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# Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law

KARSTEN NOWROT\*

## INTRODUCTION

On December 20, 1996, former Secretary-General of the United Nations, Boutros Boutros-Ghali, issued a report "Agenda for Democratization," in which he observed that international relations "are increasingly shaped not only by the States themselves but also by an expanding array of non-State actors on the 'international' scene."<sup>1</sup> Furthermore, the State parties to the recent Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction of September 18, 1997, recognize in the preamble the efforts "undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other nongovernmental organizations around the world."<sup>2</sup> In addition, in the recent statement of May 20, 1998, by the President of the Security Council of the United Nations concerning the situation in Sierra Leone, the Security Council expressly recognized "the important role played by . . . nongovernmental organizations" in the internationally monitored peace process in that country.<sup>3</sup>

These few and randomly chosen examples highlight a significant aspect of the contemporary international system: the growing influence of non-governmental organizations (NGOs) in the international realm. NGOs such as Greenpeace and Amnesty International are increasingly participating in the international decisionmaking process by advocating new international policy agendas and agitating for changes in existing international legal regimes.

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1. Boutros Boutros-Ghali, *An Agenda for Democratization*, 51st Sess., at 973, U.N. Doc. A/51/761 (1996).

2. See preamble to the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, Sept. 18, 1997 (visited Jan. 25, 1999) <[http://www.un.org/Depts/Landmine/UNDocs/ban\\_trty.htm](http://www.un.org/Depts/Landmine/UNDocs/ban_trty.htm)>.

3. U.N. SCOR, 3882nd mtg., at 1-2, U.N. Doc. S/PRST/1998/13 (1998).

They are also active in the enforcement of international law by monitoring State compliance with international legal rules and through their incorporation in international regimes, as in the areas of environmental protection, international human rights, and humanitarian law. These developments are increasingly viewed as a growing challenge to the role of the nation-state in international relations, first to their position as the primary actor in the international system,<sup>4</sup> and second, to the notion of statehood itself.<sup>5</sup>

This Article analyzes the legal consequences of the changing international system for the legal status of NGOs under international law. Although it has been advocated that their lack of legal status under international law allows NGOs to define their role unconstrained by law and to develop more creative and effective approaches,<sup>6</sup> this Article argues that there is a need to establish an international legal status for NGOs. On one side, the participatory rights of NGOs must be strengthened in order to secure their position in the international decisionmaking process. On the other side, taking into account the already existing influence of NGOs in the international system, the question arises whether there is a need for a global legal framework in order to set limits on the influence of powerful interest groups like Greenpeace,<sup>7</sup> and to provide some accountability for these organizations for the consequences of their actions.<sup>8</sup>

Part I provides a short overview of the history and evolution of NGOs as actors in the international realm. Part II evaluates the reasons for the growing participation of NGOs in the contemporary international system. Next, turning to an analysis of the increasing international influence of NGOs, Part III describes the different functions of these non-State actors in the international decisionmaking process, their monitoring of State compliance with international law, and their role in the creation of independent legal

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4. See, e.g., Jost Delbrück, *The Role of the United Nations in Dealing With Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277, 294-95 (1997); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in the International Decision-Making Institutions*, 18 WASH. Q. 45, 46 (1995).

5. See generally Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997) [hereinafter Hobe]; STEPHAN HOBE, DER OFFENE VERFASSUNGSSTAAT ZWISCHEN SOUVERANITÄT UND INTERDEPENDENZ 330 (1998).

6. See A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHL.-KENT L. REV. 61, 64 (1992).

7. See Delbrück, *supra* note 4, at 295; Karl Zemanek, *The Legal Foundations of the International System*, 266 RECUEIL DES COURS 9, 42 (1997).

8. See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 962-67 (1996).

orders, such as in the area of international sports law. Furthermore, Part III discusses possible advantages and problems resulting from the growing participation of NGOs, as well as their legitimacy to contribute to global governance.

Part IV, examines whether the character of the international system requires the legal integration of NGOs into international law. After outlining the controversy over the character of the international system, it concludes that the international system is a legal community which would be supported by a legal integration of NGOs. In Part V, possible legal constructions for giving NGOs an international legal status are evaluated, among them the question whether NGOs can already be considered subjects of international law. In addition, some strategies and their advantages and problems for the enforcement of international law against NGOs are discussed in Part VI. Finally, Part VII examines the question whether, because of the changes in the contemporary international society, the international system can already be regarded as transforming into a global society through the impact of NGO activities.

#### I. HISTORY AND EVOLUTION OF NGOs AS ACTORS IN INTERNATIONAL RELATIONS

Some authors contend that the history of non-State actors in the international system started after World War II because of increased NGO activities following the creation of the United Nations.<sup>9</sup> Although non-State actors like NGOs are today more numerous and influential than ever before, they cannot in general be regarded as a completely new phenomenon in international relations. The appearance on the international scene of predecessors to contemporary NGOs, as well as to other non-State actors like transnational corporations,<sup>10</sup> can be dated back, depending on the viewpoint, to some decades or even to some centuries ago.

As the earliest examples of international NGOs, one can probably point to the Christian churches and their spiritual and secular orders that formed in

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9. See, e.g., Christopher Tracy, *The Roots of Influence: Nongovernmental Organizations and the Relationship Between Human Rights and the Environment*, 3 J. INT'L L. & PRAC. 21, 29 (1994).

10. See Peter Fischer, *Transnational Enterprises*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 515, 516-17 (Rudolf Bernhardt ed., 1981); Peter Fischer, *Das Transnationale Unternehmen als Phänomen in der Völkerrechtsgeschichte*, in VOLKERRECHT UND RECHTSPHILOSOPHIE-INTERNATIONALE FESTSCHRIFT FÜR STEPHAN VEROSTA 345 (Alfred Verdross et al. eds., 1980).

the 6th century A.D. and represented the only private transnational networks at that time.<sup>11</sup> Two of these entities—the Holy See and the Sovereign Order of Malta—are still today legally recognized actors under international law.<sup>12</sup> These two entities have diplomatic relations with many States, they have participated in many major international conferences with States, and they are parties to some multilateral treaties as well as members of some international organizations.<sup>13</sup>

However, an international system of sovereign States did not exist in medieval times, which were characterized by a system based on strongly hierarchical and parallel religious or secular concepts of subordination and dependence.<sup>14</sup> It therefore remains doubtful whether these entities can be regarded as “nongovernmental” in the modern sense, and for that reason it has been suggested in the legal literature that, for many centuries, the status of at least the Holy See is ambiguous, and it can also be regarded as a State actor.<sup>15</sup>

The first associations which can be seen as the direct predecessors of today’s NGOs appear in the late eighteenth century when private individuals with shared interests created issue-oriented organizations to influence policymaking.<sup>16</sup> Slavery and the slave trade inspired the foundation of early NGOs, like the Pennsylvania Society for Promoting the Abolition of Slavery

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11. Hermann H.-K. Rechenberg, *Non-Governmental Organizations*, in 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 276, 278 (Rudolf Bernhardt ed., 1981). See also YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS 8 (1991); LYMAN CROMWELL WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS 4 (1951).

12. On the Sovereign Order of Malta, see B. de Fischer, *L'Ordre Souverain de Malte*, 163 RECUEIL DES COURS 1 (1979/2); Gerald I. Draper, *Functional Sovereignty and the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Malta*, ANNALES DE L'ORDRE SOUVERAIN MILITAIRE DE MALTE 78 (1974). Concerning the Holy See, see ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 325-29 (9th ed. 1992); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 152-60 (1979); Gaetano Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, 29 REVUE BELGE DE DROIT INT'L 354 (1996/2).

13. See generally JENNINGS & WATTS, *supra* note 12, at 328-29 & n.7. On the international relations of the Holy See, see also JOSEF L. KUNZ, THE CHANGING LAW OF NATIONS 276-84 (1968). See generally 2 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 353-77 (1974).

14. See, e.g., Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT'L L. 447 (1993).

15. See, e.g., Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*, 96 COL. L. REV. 1835 (1996).

16. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 191 (1997); Peter Macalister-Smith, *Non-Governmental Organizations, Humanitarian Action and Human Rights*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 477, 483 (Ulrich Beyerlin et al. eds., 1995).

in 1775 and the British and Foreign Anti-Slavery Society in 1839.<sup>17</sup> These NGOs started to become transnational and connected to each other across borders in their efforts in the middle of the nineteenth century by organizing international conferences like the International Anti-Slavery Conference in London in 1840.<sup>18</sup>

The most notable example of this period for the successful promotion of international legal regimes by NGOs is the activity of the International Committee of the Red Cross. Shocked by the brutality of the Italian wars of unity, especially the battle of Solferino, the Swiss citizen Henry Dunant in 1863 persuaded the Geneva Public Welfare Society to set up a committee to address the humanitarian situation of wounded soldiers.<sup>19</sup> The organization successfully lobbied for an international governmental conference, which took place in 1864 and at which European States adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.<sup>20</sup> From that time on, the International Committee of the Red Cross, a private organization run by Swiss citizens<sup>21</sup> and supported by a network of national Red Cross societies around the world, has played a major role in the development of international humanitarian law.<sup>22</sup> Other initiatives, which were inspired by or led to the creation of NGOs in the nineteenth century, were the peace movement,<sup>23</sup> the promotion of international law,<sup>24</sup> worker

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17. See J.J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES—A STUDY IN AUTONOMOUS ORGANIZATION AND IUS GENTIUM* 112 (1963); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *INT'L ORG.* 479, 495 (1990).

18. Charnovitz, *supra* note 16, at 192; Nadelmann, *supra* note 17, at 495.

19. See Charnovitz, *supra* note 16, at 200.

20. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 *Consol. T.S.* 361. See generally MALCOLM N. SHAW 806-23 (4th ed. 1997).

21. See Anton Schlögel, *IRC—International Red Cross*, in 2 *UNITED NATIONS: LAW, POLICIES AND PRACTICE* 814, 815 (Rüdiger Wolfrum & Christiane Philipp eds., 1995).

22. See, e.g., David P. Forsythe, *International Humanitarian Assistance: The Role of the Red Cross*, 3 *BUFF. J. INT'L L.* 235 (1996).

23. See generally EDSON L. WHITNEY, *THE AMERICAN PEACE SOCIETY: A CENTENNIAL HISTORY* (1928); F.H. HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1967).

24. The most notable example is the Institut de Droit International, founded in 1873. JAMES W. GARNER, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW* 655 (1925). On the founding of other organizations like the American Society of International Law and the Association of International Law in Japan, see, for example, Frederic L. Kirgis, *The Formative Years of the American Society of International Law*, 90 *AM. J. INT'L L.* 559-89 (1996); Shigeru Kuriyama, *Historical Aspects of the Progress of International Law in Japan*, 1 *JAP. ANN. INT'L L.* 1, 4 (1957).

solidarity,<sup>25</sup> and free trade.<sup>26</sup>

The first attempts by NGOs to influence intergovernmental conferences as a means of promoting their goals can also be dated back to the nineteenth century. The example of the First Geneva Conference, proposed and organized by the Red Cross, has already been mentioned. In addition, most of the other major conferences in the nineteenth century, starting with the Congress of Vienna in 1815 until the First Hague Peace Conference in 1899, were attended by numerous nongovernmental organizations.<sup>27</sup> Governments often used the preparatory work of private NGO conferences to formulate multinational conventions, as in the areas of intellectual property protection and international narcotic control.<sup>28</sup>

The Covenant of the League of Nations of 1919 established no formal rules governing the relationship between the League of Nations and NGOs. Rather, it referred in Article 25 only to the national organizations of the Red Cross.<sup>29</sup> In 1921, the League Council made an attempt to give Article 24,<sup>30</sup> which addressed the relationship with other international organizations, a wide interpretation in order to incorporate NGOs in this Article.<sup>31</sup> However, the Council reversed itself two years later and abandoned the idea of applying Article 24 to NGOs because of expressed worries that the appearance of official supervision could inhibit the activity of international NGOs.<sup>32</sup> Although no formal rules existed, there was nevertheless an intensive consultation process between international NGOs and the League of Nations

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25. See Charnovitz, *supra* note 16, at 193-94; DAVID HUNTER MILLER, *INTERNATIONAL RELATIONS OF LABOR* 7 (1921).

26. See Charnovitz, *supra* note 16, at 194.

27. *Id.* at 195-98.

28. *Id.* at 201-03; Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World*, 1 *AM. J. INT'L L.* 565, 576 (1907).

29. "The Members of the League agree to encourage and promote the establishment and co-operation of duly authorized voluntary national Red Cross organizations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world." *LEAGUE OF NATIONS COVENANT* art. 25.

30. "There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League." *Id.* at art. 24, para. 1.

31. 2 *LEAGUE OF NATIONS O.J.* 759 (1921); see also Bertram Pickard, *Article 24 of the League of Nations and its Interpretation*, 7 *INT'L ASS'N* 576 (1955).

32. 4 *LEAGUE OF NATIONS O.J.* 858-59 (1923); Charnovitz, *supra* note 16, at 220; CHIANG PEI-HIENG, *NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS* 37 (1981).

on a variety of activities.<sup>33</sup> The establishment of a High Commissioner for Russian Refugees in 1921 occurred because of an initiative by a consortium of NGOs, including the International Federation of Trade Unions.<sup>34</sup> Furthermore, NGOs could speak in some committees of the League and could propose resolutions and amendments.<sup>35</sup> NGOs were also given the opportunity to consult government representatives at the World Disarmament Conference in Geneva in 1932.<sup>36</sup>

Since the beginning of the 1930s, most NGOs suffered a setback in their activities as a result of the world economic and political crises.<sup>37</sup> NGO activities were further limited by Cold War politics in the first decades following the end of World War II.<sup>38</sup> As one commentator pointed out, “the United Nations took account of the nuisance value of NGOs rather than of their positive nature.”<sup>39</sup> However, NGOs were active during this period under the United Nations framework especially in the promotion of the international protection of human rights.<sup>40</sup> In addition, nuclear weapons offered a new area for NGO activities, as a part of their general, and much older, engagement in the international issue of disarmament.<sup>41</sup>

The involvement of NGOs in the international realm intensified in the 1970s and 1980s, when these entities began to grow in number, size, and diversity.<sup>42</sup> NGOs became to an increasing extent involved in the preparations for international conferences,<sup>43</sup> played a key role in stimulating new international agreements—especially in the area of environmental protection—and were incorporated in the monitoring of existing international

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33. Klaus Hüfner, *Non-Governmental Organizations*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 927, 928 (Rüdiger Wolfrum & Christiane Philipp eds., 1995); Michael M. Gunter, *Toward a Consultative Relationship Between the United Nations and Non-Governmental Organizations?*, 10 VAND. J. TRANSNAT'L L. 557, 560 (1977); see also Charnovitz, *supra* note 16, at 221-37.

34. See I/2 DAHM ET AL., VOLKERRECHT § 107 (2d ed. forthcoming); Macalister-Smith, *supra* note 16, at 484.

35. See Charnovitz, *supra* note 16, at 221-37.

36. Hüfner, *supra* note 33, at 928; Charnovitz, *supra* note 16, at 232; CHIANG, *supra* note 32, at 35.

37. Rechenberg, *supra* note 11, at 278; Hüfner, *supra* note 33, at 929.

38. See Charnovitz, *supra* note 16, at 258.

39. J. J. LADOR-LEDERER, INTERNATIONAL GROUP PROTECTION: AIMS AND METHODS IN HUMAN RIGHTS 396 (1968).

40. See, e.g., Jane Connors, *NGOs and the Human Rights of Women at the United Nations*, in THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM 147-80 (Peter Willetts ed., 1996); Charnovitz, *supra* note 16, at 258-61.

41. Charnovitz, *supra* note 16, at 261.

42. *Id.* at 261-65.

43. See Rainer Lagoni, *Article 71*, in THE CHARTER OF THE UNITED NATIONS 902, 910-11 (Bruno Simma et al. eds., 1994).



regimes. The idea of transnational relations on a nongovernmental level reached a new climax which led to a significant increase in both the number and the influence of NGOs.

This short overview of the history and evolution of NGOs as actors in the international realm demonstrates, on one side, that NGOs are not an entirely new phenomenon. On the other side, it raises the question whether, in the light of their increasing influence in recent years, their international legal status should be examined.

## II. REASONS FOR THE GROWING PARTICIPATION OF NGOs IN INTERNATIONAL RELATIONS

A variety of reasons exist why NGOs, in recent years, have gained more influence in international relations and are more active in global policymaking than ever before.<sup>44</sup> Among the most important ones are the processes of globalization.

Globalization is commonly defined as the “denationalization of clusters of political, economic, and social activities”<sup>45</sup> that undermine the ability of the sovereign State to control activities on its territory,<sup>46</sup> due to the growing need to find solutions for global problems, like the pollution of the environment, on an international level. In connection with these processes, non-State actors, like Greenpeace or Amnesty International, become global “pressure groups” that act on behalf of the public interest.<sup>47</sup>

The processes of globalization, especially the recognition of global problems, have led to more negotiations and decisions on the international

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44. For an analysis of these reasons, see e.g., Charnovitz, *supra* note 16, at 265-68; Kjell Skjelsbaek, *The Growth of International Nongovernmental Organization in the Twentieth Century*, 25 INT'L ORG. 420 (1971).

45. Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 10-11 (1993) (emphasis omitted).

46. David P. Fidler, *The Globalization of Public Health: Emerging Infectious Diseases and International Relations*, 5 IND. J. GLOBAL LEGAL STUD. 11, 14 (1997); see also Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 380 (1996); Jonathan Fried, *Globalization and International Law—Some Thoughts for States and Citizens*, 23 QUEEN'S L.J. 259, 267 (1997).

47. Peter Willetts, *The Impact of Promotional Pressure Groups on Global Politics*, in PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS 179 (Peter Willetts ed., 1982); see also Roberto Socini Leyendecker, *Organisations Non-Gouvernementales et Droit International*, 2 HAGUE Y.B. INT'L L. 169, 174 (1989); DOMINIQUE CARREAU, DROIT INTERNATIONAL 30 (4th ed. 1994).

level that also strongly affect domestic policy and legislation.<sup>48</sup> In fact, many former nationally-oriented NGOs have had to transnationalize in order to keep their status as pressure groups on the international as well as the domestic decisionmaking level.<sup>49</sup>

Another important aspect of the growing integration of the world economy is the denationalization of an increasing number of multinational corporations. These entities view the world, rather than their home States, as the basis for their operations and are able to evade the constraints of national regulatory mechanisms by moving their productions between their different operational bases all over the world.<sup>50</sup> Thus, the global activities of multinational corporations also force private actors like trade unions, consumer groups, and environmental organizations, which have traditionally communicated with business corporations on a national level, to become internationally active in order to retain their influence and restraints on the corporations.<sup>51</sup>

Other reasons for the growing influence of international NGOs can, at least in a broader sense, also be related to the processes of globalization.<sup>52</sup> First, the new developments in telecommunications and information technologies have made global communications among private individuals

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48. Alfred C. Aman, Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?*, 2 IND. J. GLOBAL LEGAL STUD. 429, 440-64 (1995); see also ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 131-56 (1992).

49. For an analysis on the connection between the increasing number of non-State actors in the international system and the processes of globalization, see Delbrück, *supra* note 4, at 278 n.2.

50. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993); Louis W. Pauly & Simon Reich, *National Structures and Multinational Corporate Behavior: Enduring Differences in the Age of Globalization*, 51 INT'L ORG. 1, 2 (1997). For a look on the problems resulting from this phenomenon, see Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L. J. 261, 304-05 (1997); see also Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 144-45 (1996).

51. See Grossman & Bradlow, *supra* note 50, at 8; Peter Malanczuk, *Globalization and the Future Role of the Sovereign States*, in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 45, 57-58 (Friedl Weiss et al. eds., 1998).

52. Although the definition mentioned in the second paragraph of Part III is generally applicable to characterize globalization, many scholars have pointed out that the word "globalization" can have various meanings in different contexts, and can describe a number of different phenomena. See, e.g., Alfred C. Aman, Jr., *An Introduction*, 1 IND. J. GLOBAL LEGAL STUD. 1 (1993); Fidler, *supra* note 46, at 14 n.5; Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1, 4 (1994); Alberto Tita, *Globalization: A New Political and Economic Space Requiring Supranational Governance*, 32 J. WORLD TRADE 47, 49 (1998).

much easier and faster than before. These developments made possible a continuing international dialogue over e-mail networks between scholars and people who share the same interests.<sup>53</sup> New information technologies also enable activists in local human rights NGOs to inform organizations all over the world of developments in their countries in a very short period of time.<sup>54</sup> The impact of this development is further strengthened through the creation of worldwide media companies like CNN International, which provide NGOs with an opportunity to explain their views to a worldwide audience.<sup>55</sup>

As a result of these processes, the world has become in the last decades more integrated, which some people believe has led to a growing "general awareness of the interconnectedness of human beings."<sup>56</sup> This general awareness finds expression, for example, in the increasing attention paid to the protection of the environment, which resulted in the creation of a new and expanding branch of international law.<sup>57</sup> Furthermore, a growing interest can be located not only at the intergovernmental level,<sup>58</sup> but also at the non-State level, in the human rights violations caused by local conflicts such as civil wars within States, which in the traditional view directly affect only the internal peace of sovereign States.

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53. Grossman & Bradlow, *supra* note 50, at 11; see also ROBERT B. REICH, THE WORK OF NATIONS 111 (1991); Peter Pernthaler, *Die Globalisierung als Herausforderung an eine Moderne Staatslehre*, in Festschrift für Friedrich Koja 69, 70 (Heinz Schäffer et al. eds., 1998) (calling the new information technologies "the basis of globalization"). For a discussion on the use of modern information technology by environmental NGOs, like Greenpeace, to enhance the effectiveness of their activities, see Jeffrey L. Dunoff, *From Green to Global: Towards the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241, 295-301 (1995).

54. See Grossman & Bradlow, *supra* note 50, at 11. For a look at the positive impact of the telecommunications revolution, and also possible problems resulting from the use of this technology by NGOs in other areas of increasingly global concern, like international health law, see David P. Fidler, *Mission Impossible? International Law and Infectious Diseases*, 10 TEMP. INT'L & COMP. L.J. 493, 501-02 (1996); David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771, 854-55 (1997).

55. Charnovitz, *supra* note 16, at 265-66.

56. Grossman & Bradlow, *supra* note 50, at 20.

57. For a discussion on the relatively "short history" of the development of international environmental law, see PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 82-135 (1992); ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION 3-30 (1983).

58. For a review of the extensive literature on this issue, see generally Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443 (1997); Lois E. Fielding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, 73 U. DET. MERCY L. REV. 551 (1996); Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519 (1994).

All these developments have led to increasing activity by private actors on the international scene, which finds its most notable reflection in the increasingly important role that NGOs play in the international system generally and international law specifically. Diplomacy and international negotiations, which have even in liberal democracies been traditionally associated with a higher level of confidentiality and secrecy compared to domestic politics,<sup>59</sup> are increasingly confronted with raised expectations about their transparency and the opportunity they provide for public participation through, *inter alia*, international NGOs.<sup>60</sup>

The growing importance of NGOs in current international relations can thus be explained by a number of different factors that have caused an increasing feeling of interdependence among national civil societies and a growing sense of solidarity in the need for pursuing the public interest on the global level.

### III. THE INCREASING INFLUENCE OF NGOs IN THE CONTEMPORARY INTERNATIONAL SYSTEM—ADVANTAGES AND PROBLEMS

Today, NGO activities encompass virtually every area of international concern.<sup>61</sup> Although a large number of influential NGOs are concerned with the protection of the environment, such as Greenpeace, and the observance of international human rights, such as Amnesty International, NGOs are also active in the legal and judicial fields, as evidenced by the work of the Institut de Droit International<sup>62</sup> and the International Commission of Jurists.<sup>63</sup> Furthermore, in the political sector, several institutions are working for the

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59. See, e.g., Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (discussing the different nature of foreign politics in the United States from a legal perspective); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

60. See, e.g., David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1-5 (1996).

61. For a detailed overview, see Rechenberg, *supra* note 11, at 276-78; I/2 DAHM ET AL., *supra* note 34, § 107.

62. See, e.g., Paul de Visscher, *La Contribution de L'Institut de Droit International a la Protection des Droits de L'Homme*, in *LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT—MELANGES MICHEL VIRALLY* 215 (A. Pedone et al. eds., 1991).

63. See Howard Tolley, Jr., *Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting*, 11 HUM. RTS. Q. 561 (1989).

promotion of international peace, such as the Inter-Parliamentary Union<sup>64</sup> and the World Peace Council.<sup>65</sup> For example, other NGOs are working in the fields of labor, religion, education, and the promotion of women's rights.<sup>66</sup>

The activities of NGOs in contemporary international law can be divided into two different kinds of fields: their participation in the international decisionmaking process concerning the codification and progressive development of international law, and their activities in the enforcement of international law and the promotion of the public interest.<sup>67</sup> Aside from these functions, there is also the International Olympic Committee, which has created a legal order independent from State jurisdiction.

The following sections provide an overview of these different kinds of NGO activities in current international law. Based on this analysis, it discusses the need for a legal framework regulating NGO activities under international law as well as the possible advantages of such legal rules for these entities. Furthermore, it evaluates the question of legitimacy in connection with the role of NGOs in global governance.

#### *A. The Participation of NGOs in the International Decisionmaking Process*

From a quantitative, as well as from a qualitative, point of view, the main function of NGOs in the contemporary international system involves their participation in the international decisionmaking process. This process can be defined as the cooperation and diplomacy between the different, mainly governmental, actors on the international level to find solutions for global problems and to develop further and strengthen existing international law. It consists of the development of policy as well as the transformation of

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64. See H.H. Klein & W. Lauff, *Inter-Parliamentary Union*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1016 (R. Bernhardt ed., 1996).

65. Rechenberg, *supra* note 11, at 277.

66. For a recent description of the activities of women's NGOs, see Wendy Schoener, Note, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537, 555-58 (1997); Martha Alter Chen, *Engendering World Conferences: The International Women's Movement and the UN*, in NGOs, THE UN, AND GLOBAL GOVERNANCE 139 (Thomas G. Weiss & Leon Gordenker eds., 1996).

67. For the current debate about public interest norms in international law, see Eibe Riedel, *International Environmental Law—A Law to Serve the Public Interest? An Analysis of the Scope of the Binding Effect of Basic Principles*, in NEW TRENDS IN INTERNATIONAL LAWMAKING—INTERNATIONAL "LEGISLATION" IN THE PUBLIC INTEREST 61, 89-97 (Jost Delbrück ed., 1997) [hereinafter NEW TRENDS IN INTERNATIONAL LAWMAKING]; Bernard H. Oxman, *The International Commons, the International Public Interest and New Modes of International Lawmaking*, in *id.* at 21, 21-60.

international policies into norms of international law.

The following section, describes the various ways NGOs participate in the international decisionmaking process. In addition, it will evaluate the need for a legal framework in the form of an international agreement governing NGO activities in connection with this process.

### *1. The Activities of NGOs in the International Decisionmaking Process*

NGOs are taking part in the international decisionmaking process in many different ways. They are contributing to the progressive development of international law by proposing new international conventions and by participating in the negotiation and drafting of treaties in a variety of areas. In the field of international environmental law, these non-State actors were involved, for example, in the preparation of the Convention on International Trade in Endangered Species, the World Heritage Convention, and the Convention on Biological Diversity.<sup>68</sup> Furthermore, NGOs played an important role in the negotiations that led to the adoption of the Desertification Convention.<sup>69</sup> NGOs have also contributed to the international protection of human rights<sup>70</sup> in connection with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment<sup>71</sup> and the Convention on the Rights of the Child.<sup>72</sup>

NGOs are especially active in the progressive development of international humanitarian law. A recent example of these activities is the

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68. Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 559 (1997); John McCormick, *International Nongovernmental Organizations: Prospects for a Global Environmental Movement*, in ENVIRONMENTAL POLITICS IN THE INTERNATIONAL ARENA 135 (Dinah Sheldon et al. eds., 1993).

69. *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, U.N. Doc. A/AC 241/15/Rev. 7, reprinted in 33 I.L.M. 1328 (1994); see also Kyle W. Danish, Note, *International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention*, 3 IND. J. GLOBAL LEGAL STUD. 133, 162-64 (1995).

70. On the role of NGOs in the drafting of conventions in this field, see generally Andrea Bianchi, *Globalization of Human Rights. The Role of Non-State Actors*, in GLOBAL LAW WITHOUT A STATE 179, 186 (Gunther Teubner ed., 1997); Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, CAL. W. INT'L L. J. 207, 218-20 (1990).

71. Kathryn Sikkink, *Nongovernmental Organizations and Transnational Issue Networks in International Politics*, in 89 ASIL PROCEEDINGS 413, 414 (1995).

72. Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137, 139-47 (1990); Maja Kirilova Eriksson, *The Legal Position of the Unborn Child in International Law*, 36 GERM. Y.B. INT'L L. 86, 96, 116 (1993).

international discourse over the prohibition of anti-personnel mines,<sup>73</sup> a development which was strongly promoted by international NGOs,<sup>74</sup> and which led to the adoption of a new international convention in the area of international humanitarian law.<sup>75</sup> Another example is the recent effort of the Red Cross to ban the production and use of tactical laser weapons under international law.<sup>76</sup> Furthermore, NGOs are actively participating in the progressive development and codification of international law in other areas of growing international concern like the international law of development<sup>77</sup> and international law on bioethics.<sup>78</sup>

In the course of international negotiations, NGOs often correct potential mistakes by pointing out logical or procedural inconsistencies in proposals of new conventions under consideration.<sup>79</sup> By providing factual background information and evaluations, often unknown to government representatives, and introducing new conceptual ideas to the negotiations, the participation of NGOs also diminishes costs to governments while at the same time improving

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73. See Michael J. Mathesona, *The Revision of the Mines Protocol*, 91 AM. J. INT'L L. 158 (1997); Kenneth Anderson & Monica Schurtman, *The United Nations Response to the Crisis of Landmines in the Developing World*, 36 HARV. INT'L L.J. 359 (1995).

74. See, e.g., the resolution on the "Worldwide ban on anti-personnel mines and the need for mine clearance for humanitarian purposes," adopted by the Interparliamentary Union on September 20, 1996, U.N. Doc. A/51/675 (1996); see also Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT'L L.J. 311, 350 (1995).

75. See *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, Sept. 18, 1997, *supra* note 2. As of October 20, 1998, the new convention was signed by 131 states, and ratified by 47 countries <<http://www.icrc.ch/unicc/icrcnews>>. The Convention entered into force on 1 March 1999 in accordance with its Article 17. The efforts of NGOs in the preparation of the convention is expressly acknowledged by the State parties in the preamble of the Convention.

76. Louise Doswald-Beck, *New Protocol on Blinding Laser Weapons*, INT'L REV. OF THE RED CROSS 272 (1996); Burrus M. Carnahan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT'L & COMP. L.J. 705 (1996). See also the recent Protocol IV on Blinding Laser Weapons of Oct. 13, 1995, to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effect, *reprinted in* INT'L REV. OF THE RED CROSS 299 (1996).

77. See, e.g., IVES BEIGBEDER, *LE RÔLE INTERNATIONAL DES ORGANISATIONS NON GOUVERNEMENTALES* 38-46 (1992); Brigitte Jessen, *Von der Fremdsteuerung zur Selbststeuerung-NGOs in der Entwicklungstheorie und-politik*, X DIE FRIEDENSWARTE 141 (1996); Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 CORNELL INT'L L.J. 623 (1992); Peter J. Illig, *The Role of Non-Government Organizations in the Development of Environmental Policy at the Asian Development Bank*, 1 BUFF. J. INT'L L. 47 (1994).

78. See Sonia Le Bris et al., *International Bioethics, Human Genetics, and Normativity*, 33 HOUS. L. REV. 1363, 1371-74 (1997).

79. Raustiala, *supra* note 68, at 559.

the range of available policy alternatives.<sup>80</sup>

In addition, NGOs sometimes even serve as members of official State delegations, especially in environmental treaty negotiations. In the deliberations prior to the Environmental Protocol to the Antarctic Treaty and the United Nations Framework Convention on Climate Change, the London Centre for International Environmental Law was a member of the delegation of the Alliance of Small Island States.<sup>81</sup> This development is also reflected by the appeal of the 1994 Conference on Population and Development in Cairo for governments to include NGOs in their delegations to conferences where issues on population and development are discussed.<sup>82</sup>

NGOs are also playing increasingly important roles in direct negotiations with governments on international issues. In September 1995, five NGOs active in the field of environmental protection entered into negotiations with the government of Mexico concerning the possibility of a new convention on the protection of dolphins during tuna fishing.<sup>83</sup> These negotiations led to a declaration by twelve nations, among them the United States, calling for a binding international agreement on this issue.<sup>84</sup> In addition, the Worldwide Fund for Nature was able to reach an agreement with Finland and a national forestry company on recommencement of logging operations in the Karelian Forest of Russia.<sup>85</sup>

Furthermore, in all the main international conferences in recent years, like the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, the 1994 Conference on Population and Development in Cairo, as well as the 1995 World Women's Conference in Beijing, one can observe

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80. *Id.* at 560. See also Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision-Making*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 191, 269-72 (Myres S. McDougal & W. Michael Reisman eds., 1981).

81. Michael J. Kelly, *Overcoming Obstacles to the Effective Implementation of International Environmental Agreements*, 9 GEO. INT'L ENVTL. L. REV. 447, 487 (1997); Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 693-94 (1993). For other cases of NGO participation in State delegations, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY—COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 260-62 (1995).

82. *Report of the International Conference on Population and Development*, para. 15.12, U. N. Doc. A/CONF.171/13/Rev. 1 (1995); see also Charnovitz, *supra* note 16, at 281.

83. See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 337 (1996).

84. See MARINE MAMMAL COMMISSION, ANNUAL REPORT TO CONGRESS 107 (1996); Charnovitz, *supra* note 83, at 337.

85. Charnovitz, *supra* note 83, at 337.



increasing NGO participation.<sup>86</sup> This fact is especially worth mentioning because these international conferences are increasingly important in the light of new developments in the international lawmaking process.<sup>87</sup> As Jonathan Charney pointed out, major developments in international law today often get their start or substantial support from resolutions and reports that are adopted and discussed in these fora where representatives of States and other interest groups come together to address important international problems of mutual concern.<sup>88</sup> Finally, NGOs are also influencing the international decisionmaking process through their participatory rights, connected with the consultative status that many NGOs hold in a number of international governmental organizations.<sup>89</sup>

However, NGO participation in intergovernmental organizations, official negotiations, conferences, and international treaty regimes reflects only one part of the influence of these non-State actors in the international decisionmaking process. Often the “informal” strategies<sup>90</sup> used by NGOs to promote their goals are even more important and successful. Besides mobilizing public pressure on governments and providing expert support for international lawmaking, NGOs are also starting direct personal appeals to, and are in contact with, responsible decisionmakers in international

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86. See Patricia Waak, *Shaping a Sustainable Planet: The Role of Non-Governmental Organizations*, 6 *COLO. J. INT'L ENVTL. L. & POL'Y* 345 (1995); Catherine Tinker, *The Role of Non-State Actors in International Law-Making During the UN Decade of International Law*, in *ASIL PROCEEDINGS*, *supra* note 71 at 171, 179.

87. See Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT'L L.* 529, 543-50 (1993); Jost Delbrück, *The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order*, in *ALLOCATION OF LAW ENFORCEMENT IN THE INTERNATIONAL SYSTEM* 135, 149-51 (Jost Delbrück ed., 1995); Christian Tomuschat, *The Concluding Documents of World Order Conferences*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY—ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI* 563 (Jerzy Makarczyk ed., 1996). For a related position, see also Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 *TEX. INT'L L.J.* 87, 120 (1991). For an analysis of these developments in the formation of customary international law, see David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 *GERM. Y.B. INT'L L.* 198, 217-18 (1996).

88. Charney, *supra* note 87, at 544; see also Jonathan I. Charney, *International Lawmaking—Article 38 of the ICJ Statute Reconsidered*, in *NEW TRENDS IN INTERNATIONAL LAWMAKING*, *supra* note 67 at 171.

89. The participatory rights of NGOs in international organizations will be discussed in more detail *infra* Part VI.B.2.a.

90. For the differences between the “formal” and “informal” strategies in the work of NGOs, see Schoener, *supra* note 66, at 540.

organizations as well as in national governments.<sup>91</sup> They are thereby indirectly influencing the behavior of States in the international system.

Because NGOs are not yet recognized as active participants in the norm-creating process of customary international law,<sup>92</sup> their activities and statements cannot be regarded as State practice and *opinio juris* in the sense of Article 38(1)(b) of the Statute of the International Court of Justice.<sup>93</sup> However, they are nevertheless influencing, through their participation in the international decisionmaking process and through their informal strategies within States and international organizations, the behavior of States and of international organizations. Therefore NGOs participate at least indirectly in the norm-creating process of customary international law. This development is also reflected by a number of international legal scholars who highlight the growing importance of non-State actors, such as individuals and NGOs, in the norm-creating process of customary international law, especially in the areas of human rights and environmental protection.<sup>94</sup>

## 2. *The Need for an International Legal Framework Governing NGO Activities*

An international legal framework in the form of an international agreement that lists the rights and duties for NGOs would further strengthen their position in international decisionmaking by securing their independence from State governments. By securing participatory rights in international lawmaking fora and institutions and thus providing a legal basis for the important contribution of NGOs to these activities, broader public

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91. For a description of the "informal strategies" of the International Commission of Jurists, see Tolley, *supra* note 63, at 561; see also Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, 48 J. INT'L AFF. 507, 512-25 (1995).

92. See Fidler, *supra* note 87, at 240. For a more detailed discussion of this issue and proposals for future changes, see Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 227-34 (1991).

93. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1(b). On the elements of customary international law, see, for example, *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20); see also *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-9 (4th ed. 1990).

94. See, e.g., Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399 (1995); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 38 (1995); Fidler, *supra* note 87, at 224-48. On the influence of non-State actors in the customary norm creating process in the area of international labor law, see Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT'L L. 291 (1998).

participation is no longer dependent on the "good will" of governments<sup>95</sup> which, especially if they have a long history of oppression on the domestic level, sometimes react with hostility toward this growing democratization of interactions in the international system.<sup>96</sup>

Because NGOs are gaining a more important role and influence in the international decisionmaking process, there is also a growing need for keeping these entities to internationally-recognized legal standards.<sup>97</sup> An international legal framework for NGOs would ensure that only those NGOs that show a positive attitude toward the values of the international legal community participate in the process of international governance. One could, for example, exclude from international fora groups that are corrupt or have a history of advocating, or still advocate, violent activities. Furthermore, internationally-recognized NGOs could be obliged to be committed expressly to international human rights standards and to nonviolent changes in order to participate in international lawmaking procedures.<sup>98</sup>

#### *B. The Role of NGOs in the Enforcement of International Law*

NGOs are not only participating in the international decisionmaking process, but they are also increasingly involved in the monitoring of State compliance with international law. They are active in the implementation of international conventions by holding national governments to their treaty

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95. See David Scott Rubinton, *Toward a Recognition of the Rights of Non-States in International Environmental Law*, 9 PACE ENVTL. L. REV. 475, 494 (1992).

96. See generally Michael H. Posner & Candy Whitome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 272-90 (1994); Laurie S. Wiseberg, *Protecting Human Rights Activists and NGOs: What More Can be Done?*, 13 HUM. RTS. Q. 525 (1991); Laurie S. Wiseberg, *Defending Human Rights Defenders: The Importance of Freedom of Association for Human Rights NGOs*, in ESSAYS ON HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT 23 (International Centre for Human Rights and Democratic Development ed., 1993).

97. For examples of situations where the participation of NGOs had a negative influence, caused by the over-zeal or selfishness of some organizations, see CHAYES & HANDLER CHAYES, *supra* note 81, at 270.

98. See generally Martha L. Schweitz, *NGO Participation in International Governance: The Question of Legitimacy*, 89 PROC. AM. SOC. INT'L L. 415, 417 (1995). A possible exception from the commitment to nonviolent changes could be considered for NGOs advocating for a right of revolution against tyrannical governments. On the international legal implications of this issue, see W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); Oscar Schachter, *Is There a Right to Overthrow an Illegitimate Regime?*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY 423 (A. Pedone ed., 1991); Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. (forthcoming 1999).

obligations under international law.<sup>99</sup> Especially, but not exclusively, in the areas of human rights and environmental protection, NGOs are investigating and publicizing violations of international law by States, thus often forcing governments to comply with internationally-recognized standards.<sup>100</sup>

In addition, NGOs are actively promoting the protection of human rights in areas beyond State control. A telling example is the important role that NGOs play in the battle against child pornography on the Internet.<sup>101</sup> Furthermore, NGOs are playing an active role in the field of conflict prevention and conflict resolution all over the world,<sup>102</sup> as well as in international election observing<sup>103</sup>—activities which have become more and more important in the post-Cold War period.

However, this participation in monitoring State compliance with international law, most of it integrated in international treaty regimes, is only one aspect of NGO activities in this area. Even more important in this connection are the often widely recognized actions undertaken by powerful environmental protection groups like Greenpeace in order to pursue their goals. Such organizations even breach the law to force national governments or transnational corporations to comply with their demands in the enforcement of a self-claimed international mandate for the protection of the

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99. See, e.g., Stuart N. Hart & Laura Thetaz-Bergman, *The Role of Nongovernmental Organizations in Implementing the Convention on the Rights of the Child*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 373, 375 (1996).

100. See David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 *MICH. J. INT'L L.* 497, 559-63 (1998); David Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights*, 12 *TEX. INT'L L.J.* 293 (1977); Maria Garner, *Transnational Alignment of Nongovernmental Organizations for Global Environmental Action*, 23 *VAND. J. TRANSNAT'L L.* 1057, 1072-84 (1991); James Gathii & Celestine Nyamu, *Reflections on United States-Based Human Rights NGOs' Work on Africa*, 9 *HARV. HUM. RTS. J.* 285 (1996).

101. For a detailed description of the role of NGOs in this area, see Jennifer Stewart, *If this Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 *HOUS. J. INT'L L.* 205, 234 (1997).

102. See Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role for Non-Governmental Actors*, 46 *J. INT'L AFF.* 391 (1993); Felice D. Gaser, *Ethnic Conflict and Preventive Diplomacy: New Challenges for International Organizations, Nation-States and Nongovernmental Organizations*, 88 *PROC. AM. SOC. INT'L L.* 146, 151 (1994); Thomas G. Weiss, *The UN's Prevention Pipe-Dream*, 14 *BERKELEY J. INT'L L.* 423, 431 (1996). For a specific example of the work of an international NGO's work in this field, see Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 *AM. U. J. INT'L L. & POL'Y* 49 (1993).

103. See Karen J. Jason, *The Role of Non-Governmental Organizations in International Election Observing*, 24 *N.Y.U. J. INT'L L. & POL'Y* 1795 (1992).

environment.<sup>104</sup> An instructive example in this respect is the Brent Spar episode, where Greenpeace forced Shell to refrain from scuttling an oil rig in the North Sea. Even after analysis from independent experts showed minimal risk for the environment, contrary to the erroneous information with which Greenpeace was working, this organization continued its campaign with great costs for Shell resulting from the launched boycott.<sup>105</sup> Thus, as Peter Spiro pointed out, Greenpeace has, in effect, proposed and “enforced a new norm of international environmental law.”<sup>106</sup> Another example is the campaign against the hunting of Canadian harp seals that resulted in dislocation for indigenous groups in the area, despite the fact that there was no evidence that the species was endangered.<sup>107</sup>

These examples demonstrate on one side, the influence of international NGOs in the enforcement of international law. However, on the other side, it also shows that the power of at least some of these entities might have to be limited by an international legal framework in order to provide for some form of accountability in cases of possible NGO irresponsibility.<sup>108</sup>

### *C. The Independent Legal Order of International Sports Organizations—The Jurisdiction of the IOC*

Another example of the functions of NGOs in the contemporary international system can be located in the area of international sports law. The predominant organization in this area is the International Olympic Committee (IOC), which “is the governing body for the Olympic Games and has final authority on all questions and disputes that arise under the Games.”<sup>109</sup> This transnational legal order in the area of sports established by the IOC also includes an International Court of Arbitration for Sports set up in March 1983

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104. See Hobe, *supra* note 5, at 198.

105. Spiro, *supra* note 8, at 964.

106. *Id.* at 965.

107. See Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 *WORLD POL.* 311, 325 & n.51 (1995).

108. See Delbrück, *supra* note 4, at 295; Spiro, *supra* note 8, at 962; Zemanek, *supra* note 7, at 42.

109. David J. Ettinger, *The Legal Status of the International Olympic Committee*, 1992 *PACE Y.B. INT'L L.* 97, 97; see also OLYMPIC CHARTER Rule 1, § 4 (1984). Because of the IOC's powerful position in international sports law, it has been advocated in the legal literature that this organization is even substantially participating in the creation of customary international law in this area of international concern. See JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 34-35 (1988); Paul Mastrocola, *The Lords of the Rings: The Role of Olympic Site Selection as a Weapon Against Human Rights Abuses: China's Bid for the 2000 Olympics*, 15 *B.C. THIRD WORLD L.J.* 141, 147-48 (1995).

by the IOC.<sup>110</sup>

By State submission to the regulations established by the IOC, an international non-governmental organization,<sup>111</sup> and to the subsequent sanctions for violating these rules,<sup>112</sup> "State practice appears to accept the relative autonomy of the legal order framed and executed by the IOC."<sup>113</sup> As a result of this acceptance of the IOC's supremacy in the international sports order, domestic courts usually refrain from granting legal protection against punitive decisions of organs of the IOC, for example a prohibition from participating in the Olympic Games.<sup>114</sup> However, taking into account the growing professionalization of sports, such punitive acts can amount to a denial of internationally recognized fundamental rights, like the freedom to choose and exercise a profession.<sup>115</sup> In addition, there are questions whether the Court of Arbitration for Sports fails to meet recognized international standards of independence and impartiality,<sup>116</sup> and questions concerning the nomination of members for and the decisionmaking process within the IOC itself.<sup>117</sup>

Thus, there is clearly a need for a strategy ensuring that this powerful and independent organization, as a consequence of its recognized autonomy in the international system, is also obliged to observe fundamental human rights in

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110. See Adam Samuel & Richard Gearhart, *Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport*, 6 J. INT'L ARB., Dec. 1989, at 39; Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347 (1994).

111. Christoph Vedder, *The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law*, 27 GERM. Y.B. INT'L L. 233, 248 (1984); LYMAN CROMWELL WHITE, INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS: THEIR PURPOSES, METHODS, AND ACCOMPLISHMENTS 199 (1968).

112. See, e.g., James A.R. Nafziger, *Nonaggressive Sanctions in the International Sports Arena*, 15 CASE W. RES. J. INT'L L. 329 (1983).

113. Hobe, *supra* note 5, at 197. See also Barbara A. O'Neill, *International Sports: Have States Succeeded Athletes as the Players?*, 6 DICK. J. INT'L L. 403, 424 (1988); Mastrocola, *supra* note 109, at 150.

114. See Jeffrey M. Marks, *Political Abuse of Olympic Sport*, 14 N.Y.U. J. INT'L L. & POL. 155 (1981); Marcia B. Nelson, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT'L L. 895, 907 (1993).

115. Hobe, *supra* note 5, at 197.

116. For some critical remarks on this institution, see Stephen A. Kaufman, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527, 532-37 (1995); Ettinger, *supra* note 109, at 112-13.

117. See Ettinger, *supra* note 109, at 115-20; JOHN LUCAS, THE MODERN OLYMPIC GAMES 136-46 (1980).

its conduct<sup>118</sup> in order to avoid an “extra-legal realm” in the international legal community.

*D. NGOs as Participants in the International System—The Dual Question of Legitimacy*

The concept of legitimacy provides an additional reason to create a legal framework for the international activities of NGOs. The question of legitimacy in international relations and international law, which in recent years has gained increasing importance,<sup>119</sup> can also be regarded as a crucial one for the participation of NGOs in international governance. It has been pointed out frequently that the participation of NGOs in the international decisionmaking process and monitoring the compliance of States with international law serves “to reduce the ‘democratic deficit’ in international law-making and implementation,”<sup>120</sup> and enhance the legitimacy of these processes through broader public participation and the promotion of transparency.<sup>121</sup> However, the question of legitimacy and NGO participation in international governance is not exclusively related to the improvement of transparency in the decisionmaking process of international law and policy. Rather, it can be characterized as a dual issue, which also concerns the internal structure of NGOs themselves.

As NGOs grow in number and become more sophisticated and better connected to each other, they can expect not only more supporters within governments but also more challenges to the legitimacy of their participation

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118. For these reasons, it has been suggested in the international legal literature that the IOC is bound by the body of international human rights law. See NAFZIGER, *supra* note 109, at 81; Mastrocola, *supra* note 109, at 158.

119. See, e.g., Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 706-13 (1988); Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT’L & COMP. L. 117 (1997).

120. LAKSHMAN D. GURUSWAMY & BRENT R. HENDRICKS, *INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL* 411 (1997).

121. See, e.g., Kevin Stairs & Peter Taylor, *Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 110, 134 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (noting that “[l]egitimacy of governmental decisionmaking is enhanced by NGO participation.”); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, *passim* (1994).

in the international decisionmaking process.<sup>122</sup> The question of legitimation can also become a crucial one for the internal organization of NGOs, since the representation and democratic legitimacy of NGOs is not above scrutiny.<sup>123</sup> With only some notable exceptions, such as Amnesty International and the Sierra Club, very few international NGOs are operating on a democratic basis.<sup>124</sup> Most NGO leaders, who are not elected by the members, enjoy broad discretion concerning the policies to be pursued and with what level of vigor.<sup>125</sup>

Another issue in this regard is the usual predominance of Western NGOs, which is especially criticized by developing countries.<sup>126</sup> The claim made by NGOs to enhance public participation in the international decisionmaking process would be thus more credible if the participation of "Third World" NGOs could be promoted. Thus, a legal framework for NGOs could also enhance the legitimacy of these organizations and would, at least to a certain extent, also strengthen the legitimacy of their claims to participate in the process of global governance.

#### IV. THE INTERNATIONAL SOCIETY AS AN "OPEN SYSTEM UNDER THE RULE OF LAW"

A further reason for making NGOs legal subjects of international law, with the consequence that these entities enjoy rights but also bear duties toward the international community, could be based on the character of the international system itself. If the contemporary international system could be regarded as an international legal society, with the purpose of ensuring legal certainty, accountability of its members, and international peace, one could argue that NGOs also should be recognized as subjects under international law because of their increasingly important and influential role in the international legal realm.

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122. Schweitz, *supra* note 98, at 417; *see also* Klaus Hüfner, *Non-Governmental Organizations (NGOs) im System der Vereinten Nationen*, DIE FRIEDENSWARTE 115, 119 (1996).

123. *See* Spiro, *supra* note 4, at 51; Hüfner, *supra* note 122, at 119.

124. Hüfner, *supra* note 122, at 119; Spiro, *supra* note 4, at 51-52.

125. Spiro, *supra* note 8, at 963.

126. *See, e.g.*, CHAYES & HANDLER CHAYES, *supra* note 81, at 270.



*A. Anarchy or Legal Order: The Controversy Over the Character of the International System*

There is general agreement among international legal and international relations scholars that States and other main actors in the international realm presently form an international system, in the sense that the actors have sufficient contact with each other and have sufficient impact on their decisions to act as parts of a whole.<sup>127</sup> However, considerable dispute exists whether this international system can already be regarded as an international society, in which the main actors are “conscious of certain common interests and common values,” and thus form a society by conceiving “themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.”<sup>128</sup> While on the one side, an international society presupposes the existence of interactions between units in an international system. On the other side, an international system can also be merely mechanical and thus does not necessarily lead to the conclusion that the actors also form an international society governed by the rule of law.<sup>129</sup>

The existence of an international legal order, as Hermann Mosler pointed out, is based on the fulfillment of two prerequisites. First, the factual observation of the parallel existence of self-governing sovereign units; and

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127. On the definition of an international system, see Stanley Hoffmann, *International Systems and International Law*, in *THE INTERNATIONAL SYSTEM: THEORETICAL ESSAYS* 205, 207 (Klaus Knorr & Sidney Verba eds., 1961); see also I/1 GEORG DAHM ET AL., *VÖLKERRECHT* 3 (2d ed. 1989).

128. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 13 (1977). From the same author, see Hedley Bull, *The Emergence of a Universal International Society*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 117 (Hedley Bull & Adam Watson eds., 1984); see also Fidler, *supra* note 87, at 214-15. However, there is some disagreement among international legal scholars concerning the meaning of the term “international society”. See Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 *RECUEIL DES COURS* 217, 245 (1994) (using the term “international community” to describe “a ‘higher unity,’ as it were, the representation and prioritization of common interests as against the egoistic interests of individuals. A mere ‘society’ (*Gesellschaft*) on the contrary, does not presuppose more than factual contacts among a number of individuals.”); see also Manfred Lachs, *Quelques Réflexions sur la Communauté Internationale*, in *MÉLANGES MICHEL VIRALLY* 349, 381 (A. Pedone ed., 1991); MARCEL M.T.A. BRUS, *THIRD PARTY DISPUTE SETTLEMENT IN AN INTERDEPENDENT WORLD: DEVELOPING A THEORETICAL FRAMEWORK* 128-53 (1995). An even stronger criticism against the notion of “international society” as defined above has been given by Philip Allott, who regards it as a misconceived conception being undemocratic and unsocialized, and thus insufficient to create a valuable legal system. See PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 244-57 (1990); Philip Allott, *The True Function of Law in the International Community*, 5 *IND. J. GLOBAL LEGAL STUD.* 391, 411 (1998).

129. See BULL, *supra* note 128, at 13-14; see also David P. Fidler, *Competition Law and International Relations*, 41 *INT’L & COMP. L.Q.* 563, 583 (1992).

second, the creation by, and awareness of, these units of legal rules which substitute for the nonexistent common superior authority.<sup>130</sup>

The factual criterion is related to the existence of an international system, as described above, and can be regarded as being fulfilled with the “birth” of the modern interstate system, commonly connected with the Peace Treaty of Westphalia in 1648.<sup>131</sup> However, the second criterion requires a more extensive analysis of contemporary international relations.

It is beyond the scope and purpose of this Article to engage in a comprehensive discussion about the legal nature of international law and the international system.<sup>132</sup> However, in the following sections, the main positions will be at least briefly described and critically analyzed in order to determine whether the character of the international system requires a legal integration of influential non-State actors like NGOs.

### *1. The Realist Perspective: Struggle for Power in an Anarchical International System*

The school of thought most critical of the concept of an international society is commonly called “realism.” This approach became the dominant mode for understanding international relations following the end of World War II,<sup>133</sup> although the roots of its classical form can be traced back as far as

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130. Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 1, 19 (1974).

131. See, e.g., V/1 DAHM ET AL., *supra* note 127, at 5; Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS 32, 43 (Richard A. Falk & Cyril E. Black eds., 1969); Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L.J. 463, 466 (1996). It has been pointed out by many scholars that this decisive date has to be regarded in historical terms as being an oversimplification, see e.g., Schreuer, *supra* note 14, at 447. Although this is probably correct, it is neither uncommon in the historical science to connect certain historical developments with specific dates, nor does it deprive this approach of a certain value in describing changes in the international system. As an example one might name the end of World War I, which is commonly viewed as the end of the Eurocentric international system, despite the fact that on the one side non-European powers like the United States, Japan and the Ottoman Empire played already before that date a major role in world politics, and that on the other side, European powers like the United Kingdom and France kept an extensive colonial empire for a considerable time after 1918.

132. For a comprehensive study on this fundamental issue, see, e.g., HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933); Mosler, *supra* note 130.

133. See Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 110 (1998); Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 721-22 (1995).

the Greek philosopher and historian Thucydides.<sup>134</sup>

Despite the fact that the realist writers differ in their approaches to a considerable extent, one can find certain core assumptions that are characteristic of the realist understanding of the nature of the international system.<sup>135</sup> Realists see the international system as a competitive environment in which States, as being the only relevant actors in the international realm, struggle with each other for survival.<sup>136</sup> In this anarchical international system, with its inherent insecurity, States “think and act in terms of interest defined as power”<sup>137</sup> to maximize their relative power over other States<sup>138</sup> to maintain their position in the international system.<sup>139</sup>

It follows from this characterization of the international system that realist thinkers have generally denied any real independent force to societal bonds between States in general and international law in particular.<sup>140</sup> Realists see not an international society governed by the rule of law, but, as Reinhold Niebuhr wrote, “an uneasy balance of power would seem to become the highest goal to which society could aspire.”<sup>141</sup> However, in the eyes of realists, even such a status is unlikely to be achieved. Rather, in light of the continuing and growing emphasis on cultural diversity in the world following the end of the Cold War, many realists see the political world as moving away from a community and getting closer to global anarchy, which will inevitably lead to a “clash of civilizations,” as famously postulated by Samuel

134. Thucydides' work “The History of the Peloponnesian War,” written in the 4th century B.C., is commonly understood as being the first “realist” work in world history. See, e.g., David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 72 n.150 (1994).

135. See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973).

136. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207 (1993); FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 47 (1998).

137. MORGENTHAU, *supra* note 135, at 5.

138. See, e.g., John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, 11 (1994-1995).

139. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 126 (1979).

140. See THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 290 (W. Robert Connor ed. & Richard Crawley trans., 1993) (stating that the Athenians say, in the Melian Dialogue, that right “is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”); GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 95 (1984); Robert H. Bork, *The Limits of “International Law”*, NAT'L INTEREST 3, 10 (1989); see also Arend, *supra* note 133, at 114-15.

141. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* 232 (1932); see also Fidler, *supra* note 134, at 72.

Huntington.<sup>142</sup> Thus realism regards international law as nothing more than an ineffective moral code due to a lack of enforcement authority in the international realm,<sup>143</sup> which merely reflects and serves the interests of the powerful and thus dominant States in the international system.<sup>144</sup>

a) *The Phenomenon of NGOs and the Realist Perspective*

The realist theory focuses on the struggle of States for power in the international system and views cooperation between States in intergovernmental organizations as only another form of power politics, with no or at least only marginal impact on the behavior of the international actors.<sup>145</sup> Since this approach is exclusively, or at least primarily, concerned with the interactions of States in the international realm, the phenomenon of the rise of influential non-State actors like multinational corporations and NGOs is generally ignored in the writings of realist international relations scholars.

However, from the realists' general conception of the international system, one can draw two alternative conclusions about their view on non-State actors. First, since the realists regard States as being the sole important actor in the international realm, they will probably downplay the role and influence of non-State actors by referring to the importance of military power for determining the influence of an actor in the international system,<sup>146</sup> an area in which States still, and for some time to come, will possess a monopoly, basically unchallenged by non-State actors.<sup>147</sup> Second, even if realists acknowledge the growing importance and influence of non-State actors like NGOs, this fact would not lead them to the conclusion that NGOs should be

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142. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF. Summer 1993, at 22, 22.

143. See, e.g., Jean-Jacques Rousseau, *The State of War*, in ROUSSEAU ON INTERNATIONAL RELATIONS 33, 44 (Stanley Hoffmann & David P. Fidler eds., 1991) (stating that "As for what is commonly called international law, because its laws lack any sanction, they are unquestionably mere illusions . . .").

144. ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS 35 (1981).

145. See Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 488 (1988); Susan Strange, *Caveat Hic Dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES 337, 345 (Stephen D. Krasner ed., 1983). On the realist's position concerning international organizations, see David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17 MICH. J. INT'L L. 411, 418-23 (1996).

146. On the importance of military capacity and its influence on the international system in the realist's approach, see Mearsheimer, *supra* note 138, at 10.

147. A possible challenge in this area could emerge from international terrorism and organized crime. See, e.g., Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 14-15 (1997).

incorporated into an international legal system by making them subjects of international law. Because of their disregard for international legal norms as an effective factor in influencing the behavior of States, realists would deny that an international legal status for NGOs would have a significant impact on the position and behavior of States in the international system. Rather, realists would merely view influential non-State actors like NGOs as a new category of actors in international relations, that, besides States, pursue their interests by participating in the power struggle inherent in an international system in which the basic paradigms and patterns of behavior, leaving aside the growth of international actors, remain the same. However, such an acknowledgment of the importance of NGOs by realists is unlikely to happen because it would lead to a fundamental shift in the realist paradigm and its entire framework for understanding international relations.

*b) The Deficits in the Realist Perspective*

By stressing the decentralized nature of the international system and the role of States as being the primary actors in the international realm, realism reflects assumptions that are also consistent with the writings of most international legal scholars.<sup>148</sup> However, by offering “nothing but a naked struggle for power which makes any kind of international society impossible,”<sup>149</sup> realism as a theory of international relations is open to criticism because of its failure to appreciate the contemporary international system with all its diverse characteristics.

First, realism overlooks the fact that the decentralized nature of the international system does not necessarily lead to insecurity of its actors and a resulting struggle for power. Depending on the social consensus,<sup>150</sup> States can also respond to the anarchical conditions in the international system

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148. See Arend, *supra* note 133, at 116 (asserting that also most international legal scholars base their description of the international system on these assumptions). See, e.g., I/I DAHM ET AL., *supra* note 127, at 11; HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 325-27 (Anders Wedberg trans., 1945); SHAW, *supra* note 20, at 5.

149. EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 93 (2d ed. 1946); see also NIEBUHR, *supra* note 141, at 231; Fidler, *supra* note 134, at 74.

150. The necessity of a social consensus among the actors in the international system as a precondition for the formation of, and particularly the respect for, legal rules has been stressed by many scholars. See, e.g., Simma, *supra* note 128, at 245; see generally Alexander Wendt, *Constructing International Politics*, 20 *INT'L SECURITY* 71, 77-78 (1995).

through the creation of legal rules, thus providing a framework for their interactions and the resolution of conflicts.<sup>151</sup>

Second, realism assumes that States are acting in the international realm with predetermined identities and interests.<sup>152</sup> This approach does not take into account that States can also change their interests and “can become *different in nature* through their participation in the international . . . system.”<sup>153</sup> As Anthony Clark Arend points out, “realists ask only if states find it in their interest to follow legal rules and fail to consider the further question of whether legal rules can change these interests by changing the very identity of states.”<sup>154</sup>

Thus, realism as a theory of international relations is too narrow in its scope to provide an approach capable of describing the nature of the international system and answering the question of the possible existence of an international legal society. This is also evidenced by new developments within the realist tradition, which emphasize the significance of international regimes and institutions on the behavior of States in the international system.<sup>155</sup> This so-called “regime theory” argues that international institutions can promote cooperation between States in the international realm, thereby moving away from the traditional realist assumptions of power struggle as the predominant characteristic of international relations.

## 2. *The International System as a Legal Community*

However, even if the realist model, because of its narrow focus on the power struggle between States with predetermined interests, is insufficient as an approach to analyze the contemporary international system, it still remains to be seen whether the the international system can indeed be characterized as a legal community, or whether this term remains essentially “a tool of political

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151. See Arend, *supra* note 133, at 116-17.

152. See, e.g., Ronald L. Jepperson et al., *Norms, Identity, and Culture in National Security*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 33, 43 (Peter J. Katzenstein ed., 1996); Arend, *supra* note 133, at 117.

153. Arend, *supra* note 133, at 117; see also Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *INT'L ORG.* 391, 405-07 (1992).

154. Arend, *supra* note 133, at 117.

155. See, e.g., Robert O. Keohane, *International Institutions: Two Approaches*, 32 *INT'L STUD. Q.* 379 (1988); ROBERT O. KEOHANE, *Neoliberal Institutionalism: A Perspective on World Politics*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER* 1, 4 (1989); see also William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 *AM. U. J. INT'L L. & POL'Y* 227, 236-40 (1997).

rhetoric.”<sup>156</sup>

Turning first to the school of natural law, one can observe that it has always been a favorite idea of this school of thought to assume the existence of an international community comprising all States, with certain preexisting rights and duties for its members.<sup>157</sup> Early writers like Francisco de Vitoria,<sup>158</sup> Francisco Suárez,<sup>159</sup> and Christian Wolff<sup>160</sup> attempted to relate the existence of an international society to the laws of nature. However, the idea of an international society rooted in the the laws of nature, whose correctness was more contended than proven,<sup>161</sup> was deeply influenced by religious beliefs of the Christian tradition in a harmonious order that exists independently of any human effort. The natural law approach is thus insufficient to describe the contemporary international system which is characterized by cultural as well as religious diversity and dominated by critical rationalism.<sup>162</sup>

Therefore, if one accepts that the international system is “a man-made construction”<sup>163</sup> with its character determined by the behavior of its main actors, one can agree with Louis Henkin that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>164</sup> Furthermore, it is notable that most of the content

156. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 232 (1993 IV); see also Helmut Freudenschuß, *Article 39 of the UN Charter Revisited: Threats to the Peace in the Recent Practice of the UN Security Council*, 46 AUS. J. PUB. INT’L L. 1, 2 (1993) (calling the term “international society” a “mythical beast”).

157. See Tomuschat, *supra* note 156, at 232.

158. On Vitoria’s concept of a world community, see Martin C. Ortega, *Vitoria and the Universalist Conception of International Relations*, in CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 99 (Ian Clark & Iver B. Neumann eds., 1996); see also JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 9-11 (1954).

159. See James L. Brierly, *Suárez’s Vision of a World Community*, in THE BASIS OF OBLIGATIONS IN INTERNATIONAL LAW 358 (Hersch Lauterpacht ed., 1958).

160. CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* § 7 (1764) (cited in Tomuschat, *supra* note 156, at 233 & nn. 74-75).

161. See CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 89 (P.E. Corbett trans., rev. ed. 1968).

162. Tomuschat, *supra* note 156, at 234; see also JAMES L. BRIERLY, *THE LAW OF NATIONS* 44-45 (Sir Humphrey Waldock ed., 6th ed. 1963).

163. Tomuschat, *supra* note 156, at 234; see also BRIERLY, *supra* note 162, at 45 (stating that “[w]e have begun to realize that a world society will not come into existence without conscious human effort.”); DE VISSCHER, *supra* note 161, at 100 (pointing out that “[t]he ultimate explanation of society as of law is found beyond society, in individual consciences”).

164. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted); see also THOMAS BURGENTHAL & HAROLD G. MAIER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 9 (2d ed. 1990); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 6 (1950). The existence of this phenomenon is also conceded by some critics of international law, see MORGENTHAU, *supra* note 135, at 249 (stating that “to deny that international law exists as a system of binding legal rules flies in the face of

of communications between States is based on legal terminology when they seek to resolve international issues and disputes.<sup>165</sup> Only very rarely do States justify their actions based on political or moral factors, whereas they frequently make recourse to international legal principles. Although the fact that States engage in an international legal discourse does not serve as the ultimate proof for the existence of an international legal society,<sup>166</sup> it can at least be seen as an indication that the main actors in the international system regard legal rules as a legitimizing source on which their actions may be based.

Furthermore, the mere fact that governments employ experts to provide advice on matters of international law shows that States consider "that the legal aspects must be carefully taken into account in the process of decisionmaking."<sup>167</sup> States that do not comply with the recognized legal rules of the international system open themselves up to often costly retaliatory measures by other governments.<sup>168</sup> Although a State may be from time to time prepared to violate these rules in order to achieve a given political goal, the fact that governments take international law into account can be regarded as a clear indication that legal rules have a significant role in the interactions between the units in the international system and are thus, at least to a certain and often varying degree, effective.<sup>169</sup> Thus, the practices of States support the assumption that legal rules are a part of what makes up the international system.<sup>170</sup> In addition, as Thomas Buergenthal pointed out, it has to be taken into account that "even the strongest states have long-term and short-term political and economic interests in an international order in which conflicts are resolved in accordance with generally accepted rules, in a manner that is

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all the evidence").

165. See Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1301 (1984); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 110 (1991).

166. See D'Amato, *supra* note 165, at 1303. For the so-called "words versus action" problem in connection with the creation of customary international law, see Fidler, *supra* note 87, at 202-03.

167. See Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law*, 255 RECUEIL DES COURS 9, 35 (1995); JENNINGS & WATTS, *supra* note 12, at 13; BUERGENTHAL & MAIER, *supra* note 164, at 9.

168. BUERGENTHAL & MAIER, *supra* note 164, at 12. This indication for the existence and at least decentralized enforcement of legal rules in the international system corresponds to D'Amato's "reciprocal entitlements" argument. See D'Amato, *supra* note 165, at 1303-13; SHAW, *supra* note 20, at 7.

169. See Brownlie, *supra* note 167, at 35.

170. Arend, *supra* note 133, at 130.



reasonably predictable, and that reduces the likelihood of resort to force.”<sup>171</sup>

By providing criteria for membership in the international system, and determining when other legal rules will be binding,<sup>172</sup> international law confers legitimacy on the actors and gives normative value to their actions and claims.<sup>173</sup> International law thus provides the rules for the identification of the actors as well as for the interactions between the actors in the international realm and is thus constitutive for the structure of the international system itself.<sup>174</sup>

However, the international system is not only a legal order in the sense that the actors and their behavior are determined by international law. To an increasing extent, international law also reflects common values shared by the members of the international system and provides for rules to pursue common interests of the international community as a whole.<sup>175</sup> This is evidenced by the fact that States have built and are still in the process of building a superstructure above and between them, consisting of international organizations and multilateral treaty systems, which is increasingly replacing the former system of merely bilateral contacts between the governments.<sup>176</sup> Furthermore, one can observe in the contemporary international system a functional expansion of international legal rules.<sup>177</sup> This is evidenced by both a substantive extension of international law<sup>178</sup> to areas like the protection of human rights, international concern for the environment and a broadening in scope of the concept of “international peace and security” to include internal

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171. BUERGENTHAL & MAIER, *supra* note 164, at 12-13; *see also* M. Somarajah, *Power and Justice in International Law*, 1 SING. J. INT'L & COMP. L. 28, 68 (1997). On this argumentation, *see* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2634 (1997).

172. *See generally* Anthony C. Arend, *Towards an Understanding of International Legal Rules*, in INTERNATIONAL RULES 298-310 (Robert J. Beck et al. eds., 1996).

173. Arend, *supra* note 133, at 143-46.

174. *See* Stephen A. Kocs, *Explaining the Strategic Behavior of States: International Law as System Structure*, 38 INT'L STUD. Q. 535, 538 (1994); INGRID DETTER, *THE INTERNATIONAL LEGAL ORDER* 30 (1994).

175. *See* JENNINGS & WATTS, *supra* note 12, at 11-16; John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 442-56 (1997).

176. Clive Parry, *The Function of Law in the International Community*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 1, 7 (Max Sorensen ed., 1968); Simma, *supra* note 128, at 229-55.

177. *See* Parry, *supra* note 176, at 43-47.

178. *See, e.g.*, SHAW, *supra* note 20, at 36-41; Perkins, *supra* note 175, at 434.

conflicts and threats to democratic governments.<sup>179</sup> The functional expansion can also be seen in the change of the character and enforcement of international legal norms. Through the concept of peremptory *jus cogens* norms<sup>180</sup> and the enforcement of a number of legal rules *erga omnes*,<sup>181</sup> international law has developed a hierarchy of norms which expresses the superiority of certain values that are regarded by the international community as being fundamental.<sup>182</sup>

In international relations theory, this normative vision of the international system as a society sharing common values has been advocated by the liberal tradition, which focuses on the liberty of the individual, democracy, and importance of economic interdependence in the international realm, rather than State power.<sup>183</sup> Liberal international relations theory also recognizes the importance of non-State actors like NGOs and individuals to international governance,<sup>184</sup> thus providing in fact a more realistic view of the contemporary

179. This is most notably shown by the broadening of the concept of threat to international peace and security under Article 39 of the Charter through Security Council actions. See, e.g., Final Declaration of the Meeting of the Heads of State of the Members of the Security Council, Jan. 31, 1992, U.N. Doc. S/PV.3046, at 143 (1992); see also Delbrück, *supra* note 58, at 887-96; Peter H. Kooijmans, *The Enlargement of the Concept "Threat to the Peace"*, in PEACE-KEEPING AND PEACE-BUILDING: THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 111 (Rene-Jean Dupuy ed., 1992).

180. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331; see generally LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW (1988); Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 RECUEIL DES COURS 272 (1981). For a critical view on the concept of *jus cogens*, see Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995).

181. Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5); see also Antti Korkeakivi, *Consequences of "Higher" International Law: Evaluating Crimes of State and Erga Omnes*, 2 J. INT'L LEGAL STUD. 81 (1996); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997).

182. See Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 364 (1994); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 432 (1983) (observing that the doctrines of *jus cogens* and *erga omnes* are "inspired by highly respectable ethical considerations."). This development is furthermore evidenced by Article 103 of the UN Charter, which declares, at least for the member States, the superior nature of their obligations under the Charter, see also JENNINGS & WATTS, *supra* note 12, at 12.

183. See Fidler, *supra* note 87, at 236-37; Gerry J. Simpson, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 15 AUSTL. Y.B. INT'L L. 103, 112-28 (1994); Brian F. Fitzgerald, *An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws*, 16 AUSTL. Y.B. INT'L L. 311 (1995).

184. See Fidler, *supra* note 87, at 241; Kenneth W. Abbott, "Economic" Issues and Political Participation: *The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 998-1010 (1996); Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423, 439-40 (1998); David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND.

international system than the realists.

Although it has to be emphasized that the extent of common values shared by the international community is heavily influenced and restricted by the cultural, religious, and political diversity<sup>185</sup> characteristics of the international system after its transformation from a Eurocentric to a universal system,<sup>186</sup> members of the contemporary international system share a sufficient number of common values to be regarded as constituting an international society.<sup>187</sup>

The character of international law, as closely related to international politics,<sup>188</sup> is necessarily determined by the nature of the decentralized international system in which it operates.<sup>189</sup> This effectively weakens the expectations for compliance.<sup>190</sup> However, despite this fact, the analysis shows that the international system can be characterized as being governed by international legal rules, in the sense of the inherent significance of law as the regulator of political action.<sup>191</sup>

J. GLOBAL LEGAL STUD. 521, 536 (1998).

185. See generally No-hyoung Park, *The Third World as an International Legal System*, 7 B.C. THIRD WORLD L.J. 37 (1987) (arguing that the Third World should be characterized as a single international system); Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305 (1987). One example of how this diversity in the international system affects the understanding of common values is the recent discussion about the relativity of human rights. See, e.g., Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997); Stephen J. Toope, *Cultural Diversity and Human Rights*, 42 MCGILL L.J. 169 (1997).

186. On this development and its effects on the international system, see Mosler, *supra* note 130, at 26; I/I DAHM ET AL., *supra* note 127, at 9.

187. See Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8-9 (1956); I/I DAHM ET AL., *supra* note 127, at 20-21; Tomuschat, *supra* note 156, at 236.

188. I/I DAHM ET AL., *supra* note 127, at 1; SHAW, *supra* note 20, at 10.

189. See BRIERLY, *supra* note 162, at 41; Max Huber, *Die Soziologischen Grundlagen des Völkerrechts*, 4 JAHRBUCH DES ÖFFENTLICHEN RECHTS 56 (1910).

190. BUERGENTHAL & MAIER, *supra* note 164, at 12.

191. Mosler, *supra* note 130, at 32. See also Sir Geoffrey Howe, *The Role of International Law in World Affairs*, 33 INT'L & COMP. L. Q. 739 (1984); Grigory I. Tunkin, *Remarks on the Primacy of International Law in Politics*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT—MÉLANGES MICHEL VIRALLY 455 (A. Pedone et al. eds., 1991). However, it has been pointed out by many international legal scholars that the full establishment of the international rule of law is a continuing process. See Sir Arthur Watts, *The International Rule of Law*, 36 GERM. Y.B. INT'L L. 15, 44 (1993).

*B. The Concept of an "Open International System." Promoting International Society Through the Legal Integration of NGOs into International Law*

Since the international society can be characterized as a community governed by the rule of law, it is the purpose of this society to pursue international stability and avoid disputes<sup>192</sup> and the arbitrary exercise of power.<sup>193</sup> In order to promote these goals, the international legal order needs to set the relations between all the main actors in the international system on a legal basis in order to promote the "civilization" of international relations,<sup>194</sup> since a failure to bring the major international actors under the rule of law imposes unnecessary risks on the inherently fragile international legal system.<sup>195</sup> As Hermann Mosler pointed out, "the legal range of membership must be determined according to the object and purpose of the society in question."<sup>196</sup>

The international society has, thus, to function as an "open system,"<sup>197</sup> which possesses the flexibility necessary to conform to a dynamic development of the international system by incorporating new, powerful non-State entities by making them subjects of international law<sup>198</sup> and providing for a legal framework for their activities. The conception of an international system as being capable of incorporating all the main actors on a legal basis can be traced back to Immanuel Kant, who recognized that in order for a global civil society to be the ultimate stage in the development of the international system, it has to be a society under law to provide for the legal

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192. See Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 81 (1997).

193. See Jost Delbrück, *Peace Through Emerging International Law*, in DIE KONSTITUTION DES FRIEDENS ALS RECHTSORDNUNG 275, 281-90 (Klaus Dicke et al. eds., 1996); Watts, *supra* note 191, at 25, 32; Mosler, *supra* note 130, at 31.

194. I/2 DAHM ET AL., *supra* note 34, § 108.

195. See Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, DUKE L.J. 748, 754 (1983).

196. Mosler, *supra* note 130, at 48. See also Grossman & Bradlow, *supra* note 50, at 22.

197. See I/1 DAHM ET AL., *supra* note 127, at 30 (emphasizing the "open character" of the contemporary international legal order). For a similar concept on the domestic level favoring an "Open Republic", see Jost Delbrück, *Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State*, 2 IND. J. GLOBAL LEGAL STUD. 45, 57-64 (1994) (stating a similar concept on the domestic level favoring an "Open Republic").

198. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11) ("Throughout its history, the development of international law has been influenced by the requirements of international life...").

constitutionalization of freedom.<sup>199</sup> As Jonathan Charney emphasizes, “the continued viability of the international system depends upon the close conformity of public international law to international realities.”<sup>200</sup>

This characterization of the international system as being open to new actors to ensure the observance of the rule of law in international relations shows the need for incorporating NGOs as new influential participants in international relations.<sup>201</sup> Given the increasingly important role NGOs play in international relations, it has become necessary to give NGOs international legal status, thus binding them to international law to support the purposes of the international legal order: legal certainty, accountability of the actors, and international peace. Thus, the character of the contemporary international system as an international society and the purposes of the international legal order support the search for a legal construction to make NGOs subjects of international law.

## V. THE LEGAL CONSTRUCTION

There are two possible legal constructions for binding NGOs under international law that complement one another. First, NGOs can be regarded as at least partial subjects of international law with not only rights but also duties under the international legal system. A second possibility is the creation of a “Code of Conduct” for NGOs in the form of an international agreement.

In the following section, I discuss and evaluate both of these possible legal constructions for limitations on the activities of NGOs under international law. However, before the legal constructions can be evaluated, I first give an

199. See IMMANUEL KANT, *ETERNAL PEACE* 81-86 (Edwin D. Mead ed., 1914) (stating Kant’s explanation to his Second Definitive Article); see also Jost Delbrück, “Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein”—Kant und die Entwicklung internationaler Organisationen, in *REPUBLIK UND WELTBÜRGERRECHT* 181, 201 (Klaus Dicke et al. eds., 1998); Mortimer Sellers, *Republican Principles in International Law*, 11 *CONN. J. INT’L L.* 403, 425-32 (1996); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 *COLUM. L. REV.* 53, 70-102 (1992).

200. Charney, *supra* note 195, at 769; see also Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 *COLUM. L. REV.* 1146, 1155 (1962) (attributing the evolution of international law to the responsiveness of such law to changing international conditions).

201. These arguments also apply and have been brought forward in connection with the growing importance of multinational corporations in the international system. See, e.g., I/2 DAHM ET AL., *supra* note 34, § 108; Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 *HARV. L. REV.* 739 (1970); Seymour J. Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic’s Analysis*, 3 *LAW & POL’Y INT’L BUS.* 1 (1971). However, a detailed analysis of the issue is beyond the scope of this Article.

overview of the discussion concerning a definition of what constitutes an international NGO—a task that is necessary to determine the scope of possible rights and duties of these entities under international law.<sup>202</sup>

*A. The Controversy Over a Generally Accepted Definition: What Constitutes an International NGO?*

Because of the wide range of actual and possible NGO activities in international relations, there is no generally accepted definition for these entities.<sup>203</sup> However, from the working definitions in international agreements, most prominently in the authoritative interpretation of Article 71 of the Charter of the United Nations (UNC) provided through resolutions of the Economic and Social Council (ECOSOC),<sup>204</sup> and the numerous definitions offered in the scholarly literature, some common features exist in the discussion of the elements necessary for constituting an international NGO.

It is generally recognized that NGOs are characterized negatively by the fact that they are not established by States through a governmental agreement under international law.<sup>205</sup> Rather, they are formed on the initiative of private, natural, or juridical persons based on a contract governed by domestic civil law.<sup>206</sup> This element distinguishes NGOs from universal or regional international organizations like the United Nations or the Council of Europe, which States create through international treaties.<sup>207</sup> However, at least in the practice of the United Nations, private entities that include members designated by governmental authorities are regarded as NGOs, as long as this governmental participation does not result in dominating political or financial

202. On the necessity of a definition of NGOs in order to interpret the scope of their possible rights under international law, see Danish, *supra* note 69, at 165.

203. See Hüfner, *supra* note 33, at 927, 933; Waldemar Hummer, *Internationale und transnationale Akteure an oder unter der Schwelle der Völkerrechtssubjektivität*, in 1 ÖSTERREICHISCHES HANDBUCH DES VÖLKERRECHTS 218, 225 (Hanspeter Neuhold et al. eds., 3rd ed. 1997).

204. See E.S.C. Res. 31, U.N. ESCOR, 49th Sess., Supp. No. 1, at 54, U.N. Doc. E/1996/96 (1996).

205. See *id.* ¶ 12; see also Rechenberg, *supra* note 11, at 276; M. Bettati, *La Contribution des Organisations Non Gouvernementales à la Formation et à la Application du Droit International*, in LES O.N.G. ET LE DROIT INTERNATIONAL 1, 7 (Pierre-Marie Dupuy et al. eds., 1986). However, this now well-established fact could change if NGOs would be subject to an international agreement that could result in making NGO formation subject to state scrutiny under international law.

206. NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC* 684 (5th ed. 1994); Finn Seyersted, *Applicable Law in Relations Between Intergovernmental Organizations and Private Parties*, 122 RECUEIL DES COURS 426, 433-34 (1967).

207. On international organizations, see generally D. W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (4th ed. 1982); I. A. SHEARER, *STARKE'S INTERNATIONAL LAW* 543 (11th ed. 1994).

influence by a government.<sup>208</sup>

From these facts, general independence from governmental influence serves as a further characteristic element of a NGO.<sup>209</sup> This is also demonstrated by the requirement, stated in ECOSOC Resolution 1996/31, that any financial contribution or other direct or indirect support from a government has to be openly declared and fully recorded in the financial records of the NGO in question.

Furthermore, for a NGO to be considered “international,” the organization must demonstrate a transnational scope of activities,<sup>210</sup> should cover “where possible, a substantial number of countries in different regions of the world”<sup>211</sup> and “shall be international in its structure.”<sup>212</sup> In the practice of the NGO Committee of ECOSOC, this is the case if an organization has operations in at least three countries.<sup>213</sup> Other intergovernmental organizations, like the Council of Europe, require only activities with effect in at least two States.<sup>214</sup>

Besides the requirements of private foundation, international scope, and general independence from State influence, there are further characteristics of NGOs that are widely accepted. Among them are the requirements of minimal organizational structure, an established headquarters,<sup>215</sup> and a nongovernmental purpose.<sup>216</sup> However, in contrast to their private origins, the objectives of NGOs are mostly public in nature, involving, for example, the protection of human rights and concerns for the environment.<sup>217</sup>

There is some controversy as to whether NGOs must be nonprofit-

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208. E.S.C. Res. 31, *supra* note 204, ¶ 12; *see also* Lagoni, *supra* note 43, at 906.

209. Hobe, *supra* note 5, at 194.

210. E.S.C. Res. 31, *supra* note 204, ¶ 8; *see also* I/2 DAHM ET AL., *supra* note 34, § 107; Hobe, *supra* note 5, at 194.

211. E.S.C. Res. 1296, U.N. ESCOR, 44th Sess., Supp. No. 1, at 21, U.N. Doc. E/4548 (1968).

212. *Id.* ¶ 7.

213. *See* Lagoni, *supra* note 43, at 906.

214. European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Apr. 24, 1986, Europ. T.S. 124 [hereinafter European Convention]; *see also* Marie-Odile Wiederkehr, *La Convention Européenne sur la Reconnaissance de la Personnalité Juridique des Organisations Internationales Non Gouvernementales du 24 Avril 1986*, 33 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 749, 753 (1987); Frits W. Hondius, *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, 7 PHILANTROPIST 6 (1988).

215. E.S.C. Res. 31, *supra* note 204, ¶ 10.

216. *See generally* Hummer, *supra* note 203, at 225; I/2 DAHM ET AL., *supra* note 34, § 107; Hobe, *supra* note 5, at 194.

217. MacAlister-Smith, *supra* note 16, at 481.

oriented.<sup>218</sup> The nonprofit criterion serves to differentiate NGOs from transnational corporations which, although like NGOs are also established by private contract, are in general solely profit-oriented economic entities.<sup>219</sup> This is true insofar as organizations that have profit-orientation as their primary purpose cannot be regarded as NGOs, since they pursue economic objectives, in contrast to NGOs which are generally functioning to promote the public interest in the international realm.

However, it would be inappropriate to apply this criterion in a literal sense because most of the larger and influential NGOs have at least some full-time and professional staff members.<sup>220</sup> NGOs are therefore allowed to have income to finance their primary activities in order to pursue their purposes.<sup>221</sup> The necessity for financial income becomes obvious in light of the goal of securing the independence of these organizations from governmental influence.<sup>222</sup> Thus the criterion of nonprofit orientation is to be understood as excluding only organizations that primarily pursue profits, like transnational corporations.

Furthermore, it is generally required in the scholarly literature that an NGO be oriented toward the rule of law, which excludes from the definitional scope of NGOs organizations that pursue illegal goals, like transnational

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218. See Rechenberg, *supra* note 11, at 276; Wiederkehr, *supra* note 214, at 754; Hummer, *supra* note 203, at 225; see also Martha L. Schweitz, *Indigenous Environmental NGOs and International Law: A Reconstruction of Roles and Possibilities*, 27 U.B.C. L. REV. 133, 137 (1993) (advocating the exclusion of commercial profit-seeking enterprises from the scope of NGOs).

219. On transnational corporations, see generally Dietmar Bachmann, *Transnational Corporations*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1239 (Rüdiger Wolfrum & Christiane Philipp eds., 1995); CYNTHIA D. WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* (1982); D. Kokkini-Iatridou & P.J.I.M. de Waart, *Foreign Investments in Developing Countries—Legal Personality of Multinationals in International Law*, 14 NETH. Y.B. INT'L L. 87 (1983).

220. MacAlister-Smith, *supra* note 16, at 481. On the importance of professional staff personnel for the effectiveness of NGO activities, see also Kathryn A. Sikkink, *Nongovernmental Organizations, Democracy, and Human Rights in Latin America*, in *BEYOND SOVEREIGNTY—COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS* 150, 151 (Tom Farer ed., 1996).

221. See also Timothy C. Evered, *Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union*, 3 BUFF. J. INT'L L. 153, 156 (1996); Peter R. Baehr, *Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs*, in *REFLECTIONS ON INTERNATIONAL LAW FROM THE LOW COUNTRIES—IN HONOUR OF PAUL DE WAART* 135, 137 (Erik Denters & Nico Schrijver eds., 1998).

222. I/2 DAHM ET AL., *supra* note 34, § 107.



terrorist or organized criminal groups.<sup>223</sup> However, this does not mean that organizations, which are sometimes willing to breach the law in order to pursue their goals, cannot be regarded as NGOs.<sup>224</sup> Thus, the strategy of Greenpeace, which sometimes breaks laws intentionally, does not exclude this organization from being a NGO. Rather, it is sufficient in fulfilling this requirement if an organization is, in pursuing its legitimate objective, generally oriented toward the rule of law.

In addition, some dispute exists whether internationally-oriented private organizations which are pursuing either primarily religious purposes, like the International Council of Christian Churches or the Muslim World League, or primarily political purposes, like transnational factions and parties,<sup>225</sup> can be regarded as NGOs.<sup>226</sup> However, since there are no systematic reasons for excluding these entities from the scope of NGOs because of their religious or political purposes, and taking into account that religious organizations often also undertake global humanitarian activities, these organizations should also be regarded as NGOs.<sup>227</sup> This inclusion is also supported by the working definition of NGOs adopted by the Organization for Economic Co-operation and Development (OECD), which includes "churches and other religious groups and missions . . . ."<sup>228</sup>

A general exception is only made for certain religious sects which do not allow their members a voluntary withdrawal from the organization. This exception, however, need not be based on the religious orientation of these groups. Taking into account that the legal systems of a great number of countries recognize an individual right of association in the negative form of

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223. Hummer, *supra* note 203, at 226; Hobe, *supra* note 5, at 194; I/2 DAHM ET AL., *supra* note 34, § 107. However, the exclusion of these groups does not imply that they are irrelevant in the contemporary international system. See, e.g., Oscar Schachter, *The Erosion of State Authority and its Implications for Equitable Development*, in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 31, 38 (Friedl Weiss et al. eds., 1998); Sara Jankiewicz, *Glasnost and the Growth of Global Organized Crime*, 18 HOUS. J. INT'L L. 215 (1995).

224. See Hobe, *supra* note 5, at 194.

225. See, e.g., Theodor Schweisfurth, *Zur völkerrechtlichen Bedeutung internationaler Vereinbarungen regierender politischer (kommunistischer) Parteien*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 586 (1976).

226. Hummer, *supra* note 203, at 226 (excluding these organizations from the definitional scope of NGOs).

227. See Rechenberg, *supra* note 11, at 276-77 (including NGOs working in the religious and political sector); I/2 DAHM ET AL., *supra* note 34, § 107; LADOR-LEDERER, *supra* note 17, at 60 (including religious NGOs).

228. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, VOLUNTARY AID FOR DEVELOPMENT: THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS 14 (1988).

being free to leave an organization,<sup>229</sup> a right which is also enshrined in a variety of international human rights conventions,<sup>230</sup> it can be argued that such entities are not generally oriented toward the rule of law and therefore already are excluded from the definitional scope of NGOs.<sup>231</sup>

Finally, ECOSOC Resolution 1996/31 requires NGOs that want to enter into a consultative relationship with the United Nations to have a democratically-adopted constitution that provides for a representative body of the members responsible for determining the policy of the organization.<sup>232</sup> In addition, the NGO must "possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through exercise of voting rights or other appropriate democratic and transparent decisionmaking processes."<sup>233</sup> It is doubtful whether these requirements can be regarded as being generally accepted elements in the definition of NGOs.<sup>234</sup> Nevertheless, it can be seen as a further indication of the growing awareness of the importance of democratic legitimation<sup>235</sup> for the participation and the exercise of NGO influence in the international realm in accordance with the liberal tradition in international law.<sup>236</sup> Despite the fact that a controversy about the necessary requirements for constituting a NGO

229. For United States case law that generally defines this right of association, see, for example, *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235 (1977). For the Federal Republic of Germany, see the decisions of the Federal Constitutional Court, *Erfvtverband*, in BVerfGE 10, 89 (99 *et seq.*); *Arbeitnehmerkammern*, BVerfGE 38, 281 (297 *et seq.*); *Mitbestimmungsurteil*, BVerfGE 50, 290 (354). See generally GERALD GUNTER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1397 (13th ed. 1997).

230. The right to freedom of association in its negative component is expressly recognized in Art. 10 of the African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, 61 (entered into force on 21 October 1986). See also the decision of the European Court of Human Rights from 23 June 1981 in *Le Compte et al. v. Belgium*, in *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 551, 555 (1981) (recognizing a "negative" freedom of association under the European Convention for the Protection of Human Rights and Fundamental Freedoms).

231. I/2 DAHMET AL., *supra* note 34, § 107.

232. E.S.C. Res. 31, *supra* note 204, ¶10.

233. *Id.* ¶ 12.

234. Remarkably, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations does not provide for similar requirements. See European Convention, *supra* note 214. Also, these elements are rarely discussed in the literature.

235. On the discussion concerning an evolving human right to democracy on the governmental level, see Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495 (1997).

236. For the importance of democracy in the liberal tradition of international law and international relations theory, see David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297, 307 (1997); 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, 405 (1994).

still exists, NGOs can generally be defined as privately founded organizations that pursue primarily nonprofit-oriented public interest objectives on a transnational basis in accordance with a general respect for the rule of law.

*B. A Possible Solution Under Contemporary International Law—NGOs as Subjects of International Law*

The question whether NGOs can be regarded as subjects of international law has to be distinguished from the legal status that NGOs hold under the national legal order of the State in which they have been constituted or where they are based. The legal foundation for the establishment of NGOs by private persons is the right of association,<sup>237</sup> which is enshrined in many national constitutions<sup>238</sup> and in a variety of international and regional human rights agreements.<sup>239</sup> Under national law, NGOs usually hold the status of a private association in regard to both the conditions of formation and dissolution and the rules under which they operate.<sup>240</sup>

In contrast to the issue of their national status, the question of NGOs as possible subjects of international law is concerned with their legal personality under the international legal order and their status in their relations with States and international organizations. In order to answer this question, one first has to define the prerequisites that an entity has to fulfill for being a subject of international law. Secondly, whether NGOs in fact meet these criteria under contemporary international law has to be evaluated.

*1. Subjects of International Law: A Definition*

In contrast to former times, where basically only States had been the actors on the international scene and constituted the sole subjects of

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237. MacAlister-Smith, *supra* note 16, at 486; Martin A. Ölz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 312 (1997).

238. *See, e.g.*, G.G. art. 9; [German Constitution]; KENPO art. 21 [Japanese Constitution].

239. For an overview of various such agreements see, for example, I/2 DAHM ET AL., *supra* note 34, § 107.

240. *Id.* For a description of the various national legal status of NGOs, see Michael H. Posner and Candy Whitome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 276 (1994); BEIGBEDER, *supra* note 11, at 327.

international law,<sup>241</sup> one of the characteristics of contemporary international law is the wide range of participants in international relations.<sup>242</sup> Under current international law, general agreement exists that at least States, international organizations, and, to a certain extent, individuals are subjects of rights and duties under international law.<sup>243</sup> However, since there are no systematic reasons why other non-State entities may not participate in the international legal system as legally recognized actors,<sup>244</sup> and thus no *numerus clausus* of subjects of international law exist, new actors may arise and achieve international legal status in accordance with the needs of the international society.<sup>245</sup>

However, not all these various entities participating in contemporary international relations can be regarded as subjects of international law, even if they may have some degree of influence on the international society. *De facto* participation in the international system is not equivalent to acting on the international scene in legally relevant ways, and thus not deserving of the qualification as a subject of international law.<sup>246</sup> Rather, international legal personality requires factual participation and some form of community acceptance through the granting of rights and duties under international law to the entity in question.<sup>247</sup>

A subject of international law can thus be defined as a natural or legal person that on the one side is actively participating on the international plane and on the other side is capable, and actually in possession, of rights or duties

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241. Also, in earlier times some other entities were considered to be subjects of international law, like belligerents and the free cities of Cracow and Danzig. See Mosler, *supra* note 130, at 49; ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* 222 (3rd ed. 1984).

242. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 74, 103 (1986); PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 20 (3rd ed. 1995); and SHAW, *supra* note 20, at 138.

243. See BROWNLIE, *supra* note 93, at 58; 1 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 89 (3rd ed. 1957).

244. Hermann Mosler, *Die Erweiterung des Kreises der Völkerrechtssubjekte*, 22 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 1, 41 (1962); I/I DAHM ET AL., *supra* note 127, at 23; JESSUP, *supra* note 164, at 21-22; Charney, *supra* note 195, at 762.

245. See *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11). See also DETTER, *supra* note 174, at 32.

246. I/I DAHM ET AL., *supra* note 127, at 21; SHAW, *supra* note 20, at 138.

247. See JENNINGS & WATTS, *supra* note 12, at 16; I/I DAHM ET AL., *supra* note 127, at 22; P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 157-58 (1992).

under international law.<sup>248</sup> Since NGOs are increasingly participating in the international decisionmaking process and the monitoring of State compliance with international law, as shown above, the question arises whether they also fulfill the prerequisite of “community acceptance” by possessing rights or duties under contemporary international law.

## 2. *The Legal Status of NGOs Under International Law*

With the exception of some traditional non-State actors in international relations, like the Holy See, the International Committee of the Red Cross, and the Sovereign Order of Malta, which more or less undisputedly hold the status of subjects of international law,<sup>249</sup> the still prevailing view among international legal scholars is that NGOs cannot generally be regarded as subjects of international law.<sup>250</sup> The arguments in favor of this proposition are mainly based on the fact that NGOs are created by private, natural, or legal persons under national law and not, as in the case of international organizations, through a legal act by States under international law.<sup>251</sup>

However, the fact that NGOs are not created through a specific legal act under international law cannot be regarded as an ultimate obstacle to the possible legal personality of NGOs under international law.<sup>252</sup> Taking into account the extensive participation of NGOs in the current international system on the one side, and the purposes pursued by the international legal order as an “open system” on the other, it becomes increasingly necessary and justified to raise the question whether NGOs are, or should be, subjects of international law. The issue of an international legal personality for NGOs requires a closer look at the current international regulations concerning these non-State entities in order to determine whether NGOs can already be

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248. See JENNINGS & WATTS, *supra* note 12, at 120; BROWNLIE, *supra* note 93, at 58.

249. See de Fischer, *supra* note 12, at 1; VERDROSS & SIMMA, *supra* note 241, at 252. However, the international legal personality of the International Committee of the Red Cross is disputed by some international legal scholars. See, e.g., CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW* 206 (1974).

250. See, e.g., IGNAZ SEIDL-HOHENVELDERN, *VÖLKERRECHT* 161, 174 (9th ed. 1997); VERDROSS & SIMMA, *supra* note 241, at 251, 268; see also Vedder, *supra* note 111, at 248, 255; Rechenberg, *supra* note 11, at 281.

251. See, e.g., Lagoni, *supra* note 43, at 913; Volker Epping, *Völkerrechtssubjekte*, in *VÖLKERRECHT* 73 (Knut Ipsen ed., 3rd ed. 1990).

252. See Mosler, *supra* note 244, at 41.

regarded as partial subjects of international law.<sup>253</sup> Despite a number of draft conventions proposed by the *Institut de Droit International* at the beginning of this century,<sup>254</sup> no international agreement regulating a uniform international legal status for NGOs exists.<sup>255</sup> Numerous international regulations addressing the legal position of NGOs in specific areas of international law do, however, exist. In the following sections, these regulations will be evaluated to determine whether NGOs fulfill, in a quantitative as well as a qualitative sense, the criteria of community acceptance that is necessary for becoming a subject of international law.

*a) The Legal Status of NGOs Under Secondary International Law*

First, the legal status of NGOs under contemporary secondary international law will be examined. The term "secondary international law" refers to the body of law that has been implemented by international organizations and their organs under international treaty regimes.<sup>256</sup> These regulations can at least in general also be regarded as a part of public international law.<sup>257</sup> Next I analyze the legal status that NGOs hold under secondary international law, first in connection with the UNC and its specialized organizations, and second, in other areas of international law.

*(1) The Legal Role of NGOs Under the UN Charter*

The starting point for an investigation of the legal status of NGOs under secondary international law is Article 71 of the UNC, which states that the "Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with

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253. This is also expressed in an emerging view among international legal scholars. See I/2 DAHM ET AL., *supra* note 34, § 107; Hobe, *supra* note 5, at 207; Ölz, *supra* note 237, at 322-23.

254. Macalister-Smith, *supra* note 16, at 487 n.16.

255. Also, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations is only concerned with the reciprocal recognition of the legal personalities of NGOs within the State parties and not with an international legal personalities of these entities. See European Convention Convention, *supra* note 214; Wiederkehr, *supra* note 214, at 750; I/2 DAHM ET AL., *supra* note 34, § 107.

256. See Mosler, *supra* note 244, at 45; I/2 DAHM ET AL., *supra* note 34, § 107; Hobe, *supra* note 5, at 203-04.

257. I/1 DAHM ET AL., *supra* note 127, at 30. See also Rudolf Bernhardt, *Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen*, in 12 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 7, 24, 42 (Bernhardt & Miehsler eds., 1973).

matters within its competence.<sup>258</sup> From the wording of this provision, which gives ECOSOC the option, but does not require it, to make arrangements for a consultative status of NGOs, it seems rather clear that it is not intended to grant any rights to NGOs.<sup>259</sup>

However, a different conclusion might be taken by looking at the practice of the UN in implementing Article 71 of the UNC through ECOSOC Resolution 1996/31.<sup>260</sup> This resolution recently updated ECOSOC Resolution 1296 of 1968<sup>261</sup> and was drafted by a suborgan of ECOSOC<sup>262</sup> in close cooperation with the NGOs concerned.<sup>263</sup>

According to ECOSOC Resolution 1996/31, NGOs are divided into three different categories depending on the extent of their involvement with the activities of ECOSOC. These categories are connected with different participatory rights, so that, for example, only NGOs in the first category have the right to submit topics for consideration on the provisional agenda and only NGOs of the first and the second categories are entitled to send observers to

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258. U.N. CHARTER art. 71.

259. See Hüfner, *supra* note 33, at 929; I/2 DAHM ET AL., *supra* note 34, § 107; Hobe, *supra* note 5, at 201.

260. E.S.C. Res. 31, *supra* note 204.

261. E.S.C. Res. 1296 (XLIV) (1968). Before the adoption of these resolutions the relationship between the Economic and Social Council and NGOs was governed by ECOSOC Resolution 288 (X) of Feb. 27, 1950.

262. E.S.C. Res. 80, U.N. ESCOR, 46th Sess., at 86, U.N. Doc. E/1993/80 (1993).

263. See, for example, the reports of the open-ended working group on the review of arrangements for consultation with non-governmental organizations. *Report of the Open-Ended Working Group on the Review of Arrangements for Consultations with Non-Governmental Organizations*, U.N. ESCOR, 49th Sess., Agenda Item 12, at 1, U.N. Doc. E/1994/99 (1994); *Report of the Open-Ended Working Group on the Review of Arrangements for Consultation with Non-Governmental Organizations on its Second Session*, U.N. ESCOR, Agenda Item 10, at 1, U.N. Doc. E/1995/83 (1995); *Open-Ended Working Group on the Review of Arrangements for Consultations with Non-Governmental Organizations: Report of the Working Group on its Third Session*, U.N. ESCOR, 4th Sess., at 1, U.N. Doc. E/AC.70/1996/2 (1996). NGOs themselves took advantage of the possibility to cooperate with the working group by submitting a number of statements. See, e.g., *Statement Submitted by the International Council of Women, a Non-Governmental Organization in Consultative Status with the Economic and Social Council, Category I*, U.N. ESCOR, 1st Sess., Agenda Item 3, at 1, U.N. Doc. E/AC.70/1994/NGO/9 (1994); *Statement Submitted by the World Federation of United Nations Associations, a Non-Governmental Organization in Consultative Status with the Economic and Social Council, Category I*, U.N. ESCOR, 1st Sess., Agenda Item 3, at 1, U.N. Doc. E/AC.70/1994/NGO/1 (1994); *Statement Submitted by the International Federation of Associations of the Elderly, a Non-Governmental Organization in Consultative Status with the Economic and Social Council, Category I*, U.N. ESCOR, 1st Sess., Agenda Item 3, at 1, U.N. Doc. E/AC.70/1994/NGO/5 (1994).

sessions of ECOSOC and its suborgans.<sup>264</sup> These regulations not only grant rights to NGOs but also provide for some duties that are connected with the consultative status<sup>265</sup> and ask for some organizational requirements like a democratically-adopted statute.<sup>266</sup> These participatory rights, granted to NGOs under the internal law of the UN, can be viewed as some form of entitlement recognized by State practice within the UN<sup>267</sup> that is an indication of an at least indirect legal personality for NGOs under international law.<sup>268</sup>

Furthermore, many special organs of the UN maintain similar consultative arrangements with NGOs, which are regulated in resolutions of the General Assembly, ECOSOC, or in rules of procedure of the special organs themselves. The UN High Commissioner for Refugees (UNHCR), for example, has adopted the ECOSOC division of three categories, while organizations such as the UN Children's Fund (UNICEF), the UN Environment Programme (UNEP), and the UN Development Programme (UNDP) only list NGOs without categorization.<sup>269</sup> In addition, other specialized organizations of the UN family have a formalized consultative relationship with NGOs according to their constitutions, like Article 12 (4) of the UN Educational, Scientific and Cultural Organization (UNESCO) Constitution<sup>270</sup> and Article 27 of the International Telecommunication Union

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264. For a more detailed description, see Marcel Merle, *Article 71, in LA CHARTE DES NATIONS UNIES* 1047, 1051 (Jean-Pierre Cot & Alain Pellet eds., 2nd ed. 1991); Lagoni, *supra* note 33, at 905; Hüfner, *supra* note 33, at 929; JULIA ZIEGLER, *DIE BETEILIGUNG VON NICHTREGIERUNGSORGANISATIONEN (NGOS) AM MENSCHENRECHTSSCHUTZSYSTEM DER VEREINTEN NATIONEN* (1998). See generally Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 113 (1996) (discussing the relationship between non-governmental organizations and the U.N.).

265. See I/2 DAHM ET AL., *supra* note 34, § 107.

266. Berit Bartram & Dorte Pardo López, *Observer Status, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE* 936, 945 (Rüdiger Wolfrum & Christiane Philipp eds., 1995).

267. Hobe, *supra* note 5, at 203.

268. See I/2 DAHM ET AL., *supra* note 34, § 107; Mosler, *supra* note 244, at 45. See also JENNINGS & WATTS, *supra* note 12, at 21 (describing the ways in which various non-State entities have traditionally been subjected to international law); Hummer, *supra* note 203, at 226.

269. Hüfner, *supra* note 33, at 931.

270. See also Resolution 104 EX/3 of the Executive Committee of UNESCO, under which NGOs have the possibility to submit petitions on behalf of victims of human rights violations. Jost Delbrück, *Non-Judicial Procedures of Enforcement of Internationally Protected Human Rights with Special Emphasis on the Human Rights Practice of UNESCO, in NEUNTES DEUTSCH-POLNISCHES JURISTEN-KOLLOQUIUM* 31, 42 (Jost Delbrück et al. eds., 1992); I/2 DAHM ET AL., *supra* note 34, § 107.



(ITU) Convention.<sup>271</sup>

(2) *Other Areas of International Law*

Outside the UN, the two most important fields where rights are granted to NGOs under secondary international law are human rights law and international environmental law. Under international law related to the protection of human rights, one can name on the universal level the status granted to NGOs by special organs of the United Nations like the Commission on Human Rights.<sup>272</sup> Furthermore, on the regional level, NGOs are entitled to observer and consultative status under the organs of the Council of Europe, with which they cooperate in a vast variety of activities.<sup>273</sup> In contrast, the Organization of American States (OAS) has not institutionalized its relationship with NGOs, but has entered into agreements of cooperation on a case by case basis.<sup>274</sup> The same is true for the Organization of African Unity (OAU), which has granted observer status to a few Africa-oriented NGOs.<sup>275</sup>

In the field of environmental protection, NGOs are entitled under a growing number of treaty regimes to observer status at the Conference of the parties to the treaty and in some cases even to more active participation by assisting the Secretariat.<sup>276</sup> For example, observer status and active assistance are provided for under Articles 11 and 12 of the Convention on International Trade in Endangered Species,<sup>277</sup> Article 7 of the United Nations Framework

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271. For a more detailed overview, see Michael M. Gunter, *Toward a Consultative Relationship Between the United Nations and Non-Governmental Organizations?*, 10 VAND. J. TRANSNAT'L L. 557, 569 (1977); Hüfner, *supra* note 33, at 931-32.

272. See U.N. ESCOR Rules of Procedure of the Functional Commissions of the Economic and Social Council, at 18, U.N. Doc. E/5975/Rev.1 (1983); see also I/2 DAHM ET AL., *supra* note 34, § 107.

273. See Andrew Drzemczewski, *The Role of NGOs in Human Rights Matters in the Council of Europe*, 8 HUM. RTS. L.J. 273 (1987); Ölç, *supra* note 237, at 332-34.

274. Ölç, *supra* note 237, at 354.

275. *Id.* at 360-61.

276. For a more detailed evaluation of the role of NGOs in treaty regimes in the field of international environmental law see Raustiala, *supra* note 68, at 543-52; Ardia, *supra* note 100, at 552-54.

277. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243. For the participation of NGOs, see Phillippe J. Sands & Alfred P. Bedecarre, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 B.C. ENVTL. AFF. L. REV. 799, 801 (1990); Laura H. Kosloff & Mark C. Trexler, *The Convention on International Trade in Endangered Species: Enforcement Theory and Practice in the United States*, 5 B.U. INT'L L.J. 327, 335-36 (1987).

Convention on Climate Change,<sup>278</sup> and Article 4 of the International Convention for the Regulation of Whaling.<sup>279</sup>

Finally, one of the most recent examples for NGO participation in international law is the World Trade Organization, which—in contrast to GATT, but in accordance with the original intent of the founders of the international trading system under the International Trade Organization<sup>280</sup>—provides in Article V.2 of its Charter that “[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations.”<sup>281</sup>

### (3) *Conclusion on Secondary International Law*

These various rights, granted to NGOs by international organizations and their organs, and existing under treaty regimes, can be regarded as indications of legal status under international law.<sup>282</sup> Secondary international law thus provides the “community acceptance” required for an entity to become a subject of international law. The institutionalization of NGO rights to participate in conference deliberations and international legal regimes provides for the effective presentation of their views and thus has to be regarded as a significant step in the development toward an international legal status of NGOs.<sup>283</sup>

278. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, 862; see also Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 115 (1998).

279. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72. See also Kieran Mulvaney, *The International Whaling Commission and the Role of Non-Governmental Organizations*, 9 GEO. INT’L ENVTL. L. REV. 347 (1997); Judith Berger-Eforo, *Sanctuary for the Whales: Will This be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT’L L. REV. 439, 478 (1996).

280. See Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, 29 J. WORLD TRADE, Oct. 1995, at 111; Charnovitz, *supra* note 83, at 337.

281. *Agreement Establishing the World Trade Organization*, 33 I.L.M. 1144, 1146 (1994). On the issue of a possible participation of NGOs in the WTO, see William M. Reichert, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219 (1996); Charnovitz, *supra* note 83, at 331. For a critical view on this issue, see Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernmental Parties*, 17 U. PA. J. INT’L ECON. L. 295, 318 (1996).

282. See Hobe, *supra* note 5, at 203; Danish, *supra* note 69, at 162-63.

283. See also Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1964 (1997).

*b) The Legal Positions of NGOs Under Primary International Law*

One can also find legal entitlements of NGOs under primary international law, which means that the rights of NGOs derive directly from international treaties concluded by, and binding upon, States. The legal status of NGOs is especially noteworthy in the areas of the protection of human rights, international humanitarian law, and in the regulatory system of the International Labor Organization.

*(1) The Legal Status of NGOs in the International Labor Organization*

Article 24 of the Constitution of the International Labor Organization (ILO) states that labor unions and business associations can file complaints to the ILO concerning treaty violations by ILO Member States.<sup>284</sup> Even the structure of the ILO itself, with representatives of governments, labor unions, and business associations as formal participants in an equal division,<sup>285</sup> reflects a strong and unique institutionalized position for NGOs in an international organization and in the operation of an international legal regime.

*(2) Entitlements of NGOs in the Protection of Human Rights*

In the field of the international protection of human rights on the regional level in Europe, the Americas, and Africa, intergovernmental organizations grant rights to NGOs under primary international law. Under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, NGOs are entitled to submit applications to the European Commission of Human Rights, claiming to be a victim of a violation of one of the rights set forth in the Convention.<sup>286</sup> The position of NGOs as

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284. See I/2 DAHM ET AL., *supra* note 34, § 107; David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1, 23-31 (1981).

285. See Peter A. Köhler, *ILO—International Labour Organization*, in 1 UNITED NATIONS: LAW, POLITICS AND PRACTICE 714, 717 (Rüdiger Wolfrum & Christane Philipp eds., 1995); Raustiala, *supra* note 68, at 553.

286. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221, 236 (entered into force on Sept. 3, 1953).

applicants has been further strengthened by Protocol No. 9,<sup>287</sup> under which they have, in certain circumstances, the right to refer cases to the European Court of Human Rights without the assistance and approval of the European Commission on Human Rights. Furthermore, the entry into force of Protocol No. 11<sup>288</sup> on 1 November 1998, which creates a single European Court of Human Rights through a merger of the Commission and the current court, again improves the legal standing of NGOs. The new Article 34 of the Convention as amended by Protocol No. 11 is based on the former Article 25 and provides the opportunity for NGOs to bring cases directly before the new European Court of Human Rights.<sup>289</sup>

Furthermore, the additional protocols to the European Social Charter<sup>290</sup> are worth mentioning, even though these protocols are not now in force. Under Protocol No. 2 of 1991, NGOs can cooperate with the organs established under this Charter, and the Governmental Committee and the Secretary General shall also consult and provide information for NGOs related to the matters governed by the Charter. Furthermore, the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 1995,<sup>291</sup> which by its preamble is intended to strengthen NGO participation, gives NGOs the right to submit complaints alleging unsatisfactory application of the Charter.<sup>292</sup>

Under the Inter-American Human Rights System, NGOs are, according to Article 44 of the American Convention on Human Rights, entitled to "lodge petitions with the Commission containing denunciations or complaints of

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287. Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 30 I.L.M. 693 (1991) (entered into force on Oct. 1, 1994). See also Frank Bodendiek & Karsten Nowrot, *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Jahre 1995*, 39 GERMAN Y.B. INT'L L. 481-82 (1996).

288. See Council of Europe: Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 33 I.L.M. 943 (1994). See also Henry G. Schermers, *The European Court of Human Rights After the Merger*, 18 EUR. L. REV. 493 (1993); Stephan Hobe, *Stärkung des Menschenrechtsschutzes in Europa: Das 11. Zusatzprotokoll zur Europäischen Menschenrechtskonvention*, 30 JURISTISCHE ARBEITSBLÄTTER 909 (1998).

289. See Ölz, *supra* note 237, at 349.

290. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force on Feb. 26, 1965).

291. Council of Europe: Protocol Amending the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, 34 I.L.M. 1453, 1456 (1995).

292. See Ölz, *supra* note 237, at 349.

violation of this Convention by a State Party.<sup>293</sup> NGOs are also granted rights under primary international law by the African Charter on Human and Peoples' Rights.<sup>294</sup> Article 45 of the Charter states the African Commission's obligation to cooperate with NGOs, which is also institutionalized in Chapter XIII of the Rules of Procedure of the Commission. Furthermore, Article 55 of the African Charter in connection with Rule 114 of the Rules of Procedure allows NGOs to file complaints concerning human rights violations to the Commission. A similar right for non-State complaints is also established under Article 42 of the African Charter on the Rights and Welfare of the Child of 1990, which is, however, not in force.<sup>295</sup>

### (3) *The Rights of NGOs in International Humanitarian Law*

Another area of international law in which NGOs are granted rights under treaty regimes is the field of international humanitarian law. The International Committee of the Red Cross has a variety of functions under the four Geneva Conventions of 1949 as well as the two Additional Protocols of 1977.<sup>296</sup> Among other specific entitlements, in cases of armed conflicts, the ICRC has the right to create a Central Prisoner of War Information Agency,<sup>297</sup> as well as to create a similar agency for protected civilians.<sup>298</sup> Furthermore, the organization has the right to establish hospital zones and localities, as well as neutralized zones in areas suffering armed conflict.<sup>299</sup> The Conventions even

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293. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, 687 (1970).

294. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 (1982) (entered into force on Oct. 21, 1986). For the participation of NGOs see also Ölç, *supra* note 237, at 360.

295. See Bankole Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 INT'L & COMP. L. Q. 432 (1992); Ölç, *supra* note 237, at 360 n.210.

296. For an overview of the rights of the ICRC under these conventions see Schlögel, *supra* note 21, at 815; SHAW, *supra* note 20, at 820.

297. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 123, in THE LAWS OF ARMED CONFLICTS 355 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981).

298. Geneva Convention (III) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 140, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 427.

299. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 23, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 305; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 14, 15, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 427; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, art. 60, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 551.

allow States to entrust the ICRC with the functions of a Protecting Power,<sup>300</sup> so that this organization can be appointed by a party to an international conflict to look after the interests of this party's nationals which are under adverse control.<sup>301</sup>

In addition, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and Their Destruction provides a role for NGOs in the assistance of the destruction of anti-personnel mines. This is not only restricted to the ICRC, but is also extended to NGOs in general.<sup>302</sup>

#### (4) *Conclusion on Primary International Law*

This illustrative list of rights granted to NGOs under primary international law shows that these entities not only possess a certain legal status under the secondary international law of international organizations and treaty regimes, but also hold a growing number of legal entitlements under primary international law.<sup>303</sup> This can be regarded as a further indication that NGOs not only participate in the interactions of the international system, but also have gained acceptance by the international community and thus received a legal personality under international law.

#### c) *The Role of NGOs as Amici Curiae and Public Interest Litigators in International Judicial Bodies*

In determining whether NGOs can be regarded as subjects of international law, one can also look at their role as *amici curiae* and litigators in the public interest in international judicial bodies. NGOs are especially active as *amici*

300. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 8-10, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 305; Geneva Convention (II) for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 8-10, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 333; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 8-10, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 355; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 9, 11, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 427; Protocol I, art. 5, in THE LAWS OF ARMED CONFLICTS, *supra* note 297, at 551.

301. On the functions of Protecting Powers, see HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 40-41 (1990).

302. Article 6 of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction, *supra* note 2, at art. 6.

303. See I/2 DAHM ET AL., *supra* note 34, at § 107; Hobe, *supra* note 5, at 205.

*curiae* in the regional human rights systems of the Americas and Europe, in contrast to the fact that they have only once participated in proceedings before the International Court of Justice.<sup>304</sup> The European Court of Human Rights, after first showing reluctance to allow NGOs to submit *amicus* briefs in pending cases,<sup>305</sup> permitted third party intervention first in the *Winterwerp* case<sup>306</sup> and in *Young, James and Webster v. United Kingdom*<sup>307</sup> and then amended Article 37 (2) of its Rules of Procedure in 1982 to create an explicit legal basis for these submissions.<sup>308</sup> After that amendment, the Court received 37 *amicus curiae* briefs in 26 cases from 1983 to 1995.<sup>309</sup> A further consolidation of the role of NGOs as *amici curiae* under the European Convention of Human Rights can be expected with the entry into force of Protocol No. 11, which will lead to the incorporation of a provision on third party intervention, by allowing NGOs to appear as *amici curiae*, into the Convention itself through a new Article 36 (2).

An even more extensive *amicus curiae* practice exists before the Inter-American Court of Human Rights.<sup>310</sup> This Court allows for third party intervention by NGOs under Article 34 of its Rules of Procedure and has received over 100 *amicus curiae* briefs.<sup>311</sup> Furthermore, NGOs have not only submitted written briefs but have also participated in oral hearings.<sup>312</sup>

NGO participation as *amici curiae* in international judicial bodies contributes to the development of international law through litigation. NGOs acting in this way can influence the interpretation and sometimes the creation of international law through international courts and tribunals. In order to show the amount of influence of *amici curiae* on the development of a legal system, one need only to refer to developments on the domestic level in the

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304. Only in the advisory opinion on the international legal status of South-West Africa did the I.C.J. permit the International League for the Rights of Man to submit a brief. See Charnovitz, *supra* note 16, at 279. For the role of NGOs as *amici curiae* before the I.C.J. and its predecessor, the P.C.I.J., see generally Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 619 (1994).

305. See Shelton, *supra* note 304, at 630.

306. *Winterwerp v. Netherlands*, 33 Eur. Ct. H. R. (ser. A) (1979).

307. *Young, James and Webster v. United Kingdom*, 44 Eur. Ct. H. R. (ser. A) (1980).

308. See Ölz, *supra* note 237, at 348.

309. *Id.*

310. See Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333, 348-51 (1994); Ölz, *supra* note 237, at 359.

311. David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INT'L L. & POL'Y 95, 111 (1993).

312. Shelton, *supra* note 304, at 640; Ölz, *supra* note 237, at 360; Padilla, *supra* note 311, at 111.

United States.<sup>313</sup> *Amici curiae* participation by public interest groups has had a significant impact on the development of constitutional law, as in the "civil rights era,"<sup>314</sup> and the development of environmental law<sup>315</sup> in this country.<sup>316</sup>

Furthermore, NGOs are also engaged in public interest litigation before international and supranational courts. For example in *Greenpeace v. Commission*, the applicants before the European Court of Justice challenged a decision of the Commission of the European Communities to give Spain financial assistance for two power stations, but were denied *locus standi* before the Court.<sup>317</sup> Although the possibilities for public interest group litigation before these courts is as yet only very limited, in the case of the European Court of Justice there have been some discussions whether to grant public interest groups like NGOs *locus standi* for this kind of litigation.<sup>318</sup> This would further strengthen the influence of these entities as a "private attorney general"<sup>319</sup> in the interpretation and development of international law, especially in the area of environmental law.

In this connection, one can again point to the parallel developments in the United States. During the first four decades of this century, the Supreme Court required a party to be directly harmed in order to have *locus standi* before the Court when suing a government official.<sup>320</sup> A turning point came in the era of the New Deal, in *Federal Communication Commission (FCC) v. Sander Brothers Radio Station*,<sup>321</sup> where the Supreme Court found the plaintiff had standing to vindicate the public interest in adequate radio service.

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313. For such a comparison, see Tarlock, *supra* note 6, at 64.

314. See, e.g., JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).

315. Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991).

316. See Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 L. & SOC'Y REV. 311, 313 (1981).

317. See *Greenpeace and Others v. Commission*, 1995 ECR II, 2209, para. 60.

318. See, e.g., Heike Gading, *Litigation by Public-Interest Groups in European Law*, 39 GERM. Y.B. INT'L L. 361 (1996).

319. See the statement of Judge Jerome Frank in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) for an application of this model to international NGOs; David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645 (1991); Tarlock, *supra* note 6, at 67.

320. See, e.g., *City of Atlanta v. Ickes*, 308 U.S. 517 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

321. 309 U.S. 470 (1940).



Furthermore in 1972, the Court stated in *Sierra Club v. Morton*<sup>322</sup> that a public interest group may have *locus standi* before the Court to represent the public interest.<sup>323</sup> The fact that a similar development now may be under way on the international level can be seen as an indication that the processes of globalization are not only affecting domestic policy and legislation,<sup>324</sup> but also developments at the global level, which can be seen as a repetition of domestic phenomena on the global scene.

Another notable case in connection with the role of NGOs in judicial proceedings is the arbitration between France and Greenpeace following the destruction of the *Rainbow Warrior* by French government agents in a New Zealand port in 1985. It was the first time that an international damages case was arbitrated by agreement between a State and an international NGO.<sup>325</sup>

This fact is especially worth mentioning because the discussion over the international legal personality of MNCs, as the other potential non-State candidates for becoming subjects of international law, mainly focuses on the legal character of agreements between States and these entities.<sup>326</sup> The fact that now NGOs are also starting to enter into international agreements with States is a further indication of their growing legal status under international law.

### 3. Conclusion

This brief analysis of entitlements granted to NGOs under primary and secondary international law in connection with their involvement as *amici curiae* in international judicial bodies also shows that NGOs have gained recognition by the international community as important actors in the current international legal order. Taking into account the extensive *de facto* participation of these entities in international relations and the character and

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322. 405 U.S. 727 (1972).

323. 309 U.S. at 476-77; see also Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 667-69 (1973); Jerry L. Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129, 1141-46 (1983).

324. See Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107, 2119-22 (1993); AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 48, at 131.

325. See Philip Shabecoff, *France Must Pay Greenpeace \$8 Million in Sinking of Ship*, N.Y. TIMES, Oct. 3, 1987, at L-2; Charnovitz, *supra* note 16, at 265; PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 98-99 (7th ed. 1997).

326. See, e.g., 1/2 DAHM ET AL., *supra* note 34, § 108.

purpose of the international system as an "open society under the rule of law," NGOs can thus be regarded as partial subjects of international law,<sup>327</sup> with the consequence that they are also bound by the norms of the international legal order applicable to them.

*C. A Suggestion for the Future Development of International Law—Creating a Universal "Code of Conduct" for NGOs*

Besides the qualification of NGOs as subjects of the international legal community, another possible legal construction for making these entities bound by international law would be the creation of a "Code of Conduct" for NGOs in the form of an international agreement. Such an attempt to regulate the behavior of non-State actors in the international system would not be an entirely new development. Steps in this direction have already been undertaken by the UN and numerous other international organizations on the universal and regional levels concerning the formulation of regulations governing the behavior of transnational corporations,<sup>328</sup> which, however, have not resulted in a binding international agreement.<sup>329</sup>

The advantage of an international treaty regulating the duties and rights of NGOs would be its precision compared to the often uncertain and inexact legal positions under customary law.<sup>330</sup> Furthermore it would dispel any given doubts concerning the legal personality of NGOs under international law, since these entities could be, at least toward the contracting parties, regarded as derivative subjects of international law. However, certain disadvantages, or at least concerns, are connected with the development of a code of conduct

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327. The same view concerning the international legal personality of NGOs was taken three decades ago by Joseph A. Kaiser, *Nichtstaatliche Internationale Organisationen*, in 2 *WORTERBUCH DES VÖLKERRECHTS* 612, 614 (Karl Strupp & Hans-Jürgen Schlochauer eds., 2nd ed. 1961); J.J. Lador-Lederer, *Nichtstaatliche Organisationen und die Frage der Erweiterung des Kreises der Völkerrechtssubjekte*, 23 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 657, 677 (1963). More recently, see DETTER, *supra* note 174, at 125; Ölz, *supra* note 237, at 323; see also I/2 DAHM ET AL., *supra* note 34, § 107; Jost Delbrück, *Von der Staatenordnung über die internationale institutionelle Kooperation zur 'supraterritorial or global governance': Wandel des zwischenstaatlichen Völkerrechts zur Rechtsordnung des Menschen und der Völker ?*, in *WELTINNENPOLITIK* 55, 64 (Ulrich Bartosch & Jochen Wagner eds., 1998); Hobe, *supra* note 5, at 207.

328. See, e.g., WALLACE, *supra* note 219; I/2 DAHM ET AL., *supra* note 34, § 108; Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of Human Rights*, 6 *MINN. J. GLOBAL TRADE* 153 (1997).

329. I/2 DAHM ET AL., *supra* note 34, § 108; Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 *GERM. Y.B. INT'L L.* 11, 17 (1979).

330. See also Lador-Lederer, *supra* note 327, at 677.

for NGOs. Bearing in mind the rather hostile attitude of some States toward many NGOs and the attempts of States to limit or prevent their effective operation,<sup>331</sup> care would have to be taken in the process of drafting such a convention that States do not use it as a means to restrict the activities of NGOs in a way that would be disproportional to the goal to be achieved. For this reason and also to enhance the legitimacy of the convention, NGOs should be strongly involved in this project.

However, even if a binding international convention on the rights and duties of NGOs cannot be expected to be agreed upon in the near future, resolutions adopted by organs of international organizations regarding the behavior of NGOs could have a certain affect on the legal position and conduct of NGOs, although they are not binding upon them. By directly addressing rules of behavior toward NGOs, those resolutions would express the expectation of the international community that NGOs are voluntarily complying with such an adopted code of conduct.<sup>332</sup>

#### VI. POSSIBILITIES FOR THE ENFORCEMENT OF INTERNATIONAL LAW AGAINST NGOS

Because the international legal order lacks a central enforcement authority, the question of the enforcement of international law toward its subjects has always been a crucial one, which even led some scholars like Hobbes, Pufendorf, and Austin<sup>333</sup> to deny international law its character as law.<sup>334</sup> However, since there are certain enforcement mechanisms in the international legal system, which are only mostly disorganized and

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331. See Posner & Whittome, *supra* note 96, at 272.

332. I/2 DAHM ET AL., *supra* note 34, § 108, concerning non-binding codes of conduct for transnational corporations.

333. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 127 (Herbert L.A. Hart ed., 1954); see also JENNINGS & WATTS, *supra* note 12, at 8.

334. On this issue, see also HERBERT L.A. HART, THE CONCEPT OF LAW 213 (Peter Cane et al. eds., 2d ed. 1994). See generally Chittharanjan F. Amerasinghe, *International Law and the Concept of Law: Why International Law Is Law*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY—ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI 79 (Jerzy Makarczyk ed., 1996); and D'Amato, *supra* note 165, at 1293.

decentralized,<sup>335</sup> one can also think about possibilities for the enforcement of international law toward NGOs.

As in the area of the international protection of human rights, where the “non-internationalists” and the “transnationalists” have developed as the two major schools of thought reflecting different enforcement strategies,<sup>336</sup> there are basically two corresponding strategies for the enforcement of international law against NGOs. On the one side, there is the “classical” way of decentralized law enforcement through States. On the other side, one can also think for the future of a more centralized enforcement of international law applicable to NGOs through either international organizations or even through NGO self-regulatory regimes. However, since the issue of enforcement of international law against NGOs has to be regarded as a question for the future of the international system, the discussion of this topic naturally has to remain a theoretical one under contemporary international law.

In the following sections, these different strategies for the possible enforcement of international law against NGOs will be discussed, including comparisons with new enforcement strategies toward multinational corporations and possible advantages and disadvantages of the different approaches.

#### *A. Decentralized Enforcement Through Individual States*

Under existing international law, non-State actors, especially individuals, can be held responsible for the international crimes of piracy, genocide, torture, and war crimes in domestic courts under the concept of universal jurisdiction.<sup>337</sup> In addition, when evaluating the possibility of decentralized enforcement through individual States against non-State actors such as NGOs, one can point to some recent developments in the enforcement of international

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335. See I/1 DAHM ET AL., *supra* note 127, at 43; JENNINGS & WATTS, *supra* note 12, at 10.

336. The “non-internationalists” claim that the protection of human rights is essentially a matter of States. This school of thought generally relies for the enforcement of international law on the sovereign States. In contrast, the “transnationalists” aim at overcoming the sovereign state as the dominant constituent element of the international system. Transnational mechanisms of international law enforcement are conceived of as being either of a self-regulatory regime type or of a supranational nature. See Jost Delbrück, *International Protection of Human Rights and State Sovereignty*, 57 *IND. L.J.* 567, 568 (1982).

337. See GERHARD VON GLAHN, *LAW AMONG NATIONS* 256 (7th ed. 1995); Brigitte Stern, *La compétence universelle en France: le cas des crimes commis en ex-Yugoslavie et au Rwanda*, 40 *GERM. Y.B. INT'L L.* 280 (1997).

legal standards toward private corporations in the United States.

First, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,<sup>338</sup> commonly referred to as the "Helms-Burton Act," provides for liability under international law of nationals and corporations of third States for trafficking in illegally expropriated property in Cuba. The novelty of the Helms-Burton Act is the domestic judicial remedy established to enforce the international law on expropriation and human rights.<sup>339</sup> Despite the ongoing discussion about the legality of this legislative measure under contemporary international law,<sup>340</sup> at least the procedure adopted could also provide a useful tool for the decentralized enforcement of international law against NGOs on the domestic level. Through the enforcement model provided by the Helms-Burton Act, a violation of international legal norms by a NGO could be enforced in domestic courts, regardless of where the act was committed.

Another notable example for the domestic enforcement of international law against non-State actors is the recent attempts of Burmese citizens to sue American oil companies in U.S. courts for entering into joint ventures with the Burmese government.<sup>341</sup> The plaintiffs allege that the operation of these joint ventures involves human rights violations. This enforcement mechanism could also be applicable to NGOs which can be accused of violating international law in the course of their activities. These organizations could

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338. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996). See Fidler, *supra* note 236, at 297; Lucien J. Dhooge, *Fiddling with Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 ARIZ. J. INT'L & COMP. L. 575 (1997); Joseph V. Walker, *The Legality of the Secondary Boycotts Contained in the Helms-Burton Act Under International Law*, 3 DEPAUL DIG. INT'L L. 1 (1997).

339. See Fidler, *supra* note 236, at 325.

340. Compare Brice M. Clagett, *The Controversy over Title III of the Helms-Burton Act: Who Is Breaking International Law—the United States, or the States That Have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations?*, 30 GEO. WASH. J. INT'L L. & ECON. 271 (1996-97); Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996); David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 HASTINGS INT'L & COMP. L. REV. 729 (1997) (arguing for the conformity of the Helms-Burton Act with international law), with Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996); Robert L. Muse, *A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996)*, 30 GEO. WASH. J. INT'L L. & ECON. 207 (1996-97); Christian Franken, *The Helms-Burton Act: Force or Folly of the World's Leader?*, 7 MINN. J. GLOBAL TRADE 157 (1998) (advocating the illegality of the Act with international law).

341. *John Doe I v. UNOCAL Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); see also *National Coalition Government of the Union of Burma v. UNOCAL, Inc.*, No. CV96-6112 RAP BQRX 1997 WL 731512 (C.D. Cal.). See also Lori Fidler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 91-99, 166-167 (1997).

be held responsible for violations of international law in the domestic courts of all countries.

These two examples show the evolution of international law enforcement against non-State actors by non-State actors in domestic courts. It is considerably more difficult to image potential scenarios in which NGOs are accused of violating norms of international law, since NGOs are much less likely to violate international legal rules than multinational corporations. However, the growing involvement of NGOs in international legal regimes and, for example, development projects also increases the danger of potential abuses of their influence and power through these organizations. Furthermore, the growing number of NGOs in itself makes the appearance of "black sheep" among these entities more likely. It is therefore necessary to elaborate possible enforcement mechanisms to deal with violations of international law also by NGOs. Thus, the above mentioned developments provide at least for a possible enforcement strategy on the domestic level against these entities.

The possible strategy of decentralized enforcement of international law against NGOs through individual States has, however, the disadvantage, already outlined above in connection with the adoption of a possible code of conduct for NGOs, that at least some States might feel tempted to restrict the activities of NGOs to a disproportionate extent by promoting the enforcement of international law toward these entities. However, under the contemporary international system, where the enforcement of international law is still mainly dependent on the actions of sovereign States,<sup>342</sup> the decentralized enforcement through States to mitigate the possible negative effects caused by NGOs in the processes of globalization seems to be the more realistic strategy at least for some years to come.

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342. See, e.g., JESSUP, *supra* note 164, at 17; Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent*, in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 107, 126 (Jost Delbrück ed., 1995). However, one can also notice in contemporary international law some developments toward a more centralized enforcement. See Jost Delbrück, *A More Effective International Law or a New "World Law"?*—Some Aspects of the Development of International Law in a Changing International System, 68 IND. L.J. 705, 720 (1993); JENNINGS & WATTS, *supra* note 12, at 11.

### *B. Centralized Enforcement Through International Governmental Organizations*

Concerning the role of international organizations, the UN could function as a supervising institution on the universal level for the conduct of NGOs, especially taking into account the already existing intensive cooperation between this organization and NGOs, outlined above. International organizations could, for example, require NGOs to employ their staff members in accordance with internationally recognized standards of nondiscrimination, and exclude organizations from consultative relationships for failing to meet this and other human rights criteria. However, one can also think of regional organizations like the OAS, the OAU, and the Council of Europe taking over some of these functions for example in the form of a mandatory reporting system on the activities of NGOs which are active in the region.

### *C. Self-Regulatory Regimes*

A final possibility would be the enforcement of international law against NGOs through a system of self-regulation. Certain developments in this direction can already be located in some sectors of NGO activities.<sup>343</sup> For example, in the Philippines the National Caucus of Development NGO Networks is working toward an agreement among its members to adopt a Code of Ethics for Social Development Organizations, which entails standards on how the NGOs relate to the communities they serve and also toward the government and to each other. In the United States, the umbrella group for private voluntary organizations engaged in foreign humanitarian help, InterAction, has adopted a detailed set of standards which are binding on its members, dealing with, for example, the issue of how photographs may be used in public fund-raising. Finally, there are groups of NGOs in India considering the development of a set of rules to govern their behavior concerning the cooperation with the national government on projects funded by the World Bank.

An enforcement of international legal norms through self-regulatory regimes could include the supervision of the actions of NGOs in a certain geographical region or field of activities through self-governed “umbrella organizations.” NGOs that are violating international legal standards could

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343. On the following examples and for a more detailed analysis, see Schweitz, *supra* note 98, at 420.

then face penalties from an umbrella organization and exclusion from future concerted actions by NGOs. The self-regulatory organizations could, for example, recommend international development banks not include certain NGOs in future development programs.

The advantage of such sectoral, self-contained regimes for NGOs under international law would be the diminished role of States in law enforcement. This could lead to enforcement on a more equal basis and would also prevent a possible abuse of enforcement power toward NGOs by some States. Thus, the examples of already existing self-regulatory regimes for NGOs on the domestic or regional level can also be regarded as a desirable model in the future for enforcement mechanisms for international law on the global scene.

#### VII. IS THE INTERNATIONAL SYSTEM TRANSFORMING INTO A GLOBAL SOCIETY?

The increasingly important role of NGOs in international relations raises the additional question whether the contemporary international system is undergoing fundamental changes by transforming into a global society. The term "global society" describes a society of State actors and non-State actors like NGOs, multinational corporations, and individuals on a global scale, which is characterized by a multitude of decentralized lawmaking processes in various sectors, independently of nation-states.<sup>344</sup>

Under the traditional conception, the international system contains sovereign and, at least in the international legal fiction, coequal States.<sup>345</sup> The international system's mechanical structure is dominated by this conception.<sup>346</sup> For example, the sources of international law depend on the interaction of States in the form of treaties and customary law, or, as in the case of general

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344. See Gunther Teubner, *Foreword: Legal Regimes of Global Non-state Actors*, in *GLOBAL LAW WITHOUT A STATE* xiii (Gunther Teubner ed., 1997). However, the terminology for this conception, although describing basically the same phenomenon, varies in the legal literature. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503, 518 (1995) (describing the characteristics of a "transnational society"); Alex Y. Seit, *Globalization and the Convergence of Values*, 30 *CORNELL INT'L L.J.* 429, 460 (1997) (labeling the new developing system a "world community").

345. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 213 (1964); JESSUP, *supra* note 164, at 17.

346. Schreuer, *supra* note 14, at 448.



principles of law, are derived from the domestic legal systems of States.<sup>347</sup> In addition, fundamental concepts of international law, like territorial integrity, nonintervention, and self-defense are based on the dominant role of the State as the primary actor in the international realm.<sup>348</sup> Although the rise of international organizations, especially in the last four decades, adds a new element to State interactions in the international system, the mere existence of these entities, which are created by States, cannot necessarily be regarded as a fundamental change in the character of the international system. International organizations function as another forum for the interactions between States, and thus underline the interstate nature of the traditional international system.<sup>349</sup>

However, in the contemporary international system, one can also observe a variety of developments indicating that the classical State-centered conception is no longer sufficient to describe the growing complexity of international relations. Leaving aside the increasingly important role of NGOs, one can notice in the course of the continuing processes of globalization, as outlined above,<sup>350</sup> a variety of new lawmaking processes by non-State actors, undermining the former monopoly of States.

The primary example in this connection is the development of a *lex mercatoria*, a self-regulatory regime of economic law, created by multinational enterprises and enforced through arbitration tribunals, independent of State involvement.<sup>351</sup> Although such a transnational legal regime in the business area is not a completely new phenomenon in the international legal realm but has its predecessor in the commercial relations of medieval times, the "Westphalian order"<sup>352</sup> mandates sovereign States either to traditionally promote economic activities at home or to regulate

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347. See, e.g., BUERGENTHAL & MAIER, *supra* note 164, at 33.

348. See Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 406 (1991); Schreuer, *supra* note 14, at 448.

349. See Schreuer, *supra* note 14, at 451.

350. See *supra* Part III.

351. See Hans-Joachim Mertens, *Lex Mercatoria: A Self-Applying System Beyond National Law*, in GLOBAL LAW WITHOUT A STATE 31 (Gunther Teubner ed., 1997); Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in GLOBAL LAW WITHOUT A STATE 45 (Gunther Teubner ed., 1997).

352. On the role of the peace treaties of Westphalia in 1648 as marking the beginning of the state-centered international system, see *supra* Part V.A.

international trade through treaties.<sup>353</sup> In the course of the processes of globalization, one can observe a new rise and increasing importance in these international private lawmaking procedures, which challenge the norm-creating role of States.

Another example—already mentioned above in connection with the analysis of the International Olympic Committee—is the development of a *lex sportiva internationalis*.<sup>354</sup> where international regulations in the area of international sport law are predominantly created by non-State actors.<sup>355</sup> A final indication for the declining role of States in certain areas of lawmaking is the recent discussion over the creation of a so-called *lex informatica*,<sup>356</sup> which governs the communications between individuals interacting on the Internet, for which State-based legal norms have proven to be largely inadequate and ineffective.<sup>357</sup>

The central authority of the nation-state is also challenged by another phenomenon worth mentioning: the growing assertion of claims and power by sub-State entities in which people no longer define their identities and loyalties only in terms of their State-granted nationality.<sup>358</sup> As Thomas Franck recently observed, there is “a powerful wave of global localism breaking over the cliffs of the State system.”<sup>359</sup>

In evaluating all these different phenomena, one can observe that the international society is undergoing some developments toward a more pluralistic society by enhancing the number of different actors in the international realm. However, the question remains whether it is already possible to describe these developments as producing a transformation of the international society toward a global society in which States constitute only

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353. Fried, *supra* note 46, at 260.

354. For the term *lex sportiva internationalis*, see Gunther Teubner, ‘Global Bukovina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 4 (Gunther Teubner ed., 1997).

355. See generally James R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 45 INT’L & COMP. L. Q. 130 (1996); GERALD SIMON, *PUISSANCE SPORTIVE ET ORDRE JURIDIQUE ETATIQUE* (1990).

356. On the term *lex informatica*, see Aron Mefford, Note, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211 (1997).

357. See *id.* at 213; see also Hercules Booyens, *Is International Law Relinquishing its Exclusively Public Law Nature?*, 4 TULSA J. COMP. & INT’L L. 219, 230 (1997); David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1997); see generally Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911 (1996).

358. Schachter, *supra* note 147, at 15.

359. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT’L L. 359, 360 (1996); see also Thomas M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT’L L. 41, 43 (1997).

one of a whole range of actors.

Despite the variety of challenges to the predominant role of States in the international realm, the institution of the State as such will probably not become obsolete and wither away in the foreseeable future.<sup>360</sup> The challenges by non-State actors to the position of nation-states, although obviously influential in some areas, can in general be regarded as being only sectoral ones, each in itself limited to a specific interest or segment of the society.<sup>361</sup> It thus still remains for the State, as Oscar Schachter pointed out, "to cope with the incessant claims of competing societal groups and to provide public justice essential to social order and responsibility."<sup>362</sup> However, on the other side, States also have already partly changed, and have to continue to change, their behavior in the international system by thinking less territorially and more functionally about how to address global problems with the assistance of non-State actors like NGOs.<sup>363</sup>

Although one cannot conclude that we have seen a fundamental shift from an international society toward a global society, it is nevertheless possible to recognize certain indications of a more multilayered international system and a society with a growing variety of authoritative actors, some of which are very independent of States,<sup>364</sup> most notably, MNCs and NGOs.

#### CONCLUSION

The analysis of the activities of NGOs in contemporary international law demonstrates that on one side these organizations perform the important role of critical "pressure groups" on a global level and engage in constructive contribution to the search for solutions to global problems. On the other side, it also becomes clear that the power and influence of these global non-State actors in the contemporary international system, that will probably increase

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360. See Schachter, *supra* note 147, at 22; Delbrück, *supra* note 197, at 63. See also Samuel K. Murumba, *Grappling with a Grotian Moment: Sovereignty and the Quest for a Normative World Order*, 19 BROOK. J. INT'L L. 829, 866 (1993); Miguel de la Madrid H., *National Sovereignty and Globalization*, 19 HOUS. J. INT'L L. 553, 560 (1997).

361. Schachter, *supra* note 147, at 22.

362. *Id.*

363. See generally RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* 196 (1992); Hobe, *supra* note 5, at 192. On the notion of "functional statehood," see Schreuer, *supra* note 14, at 453.

364. See Mark W. Janis, *International Law?*, 32 HARV. INT'L L.J. 363, 368 (1991); Schreuer, *supra* note 14, at 453.

in the coming years, requires an international legal incorporation of NGOs.

Although the international society has not transformed into a global society, the growing influence and importance of non-State actors, such as NGOs, MNCs, and individuals, require the international legal system to reflect the changes in the international realm that are caused by the increasing diversity of its actors. Recent attempts in this direction have been made with growing international sensitivity toward the behavior of MNCs. Another development worth mentioning is the increasing tendency to enact and enforce individual responsibilities under international law. This is especially reflected in the area of humanitarian law through the work of the International War Crimes Tribunals for the Former Yugoslavia<sup>365</sup> and Rwanda,<sup>366</sup> as well as the recent attempts to create a permanent international criminal court,<sup>367</sup> which led to the adoption of a statute at the UN Conference in Rome on 17 July 1998.<sup>368</sup>

However, this process of strengthening the international rule of law also requires an intensified examination of the legal role of NGOs under contemporary international law. This Article is meant to be a small contribution to the discussion on this evolving issue.

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365. See James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993); Karsten Nowrot, *The Activities of the International Criminal Tribunal for the Former Yugoslavia in the Years 1997 and 1998*, 41 GERM. Y.B. INT'L L. 344 (1999).

366. See, e.g., Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421 (1994); Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177 (1995).

367. On the history and preparatory work, see Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665 (1996). See also M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

368. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998). For a first analysis of the statute in the legal literature, see Christian Tomuschat, *Das Statut von Rom für den Internationalen Strafgerichtshof*, 73 DIE FRIEDENSWARTE 335 (1998); Hans-Peter Kaul, *Durchbruch in Rom - Der Vertrag über den Internationalen Strafgerichtshof*, 46 VEREINTE NATIONEN 125 (1998).

