughter, The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations, 4 TRANSNAT’L L. & CONTEMP. PROBS. 377, 380, 408–10 (1994) (distinguishing between world government and global governance). Nonetheless, much attention has been paid to creating international governmental structures while the lessons of an agency perspective have been neglected. This Article corrects that failing by focusing on the lessons of an agency perspective, without rejecting either the government or governance approaches, as neither of these approaches is entirely at odds with an agency perspective.
generally do not create binding law in and of themselves, nor are the treaties created by drafting conferences compulsory unless ratified by individual states and then they are generally only compulsory as to those states. The Secretariat, with its High Commissioner for Human Rights, and the Security Council fulfill executive functions. However, the Security Council's unique power to enforce international law is bound by highly political and often crippling procedural arrangements. Various organs, including the International Criminal Court ("ICC"), the International Court of Justice ("ICJ"), the Human Rights Commission (the "Commission"), and the Human


5. I use enforcement here in a traditional sense to refer to the ability to bring compulsory power to bear to effect compliance. Clearly, institutions that do not have the Security Council's enforcement power can nonetheless influence states to comply with international law.

6. See, e.g., U.N. CHARTER art. 23, para. 1 (designating certain states as permanent members); id. art. 27, para. 3 (requiring the permanent members to concur in votes on all non-procedural matters).


Rights Committee, adjudicate human rights issues to varying degrees. Yet, these bodies have limited jurisdiction and most lack the authority that might support fulsome adjudicative procedures or compulsory orders.

In the face of these limitations, human rights advocates have naturally sought more advanced international institutions that could legislate, execute, and adjudicate like domestic institutions. Since the international political system rests on the bedrock of state sovereignty, even if that bedrock is crumbling, authoritative international institutions are difficult to establish and raise their own concerns. As a result, rather than focus on the international human rights regime as a nascent government or even as a system of less formal governance, this Article proposes that we conceive of the human rights system as a network of agency relationships between the individuals whose rights the system is designed to protect and various international actors. The Article describes three main agency relationships that comprise the system, identifies costs that these agency relationships impose, and explores ways in which these costs might be minimized. In so doing, the Article demonstrates how an agency-based conception of the human rights system can improve the regime’s responsiveness to the individuals that it safeguards.

II. AGENCY RELATIONSHIPS AND AGENCY COSTS

"An agency relation is one in which a 'principal' delegates authority to an 'agent' to perform some service for the principal."12

9. See Mark Gibney, On the Need for an International Civil Court, 26 FLETCHER F. WORLD AFF. 47, 55 (2002) (noting that, although the Human Rights Committee is evolving into a more judicial body, it nonetheless "does not hear oral testimony and its adjudicatory powers are limited to expressing the 'views' of the committee"); cf. ANNE BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 33 (2001) (arguing that parties to the Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR") are bound by the Human Rights Committee’s views regarding violations, but recognizing that "[a]s of July 2000, states parties have submitted satisfactory follow-up replies to the Committee’s views in only 21% of cases disclosing a violation of the [ICCPR]").


11. Even if sovereignty is less secure than it used to be, “international law and international institutions . . . are still largely premised on a world in which states have the last word.” Peter J. Spiro, Accounting for NGOs, 3 CHI. J. INT’L L. 161, 162 (2002).

12. Edgar Kiser, Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation, 17 SOC. THEORY 146, 146 (1999); see also Trond Petersen, The Economics of Organization: The Principal-
More broadly, "[w]henever one individual depends on the action of another, an agency relationship arises." Agency relationships abound in the world: legislators representing constituents, employees representing employers, and lawyers representing clients.

These relationships serve valuable purposes. Agency relationships both allow many individuals to speak through one person and allow one individual to act through many persons. The resulting specialization allows individuals to accomplish more than they could accomplish alone. For example, representative government permits individual constituents to leave day-to-day governance to their political representatives while retaining a voice in the governance process. Employment relationships allow an employer to work through a potentially unlimited number of employees. Corporate structures take advantage of dual agency relationships, permitting shareholders to leave corporate governance to a body of specialized agents while allowing the corporation to employ countless individuals to accomplish corporate goals. Legal representation permits a party to navigate the judicial system without attending law school, passing the bar, or turning full attention to the litigation. Agency relationships thus create important efficiencies.

At the same time, agency relationships impose certain costs on the principal. The Democratic constituent committed to social welfare is represented by a Republican congressman determined to reduce federal involvement. An employee working on commission seeks to maximize sales while risking the long-term satisfaction and loyalty of the business's customers. An accident victim interested in a large recovery is represented by an attorney who forgoes work that only marginally would increase the award on which her contingency fee will be based. In each of these situations, the principal and agent have conflicting interests. The principals' interests are slighted as the agents pursue their own interests.

Agent Relationship, 36 ACTA SOCIOLOGICA 277, 277 (1993).


15. Principals may also impose costs on agents. For example, a principal might withhold promised support or fail to communicate his desires clearly. See Jeff Worsham et al., Assessing the Assumptions: A Critical Analysis of Agency Theory, 28 ADMIN. & SOC'Y 419, 435 (1997). A more comprehensive look at agency costs in the human rights system might assess the costs imposed on agents as well as those imposed on principals. However, this Article focuses on the costs incurred by principals in their attempts to improve the status of human rights. The focus is justified because certain agency costs, such as an agent's lack of information, are relatively small in the human rights arena where the principals' interests are, at least at a basic level, fairly clear.
In addition to conflicting interests, agents often possess greater information or greater capability for processing information than do their principals, resulting in information asymmetries.\textsuperscript{16} For example, agents know their own propensities for honesty or industry better than do their principals.\textsuperscript{17} In addition, agents develop expertise and possess greater information because of their proximity to the events affecting the principal's interests. These information asymmetries, while not inherently detrimental, allow agents to pursue their own interests unbeknownst to the principal or to influence the principal's perceptions and commands by controlling the information the principal receives.\textsuperscript{18}

Both conflicts of interest and information asymmetries may reduce the agent's responsiveness to the principal's interests.\textsuperscript{19} Identifying the existence of agency relationships can alert us to these costs and to ways in which the principal might minimize them.\textsuperscript{20}

Applying an agency perspective to the international human rights system supported by the U.N. thus promises to expose conflicts of interest and information asymmetries within the system and to spur exploration of ways to reduce these costs, thereby rendering the human rights system more responsive to the individuals whose interests it is intended to protect.

III. THE U.N. HUMAN RIGHTS SYSTEM: AGENCY RELATIONSHIPS AND AGENCY COSTS

The first step in applying an agency perspective to the international human rights system supported by the U.N. is to identify the agency relationships that comprise the system. This task has both descriptive and normative aspects. That is, the agency approach finds evidence of agency relationships by looking at the way the system currently operates. Having found evidence of these agency relationships and the costs they impose, agency theory suggests ways in which these costs might be reduced. In so doing, the agency

\textsuperscript{16} See Kiser, supra note 12, at 146; Petersen, supra note 12, at 278–79; Worsham et al., supra note 15, at 435; Pratt & Zeckhauser, supra note 13, at 3.

\textsuperscript{17} Kiser, supra note 12, at 149–50; Petersen, supra note 12, at 278–79.


\textsuperscript{19} Kiser, supra note 12, at 146.

\textsuperscript{20} Reducing agency costs may itself be costly. These control costs may nonetheless be justified by savings in agency costs.
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approach provides a basis for arguing that principals and agents within the system should view themselves and act consistently with the obligations inherent in their agency roles.

While a multitude of agency relationships might be identified within the U.N. human rights system, this Article focuses on three relationships. It begins, however, by identifying the principals in the system. The U.N. human rights system largely protects the rights of individuals. The Universal Declaration of Human Rights ("Universal Declaration"), for example, recognizes "the inherent dignity and . . . equal and inalienable rights of all members of the human family," and identifies certain individual rights "as a common standard of achievement for all peoples and all nations."21 The International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") build on the Universal Declaration and bind state parties to respect or seek to realize various individual rights, such as the right to religious freedom22 and the right to work.23 Other conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women24 and the Convention on the Rights of the Child,25 obligate state parties to protect the rights of individuals belonging to certain groups. As the human rights system is designed to protect the interests of individuals throughout the world, individuals are properly viewed as the principals in the system.

This Article assumes that the interests of individuals within the human rights system are uniform. Of course, even in the field of human rights, the interests of individuals differ, and are at times widely divergent.26 When principals' interests diverge, the outcomes

produced by an agency relationship do not provide a ready measure of whether the principals’ interests have been served. Instead, agency costs might be identified by determining whether individuals’ interests were adequately represented in the decision-making process, without necessarily reaching the merits of the final outcome as a matter of political choice.\textsuperscript{27} To bracket the issue of political choice and focus instead on illustrating how an agency perspective can be used to assess and improve the human rights system, this Article employs the simplifying assumption of uniform principal interests. Moreover, while recognizing that some restraints on agents’ actions and authority serve to protect against agency costs,\textsuperscript{28} this Article focuses on situations in which the actions of agents violate individuals’ interests.\textsuperscript{29}

After identifying individuals as the principals in the system, the task becomes the identification of their agents. Individuals are represented by three main agents in the U.N. human rights system: states, which enact the declarations and enter the agreements that further individuals’ interests and which control various U.N. organizations that deal with human rights; the U.N., which seeks to promote human rights and which includes organizations composed of independent experts that address human rights issues; and non-governmental organizations (“NGOs”), which promote and monitor human rights compliance.

A. States

Of these three agents, states are by far the most influential players in the international human rights system.\textsuperscript{30} The system is

\begin{itemize}
  \item 27. See Robert Howse, How to Begin to Think About the “Democratic Deficit” at the WTO 7 (unpublished manuscript), available at http://faculty.law.umich.edu/rhowse (last visited Oct. 20, 2003) (distinguishing between issues of agency and issues of political choice).
  \item 28. See infra notes 39, 62.
  \item 29. As a result, determining when limitations on agents’ authority are suboptimal is beyond the scope of this Article.
  \item 30. See Martin A. Olz, Non-Governmental Organizations in Regional Human Rights Systems, 28 COLUM. HUM. RTS. L. REV. 307, 321 (1997) (recognizing states as “the center of the traditional international legal order”); JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 27 (2d ed. 1998) (recognizing that, although individuals have obtained some recognition, “[s]tates have traditionally been the sole subjects of international law, the only actors with international legal standing”). This is not to suggest that intergovernmental and non-governmental organizations play an insignificant role, but only that states continue to play a primary role.
\end{itemize}
organized largely around states. In these capacities, states often act as agents of individuals, adopting documents such as the Universal Declaration or the ICCPR. In the General Assembly, states "initiate studies and make recommendations for the purpose of... assisting in the realization of human rights and fundamental freedoms."

However, states are also the actors the system seeks to constrain. At its core, then, the system is based on an obvious conflict of interest. The conflicting interests of states are most obviously manifest through human rights violations, which are all too common. Freedom House's annual survey of the status of civil and political rights in the world concluded that "at the end of 2002 there were 89 Free countries... 55 Partly Free countries... [and] 48 Not Free countries." At the time of the survey, 2.718 billion people, or 43.85 percent of the world's population, lived in "Free" countries, "approximately 20.87 percent of the world's population, 1.293 billion persons, lived in" "Partly Free" countries, and 2.186 billion people or 35.28 percent of the world's population lived in "Not Free" countries. Regardless of the obvious difficulties in reaching these conclusions, these figures attest to the extent to which states' interests

31. See Henkin, supra note 8, at 21–22 (explaining that states are the constituent entities within the international political system that gives rise to international law); U.N. CHARTER art. 110 (U.N. created through ratification by individual states).

32. The U.N. itself was created by “the peoples of the United Nations” acting through their “respective Governments.” U.N. CHARTER pmbl.

33. Id. art. 13, para. 1.

34. D’Amato, supra note 2, at 1113 (noting that states “are the ‘creator-subjects’ of international law”).


37. Adrian Karatnycky, Liberty’s Expansion in a Turbulent World: Thirty Years of the Survey of Freedom, in FREEDOM HOUSE, FREEDOM IN THE WORLD (2003), available at http://www.freedomhouse.org/research/freeworld/2003/akessay.htm. “Free countries” are those “in which there is broad scope for open political competition, a climate of respect for civil liberties, significant independent civic life, and independent media.” Id. “Partly Free countries” are those “in which there is limited respect for political rights and civil liberties... These states also suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and often a setting in which a single political party enjoys dominance despite the facade of limited pluralism.” Id. “Not Free countries” are countries “where basic political rights are absent and basic civil liberties were widely and systematically denied.” Id.

38. Id.
collide with those of individuals.

Not only do conflicts of interest lead states to violate individuals’ rights, but they lead states to limit the work of international organizations.\textsuperscript{39} For example, states sitting on the Commission on Human Rights, the principal U.N. human rights body,\textsuperscript{40} initially held that the Commission lacked power to respond to complaints of human rights violations.\textsuperscript{41} Although the Commission reversed its position twenty years later,\textsuperscript{42} the Commission remains crippled by the political interests of its fifty-three member states. The political hold that states maintain on the Commission is illustrated by the election of Libya, a prominent human rights violator, to chair the Commission’s most recent session\textsuperscript{43} and by the fact that the Commission has never managed to adopt a resolution criticizing China for its human rights abuses.\textsuperscript{44}

Just as states may act to limit the reach of the U.N., states attempt to limit the work of human rights NGOs by, among other things, denying them legal status and restricting their fundraising, dissemination of materials, and access to international fora.\textsuperscript{45}

\textsuperscript{39} This is not to suggest that every time a state acts to constrain an international organization, it acts contrary to individuals’ interests. There are certainly times when constraint of an international actor advances the interests of individuals and reduces agency costs. However, much of the resistance to the growth of international organizations has arisen from uncertainty regarding whether international organizations will act in individuals’ interests. As previously noted, this Article does not seek to determine the precise degree of international authority that will best serve individuals’ interests, but instead focuses on the many situations in which states’ actions vis-à-vis international organizations conflict with individuals’ interests.

\textsuperscript{40} STEINER & ALSTON, supra note 8, at 138 (describing the Commission on Human Rights as “the world’s single most important human rights organ”); Human Rights Watch, Libya Confirms Why It Is Wrong for UN Rights Chair (Aug. 20, 2002), at http://www.hrw.org/press/2002/08/libya082002.htm [hereinafter Human Rights Watch, Libya Confirms] (referring to the Commission as “the world’s chief human rights body”).

\textsuperscript{41} STEINER & ALSTON, supra note 8, at 611.

\textsuperscript{42} Id.

\textsuperscript{43} See Human Rights Watch, Libya Confirms, supra note 40.

\textsuperscript{44} STEINER & ALSTON, supra note 8, at 634–40 (providing a case study of the Commission’s failings regarding China); see also T. Jeremy Gunn, American Exceptionalism and Globalist Double Standards: A More Balanced Alternative, 41 COLUM. J. TRANSNAT’L L. 137, 150 (2002).

example, the Lawyers Committee for Human Rights recently reported that Egypt, under a new registration law, denied registration to "two well established independent human rights organizations—the New Women's Research Center and the Land Center for Human Rights." Similarly, Human Rights Watch reports that Cuba denies legal status to local human rights organizations, restricts the foreign travel of human rights advocates, and bans international organizations from conducting local investigations of human rights violations. While other examples could be provided, these few illustrations suffice to demonstrate that conflicting interests lead states to take many actions inconsistent with the interests of individuals.

B. The United Nations

The U.N. Charter provides ample evidence of the U.N.'s role as an agent of individuals. The Charter's preamble states that the U.N. was created by "we, the people" through "our respective Governments." On its face, the U.N. was created by the peoples of the world, the principals, through their agents, the states.

Furthermore, the U.N. was designed "[t]o achieve international co-operation... in promoting and encouraging respect


49. U.N. CHARTER pmbl.

50. The states were themselves represented by agents in creating the U.N., as is noted in the Preamble to the Charter. Id.
for human rights and for fundamental freedoms for all.”51 The U.N. thus seeks to advance individuals’ interests. The international human rights movement owes much of its success to the existence and efforts of the U.N.

At the same time, the U.N. serves as “a centre for harmonizing the actions of nations in the attainment of . . . common ends,” including the advancement of human rights.52 The U.N. is thus both an agent of individuals to achieve respect for human rights and a forum for coordinating the actions of states in doing the same. Although states are to “fulfill in good faith the [human rights] obligations assumed by them in accordance with the [U.N.] Charter,”53 self-interested member states often use the U.N. as a forum to accomplish their own objectives, rendering it an agent of the states.54 Moreover, the U.N. depends on its member states for its budget55 and for identification and implementation of many of its initiatives. As a result, the interests of the U.N. are at least bifurcated.

Given these conflicting interests, it should come as no surprise that the U.N. has been constrained in its efforts to promote human rights in the face of violations by member states. As noted above, the Commission on Human Rights has failed to adopt a single resolution criticizing China for its history of human rights abuses. Similarly, past “Secretaries-General have been very reluctant to embrace human rights concerns actively for fear of offending governments and jeopardizing their wider role in the promotion of international peace and security.”56 Former U.N. Secretary-General Boutros Boutros-Ghali, for example, strongly opposed the creation of a High Commissioner for Human Rights post only months before the General

51. Id. art. 1, para. 3.
52. Id. art. 1, paras. 3, 4; see also id. art. 55, para. c. (“[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms . . . .”).
53. Id. art. 2, para. 2. At the same time, the U.N. Charter does not “authorize the [U.N.] to intervene in matters which are essentially within the domestic jurisdiction of any State.” Id. art. 2, para. 7.
54. See DONNELLY, supra note 30, at 9–10 (recognizing that the U.N. is composed of sovereign states who represent themselves, not individuals).
55. The Charter establishes that “[t]he expenses of the [U.N.] shall be borne by the [member states] as apportioned by the General Assembly.” U.N. CHARTER art. 17, para. 2. A member state whose financial obligations to the U.N. are in arrears in an amount equal to its last two years’ obligations may not vote in the General Assembly, unless the General Assembly “is satisfied that the failure to pay is due to conditions beyond [the member state’s] control.” Id. art. 19.
56. STEINER & ALSTON, supra note 8, at 599.
Assembly voted to create the position. As these situations illustrate, the actions of the U.N. are often circumscribed by political considerations, most notably the political interests of its member states.

However, the U.N. is not a mere puppet of its member states. By the terms of its Charter, the U.N. possesses significant autonomy to carry out its purposes. The U.N. as a whole is to "enjoy in the territory of each of its [member states the] legal capacity . . . [and the] privileges and immunities . . . necessary for the . . . fulfillment of its purposes." The U.N. Secretary-General and his staff are prohibited from seeking or receiving "instructions from any government or from any other authority external to the" U.N. and from engaging in "any action which might reflect on their position as international officials responsible only to the" U.N. Furthermore, according to the Charter, the U.N. can expect its members to "give . . . every assistance in any action [the U.N.] takes in accordance with the . . . Charter." Member states specifically "pledge . . . to take joint and separate action in co-operation with the [U.N.] to achieve "universal respect for, and observance of, human rights and fundamental freedoms." Although these provisions are not fully realized in practice, they evidence that the U.N. has room to pursue its own interests. To the extent the U.N.'s interests diverge from both those of its member states and of individuals, its interests are trifurcated.

C. Non-Governmental Organizations

Like the U.N. and states, NGOs also represent individuals' interests in the human rights regime. The advent of NGOs is not a recent phenomenon, but their number, range, and influence have

57. Id.

58. U.N. CHARTER arts. 104–05.

59. Id. art. 100, para. 1. Correspondingly, member states commit "to respect the exclusively international character of the responsibilities of the Secretary-General and [his] staff and not to seek to influence them in the discharge of their responsibilities." Id. art. 100, para. 2. These prohibitions obviously did not prevent past Secretaries-General from avoiding human rights initiatives that might be controversial with member states, as noted above. However, they do provide the Secretary-General some autonomy to pursue U.N. goals.

60. Id. art. 2, para. 5.

61. Id. arts. 55–56.

62. The desire to prevent the U.N. from pursuing its own interests may lead individuals to limit the delegation of authority to the U.N. See supra note 39.

63. For a discussion of various definitions of NGOs, see Olz, supra note 30, at 313–21.
greatly expanded in recent years. The dramatic increase in human rights NGOs appears to have been motivated largely by a desire to provide a voice for the interests of individuals in the human rights regime. That is, the creation of increasing numbers of human rights NGOs arguably has occurred to combat agency costs imposed by the human rights system.

Human rights NGOs clearly advance individuals’ interests in the system. NGOs mold international norms, agitate for new international conventions, and participate in international meetings regarding human rights. NGOs play extensive and even institutionalized roles in the work of some U.N. bodies.

For example, the U.N. Charter authorizes “[t]he Economic and Social Council [("ECOSOC") to] . . . make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” ECOSOC has formalized principles that guide whether an NGO obtains consultative status and at which of three levels—general, special, or rostered. Depending on their level of consultative status, NGOs may participate in defining ECOSOC’s agenda, attend public ECOSOC meetings, and be involved in other U.N. activities.

64. Debora Spar & James Dail, Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations, 3 Chi. J. Int’l L. 171, 171–72 (2002) (documenting the dramatic increase in the number and influence of NGOs); Posner & Whittome, supra note 45, at 269–70, 287 (noting the proliferation of NGOs in recent years); Nowrot, supra note 10, at 581–86 (summarizing the history of NGOs).

65. NGOs are also widely perceived as advancing the interests of individuals. Wapner, Introductory Essay, supra note 26, at 156.


67. See BAYEFSKY, supra note 9, at 44; Nowrot, supra note 10, at 625–26; Klaus Hübner, Non-Governmental Organizations, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 927, 928–34 (Rüdiger Wolfrum & Christiane Philipp eds., 1995) (providing a history of NGOs’ relations with the U.N.).

68. U.N. CHARTER art. 71.


70. Id. ¶ 28, 62.

71. Id. ¶ 29.
and submit written and oral statements to the Council.\textsuperscript{72} NGOs with consultative status have similar rights with regard to the Council’s subsidiary organs.\textsuperscript{73} In addition, all consulting NGOs may counsel the U.N. Secretariat on matters of mutual interest. Moreover, the Secretary-General may provide consulting NGOs certain services, such as “\textit{[a]rrangement of informal discussions on matters of special interest to groups or organizations,}” “\textit{[u]se of the [U.N.] libraries,}” “\textit{[p]rovision of accommodation for conferences or smaller meetings of consultative organizations on the work of}” ECOSOC, and “\textit{[a]ppropriate seating arrangements and facilities for obtaining documents during public meetings of the General Assembly dealing with matters in the economic, social and related fields.}”\textsuperscript{74} However, in no case are NGOs accorded “the same rights of participation as are accorded to States not members of the Council.”\textsuperscript{75} Nor are ECOSOC’s arrangements with NGOs to “be such as to overburden the Council or transform it from a body for coordination of policy and action . . . into a general forum for discussion.”\textsuperscript{76} Nonetheless, the interaction with NGOs is designed not only to provide expert resources to ECOSOC, but also “to enable international, regional, subregional and national organizations that represent important elements of public opinion to express their views.”\textsuperscript{77} These arrangements thus open a door through which individual interests may find manifestation in the deliberations and actions of U.N. bodies.\textsuperscript{78}

\textsuperscript{72} Id. ¶¶ 30–32.
\textsuperscript{73} Id. ¶¶ 33–40, 61(d)–(e).
\textsuperscript{74} Id. ¶ 67(f).
\textsuperscript{75} Id. ¶ 18.
\textsuperscript{76} Id. ¶ 19.
\textsuperscript{77} Id. ¶ 20. Thus, organizations that receive consultative status should be limited to those whose activities in [relevant] fields . . . qualify them to make a significant contribution to the work of the Council and should . . . as far as possible reflect in a balanced way the major viewpoints or interests in these fields in all areas and regions of the world.
\textsuperscript{78} See Olz, supra note 30, at 328 (recognizing that because “NGOs represent particular constituencies, their involvement [with inter-governmental organizations] can . . . be seen as . . . ‘democratizing’ inter-governmental processes by expressing the otherwise unheard needs and concerns of the populations of the member States”); Wapner, \textit{Defending...}
NGOs play a similarly significant role in influencing state behavior and creating international custom. NGOs mobilize public pressure and directly contact government and international officials concerning problems. NGOs make a monumental difference by monitoring and publicizing the human rights practices of states. Indeed, it has been said that the U.N. human rights program would collapse without the information provided by NGOs. NGOs are able to "submit information to various thematic rapporteurs and treaty-monitoring bodies." NGOs also file complaints for victims of human rights abuses or "provide legal assistance and expertise to individual claimants" within international or domestic adjudicatory systems. In addition, NGOs engage in campaigns to educate principals regarding their rights.

The list of NGO activities that promote individuals’ interests could be expanded. Human rights NGOs have become truly prominent players in advancing individual interests within the U.N. human rights system. However, while NGOs have arisen to increase

Accountability, supra note 26, at 197 (NGOs attempt “to bring the aspirations of ordinary people to the international agenda”); Council of Europe Resolution (93) 38 on Relations between the Council of Europe and International Non-Governmental Organisations, Oct. 18, 1993, pmbl., available at http://cm.coe.int/ta/res/1993/93X38.htm (assuming that NGOs represent the interests of individual citizens).


80. Id. at 594–95. Indeed, the International Religious Freedom Act of 1998 requires diplomatic personnel of the United States to, “as appropriate, seek out and maintain contacts with religious and human rights nongovernmental organizations, with the consent of those organizations, including receiving reports and updates from such organizations and, when appropriate, investigating such reports.” International Religious Freedom Act, 22 U.S.C. § 6412(c)(2) (1999).

81. Nowrot, supra note 10, at 580, 596–97; Posner & Whittome, supra note 45, at 275–76; Olz, supra note 30, at 329; Hüfner, supra note 67, at 933. In addition, human rights NGOs publicize the work of international organizations. See E.S.C. Res. 1996/31, supra note 45, ¶ 3 (requiring consulting NGOs to “undertake to support the work of the United Nations and to promote knowledge of its principles and activities, in accordance with [their] own aims and purposes and the nature and scope of [their] competence and activities”); see also Council of Europe Res. (93) 38, supra note 78, arts. 5(b)–(c), 7 (requiring NGOs in consultative status to “undertake to . . . give maximum publicity to the initiatives or achievements of the Council of Europe in their own field(s) of competence” and to report on their efforts to do so).

82. Posner & Whittome, supra note 45, at 275; see also BAYEFSKY, supra note 9, at 42–43 (describing the dependence of U.N. treaty bodies on NGO information).

83. Posner & Whittome, supra note 45, at 287 n.66; see also BAYEFSKY, supra note 9, at 42–44; Gunn, supra note 44, at 149 n.44 (noting that “NGOs are invited to comment on the human rights practices of the participating states” in the annual review and implementation meetings of the Organization for Security and Cooperation in Europe).

84. Olz, supra note 30, at 327, 329 n.79.

85. Id. at 329.
the representation of principals’ interests at the international level, NGOs also impose agency costs. Whether an NGO is organized as a membership organization or otherwise, it is typically not financially independent. As a result, NGOs are beholden to their members and/or donors for financial support. This dependency is a double-edged sword. On the one hand, it can provide individuals an avenue for constraining NGOs’ actions. On the other hand, it raises the specter that wealth, rather than the interests of individuals, will control the agendas of NGOs.

Even in light of their financial dependencies, NGOs face little accountability to individuals. This is due, in part, to the fact that individuals do not track NGOs closely to determine whether NGOs are representing their interests. Any attempt to track NGOs is hampered by the absence of clear measurements for evaluating NGO performance and by the lack of reporting by many NGOs. Nor is there a sense that individuals effectively can alter the direction of NGOs. “Most NGO leaders are appointed rather than elected....” If a principal were dissatisfied with an NGO’s performance, she would likely be unable to effect a significant change in NGO

86. Wapner, Defending Accountability, supra note 26, at 201.

87. See id. at 201–02; Spiro, supra note 11, at 163–64. NGOs may also be beholden to individuals for support with letter-writing campaigns or other efforts. Wapner, Defending Accountability, supra note 26, at 201. Like financial dependency on members, this dependency can render NGOs more responsive to individuals’ interests.

88. See Wapner, Defending Accountability, supra note 26, at 201; Spiro, supra note 11, at 163–64. Because NGOs tend to focus on limited issues, individuals may be able to monitor NGOs’ actions more easily than they can the actions of governmental representatives who act on a wider variety of issues. Spiro, supra note 11, at 165. Similarly, because individuals do not have to wait until an election, as they do with governments, to withdraw their support, individuals can readily employ termination of support as a mode of constraint. Wapner, Defending Accountability, supra note 26, at 201. However, individuals’ withdrawal of support is likely to be less coordinated than an election, reducing its potential impact. Moreover, for withdrawal to serve as an effective constraint, individuals must monitor NGOs sufficiently to know when there is cause to withdraw support. As noted in the text, individual monitoring is relatively sparse, perhaps in part because an individual’s “material commitment [to an NGO] may not exceed nominal annual dues.” Spiro, supra note 11, at 163.

89. Wapner, Introductory Essay, supra note 26, at 157–58 (noting the relative lack of mechanisms for holding NGOs accountable).

90. See Spiro, supra note 11, at 163 (“The vast majority of... individual members [in membership NGOs], safe to say, are passive...[and] are unlikely to monitor complete organizational agendas...”).

91. Spar & Dail, supra note 64, at 173–78.

92. Id. at 173 (“NGOs have not yet developed customary mechanisms for reporting on their activities.”).

93. Wapner, Introductory Essay, supra note 26, at 157. Even in membership organizations, the leadership generally is “not formally elected or directly answerable to individual members.” Spiro, supra note 11, at 163.
governance or operation.

While NGOs who wish to obtain consultative status with the ECOSOC must satisfy certain requirements that might make them more transparent and responsive to individuals' interests, additional requirements imposed on NGOs often render NGOs beholden to the U.N. rather than to individuals. For example, ECOSOC requires that "[t]he aims and purposes of" consulting NGOs conform to "the spirit, purposes and principles of the Charter of the United Nations" and that these NGOs "undertake to support the work of the United Nations and to promote knowledge of its principles and activities, in accordance with [the NGOs'] own aims and purposes and scope of [their] competence and activities." NGOs with general or special consultative status must submit a report every four years regarding "the support [the organization has] given to the work of the United Nations." Similarly,

organizations to be accorded special consultative status because of their interest in the field of human rights [are to] pursue the goals of promotion and protection of human rights in accordance with the spirit of the Charter of the United Nations, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action.

An NGO's consultative status may be suspended or withdrawn if the NGO "clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the United Nations including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with those purposes and principles."

Although these requirements will be beneficial in almost all instances, at the margin, they might pressure NGOs to mirror rather than scrutinize the policies and preferences of the U.N., some of which might be inconsistent with those of the NGOs' members or of individuals at large. More likely, just as NGOs might short-change

95. Id. ¶¶ 2–3; see also Olz, supra note 30, at 329.
96. E.S.C. Res. 1996/31, supra note 45, ¶ 61(c).
97. Id. ¶ 25.
98. Id. ¶ 57(a). Suspension or withdrawal may also result if, in a three year period, "an organization [does] not make any positive or effective contribution to the work of the United Nations and, in particular, of [ECOSOC] or its commissions or other subsidiary organs." Id. ¶ 57(c).
99. See Wapner, Defending Accountability, supra note 26, at 203 (asserting that "NGOs
individual interests to curry favor with the U.N., NGOs might find themselves intertwined with or solicitous of states, particularly if an NGO is attempting to cultivate influence with states or assumes capacity building functions traditionally performed by states, such as training judges.\(^{100}\)

NGOs may also find that in an effort to appear even-handed they focus on problems in countries like the United States that may be less severe than problems in other countries. That is, NGOs may be more preoccupied with their own credibility or publicity than with the most pressing concerns of the individuals whom they intend to serve. This is not to suggest that countries engaged in widespread compliance should be immune from scrutiny or that such scrutiny might not advance human rights norms. But NGO resources might be spent on such countries to the neglect of more serious problems in an attempt to advance NGO interests. Similarly, NGOs may be driven by the need for immediate and visible gains where a more long-term strategy might better advance the principals’ interests. In short, while NGOs do much to advance individual interests within the human rights system, they also impose often-overlooked agency costs as a result of conflicting interests.

\section*{D. Information Asymmetries}

Just as each of the three agents in the human rights system has interests that conflict in varying degrees with the interests of individuals, so each agent has greater access to information regarding human rights than do individuals. In and of itself, the existence of information asymmetries does not prejudice individuals. In fact, the ability of individuals to rely on agents to obtain information may create valuable efficiencies. As noted above, NGOs’ efforts to obtain and publicize information have done much to advance human rights protection without much effort on the part of individuals. But information asymmetries open a door for agents to pursue interests that conflict with their principals’ preferences without detection. It is in this context that information asymmetries become prejudicial. Thus, it is necessary to be aware of information asymmetries and the

\footnotesize{organize and certainly present themselves in particular ways to meet [ECOSOC’s] ... criteria of evaluation\(^{100}\).

100. See Spar & Dail, supra note 64, at 180; Wapner, Introductory Essay, supra note 26, at 159; Wapner, Defending Accountability, supra note 26, at 203 (noting that NGOs that wish to influence states by becoming “insiders or at least partners in policy formation ... must act in certain ways that win states’ approval”).}
risk they pose.

Information asymmetries are prominent in the human rights context. Most individuals lack detailed knowledge of the various rights guaranteed under international human rights instruments, let alone of the workings of NGOs or of the U.N.¹⁰¹ Moreover, states, the U.N., and NGOs generally possess greater resources to spend on monitoring human rights events than do isolated individuals. In fact, human rights NGOs may have greater resources to spend monitoring human rights than some of the governments that they observe. NGOs, the U.N., and states also have greater access to other countries to gather information. International NGOs may have employees, volunteers, and affiliates in multiple states. States maintain diplomatic offices and intelligence services that gather information about local conditions. Various U.N. bodies can request information from governments, conduct on-site visits, and monitor complaints about country practices.¹⁰²

Similarly, each of these agents has greater access to U.N. fora where human rights issues are discussed and decided. The fact that some of the U.N. procedures for addressing human rights concerns are confidential renders the asymmetry even greater and sharpens the threat to individuals' interests. To illustrate, consider the Human Rights Commission's handling of a complaint of human rights abuses by Saudi Arabia. Under ECOSOC Resolution 1503, the Commission is authorized to consider certain "situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights."¹⁰³ Aside from the names of countries who are, or are no longer, under consideration, the Commission's deliberations regarding such situations are to remain confidential, unless the Commission decides to make recommendations to ECOSOC. However, information is often leaked, as occurred in this case.¹⁰⁴

¹⁰¹. Awareness of international human rights guarantees and mechanisms is undoubtedly increasing. A colleague of mine shared with me a humorous anecdote in this vein. Using the Internet, his eleven-year-old son tracked down a copy of the Convention on the Rights of the Child to persuade his mother that he had the right to forego a certain activity. He was disappointed to learn that the U.S. was not a signatory to the Convention and that he could not find a number to the U.N. in the local phone book.


¹⁰⁴. Id. ¶ 8; STEINER & ALSTON, supra note 8, at 616. Consistent disclosure of information may reduce, but will not eliminate, the asymmetry created by confidential proceedings to the extent disclosure occurs after the fact and leaves questions about the authenticity of the information disclosed.
The complaint against the Saudi government alleged systematic political detention, indefinite incommunicado detention without charge, torture, and execution without due process. Saudi Arabia responded to the complaint in a 17-page report in which it challenged but did not supplement the statistics in the complaint and characterized the complaint “as exaggerated, extreme, groundless, inaccurate, selective, ambiguous, and distorted.” In a hearing that lasted approximately one hour, the Commission heard Saudi Arabia “affirm [its] faith in human rights and its confidence in the UN’s human rights mechanisms,” “indicate that [it] was considering contributing more money to a UN Trust Fund for the Victims of Torture,” and assert “that it had respected international standards and had sought to improve the functioning of its judicial system.”

Several governments then welcomed Saudi Arabia’s cooperativeness and recommended dismissal of the complaint, while a small number of governments posed questions arising from Saudi Arabia’s report. The Saudi government noted the questions posed and the Commission discontinued the case.

The confidentiality of the procedure, though ultimately breached in this case, assisted states, acting through the U.N., in countenancing human rights violations by Saudi Arabia in derogation of the interests of individuals. As the situation with Saudi Arabia illustrates, information asymmetries allow agents to act contrary to principals’ interests with less threat of detection and therefore with greater impunity.

IV. THE BENEFITS OF AN AGENCY PERSPECTIVE

As the above discussion illustrates, applying an agency perspective to the human rights system supported by the U.N. facilitates the identification of problems that diminish the regime’s responsiveness to individual interests. In particular, an agency perspective points us toward conflicts of interest and problematic information asymmetries that might otherwise go undetected. An agency perspective also leads to two additional advances.

105. STEINER & ALSTON, supra note 8, at 616–17.
106. Id. at 617.
107. Id.
108. Id.
A. Shifting the Paradigm

First, an agency approach suggests that the human rights system ought to be conceptualized through a different paradigm in which the individual is the central focus of the system, and states, intergovernmental organizations, and NGOs are expected to be responsive to individuals' interests. While this perspective might seem uncontroversial on some level, it represents a significant departure from the current default view. The default view too often conceives of states as the heart of the system, responsive to the norms of the broader international community. The international community lacks broad compulsory means for imposing its norms, leaving states with significant room to pursue their own interests. Likewise, intergovernmental organizations and NGOs, while perceived as more friendly to individuals, are not always viewed as responsible to the individual. Nor are their conflicts of interest always recognized. Changing perspective may both change expectations regarding the roles of these institutions and raise those expectations. Changing perspective may also empower individuals by educating them to monitor and influence the actions of agents within the system. Thus, mere recognition of the individual as the principal within the human rights system would represent a significant advance for human rights.

B. Reducing Agency Costs

Second, agency theory focuses attention on the reduction of agency costs, suggesting ways in which the human rights system might be improved. The costs imposed by each of the three main agency relationships are amenable to reduction. Identifying possible ways of reducing these costs has important implications for how the human rights system ought to be molded. This Article highlights these possibilities in broad strokes, illustrating the types of proposals an agency perspective might yield without detailing every such possibility. In so doing, this Article attempts to persuade scholars, policy makers, and activists of the value of an agency perspective in formulating future improvements.

1. Bonding

An agent's pursuit of interests that conflict with its principal's
may be constrained through “bonding,” or the adoption of detailed rules, rather than broad standards governing the agent’s conduct.109 Bonding is not new in international human rights. For example, an important part of the work of the Human Rights Committee involves interpreting the provisions of the ICCPR.110 Similarly, the increase in human rights treaties since World War II has produced significant bonding. In the human rights context, bonding reduces the ability of states to minimize or hide human rights violations under self-serving formulations of vague rights. Conversely, bonding makes it easier for principals and other stakeholders to identify, publicize, and condemn states’ human rights violations. Further, to the extent that human rights are concretely defined, national court systems might be used to enforce human rights, increasing authoritative adjudication of rights while reducing the risk of thereby destroying uniform international definition of rights. Given the prospects of bonding for reducing agency costs, human rights advocates and institutions might continue to flesh out rights, such as the right to adequate housing, to facilitate monitoring and promotion of international human rights.111

2. Heightened Participation by Principals

Both conflicts of interest and the risks of information asymmetries may be constrained through heightened participation by principals in the human rights system. Individual participation might be increased in a number of ways. First, individuals might be afforded enhanced opportunities to bring complaints for human rights violations.112 Currently, for example, individuals may submit complaints alleging various human rights violations by states to the


110. See STEINER & ALSTON, supra note 8, at 731–37 (describing the Committee’s practice of promulgating General Comments, and collecting General Comments that illustrate the Committee’s efforts to detail the meanings of various ICCPR provisions).

111. ICESCR, supra note 23, art. 11, para. 1.

112. See, e.g., Gibney, supra note 9, at 55–56 (proposing the creation of an International Civil Court to hear individual claims against individual and state violators of human rights). States are not the only actors who need to be held accountable for violating individuals’ interests, as is evidenced by Charlotte Raab, Sexual Abuse of Child Refugees Increasing, UN Says, AGENCE FRANCE-PRESSE, May 9, 2002, available at http://www.reliefweb.int/w/rwb. nsf/s/159AB51035531A3849256BB50098817 (acknowledging evidence “of sexual exploitation of refugee children by staff of local and international non-governmental organizations, including UN agencies”). The issue of accountability for international organizations receives book-length treatment in KARL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2002).
U.N., but the effectiveness of doing so is fairly limited, in part because of resource constraints and administrative inefficiencies that could be minimized. Improved and increased adjudication of individual complaints, at both national and international levels, provides an obvious way to hold agents accountable for elevating their own interests above those of their principals. Active and streamlined adjudicative processes can also deter agents from pursuing conflicting interests.

Second, individuals might be allowed greater participation in the creation of human rights instruments. Individuals have some oversight of the creation of these instruments to the extent that ratification requires the approval of their representatives. However, the oversight provided by ratification is extremely limited. Ratification is itself accomplished through agents. These agents cannot alter the proposed instrument and may be unable to ratify something less than the entire instrument. Ratification thus cannot substitute for involvement in the original negotiations.

Opening the negotiation process to formal participation by individuals would hopelessly clog drafting efforts. It might also skew, rather than increase, the responsiveness of the drafting system as outliers (with respect to both preferences and resources) might be the only ones to participate. The participation of individuals might be more effectively achieved if individuals did not participate in the process in person, but were allowed to comment on proposed human rights instruments, as occurs in the administrative rule-making process in the United States. While opening the drafting process to individual notice and comment might also seem overwhelming, the dynamic has been manageable in the United States and presumably could be handled on an international level as well. Comments could be reviewed by working groups and reasons for their adoption or rejection explicitly recorded. Requiring explicit consideration and

113. See, e.g., Steiner & Alston, supra note 8, at 740–41; Bayefsky, supra note 9, at 25–27, 29–30, 105–13 (2001) (discussing the workload and processes of various U.N. bodies that receive individual communications, proposed ways to increase effective handling of communications, and progress made in the handling of communications); Anne Bayefsky, Ending Bias in the Human Rights System, N.Y. TIMES, May 22, 2002, at A27 (noting that few of the more than 100,000 annual letters to the U.N. regarding human rights violations actually reach one of the committees that might be able to hear the complaint due to such things "as a lack of clear guidelines about directing mail to the proper desk" and "the insufficient number of staff lawyers who could help transform complaints into viable legal cases").

114. See Howse, supra note 27, at 6.

115. See id. at 8. The treaty creating the ICC, for example, permits no reservations. Rome Statute, supra note 4, art. 120.
disposition of comments would increase the ability of individuals to monitor their agents' judgments, a benefit that would attach even if the comment process were open to and dominated by NGOs. Even if notice and comment were not implemented, negotiators might, at a minimum, be required to keep the public more informed of the course of negotiations in order to provide individuals greater opportunity to promote their interests through their governments during developmental stages.116

Alternatively, states might allow their citizens directly to elect their representatives to treaty formation conventions. Such representatives would then feel accountable to citizens rather than states.117 Moreover, states would then face greater pressure to adopt the instruments created by these representatives or at least to openly weigh individuals' interests in the instruments against other interests such as preserving sovereignty.

Of course, many states do not elect government officials. As a result, the system would not be perfect. However, the number of democratic states is high. Freedom House estimates that at the end of 2002, 121 of the 192 states in the world qualified as electoral democracies.118 Among these states, constitutional or other changes might be necessary to create the representative's office. Thus, the possibility of such a system is admittedly remote. However, if it were to succeed, it would have obvious benefits.

In addition to those mentioned above, the election of human rights representatives in democratic states might fuel the desire and conviction of citizens in non-democratic states to press for increased political rights. At a minimum, the election of human rights representatives in some countries would create a highly public reminder of the need for international pressure to motivate non-democratic states to respect the political rights of their own citizens. Such publicity could have a significant impact.

116. See Howse, supra note 27, at 10–11.

117. Where representatives to conventions are appointed by elected officials, there is arguably a degree of accountability to individuals. However, even in these situations, representatives are likely to feel greater accountability to their governments.

3. Publicity

Indeed, publicity is one of the most effective ways to improve human rights compliance, in part because it minimizes information asymmetries. As noted, states, the U.N., and NGOs possess far greater information and access to information than do individuals. The advance and spread of communications technology undoubtedly will continue to increase individuals' access to human rights information. Individuals' access to information regarding U.N. activities and the human rights practices of states has likewise been improved in dramatic ways by the efforts of NGOs. The media has also been fairly active in reporting on states' human rights practices. By contrast, the media's coverage of human rights activities at the U.N. has been less pervasive. Widespread adoption of the view advanced in this Article—that states, the U.N., and NGOs are agents of individuals—might inspire greater media scrutiny of the U.N.'s human rights activities as well as greater oversight of NGOs.

At present, additional scrutiny of the U.N. and of the states that the U.N. evaluates would be hindered by the confidentiality of certain U.N. procedures for addressing human rights abuses, such as the Commission on Human Rights' section 1503 procedure, discussed above. While a guarantee of confidentiality may have been necessary to attract state participation in the early days of the U.N. and thus arguably benefited individuals, extensive confidentiality now appears anachronistic and, on balance, detrimental. International pressure to respect human rights or, at a minimum, to submit to some scrutiny of human rights practices, is likely sufficient to keep some states from boycotting U.N. human rights procedures in the absence of complete confidentiality. As a result, the practice of confidentiality should be minimized.

To the extent that states and the U.N. have a legitimate interest in the confidentiality of certain information or proceedings, a more limited release of information might be crafted. Preferably, such a release of information would occur automatically. At a minimum,

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120. See BAYEFSKY, supra note 9, at 96 (noting that the U.N. human rights "treaty bodies have a poor record of drawing media attention to significant results of their deliberations," though placing the blame and the responsibility for improvement with U.N. bodies).

121. See supra Part III.D; see also BAYEFSKY, supra note 9, at 32–33 (discussing the confidentiality of various Human Rights Committee follow-up procedures and recommending increased transparency).
individuals and organizations should have access to non-protected information through a procedure similar to that created by the United States' Freedom of Information Act. \(^{122}\) Such access would enhance individuals' ability to monitor their agents, whether personally or through watchdogs like the media.

4. Requirements for NGOs

While the above suggestions largely focus on states and the U.N., the agency costs imposed by NGOs, though perhaps slighter, are also containable. NGOs might be rendered more responsive to individual interests through exploitation of certain prerequisites for participation in U.N. conferences and with U.N. committees. \(^{123}\) As noted, ECOSOC already imposes requirements on NGOs who apply for consultative status. For example, ECOSOC requires that an NGO have "a democratically adopted constitution . . . which . . . provide[s] for the determination of policy by a conference, congress or other representative body" and "a representative structure and . . . appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes." \(^{124}\) In addition, an NGO seeking consultative status must reveal to ECOSOC's Committee on Non-Governmental Organizations the amount and sources of voluntary contributions it receives. \(^{125}\) Similarly, an NGO lacking consultative status that seeks to participate in an international conference convened by the U.N. is to include in its application the organization's annual report or equivalent, information regarding relevant programs and activities the NGO carries out, "a list of financial sources and contributions" to the NGO, "[a] list of members of the governing body," a summary of the NGO's membership, and a copy of the organization's by-laws and/or constitution. \(^{126}\)

The information from these NGO applications, however, is not made public. Publication of this information would expand

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123. For the suggestion that more substantive requirements, such as non-discrimination in employment, could be imposed on NGOs as a condition of obtaining consultative status, see Nowrot, supra note 10, at 640. Alternatively, such requirements could be imposed by regional organizations or by an umbrella NGO. \(\text{Id.}\)


125. \(\text{Id.}\) ¶ 13.

126. \(\text{Id.}\) ¶ 44.
individuals' ability to monitor and evaluate NGOs. Broader enforcement of ECOSOC's requirements for democratic accountability would also increase the opportunity for principals to influence NGOs.

Moreover, NGOs might be required to publish reports to the general public regarding their activities and positions at the U.N. and elsewhere. While certain formal presentations and written submissions from NGOs are included in U.N. records, public reporting by NGOs would facilitate efforts to track NGO activities by individual NGOs and could disclose informal actions not included in U.N. records.

Finally, while it has been suggested that NGOs should be provided with an international legal status, rather than simply remain subject to the laws of their state of incorporation, agency theory suggests that international legal status might render NGOs more independent but less responsive to individual interests. While state-based legal status exposes NGOs to the threat of undue influence from self-interested governments, that same status provides a means for citizens to influence how NGOs are organized, leaving open the possibility that individuals might regulate NGOs to be more responsive to individuals' interests. Similarly, while it has been suggested that NGOs be permitted to participate formally in U.N. decision making, an agency perspective suggests that such a change would render NGOs less responsive to individuals, as NGOs' authority would then derive from their institutional status rather than their representation of individuals' human rights interests.

V. CONCLUSION

As this Article illustrates, the international human rights system is productively viewed as a network of agency relationships.

127. See Spar & Dail, supra note 64, at 181 (arguing that NGOs can increase their accountability through public reporting).

128. See Spiro, supra note 11, at 162 (acknowledging that "NGOs now participate in international negotiations in hallways or through state surrogates").

129. Id. at 167; Nowrot, supra note 10, at 580, 600–14.

130. Just as consulting NGOs are subject to regulation by international organizations, "NGOs are subject to the legal order of the State of incorporation, no matter whether they are national, regional, or universal in scope." Olz, supra note 30, at 324.

131. See Spiro, supra note 11, at 162, 166–69. But cf id. at 167 (arguing that major NGOs "would have to answer to their lesser counterparts" in order to enjoy the right "to represent broad non-state interests").
between the individuals whose interests the system is designed to protect and three main agents: states, the U.N., and NGOs. Viewing the system through the lens of agency theory helps identify the costs these relationships impose and suggests ways these costs might be minimized. At the same time, the agency lens focuses attention on the interests of individuals, shifting the state-centered paradigm. An agency approach thus makes a significant conceptual and practical contribution to the advancement of international human rights.