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# Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations

STEPHAN HOBE\*

## INTRODUCTION

At the threshold of the twenty-first-century, the concept of the state is subject to profound challenges.<sup>1</sup> Among Western European States, one can observe the transfer of tasks from the public to the private sector, such as the well-known example of the privatization of state owned businesses. This intrastate reshifting of tasks, which in its theoretical dimension recalls a debate of the 1970s<sup>2</sup> among James Buchanan<sup>3</sup> and Robert Nozick<sup>4</sup> on the one hand, and John Rawls on the other,<sup>5</sup> is triggered by state budgetary problems. The debate addresses the fundamental question of which state tasks: security, safety, defense, and welfare, to name but four, must be fulfilled by the public sector. A similar process of redefining the division of tasks is also presently underway with regard to the interstate division of tasks. Although the task-shifting process is slightly different within the interstate context, the concept of the state is still significantly affected.

Because of global challenges such as overpopulation, migration, and environmental destruction, states themselves have recognized their own

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1. For a description of such changes see Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT'L L. 447 (1993); JOSEPH A. CAMILLERI & JAMES FALK, *THE END OF SOVEREIGNTY?* (1992); *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. GAOR & U.N. SCOR, 47th Sess., Agenda Item 10 of the preliminary list, U.N. Doc. A/47/277-S/24111 (1992).

2. As advocates of the minimal state, Robert Nozick and James Buchanan apply an economic perspective of statehood and have proposed a profound reduction of statehood to some basic functions. In contrast, John Rawls regards the basic guarantee of a minimum level of distributive justice as a necessary function of statehood. See, e.g., Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); *READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA* (Jeffery Paul ed., 1981); PETER KOLLER, *NEUE THEORIEN DES SOZIALKONTRAKTS* (1987).

3. See generally JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* (1975).

4. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

5. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

limited capacity to respond effectively to these challenges. One important consequence of this recognition has been the internationalization of certain tasks such as peace keeping or, to a more limited extent, the protection of human rights.<sup>6</sup> In these fields, the individual state is powerless, or at least limited, in its capacity to preserve peace and human rights effectively. Interstate cooperation in the form of international governmental organization has increased rapidly since the end of World War II. This international cooperation is reflected by the progressive formulation of an international public interest and by states acting "in the public interest."<sup>7</sup> It results in both a closer integration of states into the international community and a closer interdependence of states. Through the development of an international public interest, the state itself becomes more permeable for international influences of a legally important character.<sup>8</sup>

Considering the transformation of the classical nation-state into an "open constitutional state,"<sup>9</sup> one may feel justified in speaking of a changing notion of statehood. In taking this perspective, however, one is often tempted to limit it to the immediate effects on the state that were initiated by international governmental cooperation. As will be demonstrated in this article, however, this perspective is only one, albeit important, aspect of the close and dialectical relationship of internal and external influences on statehood.

The growing influence of nonstate actors on the concept of statehood is increasingly important, but is often overlooked. Nongovernmental international organizations (NGOs) have established themselves as important actors in international relations. NGOs such as Amnesty International and Greenpeace affect states by monitoring state performance or advocating new policy agendas. Nongovernmental organizations such as these represent the nonstate sector, and their increasing presence is indicative of the growing need

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6. See Jost Delbrück, *The Role of the United Nations in Dealing With Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277, 281-83 (1997).

7. *Id.* at 285-86 (presenting examples of U.N. policy in this respect).

8. See Stephan Hobe, *Statehood at the End of the Twentieth Century - The Model of the "Open State"*, AUS. R. INT'L & EUR. L. (forthcoming 1998).

9. This designation of "open constitutional state" ("*Offener Verfassungsstaat*") dates back to Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 292/293 RECHT & STAAT 1 (1964). See also Jost Delbrück, *Global Migration - Immigration - Multiethnicity: Challenges to the Concept of the Nation-State*, 2 IND. J. GLOBAL LEGAL STUD. 45 (1994); CHRISTIAN TOMUSCHAT, 36 DER VERFASSUNGSSTAAT IM GEFLECHT DER INTERNATIONALEN BEZIEHUNGEN, VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7 (1978); Christian Tomuschat, *Die staatsrechtliche Entscheidung für die internationale Offenheit*, in 7 HANDBUCH DES STAATSRECHTS 483 (Josef Isensee & Paul Kirchhof eds., 1992).

for states to recognize nonstate interests. This development, which has been described as the emergence of international civil society,<sup>10</sup> may affect statehood from a legal perspective as well. If some nonstate actors possess an international legal personality, the state-centered perspective of the international system and international law will need to be modified to reflect the impact of nonstate actors such as NGOs. Such a modification would mean that statehood is affected not only internally and through international governmental cooperation, but also through the activities of NGOs, which act as representatives of international public interests hitherto represented solely by states. This article begins in Part I with a description of the definition of the international nongovernmental organization. Using several well-known NGOs as examples, the article then provides an examination of the activities of these nonstate actors within the international legal system. Part II describes the legal framework of NGO activities and then explores the possible consequences of the legal characterization of NGOs.

## I. FIELDS OF ACTIVITY OF INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS

### *A. International Nongovernmental Organization Defined*

Activities of international NGOs often attract public attention. For example, the activities of Greenpeace, Amnesty International, and Médecins sans Frontières are frequently publicized and widely known. Less well-known NGOs include the International Olympic Committee and the International Chamber of Commerce. These and other NGOs represent a variety of different interests, and the multitude of NGO activities makes defining the concept of a NGO difficult. Nongovernmental international organizations are not founded by states through interstate agreements, but are instead founded by private individuals from different states for the pursuit of common aims. According to the Organization for Economic Cooperation and Development (OECD), "NGOs include profitmaking organizations, foundations, educational institutions, churches and other religious groups and missions, medical organizations and hospitals, unions and professional organizations,

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10. See, e.g., Diane Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107 (1996).

cooperatives and cultural groups as well as voluntary agencies.”<sup>11</sup> A more elaborate definition can be formulated by combining the requirements that nongovernmental entities must meet to qualify for cooperation with the U.N. Economic and Social Council (ECOSOC)<sup>12</sup> with the definition of NGOs proposed by the Union of International Associations.<sup>13</sup> If one takes the bottom line of these two definitions, one can arrive at the following requirements for NGOs: they must be founded by private individuals; be independent of states; be oriented toward the rule of law; pursue public rather than private interests as an objective; demonstrate a transnational scope of activities; and possess a minimal organizational structure.

While most of these requirements are relatively straightforward, the requirement that NGOs be oriented toward the rule of law often provokes discussion. Although it is relatively clear that any action directed precisely against the law, such as acts of the Mafia, is clearly excluded from the definitional scope of NGOs, the situation is much less clear regarding organizations that agree to break the law in order to pursue their goals.

For example, consider the strategy of Greenpeace. This organization breaks the law in order to compel governments and transnational corporations to make use of and enforce their self-claimed international mandate for the preservation of the maritime environment. The actions of organizations such as Greenpeace must be distinguished from the actions of organizations like the Mafia. If an organization by definition fulfills criminal goals, it must clearly be excluded from the circle of NGOs. However, if the organization’s overall objective is generally oriented toward the law, as is the case with Greenpeace, any disregard of the law in the pursuit of its goals cannot prevent the characterization of the organization as a NGO. Rather, such conduct is a matter of criminal or civil responsibility of the organization.

Finally, in order to include as many organizations as possible in the definition of the NGO, profit-oriented organizations should not be immediately excluded as long as profit orientation is not the organization’s sole purpose. However, if the organization’s main objective is to generate profit, as is the case with multinational corporations, the organization must also be excluded from the definition of the NGO. Nongovernmental organizations can thus be

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11. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, VOLUNTARY AID FOR DEVELOPMENT: THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS 14 (1988).

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

13. *Organization Descriptions and Index*, 1 Y.B. INT. ORG. app. 3 (Union of International Associations ed., 26th ed. 1989).

defined as associations founded by natural or legal persons of private law on the basis of a civil law treaty in order to pursue idealistic and not primarily profit-oriented aims in accordance with the law. Such an organization must possess a permanent structure and its own *siège*. Even according to this narrow definition, the number of nongovernmental international organizations has increased considerably from 832 in 1951 to 5,472 in 1996.<sup>14</sup>

*B. The Broad Scope of International NGO Activities in Contemporary International Relations*

The activities of NGOs have a wide scope. For instance, in the religious field, they include the activities of the World Council of Churches, Caritas Internationalis, the World Jewish Congress, and the International Muslim Union. Moreover, in the political field, one could list as examples the work of the Interparliamentary Union or the work of the Socialist International. In the cultural field, the International Pen Club and the International Confederation of Authors and Composers are the most well-known NGOs. Finally, the activities of Amnesty International in the human rights field as well as those of Greenpeace in the field of environmental protection are well known. This wide range of activities makes it impossible to even attempt a comprehensive, systematic description of NGOs. This article will be confined to a discussion of organizations whose activities have a wide range of effects on statehood. Four types of activities will be highlighted: the role of NGOs in the fields of development aid, sports, human rights, and the environment.

*1. Development Aid and the Role of NGOs*

In the field of development aid, NGOs are increasingly regarded as an alternative to direct state action in the implementation of specific projects.<sup>15</sup> In addition to religious associations, Terre des Hommes and CARE are examples of organizations that provide development aid.<sup>16</sup> In principle, the

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14. YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS 81 (1991). See also United Nations Economic and Social Council, *General Review of Arrangements for Consultations with Non-Governmental Organizations*, U.N. Doc. E/Ac.70/1994/5, 3-7 (stating the overall importance and activities of NGOs). See generally Kjell Skjelsbaeck, *The Growth of International Nongovernmental Organizations in the Twentieth Century*, 25 INT'L ORG. 420 (1971).

15. See, e.g., Brigitte Jessen, *Von der Fremdsteuerung zur Selbststeuerung - NGO's in der Entwicklungstheorie und Politik*, 2 FRIEDENSWARTE 141 (1996).

16. For example, Terre des Hommes, founded in 1966 in Geneva, is devoted to the fate of children

state not only accepts the work of international NGOs, but even incorporates their work into its own development policy. Depending on the approach applied, the freedom of action for the NGO may differ: either the NGO must directly implement state directives or carry forward a project relatively autonomously without major state intervention.<sup>17</sup> Thus, in the field of development aid, the role of the NGO does not directly confront that of the state; instead, the state incorporates the expertise of NGOs into its own development policy and strategy. States rely heavily on NGOs in the field of development aid for a variety of reasons. These organizations often perform the tasks of providing basic services such as building organizational structures for development projects in rural areas and political lobbying.<sup>18</sup> In the sector of political lobbying, NGOs have decisive advantages compared to states because, as grassroots organizations, their involvement in civil society facilitates contact with the respective population in the developing country. This may be one major reason why the United Nations seeks the participation of NGOs in the pursuit of the aims of Article 5 of the Desertification Convention.<sup>19</sup>

## 2. *The International Olympic Committee*

In contrast, the International Olympic Committee (IOC) does not fulfill its tasks in cooperation with states but instead acts autonomously within the legal order of the Olympic Games.<sup>20</sup> It is precisely this autonomy that makes the structural organization of the IOC worth examining in detail. In view of the growing professionalization of sports, the relative autonomy of an international sports order is constantly shrinking;<sup>21</sup> however, this is not the case with regard

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from developing countries to whom help is provided by different projects. YVES BEIGBEDER, *LE RÔLE INTERNATIONAL DES ORGANISATIONS NON GOUVERNEMENTALES* 142 (1992). See *id.* at 132-63 (describing their activities and the activities of other NGOs acting in the development field).

17. See Jean Bossuyt & Patrick Develtere, *Between Autonomy and Identity: The Financing Dilemma of NGO's*, *THE COURIER*, July- Aug. 1995, at 76-78 (describing the different forms of NGO involvement).

18. See Peter Sollis, *Partners in Development? The State, NGOs, and the UN in Central America*, in *NGOS, THE UN, AND GLOBAL GOVERNANCE* 189 (Thomas G. Weiss & Leon Gordenker eds., 1996) (describing the mediator function in Central America where NGOs are expected to contribute to reducing poverty, protecting the environment, and intensifying the democratization process).

19. See CAMILLA TOULMIN, *THE CONVENTION TO COMBAT DESERTIFICATION: GUIDELINES FOR NGO ACTIVITY* 24 (1995).

20. Christoph Vedder, *The International Olympic Committee: An Advanced Nongovernmental Organization and the International Law*, 27 *GERMAN Y.B. INT'L L.* 233, 245-49 (1984).

21. For a description of the delicate relationship between the states' jurisdiction and so-called sports jurisdiction see Marcia B. Nelson, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting*

to the international legal order for the Olympic Games. The IOC is recognized as an international NGO that assumes supreme jurisdictional power to act in the area of amateur athletics. State practice appears to accept the relative autonomy of the legal order framed and executed by the IOC.<sup>22</sup> For instance, decisions regarding the selection of Olympic cities have been treated as sovereign, and state courts remain reluctant to grant legal protection against punitive acts of the IOC, such as a prohibition to participate in the Olympics. In an era of fully professionalized sports, such prohibition can, however, amount to a denial of fundamental rights, like the right to free choice and the exercise of a profession. The state's acceptance of the IOC's jurisdiction finds its telling expression in Article 34, paragraph 1 of the Olympic Charter, which defines a country as any state, territory, or part of a territory under effective sports control of the IOC and its absolute discretion. It is, therefore, not without justification that the IOC has been designated as the "United Nations Organization" or the "world government" in the field of sports.<sup>23</sup>

### 3. *The Role of Amnesty International in the Protection of Human Rights*

As a commonly recognized international NGO, Amnesty International (Amnesty) plays a very active role in the protection of human rights.<sup>24</sup> Because Amnesty is probably the most renowned NGO in the field of protection of human rights, it shall be dealt with here *pars pro toto* for all NGOs active in the human rights field. Amnesty's active role encompasses two different but interrelated fields of activity. Amnesty advocates for "prisoners of conscience" by directly approaching governments and confronting them with the individual case of a person who, according to Amnesty's evidence, is subject to governmental acts of mistreatment. This

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*Demands Placed on Olympic National Governing Bodies*, 26 VAND. J. TRANSNAT'L L. 895 (1993). See also Dieter Reuter, *Das selbstgeschaffene Recht des internationalen Sports im Konflikt mit dem Geltungsanspruch des nationalen Rechts*, 1 DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (1996). See generally Stephan Hobe & Christian Tietje, *Europäischer Grundrechtsschutz auch für Profisportler*, in JURISTISCHE SCHULUNG 486 (1996) (discussing the problem of autonomy in the international sports order).

22. See Vedder, *supra* note 20, at 234. The IOC even includes an International Sports Court. See Bruno Simma, *The Court of Arbitration for Sport*, in LIBER AMICORUM IGNAZ SEIDL-HOHENVELDERN 573 (1988).

23. Volker Rittberger & Henning Boeckle, *Das Internationale Olympische Komitee Weltregierung des Sports?*, 2 FRIEDENSWARTE 155, 160 (1996).

24. Article I of Amnesty International's Statute of 1982 determines its aim as "to contribute to the observance throughout the world of human rights as set out in the *Universal Declaration of Human Rights*." *Statute of Amnesty International* (visited Nov. 17, 1997) <<http://www.amnesty.org/aboutai/statute/html>>.



uninstitutionalized action is not covered by any state, but is based on the NGO's own initiative and responsibility and is supplemented by Amnesty's active engagement for the protection of human rights within the respective U.N. and regional human rights protection fora. According to Article 71 of the U.N. Charter<sup>25</sup> and Resolution 1296 of the ECOSOC,<sup>26</sup> Amnesty enjoys the status of a Category II NGO.

In addition to making formal petitions before human rights organs, human rights NGOs are concerned with the task of fact finding. Various human rights organizations occasionally use information uncovered by human rights NGOs.<sup>27</sup> Petitioning the United Nations and performing fact-finding tasks are activities traditionally vested in the power and authority of the state. In pursuing their roles as agents of human rights protection, NGOs such as Amnesty often assume these functions. Because of the assumption of these duties, human rights NGOs may find themselves in conflict with the traditional concept of the state.

#### *4. The Role of NGOs in the Protection of the Environment*

The role of NGOs in the international protection of the environment does not significantly differ from the role taken by NGOs in the human rights field. The influence of environmental NGOs within the U.N. system has increased considerably since the Stockholm Conference on the Human Environment of 1972 and, in particular, since the Rio Conference on Environment and Development (UNCED) of 1992.<sup>28</sup> For example, several UNCED documents specifically foresee a special role for NGOs in global environmental protection. On the other hand, international NGOs like Greenpeace often try to protect the environment through independent, unilateral, and spectacular actions. One example of such unilateral action was Greenpeace's call for a boycott of the Shell Oil Company in order to put pressure on the firm to withdraw its planned dumping of an oil platform into the North Sea.<sup>29</sup> As in the human rights field, environmental NGOs act both in institutionalized and

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25. U.N. CHARTER art. 71.

26. See E.S.C. Res. 1296, *supra* note 12.

27. See David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981-82).

28. See Sally Mopet, *NGO's and the Environment, in THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NONGOVERNMENTAL ORGANIZATIONS IN THE UN SYSTEM* 116 (Peter Willetts ed., 1996).

29. Mark Hertsgaard, *Are the French Heading for a Meltdown?*, WASH. POST, Sept. 3, 1995, at C5.

independent ways when they serve as the agents of the public good of environmental protection.

*C. The Impact on Statehood of NGO Activities: A Preliminary Assessment*

The foregoing description of the activities of NGOs in different fields makes evident that these nonstate actors can interact with statehood in different ways. First, the state may recognize the quasi-autonomy of a specific order built by the NGO, an approach that leads to minimum interference into the state's affairs by the NGO. For example, the International Olympic Order has been left relatively untouched by states. NGOs may also pursue aims that are considered useful for states. The socially interactive nature of NGOs enables these grassroots organizations to pursue development projects for states. Consequently, states use the work of NGOs to further their policies. In these cases, it is mostly the state that determines the degree of freedom the NGO enjoys while pursuing a particular goal. Finally, a NGO may act in the pursuit of the public interest, for instance, the protection of human rights or the environment. Regardless of the form they assume, NGOs represent societal, nonstate interests. The different activities of NGOs, and particularly their role in protecting the public interest, raise the question of the international legal status of NGOs. If these NGOs represent the interests of international society, or even global public interests, rather than the interests of the state, how does one characterize their status in public international law?

II. THE LEGAL FRAMEWORK FOR NGO ACTIVITIES AND POSSIBLE  
CONSEQUENCES OF THE INTERNATIONAL LEGAL PERSONALITY OF NGOS

NGOs are not generally regarded as subjects of international law.<sup>30</sup> The most important reason for this may be that these organizations are neither created nor affected by their existence in the state. They represent the nonstate sector: society. Traditionally, international legal doctrine views the state as the central actor of the international system and, as a result, it accords legal personality under international law only where states consent. Consequently, it is the state that brings other subjects of international law into existence. It

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30. See ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* 416 (1990); Volker Epping, *Völkerrechtssubjecte*, in *VÖLKERRECHT* 6 52, 73-74 (Knut Ipsen ed., 3d ed. 1990); IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 67-69 (4th ed. 1990).

does so either through explicit recognition or implicitly through attributing certain functions to such entities by international legal norms. NGOs are characterized precisely through the noninvolvement of states. Therefore, their basic legal existence cannot be indicative of a respective will of states to attribute legal personality to them. As a result, only an analysis of existing public international law in the different fields can help identify the respective state's will to attribute legal personality to NGOs.

The legal personality of the NGO is inextricably tied to the notion of a subject of international law. Legal personality in international law is a reflection of both an entity's factual participation in international life and community acceptance.<sup>31</sup> The latter requirement transcends mere sociological considerations; community acceptance is to a considerable extent reflected in international legal norms awarding rights and duties to entities.<sup>32</sup> Consequently, the number of subjects of international law is not a "closed shop", and subjects of international law can differ considerably in character.<sup>33</sup> Therefore, any change of international life can bring about the necessity of awarding subject quality to entities which before were not considered to possess it.

The best example of an enlargement of the number of subjects of international law is the recognition of governmental international organizations that took place in the twentieth century. In the *Reparations Case*, the International Court of Justice explicitly agreed to recognize the United Nations as a subject of international law.<sup>34</sup> The court had to decide whether the United Nations as an international governmental organization had the legal capacity to bring an international claim against the responsible government on behalf of one of its agents for damage incurred in the service of the organization. The court examined the historical development of international law. Whereas in the beginning of modern international law only states existed, the increasing collective activities of states culminated in the creation of the United Nations as an international governmental organization. Consequently, the United

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31. VERDROSS & SIMMA, *supra* note 30, at 221-23; OPPENHEIM'S INTERNATIONAL LAW, VOLUME 1: PEACE 119-20 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

32. See MALCOLM N. SHAW, INTERNATIONAL LAW 135-37 (3d ed. 1991).

33. See, for example, the statement of the International Court of Justice in the *Reparations Case*: "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 180 (June 27).

34. *Id.* at 178-79.

Nations did not possess all of the rights of states, but had to be regarded as an international person possessing certain rights and duties under international law.<sup>35</sup> The *Reparations Case* revealed that in the court's opinion, although only states possess full international legal personality, some recognition of rights must be afforded to international organizations.

Recognition of the subject quality of international NGOs remains disputed. Although there is not unanimity on the prerequisites for attaining the status of a subject of international law, one should consider NGOs as subjects of international law because their conduct is directly regulated by international law.<sup>36</sup> The Institut de Droit International has addressed this issue on several occasions,<sup>37</sup> and the Council of Europe adopted a Convention on the subject quality of NGOs on April 24, 1986.<sup>38</sup> This Convention, however, addresses only the question of the intrastate legal status of NGOs. None of these examinations of NGOs addressed the fundamental question of the extent of subject quality of international nongovernmental organizations in international law.

In addition to the fact that the exact subject quality of international nongovernmental organizations remains undefined, the existing international law that currently governs international NGOs also remains open to various interpretations. The basic provision governing international NGOs—however vaguely phrased—is Article 71 of the U.N. Charter. Article 71 opens the possibility to the ECOSOC to "make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence . . . ."<sup>39</sup> The text of this provision is commonly regarded as a compromise among those who advocate NGO participation in the United Nation's work and those who oppose such participation.<sup>40</sup> A reading of Article 71 of the U.N. Charter may leave one with doubts regarding any entitlement of nongovernmental organizations in the sense of a legal subject quality.

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35. *Id.* at 179.

36. See VERDROSS & SIMMA, *supra* note 30, at 200.

37. See generally L'INSTITUT DE DROIT INTERNATIONAL, ANNUIARE DE L'INSTITUT DE DROIT INTERNATIONAL (1950).

38. See Marie-Odile Wiederkehr, *La Convention Européenne sur la Reconnaissance de la Personnalité Juridique des Organisations Internationales non Gouvernementales*, 33 ANNUIARE DE L'INSTITUT DE DROIT INTERNATIONAL 749 (1987)

39. U.N. CHARTER art. 71. See Rainer Lagoni, *Article 71*, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY (Bruno Simma et al. eds., 1994).

40. Lagoni, *supra* note 39, at 914.

However, before a firm conclusion can be reached, one must examine how member states of the United Nations have applied this provision.

*A. The Application of ECOSOC Resolution 1296 to NGOs*

To understand the United Nation's approach to NGOs, one must look closely at ECOSOC Resolution 1296 which, by implementing Article 71 of the U.N. Charter, grants consultative and observer status to certain NGOs.<sup>41</sup> Resolution 1296 is fundamentally important because a discussion is presently taking place within the United Nations designed to establish a more general legal basis for the relationship between NGOs and the United Nations.<sup>42</sup>

ECOSOC Resolution 1296 establishes the characteristics of the relationship between the ECOSOC and NGOs by categorizing NGOs based on the amount of their involvement with ECOSOC activities.<sup>43</sup> Thus, Category I NGOs, those possessing common consultative status, must be involved "with most of the activities of the Council . . . and have marked and sustained contributions to make to the achievement of the objectives of the United Nations" in their respective fields. They must also be "closely involved with the economic and social life of the peoples of the areas they represent and whose membership . . . is broadly representative of major segments of the population in a large number of countries . . . ."<sup>44</sup> Category II NGOs include organizations that have a special competence and a special interest in only a few of the fields of activity covered by the Council, but which are internationally known within these specific areas of activity.<sup>45</sup> All other NGOs comprise Category III NGOs and are on a roster as organizations that possess neither common nor special consultative status but which the ECOSOC, as well as the Secretary General of the United Nations, considers appropriate to deliver useful contributions to the work of the ECOSOC in specific cases.<sup>46</sup>

The different categories qualify NGOs for different participatory rights. For instance, only Category I NGOs are entitled to submit special topics for consideration on the provisional agenda of the ECOSOC.<sup>47</sup> Category I and II

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41. See generally E.S.C. Res. 1296, *supra* note 12. See also Lagoni, *supra* note 39, at 905-10.

42. Klaus Hüfner, *Non-Governmental Organizations (NGOs) im System der Vereinten Nationen*, 2 FRIEDENSWARTE 115 (1996). See also Otto, *supra* note 10.

43. See E.S.C. Res. 1296, *supra* note 12, at 1-3.

44. *Id.* at 16(a).

45. *Id.* at 16(b).

46. *Id.* at 19.

47. See *id.* at 21, 27.

NGOs are allowed to nominate observers to the sessions of the Council and its subcommittees.<sup>48</sup> With regard to hearings, Category I and II NGOs "may consult with the organization,"<sup>49</sup> and Category III NGOs "may also be heard by the commission or other subsidiary organs."<sup>50</sup> Generally, Category I NGOs are allowed to make longer interventions than those belonging to Category II or to Category III. Furthermore, in hearings, Category I NGOs "shall be entitled" to present their point of view.<sup>51</sup>

The United Nation's practices under ECOSOC Resolution 1296 reveal that the exact wording of Article 71 of the U.N. Charter does not precisely reflect the importance and the functions of NGOs, at least within the U.N. system. NGOs undoubtedly fulfill important functions, and their right to articulate interests before U.N. fora is certainly indicative of some form of entitlement recognized by state practice within the United Nations.<sup>52</sup>

As to the current discussion within the United Nations on broadening the basis of ECOSOC Resolution 1296, it seems at least possible that, in view of the importance and legal significance of their work, NGOs will become more valued legally than has been the case in the past. It is at least the will of the states that are aligned in the Group of 77 to enlarge the participatory rights of NGOs to other fields and organs of the United Nations.<sup>53</sup> This development will most certainly lead to some important theoretical repercussions in view of the role of NGOs and the problem of their legal personality under international law.

### *B. Secondary Law and NGO Entitlement*

In addition to ECOSOC Resolution 1296, the secondary law of organizations formed to protect human rights and the environment also reflects a form of NGO entitlement. Secondary public international law refers to

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48. *Id.* at 28.

49. *Id.* at 31(a).

50. *Id.* at 31(b).

51. *Id.* at 25(a). On the regional level, the close cooperation between the Council of Europe and NGOs operates more or less according to the same rules as those of ECOSOC. See Andrew Drzemezewski, *The Role of NGOs in Human Rights Matters in the Council of Europe*, 8 HUM. RTS. L.J. 273 (1987).

52. See Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 285-89 (1994).

53. See *Report of the Open-Ended Working Group on the Review of Arrangements for Consultations with Non-Governmental Organizations*, U.N. ESCOR Commission on Human Rights, U.N. Doc. E/1995/83/Add. 1 (1995).

international law that has been implemented by international governmental organizations. As such, it is, as the following examples demonstrate, at least indirectly indicative of the state's will and acceptance of the function and status of NGOs. For example, the Committee on Economic, Social, and Cultural Rights (UNESCO), which was recently established under the International Covenant on Civil and Political Rights, foresees in its Rule 69 specific participatory rights for NGOs.<sup>54</sup>

In addition, according to the Rules of Procedure of the Committee on the Prevention of Discrimination and the Protection of Minorities, a subcommittee of the United Nations Commission on Human Rights (a suborgan of ECOSOC), NGOs are entitled to submit petitions in the name of victims of grave and systematic violations of human rights.<sup>55</sup> The Rules of Procedure 75 and 76 of the U.N. Commission on Human Rights also entitle NGOs to the same kind of consultations that are foreseen in the procedure before ECOSOC.<sup>56</sup>

Resolution 104 EX/3 of the Executive Committee of UNESCO provides yet another example of the secondary law entitlements of NGOs. According to this Resolution, NGOs are entitled to submit petitions on behalf of victims of respective violations of human rights that fall within UNESCO's competence to the Committee on Conventions and Recommendations.<sup>57</sup> Moreover, NGOs enjoy a consultative status according to the Rules of Procedure of the U.N. High Commissioner for Refugees for the Cooperation with Nongovernmental Organizations.<sup>58</sup> Each of these examples reflects entitlements for international NGOs. The fact that the international organ

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54. See Michael H. Posner, *The Establishment of the Right of Nongovernmental Human Rights Groups to Operate*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 416-17 (Louis Henkin et al. eds., 1994).

55. U.N. ESCOR COMMISSION ON HUMAN RIGHTS, *Subcommission on Prevention of Discrimination and Protection of Minorities*, 2(a), U.N. Doc. E/CN.4/1070 (1971); E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add. 1.

56. UNITED NATIONS, RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL 18 (1983).

57. See 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, 43 (Jost Delbrück et al. eds., 1992).

58. *Rules of Procedure for the Executive Committee of the High Commissioner's Programme*, U.N. GAOR, 39th Sess., U.N. Doc. A/AC.96/187/Rev.4 (1988). See Dinah Shelton, *The Participation of Non-governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (discussing the growing preparedness of international tribunals to admit NGOs as amici curiae in order to use their expertise for clarification of a matter under the point of view of "public interest").

concerned is obliged to decide on items introduced by NGOs makes it evident that these norms are meant to be entitlements and not nonbinding guidelines.

Viewed against the background of secondary international law, those concepts contained in primary international law, such as international treaties concluded by states or the founding document of an international governmental organization like the U.N. Charter, are even more indicative of the respective international legal status of NGOs. For example, according to Article 48 of the European Convention on Human Rights, which was introduced through the 9th Protocol to this Convention,<sup>59</sup> NGOs are entitled to make communications to the European Commission on Human Rights.<sup>60</sup> This provision is important because it grants a clear entitlement to NGOs. An equal entitlement for NGOs is contained in Article 44 of the American Convention on Human Rights.<sup>61</sup> Finally, although not yet law, NGOs are actively involved with the drafting of international law as is the case with human rights, for example, the Convention of the Rights of the Child,<sup>62</sup> as well as with environmental protection, as was the case with the Biodiversity Convention.<sup>63</sup>

### *C. The Enforcement Role of the NGO*

International nongovernmental organizations also play important roles in the enforcement of international law. Perhaps the best example of this function is in the field of environmental law. The growing involvement of NGOs in the negotiating process of international environmental law has already been mentioned in this article. Rule 65 of the UNCED Rules of Procedure provides observer status to NGOs invited to the Conference and the possibility to make oral statements upon invitation of the presiding officer.<sup>64</sup>

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59. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 48, 213 U.N.T.S. 221.

60. See Irene Barreto, *Article 48*, in *LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* 793-803 (Louis Edmond Pettiti et al. eds., 1995).

61. See THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 200 (2d. ed. 1995); Jochen A. Frowein, *The European and the American Convention on Human Rights: A Comparison*, 1 *HUM. RTS. L.J.* 44, 64 (1980).

62. See Cynthia Price-Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention of the Child*, 12 *HUM. RTS. Q.* 137 (1990).

63. Convention on Biological Diversity, June 5, 1992, 31 *I.L.M.* 822; Rüdiger Wolfrum, *Globale Ressourcen gemeinsam verwalten*, Remarks at the Annual Meeting of the Max Planck Society 7 (June 4, 1997) (unpublished manuscript, on file with author).

64. *Adoption of the Rules of Procedure*, U.N. Conference on Environment and Development, Agenda Item 3, Rule 65, at 18, U.N. Doc. A/Conf. 151/2 (1992).



NGOs have not only contributed significantly to the negotiation of international environmental protection rules but have also become integrated into the enforcement of modern international environmental law.

For instance, Article 11 of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>65</sup> awards an observer status to NGOs. According to Article 12, NGOs can also assist the Secretariat.<sup>66</sup> The same observer status is granted to NGOs by Article 6(5) of the Convention for the Protection of the Ozone Layer.<sup>67</sup> Moreover, a direct implementation function has been awarded to the International Union for the Conservation of Nature and Natural Resources, a NGO which, under Article 8 of the Convention on Wetlands of International Importance,<sup>68</sup> was given the function of performing the Secretariat's duties until the appointment of another organization or government. Finally, under Article 8(3) of the Convention Concerning the Protection of the World Cultural and Natural Heritage,<sup>69</sup> NGOs can attend the meetings of the UNESCO Intergovernmental Committee for the Protection of the Cultural and Natural Heritage in an advisory capacity.

These examples demonstrate that, in addition to the outstanding entrustment of a NGO with the Secretariat's function for an intermediate period in the Wetlands Convention, there are a growing number of cases in which the advice and assistance of NGOs is directly sought for the protection of the environment. As in the field of human rights, environmental protection NGOs assist states in the implementation of an international convention. The concept behind such involvement of NGOs in the implementation process becomes evident if one looks at Article 5 of the Desertification Convention. Here, the function of NGOs is described as "to promote awareness and facilitate the participation of local populations . . . in efforts to combat desertification and mitigate the effects of drought."<sup>70</sup> In other words, the NGO's grassroots character facilitates the implementation of the respective international convention.

The role, function, and importance of NGOs has been considerably augmented in the recent past. Primary and secondary international law

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65. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. 12, 12 I.L.M. 1085.

66. *Id.*

67. Vienna Convention for the Protection of the Ozone Layer, May 2, 1985, art. 6(5), 26 I.L.M. 1529.

68. Convention on Wetlands of International Importance, Oct. 12, 1972, art. 8, 11 I.L.M. 963.

69. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted Nov. 16, 1972, art. 8(3), 11 I.L.M. 1358.

70. See TOULMIN, *supra* note 19, at 24.

provides some entitlements for NGOs. These entitlements may eventually lead to the conclusion that rules of international law will grant at least partial subject status to international NGOs.<sup>71</sup> This may not be sufficient to accept the subject quality for all kinds of NGOs in any situation and position. However, seen in the perspective of the present discussion within the United Nations on a broadening of the legal framework for cooperation with NGOs, it is sufficient to encourage deeper thought about the changing role of statehood in the international system. It has become obvious during the previous parts of this article that there are many cases in which societal interests are no longer represented by states but are instead represented by international NGOs.

#### CONCLUSION

This article has observed some innovative trends with regard to NGOs. Disregarding multinational corporations<sup>72</sup> and the traditional role of nonstate actors, the increasingly important role that NGOs play in their respective fields is now contributing to the international legal involvement and recognition of these entities. Although one cannot speak yet of a general recognition of such entities as subjects of international law, the current state of affairs seems to indicate that there are some cases of partial subject quality of certain NGOs in international law. This movement is a further indication of the current trend of denationalization in the international system and of the process of globalization. It would support the opinion of those, including the U.N. Secretary General, who have observed a growing trend toward the development of a global society as opposed to the world of states.<sup>73</sup>

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71. See IGNAZ SEIDL-HOHENVELDERN & GERHARD LOIBL, *DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIEBLICH DER SUPRANATIONALEN GEMEINSCHAFTEN* 1030 (6th ed. 1995); Georg Dahm et al., *Völkerrecht* 1 2 (forthcoming 1998) (discussing a legal personality in the broader sense as subjects of secondary international law). See Joseph J. Lador-Lederer, *Nichtstaatliche Organisationen und die Frage der Erweiterung des Kreises der Völkerrechtssubjekte*, 23 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [hereinafter *ZaöRV*] 657, 657-78 (1963) (discussing an already existing subject quality). See also Hermann Mosler, *Die Erweiterung des Kreises der Völkerrechtssubjekte*, 22 *ZaöRV* 1, 45 (1962).

72. See Texts from the Council of the Organization for Economic Cooperation and Development Press Release, July 19, 1976, 75 DEP'T ST. BULL., at 83; United Nations Commission on the Transnational Corporations, *Code of Conduct on Transnational Corporations*, Special Sess., Agenda Item 4, U.N. Doc E/C.10/1983/S/2 (1983); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213(f) (1987) (noting that transnational corporations, despite their factual importance, have not yet achieved independent status in international law).

73. See *General Review of Arrangements for Consultations with Non-Governmental Organizations: Report of the Secretary-General*, U.N. GAOR, 1st Sess., Agenda Item 3, at 3, U.N. Doc. E/AC.70/1994/5

This study can support this trend, at least partially. Through an examination of the work of NGOs and their effects on statehood, we have seen that in some cases the autonomy of a certain legal order created by NGOs, for example, the Olympic Order, is partly recognized by states. NGOs are sometimes even partly integrated into the state's pursuit of tasks such as development aid. In addition, we have seen that only a third sector—exemplified by the fields of human rights and environmental protection—is truly characterized by the possibility of a fundamental challenge to statehood through the work and the activities of NGOs. In these fields of activity, the NGOs have completely transcended the role of representing interests that can be associated with the state. Further, the interests represented transcend statehood for a global interest. This latter development of a decrease of the state's functions is paralleled by the growing recognition of the individual in international law. This parallel also allows for a tentative conclusion as to the partial subject quality of the individual.<sup>74</sup> International law is on the verge of reluctantly accepting a growing institutionalization of the representation of the private sector.

The growing importance and legal recognition of the activities of NGOs are indicative of a changing paradigm in the international system and in international law. Within the international system, the state is losing its formerly dominant position. Other organizations representing community interests are becoming increasingly important. On the one hand, international governmental organizations serve to help states fulfill all such tasks and solve those problems whose scope transcends the state's capacity. This development has accurately been described as internationalization. On the other hand, the increasingly global nature of problems does not lead to internationalization but toward denationalization.<sup>75</sup> This trend defines the future tasks of at least some international NGOs: as an entity or as entities that are needed to represent global interests. Such public interests are spelled out in the *erga omnes* norms of international law.<sup>76</sup> As "agent(s) of the public interest",<sup>77</sup> the importance of

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(1994).

74. See SHAW, *supra* note 33, at 178-81; BROWNLIE, *supra* note 31, at 553, 601; DANIEL PATRICK O'CONNELL, 1 INTERNATIONAL LAW 106-12 (1970).

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

76. See Jost Delbrück, *A More Effective International Law or a New "World Law"*, 68 IND. L.J. 705 (1993) (discussing the conception of public interest norms).

77. See Roberto S. Leyendecker, *Organisations Non-Gouvernementales et Droit International*, 2 HAGUE Y.B. INT'L L. 169, 174 (1989).

NGOs can only grow in the future. In such a case, the only logical legal conclusion is the recognition of at least a partial subject quality of international NGOs. Such recognition demonstrates even more clearly the important challenge to statehood posed by NGOs, which are about to become a competitor to the state not only in factual but also in legal terms.

