International law reconceptualised: the role of NGOs.

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International Law Reconceptualised: The Role of NGOs

A thesis submitted in partial fulfilment of the requirements of The Robert Gordon University for the degree of Doctor of Philosophy.

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Declaration

I, Uche Iloka, now declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other University. I authorise the university to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

Dedication

To my sugar- Ife, my sweetie pie – Adachi and my main man- Emeka.

You are my world!

We did it!

I love you, and I thank you.

Acknowledgements

Ultimately, I am indebted to God, for his love, grace, mercy and partnership through this journey. I am eternally grateful.

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Abstract

International law has largely adhered to its traditional foundations, centring upon states as the pre-eminent actors. States have generally remained as the main subjects of international law, and state-centric considerations such as their jurisdiction, sovereignty and relations with other states, the law's main concern. There has been a general lack of attention, or sufficient attention, to the 'other' international players now common in the 21st Century. This is concerning. A greater recognition and acceptance of these 'other' international players is needed, and this could lead to the reconceptualisation of international law in the 21st century. The development of international law from the central tenets of its Westphalian inception to a form that adequately reflects modern international society is required. A failure of evolution could bring about its irrelevance.

The reconceptualisation of the paradigm of international law in a way that makes it more reflective of 21st-century realities would lead to its enduring relevance. A failure to adapt could be its downfall. The Westphalian conception of international law can be seen as the glue that holds the international legal framework together; shaping and defining the space within which states relate. However, in the 21st century, other actors have come to play a real role in that international space, and have done so actively and relevantly. Expectedly, the proliferation of activities by these new players in the international space has worn the adhesive attribute of the proverbial glue of the Westphalian notion of international law. It is becoming more apparent that the reconceptualisation of the international legal paradigm is necessary.

Amongst the new players, Non-Governmental Organisations (NGOs) play a prominent role. NGOs have played and continue to play a highly relevant and important role in today's global community. Their influence and impact are becoming increasingly pivotal to the legal, social, economic and political construct of today's global community, and their role remains central to the reconceptualisation of international law and the international legal framework.

This thesis argues that NGOs must play a central role in the imperative that is the reconceptualisation of the international legal paradigm to maintain its fitness for purpose in the face of globalisation.

Keywords: Westphalian International Law, Sovereignty, United Nations, Globalisation, Global Governance, NGOs, Legal Pluralism.

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Table of Statutes, Treaties and Conventions

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List of Abbreviations

AfCFTA	African Continental Free Trade Area
AU	African Union
CDC	US Centers for Disease Control and Prevention
CEIP	Carnegie Endowment for International Peace
COVID-19	Coronavirus Disease 2019
CPJ	Committee to Protect Journalists
CSO	Civil Society Organisations
CSW	Christian Solidarity Worldwide
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	Economic and Social Council
EU	European Union
FIFA	The Fédération Internationale de Football Association
GAC	Governmental Advisory Committee
GATT	General Agreement on Tariffs and Trade
GBD	Geneva Business Dialogue
GPEI	Global Polio Eradication Initiative
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Criminal Courrt
ICC	International Chamber of Commerce
ICE	U.S. Immigration and Customs Enforcement
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IETF	Internet Engineering Task Force
ILO	International Labour Organisation

IMF	International Monetary Fund
IP	Internet Protocol
ITU	International Telecommunication Union
LGBT	Lesbian, Gay, Bisexual or Transgender
MNCs	Multi-national corporations
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organisations
NIC	US National Intelligence Council
NIEO	New International Economic Order
OAU	Organisation of African Unity
SMEs	Small and Medium-size Enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	UN Conference on Trade and Development
UNICEF	United Nations Children's Fund
US	United States of America
USMCA	The United States–Mexico–Canada Agreement
WEC	World Economic Conference
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WSIS	World Summit on the Information Society
WTO	World Trade Organisation

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Chapter 1

1.1. Chapter 1: Introduction

The 21st-century world has changed remarkably, and it has done so as though in haste. Hence, establishing the need for a paradigm shift in the conceptualisation of international law from its limited state-centric Westphalia design to a more inclusive 21st Century conception, using the increasing global presence, work, and contributions of NGOs as an example, is imperative.

The former secretary-general of the United Nations - *Kofi Annan* had held the view that any attempt to argue with the realities and impact of globalisation in our world today could be likened to arguing with the laws of gravity.[1] Globalisation is the single most significant attribute of the 21st Century. Few subjects, however, are as polarising and intoxicating as globalisation. Globalisation blurs the boundaries between states and puts to question the concept of sovereignty. International law, like the proverbial old wineskin, fashioned by the fabrics and threads of Westphalian concepts such as the principles of state and sovereignty, seeks to house within itself, the phenomenal new wine – globalisation. In this 21st Century, it has become apparent that the skin of the Westphalian international law is undoubtedly thin, and it becomes possible and even probable that it could burst and spill. Then it will be apparent that a new concept of international law is inevitable.

There exists considerable scepticism as to a reconceptualisation of the old international legal framework to reflect the realities of globalisation. However, at the same time, the gravitation of the international community, particularly with the emergence of diverse, influential non-state global players, suggests that a reconceptualised international legal framework is imperative. Daniel Bethlehem remarked that sovereignty and territorial boundaries, upon which the Westphalian international law is pivoted, are like rocks in a river. They may impede the flow, and even perhaps, on occasion, dam up the water. More usually, however, they merely act as an impediment to the directionality of the flow of water, which eventually finds a new pathway on its free-flowing gravitational course.[2] A reconceptualised 21st-century international law is certainly more probable than not!

[1] 'Non-Governmental Organization/DPI' (*Un.org*, 2016) <http://www.un.org/dpi/ngosection/annualconfs/53/sg-address.html> accessed 28 November 2016.

[2] D. Bethlehem, 'The End of Geography: The Changing Nature Of The International System And The Challenge To International Law' (2014) 25 European Journal of International Law.

Undoubtedly, some of the key non-state players that have already emerged in the global space, whose influence prod at the legitimacy of the Westphalian international law in the 21st Century, are overwhelmingly significant. However, this research focuses its enquiry on just NGOs, largely because their interests are not for profit, but firstly, for the furtherance of a variety of 'worthy causes' and secondly, without the encumbrance of government. Governments are an extension of states and the Westphalian regime. They are arguably in the same mix of the quagmire of relevance or irrelevance of the Westphalian international law in the face of globalisation. These defining characteristics of NGOs being for causes and without any government influence, accrue to NGOs some moral currency from the general global populace in the 21st Century and place them in a very strategic position in the face of globalisation.

Hence, the core aim of establishing the need for a paradigm shift in the conceptualisation of international law from its limited state-centric Westphalia design to a more inclusive 21st Century conception, using the increasing global presence, work, and contributions of NGOs as an example.

The research is segmented into eight chapters. Each chapter inches the research closer to the central aim of the research – a paradigm shift in the conceptualisation of international law, and the role that NGOs play in the process.

So, Chapter 1 sets the framework for the exploration of the concept of international law as it is, sectioning the research question in two prongs. Concerning the first prong, it questions whether the conceptualisation of international law from a state-centric Westphalian paradigm to a more inclusive concept is pivotal to its fitness for purpose in the 21st Century. On the second prong, it draws the map for the arguments that will ensue in the course of the thesis to determine NGO as central to this paradigm shift. It highlights that these two-pronged questions are constructed in a way that the later prong is dependent on the findings of the former.

The thesis progresses the arguments with Chapter 2. It depicts the basis for these research enquiries in the light of the prevalent argument that traditional-Westphalian inspired assumptions about the state power and authority in the international space are increasingly incapable of providing a contemporary understanding of today's international legal system.

After that, chapter 3 highlights the deficit of the Westphalian concept of international law and the challenges facing the current conceptualisation of sovereignty. It will assess the impacts of globalisation vis-à-vis the "fitness for purpose" of the Westphalian international legal framework for the 21st Century. It shows how the signature attributes of sovereignty have been supplanted by the myriad of factors of globalisation, with emphasis on three, i.e. failed states, global health and the internet.

Furthermore, chapter 4 engages with the process of reconceptualisation. It explores the potential of reconceptualisation by evaluating the notion of sovereignty and its reconceptualisation. In discussing this point, it illustrates the concept of sovereignty in its full essence, which includes a depiction of the elements of consent and the delegation of sovereignty by state. It argues that sovereignty delegated does not compromise its efficacy but instead reveals it in its full essence.

Chapter 5 commences with the second prong of the research question and deals with the role of NGOs in reconceptualisation. Firstly, it examines the emergence of NGOs, their increasing influence, and the extent to which they are acknowledged or given some legitimacy on the international plane. Along these lines, it critiques the extent of their participation in international law, particularly in their relations with the United Nations. It submits that there is a lag between the extent of the participation of NGOs and their actual influence in international affairs.

To buttress this point further, chapter 6 examines the International Chamber of Commerce as an example of the growing influence of NGOs. The ICC is depicted to be an informal international lawmaker, whose influence has impacted the international legal landscape for over a century. The chapter argues that the ICC is more than just a pressure group, and its composition and workings give impetus to the argument that new forms of diplomacy and global governance on the international plane have emerged. These new norms of international governance should be considered more seriously.

To this end, chapter 7 considers the norms of international law and the making of customary international law; with a focus on state practice and *opinio juris*. Then, it examines the concept of plurality of norms with various examples. It submits that plurality of the international legal order is a bed-rock for the inclusion of the order of NGOs in the reconceptualisation of international law in the 21st Century. On this premise, it poses a question for the reconceptualisation of international law by adding layers to the international pluralistic legal paradigm. In so doing, a justification for the

legitimised role of NGOs as a significant added layer of governance will be made to the end of keeping international law in step with the 21st-century global realities.

Finally, chapter 8 concludes with a summation of the preceding arguments and the ensuing legal thoughts for consideration.

1.2. Research Question and Development of the Research Objectives

> *Whether the reconceptualisation of international law from a state-centric Westphalian paradigm, to a more inclusive concept, is pivotal to making it more fit for purpose[3] in the 21st Century and how NGOs are central to this paradigm shift?*

It is a two-pronged research question, with the latter prong premised on the findings of the former. The research question forms the basis for the development of the objectives of the study.

Firstly, this research question infers that the current international legal framework could be more fit for purpose and that its relevance in today's globalised world is shaken and uncertain. There is the current predominant argument that the traditional Westphalian-inspired assumptions about the state, power and authority in the international space are increasingly incapable of providing a contemporary understanding of today's international legal system. Westphalian sovereignty is the concept of nation-state sovereignty based on two principles: territoriality and the

[3] The term 'more fit for purpose' as a comparative adjective suggest that the Westphalian status quo could still be fitting, albeit, insufficient. The increasing pace in the integration of the international community brings to question the perpetuity of the Westphalian's fitness in the near long term. Oxford's Lexico, in defining the phrase – fit for purpose, refers to an institution, facility, etc. well-equipped or well suited for its designated role or purpose. See -'Fit for Purpose | Definition of Fit for Purpose by Oxford Dictionary on Lexico.Com Also Meaning of Fit for Purpose' (Lexico Dictionaries | English, 2020) <https://www.lexico.com/definition/fit_for_purpose> accessed 11 July 2020.
This definition underpins the crux of this thesis – that is the Westphalian design being fit for the purposes of the 1600s and onwards vis à vis the question of it being outmoded in light of the 21st century purposes. Following this definition, the context of the phrase 'more fit for purpose' in this work relates to the question of whether the Westphalian design and its inspired assumptions about the state, power and authority in the international space are capable of providing a contemporary understanding of today's international legal context. It suggest that the Westphalian notion of international law is not fit for its intended design of regulating the international community, primarily because it is not sufficiently representative of the 21st century international community. Essentially, being a state-centric notion; it does not effectively capture the significance of non-state actors, informal normative structures, and private, economic power in the global political economy and basically a pluralised international community. For example, the ensuing events from the 9/11 bombing led to one of the most enigmatic wars in history; the War on Terror. The inscrutable nature of the war is hinged on the point that the declaration of the war in the first place was against an abstract noun. Evidently far-removed from the Westphalian International Law depiction of war to be an armed conflict between states and not against flagless belligerents or independent citizens of various states scattered abroad.

exclusion of external actors from domestic authority structures. It has been argued that the Westphalian inspired notions of state-centricity, positivist international law, and 'public' definitions of authority are increasingly inadequate. They are incapable of capturing the significance of non-state actors, informal normative structures, and private, economic power in the global political economy.[4] In this post-modern 21st-Century times, there is a widening gulf between the theory and practice of the Westphalian system[5]. This divergence between theory and practice suggests in strong terms that the international legal system faces a question as to its capability of theorising contemporary developments of globalisation that do not fit within the Westphalian paradigm of international law[6].

The global community is yet to have a relevant international legal framework that adequately provides for the current realities of globalisation. The Westphalian international law struggles with its fitness for purpose; perpetually lagging behind the fast-paced global community and for the most part, in a state of indeterminacy. *Martti Koskenniemi* in the preface to the reissue of From Apology to Utopia said –

> *'Examined from the outside, international law appears to be sidelined by the informal structures of private governance while, from the inside, its functional differentiation ('fragmentation') has raised questions of whether any unifying centre remains in public international law that would seem worthy of professional or ideological commitment.'*[7]

It is, therefore, imperative that the current international legal paradigm is remodelled to be fit for purpose in governing the 21st-century international community. Whether or not the reconceptualised paradigm would result in the emergence of a global constitution or a more empowered and inclusive United Nations is beyond the scope of this research. However, it is of interest to the researcher. There are arguments that it is an exercise in futility to expect a utopian international legal concept and like framework far removed from the realities and social behaviours in the international relations of states and citizens, even in the 21st Century. Indeed, this research, to some extent, is aligned with that viewpoint. It is acknowledged that the increasing impact

[4] Gabel, Medard; Henry Bruner (2003). *Global Inc.: An Atlas of the Multinational Corporation*. New York: The New Press. p. 2.
[5] A. Claire Cutler (2001), 'Critical Reflections on the Westphalalian Assumptions of International Law and Organization; A Crisis of Legitimacy', *Review of International Studies,* 27, pp. 133 - 50
[6] Ibid
[7] Martti Koskenniemmi, 'From Apology to Utopia: The structure of International Legal Argument' *Cambridge University Press* (2005) pg xiii

of globalisation, tags along with it the temptation to swim consonant with the currents of its tides, thereby nursing a barren expectation for an entirely new international legal framework. On the contrary, the question this research seeks to explore is not the possibility of a *new* international legal framework, but a *reconceptualised* international legal paradigm with the centrality of NGOs as one of its key catalysts.

This position is what leads to the second prong of the question. Amongst the many other key players that have come on the international scene, the role of NGOs in a reconceptualised international legal framework underpins this research. The choice of NGOs as the focal subject of this research is because NGOs interfaces across all the strata of the international legal system. It engages with all players in the global space. NGOs are characterised by their apparent diversity. They encompass a broad range of organisations, social movements, and pressure groups which are the pivot of activism in various fields of public concern.[8] Also, interest comes from the essential characteristics of NGOs; some of which could be gleaned from the definition of *Peter Macalister-Smith*. His definition underpins the choice of this subject of research. In defining non-governmental organisations, he explained that as their name indicates, they are not established by a government, nor by an international agreement. Also, while they are typically private organisations founded on that basis and under the regime of private law of a state, the concerns, purposes and objects of NGOs are, in contrast to their origins, of public nature,[9] and they are not profit-seeking.[10] It puts them in a vantage position of being referred to as the social conscience of the society because they have no government agenda nor personal agenda driven by profit.

Furthermore, their legitimacy in the international legal order is gradually gathering some momentum. For instance, Article 71 of the UN-Charter enables the Economic and Social Council to consult with NGOs which are concerned with matters within its competence.[11]

[8] Daniel Thurer (1999), 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law,* Bzerlin: Dunker & Humbolt, p. 43

[9] Peter Macalister-Smith, Non-Governmental Organisations, Humanitarian Action and Human Rights in : Rudolf Bernhardt and Ulrich Beyerlin, *Recht Zwischen Umbruch Und Bewahrung* (1st edn, Springer 1995). See also - Jürgen Schramm, *The Role Of Non-Governmental Organizations In The New European Order* (1st edn, Nomos Verlagsgesellschaft 1995). See also - Daniel Thurer (1999), 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law,* Berlin: Dunker & Humbolt, pp 37-58

[10] Stephan Hobe, 'Article 71 of the UN Charter, Resolution 1996/31' in Bruno Simma Et al., *The Charter of The United Nations* (3rd edn, Oxford University Press 2012) pp. 1788 - 1815.

[11] Ibid

The centrality of NGOs in international relations cannot be overstated. The point is emphasised that the increased visibility of NGOs on the international plane cannot be overlooked. Their visibility is relevant in establishing the need for a paradigm shift in the conceptualisation of international law from its limited state-centric Westphalia design to a more inclusive 21st Century conception if international law is to be fit for purpose.

1.3. Aim and Objectives

1.3.1. Aim

To establish the need for a paradigm shift in the conceptualisation of international law from its limited state-centric Westphalian design to a more inclusive 21st Century conception using the increasing global presence, work, and contributions of NGOs as an example.

1.3.2. Objectives

1.3.2.1. To evaluate the concept of international law and appraise its processes; establishing that traditional-Westphalian inspired paradigm of international law is incapable of providing a contemporary understanding of today's international legal context of increased non-state actors, particularly NGOs.

1.3.2.2. To appraise the deficits of the Westphalian concept of international law in a 21st-century construct; evaluating the concept of sovereignty and its fitness for purpose against factors calling for a rethink of the concept.

1.3.2.3. To critically examine the process of reconceptualisation and how it relates to the notion of sovereignty to depict sovereignty in its full essence; positing that delegated sovereignty does not compromise its efficacy but instead reveals it in its full essence.

1.3.2.4. To consider the emergence of NGOs, their increasing influence, and critique the extent of their legitimacy on the international plane; highlighting the disconnect between their participation and influence.

1.3.2.5. To show the International Chamber of Commerce as an example of the growing influence of NGOs; highlighting its composition and workings as an added impetus to the argument that new forms of diplomacy and global governance in international law have emerged, and should be considered more seriously.

1.3.2.6. To consider the norms of international law and the making of customary international law; with a focus on state practice and *opinio juris*; reconceptualising international law by examining the concept of plurality of norms and the international legal order as a bed-rock for the inclusion of added layers in keeping with the 21st-century realities.

1.4. Literature Review

There is a wealth of relevant writing in the broad area of examination. It reflects the extent to which these issues falling within the scope of the research are relevant and topical. This section represents only a brief overview of the perspective of scholars. It covers a range of issues. It explores the doctrines of international law from a Westphalian paradigm of the sovereignty of states and the debatable misfit of that concept in the 21st Century. Then it engages in an exposition primarily premised on the perspective of globalisation and notably, the increasing centrality of NGOs in the metamorphosis of International law, from its Westphalian inception to the 21st Century.

1.4.1.1. Westphalian Doctrine of Sovereignty of State and International Law in the 21st Century

History has aptly made it clear that states have hardly shown interest nor implied that it is in their interest that a new international legal framework should emerge. According to *Pierre Calame*:

> "History even goes as far as to emphasise that the conception of international action is determined and limited by the concept of the state itself.[12]

It follows then that the international actions or inactions of states are premised on the idea of the sovereignty of states. So any venture across national borders is therefore always to the end of reaching a state's interest vis-à-vis respect of other sovereign states. It rings true in all circumstances, whether it is to conquer new territories, to defend existing borders or to control the natural resources of new territories imperialistically.[13]

Albeit, history bears to us that international law continues to evolve. Globalisation has taken its toll on the concept of state and its sovereignty to the extent that on certain

[12] Pierre Calame *Non-State Actors and World Governance* (2008) 'Non-State Actors And World Governance' (World-governance.org, 2016) <http://www.world-governance.org/spip.php?article297> accessed 27 November 2016.
[13] Ibid

occasions international concerns may very well be valid enough reason to undermine national interest.

As *Daniel Thurer* puts it:

> "Nowadays, international law is to a diminishing extent state-centred."[14]

A typical example is the European Union (EU), whose evolution is consequential of the second world war and is perceived as the 'necessitated good' that proceeded from the trauma of the second world war. The EU initial member states acknowledged that the defence of national interests would amount to collective suicide. Today, the realisation of the EU, with its member states indirectly subjecting their sovereignty to the international pact, is at present, an example that validates the possibility of surpassing sovereignty.[15] However, this analogy would be imbalanced without pointing out the internal revolt of nationalist citizens of the various states to the concept of a supranational state. A typical example of this internal uprising within the EU was the 2016 United Kingdom referendum and the eventual exit from the EU in January 2020. The debate was hinged mainly on the concept of sovereignty; acceptance of supranational laws, lax borders with free movements of goods, capital, services and persons, amongst other factors. It resulted in the democratic outcome of the British people reclaiming the sovereignty of the United Kingdom with the Brexit decision. This single example, amongst a myriad of other similar uprisings, mainly in the western states, suggest that states still hold fast to the Westphalian concept of their sovereignty while trying to adapt to the realities of globalisation.

However, in reality, the international legal system has changed. The concern is that it has hardly changed theoretically even though it has considerably in practice, due to the emergence and activities of various non-state actors.

Daniel Thurer further stated while reiterating *Dietrich Schindler Sen. et al.* -

> "These new global and multinational entities may not have fully metamorphosed into full-fledged subjects of international law, but they certainly contribute to creating a 'social milieu' or 'ambience' in international life out of which new legal structures and entities may grow.[16]

[14] Thurer (n8), pp. 37 - 58
[15] Calame (n 12)
[16] *Dietrich Schindler sen.,* Verfassungsrecht und soziale Struktur, 5th. Ed., 1970, 92 *et seq* cited in Daniel Thurer (1999), 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role

The question that comes to bear, however, is why it is so controversial to incorporate non-state actors, or particularly NGOs, within the framework of international law as primary subjects?

According to *John Klabbers*:

> "States, as the gate-keepers of the system, have every incentive to treat non-state entities as somehow of lesser rank rather than to elevate the newcomers to their own level and jeopardise their state sovereign prerogative."[17]

The attribute of the sovereignty of the state is of inestimable value to states. It has often been regarded as that unique quality a state has which can be referred to as the highest authority under international law within the territorial limits of its jurisdiction[18].

States are and remain the indispensable focal point of authority and power in the world of international relations and international law. They still hold the monopoly of force, and they provide the necessary infrastructure in the present world public order, which still has a mostly non-centralised character[19]. The existence of the international community is hinged on the existence of the state.

As *Pierre Calame* stated:

> "States have not quite diminished in importance on the international scene. They still wield firm muscles in their strategies of power or defence, their capacity to build stable international agreements, their role in regulation enactment by adopting international norms, their capacity to invest in infrastructures and research. Hence, they remain as the primary international players."[20]

However, it would be a mistake to consider non-state actors or particularly NGOs as second-rate or secondary players due to their influence. With the current phase of transition that globalisation has brought about to the international scene; a distinctive characteristic of these new non-territorial actors (the offspring of globalisation) is how

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of the State' in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law,* Berlin: Dunker & Humbolt, pp 37-58

[17] Jan Klabbers (2003), '(I Can't Get No) Recognition: Subject Doctrine and the Emergence of Non-State Actor', in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi,* Leiden/Boston: Martinus Nijhoff, pp. 351 -69

[18] Thurer (n 8)

[19] Ibid

[20] Calame (n 12)

they have used their influence to partially de-territorialise the notion of state sovereignty.

Daniel Thurer added to the whole argument poetically stating:

> 'Traditional institutions like the state are certainly here to stay but – in a process characterised by new, often ambiguous concepts and notions and by the tentative partly soft-law effects of new regulations – their appearance and function are to a certain extent been changed in the present times. In the place of the crumbling 'walls' of the old 'state fortresses,' new ivory networks are rapidly spreading and are covering up the old towers, bestowing on them new and exciting appearance."[21]

It is not the normative substance of the concept of states and the Westphalian international law, which is of concern here. Instead, it is the function as well as the extent of the power which states under the Westphalian international law exercise, albeit, in a rapidly changing – i.e. integrating and at the same time shrinking- public international system. Evidently, due to globalisation, there has been a veering off of power from the states to private actors.[22]

1.4.1.2. The increasing centrality of Non-Governmental Organisations in the conceptual evolution of international law from its Westphalian inception to the 21st Century

There is no gainsaying in pointing out the undeniable fact that NGOs are an intrinsic feature of the 21st-century international life. They have had an encompassing coverage of diverse activities ranging from fields of human rights, humanitarian action, business and commerce, environmental protection, women's right, safeguarding children and vulnerable people or consumer protection. It has been stated that NGOs are a typical product of the western civilisations, characterised by their inherent missionary tendencies.[23] Some of the first activities of what is now referred today as NGOs was the campaign for the abolition of the slave trade and eventually slavery itself, dating back to the 17th and 18th centuries. The next noticeable occurrence of NGOs in the global scene was the establishment of the Red Cross Movement in 1863, and since then, there has been an increase in the emergence of various NGOs across the world. However, in recent times, with the

[21] Thurer (n 8)
[22] Ibid, p. 39
[23] Ibid, p. 41

advent of globalisation in the 21st Century, NGOs have grown significantly and has become a global phenomenon, influencing worldwide policy-making and execution.[24]

Following the analysis of *Leon Gordenker* and *Thomas G. Weiss*, the growth of influence and impact of the NGOs was increasingly made prominent during the Cold War. NGOs emerged as the conscience of the civil society, claiming the rights of political, cultural and economic freedom, which eventually paved the way for the breakdown of the communist regime.[25] It was followed by the increase in activism in the Post-Cold War phase on human rights, environmental protection, women's rights and other matters that became a priority in international relations. This phase consequently created inroads for NGOs to policy-makers and gave more weight to their voice and global influence.

The international community have been reduced to a 'global space', and new global communities have emerged, which have made it possible for other non-state actors to influence the space as significantly as they have done in recent times. This increased influence and these new global communities have been primarily due to the advent of information technology. Information technology remains one of the key vehicles of globalisation, the pillars upon which the new global communities have been framed, which have formed the premise for the influence of other global non-state actors, and in particular, the NGOs. This position has been underpinned by the statements by *Leon Gordenker* and *Thomas G. Weiss* on the increasing influence of NGOs:

> "Electronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogative of nationalism. Modern communications technology is independent of territory. 'By providing institutional homes in the same way that states have accommodated nationalism', one author suggests, 'NGOs are the inevitable

[24] Ibid, p. 42

[25] Leon Gordenker and Thomas G. Weiss, 'Pluralizing Global Governance: Analytical Approaches and Dimentions in Thomas G Weiss and Leon Gordenker (eds.), *NGOs, The UN, And Global Governance* (1st edn, Lynne Rienner 1996) p 24. See also, Daniel Thurer (1999), 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law,* Berlin: Dunker & Humbolt, p. 42

> beneficiaries of the emergence of the new global communities'."[26]

It goes without question that NGOs today play a more prominent role in the affairs of the international community. This position was reiterated by *Christine Baker* and *Luisa Vierucci* when they stated as follows –

> 'it is today beyond doubt that NGOs play a prominent role in international law – relevant fields, from treaty-making to rule implementation; from support to courts to aid delivery.'[27]

The conflict lies in the fact that regardless of the increasingly active stance of NGOs in the global space, their status in the international legal order remains somewhat in limbo. There is the category of scholars who strongly hesitate to accrue any international legal significance to the activities of NGOs in the international space. It stems primarily from the anachronistic conception of international law, where subjects of international law stay defined within the narrow parameters of states, international organisations, and a few historical legal subjects such as the Holy See and per some, the Sovereign Order of Malta. [28] However, there is another category of scholars, particularly in the human rights field, who hold a view that NGOs, as well as other non-state actors, have been further propelled beyond the traditional conception of the subjects of international law.

August Reinisch further buttressed the point suggesting that the international obligations with regards to human rights do not reserve the expectation of compliance for states alone. It is extended to other non-state actors, thereby inferring that an entity can be considered a subject of the international legal system if it has rights and obligations under that system.[29]

Daniel Thurer brought about a new perspective to the arguments, stating:

> 'we can avoid the intensely debated but largely sterile questions as to whether or not NGOs […] have emerged as new subjects within the international legal order. Instead – using a constitutional or functional approach – these entities can be

[26] Ibid

[27] Pierre-Marie Dupuy and Luisa Vierucci, *Ngos In International Law* (1st edn, E Elgar 2008) pp. 2-3.

[28] Ibid

[29] A. Reinisch (2005), 'The changing international legal framework for dealing with non-state actors', In Philip Alston (ed.), *Non-State Actors And Human Rights* (1st edn, Oxford University Press 2005) p. 70.

> elegantly integrated into a broader concept of "international community"'[30]

This position cannot be overstated, given the position held by *Pierre-Marie Dupuy* and *Luisa Viercci* that NGOs are the epitome of the public opinion and the social conscience of a cosmopolitan civil society as per international relations.[31]

Daniel Thurer further stated:

> 'If we now try in a few words to evaluate the impact of international NGOs on international life, we easily see that they exceed by far the informal status accorded to them in international instruments. Undoubtedly, the most prominent NGOs represent a driving and shaping force of progress in today's international political life.'[32]

The former UN Secretary-General *Boutros-Boutros Ghali* stated:

> 'NGOs have become a basic form of popular participation and representation in the present-day world.'[33]

Given the preceding arguments, the research intends to lend its voice to the ongoing debate, with the added perspective of identifying and establishing NGOs as pivots for a reconceptualised international legal paradigm.

1.5. Methodology

1.5.1. Introduction to the Legal Methodology

The methods applied which would be discussed below are hinged upon the conceptual framework of the research. The various concepts that have inspired the research in the first place have, to a considerable extent, inspired the choice of the methods applied and discussed hereunder.

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[30] Thurer (n 8), p.53.
[31] Dupuy and Vierucci (n 27), p. 5.
[32] Thurer (n 8), p.45.
[33] Boutros Boutros-Ghali, Foreward in Leon Gordenker and Thomas G. Weiss, 'Pluralizing Global Governance: Analytical Approaches and Dimentions in Thomas G Weiss and Leon Gordenker (eds.), *NGOs, The UN, And Global Governance* (1st edn, Lynne Rienner 1996) p.7.

1.5.2. The Conceptual Framework

The conceptual framework of this thesis centres on the concepts of sovereignty and the conflicts of globalisation. Furthermore, it extends to the concept of international legal personalities, particularly about NGOs.

1.5.3. Methods Applied

1.5.3.1. Qualitative Doctrinal Research Method

Given the normative attribute that characterises most legal researches; part of the research would be investigating the International law as it ought to be rather than as it is. However, the normative character of the international law implies that the veracity of this work must manifestly be derived from the developing consensus within the scholastic community and the aggregate of opinions in the current legal debate around the core of the subject of the research.

Hence, this research is primarily carried out by an investigation into existing legal theories and doctrines, as well as scholarly positions underlying the research area, being International law, its subjects, and its fitness for purpose as well as the concepts of the sovereignty of the state. This investigation is done primarily by library desk-based research approach using both primary and secondary sources. It uses various reasoning techniques. It includes analogical and inductive reasoning. It will engage in analysing the findings to reach a precise and contributory conclusion. More specifically, the legal discourse engages in a qualitative and a meticulous library desk-based analysis of a variety of soft data, legislation, relevant case-law, books, academic journals, electronic sources and legal conferences. This exercise would enable the deciphering of their possible interpretations and relevance to the core of the research in realising its stated aims and objectives.

There is, however, the tendency to append more credibility to research work, especially scientifically, where it is not belaboured exclusively with conceptual constructions or the finding of coherence or the development of abstract theory, but is also derived from empirical investigations[34]. This tendency forms the basis for one of the major criticism of this approach. The criticism could be that this method may be perceived as being autonomous in its disposition to the economic, social and political realities. So, it could be described as being too remotely internal to the legal discipline

[34] J. M Smits, *The Mind And Method Of The Legal Academic* (Edward Elgar 2012).

that it almost loses its relevance to the much broader objective of the research. It is to the end that another additional method is also applied in the course of this research.

1.5.3.2. Qualitative Non-Doctrinal Research Method

The non-doctrinal research method could also be referred to as interdisciplinary or socio-legal research method, as it engages external factors to reach its findings within the legal context of the research.[35] This research holds the view that international law could be regarded as an international social engineering implement. The results of this work can only authenticate its integrity to the extent that it is relevant and reflects the realities of society. To this end, it entails an interdisciplinary endeavour, to recalibrate its findings and engage in the systematic challenge of international law, not as it ought to be, but as it is, in its historical and social context. This interdisciplinary expedition will give the desired meaning and relevance to the subject of this research in its current global context. It involves an analysis of mainstream political debates and records of states, regions and influential organisations in the international community, as well as the making, growth and acceptance of international law in the international community.

It endeavours to understand globalisation in its socio-economic and political context, to the end of clearly contextualising the investigated international law doctrines in both, its historical and socio-political contexts structured coherently and logically. It scrutinises the emergence of NGOs and studies their journey to global relevance, to the end of investigating whether or not they have indeed attained a status of indispensability in the social and legal construct of the international community. It then explores whether there is a space in the international legal framework that encapsulates the relevance of such entities vis-à-vis the fitness for the purpose of international law in the international community. More specifically it entails, engaging in both desk-based literature analysis, websites of various institutions as well as organs of both governmental and inter-governmental bodies, and where unavoidable, direct and participatory enquiries into relevant international and state entities. Although it is still primarily desk-based, the matters investigated are more operational and factual rather than doctrinal.

[35] Geoffrey Wilson 'Comparative Legal Scholarship' in Michael McConville and Wing Hong Chui, *Research Methods For Law* (1st edn, Edinburgh University Press 2007).

1.5.4. The justification for the Methods Applied

1.5.4.1. Qualitative Doctrinal Research Method - Justification

Descriptive legal science is usually equated with a doctrinal, black-letter or dogmatic approach.[36] There is hardly an academic discipline that can sufficiently carry on its research without engaging in some systematic description of the research objects. In various disciplines, the framework upon which such description is conducted is subjective to the peculiarities of the discipline. It also takes into consideration the object of the research. Such frameworks can be gleaned from the various textbooks of different fields. For example, research in the discipline of physics will engage in some measure of descriptive analysis of objects by quantification of their characteristics and behaviour, using a framework of symbols, terms and formulas to describe the physical reality.[37] The legal research is not excepted; it is only different to the extent that the context or style of the description is subjective to the discipline and, in this case, the journey of international law, globalisation and NGOs. The descriptive contents of these mentioned core frameworks of the study could be gotten from a variety of books, academic journals, case law, statutes, et cetera. This line of thought forms the basis of the choice of this approach of a doctrinal library desk-based method in this study.

The ultimate objective of this research is to proffer a reformed international legal system. This reformed system, in itself, is not a creation of a new system altogether, but rather the accommodating of global realities and NGOs into this system, and consequently, would recalibrate the system. This objective remains constant in the application of different sub-methodologies within the core doctrinal method. Hence, on the one hand, it systematically describes and questions not just international law itself, but its operation, application and relevance as well as its underlying philosophical, social, moral, economic and political assumptions. It is thereby determining the viability or lethargicness of the current state of the system. On the other hand, it explores the journey of NGOs and their current status of relevance to the international community. This expedition could be accurately be referred to as an applied form of expository, doctrinal research methodology, which delves as of necessity into some interdisciplinary expeditions.

[36] Smits (n 34)
[37] Ibid

1.5.4.2. Qualitative Non-Doctrinal Research Method- Justification

Given the view that real knowledge needs to be empirically testable[38], it is intended that this research will not exist in its doctrinal research-driven vacuum, but will engage in the environments in which its objectives are likely to be tested. One of the underpinning quests of this research is whether international law as an international legal instrument has and continues to meet its initially intended aims. An empirical approach is inevitable to resolve this question. However, it is essential to mention that expectations of the outcome of this method should be fixated within the context of the legal discipline and not comparable to other disciplines. Hence, the outcome sought to be reached may not be as robust as what would be obtainable in the natural sciences, though it would not be any less significant. The distinction here lies in the difference between the qualitative approach and the quantitative approach. The approach of this research, being qualitative, may engage in interviews, carrying out case studies, for example, a case study of the International Chamber of Commerce, or reading of various documents, which may not necessarily be laws concerning the organisation. That notwithstanding, the intended result is not envisioned to be generalised in the sense of natural sciences. Instead, it is to understand better the legal phenomenon of globalisation as well as the increasing relevance of non-governmental organisation to the international legal framework and globalisation.[39]

1.6. Impact of Research and Contribution to Originality

As can be gleaned from the literature review section, there has been a robust debate in the subject area of this research. A majority of the current academic debate captures the possible need for an improvement in the international legal framework. The debate across other academic quarters include the necessity to give other global players in the world stage some elevated status in the international community. However, there appears to be a vacuum in the campaign for NGOs, not merely to be given a more recognised legal status, but to be resituated as the socio-legal centre of the international community in the 21st Century. This position is the thrust of this research. As mentioned earlier in this chapter concerning NGOs, the altruistic nature of such organisations forms part of the rationale for choosing NGOs. It plays out in their lack of the encumbrance of government in its form. There is also a lack of profit as

[38] Ibid

[39] Baldwin John and Gwynn Davs, *Empirical Research in Law* Edited by Peter Cane and Mark V Tushnet, *The Oxford Handbook Of Legal Studies* (Oxford University Press 2003).

motivation in its disposition. Yet, its ability to epitomise the conscience of society across various sectors forms the rationale for this research.

An expectation that this research would bring about an actual realignment of the current international legal framework, in the manner in which this research explores, would be highly optimistic though still possible. However, the core and more realistic intent of the researcher is to expand the current debate and introduce the new paradigm of thinking, that NGOs could be key drivers of a reconceptualised international legal paradigm in the 21st Century. In academia, this would extend the parameters of knowledge within the current public international law discipline.

1.7. Ethical Matters

There are no known ethical concerns about this research. The material engaged within the course of this research all exist in the public domain.

2. Chapter 2 - The Westphalian Concept of International Law and its processes

Chapter 2 Contents

2.1. Chapter 2: Introduction

This chapter seeks to assess the Westphalian concept of internal law and its processes. It is composed of two uneven subsections.

The first section will attempt an understanding of 'law' and secondly an understanding of international law. It highlights the process of international law and the challenges it encounters in the 21st Century with the proliferation of actors; including NGOs and the perennial concern of enforcement.

The second section generally addresses the problems with the Westphalian international legal system.

2.2. Understanding the Westphalian Concept of International Law

The treaties of Münster and Osnabrück[40] gave to Europe what could be likened to as a kind of international constitution which was the premise for the conceptualisation of public international law. The Westphalian system of sovereign states was established in 1648 as part of the Peace of Westphalia.[41] The treaty covered a wide range of matters dealing with the political concerns at the time, and scholars have distilled three main points which were core to the treaty:

- The principle of state sovereignty;
- The principle of (legal) equality of states;
- The principle of non-intervention of one state in the international affairs of another.[42]

These three points are the key points relevant to the context of this research.[43] Over the years, the Westphalian model became universally accepted and widely respected as the framework for the international legal system. However, as this thesis

[40] Westphalian Peace Treaties 1648 – See 'GHDI - Document' (Ghdi.ghi-dc.org) <http://ghdi.ghi-dc.org/sub_document.cfm?document_id=3778> accessed 22 April 2020.

[41] This was in summation of the Thirty Years' War. The Thirty Years' War was a 17th-century religious conflict fought primarily in central Europe. The war lasted from 1618 to 1648, starting as a battle among the Catholic and Protestant states that formed the Holy Roman Empire. However, as the Thirty Years' War evolved, it became less about religion and more about which group would ultimately govern Europe. In the end, the conflict changed the geopolitical face of Europe and the role of religion and nation-states in society. – See 'Thirty Years' War' (HISTORY, 2018). The 30 years war is not focused upon in this work due to the wide reach of the topic and the limited word count of this thesis.

[42] Sasha Safonova, 'Relevance Of The Westphalian System To The Modern World' (Article Myriad, 2012) <https://www.articlemyriad.com/relevance-westphalian-system-modern-world-sasha-safonova/> accessed 18 April 2020.

[43] The historical analysis of the Westphalian peace treaty is not considered in detail in this work, for the same reasons provided in (n41).

portends, with time, changes came to the society. With the changes, comes the critique of the system. So as will be seen in the subsequent chapters, challenges to this model of international law and relations come from various fields, such as global health, environment, failed states, the internet and the global economy, among others. Nevertheless, the Westphalian model still plays a huge role in modern society, although it needs adjustment to today's society's needs.[44]

The Westphalian concept of international law can hardly be discussed without a discussion on the concept of sovereignty.[45] So often, Westphalian international law is synonymous with the concept of sovereignty. However, it has been argued that the Westphalian idea of sovereignty was not new in the 1640s; the question was whether sovereignty should be multipolar.[46] F. H Hinsley defined the Westphalian sovereignty as follows -

> 'the idea that there is a final and absolute political authority in the political community ... and no final and absolute authority exists elsewhere',

This idea is best represented and articulated in a treaty establishing the principle of sovereignty.[47] So, while the effects of a paper are debatable, and it has been argued that the best a paper can do is convince people that states ought to have exclusive territorial authority. However, further to this definition, Hinsley added that

> 'sovereignty is not a fact. Authority and power are facts [...] *Sovereignty* is an assumption about authority.'[48]

Along these lines, John Ruggie suggests that the Westphalian concept of sovereignty 'signifies a form of legitimation'.[49] In a Westphalian system of sovereign states, each state recognizes the authority of the other state as the final authority within their given territories, and only they can be considered actors within the Westphalian international legal system. It is precisely on this ground that scholars have identified Westphalia with the origins of sovereignty: as a formal statement of the principle of

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[44] Safonova (n 42)

[45] This is considered in further detail in Chapter 4.

[46] Derek Croxton, 'The Peace Of Westphalia Of 1648 And The Origins Of Sovereignty' (1999) 21 The International History Review, p. 590.

[47] F. H Hinsley, Sovereignty (2nd edn, Cambridge University Press 1986), first published in New York, 1966, p.26; See also, Derek Croxton, 'The Peace Of Westphalia Of 1648 And The Origins Of Sovereignty' (1999) 21 The International History Review, p. 570

[48] F. H. Hinsley, 'The Concept Of Sovereignty And The Relations Between States', in W. J. Stankiewicz (ed) *In Defense of Sovereignty,* (Oxford University Press 1969) p. 275.

[49] J. G. Ruggie, 'Continuity And Transformation In The World Polity: Toward A Neorealist Synthesis' (1983) 35 World Politics, pp. 275 – 276.

sovereignty, even if the practice has been contended to be established earlier than 1648.[50]

2.2.1. Understanding Law

An attempt to define law may turn out to be a more onerous task than to describe it. Law has been since the existence of humankind, from the age of the cave right until these contemporary times. The idea of law from which 'order' stems is pivotal to the existence of a just and stable of society. Lawlessness, on the other hand, from which chaos is incidental in inimical.[51] It follows that regardless of the players in the international community, the existence of some law remains intrinsic. Therefore, 'law' could be described as the thread with which the fabric of any community is hemmed; it creates the framework of recognised and accepted ideals, by which any community of people would commune together, progress and develop.

2.2.2. Understanding International Law

This description of law could be extrapolated to bear on the international community. However, there is a distinct contrast, in that while, generally speaking, the subjects of any community of people are people, in the international space, the subjects are nation-states. With this in mind, caution is needed when extrapolating the above description of law to international law.

Often when the term international law is used, either of two classifications of laws is inferred. The first being private international law and the second being public international law.

Private international law or what some may refer to as a conflict of laws is the collection of laws within the legal system of different nation-states that would regulate the private relationship (often, business) between the individual citizens of the states. Many times, the peculiarity of each state and its legal system could obtrude, and questions of applicability of certain foreign laws or the role of foreign courts come to the fore.[52]

[50] Croxton (n 46), p. 570.
[51] Malcolm N Shaw, *International Law* (Cambridge University Press 2014) 1.
[52] Ibid p.1

Public deals primarily with the relationship of states. International law, on the other hand, given the whole spectrum of international relations and activities of the nation-state in the global milieu, the extent of public international law remains expansive. Hence, public international law could range from bilateral, i.e. between two states, to regional, i.e. a group of states linked together either by the geographical location or by an ideology, and finally to being universal, i.e. being generally binding on all states.[53]

2.2.3. The Process of Law

Without engaging in an exposition of legal theory, a contrast, however, should be reached between universal ideals or morality and international law. While a certain standard of behaviour or ethical standards may be acknowledged in the international space, the *legality* of such behaviour or ethical standards is the determining factor of whether it is international law or not. It does not suggest that leaving the status of a certain agreed international standard of conduct as 'ethical' is a depreciatory epithet. Rather it is the obligatory strength or legality of such standard in the community that makes it law or not. This *legality* is deciphered through a myriad of social processes, as well as the content and form. It is this process that more robustly and accurately authenticates international law as law in its entirety. Hence, when encountered with a body of international behavioural or ethical standards, the question of legality is paramount if its validity or legitimacy as the law is to be ascertained.

Morality, fairness, idealism, or ethical positions and like concepts, do not equate to the law in any given community until they have gone through a prescribed process, or over time have become customary in that community and is an established state practised. Furthermore, even with the emergence of customary international law following from state practice, the principle *opinio juris sive neccessitatis* still remains an essential factor. It is the subjective element used to judge whether the practice of a state is due to a belief that it is legally obliged to do a particular act.[54] It is that legitimacy that gives rise to the element of a legal obligation. The ICJ explained *opinio juris*, in the Nicaragua case, as follows:

> "[…] for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practise', but they must be accompanied

[53] Ibid p. 2

[54] Dakshinie Gunaratne, 'Opinio Juris' (*Public International law*, 2014) <https://ruwanthikagunaratne.wordpress.com/2011/04/22/opinio-juris/> accessed 19 February 2020.

by *opinio juris sive neccessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of the rule of law requiring it. The need for such belief..the subjective element, is implicit in the very notion of *opinio juris sive neccessitatis*."

2.2.3.1. The process of law and NGOs

These kinds of concepts, like morality, fairness, idealism, or ethical or like concepts, mainly form the premise for the founding of most NGOs. However, it is their lack of legitimacy when they stand in isolation that also plagues the legitimacy of NGOs in the international community. So likewise, though NGOs and their influence for good, mostly, in the international community cannot be contended, their legitimacy in the international community is still lacking. Hence, understanding what international law is and the process by which it becomes law, may provide a kind of blueprint to how NGOs could attain legality or legitimacy in the international community as a key subject and influencer of international law.

2.2.3.2. The international legal system

Understanding the legality of international law or the authenticity of the international legal system leads to the likelihood of drawing from the legal order of the nation-states. There is the tendency to use the legal order of nation-states as parameters that will aid the explaining of the international legal system. The challenge with this approach is that, while it is logical to expect that the international legal system should mirror, at least in some respect what is applicable in some states, the reality is that this is not quite the case. In most domestic legal systems, there are three tiers of government, being the executive, the legislature and the judiciary; the absence of any these tier makes any legal system practically defunct.[55]

While the United Nations has a General Assembly made of delegates of member states, the resolutions of the General Assembly do not have the element of a direct effect on the states. Further to Article 17 of the United Nations Charter, with a few exceptions on some internal matters, such as budgeting, the resolutions of the United

[55] See generally, H. L. A Hart, *The Concept of Law* (Clarendon Press 1961).

Nations are generally recommendatory and are not binding on the member states. In this light, it cannot be akin to the legislative arm of the nation-states.[56]

Also, the International Judiciary does not replicate what is obtainable in the nation-states. Though there is the International Court of Justice in the Peace Palace, The Hague, its jurisdiction is extant only by the consent of the states. Even when there is competent jurisdiction, the court is unable to ensure that its decisions are followed.

Moreover, most importantly, an executive arm is absent in the International polity. The closest to the idea of the executive is the United Nations Security Council which is made up of 5 permanent members and ten elected members with two-year terms.[57] However, the enforcement powers and duties of the United Nations Security Council are often effectively impaired by the veto power of the five permanent members.[58] Given the preceding it becomes an obscure exercise to determine the legality of international law as law, especially when what is obtainable as law in the states is used as a premise to set the expectation of what should be obtainable in the international space.

2.2.3.3. The proliferation of actors & the process of international law

The introduction of the term 'politics, although not listed in Article 38 of the Statute of the International Court of Justice, is very relevant. It gives a practical bend, and a human likeness to the abstract terms of nations, states or any term by which organised society is described. These nations or states are primarily an aggregate of individuals subjugated by an apparatus called states[59]. Moreover, across the international space are a myriad of these apparatuses called states.

However, it is this concept of states that underpin the rationale for this thesis. It is the view of the research that states are relevant to the order of the international community. Furthermore, their relevance will remain in the foreseeable future. However, the contention with this assertion is that, given the origins of international law, the position that state's relevance eclipses the relevance of other actors on the international plane is debatable and not in tune with the 21st-century realities. Following from the Westphalian regime, it is the states that are the primary subjects of international law and not the individuals that make up the states. However, the states

[56] M. D. Oberg, "The Legal Effects of Resolutions of The UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2005) 16 European Journal of International Law. See also Malcolm N Shaw, *International Law* (Cambridge University Press 2014) 881.

[57] James A. Paul, "UN Security Council" (*Globalpolicy.org*, 2016) <https://www.globalpolicy.org/security-council.html> accessed 5 February 2016.

[58] Shaw (n 51) p. 2

[59] Antonio Cassese, *International Law* (Oxford University Press 2005) p. 3.

are by themselves inanimate and require the agency of the individuals whom they subjugate, referred to as citizens, to engage with other states in the international community. It is the individuals that have the effective mandate to govern or represent the states, and their governance is usually subjective to their proclivities as balanced out with the states' interests and priorities. As described, this process could be tantamount to the term politics - the art and science of governance and diplomacy. Antonio Cassese eloquently stated it thus –

> *"Indeed, in international law more than any other field, the phenomenon of the state as 'fictitious person' manifests itself in a conspicuous form: individuals engage in transactions or perform acts, not in their personal capacity, that is to protect or further their own interests, but on behalf of collectives or a multitude of individuals. Why is it that the world community consist of sovereign and independent States, while human beings as such play a lesser role?"*[60]

These individuals constitute for themselves other entities, such as non-governmental organisations or multi-national corporations, which in recent times have had extensive global influence. The role of the 'individual' leads to another ramification of this challenge with the concept of international law. The various players in the international space, originate from various states but increasingly have dealings across national borders. This particular ramification is beyond, mere states interactions, but the interaction of her citizens, whether natural or juristic. With this being on the increase, it is hard to categorise international law as the law that regulates the dealings of states only. The realities of this phenomenon, called globalisation, make that definition practically inaccurate.

2.2.3.4. Authenticating international law - sources

To establish what international law is, or the process by which international law becomes law, it is recommended, though incongruous at this stage, to glean from the statutes of international law itself to establish its legality or its definition of itself.

What are the social processes that international law or the international community recognises as valid enough to bring about the legitimacy of international law? What is its provenance? These are what the international community or international law

[60] Ibid p. 4

would refer to as the social processes that bring about the legality of any internationally recognised and accepted standard of conduct.

Treaties - Some processes include international agreements from which rules are brought about that are binding on the parties to the agreements. These are referred to as treaties.

Custom - Also, there are customary state practices in the international space that are recognised by the international community as an agreed and accepted old pattern of behaviour or conduct that is now metamorphosed into a customary law for the international community.

Article 38 of the Statute of the International Court of Justice encapsulates what the sources or what components need to be brought together to form international law. Essentially, the sources enumerated by Article 38 (1) include –

- treaties;
- customary international law;
- general principles of international law;
- subject to the provisions of Article 59, judicial decisions and teachings of most highly qualified publicist of the various nations, as subsidiary means for the determination of the rules of law.

However, relying on just these prescribed sources as a sufficient-enough premise to a limpid understanding of international law would be at best elementary.[61]

2.2.3.5. Origins of International law

If international law is to be given an ideal and robust context or legitimacy, then it must come from a place that is not in itself international law nor a progeny of international law, rather the reverse should be the case. The complexity of this expedition into what international law is can be garnered from the perspective that if the law can *only* exist in a society and there can be no society without a system of law to regulate the relation of its members, what then would be first in existence? Is it the law or society? So if the term in itself is international law, then it presupposes that it is the law that governs the *inter*-action of *nations*. This then suggests that nations (or society) pre-exist international law. This position is in sync with the position of Brierly, when it was stated that–

[61] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 6.

> *"the law of nations had its origins among a few kindred nations of western Europe, despite their frequent quarrels and even despite the religious schism of the sixteenth century, all had and were all conscious of having a common background in the Christian religion and the civilisation of Greece and Rome. They were, in a real sense, a society of nations."*[62]

It is important to note that this was before the advent of the modern state system, which in itself was a creation of necessity and the Westphalian international law. It marked the inception of international law as is known today. Soon after the 30 years, long European wars of religion was the birth of the modern state which undermined the traditions of the unity of the Christendom or the medieval ideal of a single world empire and eventually gave rise to the rise of the sentiments of exclusive nationalism[63]. By this, out of necessity to maintain peace, sovereignty and territory, international law was born, occasioned by the Westphalia Treaty of 1648.

Sir Frederick Pollock held the view that -

> *"the essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity, international law seems on the whole to satisfy these conditions…"*[64]

Sir Fredericks's position introduces a new complex term to the whole equation of finding what international law is – *political.*

So far, it has been established that the making of international law includes a social process that ultimately authenticates international law as law. These processes include -

- the creation of treaties, i.e. agreements between states – bilateral or multilateral;
- the evidence of customary practices which legitimises the community of nations;

[62] J. L Brierly, *The Law of Nations* (Clarendon Press 1963) 41. See also D. J Harris, *Cases and Materials on International Law* (6th Sweet & Maxwell 2004) p. 2.
[63] Ibid p. 1.
[64] Frederick Pollock, *A First Book of Jurisprudence For Students Of The Common Law* (Macmillan and Co 1904). See also D. J Harris, *Cases And Materials On International Law* (Sweet & Maxwell 2004).

- a set of rules or standards of conduct and an understanding that there is an obligation to abide by those standards (some of which include rules which are so compelling that there could be no derogation from – *Jus cogens*); and now,
- politics.

2.2.3.6. The proliferation of actors, the international legal system and the ensuing conflicts

It has been argued that the term 'international law' is something of a misnomer, in the same way, the terms statehood and nationhood are not necessarily synonymous.[65] Besides human beings being practically the primary 'engagers' in the international space representing the interests of the primary subjects of international law, such as the states, there are instances where human beings also represent the interest of other juristic persons, such as NGOs. It is common knowledge that NGOs across national borders today wield much influence in the international space and have become pivotal stakeholders. The import of this is, as, with any human relationship, their interaction with other actors in the international space would naturally entail a set of governing rules of engagement. Usually, the select framework of such rules would reflect the legal processes of the home states of the various actors. So it is almost a given that the rules would conflict one to the another, but the common denominator will be the NGO, who straddles across state lines.

The implication is then that because individuals are practically the 'real' active members of the international community, the international legal order is therefore patterned after the national legal orders with which these individuals are familiar. As has already been briefly seen, this comes with its significant problems. Firstly, the members of the international community would then nurse an expectation that the international order would hold a striking semblance to what is obtainable in the states. Secondly, because the expectation cannot entirely be met, particularly with the consistency with which domestic legal orders adapt to the realities obtainable within the state, the international legal order will continually struggle with legitimacy. Thirdly, with the advent of other entities, which have their internal standards of conduct as well as global impacts of their conducts, the state-centric international legal system appears to play catch-up with the rapid evolution of these entities. These dilemmas continually open up the international legal system to the criticism of being obsolete or not representative enough.

[65] Rebecca Wallace, *International Law* (Sweet & Maxwell 2005).

Additionally, various international NGOs from diverse nations, with their peculiarities, would struggle to adapt to the legal system of the international plane. This struggle is because, on the international plane, there is a myriad of interests and norms. Also, there is a lack of political will from the stakeholding nations in the international community to recognise the norms or the international legal order, which do not directly further the national agenda of the nations. Hence, although NGOs may be recognised nationally, they face a dilemma of legitimacy on the international plane; especially as the international community in itself even struggles to adapt international norms to international law cohesively is in the first place. To an extent, this struggle is because of the lack of an institutionalised central organ of absolute authority on the international plane, as the international plane is a collection of sovereign states, who readily want to assert their independence and their territorial absoluteness within the international legal system.

2.2.3.7. The domestic legal system and the international legal system

On the other hand, within the national legal system, there are substantive rules that define rights, standard and conducts. There are also procedural rules by which these rights, standard and conducts are established and enforced. Moreover, these developments of the legal order within the state community emerge from a group of individuals who wield power and institutionalise themselves into central organs of the community. They establish the power and order into institutions or systems of government to the end of furthering the overriding state-community interests and priorities, within the states, and at times, in the international space. These institutions operate under the leadership of the ruling group of individuals or representatives of the masses. The ruling group is often referred to as the government in power who, ideally, should abide by a system of accountability to the institutions and the constituent who elected them as representatives. The government in power sets the strategic agenda of the state for the protection of the life, property, peace and prosperity of the citizenry. In order to establish order, unlawful use of force is forbidden except in certain circumstances such as self-defence. Also, lawful coercion is monopolised by the states.[66] Furthermore, the central organs of government have the responsibility for the three primary functions of the operation of the state, which are - legislating, adjudicating the laws and enforcing the laws of the state[67].

[66] Cassese (n 59) p. 5
[67] Ibid

However, in contrast to what is obtainable globally, the challenge remains with the international community, where no state or group of states have managed to have such overriding influence such as to impose its will on the whole global community. In the international space, what is obtainable are alliances; political, economic, military, and sometimes even geographical. These alliances emerge in the international space and converge on common interests. While sometimes, there are institutionalised structures which emerged from this, the international legal order remains horizontal across states and makes the channels for accountability blurred.[68] In line with this thought, Malcolm Shaw stated –

> *"While the legal structure all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal authority (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them."*[69]

This conceptual deficit and structural incoherence of the international legal order as seen above is in itself a source of criticism, which makes it all the more difficult to accurately ascertain what international law is or how it is made and enforced.

2.2.4. International Law & its Process

2.2.4.1. International law defined

International law is a term quite challenging to define with finality and precise accuracy. With consideration given to the direction of this research, the most relevant and practical concoct of a definition, which could probably the most generally accepted is -

> *"The reference to the rules and norms that regulate the conduct of States and other entities which at any time are seen as being bestowed with International personality."*[70]

It is noteworthy that this definition, in an attempt to have a general acceptance as well as present-day relevance, slightly deviates from the rigid, theoretical and traditional understanding of international law. Historically, the parameters of a definition of international law are usually limited to only the regulation of the relationships of states, the regulations of the seas and the conduct of war. States

[68] Ibid
[69] Shaw (n 51) p. 4
[70] Wallace (n 65)

remained the centre and the primary subjects of international law. However, this historical status quo struggles with relevance in the face of globalisation and the advancements in many sectors across the globe; particularly the NGO sectors. Other players are increasingly more influential in the international space, hence making it less possible to remain affixed to the Westphalia concoction of a state-centric international Law.

2.2.4.2. The process of international law - enforcement

It has been established that one of the most legitimate sources of international law is treaties - agreements between 'states'. The dilemma with treaties is the age-long question; what will be the consequence of not obeying the terms of a treaty? The universal principle of *Pacta Sunt Servanda*[71] requires agreements to be kept.[72] Although parties should commit to their undertakings under a treaty, there are still times of disregard of the provisions of treaties. It brings to the fore another challenge with the concept of international law - the lack of teeth.

Within the national legal systems, citizens are aware of the consequences of acting contrary to a social contract – the law. The consequences are well spelt out in a substantive legal instrument, and the procedure to enforce those circumstances are precise. At times, where there is no substantive law broken, and no procedure to apply, some states, like the UK, and in particular, Scotland, have what is referred to as the principle of *nobile officium.* It empowers the Court of Session and the High Court of Justiciary to exercise its equitable jurisdiction to fill a lacuna in certain circumstance.[73] So, where there is no legal rule adequately covering a given situation, the court can give a remedy. The principle echoes the social conscience of the society as a remedy or consequence is provided in the absence of any prior written or customary one. The court can use the *nobile officium* to grant any remedy or make any order. The workings of this principle reflect the powers of established institutions of governance, and in this case, the courts. Hence, the default position within the national legal system is that all citizens know the law, and trust that where there is a gap in the law, the courts are empowered fill that gap under certain circumstance.

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[71] Second Preamble to the Vienna Convention on the Law of Treaties 1969.

[72] Anthony Aust, 'Pacta Sunt Servanda' (*Opil.ouplaw.com*, 2007) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449> accessed 18 March 2020.

[73] Stephen Thomson, 'The Nobile Officium: Still Relevant, Still Useful | Law Society Of Scotland' (*Law Society of Scotland*, 2015) <https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-12/the-nobile-officium-still-relevant-still-useful/> accessed 18 March 2020.

In contrast, in the international space, the laws are often described as a body of suggestions for international behaviour, to which none is *really* obligated. As a result, it appears that international law could be considered as too flexible, vague and uncertain to be treated as law. The lack of institutions which have enforcement powers is a significant weakness of the international legal framework. There are incidences of breaches of international law which go unpunished.

An example of such international actions is the annexation of Crimea from Ukraine by the Russian Federation in 2014 and the ensuing events. This act of the Russian Federation was argued to be in breach of international law, and particularly in breach of the Belavezha Accords establishing the Commonwealth of Independent States in 1991, the Helsinki Accords, the Budapest Memorandum on Security Assurances of 1994 and the Treaty on Friendship, Cooperation and Partnership between the Russian Federation and Ukraine[74]. In response to international criticism, and actions, considered in most circles as ineffective by both the G8 and the United Nations, Russia has maintained that the action was in concord with the international law principle of self-determination.

Another example is the invasion of Iraq by the United States without the permission of the UN Security Council. In 2010, an independent commission of inquiry set up by the government of the Netherlands maintained that UN did not authorise any member states to use military force to compel Iraq to comply with the Security Council's resolutions. As a result, the Dutch commission concluded that the invasion violated international law.[75] In 2004, the former Secretary-General of the UN stated in an interview with BBC as follows –

> "[F]rom our point of view and from the Charter point of view [the war] was illegal."[76]

Above are two instances of influential global powers disregarding international law, without any substantial repercussion.

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[74] Fred Dews, 'NATO Secretary-General: Russia'S Annexation Of Crimea Is Illegal And Illegitimate' (Brookings, 2014) <https://www.brookings.edu/blog/brookings-now/2014/03/19/nato-secretary-general-russias-annexation-of-crimea-is-illegal-and-illegitimate/> accessed 20 December 2018.

[75] Afua Hirsch, 'Iraq Invasion Violated International Law, Dutch Inquiry Finds' (*The Guardian*, 2010) <https://www.theguardian.com/world/2010/jan/12/iraq-invasion-violated-interational-law-dutch-inquiry-finds> accessed 18 March 2020.

[76] 'BBC NEWS | World | Middle East | Excerpts: Annan Interview' (*News.bbc.co.uk*, 2004) <http://news.bbc.co.uk/1/hi/world/middle_east/3661640.stm> accessed 18 March 2020.

There is the school of thought which holds the view, contrary to popular belief, that states observe international law, and violations are comparatively rare.[77] This school of thoughts holds the view that even where there are violations of international law by states, just like some of the examples above, it is so unduly and highly publicised, to the extent that it impacts negatively on the efficacy of international law. They have argued that there are just as many violations on the national plane. Hence, just as the violations of national legal orders (murder, robbery, rape, et cetera.) within the states do not undermine the legitimacy of the national legal order, so analogously assaults upon the international legal rules should not undermine its value to the international community. At worst, it should merely point to its weakness.[78]

2.2.4.3. The process of international law - transacting with sovereignty & consent

The concept of sovereignty introduces the element of consent with states in the application of international law. Hence, certain factors come into play when they exercise their consent. One of which is the factor of reciprocity. Malcolm Shaw stated as follows –

> *"States quite often do not pursue one particular course of action which might bring them short-term gains, because it could disrupt the mesh of reciprocal tolerance which could very well bring long-term disadvantages."*[79]

Hence, long-term considerations are often significant factors to states when they decide on whether or not to give their consent and thereby to subject themselves to some international law. So, where a decision will have a long-term outcome that will be detrimental to a long-standing reciprocal arrangement with other states, the state is likely to refrain from such a decision to safeguard the long-term reciprocal arrangement and relationship.

A typical example of reciprocal arrangements is the subject of immunity, as it is in the interest of states for the immunity of their foreign diplomats to be protected, hence

[77] Shaw (n 51) p. 5

[78] Md. Rizwanul Islam, "Is The Doomsday of International Law Looming Around in the Twenty-First Century?: A Response To The Sceptics Of Efficacy Of International Law" (2009) 78 Nordic Journal of International Law 294. See Also Malcolm N Shaw, *International Law* (Cambridge University Press 2014) p. 5

[79] Shaw (n 51) p. 6

the immunity of other states' diplomats are protected. Another example is when states decide on extradition. International cooperation and legal obligation, comity and reciprocity are inherent to extradition and in someways condition the entire process.[80] These are examples of how the process of international law is influenced by reciprocal reasoning or transactional motivation, and indeed, a significant part of the transactions of sovereignty or the giving of consent is influenced by reciprocal factors. This transactional element of states and their sovereignty in relations with the international community is an upshot of the sovereign status of states, and it brings to question the sense of obligation of the states in the international community, or the strength or integrity of international law itself.[81]

2.2.4.4. The process of international law – Aggregating consent

Central to the Westphalian international legal system, states are sovereign free agents; independent, and could only be bound by their consent. This attribute has been described as a self-limitation, which declares that states could only be obliged to comply with international legal rules if they had first agreed to be so obliged.[82] However, where a state arbitrarily disobeys an international rule which the state had prior consented to, such action of the state does not render the international rule invalid, or optional, nor does it remove from its aura of legality. Instead, it is merely a breach of the state's obligation under international law. This opinion is further to the norm that agreements are binding - *pacta sunt servanda*- and this is the premise upon which treaty laws are reached. While consent is required to reach an agreement, the legal principle of *pacta sunt servanda* when the agreement is reached estops an agreement from being invalid because of the retraction of consent. It is common legal knowledge that where a party has entered a contract, the parties in so doing have taken on themselves a duty to perform their solemn obligations. This point is not limited to international law or the law of treaties, but it is a norm across various sectors of the society. This point is also obtainable in contract law in many domestic legal traditions around the world. As with the general principles of contract, every agreement of a legal nature, domestic or international, whether it is a contract between individuals or a treaty between states, presupposes that in concluding the agreement the parties acted intending to abide by its provisions.

[80] Paul Arnell and Gemma Davies, 'The Forum Bar In UK Extradition Law: An Unnecessary Failure' [2020] The Journal of Criminal Law 1 p.17

[81] J. L Brierly, Hersh Lauterpacht and Cl. Humphrey M Waldock, *The Basis of Obligation in International Law, And Other Papers* (Scientia Verlag 1977).

[82] J S WATSON, *State Consent and The Sources of International Obligation* (PASIL 1992) p. 108

To contend with this subject of consent is the notion of consensus, by which international law gains significant legitimacy. The notion of consensus refers to the influence of the majority of states in the international space concerning the creation and acceptance of new norms of international law[83]. The position of this notion is to prioritise the creation of international multilateral co-operation over the bilateral interests of individual nation-states. There is the contention that consent by itself does not create international law. However, it is the collective consents of states that form a consensus, by which multi-lateral international law is made. This argument is not in any way a suggestion that the doctrine of consent is irrelevant in understanding the concept of international law. Rather, it is to recognise the limitations of consent and not necessarily to neglect its significance. Consent is one of the major components of international law, and it is only by consent that nation-states would be signatories to treaties. Generally speaking, it is the consent of states that makes the concept of the international legal system conceivable in the first place. However, it is the aggregate of the consent of states that create the consensus by which the international legal system gains its legitimacy and is given consideration over national interests in certain circumstances. So in effect, consent creates consensus and legitimises the system as a whole. Hence, while states can retract consent on particular rules of the international legal order, states may not be able to object to the consensus of the international legal system as a whole.

2.2.4.5. The process of international law: consent v consensus

A conflict between consensus and consent as to the making of international law could arise when a significant section of the citizens of the states globally have an apparent consensus on a particular subject matter in the international space. However, there is a lack of political will to give the state's consent on such a subject matter. In such a scenario, what would be the fate of such a subject matter? This question goes to one of the core objectives of this thesis - legitimising the status or influence of NGOs across the international space. Whereas there is a growing consensus from the global citizenry as to the increasing influence of NGOs and the need to be given legitimacy, formal recognition and core role in the international legal system, there is the lack of states' consent to elevate the status of NGOs on the international plane. Hence, James Paul – the executive director of the Global Policy Forum, stated as follows -

[83] Shaw (n 51) p. 9

> 'In the field of international relations, scholars now speak of NGOs as "non-state actors" (a category that can also include transnational corporations). This term suggests NGOs' emerging influence in the international policy arena where previously only states played a significant role. Though NGOs have few formal powers over international decision-making, they have many accomplishments to their credit. In recent years, they have successfully promoted new environmental agreements, greatly strengthened women's rights, and won important arms control and disarmament measures. NGOs have also improved the rights and well-being of children, the disabled, the poor and indigenous peoples. Some analysts believe that these successes resulted from increasing globalisation and the pressure of ordinary citizens to control and regulate the world beyond the nation-state.'

At times, the influence of the NGOs is at odds with the interest of states. This latent conflict is one of the reasons for the on-going contention between NGOs and states, leading to states seeking to hold back their acknowledgement of the central role NGOs play. For example, in 2018, the Nigerian state, through its military, has accused Amnesty of spreading "fictitious allegations" to "destabilise and dismember Nigeria"; calling for the closure of Amnesty operations in Nigeria "if such recklessness continues".[84] BBC reported that Nigeria's position was in response to Amnesty's allegation that at least 3,641 Nigerian residents died in clashes between farmers and herders between 2016 and 2018. It is a conflict involving the Fulani tribe of the president of Nigeria- Muhamadu Buhari, who has been accused of a tacit response to the atrocities being allegedly carried out by his clansmen.[85] So, here is an example of where the majority consensus of the international community has recognised the growing influence of the human rights organisation – Amnesty International. However, for political reasons, such an NGO contends with the government of some states concerning legitimacy, freedom to exist and express their position on a local matter with international concerns. This is just one of many examples across various sectors globally, where there is a global consensus on issues or status. However, there is a lack of state's consent; and political considerations often drive the lack of consent. The

[84] 'Nigerian Military Calls For Amnesty Ban' (BBC News, 2018) <https://www.bbc.co.uk/news/world-africa-46593180> accessed 20 December 2018.
[85] Ibid

dilemma remains that the state's consent is a significant factor by which international law may be made.

2.2.4.6. The process of international law – international legal system & domestic legal system politics and consent

With each milestone reached so far on this expedition to understand the concept of international law and its process, the earlier mentioned position of Sir Frederick Pollock comes again to the fore – in that a necessary condition for the existence of law is the existence of a political community.[86] Hence, 'politics' was included in this thesis to the traditional sources of law stipulated under article 38 of the Statute of the International Court of Justice. The inclusion of politics is because of the pivotal role 'consent' plays the process of international law, and consent is essentially an act reserved for the politicians at the helm of the affairs of the state. Politics is arguably the single most valuable underlying factor that lubricates the engine of the international legal system.

Within the national legal system, the laws are legislated by parliament and adjudicated by courts, in order to avoid too much power concentrated in one arm of government. However, though the political class makes the laws and creates the legal system, there are checks in place within the states which maintain the integrity of the national legal system. Hence, the independence of the legal institutions and their operations vis a vis the politically elected officials ideally is sacrosanct within the states, to the end that an overt interference on the juridical process would be an attacked upon fundamental principles and ardently contested.[87]

In contrast, in the international legal system, the primary arbiters of the world orders are states who make the laws, interpret and enforce them. However, there are secondary organs, such as international organisations.[88] The implication is that politics then stands at the heart of the international legal system.[89] There appears to be a vacuum in the international legal space which opens it up to the risk of 'regulated' arbitrariness, heavily influenced by political figures and factors. The divide between politics and law in the international space is very blurred, and this in itself is the predominant weakness of the system. However, this blurred divide could be the unique strength of the international legal system. It is a system that thrives on the equality of states and the concept of sovereignty, and as a result, can best function

[86] Pollock (n 64)
[87] Shaw (n 51) p. 8
[88] Ibid p. 9
[89] See generally Louis Henkin, *How Nations Behave* (Published for the Council on Foreign Relations by Columbia University Press 1979). See also Malcolm N Shaw, *International Law* (Cambridge University Press 2014) p. 9

by international cooperation, inclusion and acknowledge of the plurality of legal processes in the international plane. It underscores the argument for a reconceptualisation of international law in a way that best reflects the 21st-century realities. Remaining static to the Westphalian international legal system and its state-centrism does not take into cognisance the other influential players on the international plane, such as multinational corporations or non-governmental organisations. It follows that states ought to distil elements of their sovereignty as they give their consent on various matters, bearing in mind the influence of the other actors and the impact their decision will have on the other actors and their activities.

NGOs seem to be the keen and ready solution resource spring for most of the global challenges of the international community and is increasingly inching closer to the centre of the international legal system. NGO's influence in international space should be acknowledged. Their increasing visibility and role in the 21st-century international legal system should be legitimised. There is a consensus of the global citizenry as to the international political and social ascendancy of diverse NGOs due to globalisation. International law should be reconceptualised in that states' consent, or sovereignty correlates with the global consensus that the 21st-century international law should undergo a paradigm shift which accommodates other players in its processes.

2.3. The problem with the Westphalian notion of International Law

It is argued that traditional Westphalian-inspired assumptions about power and authority cannot facilitate a contemporary understanding of international law in practice. As a result, there is a growing disjunction between theory and practice of the global system. It has been argued that the increasing misfit of the Westphalian notion of international law for the practical purposes of the 21st-century is becoming more acute.[90] The actors, structures and processes identified and theorised as the core players in the international plane have ceased to be of singular importance.[91] Cutler has said that the Westphalian inspired notions of state-centricity, positivist international law, and 'public' definitions of authority are incapable of capturing the significance of non-state actors, informal normative structures, and private, economic power in the global political economy.[92] It is because of the state-centric nature of the Westphalian concept of international law, which ordinarily governs the relationship between states and not between non-state actors. So, there is a disconnect which plays out in the operation of a state-centred system on a global

[90] Cutler (n 5), p. 133
[91] Ibid
[92] Ibid

reality that involves influential non-state actors. In reality, there has been a fundamental reconfiguration of power and authority in the global space. The current conceptualisation of international law has not adequately considered this reconfiguration. So the lack of asymmetry between the Westphalian notions of international law and the purposes for which it exists in the 21st century is worthy of note.

The peace of Westphalia brought an end to the Thirty Years' War[93] and is generally regarded as providing the constitutional foundations for the emerging state system – classical international law. The 1648 event is, to many international legal scholars, the source and inception of the subject of their scholarship. In this regard, Kennedy[94] observes as follows –

> 'International legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Years' War. The originality of 1648 is important to the discipline, for it situates public international law as a rational philosophy, handmaiden of statehood, the cultural heir to religious principle…Before 1648 were facts, politics, religion, in some tellings a 'chaotic void' slowly filled by sovereign states. Thereafter, after the establishment of peace, after the 'rise of states,' after the collapse of 'religious universalism', after the chaos of war, came law—as philosophy, as idea, as word.'[95]

As can be gleaned from the statement above, there were some specific impacts that the Westphalian peace treaty had in the concept of international law. They include –

The emergence of the concept of sovereignty
The rise of the nation-state as the dominant subject in international law
The importance attached to consensual law-making in international law –e.g. treaties

The introduction of Westphalian international law placed state and the concept of sovereignty as the fundamental ordering principle of the state on the international plane. It set the state at the centre as the unambiguous locus of authority on the international plane. The 1648 events were pivotal to international

[93] The Thirty Years' War, (n 41)
[94] David Kennedy, 'A New Stream Of International Law Scholarship' (1988) 7 Wisconsin International Law Journal.
[95] Ibid

law as is known today. It could be described as the birth year of modern international law, which heralded the transition from natural to positive law conceptions more in keeping with notions of sovereignty.[96]

The entire edifice of modern international law rests squarely on the Westphalian foundation of positive acts of sovereign consent, evidenced explicitly in treaty law and implicitly in customary international law. Treaty and customary law came to be regarded as the primary sources of law, while states became its 'subjects'.[97] Indeed, since the inception of modern international law following the Westphalian peace treaty, states have been considered to be the sole legitimate subject of international law. The intriguing fact which stands the risk of being overlooked is that other actors were recognised as having some legal personality. Non-state entities like the Holy See, chartered companies, and belligerents have been treated as having some legal capacities. However, regardless of any such recognition, the general orientation of the law has been state-centred.

Some scholars like Stephen Krasner argued that Westphalia did not provide an unambiguous determination of the state as the sole or exclusive locus of authority.[98] He argued that the position that the Westphalian system implies that sovereignty has a taken-for-granted quality is wrong. In Krasner's view, the actual content of sovereignty, the scope of authority that states can exercise, has always been contested. The primary function of the state or the expression of its sovereignty was the exclusive territorial autonomy. This defining attribute of the state, according to Krasner, is increasingly being challenged by the creation of new institutional forms that better meet specific needs.[99]

The arguments on the viability of Westphalian international law is beyond the question of the state's claims to authority on the international plane. Instead, it is a question of the status of the state as the only 'subject' of law and politics, and other actors in the international plane as mere objects. The implications of treating other non-state actors, in particular NGOs, like individuals, as objects and not as subjects, is problematic empirically and normatively. The increasing visibility of these actors, especially NGOs, underpins the argument of this thesis.

[96] Cutler (n 5) p. 135
[97] Ibid, p. 136
[98] Ibid
[99] Stephen Krasner, 'Westphalia And All That' in Judith Goldstein and Robert O. Keohane (eds), *Ideas and Foreign Policy* (Cornell University Press 1993), p. 235.

Although these non-state actors are classified as objects at law (*de jure*), they are, in fact, operating as subjects (*de facto*).

The exclusivity of states as the subjects of international law is problematic when looked through the lenses of the 21st-century developments which is reconfiguring state-society relations, leading to increasing contraction of state authority on the one hand and expansion of non-state actors' authority in the 21st-century world on the other hand.

Culter had argued as follows -

> "All constitutional orders require some degree of fit between their principles and practices. Whether one focuses upon the symmetry between law and practice through 'rules of recognition' or the 'convergent expectations' of the participants, the legitimacy of a constitutional order is associated with some measure of conformance of the actual practices of participants with its founding legal/ constitutional theory and principles. A disjunction between constitutional theory and the practices of participants, more often than not, portends a crisis of legitimacy. When the participants fail to recognise the legitimacy of law through their practices, the law's claim to authority is challenged and potentially undermined."

It is true also with regards to the international constitutional order. For international law to have legitimacy, according to Art 38 of the Statute of the international court of justice[100], the international custom and treaties are pivotal. Determining international custom is usually achieved through state practice, while treaties are primarily the giving of consent. Traditionally, state practice constituted the state as the 'subject' of the constitutional order, and it is the states that are primarily able to enter into treaties. However, custom or state practice is increasingly attesting to the growing influence of NGOs and other non-state actors as a de facto 'subject' in the international plane. However, legal theory has not kept in step with this changing practice. The resulting disjunction between legal theory and state practice is part of a larger disjunction associated with globalisation more generally.[101]

[100] Article 38 of the Statute of the International Court of Justice
[101] Cutler (n 5)

2.4. Rethinking the Westphalian concept of International Law vis à vis the proliferation of actors on the international plane and the pivotal role of NGOs

The choice of the NGOs as the focal point of this thesis stems from the viewpoint that the international community will benefit more from a 'governance-driven' system, rather than a 'government-driven' system. The position of the state as the central arbiters of political authority and governance in the international community remains necessary. However, their role needs to be augmented by other actors who are more representative of the 'flagless' or 'passpostless' nature of the international community and the 21st-century global challenges. In the international plane, as has been pointed out, has seen the proliferation of other non-state actors. Among these are multinational corporations and inter-governmental organisations. However, this thesis has its thrust in the direction of NGOs.

The choice to focus in the direction is inspired firstly by the essential characteristics of NGOs; some of which could be gleaned from the definition of Peter Macalister-Smith as pointed out in chapter 1. His definition underpins the choice of this subject of research. In defining non-governmental organisations, he explained as can be gleaned from their name are not established by a government, nor by an international agreement[102]. Although they are inherently private organisations and operate within the private law context of the legal system under which they are founded, their activities, objects and purposes must essentially be outward-looking and for the benefit of the public or a section of the public. There are not essentially profit-seeking like the MNCs or promoting the interests and agenda of the states like the inter-governmental organisations. So NGOs is the fulcrum of this because of their fundamental characteristics.

On the one hand, because they exist for the furtherance of a variety of causes, and on the other hand, they exist without the encumbrance of government. The former point is the reason why MNCs are not preferred as the non-state actor, and the latter is the reason why international organisations are not preferred. These core characteristics set NGOs at a vantage position of being considered as the social conscience of the society because they have no government agenda nor personal agenda driven by profit.

The second rationale for focusing on NGOs follows on from the first - the extent of the representative capacity of NGOs, and it is why they are considered the social

[102] Macalister-Smith (n 9)

conscience of the society. NGOs interfaces across all the strata of the international legal system. It engages with all players in the global space. NGOs are characterised by their apparent diversity. They encompass a broad range of organisations, social movements, and pressure groups which are the pivot of activism in various fields of public concern.

The emphasis of NGOs as having some moral currency or a social conscience is more in relation to the robustness of their representative capacity. Along that line, the expression of social conscience should be construed within the context of the Ancient Chinese philosophy of yin and yang, i.e. the concept of dualism. It describes how seemingly opposite or contrary forces may actually be complementary, interconnected, and interdependent in the natural world. In simple terms - to take the good with the bad[103]. This is the reason the reference to 'moral' or 'conscience' is not qualified as good or bad because the universality or objectivity of good or bad morals or conscience is a complex and controversial concept. It follows the argument of morality being determined by statistics. Hence, if statistically, more people on a subject matter attest to such matter as good moral standard, then it is a good moral standard, not because it is inherently so, but because it is predominantly perceived as such. Examples like abortion, or the LGBT movement, hitherto was considered immoral; today, it is considered immoral to consider it as immoral. So the reference of NGOs as the moral or social conscience of the international community is not in relation to the subjective nature of conscience or morality, but that they are representative of conscience of the global space. So for every pro-life NGO, there is a pro-choice NGO. This counter views may not be palatable, but it is preferable, and it forms one of the rationales for focusing on NGOs and their role in the reconceptualisation of international law.

2.5. Chapter 2: Conclusion

This chapter set out to assess the Westphalian concept of international law and its processes. In an attempt to gain a better understanding of 'law' and international law, it established the intrinsic role of law to the existence of any society. Having established that the continued relevance of the Westphalian concept of international law is hinged on the prominence of state on the international plane; It exposes the inadequacies of that concept in the 21st-century international plane where non-state actors are increasingly taking a more prominent role. In providing a systematic

[103] Mark Cartwright and Mark Cartwright, 'Yin And Yang' (*Ancient History Encyclopedia*, 2020) <https://www.ancient.eu/Yin_and_Yang/> accessed 11 July 2020.

account of the process of international law, it identified key elements of state practice and *opinion-juris*.

Additionally, concerning international law, in general, it identified the concept of consent and politics in the expression of sovereignty. Along these lines, it went to examine the international legal system. It sought to draw on the similarities and the differences between the domestic legal systems and the international legal systems to test the hypothesis of the proposed paradigm shift. Furthermore, the argument on the viability of Westphalian international law is centred on the question on the status of states as the only subjects of international law at the detriment of other actors on the international plane as mere objects. Against the background, it established that although non-state actors are classified as objects at law then *de jure,* they are, in fact operating as subject *de facto*. The preceding establishes the legal theory has not kept in step with the changing global practices. Consequently, results in a disjunction between the Westphalian international law and the 21st-century international legal context. These go to the very basis for this thesis. The thrust of this work is to proffer an argument for the reconceptualisation of international law as well as an argument for a paradigm shift in the perception of the central role of NGOs to this shift. Along these lines, the next chapter considers factors that highlight the deficits of the Westphalian paradigm and call for a rethink in the conceptualisation of international law.

3. Chapter 3 - Deficits of the Westphalian concept of International law in the 21st Century

Chapter 3 Contents

3.1. Chapter 3: Introduction

Following on from the findings of the previous chapter around the workings of the Westphalian international legal system and some of the challenges it faces, this chapter examines the deficits of the Westphalian concept of international law with a particular focus on the concept of sovereignty. Secondly, it goes on to objectively measure the impact of globalisation and assesses the question of the "fitness for purpose" of the international Westphalian legal framework in the 21st Century.

Concerning sovereignty, it acknowledges the importance of the concept, and its enigmatic nature, having been a subject of controversy since its inception. It embarks on an analysis of Haass elements of sovereignty- internal authority, border control, policy economy and the right to be acknowledged and not interfered with as undergoing unique challenges in the 21st Century.

In examining these challenges, it identifies factors of globalisation that defy the boundaries of sovereignty. Of the many factors, three are examined in considerable detail- failed state, global health and the internet.

After that, it progresses to examine the impact of globalisation, focusing on the centrality of interdependence to global behaviour and the pivotal role of NGOs in that process.

3.2. Factors calling for a rethink of the Concept of Sovereignty

The concept - 'sovereignty', is one of the most important concepts in international law, but also certainly one of the most enigmatic. The term sovereignty has many connotations. It is perceived to be about the monopoly of power for the highest authority of the nation-state.[104] Its meaning has been the subject of controversy.[105] Haas[106] identifies four characteristics of sovereignty. Firstly, sovereignty entails the possession of 'supreme political authority and monopoly over the legitimate use of force within its territory' (internal authority). Secondly, sovereignty entails the power to regulate movement across defined borders by a state (border control). Thirdly, sovereignty entails the freedom to make foreign policy choices (policy autonomy).

[104] John H Jackson, 'Sovereignty: Outdated Concept Or New Approaches', *Redefining Sovereignty In International Economic Law* (Hart 2008). p. 8
[105] Lassa Francis Lawrence OPPENHEIM, *International Law ... Fourth Edition, Edited By Arnold D. Mcnair* (London 1928).
[106] A United State government official

Finally, sovereignty entails recognition by other entities and freedom from external interference. [107]

Haass notes further that all the elements of sovereignty identified above - internal authority, border control, policy autonomy and the right to be acknowledged and not to be interfered with - are currently under challenge.[108] As will be depicted later, all of these elements have been supplanted by a myriad of factors of globalisation. Factors like global health, the internet, terrorism, environmental matters, economic matters, religion, et cetera. Some of these are considered further down in this chapter.

Jackson argues that sovereignty has been depicted as only being relevant as a tool for hypocrisy or oration and persuasion, with no further relevance of value to science and law.[109] The complexity of the concept and its meaning or its relevance has reached a heightened point today. It plays out in the increase of these factors of globalisation and the dilemma that the term 'sovereignty' has faced in international discourse. As a result, sovereign independence of states is increasingly giving way to interdependence, and there is an inception of new players to the international plane. This issue with the concept of sovereignty needs a clear and decisive reconceptualisation. Indeed, the concept is relevant, particularly with regards to the way states relate with each other. The inter-state relationships seem to be the extent of its relevance.

Nevertheless, the Westphalian concept of sovereignty is largely inadequate in a globalised world, where global issues need a global response from global actors and not just states. However, it must be noted that the argument of this thesis is not for the concept to be undone or discarded; rather, it should be reconceptualised. While the concept of sovereignty has been incessantly critiqued, it remains pivotal to international relations and international law.[110] In alignment with Jackson's opinion[111] on the inadequacies of the traditional Westphalian concept of sovereignty, the opinion of this thesis is that the traditional Westphalian concept of sovereignty could be more fit for purpose in this 21st century. The conventional Westphalian notion of sovereignty could be perceived as anachronistic when viewed with the lenses of the

[107] Richard N. Haass, 'Sovereignty: Existing Rights, Evolving Responsibilities' (*2001-2009.state.gov*, 2003) <https://2001-2009.state.gov/s/p/rem/2003/16648.htm> accessed 6 November 2019.
[108] Ibid
[109] John H Jackson, 'Sovereignty: Outdated Concept Or New Approaches', *Redefining Sovereignty In International Economic Law* (Hart 2008). p. 8. See also, Michael Ross Fowler and Julie Marie Bunck, *Law, Power And The Sovereign State* (Pennsylvania State University Press 1996).
[110] Jackson (n 104) p. 3
[111] Ibid

factors of globalisation, as mentioned earlier. Some of these factors are considered hereunder. The various leaders at the helm of affairs at the United Nations mooted the point on the inadequacies of sovereignty. In the 1990s, during the tenure of the former United Nations secretary-general Boutros Boutros-Ghali, he stated in a statement to the Security Council –

> "Respect for [the state's] fundamental sovereignty and integrity [is] crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality."[112]

Along the same lines, his successor, UN Secretary-General Kofi Annan admitted in a 1999 annual report to the General Assembly stating that the post-war institutions were modelled for an inter-*national* world, which is different from the reality of the current 'global' world.[113] The current position of global affairs is that the world has moved on from the state of national centrism to a more global orientation, and to that extent, a global era requires global engagement. The import of this is that there are more players on the international plane than just states. These new players have a claim of ownership of the global community, and to that extent, feel a sense of responsibility in protecting the world.

The outworking of the concept of sovereignty is that only entities regarded as having sovereignty could play a significant role on the international plane as per the Westphalian model. Treaties were negotiated and entered into by states. Only states can avail themselves of certain rights in international law. Territorial power appeared to be a crucial element in who qualifies to act or speak legitimately on the international plane. Today, the influence of other actors on the international plane across various other sectors beyond the remit of territory has earned them a voice on the international plane. Economic and social matters now transcend territorial limitations.

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[112] Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 'An Agenda For Peace Preventive Diplomacy, Peacemaking And Peace-Keeping' (UN Doc A/47/277 - S/24111 1992) <https://peaceoperationsreview.org/wp-content/uploads/2015/08/an_agenda_for_peace_1992.pdf> accessed 6 November 2019. A global world is one with increased interaction and integration, to the extent of blurred territorial boundaries, sharing of common problems and common solutions, while still retaining national identity.

[113] Marcel Brus, 'Bridging The Gap Between State Sovereignty And International Governance: The Authority Of Law', in Gerald Kreijen etal. eds., *State, Sovereignty, and International Governance* (Oxford Scholarship Online 2002) <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199245383.001.0001/acprof-9780199245383-chapter-1> accessed 6 November 2019.

As a result, there are many instances of global players, predominantly, NGOs, who consider themselves custodians of the world. So they are burdened with the responsibility for its environment, values system and its socio-economic state. They feel a need to keep it a state in safety and profitability for the majority of the global citizenry.

Given this premise, it is no surprise that inter-governmental organisations, in partnership with non-governmental organisations, can challenge criminal behaviour by states. States no longer have the convenience to mete out atrocity under the shield and expectation of the sovereign immunity of the states, thereby escaping the relevant consequences for untoward actions. Previously, the concept of sovereignty has been so limited to the concept of a monopoly of power, so national leaders and politicians readily reverted to the notion of sovereignty, cleaving onto it as a crutch, to forestall needed debate on questionable matters or avoid complex thinking[114]. Today, while this status quo is still prevalent to some extent, there is a growing revolt against the right of states to do as they will because they are sovereign. However; it has been criticised that intergovernmental organisations are no more than the big country clubs or associations, and they would expense justice at their convenience[115]. This criticism of the intergovernmental organisation gives more credence to one of the positions of this thesis. On the premise of this criticism, it is argued that NGOs, not states or intergovernmental organisations, are better placed to act as conduits of fairness and equity in the international plane. It is because, unlike intergovernmental organisations, NGOs ought not to have any affiliation to any government. The activism on the civil affairs on the international plane has been replete with several activists NGOs in the areas of the environment, animal rights, human rights, religion, et cetera. To this extent, non-governmental organisations play a significant role in guarding the social conscience of the global space; collectively abhorring cruelty, and rejecting injustice.[116]

It is observed that issues relating to weapons of mass destruction, genocide, environmental dilemma, failed states, global health, the war against flagless organisations unified by terror, et cetera, all pose a significant problem for the doctrine of sovereignty. NGOs may be credited with activism and advocacy on these issues. However, the substantive and enforceable actions on these issues are still driven by

[114] Jackson (n 104) p. 5
[115] Peter Hough, 'Intergovernemntal Organisations.', in Jefrey Haynes et el (eds), *World politics : international relations and globalization in the 21st Century* (Pearson Longman 2010) <http://eprints.mdx.ac.uk/9749/> accessed 5 April 2020.
[116] Jackson (n 104) p. 9

states. Non-state actors do not have the capacity to deal with most of these crucial issues. These issues, sometimes need a response of force or the threat of the use of force and the rhetoric of sovereignty. The position of this research to this view is that coercive and brutish response has not had much positive result. Frequently violence has bred more violence, and coercion has led to more dangerous resistance, putting more innocent and helpless people in harm's way.

Hence, perhaps, there should be a complete change of paradigm on the ways to deal with these global issues. Some are of the view that the presence of humanitarian organisations, most of which are NGOs, have had a more positive impact in war-torn areas, than boots on the ground.[117]

The rhetoric of sovereignty is where the term is used as a tool of political convenience, hinged on the traditional definition of the term. The traditional conceptualisation of the term is not fit for the 21st-century purpose. It is the notion of a state's absolute power and authority over its subjects and its territory, unfettered by any higher rule. This rhetoric hinged on this definition is problematic.

John H Jackson stated in this respect as follows –

> 'It could be characterised as the nation-state's power to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions. Today, no sensible person would agree that this antiquated version of sovereignty exists. A multitude of treaties and customary international law norms impose international legal constraints (at the least) that circumscribe extreme forms of arbitrary actions even against a sovereign's own citizens.'[118]

There are many reasons why the current notion of sovereignty is inadequate in today's globalised world. These include the occurrence of failed states, terrorism, global environmental challenges, global health challenges, and the volatile global impacts of a financial crisis in a state as well as the advent of the phenomenon of the internet. From all of these, this thesis considers only three of these endless issues.

[117] David Hughes and Yahli Shereshevsky, 'Something Is Not Always Better Than Nothing: Against A Narrow Threshold Justification For Humanitarian Intervention' (*Opinio Juris*, 2018) <http://opiniojuris.org/2018/05/07/something-is-not-always-better-than-nothing-against-a-narrow-threshold-justification-for-humanitarian-intervention/> accessed 5 April 2020.

[118] Jackson (n 104) p. 11

Firstly, the element of failed states is considered, mainly because of the significant role sovereignty and the failure of the concept plays in the failure of states and how it is central to the core the thesis. Secondly, global health is considered as another example of the need to reconceptualise international law. The socio-political and economic importance of global health to a thriving international community and its relevance due to the current prevalent coronavirus are some of the factors that influence the choice of global health. Finally, the internet and its governance are considered because it is the gateway of globalisation. From all the above factors, the internet appears to be the factor the best illustrates the diminishing fit of the territorial attribute of the Westphalian international law of the 21st-century international community.

3.2.1. Failed States

When a state on the international plane has been seen to have too little of 'sovereignty' that it cannot transform their nominal sovereignty into effective governance, it could be referred to as a failed state. Barma defined a failed state as one that is unable to perform the two fundamental functions of the sovereign nation-state in the modern world system. In essence, it cannot project authority over its territory and peoples, and it cannot protect its national boundaries. [119] It has led to a myriad of activities within many states, which have threatened their continued existence. When a state is failing, it could be described that their sovereignty element is faulty. When the element of sovereignty is attenuated, then the symptoms play out in crumbling infrastructures, faltering utility supplies, unstable educational and health facilities, and deteriorating fundamental human-development indicators, such as infant mortality and literacy rates. The government barely functions, while the law-makers, courts, civil service, and military lose their capacity and professional independence.[120]

For example, at the end of the 20th century, Somalia descended into state collapse under rival warlords, and Afghanistan, a failed state under the Taliban regime, harboured the terrorist group Al-Qaeda. State failure leads to increasing humanitarian activities and likely emergency relief usually delivered by NGOs.[121] There have been instances where states have been overtaken by insurgents or militants seeking to

[119] Naazneen H. Barma, 'Failed States', in Mark Bevir (ed), *Encyclopedia of Governance* (Sage Publications 2007).
[120] Naazneen H. Barma, 'Failed State | Government' (*Encyclopedia Britannica*, 2007) <https://www.britannica.com/topic/failed-state> accessed 6 April 2020; see also Naazneen H. Barma, 'Failed States', in Mark Bevir (ed), *Encyclopedia of Governance* (Sage Publications 2007).
[121] Ibid

overthrow a government or secede without due process. Instances of violent guerrilla warfare or protest and promotion some ideological stance. They were plagued by incessant corrupt and nonconscientious practices. These activities lead to a state of unrest, ultimately gives rise to the breakdown of law and order of the states, leading to sabotage, deaths, poverty, lack of the basic social amenities and even the intrusion of neighbouring states to exploit these vulnerabilities to foment rebellion or secessionist movements.[122] Under these circumstances, the needed rebuilding responsibilities fall to the international community. Accordingly, understanding the dynamics of state failure and strengthening weak nation-states in relation to the role of NGOs is imperative.

Where the sovereignty of the state is sabotaged internally or externally, it leads to dire impacts on the citizens of the states. The grim state of the citizens of these failed states has often piqued the moral conscience of the states around the world. An example of this was seen in the case of the chemical weapons attack during the Syrian crisis.[123] The impact of failed states, whose's sovereignty has been impeded by a myriad of forces, could include a severe challenge to peace, life, property and national security across the globe in another sovereign state.

Another example of this is the unrests that plagued Afghanistan in the 1990s. The international community paid little attention to beyond the random lip service until what culminated in the 9/11 attack in the United States in 2001. The 9/11 attack changed the outlook of the international community to failing states. The failing states could be breeding ground for extremism and havens for criminals, drug traffickers, and terrorists. Such lawlessness in one state can bring devastation to another state.

Hence, it has become in the interest of the international community to prevent today's troubled states from becoming tomorrow's failed states. In doing so, it implies that the international community then assumes the responsibility of the sovereign government, which is counter-intuitive, as this further impedes on the sovereignty of the troubled state. These international military interventions are said to be motivated by a "responsibility to protect," such as the Kosovo and Libya interventions. It is a claim that the international community, in line with the principle of *jus cogens*, can bear responsibility for minorities or civilians in sovereign states, especially if these minorities

[122] Haass (n 107)

[123] Abby Ohlheiser, 'John Kerry: Syria's Chemical Attacks 'A Moral Obscenity' (*The Atlantic*, 2013) <https://www.theatlantic.com/national/archive/2013/08/john-kerry-syria-chemical-attacks-moral-obscenity/311772/> accessed 6 April 2020.

are threatened with genocide.[124] It played out in the invasion of the Afganistan by the United States.[125] The question that arises is whether the narrative could have been different if the international community responded to the failing of Afghanistan that played out in usurping of the sovereignty of State by the Taliban in the 1990s. The US response to the failing state of Afghanistan after the 9/11 attack led the US to take up some of the responsibility of the sovereign state. Mr Haass pointed out that –

> 'In Afghanistan alone, over twenty U.S. agencies operate on the ground, delivering $840 million worth of aid that we have committed to humanitarian and reconstruction efforts. Working with Afghan and international partners, we are helping local authorities resettle refugees, restore physical security, build government institutions, and jump-start economic activity.'[126]

This illustration further buttresses the argument of this thesis - the concept of sovereignty in the 21st century is not as sacrosanct or absolute as it perceived and needs to be reconceptualised. Perhaps, the concept has never been sacrosanct, not even at the initial stages of its emergence; there were always entities which struggled to meet all the elements of a functioning, viable state.

There have been different approaches taken by the international community in their intervention to deal with an impending international crisis. Some have been active incursion by the big states, who are usually the permanent members of the United Nations Security Council. Other times by other states, who may have formed a peacekeeping coalition force or a monitoring group.[127] However, these are often reactive measures rather than proactive measures. With this approach, the losses, both to life and property, are hardly mitigated. Hence, this thesis opines that it is in the interest of the international community to engage a preventive approach, rather than a reactional approach, in dealing with a potential international crisis. This opinion transcends beyond just failing states and extends to other facets of the international

[124]Moritz Mihatsch, 'A Post-Westphalian Caliphate? Deconstructing ISIS Ambitions' (*Worldcrunch.com*, 2014) <https://worldcrunch.com/syria-crisis-1/a-post-westphalian-caliphate-deconstructing-isis-ambitions> accessed 18 April 2020.

[125] In February 2020, The Taliban and the US sign agreement seen as a step towards ending Washington's longest war – See, Shereena Qazi and Alia Chughtai, 'US War In Afghanistan: From 2001 Invasion To 2020 Agreement' (*Aljazeera.com*, 2020) <https://www.aljazeera.com/indepth/interactive/2020/02/war-afghanistan-2001-invasion-2020-taliban-deal-200229142658305.html> accessed 6 April 2020.

[126] Haass (n 107)

[127] As in the case of ECOMOG during the crisis in Liberia.

community, including an impending environmental calamity, global health challenges or other like matters. As Haass pointed out,

> "the old adage rings true - an ounce of prevention is worth a pound of cure."[128]

The United Nations estimates that eight of the most expensive cases of failing states in the1990s cost the international community in excess of $250 billion. It could have been much cheaper to support in building up state capacities before they fall apart, rather than trying to pick up the pieces.[129]

So, there are instances of technological, economic and military camaraderie between states, enhancing the strength of the weaker states, while mitigating a potential international crisis. To this end, there has been the emergence of exchange programmes between states, international development banks, international justice systems, et cetera. The challenge with these approaches arises when trying to reconcile it with the sacredness of the traditional notion of the doctrine of sovereignty, of which one of its most sacred tenets is the principle of non-interference. The question that arises is whether the failing states which welcome this interference, albeit, positive, do so voluntarily, or whether consent, in dire circumstances, becomes no more than a luxury of sovereignty. Whichever is the case, it is observed that some of the sovereign power of the state is delegated. It could be delegated vertically to NGOs who provide the relevant humanitarian or advocacy support or horizontally to other states who provide the relevant military or financial support needed at the time. The import of this is that the concept of sovereignty should be reconceptualised to accommodate instances of the delegation of such sovereignty. This point is discussed further in the subsequent chapter.

3.2.2. Global Health

Another reason for the inadequacy of the doctrine of sovereignty is global health standards with particular reference to infectious diseases which have culminated in epidemics and pandemics globally. The advantages of economic globalization, such as increased connectivity and interdependence, also give rise to risks, such as the transmission of viruses. [130] Examples of these include the occurrence of Ebola and the

[128] Haass (n 107)
[129] Haass (n 107)
[130] Anthea Roberts, 'How Globalization Came To The Brink Of Collapse' (*Barrons.com*, 2020) <https://www.barrons.com/articles/how-globalization-came-to-the-brink-of-collapse-51585865909> accessed 6 April 2020.

recent Coronavirus – COVID 19. Much like the financial crisis of 2008, the recent global health crisis has set the world in a panic state. Such as has not been seen in over decades. Stock markets are at a record low, and the global economy is once again on the brinks of collapse. Here is an incident which occurred in Wuhan China but has had such global impacts, which has damaged the livelihood of citizens other far parts of the globe. Talks about the prospects of the disease irrepressibly spreading are prevalent in social corners. The Wall Street has suffered the fastest reversal since 1933 during the depths of the Great Depression. The Dow lost more than 10% of its value in a week from record-breaking highs to the lowest point since 2016. More than $5tn (£3.9tn) has been wiped off the value of global markets, and the pandemic is causing the most significant disruption in decades to economies across the world.[131] The FTSE 100 is not immune, plunging the most in a week since the 2008 crash. Markets are expected to fall further as long as the disease remains.[132] Pundits have argued that world growth could collapse into a recession for the first time since 2009, primarily because the priority of the global community and the nations is to preserve life, which in this case, will have a knock-on economic impact and enduring consequences. In order to inhibit the spread, nations have taken drastic measures, such as travel bans, school closures, cancellation of business conferences, et cetera. The Chinese city of Wuhan has been under lockdown for weeks after it was identified as the centre of a deadly coronavirus outbreak, and a typically bustling city of 11 million people now appears to be a ghost town.[133] Indeed, given the global outlook of this disease, it will require a concerted global effort to effectively respond to it as opposed to a nationalist or a protectionist approach. Globalisation, technology and climate change make the spread of viral disease easier and incubate many other social and economic ills. Lurching headlong into a protectionist and luddite world will not provide adequate and lasting solutions. The scale of our collective problems demands international coordination.[134] However, a valid argument against these points could be that there is an evident resurgence in nationalism with states closing their borders. For a moment, even the EU undermined their basic principles of freedom of movement, with EU states shutting their borders to each other. States are asserting

[131] John Burn-Murdoch and others, 'Coronavirus Economic Tracker: Latest Global Fallout' (*Ft.com*, 2020) <https://www.ft.com/content/0c13755a-6867-11ea-800d-da70cff6e4d3> accessed 6 April 2020.

[132] Richard Partington, 'Coronavirus Exposes The Danger Of Embracing Protectionism | Richard Partington' (*the Guardian*, 2020) <https://www.theguardian.com/business/2020/mar/01/coronavirus-exposes-the-downside-of-ditching-globalisation> accessed 10 March 2020.

[133] 'China's Unprecedented Quarantine Of 11 Million People In Wuhan Is 3 Weeks Old. Here's What It's Like In The Isolated City.' (*Business Insider*, 2020) <https://www.businessinsider.com/wuhan-coronavirus-what-life-like-inside-quarantined-city-china-2020-2?r=US&IR=T> accessed 10 March 2020.

[134] Partington (n 132)

internal powers to shut down places where people congregate. Countries like China, Italy, the UK, the US are setting out different national responses.

These reductions in travel and locking down of people have led to complex outcomes for nationalist paradigm as well as the globalisation paradigm. While these policies are effective at containing the virus, the world is witnessing real problems of supply as the global flow of goods is cut off or reduced. Car manufacturers throughout the world have had to pause production because of the lack of component parts from China. The number of computers and phones being produced has plummeted. Major suppliers of generic drugs, like India, are unable to continue production because 80% of the active pharmaceutical ingredients on which these drugs are based must be imported from China.[135] It is argued that due to the density of the economic interdependence; the pandemic will not lead to the collapse of globalisation. Instead, countries need to adapt and manage interdependence.

The global nature and impact of the pandemic on various facets of the international community call for a concerted global response. The bio-medical professionals across the globe have responded to the ongoing coronavirus pandemic with a vast, high-quality global research effort to find a treatment for COVID-19.[136] If a Vaccine is found, talks are ongoing on how to invest now in global infrastructure. To ensure the distribution of the vaccine globally on an equitable basis when it is proven safe and effective.[137] Also, Gavi, the Vaccine Alliance[138], has is another evidence of a global effort championed by NGOs in dealing with global issues. Since its inception in 2000, it has a record of addresses vaccine equity and helps vaccinate nearly half of the world's children. Over the last two decades, it has supported 496 vaccine programs in the 73 poorest countries and helped supply them with 600 million vaccine doses every year.[139]

Weintraub et al. have argued that around 1 billion people in the world — predominantly residents of developing countries — lack formal identities; many are mobile. It is the view of these scholars that the lack of formal identity presents a massive challenge for governments trying to reach a critical mass of dispersed

[135] Roberts (n 130)
[136] Helen Leask, 'Huge Global Effort For Clinical Trials In COVID-19' (*Medscape*, 2020) <https://www.medscape.com/viewarticle/928094> accessed 6 April 2020.
[137] Rebecca Weintraub, Prashant Yadav and Seth Berkley, 'A Covid-19 Vaccine Will Need Equitable, Global Distribution' (Harvard Business Review, 2020) <https://hbr.org/2020/04/a-covid-19-vaccine-will-need-equitable-global-distribution> accessed 6 April 2020.
[138] 'About Our Alliance' (*Gavi.org*) <https://www.gavi.org/our-alliance/about> accessed 6 April 2020.
[139] Weintraub (n 137)

people. The more significant concern regarding the COVID-19 is that without reliable IDs, there will be difficulties in knowing who has received vaccines.[140] The Scholars argue that there could be the emergence of digital IDs.[141] It follows that if the purpose of these IDs is to monitor the distribution of global vaccines for the pandemic, then there is a chance that this could lead to global digital IDs for the global community. For example, Simprints[142] has deployed biometric IDs on health and humanitarian projects across 12 countries, which have increased health care visits and quality while preventing fraud. It is yet another global response to a global challenge, driven by NGOs.

3.2.2.1. Global Harmonization and Global Health

As far back as 1995, the World Health Organization has asserted that emerging infections present a global threat which will require a concerted global effort to respond to it effectively.[143] The rationale behind this assertion is that there could be an upshot of these infectious diseases anywhere in the world, and they could spread uncontrollably across national borders through the continuous movement of people and capital in the name of trade/business or just travel for pleasure. These have severe consequences for international law because the monopoly of a state in dealing with these issues is mostly non-existent. After all, the microbes do not respect internationally recognised borders.[144] The pursuit of a national health policy which does not take into cognizance the global impacts on national health is no longer viable.

Moreover, this challenge has been the case for decades. Hence the need for cooperation is no longer just a good idea, but it is a necessity for the survival of the global citizenry. Problems abound with the onslaught on globally infectious disease, mainly if attempts to address this global challenge engages a state-centric international approach alone. Aman has pointed out[145] that the need for global

[140] The concern is that the initial COVID-19 vaccine supply will be limited, so it will be essential to verify each dose reaches a real patient. Corruption, leakage, and even accidental duplication waste precious supply and are deadly. – See Rebecca Weintraub, Prashant Yadav and Seth Berkley, 'A Covid-19 Vaccine Will Need Equitable, Global Distribution' (Harvard Business Review, 2020) <https://hbr.org/2020/04/a-covid-19-vaccine-will-need-equitable-global-distribution> accessed 6 April 2020.
[141] Weintraub (n 137)
[142] Simprints is a nonprofit tech startup from the University of Cambridge. – See 'Simprints Technology - About' (*Simprints.com*, 2020) <https://www.simprints.com/about> accessed 6 April 2020.
[143] 48 World Health Assembly, 'Communicable Disease Prevention And Control: New, Emerging And Re-Emerging Infectious Diseases: Report By The Director-General' (*Apps.who.int*, 1995) <https://apps.who.int/iris/handle/10665/177496> accessed 11 March 2020.
[144] Garrett L, 'The Return Of Infectious Disease. - Pubmed - NCBI' (*Ncbi.nlm.nih.gov*, 1996) <https://www.ncbi.nlm.nih.gov/pubmed/12349255> accessed 11 March 2020.
[145] Alfred Aman, 'Indiana Journal Of Global Legal Studies: An Introduction' (1993) 1 Indiana Journal of Global Legal Studies 1, p. 1

harmonization is increasingly becoming more relevant. After highlighting some global problems such as the global environment, Aman argued that global problems require global strategy. It is observed that this is the case across other spheres of public policy and the relevance of the traditional distinctions between national and international political, social and economic activities have been eroded and paled out of significance because of globalisation.[146] He added that the increased number of environmental issues would expectedly necessitate a solution which demands global cooperation for years to come. Aman was of the view that, ultimately, the interaction across the various spheres at the international and domestic levels will lead to a new perspective in the way law is conceptualised both on a national and an international level.

With the growing emergence of infectious disease, the public health sector becomes more denationalised. The root cause is even more deeply rooted in the norms of the 21st century, such as the increase in international travel, the increasingly global nature of food handling, processing and sales. Beyond the current threat of coronavirus, there have been infectious diseases such as tuberculosis, ebola, sars, cholera, and the list could go on. These diseases have spread to new regions through global travel and trade.[147]

However, on the other hand, the trajectory of public health response to these diseases is also global. With the increase of health-related NGOs and the support of the WHO, there have been global medical advancements. One of the major success stories is the eradication of the poliovirus. The poliovirus is an example of how the effort of a partnership between the non-governmental organisations and inter-governmental organisations were far more effective in combating the global health terror than states could have been if states have acted exclusively. In 1988, the wild poliovirus was present in more than 125 countries and paralyzed 350,000 people every year, primarily young children. At that point, the World Health Assembly set a goal to eliminate the disease, and the Global Polio Eradication Initiative (GPEI) commenced. It is instructive to note that the impact of the concerted effort at immunization across various sectors through the Global Polio Eradication Initiative, there has been a significant reduction of the number of cases by more than 99 per cent, saving more than 13 million children from paralysis. India stopped the virus in 2011, and today, polio

[146] Ibid

[147] Lance Saker and others (*Who.int*, 2004) <https://www.who.int/tdr/publications/documents/seb_topic3.pdf> accessed 20 March 2020.

is found only in Afghanistan, Pakistan and Nigeria. In 2016, there were fewer than 40 cases reported globally.[148] The Global Polio Eradication Initiative is a public-private partnership led by national governments with five partners – the World Health Organization (WHO), Rotary International, the US Centers for Disease Control and Prevention (CDC), the United Nations Children's Fund (UNICEF), Bill & Melinda Gates Foundation and Gavi, the vaccine alliance. Its goal is to eradicate polio worldwide.[149] Of the five major partners of the Initiative, three are NGOs; one is an inter-governmental organisation and the other as a department of the state. It is noteworthy that through the concerted efforts of NGOs, and the states who were primarily providing the hard infrastructure for the NGOs agenda to thrive, the initiative has been one of the most successful global health initiatives. Beyond these organisation, attention should be paid to the volunteers of various NGOs who work tirelessly to bring about the objectives of these NGOs. At the Polio 2012 summit in New Delhi, the former prime minister of India, Manmohan Singh said the following –

> "This [India's removal from the list of countries with active transmission of endemic polio] gives us hope that we can finally eradicate polio not only from India but from the face of the entire mother earth… The real credit goes to the 2.3 million volunteers who repeatedly vaccinated children even in the most remote areas, often in very bad weather conditions […]I commend each one of them for their dedication, commitment and selfless service."[150]

Another example of where a concerted global effort has had a tremendous impact was the worldwide eradication of smallpox in 1977. Smallpox has existed for at least 3,000 years and was one of the world's most feared diseases until it was eradicated by a collaborative global vaccination programme consisted of the World Health Organization and other non-governmental organisations. The last known natural case was in Somalia in 1977. Since then, the only known cases were caused by a laboratory accident in 1978 in Birmingham, England, which killed one person and caused a limited outbreak. Smallpox was officially declared eradicated in 1979.[151]

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[148] 'Polio' (*Gatesfoundation.org*) <https://www.gatesfoundation.org/what-we-do/global-development/polio> accessed 11 March 2020.

[149] 'GPEI-Who We Are' (*Polioeradication.org*) <http://polioeradication.org/who-we-are/> accessed 11 March 2020.

[150] Ibid

[151] 'Frequently Asked Questions And Answers On Smallpox' (World Health Organization, 2016) <https://www.who.int/csr/disease/smallpox/faq/en/> accessed 11 March 2020.

As can be seen from above, the solution to global health threat relies to a great extent on the international cooperation between states and non-state actors – particularly NGOs. Often, the research carried out for the cure of some of these global health concerns are done by universities and other NGOs. A typical example is the continuous efforts made by Cancer Research UK to bring about a solution for cancer. The same has been the case for other matters, including the global efforts to come up with the needed vaccines for some of the worlds most feared infectious diseases. However, it is noteworthy that the solution propounded by these non-state actors could only thrive if there is cooperation from the sovereign states. Put another way, the proposed solutions to the threat of the emerging infection rely on the potency of the sovereign state. However, ironically, the threat feeds off the impotence of the state in addressing global disease problems. When it comes to public health activities, globalization erodes sovereignty, but the proposed solution makes sovereignty and its exercise critical to dealing with the threat of emerging infections.[152] It feeds into the core theme of this thesis which is that there should be a paradigm shift in the way sovereignty is perceived. Sovereignty ought to be seen as a tool that states pool together in order to achieve the 21st-century objectives. If the concept stays static to the Westphalian connotation of sovereignty which refers to the monopolised or exclusive control of states on the international plane, then there could be no good solution to the threat of global infectious diseases or other health concerns. The success of WHO in globalizing disease control programs suggests that the defects of the Westphalian notion of international law have not hobbled its effectiveness in improving health care worldwide. One of the core strengths of WHO is its approach in engaging extensively with the NGOs in delivering its objectives.

3.2.2.2. WHO and NGOs

As found in later chapters of this thesis, the relevance of article 71 of the UN charter is similar to the provisions of article 71 of the WHO's constitution. The WHO's constitution also provides under article 71 authorisation for the organisation to make suitable arrangements for consultation and cooperation with non-governmental organisations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental". The Organization's early interest in this collaboration was shown by the vote of a resolution by the First World Health Assembly

[152] David Fidler, 'Globalization, International Law, And Emerging Infectious Diseases' (1996) 2 Emerging Infectious Diseases 77, p. 79.

in 1948 defining the "Working Principles Governing the Admission of Non-Governmental Organizations into Official Relations with WHO".[153]

The NGO's eligibility concerning consultation with WHO depends on its competence area. It should mainly be driven by health or health-related objectives.

Furthermore, the NGO should be international in its structure and its reach and should not be commercially orientated or profit-driven. The applicant NGO must align with the spirit, purposes and principles of the WHO constitution, which primarily seeks to achieve health for all.[154]

The ECOSOC[155]categorises NGOs into three categories, i.e. general consultative status, special consultative status and the roster status. The World Health Organisation only categorises NGOs into one category - official relations. At the moment, the NGO would usually apply for admission into official relations with WHO, after a period about two years of informal relational and interactions. The application will consist of a structured plan detailing collaborative activities for a three-year period agreed to by both the NGO and WHO. Thereafter, a decision is reached by the WHO executive board, and its standing committee on NGOs will review the collaborative plan every three years.[156]

If an NGO enters into official relations with WHO, then the NGO will enjoy participatory rights in meetings and committees which also entitles the NGO with the right to make statements at the invitation or with the permission of the meeting chairman. However, it should be noted that the NGO does not have the right to vote. Also, the NGO enjoys access to non-confidential information. Moreover, it can submit a memorandum to the Director-General, who reserves the prerogative to determine whether or not to circulate; considering the nature and scope of such circulation.

Today there are about 217 non-State actors in official relations with WHO further to the decisions of the 146th session of the Executive Board in February 2020.[157] These entities represent a wide range of activities including emergency and humanitarian relief

[153] Yves Beigbeder, 'Another Role For An NGO:' (*Globalpolicy.org*, 1997) <https://www.globalpolicy.org/component/content/article/177/31839.html> accessed 16 March 2020.
[154] Yves Beigbeder, 'Another Role For An NGO:' (*Globalpolicy.org*, 1997) <https://www.globalpolicy.org/component/content/article/177/31839.html> accessed 16 March 2020.
[155] DIsscused at length in the chapter 5.
[156] Yves Beigbeder, 'Another Role For An NGO:' (*Globalpolicy.org*, 1997) <https://www.globalpolicy.org/component/content/article/177/31839.html> accessed 16 March 2020.
[157] 'List Of Entities In Official Relations With WHO' (*Who.int*, 2020) <https://www.who.int/internal-publications-detail/non-state-actors-in-official-relations-with-who> accessed 16 March 2020.

organizations, trade and consumer associations, parliamentary and professional medical societies, the association of women, young people, the elderly, occupational health specialists and research organizations et cetera.[158] Beigbeder elaborated on examples of how they cooperate stating as follows -

> 'They cooperate, for example, in emergency relief operations, in [the] training of personnel, workshops on blood safety and epidemiology, as well as education programmes for young surgeons and midwives. Other activities include exchanges on bioethical issues and developments in medical law, the application of the results of research on such subjects as nutrition, human reproduction and the prevention and treatment of accidents.'[159]

NGOs may also engage in global health by trying to gather as much support for WHO policies and programmes, while influencing what the policies are. They could also exert pressure on the WHO to see that NGOs furthers their objectives or interests. NGOs could be actively engaged with WHO in providing operational assistance, competent and specialised advice, relevant training, and facilitating implementation.

The relevance of NGOs and the impact of their participation with WHO initiatives cannot be overemphasised. This point was underscored by former Director of the WHO Programme on AIDS, DR Jonathan Mann, in 1989 –

> "There is an *[sic]* increasing recognition of the power and importance of community-based organizations. These community organizations have often been pioneers, leading the way for more timid or reluctant governments [...] In AIDS programmes, there is a direct relationship between the strength, diversity and involvement of community-based and non-governmental organizations and the level of success which can be achieved."[160]

[158] Beigbeder (n 156)
[159] Ibid
[160] Ibid

3.2.2.3. Global Health as a Human Right?

Article 25(1) of the Universal Declaration of Human Rights (UDHR) provides that

> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[161]

Although the UDHR is not a treaty and is not legally binding, the global efficacy of its provisions cannot be undermined. The protection of the rights and freedoms set out in the Declaration has been incorporated into many national constitutions and domestic legal frameworks. As its title suggests, universal – meaning it applies to all people, in all countries around the world. It stipulates the fundamental human rights, which are to be protected and shared by all members of the international community and has had a significant influence on the development of international human rights law.[162] Hence, the provisions of article 25 cannot be disregarded.

The importance of global health is both a legal concern as well as a practical concern. Similar provisions to article 25 of the UDHR have been made in other international legal instruments and treaties. For example, article 12 of the International Covenant on Economic, Social and Cultural Rights[163] (ICESCR) provides that

> 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[164]

The ICESCR was adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966. It is an international human rights treaty and to that extent creates legally binding international obligations to those States that have agreed to be bound by the standards contained in it.

[161] Article 25 of the Universal Declaration of Human Rights 1948

[162] 'Universal Declaration Of Human Rights' (*Un.org*) <https://www.un.org/en/universal-declaration-human-rights/> accessed 16 March 2020.

[163] International Covenant on Economic, Social and Cultural Rights 1966, General Assembly Resolution 2200 A (XXI) 1966

[164] Article 12 of the the International Covenant on Economic, Social and Cultural Rights, 1966

However, the arguments remain as to whether or not international law creates a "right to health" and whether the provisions of article 12 of the ICESCR makes a demand on the global community to take necessary steps to preserve this right. Article 12 (2) (d) provides –

> 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for[…] the prevention, treatment and control of epidemic, endemic, occupational and other diseases.'

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[165] 'Universal Declaration Of Human Rights' (*Un.org*) <https://www.un.org/en/universal-declaration-human-rights/> accessed 16 March 2020.

[166] Article 12 of the the International Covenant on Economic, Social and Cultural Rights, 1966

[167] 'OHCHR | International Covenant On Economic, Social And Cultural Rights' (*Ohchr.org*) <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 16 March 2020.

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Effectively, states are legally obligated to ensure the full realisation of the right to health by taking steps to prevent, treat and control infectious diseases. By extension, states are legally obligated to distil their sovereignty by empowering the NGOs on the frontline, who are better positioned to respond to some of these global health issues. It should be stated that the human right in contention here is not a right to be healthy, as that cannot be enforced. Instead, according to the general comments issued by the UN Committee on Economic, Social and Cultural Rights – General Comment No 14, in paragraphs 8 and 9 stated that the right to health that is contemplated is not to be understood as a right to be healthy. It is mainly because a state cannot ensure good health, nor is it possible for a state to provide requisite protection against every possible cause of human ill-health. Hence a right to be healthy is a myth that cannot be enforced. The genetic factors, the peculiarity of each individual and their unique susceptibility to ill health and the adoption of unhealthy or risky lifestyle is predominantly within the purview of the sovereignty of the individual. To that extent, the states cannot interfere. Rather, the focus concerning the right to health should be on the entitlement of the individual to enjoy a variety of facilities, goods, services and conditions which are necessary for the realization of the highest attainable standard of health.[168]

Therefore, the right to health, according to the general comments, contains both freedoms and entitlements. So, an individual is *free* to control his health and body, and that right should be free from interference. Interference could include torture, non-consensual medical treatment and experimentation. Also, the individual is *entitled* to a system of health protection which provides equality of opportunity for

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168 (*Docstore.ohchr.org*, 2000) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL> accessed 16 March 2020.

people to enjoy the highest attainable level of health. It puts a heavy burden on states, and by extension, the international community to provide the necessary systems to protect against global infectious diseases. These systems cannot be adequately put in place without a reconceptualisation of international law. The concept of sovereignty and international law should be revisited to the end of legitimising the role of NGOs as critical influencers of the global health legal framework.[169]

On the other hand, it has been argued that the right to health is not a direct human right. It is only indirectly considered a human right, under article 3 of the European Convention of Human Rights (ECHR). Article 3 of the ECHR provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. To this extent, where the denial of the state's opportunity for the highest attainable standard of health amounts to inhuman or degrading treatment, then one could imply that the right to health is by extension a human right contemplated under article 3 of the ECHR. Arnell referred to health, examing whether it was sufficient to satisfy the human rights bar as a ground to considerer when determining extradition.[170] He stated that ill-health as a legal ground was difficult to satisfy and could entail judicial consideration of different factors. He pointed to the leading article 3 physical ill-health case of N v UK which demonstrated the high bar.[171] In that case, the UK wanted to deport N to Uganda. At the time, she was undergoing treatment for AIDS, the Grand Chamber of the ECtHR held that aliens could not in principle claim any entitlement to remain in a state party in order to continue to benefit from medical, social or other forms of assistance and services. It was held that even if the deportation would lead to a hindrance of the treatment and lead to a deterioration in health or increase morbidity, article 3 will still not have been violated.[172] The argument that could be made here is would deportation in the circumstances be in contravention of article 12 of the International Covenant on Economic, Social and Cultural Rights?

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169 (*Docstore.ohchr.org*, 2000) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL> accessed 16 March 2020.

170 Paul Arnell, 'Extradition And Mental Health In UK Law' (2019) 30 Criminal Law Forum 339, p 342

171 *N v UK* (2008) 9 47 EHRR 39; See also 'HUDOC - European Court Of Human Rights' (*Hudoc.echr.coe.int*, 2008) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86490%22]}> accessed 16 March 2020; Paul Arnell, 'Extradition And Mental Health In UK Law' (2019) 30 Criminal Law Forum 339, p. 344

172 Arnell (n 170), p. 344

3.2.2.4. Global Health Challenges and the Sovereignty of States

Further to the provisions of article 12 of the International Covenant on Economic, Social and Cultural Rights, the states are under some legal obligation to provide the necessary system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. The threat of infectious diseases poses some challenges to international law: first, the emerging infections problem exacerbates fundamental weaknesses in the law in that there is no practical way of enforcing it. Again, the root cause of this is the limited conceptualisation of sovereignty, which gives states absolute power and control of their territory and citizens. So, while states are free to agree to treaties, it has hard to enforce compliance with the terms of those treaties, as a state cannot be told what to do. The effectiveness of international law depends on the consent of states, which means that sovereignty and its exercise determine the fate of international legal rules.[173]

As mentioned earlier, the irony of it all is that global infectious diseases undermine the sovereignty of a state. However, the sovereignty of states stays relevant in determining the concerted global response of the states to the global infectious diseases. In other words, the problem by-passes the state. However, the solution has to rely on the state through the medium of international law.[174] Hence, the sovereignty of the state and its pivotal relevance to international law constitutes the core strength and weakness of international law, at least, concerning dealing with global infectious diseases. International rules that are made, often reflect the compromises that are made by states in reaching such international legal rules.

In contrast, the lack of implementation of these rules reflects the rigidity of states. States hold onto the concept of sovereignty, thereby expressing their unwillingness to restrict their freedom to act as they wish. Fidler has stated that the alleged failure of the International Health Regulations may be due to the failure of WHO member states to fulfil the duties they accepted. Neither the regulations nor WHO has any power to enforce compliance.[175] The question of enforcement is a perennial problem of international law.

The global scope of global infectious diseases such as ebola, coronavirus et cetera, necessitates agreement by most states to control infectious diseases. The control of

[173] James Crawford and Ian Brownlie, *Brownlie's Principles Of Public International Law* (8th edn, Oxford University Press 2008).
[174] Fidler (n 152) p. 80
[175] Ibid

these infectious diseases is paramount because the failure of one state in meeting the minimum standards of global surveillance and control network puts at risk the efficacy of the entire global state effort. Hence, the role of the international NGOs emerges in this process, in that, their constituents are globally situated, and their efforts are more globally orientated than just state orientated. There is a natural incentive to approach surveillance and response from a global perspective. It is particularly so for international NGOs.

Under Article 21 of the WHO Constitution, the World Health Assembly can adopt binding regulations in sanitary and quarantine requirements and other procedures to prevent the international spread of disease.[176] The World Health Assembly adopted the International Health Regulations under Article 21. While Article 21 and the regulations are relevant to infectious disease control efforts, it is doubtful whether the regulations are enough. One of the key challenges is that nothing in the existing regulations give the authority to require WHO member states to strengthen their public health infrastructure or the access to it. NGOs play a significant role here, as they tend to fill in the gaps that exist where the states do not have the requisite infrastructure to prevent control or respond to such global health challenges. Good public health infrastructure is pivotal to the global health balance. [177]For example, one of the key ways to deal with these health challenges is the quick identification of the outbreak of the disease and notification to the rest of the international community. However, the identification and notification are hinged on sound public health infrastructure. It is found that most states that have thrived in this area have heavily relied on public-private partnership of state and non-state actors, including NGOs in providing the relevant public health infrastructure.

3.2.3. The Internet

Another example of how dispersed governance is in the 21st century is the internet. It is one of the few enigmatic developments of the 21st century. It is one of the foremost catalysts of globalisation. It is essential to understand what the internet is.

Two key features of the internet are essential to an understanding of the internet. Firstly, it is software and not hardware. As a result, it appears that soft law seems more

[176] Ibid, p. 81

[177] Lee Jong-wook, 'Global Health Improvement And WHO: Shaping The Future' (*Who.int*, 2003) <https://www.who.int/whr/2003/media_centre/en/lee_lancet_article.pdf> accessed 6 April 2020.

likely in providing the needed legal framework for it. Secondly, it is derived from the term internetwork and not merely network.[178]

The implication of these two is, firstly, being that it is not hardware; it does not consist of the physical infrastructure of wires, radio waves, cables, or terminals. However, it may depend on those physical media for implementation.[179] Essentially, the internet is a standardised set of software instructions known as protocols for sending data over a network and a global set of unique addresses so data could be directed to specific addresses. These protocols can operate over any technology.[180] Secondly, due to internetworking, internet protocols can communicate with each other across a global network of addresses. As a result, these networked data across addresses are not restricted to any physical or state territory or border. Also, these networks on which data is travelling, are owned by individual organisations, public or private, that either operate their own networks for internal users or sell their network access to external users. Mueller described it as follows -

> 'The internet is the global data communication capability realised by the interconnection of public and private telecommunication networks using internet protocols (IP), Transmission Commission Protocol) and other protocols required to implement IP internetworking on a global state such as DNS and packet routing protocols.'[181]

These facts, as stated above, are such that could not have been contemplated at the inception of modern international law.

3.2.3.1. The non-territorial attribute of the Internet

Communication of data and information via the internet is done in a non-territorial way. Completely removed from the contemplations of the Westphalian idea of international order which was a question of territorial control and state autonomy. However, with the internet, web names and addresses create virtual spaces that are essentially independent of geography. By implication, it is independent of political jurisdiction, and the question of distance is abridged and irrelevant to the workings of the internet. There is now increased traffic of human digital interaction. This interaction

[178] Milton Mueller, John Mathiason and Hans Klein, 'The Internet And Global Governance: Principles And Norms For A New Regime' (2007) 13 Global Governance: A Review of Multilateralism and International Organizations, 237, p. 244
[179] Ibid
[180] Ibid p. 237
[181] Ibid p. 244

cannot be practically tied to any territory and as a result, creates a problem for governance and policy which emanates from any territory.

At the inception of the internet, there might have been a chance for connectivity arrangements to be structured to conform to national boundaries if it was primarily driven by agents of the states rather than a provider-based address assignment, which is independent of the state. As a result, global top-level domains such a .com, .net and .org could have been avoided, and more control could have been given to the state, and country codes like the telephone could have been adopted.[182] The challenge is that the influence of the internet has exponentially grown. If that foresight had been at its inception, perhaps things might have been done differently. At this point, it is unlikely that the internet could be forced to be remodelled back to a territorial model. So the internet is de facto non-territorial.

So the question arises as to how the internet is governed. A model of successful internet governance must be legitimate. Its legitimacy derives from determining if the parties who define its governance are considered the key stakeholders of the industry.[183] This thesis argues that democracy at the finest is where governance is as close to the constituents as possible. In this case, a system of governance that is accepted by the entire information society. Given the situation of the internet, consideration needs to be given to the global digital divide, ensuring that there is equal participation from all the countries in the world on a common platform if the objectives of democracy could be achieved in the governance of the internet. However, one sure thing is that the governance of the internet is not one that could be effectively nor efficiently be done when it is driven by the state. It is because of its antecedents in the private sector and the extent of its fluidity and anonymity tendencies. This fact is a further attestation to the argument of this thesis that the 21st century needs to explore new ways of global governance, and the role of NGOs in this process is central and in keeping with the realities of the 21st century. The issue of Internet governance is an aspect of globalization and needs international cooperation and regulation and harmonization of international legislation.[184] Internet governance has a global dimension characterized by multiple territorial links. Given the fact that the Internet does not take into account national borders of States, it is

[182] Ibid p. 248
[183] Adrian Cristian Moise, *Internet Governance* (2014).
[184] Ibid

clear that issues caused by this phenomenon cannot be solved but by cooperation between States.[185]

The construct of the internet is non-territorial. Therefore it is removed from the Westphalian construct of society. So any attempt for territorial governance will result in some anomaly.

John Perry Barlow[186]wrote the following poem in 1996 –

> 'Governments of the Industrial World, you weary giants of flesh and steel,
>
> I come from Cyberspace, the new home of mind.
>
> On behalf of the future, I ask you of the past to leave us alone[…]
>
> You have no sovereignty where we gather.[…]
>
> Governments derive their just powers from the consent of the governed.
>
> You have neither solicited nor received ours. We did not invite you.
>
> You do not know us, nor do you know our world.
>
> Cyberspace does not lie within your borders.[…]
>
> Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications.
>
> Ours is a world that is both everywhere and nowhere, but it is not where bodies live.
>
> Our identities have no bodies,
>
> So, unlike you, we cannot obtain order by physical *coercion.*
>
> *We believe that from ethics, enlightened self-interest, and the commonwealth, our governance will emerge.*
>
> *Our identities may be distributed across many of your jurisdictions.'*[187]

3.2.3.2. The Internet Corporation for Assigned Names and Numbers (ICANN)

There have been several attempts to have a global coordination and policymaking framework evolve, which would ultimately govern the internet. Since the mid-90s,

[185] Ibid

[186] An American poet and essayist, as well as, a fellow emeritus of Harvard University's Berkman Klein Center for Internet and Society.

[187] 'A Declaration Of The Independence Of Cyberspace' (*Electronic Frontier Foundation*, 1996) <https://www.eff.org/cyberspace-independence> accessed 8 March 2020.

there has been much work in reaching this objective. There have been several loci of activity: the Internet Corporation for Assigned Names and Numbers (ICANN), the International Telecommunication Union (ITU), the World Intellectual Property Organization (WIPO), and the World Summit on the Information Society (WSIS).[188] However, there has been hardly any consensus reached in arriving at a collective agreement. ICANN does perform technical coordination, but the organization did not win formal international recognition at the UN's WSIS.

It is important to note that ICANN was established as a non-profit public corporation in 1998. Its creation was invoked by the US Department of Commerce during a public proceeding in 1997-1998 that invited international participation. ICANN was set up as a multistakeholder governance organization which operated outwith the public sector, even though it engaged some governmental input through its Governmental Advisory Committee (GAC). When the Clinton administration contemplated some policy framework for the internet and electronic commerce, the key stakeholders of the sector, including information technology executives at firms like IBM, MCI and AOL raised concerns about the likelihood of electronic commerce being undermined by widespread assertions of territorial jurisdiction.[189] They were worried that state governments could impose on the naturally global arena of the Internet a patchwork of inconsistent or conflicting national laws and regulations.[190]

To this end, the policy of the Clinton administration was to persuade governments to establish a predictable and straightforward legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation. The non-state governing authority would enter into "private contracts" with industry stakeholders that would be global in scope, rather than subject themselves to a welter of different laws based on territorial jurisdictions.[191]

The US nursed some concern with the creation of a charter for the regulation of the internet by governments. The concern was particularly with an internet charter that is driven by European leadership. This point is a cogent one to note concerning the US policy on the regulation of the internet. Therefore, the white paper from the US commerce department, which served as the founding document for the ICANN in

[188] Mueller, Mathiason and Klein (n 178) p. 248
[189] Ibid
[190] Ibid
[191] Ibid

1998,[192] deliberately avoided direct involvement of government. At the same time, it extended an invitation to the international community, but not the states, to be engaged with the governance of the internet. In so doing, it delegated its authority to a new not-for-profit corporation formed by the private sector Internet stakeholders to administer policy for the internet name and address system.[193] As a result, the ICANN regime was a governance regime steered primarily by NGOs with some participation from the US government.

The US policy attracted some criticism, in that the US government willingly delegated its authority for the regulation of the internet to a non-governmental organisation. However, it retained its authority acting as a contractor to ICANN and also asserting "policy authority" over the domain name system's root, reserving to itself the right to review and approve any changes to the root zone file proposed by ICANN. This US indirect control was initially premised on the impression that its authority would be temporary. However, it later retracted that position and retained its unilateral authority over the DNS root.

Hence, during the first WSIS summit, the governments of South Africa, China, and Brazil, backed by several other developing countries and the ITU, expressed their concerns with the regulation of the Internet as being entirely within the remit of ICANN and by extension the United States. There was an evident dissatisfaction on the fact that a non-governmental organisation could make global public policy independently from national governments or even international agreements. At this summit, there was a clash between two groups. On the one hand, there were the dissatisfied nations alongside the ITU. They were for that traditional international model, which involved a multilateral decision by national sovereigns to confirm or amend the existing arrangements. On the other hand, there were the private sector and supporters of the ICANN, the Internet Society and the US government. They downplayed the very need for any "governance of the Internet". They claimed that the existing patchwork quilt of governance arrangements affecting the Internet - extending across ICANN, WIPO treaties, the Internet Engineering Task Force (IETF) and ITU standards, and other conventions-was fundamentally sound. Hence, there was no need for the existing NGO-driven model of governance to be tinkered with, following the principle – if it is not broken, then there is no need to fix it. Notably, the very entity – NGO is a creation of the laws of a state. There is the argument that If the rein of

[192] US Department of Commerce, National Telecommunications and Information Administration, 'Management Of Internet Names And Addresses' (white paper) 1998).
[193] Mueller, Mathiason and Klein (n 178) p. 248

NGOs were independent of the control of the state, then NGOs will simply be an opportunity for rich and powerful states to take over, albeit indirectly, and run the 'global economy'. This is certainly a possibility, hence the need for a framework that legitimises their role. Legitimising their role is essential because with legitimacy comes the requisite checks and balance.

3.2.3.3. Governing the internet

The governance of the internet does not fall exclusively within the remit of one particular section of the international community. Indeed, governments have realised that it is not possible to approach the governance of the internet in the same way that they approached other matters which are primarily territorial. Internet governance consists of intentional decisions made by the collectivity of the Internet community.

The internet community consists of the owners, operators, and users of the networks and interconnection protocols, et cetera. An insight into the workings of decision making on internetworking processes will broaden the horizon of one's approach to internet governance.

Governments will, of course, also play a critical and probably decisive role in the governance of the internet, which is one of the world's most vital global services. However, it has been said that policymakers need to take one step back if they hope to take more steps forward. There should be a paradigm shift concerning governance. One that moves away from the exclusive control of government to a more inclusive approach. One that recognises and legitimises the role of the non-governmental organisation in the function of the internet. One of the foremost governers of the internet remains the ICANN - a non-profit organisation, which could also be referred to as an NGO.

3.3. The Impact of Globalisation and a question of the 'Fitness-for-Purpose' of the Westphalian international legal framework

There is some academic commentary on the concepts of sovereignty and globalisation.[194] A paradigm shift in the way sovereignty is perceived is fundamental to the core of this thesis. It seeks to lead an analysis that reveals the reconceptualisation of international law as fundamental to a complete perception of the notion of sovereignty. A conception of sovereignty which

[194] Paul Schiff Berman, 'From International Law To Law And Globalization' (2005) 43 Columbia Journal of Transnational Law 485, p 488.

acknowledges the act of voluntarily subjecting oneself to the order of another is not an abdication of sovereignty. Rather it is an expression of sovereign will in its full essence. It is counter-intuitive to consider the latter act of being subject to another as a taint on sovereignty, without first considering the former act of voluntarily making that decision to further one's interests. Hence sovereignty and globalisation can indeed work hand in hand when considered in its fullness and completeness.

3.3.1. Interdependence: An added case for the reconceptualisation

Unfortunately, both concepts – sovereignty and globalisation, are prone to polarised controversy across many quarters. This discussion and the polarisation became increased in recent times. The core reason for it becoming prevalent lately has been the increasing meshing of the international community into one global village and the mixed bagged outcomes. As a result, national boundaries have been blurred. Many citizens have more than one nationality. There has been an emergence of digital stateless currencies such as the bitcoin, which exist beyond traditional state boundaries. People's financial behaviour is a good barometer for social trend. If people are tending towards stateless currencies, then there is an argument that the global society is willing to live by a new concept of international law that traverses the states. Attah holds the view that with the invention of Bitcoin and the proliferation of other cryptocurrencies, the unrestricted interaction of economies and complete financial inclusion is a possibility for the entire world.[195] Also, the cost and time for transportation and communication have been grossly reduced. Economic turmoil in one state engulfs the immediate region or even the globe. Security has become more than the concern of a single state but more global concern. Ultimately, interdependence has come to the forefront of the daily lives of members of the international community; whether individuals, corporate persons or states. The consequence of the interdependence outlook of the international community is that across various sectors of the international community, the kind of issues that arise are such that cannot be sufficiently dealt with by a single nation-state. The issues arising from a predominantly interdependent outlook require the concerted joint effort of various members of the international community.

[195] Elikem Attah, 'How Cryptocurrencies Are Driving Globalization ~ Crypto Core Media' (Crypto Core Media, 2018) <https://cryptocoremedia.com/cryptocurrencies-driving-globalization/> accessed 26 April 2020.

Essentially, interdependence breeds interdependence. Non-governmental organisations are significant arbiters of interdependence or some institutionalised 'coordination' mechanism.[196] Expectedly, this reality is at variance with the ageing Westphalian model of sovereignty, which is perceived to be primarily about the exclusivity of the sovereign state and is at odds with the concept of globalisation. As has been pointed out, the concept of globalisation hinders the ease with which, states hitherto could control their borders. Today, it is in the interest of states to trade the sanctity and rigidity of the concept of sovereignty and its territorial restrictions for the benefit of multi-lateral cooperation. There is a strain on the will and capacity of the sovereign states to exercise their sovereignty concerning control of their borders. This strain exists regardless of whether it is physical borders or other impalpable borders, such as technological, environmental or financial borders.

This global interdependence is the fulcrum of globalisation. The persuasion of globalisation is that it is in the interest of states to allow the freedom of movement of various 'hard' and 'soft' assets or resources across state borders. This freedom comes at the expense of rigidity on the stance of traditional sovereignty and restriction on the borders. On the other hand, the dissuasion is that globalisation is the cumulation of a diverse mix, whether positive and negative, including – political, economic, social and cultural. It abridges the geographical and ideological distance while increasing the likelihood of access beyond traditional territorial boundaries, ultimately leading to an increased flow of goods, capital, people, ideas, and information.[197] The argument is that the reality of it is more than just the increased notion of interdependence as discussed earlier, but rather the torrential increase of international flow of assets or resources, and ideologies largely defiant of traditional territorial boundaries. These are primarily driven by non-state actors who frequently straddle between the fields of home and host states, with the international space as their core playing field. The fact is that these actors are outwith the effective control of national governments. The import of all of these is that the flow across borders is not selective of just good assets or resources and ideologies but broadly includes negative assets or resources and ideologies.

[196] John H Jackson, 'Sovereignty: Outdated Concept Or New Approaches', *Redefining Sovereignty In International Economic Law* (Hart 2008). p. 4
[197] Haass (n 107)

Expectedly, therefore, it is observed that the same network that channels through it, significant investment capital between states can also transmit financial contagion leading to the global financial crisis. Similarly, the same network that channels through it, global infrastructural and industrial advancement and which holds the potential of alleviating poor regions out of poverty could also lead to inter-state environmental pollution. Such pollution could even creep to other states who are not immediate beneficiaries of such infrastructural development or industry production. The same world-wide-web that shrinks the distance between continents, facilitating commerce and exchange of information and ideas, could also be a medium for criminal enterprise. As has been seen in recent years, the web could influence political choices of individuals within states in the voting of their electoral candidates. The same scientific expertise that has advanced global medicine and provided a cure for some age-long infirmity is used to exterminate thousands for global citizens in the hands of terrorists. So, although there are many good offshoots of globalisation, there have been some significant negative offshoots of globalisation as well. The negatives include issues such as terrorist networks, global drug trade, trafficking in human beings, the proliferation of weapons of mass destruction, the spread of infectious diseases, and the destabilizing impact of rapid financial flows. [198] However, these negative challenges that are posed by globalisation are best resolved through the channels of interdependence and not by an exclusively state-centric disposition. Some of the most significant and active agents of change and solution within these global channels of interdependence are NGOs.

3.3.2. The NGOs and Interdependence

The thrust of this thesis is legitimising the active role of NGOs in global engagement and shifting the paradigm on the concept of sovereignty. It buttresses the point of the reconceptualisation of international law. The integration of the global space and even the possibility of a single supranational supreme entity is increasingly becoming more plausible with the increasing influence of global non-state actors to the regionalisation of various international communities of states. Indeed, the Trump or Brexit dispensation of a rise in nationalist rhetoric has posed a significant challenge to this possibility. However, the global challenge to the evolution of a

[198] Ibid

state-centric status quo to a more integrated global space is not by any stretch a victory for staying with the status quo. Instead, it has been argued that the contrary winds have only served to make the notion of a single supranational entity soar even higher. More regional pacts are being signed simultaneously with significant withdrawal from some significant regional pacts. For example, the United Kingdom pulled out from the European Union in January 2020, while only less than a year earlier in May 2019, The African Continental Free Trade Area (AfCFTA) was created by the African Continental Free Trade Agreement among 54 of the 55 African Union nations. This trade pact is so far the largest trade pact since the WTO. The United Nations Economic Commission for Africa estimates that the agreement will boost intra-African trade by 52% by 2022[199].

Furthermore, Robert Howse argued that states had relinquished their influence and sense of control of global affairs to global markets.[200] The principle of non-interference in the affairs of a sovereign state is shaken by global instances of where actions taken in one state (especially when it is an act of state which is a global financial power), have a tremendous impact in the internal affairs of another state. Today is a globalised world that is underpinned by a political-economic theory of oneness, where one incident in one part of the world often has a significant economic impact in another part of the world.

So, there is an increased need for the United Nations to wield its strength and relevance more to cater to the increasing oneness of the international community. To more effectively further its initiatives, particularly in the face of diverse global challenges, from poverty to global health concerns, from the extant need to maintain global peace, to the global war against terrorism, from the quest for the safeguarding of human rights and the equality of states to the curbing of the purification of nuclear weapons.

In this mix, the role of non-governmental organisations is made more germane to the balancing out of the conflicting state's interest with the overall global interests. It is more so because of the predominantly neutral nature of the NGOs, with their more apparent affiliation being to the causes that they pursue. The uniformity of the causes that these NGOs pursue are mostly the same globally, at least in

[199] 'Africa Is Launching Afcfta, The World'S Largest Free Trade Area - But These Are The Stumbling Blocks' (*World Economic Forum*, 2019) <https://www.weforum.org/agenda/2019/09/africa-just-launched-the-world-s-largest-free-trade-area/> accessed 22 February 2020.

[200] Wenhua Shan, Penelope Simons and Dalvinder Singh, *Redefining Sovereignty In International Economic Law* (Hart 2008), p. xliv.

principle. Although, this may be debatable because at times the causes are conflicting with the interest of other NGOs with a different set of value system. A typical example is a conflict between NGOs on the issue of abortion. While the pro-choice and pro-life camps are on opposing ends, the principle of their causes is alike – the human rights of either the mother or the unborn child.

However, amidst this increasing influence of NGOs on the global space, there is the convergence of sovereign states as well. However, this state's harmonisation is facilitated by technology, trade and also the uniformity of causes. These causes include matters such as the protection and prosperity of her citizens. It also includes maintenance of peace and order within the states. However, states find that non-sates actors best foster their agenda, and in particular, NGOs. Again, these increase the likelihood of a redefinition of the concept of sovereignty. A paradigm shift in the concept of sovereignty with more focus being placed on the cooperation of states and non-state actors, within their various regions and globally. A reconceptualisation of international law to a paradigm which encompasses the distilling of certain powers and responsibilities to non-state actors who are increasingly more in the frontline in tackling these global challenges.

3.4. Chapter 3: Conclusion

This chapter was undertaken to explore the deficits of the Westphalian concept of international law, evaluate the concept of sovereignty and its ensuing challenges. It embarked on a journey to objectively measure the impact of globalisation vis-à-vis the "fitness for purpose" of the Westphalian international legal framework for the 21st Century. In evaluating the concept of sovereignty, it establishes sovereignty as the possession of as supreme political authority and monopoly over the legitimate use of force within its territory. It depicts it as a concept that empowers the state to regulate movement across defined borders. It is also described as an attribute that behoves on the state the freedom and responsibility to make foreign policy choices which are acknowledged by other states. Finally, it shows sovereignty as a concept that serves as a deterrent to external interference by other states.

Furthermore, it explored how these attributes of sovereignty have been supplanted by the myriad of factors of globalisation, with emphasis on only three. i.e. failed states, global health and the internet. In analysing the notion of failed states, it likened it to faulty sovereignty in that sovereignty is attenuated and plays out in crumbling infrastructure faltering utility supplies, unstable education and health facilities, the deteriorating human development indicators such as infant mortality and literacy

rate, and the barely functional government where the lawmakers, courts, civil service and the military lose their capacity and independence. It highlighted instances in Somalia, Afghanistan and Syria where the failure of state could be a breeding ground for extremism and lawlessness.[201] These outcomes of a failed state have a devastating impact on other states; as a result, requires external intervention, thereby usurping the sovereignty of the failed state. The challenge with this positions is, at what point Is it okay for a foreign state to interfere—drawing from the position of the united nations which estimated that eight of the most expensive cases are of failing state in the 1990 cost the international community over $250 billion[202]. Is there justification for earlier intervention before a state fails? The challenge with this approach is in trying to reconcile it with the sacredness of the traditional notion of sovereignty. Notably, the principle of non-interference is sacrosanct to the traditional notion of sovereignty. This dilemma feeds into the core of this thesis.

In examining the notion of global health, it identifies the impact of global infectious diseases and their relativity to economic globalisation which plays out and includes connectivity and interdependence giving rise to transmission of diseases. It highlights the fact that the upshot of the infectious disease anywhere in the world would spread uncontrollable across national borders through the continuous movement of people and capital in the name of trade or pleasure. These instances highlight the inadequacies of sovereignty in that microbes do not respect internationally recognised borders.[203] It acknowledges that the solution to global health threat relies extensively on international cooperation between states and non-state actors - particularly NGOs. As pointed out, the majority of research carried out for the cure or prevention of this global health concern are primarily done by universities and NGOs.

However, the solution propounded by these non-state actors could only thrive if there is cooperation from the sovereign states. It acknowledges the irony of it in that the threat feeds off the impotence of state in controlling national boundaries. However, the solution relies on the potency of the sovereignty of the state in consenting to global cooperation and internal implementation of proposed solutions. So It reiterates the points of the thesis that sovereignty should not be done away with but should be reconceptualised in a way that it is 'pooled' together in the achievement for 21st-century objectives.

[201] Barma (n 120)
[202] Haass (n 126)
[203] Garrett (n 144)

About the internet, it emphasises the non-territorial attribute of the internet in a way that is completely removed from the contemplations of the Westphalian idea of international order. It revealed the increased traffic of human digital interaction which are intrinsically non-territorial, therefore creating a problem for governance. The internet has a global dimension characterised by multiple territorial links, and as a result, issues caused by this phenomenon cannot be solved but by cooperating between global states.[204] It highlights the emergence of Internet Cooperation for Assigned Names and Numbers (ICANN) as the multi-stakeholder governance organisation for the internet, which is essentially an NGO.

These three factors of globalisation highlight interdependence as central to the effective operations of the international community. Moreover, NGOs are significant arbiters of interdependence.

The preceding culminate into a call for a rethink of the concept of sovereignty. Ultimately, leading to a justifiable argument for a paradigm shift in the conceptualisation of international law. Along these lines, the next chapter engages in a forensic examination on the concept of sovereignty in order to appraise potential designs for its reconceptualisation.

[204] Moise (n 185)

4. Chapter 4 – Reconceptualising Sovereignty

Chapter 4 Contents

4.1. Chapter 4: Introduction

The findings of the preceding chapter call for a paradigm shift in the conceptualisation of international law. So, this chapter follows on and carefully reviews the idea of reconceptualisation. It explores the potential of reconceptualisation by evaluating the notion of sovereignty and its reconceptualisation.

To achieve this objective, it examines the principles of subsidiarity and conferral to determine whether or not a delegation of sovereign powers will impede the integrity of the concept of sovereignty or facilitate an understanding of the concept in its full essence.

Additionally, in examining the notion of subsidiarity and the ensuing delegation of sovereignty, it will explore the concepts of dissolution in Scotland and federalism in Germany. It seeks to extrapolate the workings of these concepts to the hypothesis of a reconceptualised international law.

Furthermore, in a bid to critically appraise the notion of sovereignty in its full essence, it will investigate the multi-faceted nature of sovereignty in relation to the increasing influence of NGOs internationally.

Finally, this chapter will critically examine the compelling principles of *Jus cogens* and the compelling case of *Van Gend en Loos* case. This principle and case will underpin the argument that even the traditional concept of sovereignty is not absolute due to its limitation in certain aspects of international law as a result of the principle of *jus cogens.* Moreover, further to the *Van Gend en Loos* case, non-state actors could be granted 'subject status' in international law as individuals were granted 'subject status' in European law. Thereby validating the crux of this thesis that international law could be reconceptualised in a way that takes into cognisance 21st-century global realities. In particular, attention should be given to the need to legitimise NGOs as subjects on the international plane.

4.2. The concept of Sovereignty and the question of Reconceptualisation

Given the realities of interdependence and the role of NGOs as discussed in the preceding chapter, it is the position of this thesis that state sovereignty has been strengthened rather than ceded. Some 'realist' hold the opinion that the state has and should continue to have the right to monopolise the exercise of power

concerning its territories and citizens. Moreover, this right of sovereignty, in their view, should deter foreign or international powers and authorities from intermeddling with the affairs of the state.[205] Indeed, this is the case, and may very well be the case for decades to come.

It is a common knowledge that the traditional Westphalian notion of sovereignty has made and continue to make essential and timeless contributions to the international community, particularly concerning its stability and peace. It is a concept that is, like a thread, deeply intertwined into the drapery of international law and is so germane to global existence. To suggest that it should be done away with would require a strong case for a substitute to fill the vacuum that such a proposition would create if considered and affirmed.

However, this position does not adequately respond to the argument that sovereignty, in its traditional context, is not sufficiently fit for purpose in the 21st century. Nevertheless, the argument should be clear; the old Westphalian doctrine of sovereignty is of limited value but is undoubtedly of some indispensable value. The value of the concept is so fundamental to the fabric of the world order. Often, because of how embedded it is to the order of the global society, there is a tendency to undermine the pivotal role that the doctrine plays. Hence, one of the thrusts of this thesis is to disentangle the embeddedness of the concept to international law, in order to explore other ways the concept of sovereignty could be perceived in its full essence.

At times the value of the concept of sovereignty could best be appreciated by first considering what was obtainable before the inception of the concept. Before the inception of the concept of sovereignty which endowed the states as the primary subject of international law in the 17th and 18th centuries, the power and authority in the international space were contested between empires, kingdoms, duchies and city-states. Additionally, there was a heavy influence of religious authority over secular authorities, which blurred the divide between religious and secular authority.[206] Hence, there were contentions between the Pope and the Kings over the same people and territory. It, with time, escalated and led to the wars of religion at the time of the Reformation.[207]

[205] Jackson (n 104) p. 4
[206] Haass (n 107)
[207] Ibid

The Westphalian treaty of 1648 was a culmination of the long unending religious wars. The emergence of sovereignty was Europe's response to the anarchy of the international space. It sought to bring a level of order to a disorderly international legal context, which was predominantly pluralistic. It was a way to maintain an order that acknowledged the inherent rights of states to have exclusive jurisdiction within their territory. It guaranteed the political independence, and equality of states with their counterparts on the international plane. It preserved the state's ability to determine their policy on their relations with other foreign nations. It ultimately meant that interference with the internal affairs of states was no longer condoned by the international community.[208]

The occurrence of the Westphalian treaty of 1648 ultimately led to the stabilisation of Europe. Then the doctrine of sovereignty extended to most of the rest of the world, including China and Japan.[209] It followed that the recognition of the sovereignty of a state by other states became fundamental to the attainment of statehood. This recognition was one of the underpinning factors of decolonisation activism after the Second World War.[210]

Over the past three and a half centuries, sovereignty has been pivotal to the world order. So, there should be a general presumption in favour of respecting it.[211] There is no gainsaying in establishing that the concept has been fundamental to the stability of the international community for centuries. It is the cornerstone of legal protection against the external intervention, the premise for negotiation of treaties, the catalyst for the formation of international inter-governmental organisations, and the prime facilitator for the development of international law.[212]

Although sovereignty continues to be relevant even in the 21st century as essential for international peace and security, the arguments remain that it has faced its greatest challenge since its inception – Globalisation.

[208] Ibid
[209] Haass (n 107)
[210] Ibid
[211] Ibid
[212] Ibid

4.2.1. Reconceptualising Sovereignty – delegation of sovereign powers

Given the rise in interdependence and the diverse ways, it poses a benefit as well as a challenge. The argument that the benefits of interdependence outweigh the challenges is highly contested and polarised. However, there is a higher chance of a consensus that interdependence is inevitable. As a result, it is prudent to conceptualise the world order in a way that effectively accommodates globalisation. The point is reiterated over and again that states are more inclined to cross-collaboration on the international plane across various strata of the international order.

States are collaborating with states, intergovernmental organisation, multinational corporations, and non-governmental organisations to deliver the state's objectives and to further common interests. Thus, there is an increasing trend of voluntarily pooling and delegating sovereign powers horizontally and vertically in the fostering of multilateral cooperation. The more this is done, the more the demarcation between the national and international boundaries blurs, leading to an amalgamation of people, interests, culture, global markets, et cetera, making it inconvenient and unlikely for states to work in silos.

The question that has been posed over time is whether states cede their sovereignty by collaboration internationally? This argument is valid because international integration across state boundaries certainly has its implication for the citizens of the states and the various institutions of the state. Inadvertently, most of the institution in the states find themselves accountable to international institutions. At times, citizens of the states could employ international law against certain positions of the state. An example of this is seen in the *Van Gen den Loos* case, which is discussed later in this chapter.

An instance of sovereign states 'ceding their sovereignty' is the European Union. Given that Europe is the heart of the Westphalian peace treaty of 1648, it could be described as ironic that the EU is a prime example of its states' subjection to a supranational government. A few decades ago, it was inconceivable that the mark, franc, lira would give up their local currency for the euro. Although, it should be pointed out that this is not in itself a novelty, as the transformation of Europe is reminiscent of the transition of the United States centuries ago from a loose collection

of states under the Articles of Confederation to a federal union under the US constitution.[213]

Ceding sovereignty and international collaboration is also seen with the advent of the African Union (AU), well underway, since the turn of this century. It is no wonder that the Sirte Declaration of 1999[214] in constituting the African Union, replaced the erstwhile Organisation of African Unity (OAU). It is helpful to point out the contrast between the 1963 OAU and the 21st century AU. The former was premised on non-interference as a cornerstone. The latter is committed to advancing the respect for human rights and good governance, as well as establishing a mechanism to monitor the compliance of member states with these commitments.[215] Of note here is that the latter favours more integration and interdependence than the former.

The core reason for these regional amalgamations is that states are faced with new challenges. The difficulty arises in determining whether to trade off some elements of sovereignty to enhance their capacity to determine their future. Even the powerful states, like the United States, have confronted this dilemma and at times, have delegated their sovereignty to international institutions to further particular interests of the states, which may otherwise be impossible to advance.

These global and regional occurrences further buttress the factual behaviour of sovereign states in response to the inadvertent need to be interdependent, seemingly at the expense of the concept of sovereignty. The question is whether the voluntary subjection of one state to another entity actually compromises the essence of sovereignty?

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[213] Ibid

[214] On 9.9.1999, the Heads of State and Government of the Organisation of African Unity (OAU) issued the Sirte Declaration calling for the establishment of an African Union, with a view, to accelerating the process of integration in the continent to enable Africa to play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they were by certain negative aspects of globalisation. The African Union (AU) was officially launched in July 2002 in Durban, South Africa, following a decision in September 1999 by its predecessor, the OAU to create a new continental organisation to build on its work. The decision to re-launch Africa's pan-African organisation was the outcome of a consensus by African leaders that in order to realise Africa's potential, there was a need to refocus attention from the fight for decolonisation and ridding the continent of apartheid, which had been the focus of the OAU, towards increased cooperation and integration of African states to drive Africa's growth and economic development. See 'About The African Union | African Union' (*Au.int*, 2019) <https://au.int/en/overview> accessed 19 November 2019.

[215] Haass (n 107)

4.2.1.1. Understanding sovereignty & delegation: The similarity between the individual and the state

The similarity should be drawn between the individual or the citizen and the state, particularly concerning the doctrine of sovereignty. The doctrine of sovereignty could best be described as the complete independence of the state, absoluteness of power and authority to determine its affairs within its territory and its foreign relations. It is the same with individuals or the citizen and their freedom in a free state. An adult individual or citizen of a free state has complete independence from the control of anybody and has absolute power and authority to determine his/her affairs. However, the individual may consider it in their interest to be subjected to some higher authority to maintain law and order in society. Alternatively, to be subject to another parallel authority in order to carry on a bilateral contract. It will be complete anarchy if such an individual, decides in the elation of his/her independence to be completely lawless. Essentially, the act of lawfulness is intrinsically a compromise of the absolute liberty of the individuals. The liberties are curbed to the extent that the citizen is free to do whatever he/she wishes to do as long as it is lawful. Though the individual may be free to drink, the 'freedom' is curbed when it comes to drinking and driving. Also, though the individual is free to contract, the 'freedom' is curbed as soon as the contract is reached. After the contract, the individual must abide by any obligation that arises out of the terms of such contract. Also, though an individual is free to marry whomever they wish, their 'freedom' is curbed when the marriage lawfully occurs. After a lawful marriage, the individual, in certain states, will not be allowed to break out of the marriage without the permission of the law, nor marry two wives/husbands at the same time. These choices are subject to another law, sometimes higher (as in drunk driving) and other times parallel (as in a contract). However, it does not necessarily mean that they curb the independence of the individual; it only curbs how that independence is expensed, in the interest of social order and progress.

This process mirrors the laws of obligation, which are a construct of the social order of most societies. For example, in Scotland, the legal obligations are either arise *ex voluntate* or *ex lege*.[216] The former refers to obligations that arise voluntarily with consent, and the latter refers to those obligations of which there is hardly the choice

[216] William W McBryde, 'THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA, VOL 15 Edinburgh: The Law Society Of Scotland And Butterworths, 1996. Xxiv, 89 And 1080 Pp (Incl Indexes). ISBN 0 406 237 15 8' (1997) 1 Edinburgh Law Review.

to be obliged by it.[217] However, they exist because of law, and citizens are simply compelled to fulfil such obligations by law.[218] Thus, the restriction on drinking and driving arises under an *ex lege* obligation, to which a 'sovereign' citizen, i.e. a free and independent is obliged to observe and obey. However, it must be pointed out that even the *ex lege* obligations are also by the indirect choice of the sovereign people, reflected in the principle of the sovereignty of the parliament[219]; also referred to as the principle of popular sovereignty. It is a doctrine in political theory that government is created by and subject to the will of the people, i.e. the rule of the people. [220] So, the state and its government are empowered by the consent of its people. The consent of the people is reflected in their representatives in parliament. The classic social-contract theorists of the 17th and 18th centuries[221] held that the state's existence and powers are generally defined or circumscribed by, the rational agreement of its citizens, as represented in an actual or a hypothetical social contract among themselves or between themselves and a ruler.[222] This concept is deeply entrenched in the history of the United States of America, and Benjamin Franklin described the concept as follows –

> "In free governments, the rulers are the servants and the people their superiors and sovereigns".[223]

It is a principle that is also shared in almost any democratic nation. The principle is underpinned by the fact that the parliament epitomises the people - having been independently elected by the sovereign will of various constituents to represent their interests in the legislation of laws in the state.

So, further to the *ex lege* obligations, the citizens are subject to the laws of the land. These laws emerge as a result of the consent of the citizens through their elected representatives.

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[217] Ibid

[218] Ibid

[219] 'Parliament's Authority' (*UK Parliament*) <https://www.parliament.uk/about/how/role/sovereignty/> accessed 15 April 2020.

[220] 'Definition Of Popular Sovereignty' (*Merriam-webster.com*) <https://www.merriam-webster.com/dictionary/popular%20sovereignty> accessed 15 April 2020.

[221] Thomas Hobbes (1588–1679), John Locke (1632–1704), and Jean-Jacques Rousseau (1712–78), See also, Brian Duignan, 'The Social Contract And Philosophy' (*Encyclopedia Britannica*) <https://www.britannica.com/story/the-social-contract-and-philosophy> accessed 15 April 2020.

[222] Brian Duignan, 'The Social Contract And Philosophy' (*Encyclopedia Britannica*) <https://www.britannica.com/story/the-social-contract-and-philosophy> accessed 15 April 2020.

[223] Benjamin Franklin and Ralph Ketcham, *The Political Thought Of Benjamin Franklin* (Hackett Pub Co 2003), p. 398.

Besides the *ex lege* obligations, there are other obligations, to which the 'sovereign' individual is subject. These obligations arise because of their choice to be bound by that obligation in a contract with another individual. So unlike the social contract just discussed from which ex lege obligations arise, there are personal contracts in which an individual might be engaged. These kinds of contracts give rise to *ex voluntate* obligations. After contracting voluntarily, the parties lose their freedom to undermine their duties under the terms of that obligation. For example, a contract to sell a car to another party gives rise to *ex voluntate* obligation. Once validly concluded, the contract robs the seller of the freedom to use the car at will in exchange for some agreed consideration. However, the 'sovereignty' of the seller is not impeded in any way. Also, the buyer is constrained from driving the car from the dealers without first having obtained the statutory third party insurance. It is because both parties have delegated their powers to other powers. Firstly, to the law of the contract or and secondly to the law of the land. So, the delegation of powers can put the delegator of such powers, under some sort of subjection and yet still retain their sovereign will and independence.

The argument for reconceptualising international law is similar to the situation of the individual. When sovereign powers are delegated by a state, the delegate subjects the delegator to the extent of the mandate. However, it should not be perceived as a compromise of the sovereignty of the delegator. It is merely a subjection to the rule of law and not that of another entity. The international order should reflect the realities of these domestic social orders. When states serve the interest of the international order, their subjection to an international social contract should not adulterate the essence of the sovereignty of the state, in the same way as the sovereignty of an individual is not tainted by being subject to various obligations, whether horizontally or vertically.

Hence, the concept of sovereignty should be reconceptualised to incorporate in its meaning the value of an international social contract. This social contract theory accentuates the concept of power and sovereignty in a way that underscored the multifaceted way the concept of sovereignty should be interpreted; with the most important attribute of sovereignty being the element of consent or the freedom to choose. The states, empowered by sovereignty, have the powers to choose to delegate, where appropriate, some of their sovereignty to alternative entities in the international plane. These decisions to delegate are often reached to meet the needs of the state and the global community at large. It does not suggest that the unit

delegating loses control. Instead, the delegating unit expends its control by consenting and making that choice to delegate. Then, the unit engages restraint of continued control and abides by the respect for the rule of law.

4.3. Delegation of Sovereignty: The principles of Subsidiarity and Conferral, Federalism and Devolution

This act of delegation or conferral of certain sovereign powers to an international subsidiary goes to the root of what sovereignty is in its essence - the choice to determine governance. Instances of this have been seen in the EU and the inception of the principle of subsidiarity and conferral. Other examples of these delegations of power include legal systems that operation federalism, or states where the central government devolves power to the subunits of the states. These concepts will be explored to illustrate ways by which they could be extrapolated to fit the argument of the reconceptualisation of sovereignty in the light of delegating sovereignty.

4.3.1. Principle of Subsidiary and the Principle of Conferral

Essentially, the principle of 'subsidiarity' which is applicable mainly in the EU is an example of the delegation of sovereignty. The principle of subsidiarity suggests that the central authority should perform only those activities that cannot be performed at a more local level. In trying to reconcile this principle with the concept of sovereignty and state, it is noteworthy that the principle of subsidiarity primarily serves the purpose of complementing the notion of sovereignty rather than substituting it. This principle does not adversely affect the essence of the sovereignty of the state that is conferring, delegating or allocating authority downwards. Instead, it facilitates the understanding of the concept of sovereignty in its completeness. The principle of subsidiarity will be considered in general terms and primarily to draw similarities. It is acknowledged that the principle may not be identical to the core theme of this thesis, but it is relevant enough to make certain inferences as to its similarities.

Professor Daniel Halberstam described the principle of subsidiarity as follows-

> "the central government should play only a supporting role in governance, acting only if the constituent units of government are incapable of acting on their own. The word itself is related to the idea of assistance, as in

subsidy, 'and is derived from the Latin *subsidium*', which referred to auxiliary troops in the Roman military."[224]

The principle of subsidiarity goes as far back as classical Greece. Then it is later taken up by Thomas Aquinas and medieval scholasticism. Subsequent talk on the principle can be found in the thoughts of political actors and theorists as varied as Montesquieu, Locke, Tocqueville, Lincoln, and Proudhon.[225]

In modern Europe, the principle of subsidiarity came slightly into the narrative and political thought due to the Catholic teachings in the 1930s. They primarily focused on the importance of the individual as a rights bearer in an era of fascism and communism.[226] The papal encyclical Quadragesimo Anno (1931) provided:

> "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice, and at the same time, a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them."[227]

The Catholic Church's sentiments on subsidiarity as shown in its Catechism had been that a community of a higher order should not interfere in the internal life of a community of a lower order. The communities closer to the constituents should not be deprived of their functions.[228] It states as follows –

> 'Excessive intervention by the state can threaten personal freedom and initiative. the teaching of the Church has elaborated the principle of subsidiarity, according to which "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help

[224] Daniel Halberstam, 'Federal Powers And The Principle Of Subsidiarity', in Vikram David Amar & Mark V. Tushnet (eds), *GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW* (Oxford University Press 2009).
[225] Paolo G. Carozza, 'Subsidiarity As A Structural Principle Of International Human Rights Law' (2003) 97 The American Journal of International Law.
[226] Steven G. Calabresi and Lucy D. Bickford, 'Federalism And Subsidiarity: Perspectives From Law' [2011] SSRN Electronic Journal, p.6.
[227] 'Quadragesimo Anno (May 15, 1931) | PIUS XI' (*Vatican.va*, 1931) <http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html> accessed 26 February 2020.
[228] 'Catechism Of The Catholic Church - Intratext, Para 1833' (*Vatican.va*) <https://www.vatican.va/archive/ENG0015/__P6G.HTM> accessed 26 February 2020.

to coordinate its activity with the activities of the rest of society, always with a view to the common good."'[229]

Notably, the principle of subsidiarity has been subject to diverse connotations. Recently, it has mostly been known for its existence within the European Union. It is provided under the (Treaty on European Union (TEU)) 1992 & 2007 - Maastricht Treaty and the amended version which came into force in 2009 – the Lisbon Treaty 2007. These provided for the application of the principles of subsidiarity and proportionality. It is designed to serve the purpose of creating a closer union among the peoples of Europe. So, decisions are to be taken as closely as possible to the citizen per the principle of subsidiarity.[230] The focal point of the principle of subsidiarity is primarily to encourage a level of participation in governance by the local authority under the central government.[231] The principle, generally speaking, stands for the proposition that governmental functions should be allocated downwards, hierarchically, to those that are most proximate to the concerned constituents.

On the other hand, there is the principle of conferral. It is provided for under the provisions of Article 5(2) of the Treaty on the European Union. It stipulates that the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties (Treaty on the European Union and the Treaty on the Functioning of the European Union(TFEU)[232]) to attain the objectives set out therein. The import of this suggests that the supranational institution has no overriding powers over the member states except those conferred upon it by the member states. It implies that the sovereignty of the member states remains sacrosanct even though practically it appears that they are subject to some supranational institution. Such subjection has been entered into voluntarily, and competences not conferred upon the Union in the Treaties remain with the member states because the European Union cannot exercise competencies by right.

The preceding reiterates the point that the delegator does not lose control. Instead, the delegator simply expends its control by making that choice to delegate. After

[229] 'Catechism Of The Catholic Church - Intratext, Para 1833' (*Vatican.va*) <https://www.vatican.va/archive/ENG0015/__P6G.HTM> accessed 26 February 2020.

[230] 'Treaty On European Union' 1992, Preamble & Art 5 (Eur-lex.europa.eu, 1992) <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF> accessed 20 November 2019.

[231] Roberta Panizza, 'The Principle Of Subsidiarity | Fact Sheets On The European Union | European Parliament' (*Europarl.europa.eu*, 2019) <http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> accessed 12 November 2019.

[232] 'Treaty On European Union' 1992, Art 1 (Eur-lex.europa.eu, 1992) <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF> accessed 20 November 2019.

that, the delegator engages restraint of continued control and respect for the rule of law. Also, the delegate upon whom control is voluntarily conferred exercises such control only within the remits of the conferral of such control.

It should be pointed out that the principle of subsidiarity has been criticised by some scholars and politicians as being no more than a mirage. Philippe Kiiver referred to it as having no more value than a sugar coat of a bitter pill. He stated as follows –

> "[…] we know that sugar coatings must under no circumstances interfere with the chemical properties of the prescribed substance itself: it is just to facilitate intake, not to change the composition of the pill proper." [233]

In essence, the principle of subsidiarity, in general terms, does not change where the power actually lies. As pointed out earlier, the presence of these principles does not negatively impact on the essence of the sovereignty of the state in questions, whose authority has been conferred, delegated or allocated downwards. Instead, in the estimation of this thesis, it enhances the notion of sovereignty in the completeness of its essence. Therefore, the reconceptualisation of international law should consider this principle in shifting the paradigm in the understanding of the concept of sovereignty.

Therefore, one of the key ways that the concept of sovereignty could be appreciated in its completeness is extending its meaning to include the power to delegate it. In the 21st century, this is even more pertinent, as the concept will take on more relevant meaning for the international community if states, by it, empower relevant actors in various industries. For instance, empowering NGOs internationally by voluntarily delegating powers by the sovereign state. Along this line, it is noteworthy that some of the critical global causes across various sectors are fostered by NGOs. Most political and social positions held in various sectors of the international polity such as the economic sector and the societal value systems are influenced or fostered by the civil society's position on the environment and human rights, et cetera. These are some of the poignant examples of the allocation of sovereign power from the states to international organisations. Some of these international organisations and their activities are driven by international NGOs and their activities. These are some of the ways that the concept of sovereignty could be reconceptualised to incorporate

[233] Philipp Kiiver, 'The Treaty Of Lisbon, The National Parliaments And The Principle Of Subsidiarity' (2007) 15 Maastricht Journal of European and Comparative Law.

within its meanings the current global realities, which at times, require the effective delegation of their sovereignty.

4.3.2. Devolution & Federalism

It is noteworthy that of the G20 countries which have the most influential economies in the world, about 12 of them have a federal constitutional structure and the others are practising some level of federalism and the devolution of power. The first group includes the United States, the European Union, India, Germany, Brazil, Argentina, Canada, Indonesia, Australia, Russia, Mexico, and South Africa.[234] The latter group includes the United Kingdom, Spain, Belgium, Italy, and Japan. Of the ten countries with the highest GDPs in the world, only two – China and France – lack any semblance of a federal structure.[235]

Furthermore, of the world's ten most populous countries, eight have federal or devolutionary structures – every country except for China and Bangladesh. Also, the only top ten countries by territorial size to lack a federal structure are China and Sudan, which recently experienced a secession. The major countries in the world have some federal structure except China and France (a member state of the European Union).[236]

On the other hand, states worldwide are being persuaded to align themselves to some international entity or international pact the other. Examples of these include entities like the EU, AU NAFTA or the upcoming USMCA, GATT, NATO, the WTO and other regional entities. Hence, it is found that the EU member states have to some extent surrendered power to the confederal supranational body concerning matters like trade, commerce, and even the control of their border with respects to the movement of persons, capital and goods[237].

While this is going on from the top, there is the increasing pressure facing these same countries to devolve power to their national subunits. Hence, there are examples such as the UK, although having left the EU in January 2020, it had devolved power to Scotland, Wales, and Northern Ireland some decades earlier. Also, Spain has devolved power to Catalonia and the Basque region. Belgium has devolved most of

[234] Calabresi and Bickford (n 226) p.2
[235] Ibid p. 2
[236] Ibid p. 2
[237] Ibid p. 3

its power to ethnic subunits in Flanders, Wallonia, and Brussels.[238] In North America, Canada has surrendered some economic power to NAFTA – a transnational free trade association – while surrendering other powers to the increasing assertive province of Quebec.[239] In September 2018, the United States, Mexico, and Canada reached an agreement to replace NAFTA with the United States–Mexico–Canada Agreement (USMCA). NAFTA will remain in force, pending the ratification of the USMCA.[240]

We find that in recent times, there is the strain on states to delegate their sovereign powers both upwards and downwards.

4.3.2.1. Federalism & Devolution Distinguished. Which is a better fit for Reconceptualisation?

Theoretically, devolution differs from federalism in that the devolved powers of the subnational authority are political decisions premised on the choice of the central government. Devolution powers might be temporary and are reversible as they ultimately reside with the central government. Thus, the state remains de jure unitary. While, under federalism, the subunits have their autonomy as of right, as provided by the constitution. The subunits have a lower degree of protection under devolution than under federalism. It has been argued that federalism is much more effective than devolution because political liberty is enhanced if power is constitutionally fragmented rather than being merely decentralized at the grace of a national government.[241]

4.3.2.2. Devolution and Federalism at work

4.3.2.2.1. Devolution in Scotland

An example of these two systems at work will be what is obtainable in the UK, particularly Scotland, and what is obtainable in Germany. In November 1998, the UK Parliament in Westminster passed the Scotland Act, which established the Scottish Parliament, and devolved certain powers to Scotland. It was the first time since the early 18th century that the people of Scotland were to be exclusively represented and be able to hold their representatives to account. The last Scottish parliament was

[238] Ibid p. 3
[239] Ibid p. 3
[240] 'United States-Mexico-Canada Agreement | United States Trade Representative' (*Ustr.gov*) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 26 February 2020.
[241] George A. Bermann, 'Taking Subsidiarity Seriously: Federalism In The European Community And The United States' (1994) 94 Columbia Law Review, 331, pp 340 – 44.

dissolved following the Acts of Union in 1707. However, the devolved powers of the current Scottish parliament are extant only to the extent that the parliament continues to enjoy the good graces of the UK parliament. It is so because the Sottish Parliament is existent under the Scotland Act of 1998. The Act could be abolished by the UK parliament, and as a result, the parliament will cease to exist.

Essentially, the Scottish Parliament is established through a general devolution of powers subject to express exceptions. The exceptions referred to are areas of law which have been specifically reserved for Westminster Parliament, and they include matters like a particular foreign policy, defence, constitutional law as well as citizenship and immigration law.[242] Generally speaking, the legislative authority of the Scottish parliament which extends to a broad range of matters which may be similar to that of the German Länder[243]. However, the noticeable difference is that the UK has not been changed into a federal system due to the devolution and the various nations of the United Kingdom are not states; unlike the German Länder which, as a subunit is a state operating a federal system.

In the UK, the understanding is that the Scotland Act of 1998 is an act of the UK Parliament. To that extent, the UK Parliament could repeal the Scotland Act, or even legislate on matters which are within the powers devolved to the Scottish parliament. In other words, the Scotland Act 1998 has not in any way impacted on the sovereignty of the UK Parliament. However, section 28 (7) and (8) of the Scotland Act 1998 provides that

> 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland. But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'[244]

It is noteworthy to mention that section 28(8) is a more recent addition, which was made pursuant to the Scotland Act 2016.[245] The Scotland Act 2016 was an outcome of a compromise between the 'NO' campaign of the Scottish Independence

[242] Schedule 5 of the Scotland Act 1998.
[243] A Länder (singular Land) or Bundesländer (singular Bundesland) is the name for (federal) States of Germany, the 16 federal subdivisions of Germany.
[244] Section 28 (7) and (8) of the Scotland Act 1998
[245] Section 2 of the Scotland Act 1998

Referendum in 2014 and the then Prime Minister of the United Kingdom – David Cameron.

Before the provisions of the Scotland Act of 2016, the devolution of powers to the Scottish Parliament led to the possibility that both houses in Edinburgh and London may seek to promote legislation on the same topic. This possibility was recognised earlier, and there was a consensus from both governments in an accord named after Lord Sewel. Under this accord, the UK government pledged that it would not seek the passage of legislation at Westminster on matters which have been devolved to the Scottish Parliament without the consent of the Parliament.[246]

This consent is obtained through a motion called the Sewel motion, and it requires the Scottish Executive to submit to the Scottish parliament for a vote which effectively invites the Westminster Parliament to impinge on the Scottish Parliament competences. There are some reasons why this is done, and they include –

- occasions when it makes sense to legislate on a UK-wide basis;
- where there may be a suitable legislative vehicle available at Westminster which would save legislative time in the Scottish Parliament;
- where legislating at Westminster could be an appropriate means of dealing with issues which straddle both devolved and reserved matters;
- where it would be helpful to make minor and technical changes in devolved areas, for the effective operation of legislation in non-devolved areas;
- where an operational role is proposed for Scottish ministers in reserved.[247]

The fact about the Sewel motion and devolution as a whole is that while the central government approaches its policy from the standpoint of preserving political stability,

[246] The accord is named after Lord John Buttifant Sewel, a former Labour life baron for Gilcomstoun in Aberdeen. The Durham University and Aberdeen University educated 71-year-old sat on the Scottish Constitutional Commission between 1994 and 1995. His name was used because he was the Scottish Office Lords Minister who saw through the key devolution act. The convention has now been restyled Legislative Consent Motion (LCM) but the name "Sewel" has remained in common parlance – see 'Sewel Motions And The Brexit Process' (*BBC News*, 2017) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-38731693> accessed 29 February 2020.

[247] 'Sewel Motions And The Brexit Process' (*BBC News*, 2017) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-38731693> accessed 29 February 2020.

the subunit approaches it as a progressive step in reaching the ultimate aim of independence.[248]

The Scottish government progressed with the devolution, and it culminated with the independence referendum in 2014, which then led to the establishment of the Scotland Act 2016. It is noteworthy that Section 1 of the Scotland Act 2016 provides that the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. Although it is said that the UK has no written constitution, it is trite knowledge that the constitution of the United Kingdom is spread over different legislation, such as the Bill of Rights 1689[249], and the Scotland Act 1998 et cetera. The provision of the Scotland Act 2016 indicated the commitment of the parliament and the government of the United Kingdom to the Scottish Parliament and the Scottish government. This commitment was made in somewhat of a constitutional document.[250] By an act of the UK Parliament, it curbed its extent of sovereignty by taking away the powers of the parliament to abolish the Scottish parliament or government by repealing the 1998 Act or the 2016 Act. The way the Scottish Parliament could be abolished was based on a decision of the people of Scotland voting in a referendum.

However, reconciling the provision of the Scotland Act 2016 with the principle of parliamentary sovereignty, the question that arises is which law of the parliament is sovereign? Is it all laws of the parliaments, including the past laws that are sovereign? Or is it the new and current law of the parliament? If the current law is sovereign, then the Scottish government could still be abolished by a new act of a current UK parliament, as old acts do not take precedence over new acts of parliament. Dicey, one of the leading constitutional experts on the UK constitution (although writing in the 19th century) contends that the doctrine of UK parliamentary sovereignty means parliament has unlimited legal power. Dicey's definition of parliamentary sovereignty was that

> 'the principle of parliamentary sovereignty means neither more nor less than this; namely, that parliament has the right to make or unmake any law

[248] Markus Ogorek, 'The Doctrine Of Parliamentary Sovereignty In Comparative Perspective' (2005) 6 German Law Journal, 967 p 972
[249] The Bill of Rights 1689
[250] Section 1 of the Scotland Act 2016.

whatever; and, further, that no person or body is recognised by the law as having a right to override or set aside the legislation of parliament'.[251]

Additionally, the case of *Ellen Street Estates Ltd v Minister of Health*[252] supports this position that no Acts can be entrenched and protected from repeal. It stated that the position of the constitutional position is that Parliament can alter an Act previously passed, and it can do so by repealing the previous Act, or by enacting a provision which is inconsistent with the previous Act. Scrutton L.J. referred to the academic discussion of previous cases in which Parliament had enacted a provision which was inconsistent with a previous provision, without using the word "repeal." Maugham L.J. added that the constitution does not permit Parliament to bind itself as to the form of subsequent legislation.[253]Whether it is politically viable that the parliament can indeed abolish the Scottish parliament by repealing the Scotland Act 1998 and 2016 is another question altogether.

The point which this thesis seeks to make from the preceding paragraphs is to reiterate the position that while sovereignty could be distilled or delegated to other subunits, under the principle of devolution or subsidiarity, its essence can stay intact with the original custodian of that sovereignty. So, while the UK Parliament has distilled element of its sovereignty to the Scottish government, due to the doctrine of parliamentary sovereignty, it is still empowered with sovereignty in its full essence. It also legally retains its power to recall powers devolved to the Scottish Parliament. Understandably, this may not be a political possibility, and its legality could be highly contested due to the provisions of Section 1 of the Scotland Act 2016.

4.3.2.2.2. Federalism in Germany

With federalism, on the other hand, a federal system requires that the competences of the various levels of government be balanced in such a way that the nation as a whole and the constituent states remain viable and complement each other. The Basic Law for the Federal Republic of Germany 1949 (Last amended 2019), which is the German constitution, makes explicit provisions for this. According to Article 70, the Länder[254] retain legislative authority, provided that the Basic Law has not reserved this

[251] A. V Dicey, *Introduction To The Study Of The Law Of The Constitution* (Macmillan 1897), pp 39-40.
[252] *Ellen Street Estates Ltd v Minister of Health* (1934) 1 KB 590
[253] Ellen Street Estates Ltd V Minster Of Health' (*Lawteacher.net*, 2018) <https://www.lawteacher.net/cases/ellen-street-estates-v-minister-of-health.php> accessed 2 March 2020.
[254] Ogorek (n 248)

legislative authority to the federal government.[255] A legal situation comparable to Scotland, in which both the federal legislature and the individual state legislatures may pass acts regulating the same matters, does exist under the concurrent legislative authority. Article 71 of the Basic Law states that the division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Matters which are reserved under the exclusive legislative power cannot be legislated by the Länder, except when and to the extent that they have been expressly authorised. Concerning the matters where the concurrent legislative powers exist, Article 71(1) of the Basic Law states that the Länder shall have the power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. However, subsection 2 suggest that the federal government shall only legislate on these matters only when it is necessary to ensure comparable living conditions throughout the national territory or to preserve legal and economic unity in the interest of the nation as a whole.[256]

Although the matters reserved for the federal government as provided in Article 73 of the Basic Law far outweighs those that are devolved or for which concurrent jurisdiction is enjoyed as provided for in Article 74 of the Basic Law, the Länder have a broad scope for its independent legislation. The federal government gives the Länder sufficient participatory rights which are protected under Article 79 (3) of the Basic Law, concerning the legislative function of the Länder as provided for in Articles 50 and 77 of the Basic Law. As a result, the federal legislature should obtain the consent of the Bundesrat, or Federal Council (of which the Länder is a part of under Article 50 of the Basic Law) before it passes legislation on some issues. Some of which include Article 84(1), 87(3) 105(3) of the Basic Law. Should the Federal Council withhold its consent to a bill on such a matter, the Federal Parliament cannot then enact it (no matter the level of support for it within the Federal Parliament).[257]

[255] Article 70, Basic Law for the Federal Republic of Germany 2019. – Originally enacted on the 23rd May 1049 but last amended on the 28th March 2019 – see (*Btg-bestellservice.de*, 2019) <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 2 March 2020; See also, Markus Ogorek, 'The Doctrine Of Parliamentary Sovereignty In Comparative Perspective' (2005) 6 German Law Journal, 967 p 972
967 p 972

[256] Article 72 (2) of the Basic Law of the Federal Republic of Germany; see also - Markus Ogorek, 'The Doctrine Of Parliamentary Sovereignty In Comparative Perspective' (2005) 6 German Law Journal, 967 p 972

[257] Ogorek (n 248)

4.4. Criticism of the principles behind Subsidiarity and Conferral, Federalism and Devolution

There is the criticism that the distilling of sovereign power downwards could lead to the creation of rogue powers closer to the constituents which could ultimately lead to a rebellion or a divergence from the initial objective of the arrangement. Further to the previous discussion, some other examples include the rebellion of the US against England in the eighteenth century. Another is the decolonisation of most of Africa. These instances exist, to a great extent, because of the closeness of power to the constituents. Two questions come to bear in this situation –

Firstly, whether or not it is good that the ultimate decisions made are those that are actually needed by the constituents and not those merely handed down by sovereign power. Secondly, whether the proposed distilling of power has to be done only downward? Concerning the first question, one can hold the view that it reflects the true principles of democracy, where the wish of the people ought to be given more credence. Concerning the second question, although the principle of subsidiarity suggests an allocation of power downward, the context in which this thesis suggests this principle here opens up the option for allocation of powers horizontally and vertically.

As mentioned earlier, the principle of subsidiarity prescribes that the making of law should be as close to the constituents as possible. It ultimately leads to less intrusion from the government at centre or top of the ladder and more ownership at the grassroots of each constituency. It is preferred to a situation where leadership only emanates from the centre. Where leadership is centre-driven, it ultimately leads to a disconnect between the formulation of the laws and the realities on the ground. Those at the centre of government are removed from the pinch of the people at the bottom of the ladder.

In a federal system of government, the local governments, being closer to the grassroots, tend to be more relatable and in touch with the individual citizens of their localities than their counter-parts up the ladder in the federal government.

As mentioned earlier, it could be held that the principle of subsidiarity, federalism and devolution are similar, although not identical, in their essence. However, another challenge with these concepts is that the local government are not always as efficient as theoretically suggested. There have been arguments that the divergent, and at times, petty, views and disagreement within smaller units are harder to manage than

that of larger regions.[258] It becomes apparent where the divergence of views is between the locals in the local government and the political stance of the federal government. As a result, there is an intrusion into the prerogative of one or the other. It often leads to a policy quagmire, where political will plays a significant role. Thus, to that extent, it could be simplistic to suggest that local control is simply preferable to a unitary system-based control, or the control of the central government in a federal system.[259]

A case in point is with the state of California in the United States. There was incessant defiance of the policy on immigration from the Federal Government of the United States. Governor Jerry Brown signed a bill, California Sanctuary Law SB54, on the 5th of October, 2017. The law makes California a "sanctuary state", barring local and state agencies from cooperating with Immigration and Customs Enforcement (ICE) regarding illegal migrants in California.[260] Although, the powers to regulate on a subject matter as immigration and naturalisation were exclusively reserved for the federal government, the Trump policy was at odds with the reality of the state of California, being home to at least 2.3 million illegal immigrants. A policy quagmire was therefore reached when the said bill was approved by the Governor, and the California Attorney General Xavier Becerra has threatened to prosecute California employers who cooperate with federal immigration authorities conducting enforcement sweeps. There was a myriad of suits between the locals, the local government and the federal government, even though there is a supremacy clause in the US constitution which renders any inconsistent state laws a nullity and should have no legal effect.[261]

The critics of the principle of subsidiarity, have argued that risks abound if the locals at the grassroots are allowed to function as their own fiefdom. Critics say that it will inevitably lead to some level of anarchy. Consequently, local factions could be incentivised to impair local governments for the benefit of their self-interests. Their interests could be economical, political or ideological.[262]

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[258] Mark Pulliam, 'Subsidiarity, Federalism, And the Role of The State - Law & Liberty' (Law & Liberty, 2018) <https://www.lawliberty.org/2018/04/10/subsidiarity-federalism-and-the-role-of-the-state/> accessed 14 November 2019.
[259] Ibid
[260] 'Bill Text - SB-54 Law Enforcement: Sharing Data.' (*Leginfo.legislature.ca.gov*, 2017) <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB54> accessed 17 November 2019.
[261] Mark Pulliam, 'Subsidiarity, Federalism, And the Role of The State - Law & Liberty' (Law & Liberty, 2018) <https://www.lawliberty.org/2018/04/10/subsidiarity-federalism-and-the-role-of-the-state/> accessed 14 November 2019. See also, 'Article VI, Constitution of The United States - The Bill of Rights & All Amendments' (Constitutionus.com, 1787) <http://constitutionus.com/> accessed 16 November 2019.
[262] Pulliam (n 258)

Hence, it is imperative, if local control should be palatable, then there must be measures that ensure its consistency, fairness, justice, inclusion and efficiency.

4.5. The relevance of these concepts: Subsidiarity, Federalism & Devolution

The preceding criticisms suggest that neither of these concepts – subsidiarity, federalism, or devolution is infallible. They all have their shortcomings. However, they are generally preferred to the absolute centralisation of power. Hence, they could be used as a model for a reconceptualisation of international law by fostering a paradigm shift in the way sovereignty is perceived. The three terms- subsidiarity, federalism or devolution, though might be significantly distinct, are quite similar, and all need the active participation of government, at different levels to thrive. Perhaps, it is one of the reasons for their shortcomings.

Federalism and subsidiarity deal with a fundamental question that arises from democracy. The question is, although it is generally accepted that democracy is the rule of the people, the question is from which demo or territorial unit of the people can the 'rule' emerge? What will be the best representative of the people? Is it the government representative of the people or is it merely the people and the entities that arise from the people.

This question points out the significant role of the NGOs in this process which is yet to be fully appreciated. For example, people are persuaded to pay taxes to the government in order to have a society run well. NGOs, on the other hand, are also sponsored by the people, only that the people voluntarily make donations to causes that they consider important. The leadership or the representative element of the NGOs are not elected like the state and its government parastatal. Instead, the NGOs are simply voluntarily endorsed by the people. It gives a little more credibility to the representative capacity of the NGOs.

As pointed out earlier, the principle of subsidiarity requires that matters should be decided at the lowest or least centralized competent level of government. It emanates from the position that individual rights exist as a matter of natural law. Rights belong naturally to only individuals. So, if social entities should legislate, they should do so only to the extent that individuals or smaller social units lack competence. Going back to the modern roots of subsidiarity; consideration should be given to the views of the papal encyclical Quadragesimo Anno (1931) which says

> 'it is an injustice, and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do…For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them[…] therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of ―subsidiary function,‖ the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State'.[263]

The value of having significant state decisions made from as near the constituents as possible is noteworthy, and much in tune with the values of democracy. It could be argued that, if done well, could very well be looked at as democracy at its finest. It is observed that where the government of the state or an inter-governmental organisation is near enough its constituents, there is a lesser chance of the government or its representatives being out of touch with the realities on the ground. There is a higher chance that the government can better reflect the subtleties, necessary complexity, and detail embodied in its decisions in a way that most benefits those constituents.[264] The NGOs are the closest to the constituents that they represent, and they exist primarily for the causes for which they were constituted. Also, there is a better chance that there will be more sense of ownership of any policy in question and as a result, more sense of accountability. To that end, the role of NGOs in the reconceptualisation of international law is certainly a valid argument to be carefully considered. It should be considered in the light of empowering the NGOs and legitimising their processes. Ways by which this empowerment could be done could be gleaned from the concepts of subsidiarity and federalism. Consideration of ways by which aspects of these concepts could be extrapolated to the international space to the end of empowering NGOs.

4.6. Delegation of Sovereignty and the compelling force of Jus cogens

Hence, it has been established that whether in the 19th, 20th or the 21st century, sovereignty has not quite been considered absolute. The reason is that where states act with impunity in contravention certain international norms which put at risk the safety and security of life and property or other nations, then the privileges of

[263] Anno (n 227)
[264] Jackson (n 104) p. 14

sovereignty will be curtailed. *Jus cogens* is a peremptory norm. A fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.[265]

It is essential to bear in mind that this position of the extent to which sovereignty could be curtailed is also that of the traditional Westphalian concept of international law at its inception. Although the Westphalian concept of international law is hinged on the twin principles of sovereignty and territorial control, it also entertains the help of the international community via the UN and the Security Council, in ensuring that peremptory norms are observed. It further buttresses the point that a complete understanding of the concept of sovereignty will go beyond the mere enjoyment of territorial control and finality in decision making within the boundaries of a state. It will extend to the collaboration of the international community to stay prosperous, safe and maintain the order of the international community. It was for them, a collective effort to protect their sovereignty and the peace and order of the international community.

There is a concern with the position that the United Nations is the vehicle by which this order is maintained, with the Security Council acting as the international law enforcement agency. The argument is that there is a democratic deficit in the way the UN is structured. The particular concern is with the structure of the Security Council. So, the question that comes to bear is who enforces the law against the international law enforcement agency? Who polices the international police? Are there sufficient checks in place? So, the role of the non-governmental organisations becomes very germane to the needed refurbishment of the international legal framework. Hence, there is the needed reconceptualisation of the way international law is perceived, which gives legitimacy to the social conscience of the international community as a necessary check as represented by the various NGO groups which are more representative of the international community.

Former UN Secretary-General Kofi Annan had declared that states who are bent on criminal behaviour do not have the unbridled defence of their frontiers, and the massive and systematic violations of human rights must be never be condoned.[266] The

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[265] Anne Lagerwall, 'Jus Cogens' (Oxford Bibliographies, 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml> accessed 8 April 2020.

[266] 'Press Release SG/SM/7136 GA/9596 - SECRETARY-GENERAL PRESENTS HIS ANNUAL REPORT TO GENERAL ASSEMBLY | Meetings Coverage And Press Releases' (*Un.org*, 1999) <https://www.un.org/press/en/1999/19990920.sgsm7136.html> accessed 19 November 2019.

campaign against human rights abuses by the United Nations, states and particularly non-governmental organisations cannot be over-emphasised. Worthy of note is that the fight for the preservation of the fundamental human rights of global citizens has been underpinned by a myriad of international and domestic legislation. Nevertheless, more importantly, these human rights, animal rights, environmental rights, and so on have been mostly advocated, protected and advanced by NGOs around the world.

4.7. Reconceptualisation: Accommodating the multi-faceted nature of Sovereignty and the relevance of 'consent'.

One argument of the thesis is that the conceptualisation of sovereignty should evolve to include the many facets to the concept of sovereignty. One expression of the concept does not diminish the relevance of another expression of the same concept. For example, the fact that a sovereign state voluntarily subjects itself to another entity should be considered as just another expression of a facet of sovereignty. The same way another expression of sovereignty could be seen in a state determining who is allowed through its physical borders. Thus, the position of this thesis is that the notion of sovereignty ought to be reconceptualised. Although it should be added that the reconceptualisation is not to add to the meaning of sovereignty, what was not there before. Instead, it is to reveal in its completeness what the concept entails.

The instructive part in the illustration above is that 'the sovereign state voluntarily subjects itself'. That single act of voluntarily doing something or the consenting to an act is the very element that constitutes the principle of sovereignty. The aftermath of that consent or voluntary action does not cancel out the sovereign will of the state to choose the first place. Hence, it is the ability to consent that forms the basis of sovereignty. If a state, after consenting, is under the control of another entity, it does not change the fact that in the first instance, the conferring of control was an act of control in itself. If Sovereignty is reconceptualised to accommodate this legal position, then the distilling of sovereign powers horizontally or vertically should just be seen as the many sides of the expression of sovereignty. Therefore, if NGOs are empowered by the consent of a state to regulate certain aspects of international life, because they are best positioned to do so, it should not be considered as a compromise of the sovereignty of the state who have empowered the NGOs. It should just be considered as another expression of sovereignty which legitimises the role of NGOs in the international community.

Is the state's consent to external control is all that is relevant to the authenticity of the essence of sovereignty? Is it in all circumstances that the state has the option of consent? Is it not the case that, at times, the option for the state to consent is actually a veiled mandatory request to which there could be no reasonable dissenting, and not to consent may find the state inadvertently subject to a myriad of social, political and economic pressures? Indeed, at times, circumstances may present themselves with scenarios where consenting is the only viable option and not to consent will lead to various adverse outcomes. Even at these times, consent is what determines sovereignty, even if there was no other viable option than to consent. The exception to this position is only in circumstances where the consent is coerced by armed force. If consent is coerced by armed force, then it will be against the principles of international law. Art 2(4) of the UN Charter provides that

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

Although, it could be argued that the use of force contemplated in Art 2(4) comprises other forms of force, such as political or economic coercion. Para 7 of the Preamble to the Charter states as one of the goals of the United Nations - ' that armed force shall not be used, save in common interest' and Art 44 of the Charter supports the view that he Charter uses the term 'force' where it clearly means 'armed force'. Finally, the *travaux preparatories* of the UN Charter illustrates the fact that only military force is the concern of the prohibition of the use of force. At the San Francisco Conference, a proposal by Brazil to extend the prohibition of force to economic coercion was explicitly rejected.[267] Therefore, save for the coercion by armed force, consent is still consent.

Regardless of the extent of the efficacy of consent, should the mere necessity of it in the dealings among state be sufficient in understanding sovereignty? In other words, the ability to consent by the state in the international plane is fundamental to the essence of sovereignty and should be acknowledged as such. Where the state has indeed consented, it should not be considered as a let-down of sovereignty, but quite the opposite. The paradigm that this thesis hopes to foster is that by the consent or sovereign will of the state, it can distil its powers across various structures in the

[267] Bruno Simma and others, *The Charter Of The United Nations* (3rd edn, Oxford University Press), p.209.

international plane, and enhance a refurbished pluralised legal framework while retaining its essence as a concept. It is the premise for the argument for a reconceptualisation of the notion of sovereignty. The concept of sovereignty should be reconceptualised to acknowledge the pivotal role the element of 'consent' is to its essence. Where such consent is expressed to the extent that it subjects the consenting state to the control of another entity, it should not be considered as a compromise of sovereignty. Instead, it should be considered as an expression of sovereignty.

A known facet of the notion of sovereignty is the exclusive power and authority of the state over its affairs in the international plane. The challenge with this is the limited perception of the concept as it does not include other facets of the concept of sovereignty. Today, there are a handful of supranational bodies. These bodies are products of the state. Moreover, their positions in the international plane have been legitimised by the consent and participation of the states. Going by the commonly accepted facet of sovereignty that states have exclusive power and authority of the state over its affairs in the international plane. It will lead to the position held by states that there is no higher power in the international plane than that of the state. Therefore, international laws that emanate from these supranational bodies, and indeed the institutions themselves, have no validity or legitimacy except the states have consented to their existence. The focus here should be on the steps of consenting as the beginning of the expression of sovereignty.

However, a dilemma unfolds, as the consenting states are obligated to the mandate of an intergovernmental or supranational organisation. Especially where such organisation has propounded a law or international rule to which this state is reluctantly beholden to observe. A prime example of this in action is the creation of international treaties. The concern is with the potential offshoot of a treaty many years later. When such a treaty might have led to the creation of some intergovernmental body, and then, such intergovernmental body may then obligate member states to actions, under the provisions of the treaty, which was not anticipated at the time of reaching the treaty. This occurrence was replete in the uproar from many African states, when their erstwhile leaders were subject to trial at the International Criminal Court (ICC) for war crimes, genocide, et cetera, primarily because the states were signatories to the Rome Statute from 1998 onwards.

Moreover, this was, disproportionate to the number of other states from the rest of the world which were subject to the ICC jurisdiction. Hence, the ICC, like many other intergovernmental organisations, which have been presented by key promoters as a legal bastion immune from politics, has been criticised as being is inherently political and a tool of influential states to control 'less influential' states.[268] The question that arises is whether, indeed these bodies have become political, or are they naturally living out to their full potential as empowered by the sovereign states via the treaties. Also, whether the 'less influential' states consented to the proxy control of the more influential states through the intergovernmental institutions. These questions place the notion of sovereignty in somewhat of a quagmire. It further underpins the argument of this thesis that the notion of sovereignty should be reconceptualised. The principles of subsidiarity, federalism and devolution should be considered. These principles should be adapted to fit global realities in a manner that advances fairness, inclusiveness and justice.

A clear way this can be achieved is if NGOs are brought into consideration, firstly because they are intrinsically 'non-governmental'. It absolves them from the potential criticism of being used as proxy agents for the control of the 'less influential' states and secondly because they are more in touch with the causes that they represent than their political counterparts. Therefore, their independence from governments, their proximity to the issues, and the fact that they a predominantly not driven by profit make them more acceptable than their inter-governmental counterparts or the multinational corporations. Unlike inter-governmental organisations and multinational corporations, NGOs represent the interest of causes which are the prime concern of the grassroots of the international community.

Hence, the principle of subsidiarity, if applied as a means of reconceptualising international law, should be extended to delegate sovereign powers to entities at the lowest levels. The principle of subsidiarity should be considered beyond the context of the EU or Federalism or some international institution. The principle should be extended to the community or sub-nations of the grassroots, which are represented by NGOs. As can be gleaned from above, the locals tend to be more in-tune with the currents of their localities. It is more so with the various factions of industry and social clutters of the international community, which have created artificial localities. These localities are spread around the globe, held by a common interest and culture. They could be

[268] S. M. H. Nouwen and W. G. Werner, 'Doing Justice To The Political: The International Criminal Court In Uganda And Sudan' (2010) 21 European Journal of International Law.

described as a depiction of the social and industrial-nations of the 21st century. Each one of them has an NGO which furthers its cause. Examples of these include nations of religion, nations of environment, nations of information technology, nations of entertainment, nations of financial markets, nations of commerce, and the list goes on.

These nations, though geographically spread about, are intrinsically one and are proximate one to the other, due to the aid of technology, globalisation and the enthusiasm of the NGOs on the international plane. In these many areas of existence in the 21st Century, neither the supranational, federal or local governments are equipped enough to make the laws that govern their existence and operations. The remit of these sovereign government should be the creation the soft infrastructure and international legal environment which acts as an enabler rather than be another bureaucratic impediment for the 21st-century existence. The governing apparatus of these sovereign governments should be extended to these peculiar nations of the 21st century, and these nations of like-norms should be empowered to govern via the NGO that fosters their interest.

4.8. A case for Reconceptualisation of International Law - The implications of the Van Gend en Loos case[269]

The *Van Gend en Loos* brought about a real revolution in European law, which also should prod the status quo in international law if the similarities in the two legal systems (that is the European legal system vs the International legal system) were to be drawn. The *Van Gend en Loos* case is primarily known for two things - firstly, the lack of the uniform application of European Law by national courts across the six-member states at the time, and secondly, the lack of the primacy granted by to international law in the member states.[270] Therefore, this thesis opines that the implication of this case is the fact that the courts pointed out that an individual was to be classed as a direct subject of European law and the European legal system. As a result, such individual could directly apply European law, even against a state, and would have the requisite *loci standi* to do so, even as an individual. This argument gives credence to the crux of this thesis that, if non-state actors, whether multinational organisations, individuals or non-governmental organisations, have such sway in the way the 21st-century global affairs are determined then they should be recognised as such. More so, if the courts, as can be seen in the *Van Gend en Loos* case, could recognise an individual as a

[269] Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECJ, Case 26/62 E.C.R (ECJ).

[270] Morten Rasmussen, 'Revolutionizing European Law: A History Of The Van Gend En Loos Judgment' (2014) 12 International Journal of Constitutional Law <https://academic.oup.com/icon/article/12/1/136/628616> accessed 22 November 2019.

subject of some level of international law, i.e. the European Law, of which, the loosed and arbitral way by which individuals operate on the international plane. Ordinarily, it should make it less likely for individuals to acquire such a recognition compared to NGOs which have some measure of regulated behaviour and are more organised. Hence, there is a valid argument for the reconceptualisation of international law in a way that takes into cognisance 21st-century global realities. This argument should be considered. Particularly concerning the need for the institutionalisation of NGOs on the international plane and their actions on the international plane.

David Edwards pointed out that the decision in the case merely brought to light or theorised the core doctrines which were in existence before the judgment was reached.[271] Some of these doctrines included the fact that treaties should be interpreted objectively and not subjectively.[272] As a result of the Treaty of Rome 1957 and other case law, there was the primacy of the European law vis-à-vis national legal orders.[273] It is noteworthy that the ECJ went progressed on along these lines in 1964 where the primacy of EU was more clearly established in the *Costa v E.N.E.L* judgement.[274] Furthermore, Joseph H. H. Weiler stated as follows –

> "Van Gend en Loos and its progeny are not the result of a new hermeneutics and that the decision would, or at least could, be the same under the traditional rule of interpretation of public international law…[275] [The key step towards establishing what the court would term] "…a new legal order of international law".[276]

[271] David Edwards, 'Judicial Activism – Myth Or Reality? Van Gend En Loos, Costa V. ENEL And The Van Duyn Family Revisited', Essays in the Honour of Lord Mackenzie-Stuart (29th edn, 1996); See also - Morten Rasmussen, 'Revolutionizing European Law: A History Of The Van Gend En Loos Judgment' (2014) 12 International Journal of Constitutional Law <https://academic.oup.com/icon/article/12/1/136/628616> accessed 22 November 2019.

[272] David Edwards, 'Judicial Activism – Myth Or Reality? Van Gend En Loos, Costa V. ENEL And The Van Duyn Family Revisited', Essays in the Honour of Lord Mackenzie-Stuart (29th edn, 1996) 36–37. Edwards cites three judgments: Case 1/54, French Republic v. High Authority of the European Coal and Steel Community, 1954 E.C.R. 1. and Case 7–9/54, N. V. Kolenmijnen van Beeringen, N.V. Kolenmijnen van Houthalen, N. V. Kolenmijnen van Helchteren en Zolder v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 311 and case 2–3/62 Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium, 1962 E.C.R. 425

[273] David Edwards, 'Judicial Activism – Myth Or Reality? Van Gend En Loos, Costa V. ENEL And The Van Duyn Family Revisited', Essays in the Honour of Lord Mackenzie-Stuart (29th edn, 1996) at 37 and 42–43. Edwards cites two judgments: Case 7–9/54, Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority of the European Coal and Steel Community, 1956 E.C.R. 175 and Case 13/61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, 1962 E.C.R. 45

[274] Costa v ENEL (1964) ECJ, Case 6/64 E.C.R. (ECJ)

[275] Joseph H. H. Weiler, 'Rewriting Van Gend En Loos: Towards A Normative Theory Of ECJ Hermeneutics,', Judicial Discretion In European Perspective (2003), p 150.

[276] 'Speech By Joseph Weiler Made At The ECJ'S 50 Years' Celebration Of Van Gend' (2013) <http://player.companywebcast.com/televicdevelopment/20130513_1/en/player;> accessed 22 November 2019; See also -Morten Rasmussen, 'Revolutionizing European Law: A History Of The Van Gend En Loos Judgment' (2014) 12 International Journal of Constitutional Law <https://academic.oup.com/icon/article/12/1/136/628616> accessed 22 November 2019.

It is essential to bring to the fore one of the core issues in the Van Gend en Loos case. It was whether Article 12. of the European Economic Community Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, based on the Article in question, lay claim to individual rights which the courts must protect. Article 12 of the treaty provided that member states shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.

To provide a little context to the case, Van Gend en Loos, a postal and transportation company, imported chemicals from Germany into the Netherlands and was charged an import duty that had been raised since the entry into effect of the Treaty of Rome. Although the tariff was paid, a refund was sought before the Dutch Tariff commission, stating that the tariff was in breach of Article 12. The commission asked the ECJ whether the provisions of Article 12 were directly applicable within member states, in such a way that citizens of the member states could leverage its provisions directly. [277]

The ECJ argued held the view that the interpretation of Article 12 should be such that takes into consideration the spirit and wording of the Treaty of Rome. As a result, the provisions of the Treaty of Rome was indeed directly effective in national legal orders. It is important to quote directly from the judgement the following –

> "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, *and the subjects of which comprise not only Member States but also their nationals."*[278]

This provision is of such legal relevance to the current international legal order. It confers on individual the status of subjects of international law, and such conference was premised on the pronouncement that the judgement should be considered as an introduction of a new legal order of international law.

This case established the Principle of Direct Effect for the provisions of the EC Treaty, and it set a precedent for the future determination of Direct Effect application in any given legislation. Notably, the Treaty of Rome did not clearly state how national courts were to implement the Treaty within a sovereign state. However, the ECJ, without the engagement of politics and legislators, interpreted the Treaty in a way that a new law

[277] Van Gend en Loos case (n 269)
[278] Ibid

was thus created. Hence, an individual can invoke the community's law within the national courts, and this was achieved without the Member States agreeing expressly on this point. Hence, where there is a conflict between national legislation and EC law, the EC law now takes precedence.

Another typical example of the EC having powers to overrule national legislative body is the *Factortame*[279] case. Here, the UK courts held that they had the power to restrain the application of an act of parliament pending trial and ultimately to dis-apply the act when it was found to be contrary to EU Law.

It leads to the question as to whether this is at variance with the provisions of Article 2(7) of UN Charter which reserve domain of domestic jurisdiction into which intervention is not permitted.

As pointed out, it becomes clear that it has already been established in international law that there is a new international legal order which accommodates individuals as direct subjects of international law. It gives further impetus to the argument that NGOs, who play a very significant role in the affairs of the international community could, in the same vein, be recognised as such. Moreover, beyond such recognition, which is to some extent in existence today, their activities and role should be endorsed to give it more legitimacy. The consent of the state in reaching this position does not compromise the sovereignty of the state; it only evolves international law accommodate 21st-century realities and make it better fit for purpose. Hence, the relevance of the Van Gend en Loos case to this thesis is to bolster the need for a reconceptualisation of international law, being that the ECJ had already entertained such paradigm shift in international law.

4.9. Chapter 4: Conclusion

This chapter engaged in a careful review of the idea of reconceptualisation. It explored its potential by evaluating the notion of sovereignty and a rethink of that notion. To this end, it engaged in a critical analysis of the notions of subsidiarity, federalism and dissolution of powers and their common attribute of the delegation of sovereignty.

It sought to resolve the question of whether collaboration of the sovereign state in the international plan is tantamount to the ceding of their sovereignty. In resolving this question, this chapter draws on the sovereignty of the citizen and the state. It poses the same question as to whether the sovereignty of the citizen is curtailed by the

[279] *R (Factortame Ltd) v Secretary of State for Transport* (1990) 7 UKHL.

citizen being subject vertically to the laws of the land or horizontally in contracting bilaterally with fellow citizens.

Along these lines, it highlighted the pivotal role of consent to this social transaction between the individual and the state. Then it opined that at the very core of sovereignty is the element of consent which aides in providing an accurate perception of sovereignty in its full essence; revealing its multi-faceted nature.

Against this backdrop, the principle of subsidiarity, federalism and dissolution are critically examined and argued as principles that do not negatively impact on the essence of the sovereignty of a state whose authority has been conferred, delegated or allocated whether downwards, horizontally or vertically. Instead, in the estimation of this thesis, these concepts are considered to enhance the notion of sovereignty in the completeness of its essence. To this end, these concepts were explored as possible prototypes of a reconceptualised international law, whereby some aspects of the sovereignty of state are delegated to non-state actors, particularly NGOs.

Finally, in exploring a pathway to reconceptualisation, it examined existing compelling concepts and examples such as concepts of *Jus cogens* and the *Van Gend en Loos* case. Concerning *Jus Congens*, it established that as far as international law is concerned, the traditional notion of sovereignty had never been quite absolute because states cannot, even under the Westphalian legal context, derogate from a *Jus cogens* law. Concerning the *Van Gend en Loos* case, it highlighted the pronouncement of the European court which concluded that European Community constituted a new legal order of international law where a subject of international law comprises of not only the member states but their nationals.

This chapter concludes that these examples and various existing concepts discussed, give credence to the focal point of this thesis. Thus, there should be a reconceptualisation of international law in a way that aligns with the 21st-century global realities. There should be a paradigm shift in the perception of international law in a way that acknowledges the influence of NGOs. Per the above findings, it is observed that the quest for reconceptualisation is not only aspirational but practical.

Having reached the position that the reconceptualisation of international law is not only a possibility but also a practical probability, the next chapter approaches this quest by honing in on NGOs, its emergence, its operations and its place and growing influence on the international plane. The core rationale for this is to begin to

accentuate the applied relevance of the exposition in this chapter and its preceding chapters.

5. Chapter 5 - Part A: Understanding Non-Governmental Organisations

Chapter 5 Contents

5.1. Chapter 5 Part A: Introduction

Having engaged in a conceptual analysis of the concepts of international law, factors that call for its rethink, and consideration of ways the concept of sovereignty could be reconceptualised, this chapter underscores the second ambit of the research question and commences a journey to highlight the applied relevance of this exposition. It does this by focusing on NGOs and their existing influence and operational status on the intentional plane. This chapter is structured into two parts. This first part focuses on providing an understanding of non-governmental organisations. It embarks on an exposition of the emergence of NGOs and explores the growth of their influence nationally, regionally and internationally over time. It acknowledges that NGOs have been allowed some level of visibility and evident participation in the process of the international legal order. However, it engages in an appraisal of the dilemma that NGOs face. This dilemma is seen in the fact that NGOs have experienced some level of political and social ascendancy on the international plane but lack the corresponding legal ascendancy. Consequently, this lack of correlation between their socio-political stance and their legal stance on the international plane results in a legitimacy deficit.

In order to provide a systematic analysis of NGOs, including their construct, their growth and increased relevance in today's 21st Century, the chapter explores an exposition on the description, classification and function of NGOs.

It further examines other general considerations, including the foundational legislation regarding the emergence and the ensuing relationships of NGOs in the international community. Consequently, article 71 of the UN Charter and ECOSOC resolution 1996/31 on the Consultative Relationship between the United Nations and Non-Governmental Organisations, are evaluated.

Furthermore, a critical examination of the findings of the Cardoso Report of the Panel of Eminent Persons on United Nations-Civil Society Relations of 2004 vis-à-vis the cardinal objectives provided by Kofi Anan to the panel is carried out. The report's submissions on ways to enhance the relationship between NGOs and the United Nations are considered.

Finally, the UN Economic and Social Council is meticulously assessed. This assessment should shed light on the various categories available to NGOs in participation with the United Nations. These categories – general, individual and roaster statuses, are then critiqued. This critique examines the inadequacies of the status quo for eligibility in contrast to the global realities of the increasing influence of NGOs.

5.2. The Emergence of Non-Governmental Organisations

Non-Governmental Organisations (NGOs) have become even more pivotal to the organisation of society today. Their impact is increasingly felt nationally, regionally and internationally. NGOs have indeed been allowed some level of visibility and evident participation in the process of international cooperation. They are vital to the opening up of states and other international actors to scrutiny on the adherence to international law. However, they are still, at best, spectators on the international scene, to whose *chants* and *rants,* the current legitimate primary actors act on the international scene.

There has been sufficient discourse on the *political and social ascendancy* of NGOs on the international plane. However, the challenge lies in the lack of a corresponding *legal ascendancy*. The lack of correlation of socio-political stance with the legal stance of NGOs results in a 'legitimacy deficit'. The phenomenon of globalisation has made the traditional Westphalian based decision-making representations in international relations less relevant when considered in the light of post-modern politics. The various facets of the 21st-century international space, such as economics, trade, communication, culture, et cetera, are global. Some of the most vital decisions that affect the daily lives of people on the international plane are primarily reached by international organisations that represent these sectors.[280] The Cardoso Report on the United Nations relationship with civil society described the situation as follows –

> 'Representative democracy, in which citizens periodically elect their representatives across a full spectrum of political issues, is now supplemented by participatory democracy, in which anyone can enter the debates that most interest them, through advocacy, protest and in other ways.'[281]

NGOs have been one of the foremost channels by which people voice their views on the international plane. The role of NGOs on the international plane tends to supplement the role of the elected representatives and institutions within the legal system of the state.

[280] Sergey Ripinsky and Peter Van Den Bossche, NGO Involvement in International Organizations (1st edn, British Institute of International and Comparative Law 2007), p.2.

[281] United Nations General Assembly, 'Report of The Secretary-General in Response to The Report of The Panel of Eminent Persons on United Nations-Civil Society Relations - A/59/354' (Documents-dds-ny.un.org, 2004), para 13, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/507/26/PDF/N0450726.pdf?OpenElement> accessed 12 June 2018.

Additionally, other factors have contributed to the increased visibility and relevance of NGOs on the international plane. For instance, the growth of multinational corporations across the national boundaries has the corresponding effect of its stakeholders extending beyond national boundaries as well. These stakeholders include a wide spectrum of groups, most of which find expression through the vehicle of NGOs, trade unions, cultural groups, human rights groups, consumer groups, environmental organisations, et cetera.

Furthermore, with the exponential advancement of technology and seamless global communication, information is freely dispersed globally. The import is that local interests and advocacy quickly becomes global interests and advocacy, vice versa. These interests, whether global or local, are expressed mainly through the channels of NGOs.

Generally speaking, the increasing integration and interconnectivity of people and interests across the world today have added to the proliferation of NGOs globally.[282]

The broad spectrum of issues that are contended with locally and globally today tend to be more effectively and efficiently resolved through the actions of international organisations, with the significant help from the NGOs' operation in such sectors. It is debated that the NGOs are more responsive, efficient and effective than some states. For instance, where there are issues which are related to matters of environment, war, consumer protection, children and youth, family, refugees, et cetera, it is sure to find an NGO whose primary objective is to deal with that specific issues. Often the NGOs are first responders in such circumstances. Then they become the voice of the victims and the pressure on the parties concerned (whether states or other international actors) for the right actions to be taken. Another reason for the quick response

This increasing relevance of NGOs on the international plane, have made it impossible for NGOs to be ignored. The other actors on the international plane are pressured to adapt to the reality that NGOs are significant global stakeholders who have systematically encroached unto the erstwhile 'state-only' activities on the international plane.[283]

[282] Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 Indiana Journal of Global Legal Studies.
[283] Kal Raustiala, 'The "Participatory Revolution" In International Environmental Law' (1997) 21 The Harvard Environmental Law Review. p.537 at 542.

5.3. NGOs - A Paradox of Legitimacy

The apparent paradox plays out in the undeniable informal acceptance of NGOs by the citizenry and actors in the international community and the seeming reluctance of the same actors to formally accept NGOs as legitimate actors of the international community. The certainty of the continuous growth in influence by NGOs in this 21st century and beyond is irrefutable. The Cardoso Report stated as follows -

> 'Effective engagement with civil society and other constituencies is no longer an option – it is a necessity in order for the United Nations to meet its objectives and remain relevant in the twenty-first century.[284]

Regardless of the consensus that NGOs and international intergovernmental organisations should work in partnership, uncertainty remains with the question of how the actors can formally work together with legitimacy and defined legal authority underpinning their relationship? This question leaves a vacuum that needs to be filled. NGOs continue to deal with this dilemma of being needed but not being acknowledged as needed in the international space. This dilemma is the paradox of their legitimacy as they could very well be described as a legitimate, illegitimate non-state actor on the international plane.

It has been observed by John Gamble and Charlotte Ku that,

> *'NGOs have had difficulty finding a seat at the table of authoritative decision-making'.*[285]

Hence, regardless of how significant their influence has become on states, and other actors on the international scene, including international organisations, they still have not attained the function of an authoritative decision-maker. The essence of this point is not to suggest that NGOs as they are, should become *'the'* authoritative decision-makers. NGOs as *'the'* authoritative decision-makers may not be plausible. Indeed, there is a broad acceptance that civil society bodies and global governance institutions, including states, should have relations with each other. However, there is far less clarity, let alone agreement on how these relations should be conducted and to what ends.[286] These concerns are not new.

Additionally, perhaps one of the biggest challenges of NGOs today, which incidentally, is one of the focal points of this research is the international legal status

[284] United Nations General Assembly (n 281)
[285] John K Gamble and Charlotte Ku, 'International Law - New Actors and New Technologies: Center Stage for NGOs?' [2000] 31, Law and Policy in International Business, 221, 236-7.
[286] Ibid

of NGOs in the international space. NGOs remain one of the few actors on the international plane who do not have any legal status, nor is there a known uniform regulation under international law which governs the registration, requirements and the legal status of NGOs. It has been pointed out that attempts have been made over time to reach some multilateral agreements, which have all reached the same unsuccessful fate as preceding proposals. Interestingly, some of the chief antagonist to this elevated status are states.[287]

Persons, natural or juristic, make up NGOs and they are initially registered in their homeplace, under such dispersed criteria, differing from country to country around the world. Hence, the various NGOs around the world would be governed by the domestic laws by which they had been initially created. The effect of this is that due to the apparent lack of a uniform legal regime for international NGOs, their legitimacy, rights and duties are coloured by the diverse legal regimes across the various states.

5.4. What is an NGO?

An impasse encountered in this exposition is the simple yet complex question - what is an NGO, and how is that term easily distinguished from other like-bodies? Is there a difference in the meaning of the terminologies associated with it and like bodies, or should the body of terminology in this field be used interchangeably? Unfortunately, there has been a myriad of definitions that may have obscured the term even further.

To this end, some scholars have veered off the path of looking for a precise definition for NGOs. Most scholars have sought to describe NGOs rather than to define it. The rationale behind this is the fact that there is no universally accepted definition of NGOs, and the term 'NGO' is used, often interchangeably with other terms, which may connote a different meaning in a different context. For instance, the use of the terms such as NGOs, Civil Society Organisations (CSOs), Not For Profit Organisations, The Third Sector, or Voluntary Organisations or Charities, could mean different things. Still, the distinguishing factor of all of them remains blurred. Their objectives and activities are often interwoven. Hence, it is argued that there should be a precise determination of these terms, distinguishing one from the other, would be one of the crucial steps in legitimising the status of NGOs in the international community. On the journey to a precise definition, it may be helpful to investigate how it has been described.

[287] Ibid

Firstly, the phrase Non-Governmental Organisations commences with the negative– 'non-governmental', which implies that any governmental organisation or entity is excluded from what can be referred to as a Non-Governmental Organisation. The current definition adopted under the resolution of the Economic and Social Council – Res 1996/31 in describing a Non-Governmental Organisation, stated thus –

> 'any such organisation that is not established by a government entity or intergovernmental agreement shall be considered a non-governmental organisation for the purposes of these agreements.'[288]

This further buttresses the point that NGOs are not government entities, but it extends further to distinguish NGOs from bodies or groups which are an offshoot of an intergovernmental agreement. Hence, the position that is being held out is that an NGO should not be a creation of government or an intergovernmental agreement.

The United Nations have been one of the foremost actors that have endeavoured to define an NGO. The glossary to the Cardoso Report on the UN and the Civil society suggests that -

> 'an NGO is any organisation of relevance to the United Nations which is not a central government and was not created by intergovernmental decision, including associations of businesses, parliamentarians and local authority'.[289]

Interestingly, it acknowledges that there is a confusion with trying to get a clear definition of NGOs that is distinguished from civil society. The problem with the definition contained in the glossary is the fact that it also contains a separate definition of *civil society*, which suggest that both terms are different and by implication, ought not to be used interchangeably. It refers to civil society as follows –

> '[a]ssociations of citizens (outside of their families, friends and businesses) entered into voluntarily to advance their interest, ideas, ideologies, such as trade unions, professional associations, social movements, indigenous people organisations, religious and spiritual organisations, academe and public benefit non-governmental organisations'.[290]

[288] ECOSOC Res 1996/31 (25 July 1996), para 12
[289] The Cardoso Report (n 281)
[290] United Nations General Assembly (n 281)

Generally, NGOs have either been construed NGOs to be a type of CSO or used synonymously with CSOs. However, civil society could be described as that sphere of the society that is not occupied by the government or the business actors.[291] On this premise, the term - civil society organisations could be reasonably accurate when it is shown to be non-governmental, a non-profit, a voluntary organisation consisted of people in the civil society sphere of society. This sector so described, expectedly, encompasses a broad spectrum of people, movements, faith-based groups, organisations and interests, which composition could be formal, informal, long-term, ad-hoc or cause-specific based.

Likewise, NGOs have been described as a non-governmental, non-profit, voluntary organisation also consisted of people or organisations in the civil society space.

However, NGOs can be distinguished from civil society groups in that NGOs are restricted to being composed of the various stakeholders formally and in most cases, are registered. In contrast, not all CSOs have to be formalised.[292]

The import of this is that all NGOs are civil societies, but not all civil societies are NGOs. However, it should be noted that a caveat was stated in the Cardoso Report, acknowledging that there is no correct definition of the term civil society, and the boundaries between both terms – Non-Governmental Organisations and Civil Society Organisations are porous. It is argued that the actions and obligations of these related bodies are more similar than they are not, and the differences are blurred.

Hence, the distinction between these terms is universally important but practically needless because, in an applied sense, the terms could be used interchangeably. This position was reaffirmed by the Secretary-General to the United Nations, who, in response to the Cardoso panel, stated that he would discuss NGOs following the traditional United Nations parlance and by using *civil society* and *NGOs* interchangeably[293]. It remains a conceptual dilemma in the understanding of NGOs, and related bodies and their dealings with the local and global community.

5.5. Further Description, Classification and Functions of NGOs

As pointed out in chapter one, the rationale for focusing on NGOs is primarily because their interests are not for profit like their MNCs counterparts, but firstly, for the furtherance of a variety of 'worthy causes'. Secondly, they exist without the

[291] Ripinsky and Bossche (n 280), p. 5
[292] Ibid p. 5
[293] United Nations General Assembly (n 281)

encumbrance of government like inter-governmental organisation, and so they can execute their mandates independently. It was pointed out that the defining characteristics of NGOs being for causes and without any government influence, should result in NGOs being considered as the ideal custodians of the moral conscience of the international community. However, this position should be meticulously analysed.

5.5.1. Description of NGOs

Given the dilemma of reaching a definition, it suffices to attempt an accurate description which may, in essence, have the semblance of a definition. The following position has been argued by scholars[294] –

Firstly, NGOs are voluntary organisations not established by states which are consisted of actors from the civil society sphere. They represent the interests of actors, such as private persons, natural persons and juristic persons.[295]

Secondly, from the first component of the compound term – *Non*-Governmental Organisation, it is apparent that an NGO is an organisation intrinsically independent of the government and the influence of the government.[296]

Thirdly, NGOs represent interests, whether public or private. The common characteristic of NGOs in their representative capacity is that most of the interests that they represent are topical and would ultimately benefit the public or a section of the public. So public interest and public benefit is paramount to the construct of an NGO. However, some NGOs represent a more narrow set of private interests like industry or business associations such as the ICC.[297]

Fourthly, though NGOs may, at times, need to run on profit, profit-making cannot be an object of an NGO, and they are constrained from making a profit for the benefit of the owners. Somewhat, where profit is made, it is expected that such profit should be re-injected into the NGO with the ultimate aim of advancing the objectives of the NGO. It is this feature that distinguishes an NGO from a corporation, whose primary objective is to make a profit for its stakeholders.

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[294] Ripinsky and Bossche (n 280), p. 5.
[295] Ibid
[296] Stephan Hobe, 'Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations' (1997) 5 Indiana Journal of Global Legal Studies <http://www.repository.law.indiana.edu/ijgls/vol5/iss1/10> accessed 28 June 2018.
[297] Steve Charnovitz, 'Nongovernmental Organizations And International Law' (2006) 100 American Journal of International Law 348, p.350

Fifthly, as *Non*-Governmental Organisations are not supposed to transform into governmental organisations or political parties, NGOs are constrained from being involved in political parties or canvass for political power. This restriction is what distinguishes it from other CSOs or political parties which are neither governments nor businesses but exist to assume political power in the future.

Lastly, NGOs are expected to be law-abiding. This feature distinguishes it from like-groups, which are neither political nor profit-driven but are also driven by causes, except that these like-groups are driven by sinister unlawful causes, such as terrorism or other forms of criminal behaviour.[298]

The preceding notwithstanding, giving the diversity NGOs across the world, and their differing mandates, constitution, representative capacities, size, et cetera, it becomes a challenging task to attempt a unified definition or some form of generalisation. James Paul has argued that the reach of NGOs in today's 21-st century extends to the length and breadth of the globe across various industry sectors. He explains it thus –

> 'In addition to the great [non-governmental] organisations dealing with human rights, environmental protection and humanitarian assistance, there are NGOs representing industry associations like soap and chemicals, narrowly zealous religious organisations and advocates of obscure causes like Esperanto and space colonisation. While some NGOs are fiercely independent, others are known as the creatures of the government, businesses or even criminal interests. Some have hundreds of thousands of members around the world, while others speak for only a handful of people. Some have large central secretariats, and some are very decentralised. With such diversity, generalisation about NGOs can be difficult.'[299]

5.5.2. Classification of NGOs

To aid a better understanding of NGOs and to determine how they operate and are perceived, this thesis classifies NGOs. This classification is made further to general observations of NGOs and their workings globally. They are as follows -

Firstly, NGOs are classified by their mandates and the interests that they foster. Also, there could be business and industry-driven NGOs such as the International Chamber

[298] Nowrot, (n 282). 615 - 20

[299] James A. Paul, 'NGOs And Global Policy-Making' (Globalpolicy.org, 2000) <https://www.globalpolicy.org/empire/31611-ngos-and-global-policy-making.html> accessed 29 June 2018.

of Commerce. There could also be sectoral safeguarding and advancements NGOs such as professional associations, trade unions, religious groups. All of these examples fall into the first classification, which is a mandate or interest-driven NGOs.

Secondly, NGOs could be classified based on where the NGO is situated, including the extent or reach of their objectives and representation. Examples of this could include NGOs which are grassroots NGOs, local or community-based, or it could be NGOs which have a national interest, or it could be an international NGO with a global reach. The focal point of this work is predominantly international NGOs. These have been described as NGOs who have members or branches in more than one state, or if their objectives are not limited to one state. It is the international NGOs that mostly transact on the international plane on significant international matters and to that extent are relevant to the refurbishment of the international legal system.

The third classification of NGOs is activity-driven NGOs. Here, there could be demarcated into two broad categories; the service-based NGOs or the advocacy NGOs. The service-based NGOs are those NGOs that provide services, such as health services, food, housing, legal services, education to the rural communities, humanitarian relief materials for emergencies or crisis, et cetera. The advocacy NGOs, on the other hand, are engaged in lobbying and campaigns around topical issues related to the interest focus of the NGOs. Hence, one could have some advocacy NGOs campaigning for the preservation of the wildlife, climate and other environmental concerns, human rights issues et cetera. The objectives of the advocacy NGOs are primarily to effect significant policy changes by pressuring the political system with the opinion of the public regarding a particular policy change that is tied to the sector in question.

5.5.3. Functions of NGOs

In a bid to further describe and classify NGOs, a simple tabular depiction of the functions of NGOs is helpful. To this end, the final report by Dr Sebastian Oberthür et al. on the Participation of Non-Governmental Organisations in International Environmental Governance is referenced. Although the report is quite specific to environmental governance, its relevance is readily transferable across various strata of the international community.

Table: Functions, Activities and Channels of Influence of NGOs in International Environmental Co-operation Functions: Illustrative List of Activities and Channels of Influence[300]

Functions	An illustrative list of Activities and Channels of Influence.
Enhancing the knowledge base (science, policy and law)	• gather, compile and disseminate information • conduct and publish studies and reports • distribute information and organise side-events at major conferences
Advocacy and lobbying	• informal contacts with government delegates (side events, workshops, conferences, in the corridors, modern telecommunication technology) • formal participation in inter-governmental negotiations (official written submissions, unofficial written position papers, statements in meetings) • provision of advice to "friendly" delegations • campaigns outside the negotiating arena (e.g. media and public information, protests) to enhance influence.
Membership in national Delegations	• receipt of inside information about governmental negotiations • provision of advice to governments • negotiate on behalf of governments
Contribution to compliance review and enforcement as well as dispute settlement procedures	• submission of amicus curiae briefs • provision of information on implementation/alerting delegations and institutions of noncompliance
Ensuring transparency	• reports from negotiations • 'naming and shaming' of laggard countries • public relations work (media) • reports on the effectiveness of implementation
Supporting international Secretariats	• provide Secretariat functions • provide advice and expertise to Secretariats

300 (*Ecologic.eu*) <https://www.ecologic.eu/sites/files/download/projekte/1850-1899/1890/ngo_summary_en.pdf> accessed 10 March 2020.

Broader functions of NGOs in international environmental governance	• shaping the opinions of individuals and groups (campaigns and training) • co-operation between environmental groups and business and industry • networking, including integrating levels of governance • 'globalisation' of values and preferences objects of the NGOs.

To the end of adequately describing what an NGO is and what they do, the above table effective serves to that end.

5.6. NGOs – Other General Considerations

The emergence of NGOs as is known today dates back to the nineteenth century with the advent of organisations such as the Anti-Slavery International. For instance, the anti-slavery society emerged in 1839, formed by Thomas Clarkson and Thoma Fowell Boxton and other abolitionist campaigners against slavery worldwide.[301]

In the mid-20th century, NGOs were recognised as global players in some documented way during the formative stages of the United Nations (UN). Article 71 of the UN Charter and further to the provisions of the Economic and Social Council (ECOSOC) resolution 288(X) (1950), NGOs were referred to and were given consultative status. The implication being that NGOs were entitled to attend meetings and make written submissions and presentations during the meetings.[302] Today there exist a list of over 4500 NGOs with consultative status at the UN.[303]

However, this recognition, fall short of the functional role of being decision-makers; to have a more declaratory role than a mere participatory role. The rationale may be that NGOs have not, even among themselves, come to a clear consensus on who they are, how they are constituted, how they make decisions, or how their ideology can be tested against each other.

[301] 'Anti-Slavery - Our History' (*Antislavery.org*, 2016) <http://www.antislavery.org/english/who_we_are/our_history/default.aspx> accessed 8 December 2016.
[302] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (1st edn, Cambridge University Press 2016,) p.107.
[303] 'Welcome to Csonet.Org | Website of The UN DESA NGO Branch. At Your Service' (*Csonet.org*, 2016) <http://csonet.org/> accessed 8 December 2016.

5.6.1. Early considerations on NGOs and the United Nations – ECOSOC

The criteria by which NGOs are endowed with such consultative status with ECOSOC may be by itself problematic but does not erode the fact that the prominence of NGOs at the international space is on the increase.

As stated earlier, the ECOSOC resolution 1996/31 considers as an NGO

> '[a]ny such organisation that is not established by a government entity or an intergovernmental agreement'.[304]

However, for an NGO to be eligible to have consultative status with the ECOSOC, the following must be considered –

- The NGO must conform with the spirit, purposes and principles of the UN Charter, and it must be of sound reputation within its field.
- Further to that, the NGO must have an established location and
- The NGO must have a constitution derived democratically and a mode of operations and decision-making that is both democratic and transparent.
- The NGO must have the authority to speak for their constituency, a set structure and a clear accountability mechanism.[305]

The preceding acknowledges the necessity for NGOs to have an elevated status in international relations, but are concerned, and rightfully so, about stringent measures that must be met, if such status is to have any legitimacy in the global space.[306]

Another criteria that may be considered problematic are the position held regarding whether or not, NGOs should be making profits or having political affiliations.

5.6.2. NGOs & Profits

The notion that NGOs are not for profit organisations is one idea that is subject to intense debate.[307] The core of the debate rests on the fact that due to the extensive activities of NGOs, it is impossible to expect that NGOs would efficiently and effectively meet their objectives without funds. Distinguishing between for-profit and non-profit remains a hazy task. NGOs need funds to operate and often could be regarded, in terms of functionality, as for-profit organisations.[308] The line of demarcation should be drawn between raising funds to meet an objective for which

[304] Bantekas and Oette (n 302), 109
[305] Ecosoc Resolution1996/31. Consultative relationship between the United Nations and non-governmental organization 1996
[306] Ibid, para 21
[307] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (1st edn, Cambridge University Press 2016) p. 108. See also - Jude L Fernando and Alan W Heston, *The Role of NGOs* (1st edn, Sage 1997) Pp. 8-20 at 11.
[308] Jude L Fernando and Alan W Heston, *The Role of NGOs* (1st edn, Sage 1997) Pp. 8-20 at 11.

the public are beneficiaries and raising funds for the benefits of its owners. This line becomes even blurrier when the question is posed regarding the expertise of the owners of NGOs. It plays out, primarily when the owner's expertise is used in meeting the objectives of the NGOs. In such a situation, the question arises as to whether the owner should be remunerated or not. If so, then whether the NGO is a profit-making or not. It insinuates the clear need for integrity and transparent operation mechanisms for NGOs if they are to hold any global legitimacy.

Another note of debate is the fact that NGOs are run and sustained by funds from members of the public aligned with their core objectives. Hence, funds are generated from individuals or other juristic persons. The concern here is the fact that such funds so secured may tag along with it the necessity to further the agenda of such individuals or bodies. To this end, it appears more apt for some NGOs to seek to generate funds from activities that are directly linked to the carrying on of their objectives, such as sales of publications or tickets for awareness concerts et cetera. However, the challenge to this position is that engaging in profit-making activities could be a distraction for NGOs, and could also be interpreted that NGOs are using their mandate as a cover for business activities. Hence, some would argue that it is preferred that such practices are limited or done away with altogether.[309]

5.6.3. NGOs & Politics

On the issue of NGOs having a political affiliation, it follows to align to the position that many NGOs wield strong political influence, and many of their members may be and often are, affiliated to certain political parties or ideologies.[310] However, the distinction must be made between NGOs and political parties. Generally, political parties nurse the sole ambition of influencing in the political system and partaking in governance. NGOs on the other hand, as defined by Peter Willetts as follows-

> 'independent voluntary association[s] of people acting together continuously, for some common purpose, other than achieving government office, making money or illegal activities'.[311]

Regardless of the many concerns as to what legal status NGOs may eventually occupy in the international construct, it remains evident that the influence and impact of NGOs in the international space across various sectors stays on the increase.

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[309] Bantekas and Oette (n 302), p. 109

[310] Ibid

[311] Peter Willetts, 'Article on NGOs For UNESCO Encyclopaedia' (*Staff.city.ac.uk*, 2016) <http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM> accessed 8 December 2016.

The activities of NGOs are numerous and varied, and usually have impacts on politics and government. They cut across a variety of sectors; whether human rights activism, humanitarian activities, development campaign or environment protection. There is a myriad of impacting activities in which NGOs play a very prominent role, and these activities are sufficiently representative of the governance, global community and international relations.

5.6.4. Internal challenges of the growing influence of NGOs

Some of the most prominent NGOs had initially commenced pursuing a single agenda, but in so doing have increased in influence and have engaged in other activities which may be outside their initial mandate, but which may be ancillary to it. A typical example would be Amnesty International. When Amnesty International commenced in 1960, it had a single mandate which was the protection of the rights of peaceful political prisoners, but its mandate, since the turn of the century, has of necessity broadened to include economic, social and cultural rights. Today on their website, they describe themselves as ordinary people from around the world standing up for humanity and human rights.[312] This description could not be broader than this; where ordinary people from around the world are standing up for humanity. They pursue a global mandate and see themselves as an organisation with the status as a 'global citizen'. This development is a similar occurrence with most influential NGOs globally.

A concern with the growing influence of NGOs could be the need to define themselves clearly and stay consistent. It leads to the argument of whether or not NGOs would be considered legitimate in a fluid and fast-paced world. With the increase of influence, sometimes the thrust of some of the NGOs are diverted from their initial mandate. As they grow, they are influenced by a myriad of factors which are sometimes conflicting. Some of such factors include matters like the source of funding, the political climate, the media, the current overbearing circumstance or global debates et cetera.

This haphazard nature and kneejerk disposition/reaction of some NGOs question whether or not they are deserving of such status of international legitimacy. Hence, though the mandate of an NGO is its crux, some challenges face the adoption of mandates by NGOs. These days, it could be said that NGOs are prone to act '*ultra*

[312] 'Home' (*Amnesty.org.uk*, 2016) <https://www.amnesty.org.uk/> accessed 9 December 2016.

vires'. That is, they are regularly going beyond their mandates and are extending to carry on general goods that could be remotely close to their initial mandate.

This fluidity of focus is at odds with one of its strength in comparison with states. For instance, this thesis argues that NGOs are focused on particular causes and as a result are more productive on those issues, unlike states, which naturally concern themselves with governance that extends to all strata of the society. The challenge with the broad reach of states is their engagement with too much could yield uneven and inadequate results across the board. It is why NGOs could stand a better chance in dealing with specific issues if sufficiently legitimised. It is similar to chat was obtainable in the earlier centuries where the social affairs of the states were left to the vestiges of the ecclesiastical domain under the authority of the church, and the government engaged only with inter-state affairs.[313]

Mandates, by implication, circumscribe what an NGO should be doing and therefore defines its profile and its boundaries.[314] Most mandates are very specific. However, a shift in the funding opportunities or a change in the political realities may cause NGOs to change or broaden their mandate expressly or just functionally. The transition from the initial mandate of the NGOs to a broader one could bring about some queries. Queries such as if the NGOs have compromised or overstepped their boundaries.

The prevailing point to be taken from the above is that the global space is fluid, and various factors impact on NGOs and their objectives. These factors include matters such as funding, politics, environmental issues or even human rights matters. The likelihood for NGOs to stay static to their initial form and mandate is generally slim. NGOs have and would continue to transform and broaden their horizons. The onus is now on the global polity to accommodate the impending changes, and still find them deserving of legitimacy and enhanced status in the international space. NGOs have emerged as key players in various sectors, both internationally and domestically, and their increased influence should lead to some legitimacy for their causes.

5.6.5. NGOs and Globalisation

It has been argued that a significant reason for the emergence of the NGOs and their empowerment on the international plane remains the phenomenon of globalisation and the growing need to find global solutions for global problems[315]. States have had

[313] Lorie Charlesworth, 'Http://Vahs.Org.Uk/Vahs/Papers/Charlesworth.Pdf' (*Vahs.org.uk*) <http://vahs.org.uk/vahs/papers/charlesworth.pdf> accessed 2 April 2020.
[314] Bantekas and Oette (n 302), p. 110.
[315] Ripinsky and Bossche (n 280), p. 1.

to transcend beyond their traditional national boundaries and engage with other states to find mutual solutions to mutual problems. Governments have had to engage in more negotiation, policy formation and decision making at the international level, which, expectedly, has had a significant impact on domestic policy and legislation.[316] So, international legal development has been seen to sip back into the national legal framework.

Also, nationally, NGOs have been at the forefronts of national campaigns. These national movements have resulted in international reforms, such as the fights against racial prejudice, acceptance of refugees, child abuse and trafficking or discrimination by the apartheid government in South Africa.[317] It is worthy of note to state that the predominant facilitator of these movements, whether on the international or the national level have been NGOs. However, it remains a paradox when an attempt is made to compare the significant presence of NGOs across the international plane and the meagre formal recognition and acceptance of NGOs as a legitimate international actor and influencer of the international legal framework.

The broad spectrum of the form and activities of NGOs is simply too broad to examine generally. To this end, it imperative that NGOs, conceptually and functionally, be examined along with the lines of their participation across the various global sectors of today's global community. The import of this is to ascertain a better understanding of NGOs. Moreover, beyond that, to establish more accurately the centrality and the growing influence of NGOs in the global polity.

5.7. NGOs and the United Nations

The increasing norm in the regulation of the international community has moved beyond just the remit of states and has extended to the supranational conceptual remit. The key drivers of this new norm are the sum of private interests, national interests and global interest, which are best epitomised by international organisations. The chief of which is the United Nations. Since NGOs became formally recognised as international players following Art 71 of the UN Charter in the mid 20th century, they have become pivotal to international policy-making and compliance monitoring.[318] It was pointed out by Kal Raustiala over two decades ago that the growth of NGO activities indicates an emerging transformation of the international socio-legal and

[316] Ibid
[317] Fanyana D Mazibuko, 'The Role of Non-Governmental Organisations (NGO'S) In Educational Advancement in Developing Countries: The South African Experience.' (2000) 3.1 Journal of International Cooperation in Education.
[318] Ripinsky and Bossche (n 280), p. 1

socio-political system. Raustiala stated that this transformation results in a decline in the importance of the sovereign state and the state system. He explained that at the same time, the transformation could lead to a rise of governance by a dynamic global civil society.[319] Hence, it is not surprising, that a significant portion of governance of a broad spectrum of sectors and the people that deal in those sectors are now primarily a responsibility of the international institutions or organisations – representative of the international community. These international organisations or institutions are predominantly offshoots of the United Nations and groups by stakeholders within the various industry sectors. These organisations have seen an increased interface with NGOs.

5.7.1. The Cardoso Report

The Cardoso Report of the Panel of Eminent Persons on United Nations – Civil Society Relations of 2004[320] made a case for the civil society to be very engaged with the workings of the UN both nationally and internationally, and it centred its findings on three concepts.

5.7.1.1. Cardoso report three core concepts

Firstly, there is the concept of functionalism – being that NGOs are tailored to specific industries or facets of the international community; they are specialised and better positioned to attend to the challenges and growth of such industry or facet of the international community.

Secondly, there is the concept of global corporatism which is hinged on the need to engage relevant stakeholders or vested interests.

Thirdly, there is the concept of democratic pluralism which is fundamental to global policymaking.

5.7.1.2. Kofi Annan's objectives to the Cardoso group

What is significant about the Cardoso report is its antecedents. Kofi Annan, the then Secretary-General of the United Nations, at his inception to office in 1997 had sought to drive the reform of the United Nations and engage the civil society as strategic partners in its work.

Though the idea went through a tumultuous phase, in 2002 - facing much resistance from some states, the Cardoso panel was nevertheless appointed against the

[319] Raustiala (n 283) p.537 at 539.

[320] Fernandon Henrique Cardoso, 'We the Peoples: Civil Society, The United Nations and Global Governance' (Unngls.org, 2004) <https://www.unngls.org/orf/Final%20report%20-%20HLP.doc> accessed 12 June 2018.

backdrop of making the UN the focal point of the global political construct[321]. The range of members of the panel was far-reaching and diverse, from different echelons of society. There has been criticism that although the people that constituted the panel were eminent persons, they were not experts in the dealings of NGOs and their relationship with the United Nations.[322]

The objectives out by Kofi Annan for the panel were -

First, to review existing guidelines, decisions and practices that affect civil society organisations' access to and participation in United Nations deliberation and processes.

Secondly, to identify best practices in the United Nations system and in other international organisations to identify new and better ways of interacting with non-governmental organisations and other civil society actors from developing countries to participate fully in the United Nations activities.

Thirdly, to review ways of making it easier for civil society actors from developing countries to participate fully in the United Nations activities, amongst others.[323]

The need for this exercise by the panel was even more relevant due to the assumed responsibility of the UN to manage globalisation, which task could be better carried out by a more functional, inclusive and egalitarian approach. It could only be accomplished if the global community more faith in the UN and felt more included in the activities of the UN. Hence, the ultimate objective of the UN to the Cardoso panel was to see that the predominant perspective of the public on the United Nations is that the UN is an organisation which includes and engages governments, and more importantly, the rest constituencies of the global community in global policy-making.

The need for the UN to sustain its global relevance could more likely be accomplished if the 'inclusion' concern is effectively resolved. Although this concern is just one of a few concerns, it is a crucial one. Hence, these objectives that the UN assigned to the Cardoso panel were crucial. It was crucial because, as repeatedly mentioned, the growing presence of other non-state actors in the global space could no longer be ignored. In particular, the influence and capacity of the non-governmental organisations globally are increasingly pivotal to the social construct of the global

[321] Peter Willetts, 'The Cardoso Report on The UN And Civil Society: Functionalism, Global Corporatism, Or Global Democracy?' (2006) Global Governance, Vol 12, Lynne Rienner Publishers <http://www.jstor.org/stable/27800619> accessed 12 June 2018.
[322] Ibid
[323] Cardoso (n 320)

community. The need for inclusion is, therefore, inevitable. Hence, more traditional actors on the international plane face a necessity to reassert their legitimacy in the view of the public by including and acknowledging the existence and influence of non-governmental organisations. They also face pressure to align with or take into cognisance, in their decision making, the view or position of the non-governmental organisations. Willetts stated that the United Nations is engaging a policy-making characteristic that is marked by multi-stakeholder partnerships. A partnership that connects the local with the global, and supplementing the traditional intergovernmental process of decision making with a more inclusive global network of actors, including governments, civil society actors, firms, private persons and others.[324]

5.7.1.3. The Cardoso panel's 'centrality' and 'function' dilemma: NGOs vs State

The Cardoso Report likened the *'global public opinion'* to a second global super-power. It held the view that it would be strategic for the United Nations to be in tune with global public opinion/interests to enhance its legitimacy.[325] NGOs are positioned to navigate the public opinion/interests on a myriad of issues and stir up what global issues should be brought to the attention of other international actors. For the most part, the state remains the only actor that can legitimately decide on these issues for them to have a country-level impact and affect real lives.

It should be noted in response to the Cardoso Report, Kofi Annan sought to reiterate a vital point. He stated that although civil society has a significant influence in the global space, the state remains the chief interlocutors for country-level engagement with the United Nations. However, according to the glossary of the report, NGOs are a significant part of the broader civil society.[326] NGOs are seen as the actors that have a variety of apolitical expertise. They are perceived as having the core function as the voice of public opinion/interests. This unique attribute and function of the NGO could be very beneficial to the enhancement of the quality and acceptance of the UN's policy-making endeavours. However, it does not In presenting the report, a correspondent asked whether increased civil society participation in the General Assembly, which was also suggested in the report could raise tensions between government representatives and NGOs, and the case of the invasion of Iraq was

[324] Willetts (n 321)
[325] Cardoso (n 320)
[326] Willetts (n 321).

pointed out. The response was that the civil society organizations would have no seat or vote in the General Assembly, he explained, but would simply be allowed a voice

The challenge remains that though the functional place of NGOs is etched in the fabric of the international community, the form and status by which they are identified in the international community remains unclear. The position of the researcher aligns with Peter Willet and follows the aphorism in architecture that *form follows function*[327]. So, given the pivotal role that NGOs play in the international community, debatably functioning as the voice of the public opinion/interests, particularly with United Nations, they should be given a form and status in the international community that reflects their function and relevance in the society.

This opinion rests on the position of the Cardoso panel in one section of the report, which was titled 'streamlining and depoliticising accreditation and access'. This section canvassed for the accreditation of NGOs to be based on functional factors such as expertise, competence and skills.

Additionally, the function and relevance of NGOs in their dealings with the United Nations and other international organisations continue to be made more apparent since the advent of *stakeholder capitalism* in the 1980s onwards and particularly in 1990s.[328] Stakeholder capitalism is a classification of corporations orientation to serve the interests of all their stakeholders as opposed to just the shareholders.[329] There has been a wave of global partnerships, multi-sectorial colloquium, multi-stakeholder dialogues and collaboration across various constituencies and between public and private sector to deal with global issues. These have evolved into various global summits on sustainable development and economic enhancement to which NGOs have been very crucial. It was on this premise that the Cardoso Report proposed that the United Nations should have an Office of Constituency Engagement and Partnership with an under-secretary-general in charge. The office was to consist of the Civil Society Unit charged to promote a partnership approach.[330]

The challenge, however, is the question of whether these key roles that non-governmental organisations have assumed on the international plane have been so assumed legitimately and to whom are these influential non-governmental

[327] Ibid
[328] Will Hutton, The State We Are In (Jonathan Cape 1995), at chap 12; also see Bruce Ackerman, Stakeholder Society (Yale University Press 2008).
[329] Deborah D'souza, 'What Is Stakeholder Capitalism?' (*Investopedia*, 2020) <https://www.investopedia.com/stakeholder-capitalism-4774323> accessed 2 April 2020.
[330] Cardoso (n 320)

organisations accountable? This question cannot be adequately responded to without an exhaustive debate on the democratic characteristics needed for the legitimacy of non-governmental organisations. The democratic elements are indicative that it is the will of the majority of the members of the international or national society, and not just the overriding influence of a few, or an internal construct which is not inclusive. The question of the democratic element of NGOs remains central to any debate on the legitimacy of NGOs. For any system to be considered democratic, certain factors are taken into consideration. Some of such factors include - the decision-making process which must be typified by transparency, diversity, and there must be a system for accountability for the decisions taken.[331]

The United Nations and most international organisation contend that they owe their accountability to the governments and to the specific stakeholders for which they are formed. However, there remains a need for the United Nations and international organisations to stay transparent to all direct and indirect stakeholders. Often, it is the unspoken rule and role of most NGOs to bring that transparency or lack of it to visibility for the public, which would in its turn result in more or less credibility for the international organisations. Hence, the role of NGOs in ensuring that democratic principles are adhered to globally remains one of its most relevant factors. Their role in the enhancement of democracy and reshaping multilateralism cannot be overemphasised. As a result of this essential role of the NGOs, the NGOs must be themselves of a democratic construct.

5.7.1.4. An enhanced role of NGO's in global relations

The sum of the purpose of the Cardoso report appears to be that the traditional intergovernmental process that characterises that United Nations and their dealings with the governments of member states need a rethink. The UN and their state-centric relations with states in the formulation of global policies which are to be implemented are increasingly dated. They have been supplanted what has been referred to by the United Nations as the "global policy networks" which would bring together constituencies such as civil society among others, along with central governments, in joint initiatives for policy analysis and action[332].

It behoves on the United Nations and other international organisations to adapt to this new paradigm and be formally inclusive of NGOs and other key actors, going beyond

[331] Willetts (n 321)

[332] Tim Wall, 'Panel on Civil Society Relations Sees A Networked UN' (Unodc.org, 2018) <https://www.unodc.org/unodc/en/press/releases/press_release_2004-06-21_1.html> accessed 20 June 2018.

its core membership of central governments. - an added organ of the UN referred to as the People's Assembly should be considered. A network interweaved by civil society, of requisite representative capacity to continually engage with the UN-based on representing the voice of the people directly to the UN and other international stakeholders. Hence, these new networks should be entrenched in the global policymaking system.

Hence, a rethink of global relations is imperative. On the one hand, the UN Charter categorically states that that the world body is made up of states. At the same time, on the other hand, it also talks of "universal values," such as human rights. These universal values are often advocated for and safeguarded by NGOs as the defacto watchdogs of the states.[333] The panel's opinion is that there should be a move from the previous top-down approach of governance, i.e. global agreements transmitted to governments for national implementation, to a bottom-up approach.

There should be a change from the top-down approach to the bottom-up approach where the United Nations, governments and a range of civil society actors would collaborate on strategies for translating global agreements into programmes relevant to the national context. At the same time, pushing the lessons learned from national processes upward to inform the setting of the global agenda.[334]

However, there is a significant portion of governments of states in the international community who have been hostile to NGOs. This hostility, exists, regardless of the drive for the incorporation of NGOs to the global policy-making. Interestingly, the antagonism has not come only from dictatorial governments, but at times, also from democratic governments, including the United States, France and India.[335]

Today, there are possibilities and increased probabilities of a new norm which incorporates other global policy networks, including NGOs, in global policymaking and the reshaping of the 21st-century international legal framework; a legal framework which ought to be characterised by legal pluralism. However, given the current argument that NGOs, even as a watchdog, do not all have the pedestal to be watchdogs, especially where their structure is not incontrovertibly considered to be democratic. According to some schools of thought, the NGOs need a watchdog,[336] and should not be considered for any elevation from their current state. Hence, some

[333] Akhilesh Upadhyay, 'Ngos: Do The Watchdogs Need Watching?' (*Globalpolicy.org*, 2003) <https://www.globalpolicy.org/component/content/article/176/31397.html> accessed 3 April 2020.
[334] Wall (n 332)
[335] Willetts (n 321)
[336] Upadhyay (n 333)

hold the position, that due to the preceding, it is no surprise that there is a lack of a precise and formalised status of NGOs in the international space and global policymaking. The Cardoso Report confirms that the United Nations and other international organisations must be aware of the "democracy deficits" to which global governance is prone. As a result, a clear position should be held on this.

Nowadays, public opinion/interests, of which NGOs increasingly personifies, is on the increase. With the advent of the internet and other elements of globalisation, public opinion/interests reverberate globally and is indeed a significant and powerful force in shaping policies and priorities. Hence, the international community, which is consisted of states, should be proactive by facilitating an increased legitimacy by the incorporation of the '*public-opinion/interests-embodied-NGOs'* in global policymaking. It is one of the main ways by which the 'democracy deficit' that plagues global policy-making as well as NGOs could be tackled effectively. The pivotal role of the NGOs in this 21st-century international community can not be overemphasised. It is, therefore, in the interest of all actors in the international community to legitimise the role of NGOs. It can be done by giving them an enhanced status in the international community and regularise their activities, creating the expected sense of predictability and accountability that should follow such a vital legal construct as the NGOs. It would also guarantee a democratic disposition in the carrying on of their activities.

5.7.2. The scope of NGO's interface with the UN and its activities

The United Nations has had a continued interface with non-governmental organisations representing the interests of civil societies globally since its inception in 1945.

The impetus for creating the United Nations came from an understanding, after two world wars, that a global framework for working together was essential to avoid a repeat of the catastrophic suffering.[337] However, the mindset of working together was that of states working together. Over the years, other players have shown significant relevance to global work. Today, scepticism is also on the increase globally particularly as to the value of multilateralism and the United Nations, while approaching its 75th year, continues to face the challenge of remaining relevant and effective. Secretary-General António Guterres recognised this when he took office,

[337] 'The 67Th UN DPI/NGO Conference Concept Note | Outreach.Un.Org.Ngorelations' (Outreach.un.org, 2018) <https://outreach.un.org/ngorelations/content/67th-un-dpingo-conference-concept-note> accessed 19 July 2018.

declaring: "We need to re-assert the value of multilateralism; only global solutions can address global problems."[338]

One of the most significant developments in the relationship between the United Nations and non-governmental organisations was the resolution of the United Nations Economic and Social Council (ECOSOC). The prescription for the relations between the UN and the NGOs are outlined in Article 71 of the United Nations Charter and ECOSOC resolution 1996/31. It is one of the few and foremost regulatory channels by which the UN can interfaces NGOs. The rights and privileges enumerated in detail in the resolution enable qualifying organisations to contribute to the work programs and goals of the United Nations.

The overarching purpose of the United Nations and the possible cooperation with other actors is to help solve the problems facing the world today via camaraderie; facilitating communication and information exchange and promoting mutually supportive activities between diverse groups of state and non-state actors. To this end, the United Nations maintains close relations with thousands of NGOs around the world because NGOs play an important role in interactions between civil society and government.[339]

Before one embarks on an attempt to unpack the provisions of Art 71 and its implications, it would be a helpful exercise to get an understanding of the Economic and Social Council of the United Nations – The ECOSOC.

5.7.3. The Economic and Social Council – ECOSOC

The Economic and Social Council (ECOSOC) is pivotal to the United Nations system and has described its key objective as the advancement of the three dimensions of sustainable development – economic, social and environmental. It stands as the central avenue within the United Nations upon which extensive debates and innovative thinking is fostered, to the end of reaching an agreement on ways forward, working with the relevant stakeholders to achieve the internationally agreed goals.[340] The Economic and Social Council is one of the six organs of the United Nations. The United Nations has six major organs, namely; General Assembly, the Security Council,

[338] Ibid

[339] 'Guidelines: Association Between the United Nations and Non-Governmental Organizations (NGOs).' (Esango.un.org) <http://esango.un.org/paperless/content/guidelines.pdf> accessed 19 July 2018.

[340] 'UNITED NATIONS ECONOMIC And SOCIAL COUNCIL' (*Un.org*) <https://www.un.org/ecosoc/en/home> accessed 3 April 2020.

the Economic and Social Council, the Secretariat, the International Court of Justice and the Trusteeship Council.[341]

The various organs have their various purposes and compositions. However, for this work, the ECOSOC is very relevant. The main concerns of ECOSOC are sustainable development; social development; status of women; population and development, and human rights.[342]

The ECOSOC addresses its main concerns by promoting three main activities:

- Creating higher standards of living, full employment and conditions for socio-economic progress and development.
- Solving problems related to international health, economics and social issues and promoting international cultural and educational cooperation.
- Establishing universal respect for human rights and fundamental freedoms for all regardless of race, gender, ethnicity, religion or language.[343]

As can be gleaned from its website, it primarily deals with matters of the UN that revolves around subjects of economic and social relevance. The two terms-economic and social, are broad terms, which in turn makes the remit of the ECOSOC very wide-ranging. The import of this is that the mandate of the ECOSOC could extend into matters human rights, environmental concerns, religion, poverty alleviations, national corruption, business and industry, technology and to some extent humanitarian response to war-torn areas and the aftermath. The list could be endless, and to this end, it could be stated that the ECOSOC is almost all-encompassing.

At the inception of the ECOSOC after 1945 further to the UN Charter; it was a small executive council constituted of members who were just about 18 governments as elected by the General Assembly. It was soon expanded to 27 governments in 1965

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[341] 'Main Organs' (*Un.org*) <https://www.un.org/en/sections/about-un/main-organs/index.html> accessed 3 April 2020 - The Trusteeship Council was established in 1945 by the UN Charter, under Chapter XIII, to provide international supervision for 11 Trust Territories that had been placed under the administration of seven Member States, and ensure that adequate steps were taken to prepare the Territories for self-government and independence. By 1994, all Trust Territories had attained self-government or independence. The Trusteeship Council suspended operation on 1 November 1994. By a resolution adopted on 25 May 1994, the Council amended its rules of procedure to drop the obligation to meet annually and agreed to meet as occasion required -- by its decision or the decision of its President, or at the request of a majority of its members or the General Assembly or the Security Council.

[342] (*Gob.mx*) <https://www.gob.mx/cms/uploads/attachment/file/7623/Lineamientos_de_la_ONU_asociadas_con_las_ONG_S.pdf> accessed 10 March 2020. – This This document was prepared by the NGO Section of the Department of Economic and Social Affairs (DESA). It contains guidelines for all non-governmental organizations and entities of the United Nations in consultation with each other.

[343] Ibid

and then 54 members in 1971. The Council's 54 member governments are elected by the General Assembly for overlapping three-year terms. Seats on the council are allotted based on geographical representation with fourteen allocated to the African States, eleven to the Asian States, six to the Eastern European States, ten to Latin American and the Caribbean States, and thirteen to Western European and other States.[344]

Today, ECOSOC is a network hub of the various other bodies that come under the umbrella of the United Nations as part of the UN family of entities with a core commitment to ensuring the existence and maintenance of sustainable development. For the most part, it provides the overarching guidance and coordination for most of these other related entities. The entities include regional economic and social commissions, functional commissions facilitating intergovernmental discussions of major global issues, and specialised agencies, programmes and funds at work around the world to translate development commitments into real changes in people's lives.[345]

Further to its capacity and mandate to coordinate the various other related organisations within the UN system, ECOSOC is positioned as a gateway for UN partnership and participation by the rest of the world. To this end, it is positioned as a rendezvous for productive dialogues among policymakers, parliamentarians, academics, foundations, businesses, youth and 3,200 plus registered non-governmental organisations.[346]

The increased relevance of the ECOSOC over the recent years have been as a result of the reforms over the last decade, particularly General Assembly resolution 68/1. The resolution acknowledged the preeminence of ECOSOC in the identification of emerging challenges. Including its lead role in promoting reflection, debate and innovative thinking on development, as well as in achieving a balanced integration of the three dimensions of sustainable development.[347] Hence, the leading role of the ECOSOC in identifying emerging challenges, promoting innovation, and achieving a balanced integration of the three pillars of sustainable development—economic, social and environmental has been rejuvenated. The ECOSOC has created the primary passage which the civil society interfaces with the United Nations and it is a

[344] 'About Us | United Nations Economic & Social Council' (Un.org, 2018) <https://www.un.org/ecosoc/en/about-us> accessed 25 July 2018
[345] Ibid
[346] 'Ibid
[347] 'UN Economic And Social Council' (*Un.org*, 2013) <https://www.un.org/en/ecosoc/about/strengtheningofecosoc.shtml> accessed 3 April 2020.

relevant reference point for other actors on the international plane to determine and design the parameters and form of engagement with the NGOs. The need for the partnership of the United Nations with the NGOs was enshrined in the UN Charter. Article 71 of the Charter will be explored further hereunder.

5.7.3.1. The Scope of Article 71 of the UN Charter

Article 71 of the UN Charter provides as follows –

> 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangments may be made with international organisations, and where appropriate, with national organisations after consultation with the Member of the United Nations.'[348]

This clause means that the ECOSOC can consult with NGOs on matters that are within its competence.

So, are the matters referred to matters within the competence of the ECOSOC or the NGOs, or both? Due to the construction of Article 71, there is some level of ambiguity in giving a literal and pedantic interpretation.

The rationale for this enquiry is, if it is interpreted to mean – 'matters within the competence of the NGOs', then it could be implied that any NGO could be consulted by the ECOSOC on any matters. Including matters of international peace and security, if they have the competence to hold consultations, even where such matters fall clearly within the purview of the UN Security Council. On the other hand, if it is interpreted to mean – 'matters that are within the competence of the ECOSOC', then it means that it excludes some NGOs. So NGOs which may have mandates that are linked to international matters that are within the exclusive remits of other organs of the United Nations, such as international peace and security et cetera are excluded. It means that some NGOs may not be eligible for consultation with the ECOSOC of the United Nations under the provisions of article 71 of the UN Charter.

The predominant consensus is that the latter interpretation is preferred. The import of this is that article 71 provides a basis for the recognition of NGOs in their interface on the international plane, and the remit of the ECOSOC is vast and could at times be considered all-encompassing. However, further to Artice 71 of the UN Charter, other organs of the United Nations, still require some legal or regulatory basis to legitimately

[348] Article 71 of the Charter of the United Nations 1945.

recognize and interface with NGOs which are driven by mandates that are within their remits.

Scholars have also held this position that given the language of Article 71, the scope is quite clear and in context, it suggests that it limits the involvement of NGOs to only activities of the ECOSOC itself. It cannot extend in meaning to suggest that the ECOSOC could make suitable arrangements for NGOs to interface with other UN organs. Notably, the General Assembly upon which rests the responsibility and the general competence to deal with all issues falling within the ambit of the UN Charter, and the Security Council.[349]

Therefore, this thesis opines that there need to be further formal recognition NGOs on the international plane and in particular within the United Nations, beyond only economic and social matters.

However, it should be pointed out that over time, the practice of NGOs in the international community has seen an evolution. This evolution plays out in the extent to which the NGOs now interface with other organs of the United Nations. Of particular note would be the increased participation of NGOs in the work of the United Nations General Assembly's main committees and that of some of its subsidiary bodies, as well as in special sessions of the Assembly.[350] A typical example is the ICC which was given observer status with the UN General Assembly in 2016.[351] It should be noted that some of these participations are still informal and they lack the degree of legitimacy that is seen in the participation of NGOs with the activities of the ECOSOC, as a result of Article 71 of the UN Charter.

Additionally, beyond the import that Article 71 of the UN Charter does not extend to the involvement of NGOs with other organs of the United Nations, it also does not extend to the participation of NGOs with the organisations or specialised agencies of the United Nations. It implies that it is the prerogative of the various organisations and specialised agencies of the United Nations to design the relevant regulatory framework by which NGOs can legitimately be recognised and participate in their activities. So, there would be some legal frameworks, by which NGOs are engaged

[349] Ripinsky and Bossche (n 280), p. 20

[350] 'Reference Document on The Participation of Civil Society in UN Conferences and Special Sessions of The General Assembly During The 1990S' (Globalpolicy.org, 2001) <https://www.globalpolicy.org/component/content/article/174/30605.html> accessed 25 July 2018.

[351] Andrew Wilson, 'ICC Granted UN Observer Status - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2016) <https://iccwbo.org/media-wall/news-speeches/un-general-assembly-grants-observer-status-international-chamber-commerce-historic-decision/> accessed 20 March 2020.

on the international plane. Some scholars have held the view that Articles 71 of the UN Charter and the participation of NGOs with the ECOSOC sets a clear benchmark for other United Nations Agencies.[352] It has been noted that in recent years, many United Nations Organisations have been taking steps to review their relationships with NGOs.[353] However, ECOSOC remains the key gateway by which NGOs can interface with the United Nations.

5.7.3.2. ECOSOC Resolution 1996/31

On the 25th of July 1996, ECOSOC adopted what is now popularly known as the Resolution 1996/31 on 'Consultative Relationships between the United Nations and Non-Governmental Organisations'[354], under its mandate in article 71 of the UN Charter. The resolution makes provisions for the types of consultation NGOs may enter into, as well as the extent of the participatory rights that NGOs may have with the ECOSOC and its subsidiary organs. The resolution also lays out the basis for accreditation of NGOs, the rules for their participation in United Nations' conferences and the grounds for suspension or withdrawal of their consultative status.[355]

The Resolution 1996/31 is an updated version of the resolution 1296 of the 23rd of May 1968,[356] which restricted the UN processes to just international NGOs. This restriction was done away with the in Paragraphs 5 and 8 of the Resolution 1996/31, and then immediately, UN processes were also opened to national NGOs.

The definition of NGOs adopted by the Resolution 1996/31, was structured in a way that it precludes the involvement of government in the setting up of an NGO.[357] Any financial contribution or other support, direct or indirect, from a Government to the NGO must be openly declared to the Committee through the Secretary-General and fully recorded in the financial and other records of the organization. It shall be devoted to purposes per the aims of the United Nations.[358]

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[352] Steve Charnovitz, 'Two Centuries of Participation: NGOs And International Governance,' (2018) 18 Michigan Journal of International Law <http://repository.law.umich.edu/mjil/vol18/iss2/1> accessed 25 July 2018.

[353] UNCTAD-Civil Society Dialogue: On Selected Development Issues Being Addressed by The United Nations System (Geneva, 10 December 2001): Papers Prepared in Support of The Issues Discussed (United Nations Conference on Trade and Developments -New York: United Nations 2002).

[354] '1996/31. Consultative Relationship Between the United Nations and Non-Governmental organizations' (Un.org, 1996) <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> accessed 6 August 2018

[355] Ibid

[356] 'ECOSOC Resolution 1296 (XLIV)' (*Globalpolicy.org*, 1968) <https://www.globalpolicy.org/component/content/article/177/31832.html> accessed 3 April 2020.

[357]'1996/31. Consultative Relationship Between The United Nations And Non-Governmental Organizations' (*Unov.org*, 1996), Paragraph 12 and 13 <https://www.unov.org/documents/NGO/NGO_Resolution_1996_31.pdf> accessed 3 April 2020.

[358] Ibid

Paragraph 12 provides as follows –

> ' Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.'[359]

However, the definition of NGOs is tacit on the profit-making element of an organisation. It should be pointed out that the structure of the definition implicitly excludes profit-making NGOs. The requirements for NGOs to be accredited and considered eligible for being conferred with a consultative status includes a requirement that the primary resources of the organization shall be derived in the majorly from contributions of the national affiliates or other components or individual members.[360]

Resolution 1996/31, in alignment with the provisions Art 71 of the UN Charter provides for the granting of the consultative status to NGOs, and it outlines two key motivators for bestowing such status on NGOs. Firstly, to allow for the Council to secure an expert opinion from organisations that have specialised expertise and competences in the relevant subject area in view. Secondly, to allow for NGOs who represent the views of a significant portion of the public opinion to put forth their positions on these issues.[361]

According to the resolution, NGOs could be granted different types of consultative status. The three types of status include –

1. General Consultative Status;
2. Special Consultative Status; or
3. Inclusion on the Roster.

All of these would be discussed in further details in the sections to follow.

The variety of options is dependent on the nature of the NGO and the activities that they carry on. Also, the extent of their influence and contribution to the works of the council is considered. With each category of status that NGOs could be given comes certain corresponding rights. These rights have been clearly stated to be different from the rights that could be accrued to non-member states of the council or the rights of

[359] Ibid
[360] Ibid, Paragraph 13.
[361] ECOSOC 1996/31 Resolution (n 354), para 14 and 20.

the representatives of UN specialised agencies. For example, the provisions of Resolution 1996/31 do not provide that NGOs should have the capabilities to participate in voting. The extent of the involvement of NGOs with the council was primarily to participate without voting.

It goes to the crux of this thesis. The influence of NGOs on the international plane is such that it is deserving of a declaratory status and not only a participatory status. NGOs should have a status which allows them to vote rather than having a mere participatory status. This restriction on voting right is similar to what is obtainable with the states which are not members of the Council. However, it is a deliberate attempt by the drafters of the resolution to distinguish the kind of rights enjoyed by different actors on the international plane. So, the objective is that the rights that are enjoyed by states regardless of if they are members of the council or representatives of the UN specialised agencies should be distinguished from the kind of rights that are enjoyed by non-governmental organisations in the same circumstance.

Hence, the provisions of paragraph 18 of the Resolution 1996/31 states as follows-

> 'A clear distinction is drawn in the Charter of the United Nations between participation without [a] vote in the deliberations of the Council and the arrangements for consultation. Under Articles 69 and 70, participation is provided for only in the case of States, not members of the Council, and of specialised agencies. Article 71, applying to non-governmental organisations, provides for suitable arrangements for consultation. This distinction, deliberately made in the Charter, is fundamental and the arrangements for consultation should not be such as to accord to non-governmental organisations the same rights of participation as are accorded to States not members of the Council and to the specialised agencies brought into relationship with the United Nations.'

Notably, it implies that NGOs could have even lesser rights than that that is enjoyed by the non-member states of the council or even the UN specialised agencies. To further bolster this point, paragraph 19 of the Resolution 1996/31 highlights the fact that the wheel of the international system of law and governance need not be reinvented and that core purpose for the council should not be altered because of the involvement of the NGOs with the council in its consultative role. As can be gleaned from the preceding, the rights enjoyed by the NGOs are such that are designed not to have any significant impact on the United Nations and international law generally.

So, the various categories by which NGOs could be involved with the ECOSOC must be discussed to ascertain the extent of the rights and influence of NGOs. It is only at this point that a valid and informed argument could be made as to the status of NGOs concerning their dealings with the United Nations, and particularly the Economic and Social Council. This discussion should eventually lead to more clarity for NGOs concerning their participation in the international affairs and by extension, increased legitimacy within the international legal framework.

Ripinsky and Bossche hold the view that increased participation and legitimacy may stifle the decision-making process of the ECOSOC[362], and international law as a whole. Moreover, this is not necessarily a negative. The rights accruing to NGOs are severely tempered with several conditions. These conditions are to retain ECOSOC's oversight and control over the involvement of NGOs in their organisation. Moreover, so it presents a deficit in the international legal order, which is removed from the 21st Century realities. This position is held because the role of the non-state actors in the 21st Century international community is so fast-paced that any entanglement of exclusion of such players will be problematic.

5.7.3.2.1. The General Consultative Status

Further to paragraph 22 of the Resolution 1996/31, there are specific criteria which a non-governmental organisation need to meet to be given the General Consultative Status with the ECOSOC.[363]

- Firstly the non-governmental organisations must deal in most of the activities of the Council and its subsidiary bodies.
- Secondly, the non-governmental organisation must be able to convincingly show that they have significant and consistent contributions which would facilitate the achievement of the objectives of the United Nations in matters falling within the competence of the Economic and Social Council and its subsidiary bodies.
- Furthermore, the non-governmental organisations must demonstrate that they are closely involved with the economic and social life of the peoples of the areas they represent.
- Lastly, their representative capacity should be broad and far-reaching; with a significant size of membership which is broadly representative of major

[362] Ripinsky and Bossche (n 280), p. 23
[363] ECOSOC 1996/31 Resolution (n 354), para 22.

segments of society in a large number of countries in different regions of the world.

When a non-governmental organisation meets these criteria, then they are eligible to be granted the General Consultative Status with the United Nations Economic and Social Council.

NGOs which attain this status are entitled to very far-reaching rights and privileges, beyond what is obtainable in the other two categories of consultative status with the UN ECOSOC. Also, the rights would differ where the consultative status is not with the council itself, but with its commissions or other subsidiaries organs of the council.[364] However, as shall be noted, there are challenges as to whether these rights accruable are enough and whether the privileges should be more rights than privileges, at least in practice.

Some of the rights that accruable to a non-governmental organisation with a general consultation status are provided for in paragraphs 27 – 30 of the Resolution 1996/31, and they include –

1. Paragraph 27 provides that Non-governmental organisations with a General Consultative Status are entitled to be informed of a provisional agenda of the Council.[365]

Having a General Consultative Status entitles the non-governmental organisations the right to propose to the Council Committee on Non-Governmental Organisations that the Committee request the Secretary-General to place items of special interest to the organisations in the provisional agenda of the Council.[366] However, this right is subject to certain conditions, including informing the Secretary-General of the United Nations at least 63 days before the commencement of the session and giving due consideration to any comments the Secretary-General may make. The interpretation of due consideration remains hanging.[367] Moreover, the proposal shall be formally submitted with the relevant necessary documentation not later than 49 days before

[364] '1996/31. Consultative Relationship Between the United Nations and Non-Governmental organizations' (Un.org, 1996) <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> accessed 6 August 2018, part V. In Part V, Paragraphs 33 – 37 of the Resolution 1996/31 makes provision for the NGOs with general consultative status and their dealings with commissions and other subsidiary organs of the council.
[365] ECOSOC 1996/31 Resolution (n 354), para 27
[366] Ibid, para 28
[367] Ibid, para 34.

the commencement of the session and the item shall be included in the agenda of the commission if it is adopted by a two-thirds majority of those present and voting.

2. Additionally, paragraph 29 provides that an NGO with General Consultative Status may designate authorised representatives to sit as observers at public meetings of the Council and its subsidiary bodies.[368]

However, it is essential to note that these attendance arrangements may be supplemented to include other modalities of participation.

3. Furthermore, paragraph 30 provides that written statements relevant to the work of the Council may be submitted by organisations in General Consultative Status on subjects in which these organisations have a special competence.[369]

Such statements get the audience of the Secretary-General of the United Nations, who then has the responsibility to circulate same to the members of the Council when they are still relevant and in-date. So, where the statements deal with matters which have already been disposed of or have already been circulation by other means, there would be no further need for the Secretary-General to duplicate the process.

It should be noted that, concerning the provisions of paragraph 30, certain conditions shall be observed regarding the submission and circulation of such statements[370]:

Firstly the written statement ought to be submitted in one of the official languages.

Secondly, sufficient time should be allowed for the Secretary-General and the relevant organisation to have the requisite robust consultation, before it is circulated. The consultation may lead to views and comments from the Secretary-General, and the organisation is obliged to give such and view or comment due consideration.

If the written statement submitted by an organisation in General Consultative Status is to be circulated in full, then the drafters of the statement must endeavour to see that the written statement does not exceed 2,000 words. If they fail to do so, then they are obliged to submit a summary which shall be circulated. There is also the option to provided the full text in enough copies of the full text in the working languages for distribution. A statement will also be circulated in full, however, upon a specific request of the Council or its Committee on Non-Governmental Organisations;

[368] Ibid, para 29
[369] Ibid, para 30
[370] Ibid, para 31

4. Para 32 provides for oral presentations

A significant privilege that could be accrued to organisations with a general status is that the Council Committee on Non-Governmental Organisations shall make recommendations to the Council as to which of such organisations should make an oral presentation to the Council.[371] The Council is entitled to determine the basis or terms upon which they should be heard including what items they could be heard. Upon their approval, such organisations may be heard. The same organisations may further be invited by the president of the Council and shall be allowed to make one statement to the Council, subject to the approval of the Council.

Additionally, whenever the Council discusses the substance of an item proposed by a non-governmental organisation in General Consultative Status and included in the agenda of the Council, such an organisation shall be entitled to present orally to the Council. The presentation shall be as appropriate, an introductory statement of an expository nature. Furthermore, during the discussion of the item, the same organisation may be invited by the President of the Council, to make an additional statement for purposes of clarification.

5.7.3.2.2. The Special Consultative Status

There are Non-Governmental Organisations that have special competence in and are concerned specifically with, only a few of the fields of activity covered by the Council and its subsidiary bodies. The NGOs with this status are known within the fields for which they have or seek consultative status.[372]

An NGO with a General Consultative Status differs from that with Special Consultative Status in the scope of their competences. The former must deal in most of the activities of the Council and its subsidiary bodies. It must be able to show the extent of their contribution to the activities of the United Nations, particularly the ECOSOC and the broadness of their membership. The latter, on the other hand, deals with only a few of the fields of activities covered by the council and its subsidiary bodies.

However, like their counterparts with General Consultative Status, NGOs with a Special Consultative Status enjoy some rights and privileges. Most of which are similar to that enjoyed by NGOs with a General Consultative Status. Some of the similarities and

[371] Ibid, para 32
[372] Ibid, para 23.

differences concerning the rights and privileges that they enjoy are provided for in paragraphs 27 – 37 of the Resolution 1996/31, and they include –

- Being informed of the provisional agenda of the Council and its subsidiary organs.
- Option to attend public meetings of the Council and its subsidiary organs.
- The possibility of being heard by the council (upon the recommendation of the Committee on NGO, and in the case of the NGOs with Special Consultative Status, they can be heard only in cases where there is no subsidiary organ with jurisdiction over the subject-matter concerned.[373]
- Option to submit written statements subject to similar conditions as that to which the organisations with a general status are subject. The difference, however, is that the written statements must not exceed 500 words for the council and 1500 words for the subsidiary organs. Moreover, where they do, the NGOs should make arrangements for a summary, which would then be circulated. According to para 43 of the Resolution 1996/31, where the council of its Committee on NGO or a subsidiary organ have requested the written statement, then the prescribed word limit would not be applicable.
- Upon the request of a subsidiary organ of the Council, they can opt to carry out specific studies or investigations or prepare specific papers.
- Paragraph 28 provides another distinguishing feature between NGOs with a General Consultative Status and Special Consultative Status.
- The NGOs with Special Consultative Status cannot propose to place items that they have an interest in on the agenda of the Council or that of its subsidiary organs. Also, concerning their privilege of making an oral presentation at the meetings of the Council is quite limited. They are only able to make an oral presentation in the absence of a subsidiary body of the Council with jurisdiction in a major field of interest to the Council and the organizations in Special Consultative Status.[374]

[373] Ibid, para 32

[374] Ibid

5.7.3.2.3. Roster Status

Besides the first two categories already discussed, there is another category which can be referred to as the Roster. Non-governmental organisations which neither has the general nor the Special Consultative Status can be included on a list known as the Roster. An organisation is put on the Roster, where –

> 'the Council, or the Secretary-General of the United Nations in consultation with the Council or its Committee on Non-Governmental Organisations, considers that the organisation can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies within their competence.'[375]

This list may also include organisations in consultative status or a similar relationship with a specialised agency or a United Nations body. These organisations shall be available for consultation at the request of the Council or its subsidiary bodies. The fact that an organisation is on the Roster shall not in itself be regarded as a qualification for general or Special Consultative Status should an organisation seek such status.[376]

Like the previous two categories, there are some similarities and some differences concerning the rights and privileges that are accruable to the NGOs in the different categories. However, some of the rights and privileges of the NGOs on the roster are provided for in paragraphs 24 – 39 of the Resolution 1996/31 and are as follows –

- They are informed of the provisional agenda of the Council and its subsidiary organs.
- They may attend meetings of the council and its subsidiary organs concerned with matters within the field of competencies
- Upon the invitation of the Secretary-General, the Council or its Committee on NGO, the NGOs on Roster may submit written statements to the Council and its subsidiary organs. Submission of written statements under this category should be made subject to the same conditions that an NGO with a Special Consultative Status.
- Upon a recommendation of the Secretary-General and if requested by a subsidiary organ, an NGO on Roster may be heard by a subsidiary organ.

[375] ECOSOC 1996/31 Resolution (n 354), para 24.
[376] Ibid

- Upon the request of a subsidiary organ, an NGO on the Roster may carry out specific studies or investigations or prepare specific papers.

NGOs on the Roster are restricted from making proposals regarding what should be on the provisional agenda of the Council or its subsidiary organs. The ECOSOC Resolution 1996/31 is silent on making of proposals regarding what should be on the provisional agenda of the council from NGOs on the Roster.

Concerning written statements, the NGOs on the Roster can be circulated in full if it does not exceed 500 words. Where a statement is more than 500 words, the NGO shall submit a summary which will be circulated. However, the written statements will be circulated in full only upon a specific request of the Council or its Committee on Non-Governmental Organisations.

Concerning oral presentations to the council, NGOs on a Roster are also restricted. They are only allowed to speak at the meetings of ECOSOC's subsidiary organs further to the provision of paragraph 38 of the Resolution 1996/31. It provides that on the recommendation of the Secretary-General and at the request of the commission or other subsidiary organs, organisations on the Roster may also be heard by the commission or other subsidiary organs.[377]

[377] Ibid, para 38

5.7.3.3. Critiquing the rights and privileges accruable to NGOs with a General Consultative Status, Special Consultative Status and on the Roster: The need for a reconceptualisation

Rights of NGOs in Different Types of Consultative Status[378]

Rights & Privileges	General Consultative Status	Special Consultative Status	Roster
Council To receive the provisional agenda of the Council	Yes	Yes	Yes
Tp propose to place additional items on the provisional agenda of the Council (through the Committee on NGO	Yes	No	No
To attend public meetings of the Council	Yes	Yes	Yes
To submit written statements relevant to the work of the Council	Yes (generally of no more than 2000 words)	Yes (generally of no more than 500 words)	Only upon invitation (generally of no more than 500 words)
To make oral statements to the Council	Yes (upon recommendation and approval)	Yes (Upon recommendation and in the absence of the subsidiary organ)	No
To make oral presentations of an expository nature on items included into the agenda of the Council upon the proposition of this NGO	Yes	No	No
Subsidiary Organs To receive the provisional agenda of the subsidiary organs	Yes	Yes	Yes
To propose to place additional items on the provisional agenda of commissions	Yes	No	No
To attend public meetings of the subsidiary organs	Yes	Yes	Yes
To submit written statements to the subsidiary organs	Yes(generally of no more than 2,000 words)	Yes (generally of no more than 1,500 words)	Only upon invitation (generally of no more than 1,500 words)
To be consulted by the subsidiary organ (includes making oral statements)	Yes	Yes	Only at the request of the subsidiary organ
To undertake specific studies or investigations or prepare specific papers, upon request of a subsidiary organ	Yes	Yes	Yes

[378] Ripinsky and Bossche (n 280), p. 29

The NGOs interface on the international plane, at least in their relationship with the United Nation's Economic and Social Council, differs from one NGO to the next. The rights and privileges enjoyed by the NGOs also differ from one NGO to the next.

With regards to the consultative status, the main difference in the rights and privileges of the NGOs with the General Consultative Status and the Special Consultative Status rests primarily on three core issues, namely –

The rights to propose to put items on the list of the council;
the word limits of written statements that could be presented for circulation; and
the possibility to make oral statements.

It has been posited that the allowances given to NGOs to participate in the public meetings do not extend to NGOs the preparatory processes that precede these meetings.[379] So, while NGOs with some status with the UN's ECOSOC could have access to the public meetings, it is implied that they are excluded from the preparatory meetings and are not give any preparatory working documents which are given to state delegation. They are only given the provisional agenda.

So, while it can be seen that the rights of an NGO with a general or Special Consultative Status is quite extensive, it is subject to the prerogatives of other bodies and in effect could bring its independence to question. These rights and privileges are better classified as privileges, because, NGOs are not able to use their rights and privileges except there are recommendations, approvals, and requests of the ECOSOC or other subsidiary organs of the council.[380] For instance, a pre-requisite for the circulation of written statements made by NGOs is that the NGOs are mandated to take into consideration the comments made by the Secretary-General of the United Nations on the written statements.[381] Depending on its interpretation, this provision could be considered as an impediment to the independence of the NGO.

Secondly, the restriction as to the number of NGOs that are given an oral audience buttresses the point that these rights and privileges are best classified as a mere privilege and not a right. This provision allows for arbitrariness in the process by which NGOs are selected to be heard. It is based on the recommendation of the Committee on NGO before an NGO could be given an oral audience with the council. Even

[379] Ibid p. 28
[380] Ibid p. 30
[381] ECOSOC 1996/31 Resolution (n 354), para 31 (c)

when this is done, the Council is entitled to determine the basis or terms upon which they should be heard including what items they could be heard on, and upon their approval, such organisations may be heard. This arbitrariness hampers the effectiveness of NGOs and reinforces the point that the influence of the NGOs on the international plane today is not commensurate to the extent of their recognition, nor is it proportionate to the level of regulatory legitimacy that they enjoy.

It should also be pointed out that, even where NGOs are invited by the president of the Council to present orally to the Council, they can only do so 'as appropriate'. The parameters being appropriate is undefined. Where such undisclosed parameters are met, the NGOs are only allowed to make introductory statements of an expository nature, and in the course of the discussion of the item before the Council, an additional statement may be allowed, although, only for further clarification.

Therefore, the real value that NGOs enjoy from the elevated status with the United Nations is the arbitral benefits and privileges. These benefits include having some level of access to lobbying as a result of their elevated status. Martens has argued that the consultative status is a free pass for the NGOs to the UN buildings and offices; having a UN badge gives the NGOs access to directly contact UN delegates and their representatives during these meetings, even during the preparatory phases, albeit informally. [382] These arbitral benefits and privileges are the real value that NGOs get from being recognised at this level. This access is of key significance and importance to the NGOs, particularly to advocacy NGOs more than to service NGOs, as it enables them to keep abreast of current discussions, projects and decisions and lobby officials informally to influence key decision-makers. Unfortunately, this is beneath what should be accrued to NGOs given their influence. The picture of NGOs walking in the corridors and walkways, trying to catch a moment with a UN delegate or representative to implore and push their agenda is not in tune with the influence that NGOs wields in the realms of public opinion.

5.8. Chapter 5 Part A: Conclusion

This first part of this chapter focused on providing an understanding of non-governmental organisations.

This chapter revealed that there is a paradox of legitimacy with NGOs. It plays out in the undeniable informal acceptance of NGOs by the global citizenry and actors of

[382] Kerstin Martens, NGOs And the United Nations: Institutionalization, Professionalization and Adaptation (Palgrave Macmillan 2005), p 134.

the international community. However, on the other hand, there is an incessant reluctance or resistance by the same global actors to formally accept NGOs as a legitimate actor of the international community. Hence, NGOs were described as the legitimate illegitimate non-state actor on the international plane. The findings from the Cardoso report emphasised the point that active engagement with civil society was a necessity that was germane to the continued relevance of the United Nations in the 21st Century.

One of the principal objectives of this part was to attempt a good definition of an NGO and adequately describe it. In embarking on a clear description of an NGO, its attributes, classification and functions were examined. The findings revealed that NGOs are law-abiding voluntary organisations, intrinsically independent of the government and the influence of the government, representing either public or private interests. It was also observed that even if NGOs may need to run on profit, profit-making cannot be the objective of the NGO. This examination was imperative to make a justifiable argument for their legitimacy. Also, the journey to prominence of NGOs due to its endowment with consultative status the ECOSOC was considered. In the discharge of their causes over the years, it was observed that although their influence is on the increase, their functional role falls short of being decision-makers. Essentially, while this thesis seeks out a declaratory status for NGOs, their role in international governance remains mainly participatory. Along these lines, the criteria by which NGOs are endowed, such even the participatory status were assessed. It is summed up to be the need for the NGO to conform with the spirit and purposes and principles of the UN, and it should have a transparent and accountable organisational structure.

Additionally, to gain a better understanding of NGOs relationships with globalisation, the relationship between NGOs and the United Nations was critically analysed. To this end, the Cardoso Report of the Panel of Eminent Persons on United Nation-Civil Society Relations of 2004 was thoroughly examined. The analysis was hinged on Kofi Annan mandate to the panel to review existing generally come review means and processes that will enhance the UN's engagement with the civil society. The findings of the report reveal that the enhancement of engagement with civil society is in the UN's interest. It was pivotal to sustaining the relevance of the UN; therefore, a rethink of the international legal order was a welcome consideration. The need for the paradigm shift is evident in the fact that the UN Charter acknowledges the significant place of states in international relations, but at the same time canvasses for 'universal

values' such as human rights which are often safeguarded by NGOs as the default watchdogs of the state.

Also, the scope of NGOs interface with the UN and its activities, mainly ECOSOC was explored, and the underpinning legislation- article 71 of the Charter of the United Nations 1945 is methodically appraised. Along these lines, the ECOSOC resolution 1996/31on Consultative Relationship between the United Nations and Non-Governmental Organisations is assessed. The rationale for the granting of such status is to allow the Council secure expert opinion from organisations that have specialised expertise and competencies in the relevant subject area and to allow NGOs to represent a significant portion of the public on relevant issues. The resolution makes provision for the types of consultations NGOs may enter into as well as the extent of the participatory right that NGOs may have with the ECOSOC and its subsidiary organs. It lays out the basis for accreditation of NGOs; the rules for their participation; and the grounds for their suspension or withdrawal.

Consequently, this part considered the general, special consultative status and the roster status that NGOs may be granted. A critique of the impact of these statuses on the legitimacy of NGOs was carried out. The critique reveals that the real value that NGOs enjoys from the elevated status is no more than an arbitral participatory benefit and privileges which do not technically extend to any significant right or legal obligations.

This findings of this chapter include the position that the elevated status of NGOs under the various legal regime discussed do not correlate with the influence of NGOs. The elevation of NGOs has been described as no more than NGOs walking in the corridor and walkway of the UN buildings trying to catch a moment with a UN delegate or representative to implore or to push their agenda. Occasionally, being called upon to hear their views, and this privilege remains the prerogative of the state.

5. Chapter 5 – Part B: Accreditation and Legitimisation of NGOs

5.9. Chapter 5 Part B: Introduction

This part examines the legal basis for NGOs elevation statuses discussed in the other part. Hence it examines the eligibility requirement of NGOs to be accredited with the United Nations on the resolution 1996/31.

So, the four critical criteria for accreditation are considered. These include

- the alignment of the NGOs with the United Nations objectives.
- the democratic constitution and the channels of accountability of the NGOs;
- the existence and organisational structure; and
- the basis and source of its funding.

The procedure for establishing the eligibility of an NGO for accreditation is assessed.

Additionally, the United Nation's Committee on Non-Governmental Organisation is thoroughly examined. Their role of assessing the application for consultative status by NGOs as well as monitoring NGOs activities via the NGOs quadrennial reports is evaluated and critiqued. As a result, the political influence in the Committee's discharge of their responsibilities which plays out in unfair and partial decisions or decisions along political stance or ideology are identified and investigated.

Finally, arguments are made for and against the legitimisation of NGOs beyond is the current state of elevation.

5.10. Accreditation of NGOs

It is imperative to examine the current legal basis for NGOs elevation to these statuses, as just discussed in part a of this chapter. ECOSOC's engagement with these organisation will be looked at to see how the NGOs acquire some level of formal recognition. The exercise will include looking at the rules for the accreditation or the basis for the exclusion of other NGOs from engaging with the same international organisations. The extent of NGOs' accountability and participation in the programmes and events on the international plane is very relevant in ascertaining whether the status quo sufficiently accommodates NGOs in a way that matches their increasing global influence.

In the context of the United Nations and their interface with NGOs, the ECOSOC Resolution 1996/31 creates a clear framework of the eligibility requirements for NGOs

to be accredited with the UN. It has been said that accreditation in the UN parlance, merely means the conferring of consultative status.[383]

Article 71 of the United Nations Charter, which established the ECOSOC stated that the ECOSOC might make suitable arrangements for consultation with NGOs which are concerned with matters within its competences. Moreover, such agreements may be made with international organisations and, where appropriate, with national organisations after consultation with the member state of the United Nations concerned.

It is on this premise that the ECOSOC formulates its eligibility requirements for such consultative status to be granted. It is important to note that these eligibility requirements are for the NGOs to meet and to show that they have met them as provided in Resolution 1996/31.

5.10.1. Criteria for accreditation

According to the provisions of Resolution 1996/31[384], the various criteria for eligibility can be broadly condensed into the following -

- Firstly, whether the activities of the NGO are relevant and align with the objectives and competencies of the ECOSOC. Also, whether the NGO is of significant representative capacity.
- Secondly, whether the NGO is democratically constituted; having clear and transparent channels of accountability.
- Thirdly, whether the NGO in existence has a clear organisational structure, with an Identifiable headquarters and executive officers
- Finally, whether the NGO has shown the required basis and source of its funding.

These would be discussed in further details.

[383] Ripinsky and Bossche (n 280), p. 30
[384] ECOSOC 1996/31 Resolution (n 354), para 8 - 14

5.10.1.1. NGO's relevance and alignment with the objectives and competencies of the ECOSOC and representative capacity

Firstly, in determining whether the activities of the NGO are relevant and align with the objectives and competencies of the ECOSOC and whether the NGO is of significant representative capacity, it is further expounded upon hereunder-

Paragraph 1 of the Resolution 1996/31[385] provides that the non-governmental organisation shall be concerned with matters falling within the competence of the Economic and Social Council and its subsidiary bodies. Further to the provisions of Article 62 of the UN Charter, these matters are far-reaching. It provides that

> 'The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters and make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to specialised agencies concerned.'

Additionally, it may make recommendations to promote the respect for, and observance of human rights and fundamental freedoms for all.

Paragraph 2 of the Resolution 1996/31[386] provides that the aims and purposes of the non-governmental organisation shall align with the spirit, purposes and principles of the Charter of the United Nations, as provided for in Articles 1 and 2 of the UN Charter. Articles 1 and 2 of the UN Charter provided for the purpose and principles of the UN.

Article 1 provides that purpose of the United Nations is to maintain international peace and security and to that end, take measures to deal with threats to peace and acts of aggression. Additionally, there is the purpose of developing friendly relations amongst nations giving full consideration to equal rights and self-determination of peoples. Also, there is the purpose of achieving an international corporation in solving global problems that are of economic, social, cultural or humanitarian character in the promotion of human rights et cetera.

The principles of the United Nations are outlined in Article 2 of the UN Charter. The chief principle being the principle of sovereign equality of all its Members. Also, there is the principle of resolving issues primarily by peaceful means, and the express

[385] Ibid, para 1
[386] Ibid, para 2

expectation that its members shall refrain from entering international relations from the position of threat or use of force against the territorial integrity or the political independence of any state, et cetera.

From the preceding, it follows that any NGO which acts violently or promotes activities that are not inherently peaceful or would not be working towards the adherence of the principles of peace and territorial sovereignty of the states. Therefore, are contravening the provisions of paragraph 2 and 3 of the Resolution 1996/31. The provisions state that the NGO shall be aligned with the spirit, purposes and principles of the UN Charter. Hence, this could be sufficient grounds for accreditation request to be refused to any applicant.

Furthermore, ensuring that the activities of the NGO and the United Nations are sufficiently linked together to make sense of the accreditation. Hence, paragraph 8 of the Resolution 1996/31 provides that NGOs across various sections of the national, regional, subregional or international communities may be admitted provided that they can demonstrate that their programme of work is of direct relevance to the aims and purposes of the United Nations. In the case of national organisations, after consultation with the Member State concerned. Hence, where the activities of an NGO is unrelated or at best, very remotely linked to the aims and purposes of the United Nations, such an NGO may not be eligible to be accredited and given a consultative status.

Additionally, paragraph 9 of Resolution 1996/31provides that for an NGO to be given a consultative status, such an NGO shall be of recognised standing within the particular field of its competence or be representative.[387] This provision lacks clarity regarding the parameters determining the level of reputation of the applicant NGO for such an NGO to meet this requirement. Some scholars have argued that this requirement is subjective.[388] Usually, some level of recognition from an international organisation, some of the specialised agencies of the UN or even a national recognition would suffice. It is a question of evidence, and the onus is on the applicant NGO to show that they meet the requirement of paragraph 9 of Resolution 1996/31. Sometimes the mere proof of the existence of the NGO and the fact that it is active in its field of operation should also suffice, mainly where it is a grassroots NGO.[389]

[387] Ibid, para 9

[388] Ripinsky and Bossche (n 280), p. 31

[389] Information from the NGO section of the Departments of Economic and Social Affairs, 17 Jan 2006; See also Sergey Ripinsky and Peter Van Den Bossche, NGO Involvement in International Organizations (1st edn, British Institute of International and Comparative Law 2007), p 32.

This burden of showing that the NGO has some recognised status goes hand in hand with the corresponding requirement – to show that the NGO is representative. It suggests that the NGO must show that it represents a substantial portion of the public. Where this is shown, it follows then to conclude that the NGO is of some recognised status, albeit such recognition has come from the public.

Paragraph 9 further provides that where there exist some organisations with similar objectives, interests and basic views in a given field, they may, for the purposes of consultation with the Council, form a joint committee or other body authorised to carry on such consultation for the group as a whole.

5.10.1.2. NGO as democratically constituted and with clear and transparent channels of accountability

Secondly, in determining whether the NGO is democratically constituted; having clear and transparent channels of accountability, is further expounded upon hereunder –

Paragraph 10 of the Resolution 1996/31 provides that the NGO

> '…It shall have a democratically adopted constitution, a copy of which shall be deposited with the Secretary-General of the United Nations, and which shall provide for the determination of policy by a conference, congress or other representative bodies, and an executive organ responsible to the policy-making body.'[390]

This requirement has come under much scrutiny amongst NGOs. It is because technically, NGOs appear to be inherently undemocratic. They are founded by individuals or groups to further a particular agenda in which they have some significant interests. The founders of these organisations, while they act in a representative capacity, do not have very effective participatory operations beyond the request for funds and reporting back on activities. The question then is if this requirement is more about a transparent organisational system of operation and accountability as opposed to a democratic system. The operational structure of NGOs are not more or less democratic than the operational structure of companies, and the general principles of corporate governance apply, in addition to the specific

[390] ECOSOC 1996/31 Resolution (n 354), para 10

guidelines provided by the relevant regulator. The import of this provision is that the internal governing structure of the NGO should be in alignment with the principles of democracy and checks and balances; where there is a clear demarcation being the powers of policymaking and the powers of execution.

Therefore, it is argued that more emphasis should be placed on the governing principles of the NGO rather than the democratic nature of the NGO, and this would be more representative of the realities of the workings of NGOs globally.

Furthermore, paragraph 11 of the Resolution 1996/31[391] provides that the NGO shall have authority to speak for its members through its authorised representatives and evidence of this authority shall be presented if requested. It goes to the question of internal legitimacy. This requirement is often met through the provisions of the NGO's constitution or by-laws. The challenge is ascertaining the endowment of mandate or authority by the constituents of the NGOs which are represented. Also, the assurance of mandate from constituents for whom the NGO claims there is the mandate or authority to speak. This question arises because NGOs tend to represent the interest of its members. However, at times, it has been criticised to assume the interest of a select portion of the populace, and it cannot be ascertained whether that portion of the populace has mandated such NGO to represent their interest.

Paragraph 12 of the Resolution 1996/31 provides that -

> 'the organisation shall have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes…'[392]

This provision goes to the question of a transparent system of decision making and accountability. The provision refers to an ideal mechanism of decision making and accountability to be one where there is effective inclusion regarding the policies and actions through the exercise of voting rights or a transparent decision-making process. It is important to note that the voting rights requirement is conjoined with the requirement for an appropriate democratic and transparent decision-making process with the word 'or'. It indicates that the requirement for voting rights is not mandatory, but is in the alternative to an appropriate democratic and transparent decision-

[391] Ibid, para 11
[392] Ibid, para 12

making process. This line of thought could be in itself moot as voting rights, and democratic and transparent decision-making process could be synonymous. However, it appears that what is being detailed in this provision is akin to what is obtainable in most corporate governance requirements of listed companies. Whether this is tantamount to the democratic principle of inclusiveness of the many is questionable.

5.10.1.3. An organisation in existence having a clear organisational structure, with an Identifiable headquarters and executive officers

Thirdly, in determining whether the organisation in existence, having a clear organisational structure, with an Identifiable headquarters and executive officers, the following is further expounded as follows -

Paragraph 10 of the Resolution 1996/31 provides that the NGO shall have an established headquarters, with an executive officer. It is a straightforward requirement. It exists to ensure that the NGO does have a place from which it carries out its objectives. Also, there should be a named person who is responsible for the execution of the objectives of the NGO.

Furthermore, paragraph 61 (h) of the Resolution 1996/31[393] states that an NGO that applies for consultative status should attest that it has been in existence for at least two years as at the date of receipt of the application by the Secretariat and shall be in a position to provide the evidence of such existence to the Secretariat.

Again the import of this is to avoid knee-jerk driven organisations which are not sustainable to be elevated to such status. It will reduce the chances that NGOs cease from existence even before they are to send in the required quadrennial reports to the United Nations. It would lead to more bureaucratic work for the secretariat and need to more frequently review their database to ensure that those NGOs which have been elevated to such status are indeed still in existence.

5.10.1.4. The basis and source of its funding

Lastly, in determining whether the NGO has shown the required basis and source of its funding, it is further expounded upon hereunder-

Paragraph 13 of the Resolution 1996/31 provides that

> 'the basic resources of the organisation shall be derived in the main part from contributions of the national affiliates or other components or

[393] Ibid, para 61(h)

individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organisations.'[394]

The import of this provision is that the funds of the NGO must be traceable, in order to guarantee that the NGO is not doing the biddings of any organisation whose objectives are contrary to the spirit, purposes and principles of the United Nations. This requirement of financial transparency is also imperative to guard against the organisation being linked to potential global money laundering schemes.

It is important to note that an NGO may be accredited without meeting this requirement if it provides sufficient reasons per the complete rendering of the provision of paragraph 13 of the Resolution 1996/31. Paragraph 13 suggests that where the criterion is not fulfilled, and an organisation gets its finance from other means, the organisation need to explain its source to the satisfaction of the Committee. It should state its reasons for not meeting the requirements. Any financial contribution or other support, direct or indirect, from a Government to the organisation ought to be disclosed to the Committee through the Secretary-General and fully recorded in the financial and other records of the organisation. Lastly, all the funds souced can only be used in meeting the aims of the United Nations.'

5.10.1.5. Summing up the criteria for accreditation

From the preceding, it can be seen that the key four criteria for an NGO to be accredited can be summed as follows –

- That the applicant NGO's activities are relevant to the work of ECOSOC
- That the applicant NGO must have a clear and transparent mechanism for decision making and accountability.
- That there is evidence of the existence of the NGO for no less than two years and that there should be the NGO office headquarters and a named executive officer
- That there is clarity as to the source of the funding of the NGO. Where that is unavailable, then there should be a satisfactory explanation to that effect.

However, the Committee on NGO addresses two of the four criteria with more significance than the others. They are–

[394] Ibid, para 13

- The funding of the NGO – the Committee on NGO wants to be sure that there is clarity as to the NGO's source of funds. That the NGO is independent of governments, and it is not a profit-making entity nor is it being funded by some interest groups which are not in alignment with the spirit, principles and purposes of the UN. Additionally, all the funds of the NGO must be expended for the primary objective of the NGO and no other purposes.
- The activities of the NGO – the Committee on NGO wants to be sure that the NGO can practically contribute to the work of the ECOSOC and its subsidiary bodies.[395]

5.10.2. Criteria for the different status categories

As per the different categories of the consultative status that the NGOs are eligible, further to the provisions of Resolution 1996/31, for an NGO to be elevated to the General Consultative Status, paragraph 22 of the Resolution 1996/31 provides that the NGO must show that –

- Its activities are related to most of the activities of the ECOSOC and its subsidiary bodies.
- It has a substantial and sustained contribution to the achievement of the objectives of the United Nations.
- It is closely involved in the economic and social life of the peoples in the areas it represents
- It has a significant membership which is widely representative of the segments of the society in a large number of countries globally.[396]

Concerning the Special Consultative Status, the criteria are as follows –

- The scope of competence and activities of the NGO are limited to only a few fields of activity covered by the Council and its subsidiary bodies.
- That the NGO is known in the fields for which it seeks to have consultative status.

[395] Information from the NGO Section of the Department of Economic and Social Affairs, 17 Jan 2006; See also Sergey Ripinsky and Peter Van Den Bossche, NGO Involvement in International Organizations (1st edn, British Institute of International and Comparative Law 2007), p 34.
[396] ECOSOC 1996/31 Resolution (n 354), para 22

NGOs on the Roster are covered explained under paragraph 23 of Resolution 1996/31. Paragraph 24 provides –

> 'Where an NGO does not fulfil these criteria for either being eligible for the general or the Special Consultative Status, but it can make occasional and useful contributions to the work of the council, or its subsidiary bodies, or other UN bodies, then such an organisation could be eligible for being put on the Roster.'[397]

The determination of whether the organisation would be able to make the stated contribution is the prerogative of the Council. Alternatively, the Secretary-General in consultation with the Council of its Committee on NGO could make such determination. Also, an organisation being eligible to be on the Roster is not tantamount to meeting the criteria for general or Special Consultative Status should an organization seek such status.

In summary, from the preceding, the determinant for what category of consultative status an NGO would be given is the scope of its activities and how they relate to the activities of the council. Where the scope is broad, then they are likely to be given a General Consultative Status. Where the scope deals with only a few of the activities of the council, then they are likely to be given a Special Consultative Status. Where the scope is neither broad nor deals with only a few activities of the UN, then a decision depends on other factors. Notably, the determination made by the Council or the Secretary-General of the UN, in consultation with the Committee on NGO, is fundamental. So if the NGO could make some occasional and useful contribution, then the NGO may be put on the roster.

5.10.3. The Procedure for Accreditation.

The procedure for accreditation of an NGO as provided for by the NGO Section of the Department of Economic and Social Affairs (DESA) in the Guidelines of Association between the United Nations and Non-Governmental Organisations[398] is as follows –

The organisation should write a letter of intent, on its letterhead and signed by its secretary-general or president addressed to the NGO Section of the Department of

[397] Ibid, para 24

[398] 'Guidelines For Association Between The United Nations And Non-Governmental Organisations' (Staff.city.ac.uk) <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF> accessed 29 August 2018.

Economic and Social Affairs (DESA) which provides technical support to the Committee on NGO.

Some of the key responsibilities of the NGO Section to the committee, ECOSOC and other UN entities are discussed below -

- They are responsible for the initial screening of the application package from NGOs applying for consultative status with the UN. It ensures that all the required documents needed for the committee to make an informed decision are provided in the application package. Based on that, the committee decides whether or not to recommend the status. Their screening confirms whether or not the NGO meets technical requirements as prescribed by ECOSOC, but they do not decide on whether or not the applicant NGO should be given a status. They only screen to see whether the application package has all the requisite documents to make the NGO eligible for the consideration by the committee. In this period the NGO may be contacted and asked for more information or clarification.[399]

  It is essential to add that the NGO section is not to send an opinion on whether or not the NGO should be granted a status when returning the documents to the committee. However, it is presumed that when the NGO section sends the application to the committee, NGO is deemed to have satisfied the accreditation criteria.[400]

  The NGO section has the powers to reject an application before transmitting it to the committee if it considers that the NGO concerned does not meet the eligibility requirements.[401]
- They have oversight of the authorisation and accreditation process of NGO participation in UN-sponsored events.
- When the NGOs submit their quadrennial reports, a monitoring device which states what the activities of the NGO in the four years, the NGO Section has the responsibility to process the reports. The report enables the committee to monitor the NGOs with either a general or special status to ascertain whether they have been amenable to the UN rules and regulations. It details if their activities have remained relevant to the activities of the United Nations, and have stayed consistent with their initial activities upon which they were accredited in the first place.

[399] Ripinsky and Bossche (n 280), p. 37
[400] Ibid
[401] Ibid

- They deliver administrative oversight and support, in that they provide a wide range of services to NGOs including:
    - They act as a liaison for NGOs to make enquiries on procedures for obtaining consultative status or preparing quadrennial reports or reclassifying the NGO. To this end, they provide the requisite guidelines to the NGOs;
    - They issue the UN passes to representatives of NGOs in Consultative Status with the ECOSOC;
    - They act as a liaison with offices of the UN that are relevant to NGOs;
    - They facilitate NGO participation in UN meetings ;
    - They disseminate information on the procedure and other matters pertaining to NGOs[402]

When the NGO Section of DESA receives the application, they will send the application pack by mail, including a questionnaire and all the relevant material to the applicant NGO.

The NGO should fill the application and the questionnaire, and where there are any ambiguities or questions, such enquiries should be directed to the NGO section of DESA for clarity.

NGOs are highly persuaded to painstakingly review the instructions for completing the application and the questionnaire. To do otherwise may lead to undue delays and deferrals in the processing of the application. It may ultimately delay the making of a recommendation by the committee.

The application should include the required accompanying documents, which must either be in French or English, before it can be processed by the NGO Section and then recommended by the Committee on NGOs to ECOSOC. In circumstances where the documents are not written in French or English, then the applicant should send the original document alongside an unofficial translation into French or English. The requisite documents include[403] -

[402] 'Guidelines For Association Between The United Nations And Non-Governmental Organisations' (Staff.city.ac.uk) <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF> accessed 29 August 2018; See also, 'How To Apply For Consultative Status With ECOSOC? | DISD' (*United Nations*) <https://www.un.org/development/desa/dspd/civil-society/ecosoc-status.html> accessed 4 April 2020.

[403] 'Guidelines For Association Between The United Nations And Non-Governmental Organisations' (Staff.city.ac.uk) <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF> accessed 29 August 2018. See also, 'How To Apply For Consultative Status With ECOSOC? | DISD' (*United Nations*) <https://www.un.org/development/desa/dspd/civil-society/ecosoc-status.html> accessed 4 April 2020.

- An attestation that the NGO has been in existence for at least two years under paragraph 61 of the 1996/31 resolution.
- A copy of the NGO's constitution, charter, statutes or by-laws should be provided.
- An attestation or document that the NGO has been in existence for at least two years under paragraph 61 of the 1996/31 resolution. It could include - Registration papers from the country where the NGO is incorporated or holds tax-exempt or non-profit status. For NGOs based in countries where there is no legal requirement to register, the NGO Section needs evidence that the NGO is a non-profit organisation.
  This document must meet the requirement of being evidence that the NGO is in existence must emanate from the government of the country where the NGO is registered. Where the registration document which evidences the existence of the NGO, originates from an office or an entity other than an official government office, such a document will not be accepted.
- A document which shows the source of the funds of the NGO should be provided. It includes a copy of the most recently completed financial statement, which is prefered to have been audited. The document should be exhaustive, stating its income and the source, whether it is contributions from members, or if funds have been received from governments and inter-governmental sources or they have been received from other sources, including private foundations.
- A list of associations and groups affiliated with the NGO should be disclosed.
- A document showing some of the publications or the reports on the activities of the NGO should be provided. These activities should be re related to the activities of the United Nations. Publications and articles concerning the activities of the NGO should also be submitted.
- A completed questionnaire.
- Finally, a completed summary of the application should be submitted.

The completed application should be returned to the NGO Section of DESA, and it must be received by the 1st of June of the year preceding the year, the applicant

NGO is requesting its consideration for recommendation by the Committee on NGOs.[404] Hence the guidelines give the following example, -

> 'complete applications, (which include a completed questionnaire and all the required supporting documentation) received by the NGO Section before 1 June 2000, will be taken up by the Committee on NGOs in the year 2001.'

As aforementioned the key requirements that the Committee on NGOs examines in reaching its decision of whether or not a recommendation should be sent to the ECOSOC, include the following;

- the activities of the organisation must be relevant to the work of ECOSOC;
- there must be a democratic decision-making mechanism;
- there must be evidence that the NGO has been in existence, having been officially registered with a government as an NGO for at least two years;
- there must be clarity as to the source of funds of the organisation. It will help ascertain that the organisation is not government-funded or funded by some organisation which does not align with the spirit, principles and purposes of the United Nations.

When the organisation submits its application latest by June of the preceding year, the committee will commence the review of the application until a decision is reached. In this period, the contents and facts stated in the completed applications would be verified, and potential recommendations would be debated among the Committee members. When a decision is reached following these deliberations, the decision would be relayed in a draft format to the ECOSOC. It will be relayed in one of the Committees reports after either its regular meeting in January or its resumed meeting in May.[405]

5.11. The Monitoring of NGOs with Elevated Status - the Quadrennial Reports

NGOs with a General or Special Consultative Status are required to submit a report to the Committee every four years. This report is known as the Quadrennial report. It is a

[404] 'Guidelines For Association Between The United Nations And Non-Governmental Organisations' (Staff.city.ac.uk) <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF> accessed 29 August 2018. See also, 'How To Apply For Consultative Status With ECOSOC? | DISD' (*United Nations*) <https://www.un.org/development/desa/dspd/civil-society/ecosoc-status.html> accessed 4 April 2020.

[405] 'Guidelines For Association Between The United Nations And Non-Governmental Organisations' (Staff.city.ac.uk) <http://www.staff.city.ac.uk/p.willetts/NGOS/GUIDELNS.PDF> accessed 29 August 2018. See also, 'How To Apply For Consultative Status With ECOSOC? | DISD' (*United Nations*) <https://www.un.org/development/desa/dspd/civil-society/ecosoc-status.html> accessed 4 April 2020.

brief report of the activities of the NGO in the preceding four years. NGOs who are on the Roster are not required to send these reports.[406] However, it is essential to note that the Committee on NGO may request a report from any NGO. This request could also be made to those on the Roster. The Committee may make such a request at any time, whether or not the regular four years timeline has elapsed.[407]

It is required that the report should be brief, should not be more than four pages, and should contain specific information prescribed by the Committee. Some of the information required to be in the report include-

- An introduction, which reiterates the aims and purposes of the NGO;
- A description of any updates within the NGO, which may have occurred within the preceding four years. Some of the changes may include -
    - Whether the NGO has grown in membership strength and expanded geographically;
    - whether there have been any significant changes in the source of funding for the NGO;
    - whether there are any new affiliations to other NGO in consultation status;
- A synopsis of its involvement and participation in conferences of ECOSOC or other entities of the UN stating matters such as their attendance, presentation of oral or written statements, dates and places of meetings);
- A discussion of how the activities of the NGO had contributed and cooperated with the UN's entities and agencies;

5.12. The Committee on Non-Governmental Organisation and their role in the Accreditation of the NGOs

The Committee on Non-Governmental Organisations was established by the Economic and Social Council (ECOSOC) in 1946 as a standing committee. It holds its annual meetings twice in the year, in January and in May. The January meeting is often referred to as the regular session, and the May meeting is referred to as the resumed session. After each meeting, it reports directly to ECOSOC. The reports of its annual regular session of January and the resumed session of May is sent to the Council. It will include the details of matters arising and where there have been

[406] ECOSOC 1996/31 Resolution (n 354) para 61(c).
[407] Ibid, para 61(c)

resolutions reached, the draft resolutions or decisions on matters calling for action by the Council would be stated in the report.[408]

The Committee is constituted of nineteen members who are relatively representative of the geographical demographics of the member states of the United Nations. Hence, there are representatives from five members states from Africa, representatives from four members states from Asia, representatives from two member states from the Eastern European States, representatives from four members states from Latin American and the Caribbean States and four members from Western European and other States. Each of these members has a tenure of four years. However, there are no limitations as to the number of tenures. The committee remains guided by Resolution 1996/31 and during its proceedings, by the rules of procedure of the Council.[409]

The key responsibilities of the Committee include the consideration of the application for the consultative status and any requests made by the NGOs seeking to be reclassified. They also have the responsibility of monitoring the NGOs and their activities by considering the contents of the quadrennial reports submitted by the accredited NGOs, either the general or special status. Their responsibility includes ascertaining whether the NGOs' activities in the past four years has remained relevant to the work of the Council.

Additionally, their responsibility includes ascertaining whether there has been a substantial change in the source of funding. The Committee checks that the reports have a clear description of the NGOs' continuous contribution to the activities of the United Nations, its entities and agencies. Essentially to ascertain whether the NGO has maintained its eligibility for its accredited status with the ECOSOC. Hence, the committee has the responsibility to monitor the consultative relationship continually as well as to implement the provisions of Council resolution 1996/31 and deal with other issues that the ECOSOC may require the committee to consider.[410]

The Committee makes recommendations which are communicated in the draft decisions format, which then requires the Council to take action. Whether or not to accept the recommendation or to deny it. When the committee presents its report, the draft decisions are usually contained in Part 1 of the report.

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[408] '1 June Is The Last Day To Apply For Consultative Status With ECOSOC' (Csonet.org) <http://csonet.org/?menu=105> accessed 28 August 2018.
[409] Ibid
[410] Ibid

When the Committee reviews and approves an application from an NGO, such approval will be transferred to the Council. It is only at that point, it is considered as a recommendation for the consultative status. The approval of the Committee on NGO does not in itself confer a consultative status on the NGO. So when the ECOSOC holds its next meeting, usually in July of the same year, the ECOSOC would review the recommendations from the Committee on NGO's reports which have come in the form of draft decisions. It is at this point that the ECOSOC may uphold the decision of the Committee, thereby granting the relevant status to the applicant NGO. So, until the ECOSOC decides to confer the status, there is no accreditation. Any approval based on just the decision of the Committee on NGO is at best a recommendation.[411]

5.12.1. Criticisms facing the activities of the Committee on NGO

5.12.1.1. Unfair and partial decisions based on politics

The predominant critique of the Committee is that their decision of the committee could be politicised. There have been concerns raised, from both human rights organisations or even some governments, alleging, among others, that there have instances where the Committee has made unfair and partial recommendations. Some of these alleged unfair recommendations impede the accreditation request for consultative status by legitimate and otherwise eligible human rights NGOs. It is alleged that this has happened mostly where the Committee has been constituted by representatives of members states who have a questionable human rights track record.[412] Sometimes, it is the case that the representative member states may have weak human right track records, and the applicant NGO is a human right activist. So, the ideals of the applicant NGO are at variance with the practices of one or more of the Committee's representative member states.

A typical example was the media report in May 2016, which stated that the UN Committee on NGO denied media accreditation to press freedom group. It explained that China and Russia voted against giving consultative status to the Committee to Protect Journalists, which helps reporters around the world and in conflict zones.[413] The committee voted 10-6 with three abstentions on Thursday to deny accreditation to the application of the group - Committee to Protect Journalists (CPJ), which was first made in 2012. Azerbaijan, Burundi, Cuba, China Nicaragua, Pakistan, Russia, South Africa, Sudan and Venezuela were among the countries that voted against

[411] Ibid

[412] 'UN Committee Denies Press Freedom Group Accreditation' (The Guardian, 2016) <https://www.theguardian.com/world/2016/may/26/un-denies-media-access-committee-to-protect-journalists-press-freedom> accessed 28 August 2018.

[413] Ibid

accreditation for the New York-based organisation which sought to protect press freedoms around the world and in conflict zones. It was argued that the countries who voted against it as the representative members of the Committee on NGO had poor press freedom records. The claim was that bureaucratic delaying tactics to undermine any efforts that call abusive policies into high relief.[414]

Another instance of this kind of criticism is with the rejection of the accreditation request by the Christian Solidarity Worldwide (CSW). This organisation made its first application for accreditation in 2009. However, Its application had been deferred by committee members. It was said that they had who asked more than 80 questions about its work over the past seven years.[415]

On Feb. 3, 2017, the committee voted 4-11 with one abstention to oppose accreditation for Christian Solidarity Worldwide, known by its initials CSW. The four votes in favour were Greece, Israel, U.S. and Uruguay. The 11 votes against were Burundi, China, Cuba, India, Iran, Nicaragua, Pakistan, South Africa, Sudan, Turkey and Venezuela. Russia abstained, and three countries were absent.[416] Britain's deputy ambassador to the UN at the time, Peter Wilson said that he was "deeply disappointed" that the 19-member committee that accredits non-governmental organisations voted to reject the U.K.-based Christian group's application. In this regards, Britain stated that it would seek to overturn a U.N. committee's decision to deny accreditation to the organisation Christian Solidarity Worldwide which promotes religious freedom in over 20 countries across Asia, Africa, the Middle East and Latin America.[417] Hence, Britain's U.N. Mission said it would appeal the committee's decision to the 54-member U.N. Economic and Social Council, and this ultimately resulted in its eventual accreditation. On 19 April 2017, 28 ECOSOC member nations voted in

[414] 'UN Committee Denies Press Freedom Group Accreditation' (The Guardian, 2016) <https://www.theguardian.com/world/2016/may/26/un-denies-media-access-committee-to-protect-journalists-press-freedom> accessed 28 August 2018. - This rejection faced considerable backlash from the human rights community globally as well as from several governments. Hence, the then Ambassador to the UN, Ambassador Samantha Power, stated that the US was going to appeal against the committee's decision to the full 54-member Economic and Social Council of which the 19-member committee is a particle All of these backlashes ultimately led to the CPJ finally being granted accreditation after the UN's United Nations Economic and Social Council voted to permit it.

[415] 'UN Committee Refuses To Accredit Religious Freedom Group' (Mail Online, 2017) <http://www.dailymail.co.uk/wires/ap/article-4209512/UN-committee-refuses-accredit-religious-freedom-group.html> accessed 28 August 2018.

[416] 'UN Committee Refuses To Accredit Religious Freedom Group' (Mail Online, 2017) <http://www.dailymail.co.uk/wires/ap/article-4209512/UN-committee-refuses-accredit-religious-freedom-group.html> accessed 28 August 2018.

[417] Ibid

favour of granting Consultative Status to CSW, with 9 voting against and 12 abstaining.[418]

It appears that the rejection of accreditation of this Christian organisation was for reasons which seem to be political and perhaps, religious, judging from the religious affiliation of the countries. In critiquing the decision of the Committee on NGO, the CSW's Chief Executive Mervyn Thomas stated that

> "It is deeply disturbing that the U.N. Committee on NGOs, the very entity which is tasked to facilitate NGOs access to the U.N., is instead actively blocking civil society access to the U.N…We believe that this decision is effectively an attempt to silence CSW and undermine the promotion of freedom of religion or belief within the U.N. system."[419]

It was a broad consensus among the public that the organisation does significant work which was related to the activities of the United Nations. Particularly concerning the protection of the freedom of religion or belief. So the actions of the NGO's committee should be to enhance, and not to restrict, the space for civil society participation in the United Nations. Hence, if the NGO had apparently met the necessary criteria to be accredited and was yet rejected, it follows that one can conclude that the decision, at times, remains mostly subjective and consequently prone to politics.

This position has further been noted and reinforced by scholars[420] that the work of the Committee on NGO could quite easily be politicised. The widespread criticism that independent human rights NGOs advance against the Committee and the member states that constitute it is - NGOs which are more likely to criticise the member states which are part of the Committee, tend to face difficulties when applying for consultative status. Alternatively, where they already have the status, stand a higher chance that the status may be subject to certain levels of intimidation, including the threat of having their status suspended or withdrawn.

The preceding are just some of the incidences, where the Committee on NGO have faced some criticism.

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[418] 'UN: CSW Receives UN Accreditation' (Csw.org.uk, 2017) <https://www.csw.org.uk/2017/04/19/news/3520/article.htm> accessed 28 August 2018.

[419] Ibid

[420] Olivier de Frouville 2008: "Domesticating civil society at the United Nations" in Pierre-Marie Dupuy and Luisa Vierucci, Ngos In International Law (1st edn, E Elgar 2008).

The preceding goes to reiterate the point that the Committee on NGOs could sometimes be accused of being politicised. Hence, where human rights NGOs criticise member states for alleged human rights violations, they inadvertently create an impediment to their attaining the consultative status. Where they already have such consultative status, they create an avenue for the criticised member states who form part of the Committee, to have their status suspended.

5.12.1.2. Political stands and Ideologies

Another challenge with the Committee is that sometimes, due to the facts that the Committee is made up of countries with different ideologies and political stands, their views could vary and at times, be subjective. A typical instance in with regards to the application from the *Human Rights Organisation* in 2008[421], for consultative status. The committee was divided in their view, primarily due to their political and ideological stands. Some countries, like Cuba, which argued that the chairman of the applicant organisation was a convict in Cuba as a terrorist for criminal activities in Bolivia. Some other countries, like the United States, held an opposing view, stating that Armando Valladares, the chairman of the organisation, was a prisoner of conscience, and now a poet and writer in the United States. So, the Committee was divided across those lines, and eventually, it was decided that the committee would recommend that NGO should not be granted the status.[422]

Another instance of the Committee acting along the line of the political interests is the case of the *Arab Commission on Human Rights.* One of its representatives who addressed the Human Rights Council, Mr Rachid Mesli, was convicted in absentia by an Algerian court on criminal charges along the lines of terrorism.[423] However, according to Amnesty International, he was a prisoner of conscience. He had been targeted by the Algerian authorities for over a decade. It is alleged that he was targeted for engaging in activities which exposed the violations committed against the Algerian authorities in the 1990s.[424] Again, this is another case of the committee drawn along the lines of political stands and ideological positions.

A common theme in the immediate two preceding cases is the issue of terrorism. Hence, it is not surprising that the Committee on NGO would use the terrorism-related

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[421] United Nations Economic and Social Council, 'Report Of The Committee On Non-Governmental Organizations On Its Resumed 2008 Session' (ECOSOC 2008).

[422] Lisa Boström, 'Controversial Issues In The NGO Committee' (*Csonet.org*, 2011) http://csonet.org/content/documents/ControversialIssues.pdf, p.5, accessed 4 January 2019

[423] Ibid

[424]'Amnesty International' (*Amnesty.org*, 2009) <https://www.amnesty.org/en/documents/MDE28/001/2009/en/> accessed 8 January 2019.

allegations when trying to determine the decision of the whether or not to recommend that such organisation be granted the consultative status. The reason this is the case is that the goal to counter-terrorism is a common international community goal, and of particular interest to the United Nations, since the 9/11 incidence in the United States in September 2001. Terrorism is an internationally recognised activity and therefore sufficient grounds for suspension or withdrawal of consultative status according to 1996/31. Paragraph 57 of the Resolution 1996/31 provides -

> 'the consultative status of non-governmental organisations with the Economic and Social Council and the listing of those on the Roster shall be suspended up to three years or withdrawn […]: (b) if there exists substantiated evidence of influence from proceeds resulting from internationally recognised criminal activities such as the illicit drugs trade, money laundering or illegal arms trade..'

The challenge, however, lies with the fact that the use of wide-ranging definitions of terrorism which allow the detaining of individuals who is critical of the regime, blurs the lines between human rights violations and terrorism prosecution. This concern was observed by the United Nations Global Counter-Terrorism Strategy in 2006. Under that resolution, it was agreed that any measures taken to combat terrorism must comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.[425]

It has also been seen with the application from NGOs working for the rights of lesbian, gay, bisexual or transgender (LGBT) people. It is observed that the position of the Committee has been polarised across ideologies and political stand. Hence, the more conservative and religious nations like China, Egypt, Pakistan, Qatar, the Russian Federation and Sudan were in opposition to the granting of the status to NGOs with LGBT mandates. While the more liberal nations like the United Kingdom, the United States, Columbia, Israel, Peru, and Romania, were in support of granting the consultative status to the NGOs which had an LGBT mandate. [426]

All the issues above that may form the premise of how the Committee on NGO may react to applications made to it for some status or the other have the common thread of human rights. The responses of the Committee have been argued to be mostly subjective along ideological lines and political stands. Hence, it has been seen that human rights NGOs refused their application due to NGO being critical of some of the

[425] 'A/RES/60/288 | Counter-Terrorism Implementation Task Force' (Un.org, 2006) <https://www.un.org/counterterrorism/ctitf/en/ares60288> accessed 8 January 2019.
[426] Boström (n 422), p. 5

member states which make the committee. According to Lisa Boström, the dilemma then lies in

> 'the question of what kind of human rights organisations should be allowed to work with the United Nations, if the ones who criticise members are ineligible.'

The irony of this response ideally, the protection of human rights is one of the key prerogatives of the United Nations. Hence, one ought to be rested in the fact that as the protection of human rights is key to the objectives of the UN, then an agency of the UN burdened with the responsibility of assessing prospective partnerships with NGOs should be elated that the prime objective of the applicant NGO is the advocacy and protection of human rights. In reality, this is not the case, and it is ironic, especially as many UN policy and documents are filled with a plethora of provisions on the protection of human rights.

Given this premise, it then becomes slightly irreconcilable that the controversies that are seen with how the Committee on NGO have dealt with applications, that the committee has put political interests and national ideologies above human rights concerns. Again, this brings to bear the question of whether or not national concerns often supersede international concerns when international bodies seek to make international policies. Again, this goes to the crux of the argument of this thesis. States as the only actors on the international plane who are responsible for international governance is inadequate. It does not correspond with the realities of the 21st century, where there are more actors on the international plane and interface interests. Hence, the argument that there should be a reconceptualisation of international law in a way that makes it fit for the 21-st century purposes. Also, NGOs are pivotal to this reconceptualisation because they are driven by causes and not national agendas or politics. With the right measures in place, there could be an international legal system that takes on board the activities of various NGOs, which may be at odds with themselves.

However, it would be presumptuous to assume that states would hold their loyalty to international interests above their national interests, whether acting within the Committee on NGO or in any other intergovernmental committee. The alternative perspective should not be that the Committee on NGOs should remain politicised. The process by which the Committee decides the fate of NGOs seem arbitrary, and not adequately representing the influence of NGOs.

5.13. The legitimisation of NGOs beyond ECOSOC

The ironic dilemma as to the status of NGOs and their legitimisation across various bodies is that, while their increased involvement is said to enhance the legitimacy of international decision making, they are themselves regarded as having a deficit in legitimacy. Therefore, their participatory rights in the international community are said to be in question.

Hence, questions abound as to whom do the NGOs represent? To whom are they accountable? What factors give them the credibility to hold themselves out to be the voice of public opinion? At least with the democratic governments, they can rely on the facts that they are elected by the public. So the democratic government are accountable to the electorate and for whom they are responsible. It is not the case with the NGOs. Agam has stated that there are some governments which would refer to NGOs as organisations with 'narrow, self-serving interests… driven by the personal egos and ambitions of a few frustrated individuals'.[427]

The argument has been for a long time concerning the issue of accreditation and the focal question of legitimacy. It has been the concern of the international community and the relevant stakeholders that NGOs and their representative capacity should be the basis for their international legitimacy. Hence, Wapner noted-

> '[t]o be an NGO these days, it seems one needs only a fax machine and internet access'.[428]

There are other NGOs which have large memberships that are bigger than some of the population of some states. An example of the ICC will be considered in the next chapter. These large NGOs are said to have a democratic structure. It follows that these larger NGOs naturally have more political legitimacy than the other smaller obscure NGOs. Hence, most international organisations in their accreditation processes, take into cognisance these factors that ensure at least a degree of legitimacy, albeit, just political legitimacy. The Cardoso Report pointed out that it would be reasonable to 'expect the UN Secretariate to ensure that actors engaging in their deliberative processes meet at least some basic standards of governance

[427] Hasmy Agam, 'Working with NGOs: A Developing World Perspective' (2002) 13 Colorado Journal of International Environmental Law & Policy.
[428] Paul Wapner, 'The Democratic Accountability of Non-Governmental Organisations: Defending Accountability In NGOS' (2002) 3 Chinese Journal of International Law.

and demonstrate their credentials. It should be the case whether the actors' credibility is based on experience, expertise, membership or a base of support.'[429]

However, it should be noted that both the small and the big NGOs all lack the legal or regulatory legitimacy on a broad international basis. It is observed that the political legitimacy that is enjoyed by most of the more prominent NGOs are as a result of predominantly informal activities and the socio-political recognition of the NGOs on the international plane. However, the concern remains as to how could these informal activities and socio-political recognition transit to the formal accreditation and the legal/regulatory recognition of the activities and status of NGOs on the international plane by the relevant stakeholders across the various sectors, beyond the mere accreditation with the ECOSOC.

Some of these informal activities include the activist campaigns, direct personal appeals and interface with the key stakeholders and decision-makers within the international organisations or national governments. Others include as rallies, topical campaigns, proposals and other forms of campaigns and dialogues with the relevant key stakeholders in the various sectors or specialities of the NGOs. It should be noted that these informal activities and socio-political recognition of NGOs are some of the most persuasive factors in the quest for the legal/regulatory recognition of NGOs on the international plane. Hence, it is necessary to take seriously the findings of Ecologic and Field report on the Participation of Non-Governmental Organisations in International Environmental Governance that 'the informal practices have an inherent danger of being easily eroded in the future'.

Hence, it is essential to deal with the situation with a sense of haste as the need to formalise these informal activities, and socio-political recognition are imperative to the international legal order or concept of international law, sustaining its fitness for purpose. However, it is becoming less likely to easily undermine the increased relevance of NGOs to the international community.

Jeffrey Andrew Hartwick had observed that there are two schools of thoughts on the acknowledgement or legitimisation of NGOs and their participation in the international community, beyond just the ECOSOC consultative status,

[429] Cardoso (n 320)

The first school of thought is that referred to as the 'accommodationists'. The second school of thought is that referred to as the 'restrictionists'.[430] The accommodationists are pro-NGOs and align with the position that increased participation of NGOs in the international community would lead to better international governance. Some of the propounders of this school of thought even hold the extreme view that NGOs could be at par with their counter-part actors on the international scene, such as states or other international institutions such as the General Assembly of the United Nations, et cetera.[431] The radical nature of this viewpoints faces much opposition and in some circles, ridicule because of its political impracticability. It is argued that states are not expected to relinquish their extreme international powers for the benefit of NGOs, regardless of what good NGOs carry out on the international scene. This thesis acknowledges the unyielding influence of states, and that it may stay that way for the foreseeable future. However, this thesis also entertains the possibility, not probability, that the occurrence of globalisation and the increased relevance of NGOs would take the exclusivity of choice from the states. Moreover, the preference of states may stand a chance to be overtaken by the necessities of globalisation.

On the other hand, there is the restrictionists school of thought which holds the view, that NGOs should be constrained, as they ultimately serve to impede the state's function in a state-centric international community. Hence, they believe that NGOs' legitimisation should be limited, as should access to meetings and participatory rights.[432] Also, NGOs' function in roles that have ordinarily been within the remit of states to function should be prohibited.[433]

States are the most significant actors in the Westphalian international legal construct. However, a significant question that ought to be considered is whether states retain this position. If they do retain the position, will lit be as a matter of right and as a matter of function in the 21st-century globalised international community? Should the question of function come more to the fore, beyond the question of right? It is not in dispute that states are and will probably remain the principal actors of the international community. So, the quest for the increased legal status of NGOs on the international plane could be perceived to be on a collision course with the States as it tends to encroach on the power and sovereignty of states. It is more likely to hold

[430] Jeffrey Andrew Hartwick, 'Non-Governmental Organizations at United Nations-Sponsored World Conferences: A Framework for Participation Reform' (2003) 26 Loyola of Los Angeles International and Comparative Law Review <http://digitalcommons.lmu.edu/ilr/vol26/iss2/2> accessed 18 July 2018.
[431] Ibid
[432] Ibid
[433] Nowrot, (n 282). 614

this view if the concept of sovereignty and international law does not undergo a paradigm shift that conceptualises sovereignty in its full essence, as discussed in chapter four.

5.13.1. Arguments for and against the legitimisation of NGOs

Amidst a myriad of views for and against the increased relevance of NGOs in the International Legal framework, some of the more persuasive views include –

Firstly, some scholars[434] have argued that NGOs involvement facilitates the decision-making process, as NGOs are privy to insights not always available to governments, at least not in the same unadulterated form, as it is to the NGOs. It is primarily due to the construct of NGOs. Most NGOs are grassroots oriented, and they have specialised knowledge due to most NGOs being subject or sector-focused. NGOs' approach has an impact on the quality of the analytical capacity. It also makes them readily available with unconventional expertise at their disposal. Hence, it has been argued that NGOs provide information, arguments and perspectives that governments do not bring forward.[435] It has further been posited that NGOs could function as intellectual contributors to governments in the formulation of the most effective and efficient policies. Due to the robust NGOs' resources and specificity of their expertise, their contribution to international policy-making would enhance the quality of policy debates.[436]

Secondly, this thesis opines that the increased involvement of NGOs in the international plane increases the legitimacy of international organisations. It is because of the increased interface between the international organisations and NGOs, and it suggests that international organisations are not operating arbitrarily. Instead, they are taking into cognisance the interests of the various constituencies of the international community. Notably, those that are represented by the NGOs. It makes international organisations more democratic in their outlook. As pointed out in Chapter 1, NGOs could be referred to as the conscience of the international civil society. So, the public's confidence in the governance of the international community

[434] Ripinsky and Bossche (n 280), p. 11
[435] Ibid
[436] Daniel C Esty, 'NGOs At the World Trade Organization: Cooperation, Competition, Or Exclusion' (1998) 447 Faculty Scholarship Series <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1446&context=fss_papers> accessed 10 July 2018.

increases when NGOs are seen to interface in the dealings of international organisations and other actors in the international community.

Apart from the enhanced outlook and credibility that NGOs give to the governance and dealings of the various actors in the international community, there is the actual outcome of increased transparency in the process. It has been argued that working with NGOs in the international community enhances an open and transparent exchange of rational arguments as opposed to shady bargaining.[437] Additionally, if there is the NGOs' buy-in of policies, they could quickly be disseminated at the national level, and draw more public support and enlightenment on the subject and spirit of the policies.

In the third place, specific transnational issues may not be considered relevant enough to attract the attention of the national governments, and to that extent, are not tabled by the national government for consideration in the formulation of international law and policy. NGOs play a crucial role in these scenarios. They usually have the mandate of the people to table down such issues. Hence, the involvement of NGOs in the deliberation and processes of the key actors of the international community creates an opportunity for these kinds of issues to be discussed in scenarios where it would otherwise not be discussed.

Fourthly, NGOs thrive better at the national level where the government is democratic and open to dialogue from the various constituencies. On the contrary, NGOs struggle to survive where dictatorship and other less open government exist. Hence, the participation of NGOs on the international plane makes it easier for the concerns of the citizenry of such closed states to be addressed, where it is impossible to do so on the national level.

The above four arguments are persuasive and suggest that NGOs should indeed have increased status on the international plane.

On the other hand, there are opposing arguments against the notion that NGOs continue to emerge in relevance to the framing of the international legal framework.

Some have argued that due to the limited representative capacity of NGOs, the increased influence of NGOs could end up in the hijacking the policy-making process by special interests.[438] The position, therefore, is that allowing NGOs to have such

[437] Ripinsky and Bossche (n 280), p. 11

[438] Jeffrey L. Dunoff, 'The Misguided Debate Over NGO Participation at the WTO' (1998) 1 Journal of International Economic Law.

increased influence and legitimacy on the international scene; one should be open to the possibility of ultimately giving special interests and not public interests, undue influence. It is the view of this thesis that the criteria for accreditation used with the ECOSOC could be further developed to guarantee that NGOs are not entirely overtaken by special interests.

Secondly, it has been posited that NGOs may lack a comprehensive representation, and NGOs may not be inherently democratic. So, there is a chance that the elevation of NGOs' status leads to the elevation of a group representing narrow and non-encompassing interests. It becomes apparent where it is benchmarked against the construct of the governments, which are set with the primary aim of servicing public interests. When an NGO asserts itself internationally, the quest for legitimacy behoves on the public to inquire regarding what interests are represented by the NGOs.

Thirdly, there is the disparity in the buoyancy of NGOs across the world; with the NGOs in the developed countries being more organised and financially advantageous in comparison to the NGOs in the developing countries who tend to be less organised and financed. Hence, there is the chance that countries with the less influential representation of NGOs, could be marginalised in international decision making.[439]

In the fourth place, the Cardoso Report points out that the involvement of all NGOs in international decision making could lead to an infinite long-winded bureaucratic process which could end a significant portion of the decision-making process in a stalemate. In the words of the report, it was stated,

> '[i]f the United Nations brought everyone relevant into each debate; it would have endless meetings without conclusion […] governments would find other forums for negotiation…'[440]

Notably from the above and as stated by the UN background paper for the Cardoso panel, there is the chance that increased interface with NGOs could lead to some level of confusion. It could impede the inter-governmental search for common grounds, erode the privacy that is needed in sensitive discussions. It could lead to over-crowded agendas. It could very well be a distraction at important meetings.[441]

[439] Ripinsky and Bossche (n 280), p. 12
[440] Cardoso (n 320)
[441] 'UN System and Civil Society: An Inventory and Analysis of Practices, Background Paper for The Secretary-General's Panel of Eminent Persons on United Nations Relations with Civil Society' (Globalpolicy.org, 2003) <https://www.globalpolicy.org/component/content/article/226-initiatives/32330-un-system-and-civil-society.html> accessed 18 July 2018.

From the preceding, another perspective could be that the increased interface of NGOs with the international community and the formulation of international law and policy would enhance the quality of decision making, accountability, and the necessary transparency needed for the international policy to enjoy the legitimacy needed for it to thrive. It also allows for a process characterised by inclusion. A process that is enriched by a variety of views and specific expertise and experiences.

5.14. Chapter 5 Part B: Conclusion

This part of the chapter assessed the process by which NGOs obtain an elevated status with the United Nations. The chapter set out to critically analyse the roles of the UN agencies and standing committees such as the ECOSOC and the UN community on NGOs in shaping the narrative of NGOs influence and involvement in the international community.

To this end, the criteria for the accreditation of NGOs as provided on the resolution 1996/31 was thoroughly examined. The findings from the examination of these criteria are as follows –

Concerning the need for NGOs to align with the UN objectives, it was observed that non-governmental organisation must be in tandem with the spirit, purposes of the UN charter. Concerning the need for NGOs to be democratically constituted, the dilemma that faces NGOs on this point was highlighted. Thus, it is conceded that NGOs are inherently undemocratic due to the potential overbearing passion and the possible influence of the founders of the organisation on the objectives. However, the operational structure of NGOs is not more or less democratic than the operational structure of companies. To which, the general principles of corporate governance apply, ensuring a measure of accountability.

Regarding the existence and the organisational structure of NGOs, it was determined that an NGO in existence for at least two years at the date at the relevant time of application suffices as satisfying the criteria. Finally, about the basis and source of funding, it was established that the funds of NGOs must be traceable. This transparency is imperative to maintain the independence and integrity of the organisation.

Furthermore, the workings of the NGOs in regulating the procedure for accreditation and monitoring the activities of NGOs via their quadrennial report was investigated, and the findings revealed some lapses. It was observed that the decision making of the Committee in endowing an NGO with elevated staus was at times politicised,

leading to unfair and partial outcomes. A typical example was highlighted in cases where the representative member state which constitutes the Committee had rejected an application from human right NGOs, and it was alleged that these member states had questionable human right track records. Additionally, it was observed that there are instances where the Committee had been alleged to make decisions along the lines of their ideology and political stance. An example was identified in the application of an LGBT NGO. The Committee was polarised in their decision along the lines of ideology and pollical stance. Hence more conservative and religious nations such as China, Egypt, Pakistan were in opposition in granting of status while more liberal nations such as the United Kingdom and the United stated were in support of granting the application. These observation buttresses the point of this thesis that the participation of NGOs on the international plane exists at the behest of member states and objectivity is thoroughly compromised. And the concern with this arbitral nature of the member states determination of the extent of NGO's involvement in the international plane call for a rethink.

The arguments of Part A and B of this chapter highlights the current position of NGOs in general. The next chapter zooms in further to examine a particular NGO as an example that underscores the arguments of this thesis.

6. Chapter 6 – The ICC as an example

Chapter 6 Contents

6.1. Chapter 6: Introduction

Further to the finding of the preceding chapter, this chapter examines the International Chamber of Commerce as an NGO with significant global influence. It explores the ICC intending to justify the core argument of the thesis that the growing influence of NGOs in the international plane should accrue to them some legitimacy. In proffering an understanding of the ICC, it examines its objectives which include fostering international trade, promoting and protecting open markets for goods and services and free flow of capital. In meeting these objectives, its activities are hinges on three cardinal points which include the establishment of rules, dispute resolution and policy advocacy. It is observed that the ICC, although an NGO has an unparalleled authority in the setting of rules that govern cross border businesses.

As a result, the ICC is considered as an indirect international lawmaker due to its prevalent standard-setting role which underpins international trade and commerce. The ICC is also identified as an example of a global response to global interest and challenges.

Additionally, the historical context of the ICC is critically considered, and the pivotal role it has played in international policy decision fora are analysed. The longevity and influence of the ICC over the decades lend credibility to the argument on elevating the status of NGOs and reconceptualising international law. Its pivotal role to global trade and governance, which earns it an epithet as the world's parliament for business is discussed extensively.

Furthermore, its influence and its relevance to the United Nations as an NGO is considered. It is mainly analysed in reference to the ICC attaining a consultative status with ECOSOC, and observer status with General Assembly buttresses the inadequacies of such statuses in the light of its global influence.

6.2. Distributing authority across influential NGOs

As earlier emphasised, the global community continues to face rising complexities in the way the global space functions juxtaposed against the theoretical Westphalian international legal framework. An intended outcome of this thesis is to move from the current state-centric approach of the international legal system to a more inclusive approach. Giving the needed legitimacy to the diffusion of authority amongst all the global players in the international plane. These global players go beyond just states

and include other non-state actors. This global diffusion of authority serves the purpose of the reconceptualisation of the notion of sovereignty. It takes into cognizance the realities of globalisation and the rising influence of global non-state actors, the focus of which, for this thesis, is the non-governmental organisations.

Today, international relations confronts a dilemma with its original Westphalian attributes. It faces a new question of whether, if the status quo is maintained, it will be well-positioned to achieve the global goals of all the global actors, including the non-state actors in the international space. It should be noted that these goals of the non-state actors are also in the interests of traditional subjects of the Westphalian international legal framework – the states. In reality, the theoretical description of international relations or diplomacy is out of touch with the realities. The operational ideals of the Westphalian concepts of territoriality and absolute sovereignty are removed from the practical socio-political outlay of the international community. Ideally, the Westphalian concepts of territoriality and absolute sovereignty are inherently state-centric. Today, international relations involve relations which extend beyond just states, to embrace other actors, some of which are significant actors of the global civil society who are frequently straddling across national boundaries.

A prime example is the international NGOs. This fact brings to fore the point that the international community, which is now consisted of activities by actors pay less attention to the significance of territoriality. It is so primarily because the concept of territoriality, particularly regarding the process of international relations across various industry and other societal sectors, seems to have been fused out of relevance and formed into one giant global space.

In a bid to give legitimacy to the current state of diffusion of authority amongst the global non-state actors; particular interest is paid to some specific global actors who epitomise the growing influence and operations of NGOs in the international plane. A key NGO that best fits this purpose is the International Chamber of Commerce (ICC). After careful consideration of the various international NGOs, the International Chamber of Commerce stands out as one of the most significant NGOs dealing in the international space under such changing diplomatic milieu.

6.3. The International Chamber of Commerce (ICC)

6.3.1. Why the ICC?

In a bid to determine which non-state actor to be the focal point of this research, consideration was given to MNCs and intergovernmental organisations. However, NGOs were preferred due to their representativeness and the key attributes of their essence – being that they are driven by causes and not profit, plus, ideally they exist without the encumbrance of government.

Along these lines, the ICC was chosen for five main reasons.

Firstly because it is one of the most representative among the NGOs. The ICC comprises of MNCs and an NGO, so it was the best of both worlds. The ICC is an organisation that straddles two of the most influential worlds of global Non-State Actors – the MNCs and the NGOs. The ICC personifies the international business community and in a sense, represents some of the most significant non-state actors in the international legal framework - the multi-national corporations. Furthermore, it is listed by the United Nations Economic and Social Council as one of the Non-Governmental Organisations as of September 2016 and was listed since its inception. Any of the other more 'pious' NGOs would be counter-intuitive to the argument of the thesis because they will essentially exclude a significant portion of the international community – the MNCs. It is noteworthy to highlight that the choice of ICC as the prime example of NGOs in the context of this argument lends to its originality. This line of thought is primarily so because the ICC is not the typical NGO, more so, on the surface, it is quite unlikely to be selected as the poster NGO for the purpose of furnishing the arguments of this thesis.

However, as with other NGOs, the ICC exists to canvas causes, albeit for the interest of the international business community. It should be pointed out that the international business community is also part of the international community. Additionally, responsible business conduct is both good business strategy and helps promote international peace and prosperity, against which a myriad of all other NGO causes are hinged.

Secondly, The ICC underscores the point that while some NGOs may be a composite of all other non-state actors, MNCs and IGOs cannot be a composite of NGOs. So, this second point further propels the point that NGOs play a more pivotal role in the international legal framework, beyond any other actor on the international plane. It

also further accentuates the rationale for NGOs being one of the focal points of this thesis.

Thirdly, the ICC is considered as an indirect international lawmaker due to its prevalent standard-setting role which underpins international trade and commerce. Moreover, as shall be seen further down in this chapter, while these rules are voluntary, a myriad of international commercial transactions are premised on the ICC-established rules which are considered as part of regular international trade, which in a sense, usurps the traditional function of the Westphalian system, where states are the sole lawmakers for the international community. Today, there are examples like the recognised Incoterms rules to the UCP 600 Uniform Customs and Practice for Documentary Credits, which are used widely in international finance. Along this line, there is also the International Court of Arbitration (ICC), which is an ICC institution which aids in resolving international commercial disputes. Although the international court of Arbitration is called a court, they do not engage in making formal judgments on disputed matters. They only exercise judicial supervision of arbitration proceedings and ensuring that the proper application of the ICC Rules, as well as assist parties and arbitrators in overcoming procedural obstacles.[442]

In the fourth place, the ICC is also identified as an example of a global response to global interests and challenges. As mentioned earlier, the 21st-century challenges are global; both states and multinational corporations, as well as other international players, encounter common challenges, such as environmental sustainability, cybersecurity, human rights and security or labour concerns, et cetera. The sole and exclusive response of any of the players will be insufficient to deal with the challenges which are not by their nature constituent specific. So the lone acts of states, or MNCs or the Intergovernmental organisations, will be insufficient in tackling these challenges.

[442] 'ICC International Court Of Arbitration® - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2020) <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> accessed 13 July 2020. Additionally, in an effort to protect and support a stable Internet, the Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a programme for the introduction of new generic Top-Level Domain Names ("gTLDs"). All disputes arising out of the application for new gTLDs will be resolved following the programme's dispute resolution procedure: the new gTLD Dispute Resolution Procedure. The New gTLD Dispute Resolution Procedure is administered by three institutions; one of which is the ICC International Centre for ADR. The ICC International Centre for ADR will administer the Procedure under the ICC Rules for Expertise, which has been in force as of 1 January 2003. The Rules are supplemented by a Practice Note on the Administration of Cases under the Procedure under the New gTLD Dispute Resolution Procedure. – See 'ICANN New Gtld Dispute Resolution - ICC - International Chamber Of Commerce' (ICC - International Chamber of Commerce, 2020) <https://iccwbo.org/dispute-resolution-services/icann-gtld-process/> accessed 13 July 2020.

It is in the common interest of all actors to fashion a concerted common approach in dealing with these challenges. To a great extent, the ICC personifies the common response to these challenges. The ICC is in a quadrilateral relationship with national governments, civil society organisations and multilateral institutions, with the ICC at the centre. Along these lines, we find the ICC as the spearhead of some of the most effective joint global efforts among all the actors to promote peace and prosperity through trade and responsible business conduct. A chief example is the emergence of the UN Global Compact, which was emanated from the ICC's initiated UN - Business Dialogue in 1998. It was an initiative which required businesses to align strategies and operations with the universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.[443] These principles are another example of soft law, which have indirectly been made by the ICC.

Finally, the influence of the ICC with the UN as an NGO was a persuasive reason to focus on the ICC as the poster NGO for the reconceptualisation of international law. For instance, it was given a Category 'A Consultative Status' with the United Nations Economic and Social Council in 1946. Furthermore. In 2016, the influence of the ICC was further increased by being the first NGO to be granted the Observer Status with the General Assembly of the United Nations.[444] This achievement attests to the reach of the ICC and underpins the choice for focussing on the ICC as the prime NGO example.

6.3.2. Understanding the ICC

It is important to note that although profit-seeking businesses are not NGOs, associations of business entities can be, such as the International Chamber of Commerce (ICC).[445]

The ICC exists to promote international trade, responsible business conduct and engages a global approach to regulation and dispute resolution services. It comprises multinational corporations(MNCs), small and medium-sized enterprises (SMEs), business association and local chambers of commerce[446].

[443] Andreas Rasche, Sandra Waddock and Malcolm McIntosh, 'The United Nations Global Compact' (2012) 52 Business & Society.
[444] Wilson (n 351)
[445] Charnovitz (n 297)
[446] 'Who We Are - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2019) <https://iccwbo.org/about-us/who-we-are/> accessed 18 June 2019.

The International Chamber of Commerce has often been described as the largest, most diverse business organisation in the world; with hundreds of thousands of member companies from more than 100 countries and broad business interests. It has a wide range of members; extending to all sectors. It plays a pivotal role in keeping its members informed on matters that are relevant to the affairs of their industries. On the other hand, they also act, somewhat, like a conduit or a liaison between the global business community and the highest level of global intergovernmental organisations and agencies[447].

The choice to focus on the ICC is because it personifies the global business community and in a sense, represents some of the most significant non-state actors in the international legal framework - the multi-national corporations. Furthermore, it is listed by the United Nations Economic and Social Council as one of the Non- Governmental Organisations as of September 2016 and was listed since its inception.

The ICC is an organisation that straddles two of the most influential worlds of global Non-State Actors – the MNCs and the NGOs. However, this is not unique to the ICC, as it is found that most of the larger NGOs share the same tendencies. However, the same cannot be said for MNCs. Hence, while some NGOs may be a composite of all other non-state actors, MNCs cannot be a composite of NGOs. So, this further propels the point that NGOs play a more pivotal role in the international legal framework, beyond any other actor on the international plane. It also further underscores the rationale for NGOs being one of the focal points of this thesis. The ICC is a prime example of an NGO, representing interests of Multinational Corporations and other businesses, globally, before intergovernmental organisations such as the United Nations ECOSOC, the World Trade Organisation, or the G20 among others[448].

6.3.2.1. The focus of the ICC

The ICC fosters international trade and is established to promote and protect open markets for goods and services and the free flow of capital[449]. The activities of the ICC are hinged on three cardinal points –

- the establishment of rules;
- dispute resolution; and

[447] 'International Chamber Of Commerce (ICC)' (*Investopedia*, 2019) <https://www.investopedia.com/terms/i/international-chamber-of-commerce-icc.asp> accessed 18 June 2019.
[448] ICC (n 446)
[449] ICC (n 447)

- policy advocacy.

The effectiveness of these activities in the international space is yet unmatched, even in comparison to exclusively state initiatives. It is primarily because the composite of the ICC is far-reaching and arguably more influential than states alone. So, as members of the ICC and their associates engage in international business, the ICC has unparalleled authority in setting rules that govern cross-border business. While these rules are voluntary, thousands of daily transactions abide by the ICC-established rules as part of regular international trade[450]. Holding this view against the canvas of the traditional Westphalian concept of the international legal framework, it becomes apparent that the construct of the ICC, as well as other NGOs globally, have indeed disrupted the status quo in functionality. However, the concept or theory of international law has stayed static to the state-centric position held in the 1600s. Unfortunately, the lack of theoretical reconceptualisation of the Westphalian notion of the International legal framework has a significant impact on the legitimacy of the activities of some of the most significant actors in today's global space.

The focal drive of the ICC is to enhance international trade and investments as key instruments for integrated growth and prosperity globally; dealing with global challenges and reaching universal aspirations. It achieves this through a wide range of activities, including resolving disputes when they arise in international commerce to providing frameworks to streamline customs and border procedures.

6.3.2.2. The ICC as an indirect international lawmaker

Some of the activities carried out by the ICC include matters like advocacy and standard-setting, i.e. establishment of rules. However, it is standard-setting that is primarily of interest to this thesis. The interest in ICC stems from its standard-setting role, which is a less formal way by which laws are made for the global business community. These laws are referred to as soft law because they are voluntary in their form but are essentially mandatory in their function. The ICC is engaged in facilitating global business and legal training, and are the prime publishers of practical tools for international business, banking and arbitration. Some of these rules formulated by the ICC extend from recognised Incoterms rules to the UCP 600 Uniform Customs and Practice for Documentary Credits, which are used widely in international finance[451].

[450] Ibid
[451] ICC (n 446)

The effective policy advocacy, development of rules and guidelines by the ICC could be referred to as a unique informal body of international law. It is noteworthy that the ICC-made rules are practical and adapt to the challenges of trading in a fast-paced global economy. However, these ICC-made rules lack, to some extent, in legitimacy, when juxtaposed against the multilateral or bilateral state treaties, which primarily forms traditional international law.

Hence, while these legal instruments are, in fact, as significant as some international legislation, they lack the legislative legitimacy and as a result, are unable to have the requisite force of law. It is one of the primary reasons most of these rules and regulations do not cross the boundaries of guidelines due to their inherent voluntary nature. The ripple effect soft laws or guidelines is that they leave a loophole for the businesses who pay lipservice to these guidelines, sign unto them, perhaps, to brand themselves as responsible and compliant, but without sufficient room for accountability or enforcement. Berliner and Prakash[452] and others describe paying lipservice to soft law without the fear of sanction for non-compliance as "bluewashing" -the attempt to cover multi-national corporations in the colours of the UN flag[453] in order to promote them as having a reputation as a socially responsible and law-abiding corporation.

As a result, the mischief that some of these laws seek to solve, remain unresolved. Furthermore, this leads to less credibility in statistics and an apparent disconnect between the statisticians and the realities. For example, statistics may arise as to how many businesses have responded positively to the global concern of climate change, and there may be a real disconnect between the statistics and the realities on the ground. It is a fact that around half of the CO2 emitted since 1750 has been in the last 40 years[454] and, Ironically, there appears to be more engagement with the problem from stakeholders, at least, statistically; with more climate change soft laws that ever before.

[452] Daniel Berliner and Aseem Prakash, '"Bluewashing" The Firm? Voluntary Regulations, Program Design, And Member Compliance With The United Nations Global Compact' (2014) 43 Policy Studies Journal.

[453] This was in respect to the UN Global Compact, but generally applicable to all soft laws. The UN Global Compact initiative, is also one of the upshoots of the collaborative activities of the ICC.

[454] Sabrina Weiss, 'The 10 Facts That Prove We're In A Climate Emergency' (*Wired.co.uk*, 2019) <https://www.wired.co.uk/article/climate-change-facts-2019> accessed 21 June 2019.

6.3.2.3. *ICC: An example of a global response to global interests and challenges*

As have been pointed out earlier, a significant catalyst of globalisation has been the international commerce. The ICC sits at the heart of this, and to a certain extent, sets the operational framework for some of the most noteworthy actors in the global space; promoting international trade, responsible business conduct, and a global approach to regulation.[455]

Over the century, there has been an evolving strategy and a reiteration of the driving rationale for the ICC. The global challenges face the states and the business communities alike, as well as other players in the international scene. The response of either the state alone or the businesses alone will be insufficient in tackling these challenges. There is a mutual interest in dealing with these challenges. Challenges such as environmental sustainability, cybersecurity, human rights and security or labour concerns, et cetera, are aftermaths of globalisation. Globalisation has inadvertently established a coalition of interests and interrelated goals across various segments of the international society. These interrelated goals and common interests, have led to the significant shifts in norms and values across various sectors and has given rise for keen attention to be given to these issues when the various actors on the international plane fashion their various policy strategies.

The ICC stands as the very pivot of the delivery of these bespoke policy strategy formulation, amongst many other things with which it is involved. Hence, scholars have noted that the ICC finds themselves in this quadrilateral relationship with national governments, civil society organisations and multilateral institutions.[456] However, a challenge lies where there is no requisite legitimacy. This pattern of relationships that the ICC has with the international community gives rise to a level of fluidity that stems from the lack of legislative legitimacy and ultimately leads to uneven and often unpredictable relationships. This challenge is replete among many other relations ships on the international plane with influential NGOs. As with other influential NGOs, the dynamics of these types of relationships are made possible by the adaptive tendencies of non-state actors which adapt being ultimately at the mercies of the traditional Westphalian actors. So, NGOs, regardless of the legitimacy limitations, generally focus on the global need for which they exist and just tend to adapt to any

[455] ICC (n 446)

[456] Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p.4.

legislative framework, while trying to meet those needs. Most times, states and NGOs have mutual interests, but the interest of the states does not always align with that of NGOs. Sometimes, the interests of the states could be largely political and detached from the realities of the peoples of the international communities, and their agendas canvassed by NGOs.

However, the mutuality of interests can no longer be ignored. These mutual interest and goals require more cooperation among actors, exchange of resources, adapting their roles and shaping their policies according to the shifting demands of globalisation. This sentiment is shared by members of the key stakeholding organisations of the international community. The multinational corporations, the states, and the inter-governmental organisations all hold the same view that their common interests are common. In 1997, the then UN Secretary-General – Kofi Annan echoed this point in his speech to the World Economic Forum at Davos when he stated the following -

> *'The United Nations once dealt only with governments. By now, we know that peace and prosperity cannot be achieved without partnerships involving the governments, international organisations, the business community and civil society.'*[457]

In February 1998, at a joint press release issued by the UN and the ICC, this position was further reiterated stating as follows -

> *'There is great potential for the goals of the United Nations - promoting peace and development - and the goals of the business - creating wealth and prosperity - to be mutually supportive. Development and peace are essential for trade and investment to occur and for business to grow. At the same time, thriving markets are a precondition for creating jobs, improving standards of living, spreading more widely the benefits of globalisation and integrating developing countries into the world economy.'*[458]

The international discourse is replete with statements that ultimately share the same sentiments as has been stated above. An instance where this could be gleaned from when the ICC announced the establishment of the ICC Geneva Business Dialogue,

[457] L Silber, 'UN Reformer Looks For New Friends In The World Of Business' *Financial Times*(1997).
[458] UN Press Release, 'SG/2043' (1998).

which met in September 1998.[459] One of its focal interests was facilitating a dialogue between the business world and the world of inter-governmental organisation. It was to the end of incorporating business influence to the decision-making process for the global economy.'[460]

One of the most notable milestones reached in the quest for a UN-Business dialogue was the emergence of the UN Global Compact which was launched in July 2000, and within its first ten years became the world's largest corporate citizenship initiative.[461] Under its aegis, there has been a commitment from major multinationals to observe a voluntary set of principles on the environment, child labour, and freedom of trade unions.

Interestingly, this dialogue or collaboration is not only in the interest of the business community, but it also helps accentuate the relevance of the UN in a world where the growing influence of globalisation puts its significance at risk of a downward spiral. Hence, it is generally argued, at least in the international business circles, that the initiatives pioneered by Kofi Annan were intuitive and sensitive to the global business climate of the day. Annan's initiatives have been considered by most as being valuable to the partnership between the intergovernmental organisations and the ICC to the momentum of free trade, the campaign against abuse of human rights by businesses and the preservation of the environment.

The foregoing suggests that the current global challenges of the 21st century are common to the various nations of the international community. The best response concerning providing the necessary legal order that could respond to these challenges is the concerted effort of the various stakeholders of the international community. Ideally, these concerted efforts should be back-up by the support of the force of law. International NGOs champion these efforts by taking up the global challenges on a thematic basis; such as environment, human rights, global health, terrorism, international commerce, et cetera. The ICC is a personification of this approach. However, due to the lack of legitimacy, their activities requires the cooperation of the international community, as it cannot be enforced otherwise, due to its informal voluntary nature.

[459] Kelly (n 456), p. 9
[460] Ibid, p. 9
[461] Andreas Rasche, Sandra Waddock and Malcolm McIntosh, 'The United Nations Global Compact' (2012) 52 Business & Society.

The challenge remains that due to the voluntary nature of these rules, standards or guidelines, many multinational corporations are increasingly being accused of using the emblem of the UN to launder their image. They hide their iniquitous transgressions on human rights and the environment while appearing to be adhering to the loosely monitored principles.[462]

6.3.3. The History of the ICC

The ICC was founded in Paris, France in 1919. The organisation's international secretariat was also established in Paris, and its International Court of Arbitration was formed in 1923. The first chairman of the chamber was Etienne Clementel, the early-20th-century French politician[463].

The ICC has played a significant role in world politics since the turn of the century in the early 1900s. However, to have a holistic understanding of the body, it must be considered fully within the context of the earlier phases of its evolution and its adaptation to the shifting sands of world politics and the evolving patterns of institutional structures and norms, so it is now. Before its emergence, there have been national and local chambers of commerce, which played a significant role in shaping the national business contexts in which businesses operate. From shaping the local and national government policies to the creation of standards with which businesses deliver their services amongst themselves. However, after the World War I, the International Chamber of Commerce emerged as a federation of national chambers with a Paris-based secretariat and an extensive web of specialist committees covering most of the key areas of concern to the business community[464].

One of the reasons for the success of the ICC over the years can be traced back to its strategy to gain access to key international policy decision fora and multilateral agencies to seek to influence its decision process. Hence, through its various specialist committees, it developed close relationships with the relevant sections of the League of Nations and the International Labour Organisation as these bodies developed during the 1920s[465].

The process by which the International Chamber of Commerce came into existence was via a decision to establish a non-governmental organisation which served the

[462] See Berliner and Prakash (n 452) and (n 453)
[463] ICC (n 447)
[464] Kelly (n 456), p. 4
[465] Ibid p. 4

interests of world business. This decision was taken at the behest of the US Chamber of Commerce in a meeting held in Atlantic City, New Jersey on October 1919, which had in attendance influencers of the global business milieu, primarily from UK, Europe and the US[466].

Further to this meeting, the ICC was officially inaugurated on June 24 one year later, although it had unofficially existed before then. As pointed out by Dominic Kelly, this is an example of a non-governmental organisation that is older than the United Nations and most of its associated agencies and has outlasted the UN's predecessor – the League of Nations. It pre-dates the major institutions such as the World Bank, the International Monetary Fund and the ITO/GATT/WTO trio. It is a non-governmental organisation that is older than many of the states in which its constituent National Committees reside.[467]

6.3.3.1. The influence of the ICC over the years: As an international lawmaker and diplomat

The longevity and influence of the ICC over the decades gives credibility to the argument on elevating the status of non-state actors. In particular, elevating the status of NGOs; giving them requisite legitimacy to carry on the significant activities which they already do. The ICC has over the years, not only existed, but its influence is undeniable. Some of its influence include the creation of policy which serves as global governance standards across various sectors and institutions. Hence, the International Chamber of Commerce is a typical example of a non-governmental organisation with whom states and inter-governmental organisations have consistently liaised with, and drawn from their unmatched resources, in reaching their various decisions over the century.

For years, the influence of the ICC is pivotal to global trade and governance. Interestingly, the ICC has taken on different names from different scholars that are reflective of its characterisation at each point in time. Ridgeway referred to the ICC as an 'international movement.'[468] White referred to it as the 'world parliament of business'.[469] The ICC has referred to itself as the 'defender of the multilateral trading

[466] Nigel Blackburn, *World Peace Through World Trade* (International Chamber of Commerce 1979), pp. 21-38.
[467] Kelly (n 456), p. 10
[468] George L Ridgeway, *Merchants Of Peace* (Columbia University Press 1938), p.3.
[469] Lyman Cromwell White and Marie Ragonetti Zocca, *International Non-Governmental Organizations : Their Purposes, Methods, And Accomplishments* (Greenwood Press 1968), p. 20.

system' and as a 'private sector policeman for world-trade'.[470] This various description gives further impetus to the stance and influence of the ICC globally.

The role and the effectiveness of the ICC over the century have been both latent and dramatically blatant. One of its dramatic impacts was the implementation of the Dawes Plan.[471] Having come into existence during the end of the World War 1 and having to deal with the immediate challenge of business interests as a result of the aftermath of the war, it was very instrumental in dealing with the issues of reparations which Germany had to pay as a result of the war.[472] The United States and a group of very able American businessmen-diplomats in the lead, mostly from the International Chamber of Commerce, pressured the French to accept the Dawes Plan. It was hoped that the plan would solve the reparations problem; encouraging healthy economic recovery and growth (which would embrace large sales of American capital goods to Germany). Ultimately, it was to ensure peaceful contentment in two nations – France and Germany, which were bitter enemies at the time.[473] So, they led a passionate campaign to break the deadlock over the settlement of post-war reparations, actively sponsoring and heavily funding the Dawes Plan, which was brought into effect by the 1924 Treaty of London.[474] The work of the ICC in the bringing to fruition this plan, which also led to Charles Dawes sharing a Nobel peace prize, could not go unnoticed as pivotal to the successful resolution of the problem at the time. Hence it was stated -

> *'The Dawes Plan was really the work of the International Chamber of Commerce. Without official standing, without any means of coercion, by the sole force of its competency and the weight of the interests it represents, the International Chamber of Commerce was able to play a decisive part in settlement of a great international question. […] In brief, what thirty-two diplomatic conferences with the help of countless meetings of ambassadors and interviews between heads of governments were unable to achieve, has been done by a private business organisation.'*[475]

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[470] Kelly (n 456), p. 11

[471] The Dawes Plan (as proposed by the Dawes Committee, chaired by Charles G. Dawes) was a plan in 1924 that successfully resolved the issue of World War I reparations that Germany had to pay. It ended a crisis in European diplomacy following World War I and the Treaty of Versailles; See 'Dawes Plan | Encyclopedia.Com' (*Encyclopedia.com*, 2020) <https://www.encyclopedia.com/history/modern-europe/treaties-and-alliances/dawes-plan> accessed 20 March 2020.

[472] Frank Costigliola, 'The United States And The Reconstruction Of Germany In The 1920S' (1976) 50 Business History Review.

[473] Ibid

[474] Kelly (n 456), p. 11

[475] White and Zocca (n 469), p. 27

The disappointment of war and post-war years had discredited politics and politicians but had highlighted the increased relevance of non-state actors, including businesses. This public confidence in business empowered businesses to propose compromises that would deal with the post-war concerns, including the controversy of French Damoclean sword of reparations held over Germany.[476] It ultimately led to the involvement of American businessmen - Charles Dawe and Oliver Young, and the solution was reached devoid of political entanglement of states.

The foregoing emphasizes the point that the ICC etched itself in the history books to come as a result of the active role it played in post-World War 1. Hence, it has also, at times, been referred to as the Merchants of Peace. Its global relevance since then was not only established but have been on the increase over the century.

Dominic Kelly pointed out that this achievement of the ICC in the 1920s was closely followed in 1931 by a successful campaign, conducted through the media and behind closed doors, to reverse President Hoover's decision not to make any concessions concerning the payment of war debts.[477]

As can be seen, at the turn of the 20th Century, the global space had involuntarily acknowledged the place of 'competency' and 'influence' being given free rein without the entanglement of politics or the attribution of sovereignty.

The ICC continued to etch its global relevance beyond its activities post World War 1, although in ways more latent, strategic and less dramatic. One of the first projects on its agenda was the reintegration of Europe as the centre of the world economy and to deepen its relationship with the upcoming global power – the United States of America. Its core strategy was to focus on four main sectors of the global economy at the time – transport, communication, finance and trade. What followed was a series of conferences, initiatives, commissions, proposals and agreements which proffered effective and peaceful standards that underpinned the various global trade ventures at the time and ensured continued profitability.

[476] Costigliola (n 472)

[477] Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 12; See also, Lyman Cromwell White and Marie Ragonetti Zocca, *International Non-Governmental Organizations : Their Purposes, Methods, And Accomplishments* (Greenwood Press 1968), p. 27-8.

6.3.3.2. *ICC and historical impacts on global trade as an international lawmaker*

One of the ICC's activities of note was the ICC's involvement with the World Economic Conference (WEC) in 1927 convened by the League of Nations to the end of lowering tariff barriers.[478] ICC has been seen to have been the conceptual originator of the General Agreement on Tariffs and Trade (GATT). The influence of the ICC in the run-up to the conference is apparent from the comments made in the Final Report of the conference and the ensuing official commentary. As was scribed in the ICC's treatise – World Peace through World Trade, the following was recorded anonymously -

> *'Certain sections of the ICC report [to the WEC] could be regarded as the conceptual origin of the General Agreement on Tariffs and Trade: others gave virtual draft texts for conventions on specific issues. The Conference very largely accepted the report's recommendations. One significant result was the 1928 convention on import and export prohibitions - the world's first multilateral agreement on trade policy.'*[479]

Hence, this is an instance of the success of the ICC had made its mark in the setting of global standards, or put differently, informal international law-making, at least, in the international trade sector.

Of course, this feat by a non-state actor attracted some criticism and backlash from some sections of the global community. Having made a significant impact at the conference, both from its report and its attendance from various national committees. Also, it made direct representation to the Economic Consultative Committee of the League of Nations, and it received a variety of reaction from different actors on the global space, including other non-governmental organisation. An example was the reaction from the International Co-operative Alliance, which stated as follows:

> *'Our attention has been drawn to the extraordinary claims which have been publicly made that the organised private traders of the world had not only succeeded in entrenching themselves at Geneva in the authorities of*

[478] Kelly (n 456), p. 12

[479] Nigel Blackburn, *World Peace Through World Trade* (International Chamber of Commerce 1979), p. 3; See also - Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 12;

the League on the basis of equality of voice and voting with the National Governments but wielded such influence […] that they practically dominated the situation and were even able to repudiate their own National Governments…'[480]

Given the foregoing, it is inevitable that the influence of the ICC at least in the area of trade was on the increase, albeit, criticised.

6.3.3.3. The influence of the ICC: As agents of world peace through world trade

Just before the war in 1937, at the Berlin Congress, the ICC adopted as its motto the slogan 'World Peace through World Trade.' At this congress, Hitler and Goering were in attendance.[481] ICC's new slogan was an indication of its intention to intervene more in global political and economic matters. It stemmed from the position held by the ICC and the wider business community, that business was pivotal to the political and economic stability of states. It was of the view that the nature of the market is such that, its relevance transcends the complex and petty intricacies of political differences. Therefore, in its view, common business interests ultimately resolve national and political differences. Their position was given credence due to its past successes at the international level, which appeared to have resolved intractable problems between states.

The global influence of the ICC was further enhanced with the collaboration with yet another nongovernmental organisation – the Carnegie Endowment for International Peace (CEIP) via a meeting held between the members of both organisations in March 1934 at the Royal Institute for International Affairs (Chatham House).[482] Kelly noted that one of the significant outcomes of this conference was the formation in that same year of a joint CEIP/ICC Committee. The conference was attended by business leaders and academics from various countries aiming to lay the groundwork for the improvement of commercial and, thus, political relations between nations.[483] It led to the publications of a series of technical reports, which focused on the need for monetary stabilisation. It was followed by the 1938 publication from the Carnegie

[480] White and Zocca (n 469), p. 31
[481] Ridgeway (n 468) p. 384
[482] Ibid pp. 379-385
[483] Kelly (n 456), p. 14

Endowment for International Peace, a history of the ICC which was christened the *Merchants of Peace.*[484]

6.3.3.4. The influence of the ICC: Post World War 2

6.3.3.4.1. ICC and GATT

After the 2nd World War, the ICC was again involved, as it was after the 1st World War, with the need for reconstruction and rehabilitation. This time, its campaign was for robust monetary and trade regimes. It led to its short-lived support of the ill-fated International Trade Organisation, with the provision that certain agreements on commercial policy and trade restrictions, such as the GATT will be incorporated into the ITO charter. Unfortunately, this was not the case upon the release of the draft charter before the UN Conference on Trade and Employment (Havana, November 1947 – February 1948), and it resulted in the ICC withdrawing its support for the ITO charter and concentrate on building the GATT into a permanent organisation. It led to the eventual creation of the World Trade Organisation decades later. The primary purpose of the General Agreement on Tariffs and Trade (GATT) was to facilitate international trade by a significant reduction or absolute elimination of trade barriers such as tariffs and quotas. It provides that its purpose was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis."[485]

The GATT functioned de facto as an organisation, conducting eight rounds of multilateral trade negotiation addressing various trade issues and resolving international trade disputes. The Uruguay Round, which was completed on December 15, 1993, after seven years of negotiations, resulted in an agreement among 117 countries (including the U.S.) to reduce trade barriers and to create more comprehensive and enforceable world trade rules. The agreement coming out of this round, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, was signed in April 1994. The Uruguay Round agreement was approved and implemented by the U.S. Congress in December 1994 and went into effect on January 1, 1995.[486] This agreement also created the World Trade Organisation (WTO), which came into being on January 1, 1995. The WTO implements the agreement, provides a forum for negotiating additional reductions of trade barriers and for settling

[484] Ridgeway (n 468)
[485] (*Law.duke.edu*, 2019) <https://law.duke.edu/sites/default/files/lib/gatt.pdf> accessed 30 July 2019.
[486] Ibid

policy disputes, and enforces trade rules. The WTO is a successor to GATT, and the original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994.[487]

6.3.3.4.2. ICC's Consultative Status with the UN

The influence of the ICC increased even further with it being elevated to a Category 'A Consultative Status' with the United Nations Economic and Social Council in 1946. As discussed in the previous chapters, the implication of this consultative status is far-reaching in terms of its global influence, particularly to the process of making international decisions on economic and social matters that at times evolve to international law. Since then, the ICC has been an active participant at the UN. However, there appears to have been some contention between the two bodies in its early years, concerning ideologies and set perspectives of certain country factions within the UN, mainly due to the cold war.

Notwithstanding these slight hitches, the influence of the ICC in the decades that followed was almost unimpaired. The world increasingly grew as a predominantly capitalist economy and experienced the boom years, as did the conversations around the need for an expansion of in an international ambience of free trade and tighter integration of with the European Economic Community, following the signature of the Treaty of Rome. The ICC's objective was to also expand its influence beyond to West into Asia. In 1955 the first ICC Congress to be held in Asia took place in Tokyo, and by 1959 seven new National Committees had been set up, along with a regional Commission on Asian and Pacific Affairs. The brief of the ICC's regional Commission on Asian and Pacific Affairs was to coordinate their activities and represent the ICC to the regional office of the UN in Bangkok.[488]

6.3.3.5. The influence of the ICC: International lawmaker in contemporary times

The growth of capitalism from the end of the 50s through to the next three decades were faced with immense challenges for the ICC. At the time it was considered to be a western capitalist club. There was a wave of decolonisation in Africa and the increasing concerns of the impact of business on the climate and other new age challenges of business, globalisation and a myriad of other social issues. These

[487] 'WTO | Legal Texts - Marrakesh Agreement' (*Wto.org*, 1994) <https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm> accessed 30 July 2019.
[488] Kelly (n 456), p. 15

challenges indeed, added to the needed evolvement of the ICC to be relevant to the current global commercial challenges. As it was evident that the public exerted their anger of the depleting of the ozone layer and the economic challenges that came with the decolonisation wave, particularly in the developing countries, led to the adverse reaction of the public against the multinational corporations.

However, the ICC responded quite quickly, re-asserting its influence over the global economic and social circles. The trajectory of its narrative as reflected from its major themes at the ICC congresses held from the late 50s to the late 60s was intended to communicate its reinvention from a pro-capitalist NGO to a socially responsible global influencer. In 1959 at the Congress held in Washington, the theme was centred on - 'Today's Challenge to Businessmen - their Responsibility in Domestic and World Affairs'. In 1961 (Copenhagen) the theme was 'Private Enterprise in Economic Development'. The 1963 congress (Mexico City) considered the theme of 'Economic Growth through World Interdependence', while the 1965 congress (New Delhi) dealt with 'World Progress through Partnership'. At the 1967 congress in Montreal the theme was 'Private Enterprise in a Changing World', while at the final congress in that decade, Istanbul in 1969, attention zeroed in on the apparent villain of the piece under the theme 'International Economic Growth - the Role, Rights and Responsibilities of the International Corporation'. [489] One of the strategic steps taken by the ICC in those years was the establishment of the inaugural UN Conference on Trade and Development (UNCTAD) held in Geneva in 1964, and again at UNCTAD II in New Delhi four years later. The significance of this direction that the ICC took was that it led the narrative of the role of business in global peace, prosperity, progress and harmony.

In all of these, it brought about the various informal legal frameworks within which the international business community operated. This approach perpetuated its relevance and increased its influence over time. Its influence is characterised in recent times as the NGO body which represented the business community in the international plane, and then showing that business is pivotal to the economic development and stability of the international global community. This characterisation goes back the focal point of the discussion of ICC to this thesis – the standard-setting role. Given the global influence of an organisation like the ICC, and how it perpetually comes up with standards that regulate the international business community even more than states,

[489] Ibid p. 16

feeds to the case for the reconceptualisation of the Westphalian notion of international law.

The ICC used these strategic network built in the global community to enhance its creation of standardised regulatory conditions for its members globally. In a sense, it was evolving into an informal private international lawmaker. Furthermore, towards the end of the 60s into the beginning of the 70s, it began talks on the roles, rights and responsibilities of multinational corporations, which eventually led to the launch of its 'Guidelines for International Investment' in December 1972. This initiative persuaded governments to investigate and adopt standard investment and insurance practices which covered all aspects of private foreign investment.[490] In 1976 The Organisation for Economic Co-operation and Development; an intergovernmental economic organisation founded in 1961 to facilitate economic progress and world trade through policy-making, published their own 'Guidelines for Multinational Enterprises'. It was well received by the ICC, due to the significant role the ICC had played in it.[491] The ICC went on to increase its participation with key projects initiated by the newly-created UN Commission and Centre on Transnational Corporations. Some of such projects included the establishment of a code of conduct for transnational corporations (TNCs), international standards of reporting and accounting, and the creation of a database on TNCs for government use[492].

6.3.4. The ICC and the Bretton Woods Agreement

The Bretton Woods agreement was created in Bretton Woods, New Hampshire in a 1944 conference of all of the World War II allied nations. It brought about a new global monetary system which replaced the gold standard with the U.S. dollar as the global currency. It inadvertently set America as the dominant power in the world economy, creating rules-based organisations such as the World Bank and the International Monetary fund, and the defunct International Trade Organisation, which later became the World Trade Organisation. The ICC was pivotal to this process. In 1944, ICC joined leaders from around the world in Bretton Woods, New Hampshire, to create the framework for today's multilateral international system. In the view of the ICC, the Bretton Woods Conference was pivotal the creation of a unified international

[490] Ibid p. 17
[491] Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 17; See also Nigel Blackburn, *World Peace Through World Trade* (International Chamber of Commerce 1979).
[492] Kelly (n 456)

monetary and financial order established better clarity and certainty for business around the world. The ICC Secretary General John W.H. Denton AO said -

> *"The Bretton Woods Conference was a defining moment that recognised the need for rules-based relations between countries to ensure a more stable international financial system. As an original participant at that conference, ICC continues to support many of the values embedded in the Bretton Woods system. We also believe we must channel the boldness demonstrated in 1944 to shape a global financial architecture fit for the 21st century."*[493]

Under the agreement, countries promised that their central banks would maintain fixed exchange rates between their currencies and the dollar.[494]

The role of the ICC in this conference, which essentially led to a significant change in the international monetary regime globally is another attestation as to the global relevance of the ICC as an international lawmaker.

6.3.5. The ICC and the United Nations

6.3.5.1. Opportunistic globalisation: The role of ICC in salvaging the relevance of the UN in the 21st Century

Just before Kofi Annan became the Secretary-General of the UN, it combatted the premonition of its waning out of relevance due to the trajectory of globalisation. The concept - globalisation was an embodiment of irony; it blurred boundaries, particularly concerning how to more easily interact, which at the same time raised the tendency for higher fences between states, particularly with the increase of nationalist narrative. It seemed that the powerful nation used the concept at their convenience; embracing it when it served their interest and refraining from it when it appeared to curtail their interests. It is a concept not accurately characterised by a simple abridging of nations but more accurately, an abridging of the interests of the peoples of the world, with the more powerful nation steering the wheels of globalisation. So nationalist rhetoric is not just a recent occurrence. However, they have been more prevalent in recent times, given the examples of Scotland's independence referendum in 2014, Trump's administration and policies since 2018, and more recently Brexit of 2020.

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[493] Timothy Conley, 'ICC Celebrates UN Charter And Bretton Woods Agreement Anniversaries - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2019) <https://iccwbo.org/media-wall/news-speeches/icc-celebrates-un-charter-bretton-woods-agreement-anniversaries/> accessed 20 March 2020.

[494] Kimberly Amadeo, 'How A 1944 Agreement Created A New World Order' (*The Balance*, 2019) <https://www.thebalance.com/bretton-woods-system-and-1944-agreement-3306133> accessed 10 August 2019.

Historically, nations have often served self-interests first. For instance, the US, in response to the calls of a New International Economic Order side-stepped the United Nations in favour of unilateral and bilateral management initiatives. The New International Economic Order (NIEO) which could have further fostered globalisation, although, to serve the interest of the developing countries. It was an initiative which came about at the United Nations Conference on Trade and Development. It consisted of proposals from predominantly the developing countries from the Non-Aligned Movement[495] soon after the years of decolonisation. The proposals were to advance their interests by stating their own terms of trade, increasing development assistance, developed-country tariff reductions, et cetera. The thrust of the NIEO was to reshape the international economic system in favour of Third World countries. It was to replace the Bretton Woods system, which had benefited the leading states that had created it – especially the United States.

It follows that the US would conveniently ignore the new initiative of the UN, side-stepping the UN in its effort to bring about the New International Economic Order. This sidestepping led to the demise of that initiative.[496] How the UN was tossed back and forth, seemingly at the convenience of state powers, dealt a blow to its continued significance and influence.

6.3.5.1.1. The depleting reputational capital of the UN

Smouts argued that the behaviour of big states as to their relationships with the UN seemed opportunistic. It was a significant concern as to the integrity of the UN; worsening the 'legitimacy deficit' for the UN. Examples of this could be seen in several instances, including the attempts by the US to persuade the UN to lessen the 'burden' of its financial commitment, while strong-arming the organisation to align itself with the US foreign policy goals.[497] The reputational capital of the UN depleted and led to the view from sceptics that many reforms of the UN were a scheme to entrench further the powers the bigger states at the detriment of the smaller states. This concern was significant because the aggregate of the smaller states was a majority and increased the likelihood of the UN losing the requisite global goodwill to wield the global

[495] Neither on the parts of the Western world nor the Soviet Union during the Cold War years.

[496] Harold K Jacobson, 'The United States and the UN System: the hegemon's ambivalence about its appurtenances', in Robert W Cox, *The New Realism* (Macmillan Press 1997); See also Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 19.

[497] M-C. Smouts, 'United Nations reform: a strategy of avoidance' and A. Morales, 'The United Nations and the crossroads of reform', in Michael G Schechter (ed), *Innovation In Multilateralism* (Macmillan 1999), pp 29 – 41 and 42- 60 respectively; See also Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 19.

influence it purports to wield. Hence, there were incessant calls for structural reform of the Security Council. There were calls to transform the underlying philosophy of the UN premised on Western views or even an outright abolition. Then it should be replaced with an institution or institutions reflective of the changed circumstances and varied social, political and cultural viewpoints given expression around the world.[498]

The increasing lack of trust stemming from opportunistic globalisation gave rise to an increase in the opposition of the underpinning ideology of the UN before Kofi Annan became the Secretary-General. Most NGOs directed their activism and agendas to counter capitalism or perceived injustice or trans-border damages[499] due to capitalism in various areas but in particular the environment[500]. Consequently, the activism affected the multinational corporations as well as other global interest, and so it was in the interest of both international business community (embodied in the ICC) and the United Nations to reinvent themselves.

6.3.5.1.2. The ICC's Geneva's Business Dialogue: Reinventing the UN

The quest to revitalise the UN came at the time of Kofi Annan, who went to great lengths to introduce initiatives geared towards sustaining the relationship between the promotion of peace and development and the creation of wealth and prosperity, which inadvertently had the international business sector at the centre of his agenda. The ICC aligned with the strategy of the United Nations at the time, and proliferated the Public-Private Partnership idea, through a myriad of events, press releases, speeches, et cetera, all of which led to the Geneva Business Dialogue. Grave concerns about the increasingly negative reputation of globalisation and capitalism were the focal point of the dialogue. It attracted 450 business leaders from across the world who met with representatives of international organizations in Geneva at the end of September in 1998.[501] The global policy forum in reporting the event stated as follows-

> *"Captains of industry from the largest corporations on earth, businessmen from Third World countries and various political leaders agreed on the need to regulate 'hot money' flows, counter 'globaphobia' and establish a global*

[498] Kelly (n 456), p. 19

[499] M. W. Zacher, 'Uniting nations: global regimes and the United Nations system in Raimo Väyrynen (ed), Globalization And Global Governance (Rowman & Littlefield Publishers 1999).

[500] Kelly (n 456), p. 20

[501] 'The Geneva Business Dialogue' (*Globalpolicy.org*, 1998) <https://www.globalpolicy.org/component/content/article/221-transnational-corporations/47073.html> accessed 21 March 2020.

framework for 'managing globalization'. Sensing an upcoming backlash against globalized neoliberalism, business leaders clearly fear that not only the financial crisis but also the debate about how to regulate the runaway global economy could move beyond their control and turn against them."[502]

The ICC was the prime organiser of the Geneva Business Dialogue (GBD), and the then chairman Helmut Maucher, stated in his welcome concerning the purpose of the event as follows,

"[the need to] increase mutual understanding between business leaders and international organizations[…] to join forces to improve the situation[…] action point for how to establish global rules for an ordered liberalism were needed."

In his conclusion, he stated –

"[t]he ICC is in the front of the discussion, as the voice of business, dialoguing with the WTO and the UN….to deal with global problems, powers need to be delegated to that level".

This meeting dealt with a wide range of issues which are at the front burners of both the United Nations and the ICC's agenda. The matters included development goals, particularly in developing countries. These discussions ultimately led to the campaign which underscored the UN Global Compact.

6.3.5.1.3. The ICC and the UN Global Compact

Both the UN and the ICC needed the UN Global Compact. The need for it was not necessarily only for the good of the global community, but also for the sustained legitimacy of both bodies. The UN, on the one hand, faced an imminent risk to its relevance in the post-Westphalian world order. In contrast, the ICC faced the common challenged faced by the business community – the criticism of capitalism, the inequitable balance between the rich and the poor and the blame for the world depreciation. Hence, the Global Compact stood as the saving grace for both bodies in the late 90s.

The Global Compact was an initiative which required businesses to align strategies and operations with the universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals. These principles are another example of soft law.

[502] Ibid

The UN seemed to benefit substantially from the alliance with the ICC. Some of the most significant benefits of the Global Compact and the various Public-Private Partnerships was the cash advantage for the UN. The UN gained funding for most of its activities due to corporate philanthropy and corporate investment in UN driven projects. The corporate world, as facilitated by the ICC, committed billions of dollars to fund various UN activities. Also, the ICC's business world enjoyed the incentive of being able to venture into new markets due to the provisions of the predictable and stable soft infrastructure brought about by UN development assistance which was initially funded by the corporate philanthropists and investors[503]. In the years that followed, many more developing economies joined the ICC, with Russia, Poland and Cuba joining in May 2000, and then most countries from Africa joining from 1999 onwards into the early 2000s.

6.3.5.1.4. The Global Compact Ten Principles as Soft International Law

The Global Compact has been described as an initiative which is meant to be a 'social norming proposition'[504] and 'a platform for institutional learning'.[505] It reiterates the set of values and principles contained within the Universal Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration of the UNCED (1992). Practitioners and scholars have considered it a soft international law made by the business community for the business community, often through the facilitation of the ICC.

The Ten Principles are delineated under several broad headings. Hence under the concept of Human Rights, there are two principles, which are -

- Firstly, businesses should support and respect the protection of internationally proclaimed human rights; and
- Secondly, businesses should make sure that they are not complicit in human rights abuses.

Under the broad topic of Labour, there are four principles which are -

- businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- there should be the elimination of all forms of forced and compulsory labour;
- there should be the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

[503] ICC, 'World Business Message For The UN Millennium Assembly On The Role Of The UN In The 21St Century'.
[504] Jagdish N Bhagwati, *In Defense Of Globalization* (Oxford University Press 2007) p 191
[505] Malcolm McIntosh, Sandra Waddock and Georg Kell, *Learning To Talk* (Routledge 2017) p107

Under the topic of Environment, there are three principles –

- Firstly, businesses should support a precautionary approach to environmental challenges;
- secondly, businesses should undertake initiatives to promote greater environmental responsibility; and
- thirdly, businesses should encourage the development and diffusion of environmentally friendly technologies.

Lastly, and most recently added, there is the single principle under the broad heading of Anti-Corruption. The principle states that businesses should work against corruption in all its forms, including extortion and bribery.[506]

The above is basically a list of soft international law, and it has faced much criticism because of its lack of enforcement powers.

While the ICC and the UN are quite in tune with the Global Compact, the ICC has sought to bring a balance between corporate responsibility and corporate profitability. The ICC holds the view that the international business community remains committed to working with the intergovernmental organisations, especially the UN, to enhance the international development and corporate responsibility, however, the underpinning rationale for the existence of business remains the economic objective of making a profit for the shareholders. The ICC must maintain this view in order to sustain its relevance to the business community who are its most important stakeholders, and for whom it has become a de facto international legislative arm, albeit, without the requisite legitimacy.

6.3.5.2. The role of global crisis in establishing the relevance of the ICC

The journey of the ICC with the United Nations could be traced back to its inception, and the relationship formed at the time with the League of Nations. It appeared that global adversity and unrest have always amplified the relevance of the ICC. This fact stems from the very first global impact made by the ICC at the end of World War 1 concerning its role in dealing with the reparations controversy between Germany and France. Post World War 2, the ICC, through its national section in America was one of the substrata of the emergence of the United Nations at the San Francisco Conference in 1945, and it was successful in securing the facilities for consultation of non-governmental organisations according to Article 71 of the UN Charter.[507] More

[506] 'The Ten Principles | UN Global Compact' (*Unglobalcompact.org*, 2019) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 14 August 2019.
[507] Blackburn (n 466) p. 14

recently, is the instance of the dwindling fate of the UN due to 'globaphobia'.[508] This depletion of the reputational capital of the UN resulted in its reinvention and increased the influential role of the ICC in the process.

6.3.5.3. The inadequacy of ICC's UN's Consultative Status

Thenceforth, in October 1946, it obtained the highest level (Category A) consultative status with the United Nations Economic and Social Council (ECOSOC). This status and the provisions of Article 71 of the UN Charter are central to the argument of this thesis. NGOs, and the ICC in particular, are acknowledged for the significant role they play in the operations of the global community. To an extent, they are part of the team of architects that build the international legal framework. However, they still fall short of getting the requisite legitimacy needed for their effectiveness. They continue to operate from a voluntary standpoint, churning out guidelines that cannot be legally enforced due to their intrinsic voluntary tendencies. Today, the consultative status of the ICC and other influential NGOs have been considered to be a welcome development, albeit, inadequate. At the time when the status was granted, it might have been satisfactory and considered to be the best that could be achieved in the circumstances. True to the prevailing circumstances at the time, this recognition paved the way for submissions both verbal and written, to be made to the various UN agencies and global decision-makers. By 1949, the ICC had already had business representation at 93 meetings of UN organs lasting 580s, plus a further 21 meetings lasting 372 days organised by its specialised agencies[509].

At the end of World War 2 and the growth and intensity of the Cold War wax, and then finally waned, so the ICC and its activities continued to thrive under growing pressures to justify its actions to a global populace polarised against the increasing influence of global capitalism. Consequently, it had to walk a blurred line between the campaign for the private interest of its members and the broader global interests of an enlightened public. It led to the need for the ICC to reinvent itself and brand itself as an organisation with a thrust to achieve world peace through world trade.[510] In a sense, it was amalgamating two polarised sections of the international community by their common interests.

[508] The Geneva Business Dialogue (n 501)
[509] Blackburn (n 466), p. 14
[510] Kelly (n 456)

6.3.5.4. ICC's early international soft laws

The members of the ICC contended with the increasing cynicism of the rest of the global populace. They realised that a positive role and achievements of private enterprise needed to be identified, promoted and defended if it was to be a predominant force in the world economy. In a bid to achieve this consideration, it was essential to address the cynicism, and there was a need to be introspective and determine what they would be promoting and defending. So in the 1967 Montreal Congress, it reached the unanimous agreement on a 'Charter for Private Enterprise' a first world level declaration of principles which stipulated ethical standards for a free enterprise system. It inadvertently made private international law, albeit, soft law.[511]

The core aim of the ICC have been interwoven in its broad aspiration 'to make the voice of business heard in the global decision making'; ultimately to promote the self-regulation of business and strategy. Over the years, the ICC has sought the achievement of its aspiration through the rapid growth of its network of member chambers throughout east and central Europe, Asia, Latin America, and Africa. It has set the scene for the creation of national and international legislation and regulation by means other than by the traditional parliament, through the creation and adoption of self-regulation and standards-setting proliferated by a vast web of issue-based and sector-specific committees from member national chambers and multinational corporations. The ICC further fostered this proliferation of alternative channels of law-making by taking advantage of the close relationships and relevance with national governments and regional and global institutions such as the EU and the UN system.[512] This harnessing of diverse actors on the international plane inadvertently has made the ICC a renowned private international lawmaker, with tremendous global influence, increasingly given more impetus by globalisation. More recently, its influence has grown even further, particularly with its relationship with the United Nations.

6.3.5.5. The Observer Status of the ICC with the General Assembly of the United Nations

In 2016, the ICC upped its influence by being granted the Observer Status with the General Assembly of the United Nations.[513] This elevation was an unprecedented move, which further underscores the position of this thesis. This achievement is an

[511] Nigel Blackburn, *World Peace Through World Trade* (International Chamber of Commerce 1979), p. 19-26; See also Dominic Kelly, 'The Business Of Diplomacy: The International Chamber Of Commerce Meets With The United Nations.' (2001) Working Paper No. 74/01 Centre for the Study of Globalization and congregationalist, p. 18.
[512] Kelly (n 456), p. 19
[513] Wilson (n 351)

attestation to the reach of the ICC eclipsing that of most states, especially given the fact the UN observers' status is highly circumscribed and predominantly opened to inter-governmental organisations. The implication of this is that it furthers the ICC's role as a quasi-international lawmaker, who now has a direct voice within the UN system.

Consequently, the ICC can contribute directly to the work of the General Assembly and reflecting the increased influence of NGOs across various sectors of global governance. Interestingly, this move is a win, not just for NGOs, but also for multinational corporations and the entire category of non-state actors. IN response to this move, the ICC Chairman stated as follows in

> *"This is a huge recognition of the role that business can play in contributing to a better and peaceful world. There is only one route to meeting the many challenges that face our society-from climate change to mass migration-and that is for governments and civil society to work hand-in-hand with the private sector."*[514]

ICC Secretary General John Danilovich had pointed out that this move was particularly needful given the complexity of today's global challenges. It is a win for all stakeholders if the ICC could deploy the resources, expertise and knowledge of world business in the work of the General Assembly.[515]

6.4. The ICC – An example that NGOs are more than a pressure group

From the foregoing, it is safe to conclude that the ICC like many other NGOs, affirms the fact that although new' forms of diplomacy have not supplanted the 'old': they have supplemented and indeed complemented them. There is a need to acknowledge this in a way that gives them more legitimacy.

It is hard not to notice the functional changes of the various structures that exist in the international space. The state, the inter-governmental organisations, the multinational organisations or the nongovernmental organisations, as structures of the international community, are evolving functionally in a way that is reflective of the increased awareness of material and non-material autonomy dilemmas and constraints. The global interaction between all these actors is expanding and birthing new 'norms and 'intersubjective meanings' archetypal of the global reality.

The ICC, being one of such organisations undergoing this metamorphosis, seeks to play a significant role in the process, as it has done for the past century as a private

[514] Ibid
[515] Ibid

international lawmaker by default. At this point, where it is apparent that the influence of business in the international community is arguably more than that of other actors. The ICC, which straddles the NGO and the business function, is strategically placed and is further entrenching its footprint in the emerging international legal framework through its soft law-making endeavours.[516]

Given the foregoing, there is credence to the argument that the ICC is more than a pressure group. It is a non-governmental organisation which provides a voice and a legal framework, in terms of standards and regulations, for the international business community as a representative of the broad, diverse and influential community of global actors. It is an example of an NGO who operates at a level more influential than some states and gives impetus to the argument that the role of NGOs should be acknowledged in the reconceptualisation of the Westphalian notion of international law to be fit for purpose in a globalised 21st century and beyond.

6.5. Chapter 6: Conclusion

This chapter set out to examine the International Chamber of Commerce as an NGO with significant global influence. The critical objective was to use the ICC as an example which illustrates one the core argument of this thesis that the increased influence of NGOs in the international plane should result in legitimising their role.

It was observed that authority on the international plane could be effectively distributed. The activities of the ICC over time attests to the possibility and the success of such an approach.

The ICC was reviewed systematically to provide a detailed account of the extent of their influence. Stemming from the core purpose of their existence to promote international trade responsible business conduct, and a global approach to regulations and dispute resolution services; the ICC is well-positioned to act as a conduit for effective governance for the international government community. One of the key rationales for opting for the ICC as an example to illustrate the point of this thesis is that it is an organisation that straddles two of the most influential worlds of global non-state actors -MNCs and NGOs.

Three core activities that the ICC engages with include the establishment of rules, dispute resolution and policy advocacy. The findings of this chapter reveal that in the discharge of its core activity, the ICC has proven to be more effective than state initiative. One of the rationales for this is the composite of the ICC. It is diverse and far-

[516] Kelly (n 456), p. 24

reaching, beyond the limitations that encumber the states. The ICC has members and associates that engage in international business from countries around the world. They can set cross border business standard with such unparalleled authority due to their inherent global nature. However, due to the lack of requisite legitimacy, their roles remain voluntary and lacks the requisite element of enforcement. Consequently, their laws are aptly referred to a soft law because it is voluntary in their form. However, due to the economic persuasion that they wield, the laws are essentially mandatory in their function. Hence, it is ideal to describe them as informal, indirect international lawmakers.

An attempt was made to evaluate the significance of ICC to the argument for reconceptualization. This evaluation was done by considering the ICC from a historical perspective. It was observed that, historically, its role in international policy-making circles has been both latent and dramatically blatant. Instances of its dramatic impact were considered. Its role in dealing with reparations controversy right after the First World War was highlighted. It has been acknowledged that the work of the ICC was instrumental in the success of the Dawes plan, which brought into effect the peace treaty of London in 1924. Another significant impact of the ICC was after the Second World War. Of note is the role it played during the Bretton Wood's conference in 1944 which effectively is the birthplace of the International Monetary Funds, and the World Bank. It has also been referred to as the conceptual originator of the General Agreement on Tariffs and Trade (GATT) which eventually led to the emergence of the world trade organisation decades later.

Finally, the influence and relevance of the ICC to the United Nations are crucial. It was seen in the role it played in revitalising United Nations at the beginning of the 21st Century through the proliferation of the public-private partnership idea during the Geneva business dialogue in 1998. Additionally, its significance is seen in the role it played in the emergence of the UN Global Compact initiative which required businesses to align strategies and operations with universal principles on human rights, labour, environment and anticorruption.

The preceding suggests that the ICC is more than just a pressure group, it also underpins the argument that new forms of diplomacy and global governance has emerged in which NGOs like the ICC play a significant role. These new norms of international governance form the basis of discussion in the subsequent chapter.

7. Chapter 7 – Reconceptualisation – Entrenching Plurality of Norms

Chapter 7 Contents

7.1. Chapter 7: Introduction

The preceding chapter highlighted the emergence of NGOs, and in particular the ICC. The ICC's role in global governance and as an indirect international lawmaker among other examples of its influence on the international plane underscores some of the new norms of the 21st-century international legal system. This development goes to the crux of the arguments that there needs to be a reconceptualisation of international law in a way that reflects these new norms of the 21st century. So, along these lines, this chapter will undertake a study of the development of concept and norms in particular. It will focus on the possible conceptualisation of international law in a way that incorporates 21st-century international norms. Along these lines, it will examine in more detail the concept of state practice and *opinio juris* in the making of customary international law. It will evaluate the dilemma faced in the workings of the two concepts and use it as a roadmap for incorporating 21st-century international norms to reconceptualise international law. Consequently, Article 38 of the Statute of the International Court of Justice 1945 will be systematically appraised.

Additionally, it will review in detail the emergence of new international norms. It will consider their multicentric nature as a pathway to a pluralised international legal context. It is a pluralised international legal context which evolves organically. Some of these will include the norms of standard-setting and soft law as just observed with the ICC.

Furthermore, steps will be taken to describe the 21st-century pluralistic legal environment systematically. First, there will be an evaluation of legal pluralism as the bed-rock of the inclusion of added layers in the reconceptualisation of international law.

Finally, on the premise of the preceding, it will lead an argument for the reconceptualisation of international law by adding layers to the international pluralistic legal paradigm. In so doing, a justification for the legitimised role of NGOs as a significant added layer of governance will be made to the end of keeping international law in step with the 21st-century global realities.

7.2. Reconceptualisation – The Two Paradigms of UN- New York & UN - Geneva

International law evolves or should evolve, in concert with globalisation. Many Scholars have attested to this fact, and given the global realities of today, it can be

said that they affirm the fact that international law has, in reality, though not, in theory, reached a full circle. [517]

It appears that there is a dichotomy between the 'worlds' from the UN New York perspective as opposed to the UN Geneva Perspective. While the former remains a State centric construct, with the General Assembly and the Security Council, the later reflects the reality of today, as it houses most of the UN Specialised Agencies, which are flagless, and are a depiction of a cooperative globalised world.

Further to the publication of the US National Intelligence Council (NIC) –*Global Trends 2030: Alternative Worlds*, [518] there was a wide range of essays that attest to the changing global status quo. In it, there was a specific query by the then Senior Vice President of International Affairs at the US Chamber of Commerce on whether the world is on a path to convergence or a path to divergence.[519] He expressly states the need for a reform of the major International Institutions to accommodate the changing realities of the 21st-Century, or risk the eventuality of obsoleting. He is emphatic as to the point that there will be a global change in the international system. Though, he clarifies that it will not be revolutionary but evolutionary. This evolution is akin to the view of this thesis. This thesis opines that there should be a paradigm shift in the way international law is conceptualised to make it fit for purpose in the 21st Century.

7.2.1. The making of international law – incorporating UN Geneva 21st-century international norms?

Taking the law to be an ontology of norms; the 'kinds' of law can be described as the phenomena through which the norms manifest themselves.[520] These 'kinds' or concepts have stayed static to the Westphalian international law model epitomised by the UN New York paradigm, i.e. the relations of states and the concepts of sovereignty in its limited expression as stated in Chapter 4.

International law and the concepts of its core doctrines, such as sovereignty is central to any change in the construct of the international system, whether as reflected by the Geneva or New York paradigm. These concepts create the legal environment for which the international community can continue to exist and interact. It goes to the

[517] Andrea Bianchi and Professor Robert McCorquodale, *Non-State Actors And International Law* (Taylor and Francis 2009).
[518] Myron Brilliant, 'The World In 2030: Are We On The Path To Convergence Or Divergence? : Global Trends 2030' (*Gt2030.com*, 2012) <http://gt2030.com/2012/05/27/the-world-in-2030-are-we-on-the-path-to-convergence-or-divergence/> accessed 23 March 2020.
[519] Ibid
[520] Jörg Kammerhofer, 'Uncertainty In The Formal Sources Of International Law: Customary International Law And Some Of Its Problems' (2004) 15 European Journal of International Law 523-553, p. 538.

core of the questions that this research seeks to answer; whether there should be a gulf or a disjoint between the realities of the 21st-century international relations or the international system and the theoretical international law. International law, in theory, is still patterned after the Westphalian concept of international law. It has not taken into cognizance the plurality of norms that are replete in the 21st-century international community.

From this plurality, a norm that this thesis seeks to entrench as an international norm is the increasing influence of non-state actors in international relations. The increase of UN agencies in Geneva, which reflect the increasing role of non-state actors in the global governance is central to the position of this thesis, in that it lends points to the argument that the 21st-century realities include the active role of non-state actors, and in particular, NGOs. Most of the UN agencies in Geneva tend to involve NGOs as observers in their decision making. Indeed, there is an acknowledgement of the Influence of NGOs. Still, the position of this thesis is that it is insufficient – NGOs need to be given more than participatory rights than they have in the past, and should in a sense be given declaratory rights.

The plurality of norms should culminate into 21st-century customs, from which international law should evolve. Customs are informed by state-practice or norms of the society. The international society has seen a proliferation of norms and practices which suggest the emergence of new international customs. According to article 38 of the International Court of Justice provides custom is one of the primary sources of international law. It is determined through state practice and *opinio juris*. However, there is uncertainty as to how international custom is formed, particularly concerning its core elements –state practice and *opinio juris*

7.2.1.1. The Dilemma with State Practice & Opinio juris

The question of state practice is one that comes with levels of uncertainty as to precisely what it is. One of the reasons is the lack of clarity concerning the determination of the extent of the longevity of practice to validate the existence of state practice. For *opinio juris,* the challenge also abounds - knowing how one can have a belief that something is already a law in order to create it as law.[521]

This dilemma plays out in that states do not usually issue general opinions on which norms form international law as a result of their state practice. Nevertheless, it is the position of this thesis that state practice ought to be continuously observed for

[521] Ibid, p.523.

international law to evolve. The process by which such observation is made is a different question altogether. The import of this should be that where international custom evolves, the international legal framework ought to align with any such evolution in its custom or the behaviour of the international community. International law should adopt and adapt to such changes within the context of the law, as it is and as it ought to be.

Hence, there is a need for an intentional constant observation because with custom; there is no inherent 'thereness' waiting to be identified and explored. There is no authoritative text that states what a custom is, basically because customs are not written.[522] Also, the determination of how state practice becomes eligible to be classified as a custom is blurred. So the question is whether it is settled state practice that the state's interface with non-state actors and in particular NGOs, and their growing influence is acknowledged. Should this practice result in the sort of *opinio juris* of a paradigm shift, in the manner international law should be conceptualised?

One of the most authoritative sources for determining how state practice constitutes custom can be found in the North Sea Continental Shelf cases before the International Court of Justice (ICJ):

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are especially affected, it should have been both extensive and virtually uniform in the sense of the provision invoked . . ."[523]

From the provision just stated above, the said practice should amount to a settled practice and a belief that the practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[524]

Academics and jurists are more inclined to hold the view that a practice which has been exhibited much longer and consistently by more states than another is more

[522] Ibid, p. 525
[523] *North Sea Continental Shelf, (1969) 3,* [1969] International Court of Justice, 3 ICJ Reports (International Court of Justice) 44, para 74
[524] Kammerhofer (n 520) Law 523-553, p. 534

likely to be considered custom than the later.[525] However, there are dissenting views which opine that the 21st-century international society needs less time and repetition than was previously required to establish customs.[526]

So while the dilemma remains as to longevity, uniformity or consistency needed for establishing customary international law persist. It suffices, in the interim, to ascertain that if there is a known number of precedents on a particular subject matter or behaviour, it should be sufficient to establish the existence of an international norm.[527]

On the other hand, concerning *opinio juris*, it has been considered as the cornerstone for customary international law. However, a clear understanding of it is significantly conflicted when juxtaposed against the apparent nature of customary international law. For instance, customary international law suggests that a custom exists due to its reputation as such, and it is not legislated as are other sources of law. Therefore, trying to marry that with the import of *opinio juris* creates a dilemma. On the one hand, customary law-making is by nature indirect and unintentional; on the other hand, *opinio juris* is, in a sense an intentional activity acknowledging an unintentional activity as law. To put another way – it requires some form of intentional activity, an act of will.

7.2.1.2. Understanding the making of customary international law

Koskenniemi suggests that the challenge with customary international law is that it is indeterminate because it is circular. It assumes 'behaviour' to be evidence of *the* '*opinio juris*' and the latter to be evidence of the 'behaviour' assumed, and these elements are relevant to create custom.[528] Expectedly, the known is used to prove the unknown. For instance, in a criminal case, 'evidence' is typically drawn from factual circumstances to prove the *mens rea* element; being that the *mens rea* exists within the confines of the mind of the accused, which is by nature intangible or unknown. It is the same with the ascertainment of *opinio juris* in customary international law. In essence, it should be deciphered from the evidence of prevalent state practices, but after such ascertainment, is the consent that such practice should be law.

This ascertainment is *opinio juris* in action – a theory which takes customary 'law' to be a manifestation of pre-existing law.[529] It presents no particular problem - the rationale

[525] Ibid 523-553, p. 538
[526] Karol Wolfke, *Custom In Present International Law* (Nijhoff 1993), p.60
[527] Kammerhofer (n 520) Law 523-553, p. 537
[528] Martti Koskenniemi, 'The Politics Of International Law' (1990) 1 European Journal of International Law 4, p.26; see also Martti Koskenniemi, *From Apology To Utopia : From Apology To Utopia: The Structure Of International Legal Argument* (Cambridge University Press 2015), first publish in 1989, 60;
[529] Raphael M. Walden, 'The Subjective Element In The Formation Of Customary International Law' (1977) 12 Israel Law Review 344, pp 357-359.

being that the belief in a law that already exists is not constitutive but declaratory. The prevalent role of non-state actors, and in particular NGOs, in the relations of the international community, including the extent to which all stakeholders feel a sense of obligation to abide by the agenda proffered by these actors, is suggestive of the existence of a kind of law. Hence, along these lines, it could be said that the thrust of this thesis is not asking for a reconceptualisation of international law in a way as to constitute a new legal framework. Instead, in a declaratory way, to bring the conceptualisation of international law to align with the realities of its practice, and to legitimise that process.

Therefore, the making of international customary law is inherently paradoxical, or as Koskenniemi put it, circular and indeterminate. Raphael Walden, suggest that the needed consent that practice is law is not an active one but a tacit one[530] - implying that consent ought to be inferred and known behaviour should naturally constitute international customary law. Given the preceding, the practice of the international community and influential NGOs across various sectors, as seen in previous chapters, should be perpetually observed and call for a rethink of the international legal order. It suffices that the practice is consistent and is known. It is not always the case that all states or even the majority of states actively play a significant role in the making of anyone norm of customary international law. So as has been argued, it is, at times, the case that the 'inert mass' of non-participating states acquiesce, by the 'qualified silence', to the creation of customary law.[531]

7.2.1.3. Reconceptualisation and Customary international law: Examining Article 38

The challenge with the understanding of the process of customary international law mirrors the problem of international law as a whole; the lack of a 'thereness'[532]. There is no perceptible constitution of international law, and this poses a more significant challenge for its evolution as it appears to evolve arbitrarily. Questions abound as to what is an accurate depiction of the formal sources of international law. There are positions held which do not align with the position that Article 38 is the 'foundation for

[530] Ibid p. 355
[531] I.C MacGibbon, 'Customary International Law And Acquiescence' (1958) 33 British Yearbook of International Law, p.115.
[532] Kammerhofer (n 520)

the doctrine of the sources of International Law'.[533] Alf Ross comes to this conclusion because for him the sources of law are themselves not based in law, but facts.[534]

Consequently, it can be appropriately inferred that to determine the validity of a norm, if the process of its emergence is one that is recognised in a normative order, that normative order could be considered as a source of that norm's binding force. So, the North Sea Continental Shelf case[535]is considered alongside the provisions of article 38[536] which provides that customs emanate from state practice and *opinio juris;* it follows that 21st-century global state practices should be taken into cognizance when considering the conception of international law. The acceptance of such practices is aligned with the process of customary international law. Therefore, such acceptance should be the premise for those 21st-century global state practices having the requisite binding force that the normative order of the international legal system brings under article 38.[537]

Hans Kelsen, in his Principles of International Law (1952) postulates that customary international law is the highest source, international law's grundnorm is simply –

> 'The states ought to behave as they have customarily behaved.'[538]

The norm 'pacta sunt servanda', as the grundnorm of the subordinate legal order 'international treaty law' is, according to Kelson, merely a norm of customary international law. Today, states and other international actors, as was discussed in previous chapters, have engaged and abided by standards which are created by NGOs. Some of the NGOs which were cited include the ICC or ICANN, et cetera. Hence, it is plausible that a call for a paradigm shift in the way international law is conceptualised in order – a process where the socio-normativity is transformed into law by calling it law.[539]

As mentioned earlier, a notable attribute of the sources of international law is that no constitution is apparent. There is not a law which stipulates the formation of international law, nor any which prescribes the form which international law should

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[533] Alf Ross, *A Textbook Of International Law* (Longmans, Green 1947), p. 83
[534] Ibid; see also Jörg Kammerhofer, 'Uncertainty In The Formal Sources Of International Law: Customary International Law And Some Of Its Problems' (2004) 15 European Journal of International Law 523-553, p,541.
[535] *North Sea Continental Shelf Case* (n 523)
[536] Article 38 of the Statute of the International Court of Justice 1945.
[537] Ibid
[538] Hans Kelson, *Principles Of International Law* (1952). p 418; see also Jörg Kammerhofer, 'Uncertainty In The Formal Sources Of International Law: Customary International Law And Some Of Its Problems' (2004) 15 European Journal of International Law 523-553, p,548
[539] Ralf Seinecke, 'Nomological Legal Pluralism', *INTRAlawConference Aarhus,* (2018) p. 11

take. Instead, the practices of states have been observed and used as the premise for the international legal order. It has been observed that the idea of human behaviour and events, or in this context, the practice of states, being endowed with legal meaning—possessing immanent or ascribed legal sense—was a noteworthy perception of Kelsen.[540] The challenge is that the observation of these behaviours does not seem to have continued. Thus, the legal ascription of states behaviours as the law has stayed static. They have not moved beyond the doctrines that emerged from early state practices of the Westphalian times and have stayed so posited as law. These positive laws, which have emanated from non-positive orders have been imposed as the framework of the international legal system and appears to have blocked the chances to consider other concepts from the same prism of international law in the 21st- Century. Domestically, countries which have a written constitution might be not burdened by the same conceptual challenge of what the grundnorm is. However, it should be noted that even at that level, the liberation from such burden is more pragmatic than theoretical, because, domestic legal systems encounter the same legal theoretical problems as to what is the source of the said grundnorm. Kelsen recognized that the chains of validity do not regress indefinitely, and one will ultimately run out of higher authorizing valid norms.[541]

7.3. Acknowledging new international norms

Firstly, this will be considered from the viewpoint of acknowledging new international norms. It has become apparent that new norms have evolved in the international community. New trends in governance, patterned in ways which are slightly different from what was the norm in a typical Westphalian international construct. The realities of the new patterns of governance in today's international political system are increasingly complicated. As discussed earlier, there has been an increased mutuality of interests and concerns. This convergence of interest has increased the need for compromise and the need to adjust traditional positions, transfer new knowledge and patterns from one body to another, exchange resources and generally adapt in function to the demands of a knottily woven international policy-making milieux.

As pointed out in preceding chapters, due to the globalisation of the international space, the existing governments domestically and international have devised ways by which they could be more strategic and tactical in their dealings with themselves

[540] Hamish Ross, 'Hans Kelsen And The Utopia Of Theoretical Purism' (2001) 12 King's Law Journal, p.180.

[541] Hans Kelsen and A. Javier Treviño, *General Theory Of Law & State* (trans Andes Wedberg 1945), See also Aaedraa Upadhyay, 'The Grundorm Vis A Vis International Law' (2017) 4 International Journal of Law and Legal Jurisprudence Studies <http://ijlljs.in/the-grundnorm-vis-a-vis-international-law-aardraa-upadhyay-semester-6-hidayatullah-national-law-university/> accessed 28 March 2020.

and other non-state actors, particularly NGOs. The NGOs, on the other hand, have also devised ways to corporate and embark on joint ventures together. In reality, traditional patterns of international relations are giving way to the growing influence of other non-state actors. However, theoretically, the international legal system has managed to stay static to the Westphalian ideology.

7.3.1. Multicentric norms

Beyond just the relationships of governments and NGOs, which is one of the focus of this thesis, it may be helpful to see that the changes which have occurred in the relations of governments with NGOs extend to all other non-state actors. For example, the traditional state-centric norm of international relations faces increasing academic literature on the engagement of the business community with the international community across national boundaries, emerging as new subjects.[542]

Today's perception of international relations and diplomacy no longer conjures only an image of the state-centric notion of states relating to states across national boundaries. Instead, it includes a multicentric environment where there is an increasing relationship between states and non-state actors. This multicentricity is the introduction of a new norm and a pluralised international legal framework. This new norm and pluralised international legal framework is removed from the previous monopolised framework. Previously, only states were the key stakeholders, agents and negotiators. Today, all actors in the international plane, states and non-states alike, have adapted their behavioural patterns to reflect the new norm of this global reality and demands for multilateral international diplomacy. This adaptation has been somewhat organic and is a reflection of the 'unintentional' natural response of the various actors to the persuasive factors of globalisation. As mentioned earlier, this is a clear example of state practice and *opinio juris*.

Therefore, these new norms and the concept of this plurality of the international legal framework are more evident in the increasing participation of the Non-Governmental Organisation in global affairs and international relations. This new norm is premised of a variety of movements and initiatives of the global civil society and the business society. As a result, there is an intricate interaction between the various actors in the international plane, leading up to this new phenomenon or new norm removed from the previously known attributes or traits of the international community in the earlier phases of the Westphalian legal framework.

[542] Rainer Hofmann and Nils Geissler, *Non-State Actors As New Subjects Of International Law* (Duncker & Humbolt 1999).

This has led to an increased variety of terminology which attempts to connote these new norms, including multilateralism, associate diplomacy or minilaterlism, and polylateralism. Multilateralism refers to a situation in which several different countries or organisations work together to achieve something or deal with a problem.[543]Associative diplomacy or minilaterlism is a form of multilateral diplomacy between a group of countries and organisations, which may also be non - governmental or other entities in global politics, which focuses on precise matters.[544] More importantly, polylateralism applies in cases where there is the incorporation of transnational actors into the mix. Polylateralism is a term that was coined to represent the participation of non-state actors in the conduct of international relations[545]). The underlying point with all of these concepts, which are on the increase is that the international space has undoubtedly moved beyond exclusive bilateral based relations and regulatory framework on the international plane. Rather, the regulatory environment is more intricate and involves an increased variety of actors.

7.3.2. Standard-settings & soft law norms

Non-state actors, including NGOs as was seen in the example of the ICC, have been able to influence the outcomes and policy-making processes of the governments and the international agenda on related topic areas. These non-state actors have been systematically interleaved into the international policy processes, being more or less akin to global governors through the emergence of sectorial standards-setting and self-regulatory processes as a new norm in the international polity. It is within this current context that this thesis evaluates the traditional conceptualisations of a Westphalian international legal framework.

Therefore, there is an increasing quest for the development of new systems or structures, whether completely novel or a hybrid of the existing norm and the new norms, which would form the new international legal framework that is inclusive in its outlook. The process of international law-making today cannot be removed from the process of international standards making across industry sectors; even though the

[543] 'MULTILATERALISM | Meaning In The Cambridge English Dictionary' (*Dictionary.cambridge.org*) <https://dictionary.cambridge.org/dictionary/english/multilateralism> accessed 29 August 2019.
[544] Moises Naim and others, 'Minilateralism' (*Foreign Policy*, 2009) <https://foreignpolicy.com/2009/06/21/minilateralism/> accessed 29 August 2019.
[545] Rina-Louise Pretorius, 'Polylateralism as Diplomatic Method: The Case of the Kimberley Process, 2000-2002' (Master of Diplomatic Studies, Universityf Pretoria 2011).

former primarily involves the states, the latter is on the increase but is faced with the challenge of adequate enforcement powers.

Today, both the states and the non-state actors' role in forming the policy-making environment are interdependent. To a large extent, the success of this process lies in the capacity of states and non-state actors to work with mutual respect to the international regulatory environment. This mutual respect includes validating the role of the non-state actors, and in particular, the NGOs, with some legitimacy. The impact of this is that it will make regulations which were facilitated by these non-state actors more than mere soft law with no force, at least in theory.

7.4. Describing the 21st- Century international pluralistic legal environment in reality

In reality, the international legal environment is pluralised. It is challenging to describe term - legal pluralism. An apt definition is as provided by Seinecke -

> "Legal pluralism means that more than one law is observed at the same time in the same space".[546]

Today's ideal description of the international legal framework is a conundrum of a collection of non-hierarchical relationships of a symbiotic nature. It engages the various players on the international plane who have like constituents and interests in one form or the other and believe in the potency of synergy and cooperation beyond national boundaries.

This phenomenon of globalisation has buttressed the loopholes of governments in the carrying on of their activities independently or in synergy with others. Particularly, in terms of their scope of activity, speed of response to global issues and range of contacts. It reveals that for the most part, the governments might have fallen short in addressing global issues adequately, especially when they act exclusively. The emergence of public-private partnerships further underscores these deficiencies of governments to which other actors can fill.[547]

This view has been further supported by the views of scholars including Kelly and Reinicke in the *Business of Diplomacy* and Global *Public Policy* as follows -

> *"It is not that multigovernmental institutions are irrelevant but that the more diverse membership and non-hierarchical qualities of public policy*

[546] Ralf Seinecke, 'What Is Legal Pluralism And What Is It Good For?', *Legal pluralism – qui bono?* (2015).
[547] Kelly (n 456), p. 9

networks promote collaboration and learning and speeds up the acquisition and processing of knowledge. What [Reinicke] terms' vertical' subsidiarity in which policy-making is delegated within public sector agencies, has to be supplemented by 'horizontal' subsidiarity through outsourcing to non-state actors."[548]

Therefore, given the preceding, it is apparent that the aptest description of the new norm of governance on the international space is primarily a system of legal pluralism. However, this has not been acknowledged theoretically.

The term has been used quite frequently and is mostly a common catchphrase in contemporary legal theory, which cuts across the entire strata of the international society. Ironically, it is one of those terms that is prone to be easily misunderstood. This thesis opines that within it lies a possible solution to the theoretical disconnect between the Westphalian international legal framework and the reality of the globalised 21st Century, and therefore, the bedrock of reconceptualisation.

The term' legal pluralism' is a bit of an enigma, mainly because of the pluralised way by which it is used. One of the best comments on the term and attempt to define it comes from Ralf Seinecke who stated that legal pluralism is part of a terminology struggle rather than a descriptive word.[549] Hence, in practical terms, it entails the struggle of concepts and the attempt of distinguishing between terms such as – rules, laws, legal, customs, norms, regulations, et cetera, while trying to decipher their co-existence.

7.4.1. Examining Legal pluralism as the bedrock of the inclusion of the order of NGOs in the reconceptualisation of international law in the 21st Century

Given the definition of the term given earlier, it is noteworthy to highlight specific keywords employed in Seinecke's definition – *more than one law is observed at the same time in the same space.*'[550]

Firstly, the import of this definition is that the law is pluralised, i.e. more than one, meaning that it goes beyond the singularity of the law. It underpins the reality of the 21st-century international legal framework which straddles more one legal system,

[548] Ibid; See also, Daryl Copeland and Wolfgang H. Reinicke, 'Global Public Policy: Governing Without Government?' (1998) 53 International Journal, pp. 89 & 229l; Wolfgang H. Reinicke, 'The Other World Wide Web: Global Public Policy Networks' [1999] Foreign Policy, p.46
[549] Seinecke (n 546)
[550] Ibid

including some entrenched systems, which are very fluid and even unrecognised. Hence, it is not far-reaching to extend the concept of legal pluralism to include scenarios like the legal framework of the United Nations.[551] And within the UN, the divergence of frameworks between the Security Council, General Assembly and the Economic and Social Council. All of these core organs, being situated in New York, representing the New York paradigm. Beyond the UN organs are the various global governance structures of various inter-governmental organisations and agencies, including the World Trade Organisation, the International Telecom Union, The World Intellectual Property Organisation, the International Organisation for Standardisation, World Health Organisation, International Labour Organisations, and the many others, mostly situated in Geneva Switzerland. Beyond these, are more legal frameworks, which are industry-focused, and they are driven by unions of industry and Non-Governmental Organisation. The list goes on and on. Hence, the international plane is a nest for brooding the concept of legal pluralism.

Secondly, looking back at the definition of legal pluralism which implies that it goes beyond the singularity of the law, then it is essential to explore what the term 'law' connotes in the context of this definition. The term 'law' could conjure up different labels and concepts. It could include notions like legal systems, legal principles, precedents, rules, regulations, rights, et cetera. Again, further explorations of the term legal pluralism suggest that there is a multiplicity of laws in force at the same time within the same location. The depiction of the international plane and the various organisations and the various law/standards that they represent within the same global space reaffirms the position that the term legal pluralism is an accurate description of the current international legal framework.

The concept was comprehensives presented in the paper - Nomological legal pluralism by Dr Seinecke at the INTRAlaw conference in Aarhus Denmark, in 2017.[552] Here 'law' is described as a 'nomos'. Robert Cover depicts thus –

> "We inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. […] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution, there is an epic, for each Decalogue a scripture. Once understood in the context

[551] Bethlehem (n 2)
[552] Seinecke (n 539)

> of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[553]

In the background of this canvas, 'law' can, therefore, be described in two levels. On one level, as a nomos. On the other level, in a narrower sense, as embedded within the broader context, its nomos, i.e. the legal texts, legal doctrine, legal institutions, legal education, legal exams that exist within the broader context of its nomos - legal culture, for example, the role of judges, legal methodology, legal science, legal practice; legal ideology (world view), for example, democracy, the rule of law, liberalism; religion in law, for example, the sovereignty of God, the patterns of faith and salvation; legal orders (organisation of society), supranationalism, the order of states, regions, businesses, NGOs, individuals, et cetera. On this premise, legal pluralism was described as follows –

> "Legal pluralism is the interaction between a first, dominating nomos of law and a second, alternative nomos of law. Legal pluralism is the nomos of nomoi."[554]

Drawing from this description, it is evident that the law exists within several competing law constellations. For example, private law and public law; sources of law, including codes against customary law or case law or vice versa. There are competing jurisdictions between courts, competing competencies between state powers, i.e. legislature against judiciary or executive or vice versa; competing powers of institutions. There are also competing legal and non-legal norms, expressed in the factual inoperativeness of the 'official' law. So these plays out in instances of socially approved disrespect of state law within certain quarters (e.g. the Mafia, Taliban or Daesh); religious arrangement with state law (e.g. in canon or Jewish law); and traditional or indigenous laws competing with codified law (e.g. the Bukowina).[555] There is also the many traditions inside one legal order. For example, there is the 'Roman' and 'Germanic' roots of the German BGB in late 19th Century; traditional, religious, colonial, or modern state origin of law in Indonesia; the hybrid influence of common law and Roman law in Scotland.[556] With this premise, this thesis seeks a paradigm shift in international law, only to the extent of adding another nomo to the nomoi which incorporates the legal role of non-state actors, and in particular NGOs

[553] Robert M. Cover, 'The Supreme Court, 1982 Term Foreword: Nomos And Narrative' (1983) 97 Harvard Law Review, p. 4.
[554] Seinecke (n 539, p. 20)
[555] Peter Mahmud Marzuki, 'The History Of Indonesian Law In An Introduction To Indonesian Law' (*Bphn.go.id*) <http://bphn.go.id/data/documents/thehistoryofindonesianlaw.pdf> accessed 30 March 2020.
[556] Seinecke (n 539, pp 23 -26)

in the conceptualisation of international law. This paradigm shift will bring put it in concert with the 21st-century legal realities. Along these lines, Eugen Ehrlich stated as follows -

> "The centre of gravity of legal development; therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time."[557]

It follows to align with the position that the reconceptualisation of international law can be amply explained using the concept of legal pluralism, which depicts the journey of law from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states. Moreover, now, it needs to continue on that road focus its attention on a new body of law that emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation-states.[558] Legal pluralism is evident across various territories, the international society, the economic and social systems and the religious sects of the international community, et cetera.

7.4.2. The different expressions of legal pluralism

Furthermore, many phenomena go by this label – 'legal pluralism', due to the subjective bias that comes from it being an observed concept. As mentioned earlier, 'law' continues to evolve as its constituents evolve. This line of thought is one of the cornerstones of the jurisprudence of customary law. In essence, the longevity of practice and the plurality of practice gives it some moral credence and often the informal legitimacy as the consensus law of the people. The evolution of society must continue to be observed and stay open to transformation. One of the bedrocks of a pluralistic legal order is that it is dynamic and open to new norms. However, the new norms have to be underpinned by principles and practices that could align well with the intendment of the term 'legal' or 'law'. So, while legal pluralism must be liberal and democratically underpinned, it must intrinsically be 'law' or a means to justice, at least in its philosophy. Expectedly, the concept thrives within the context of various non-state actors. It is primarily so, because states, hold the view that they have the monopoly of what 'legal' or 'law' is or is not, and the clarity of state's description of law

[557] Max Rheinstein, 'Sociology Of Law. Apropos Moll's Translation Of Eugen Ehrlich's Grundlegung Der Soziologie Des Rechts' (1938) 48 The International Journal of Ethics.

[558] Gunther Teubner, 'Global Bukowina: Legal Pluralism In The World Society', in Gunther Teubner (ed) *Global Law Without a State* (Dartmouth 1997) 3, p.4.

comes from the singularity of its source and its existence. However, this position is not as tenable when viewed within a globalised paradigm.

7.4.2.1. States' context

The reality of the globalised worlds is that beyond the nation-states of the Westphalian era or the pre-modern worlds are many instances of stateless laws. An example of this could be gleaned from the colonial era, where the indigenous communities of the colonial era, contended with the laws imposed by the states, run by the colonialist, and the norms of traditions which are stateless and agreed indigenously. This presents the dichotomy between the law as it ought to be – posited by the state, and the law as it is as made by the prevailing norms of the society. The import of this is that these two sets of laws run simultaneously and somehow, the indigenes of such communities manage to find the balance.

Another instance is the legal system within a state context, for example, the federalised system of governance. As pointed out earlier in Chapter 4, the federalised system of governance is an expression of a pluralised system of legal governance. There is a myriad of laws which existed besides the law of the centre. An example of the extent to which legal orders are pluralised within the domestic purview will be the example from the studies by Franz and Keebet von Benda-Beckmann of the law of indigenous communities in Indonesia.[559] An examination of the legal order in Indonesia elaborates on these points. The legal order of Indonesia reveals that the extant law in the communities therein is formed by no more than five legal orders. They include their legal traditions, also known as the Adat, the Islamic proselytisation commonly referred to as Sharia law, the laws from the influences of the Dutch colonial regime.[560]

7.4.2.2. Religious context

Another instance of the legal pluralism within communities is in the religious context. The multiplicity of legal orders in a society with religious influences is typical of legal pluralism. Some examples of this include sharia law to cannon law. Interestingly, the legal system from the religious context precedes the Westphalian legal order, and it appears that the global polity is going full circle to return to the pre-Westphalian age

[559] Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, And The State' (2018) 50 The Journal of Legal Pluralism and Unofficial Law; See also Ralf Seinecke, 'What Is Legal Pluralism And What Is It Good For?', *Legal pluralism – qui bono?* (2015).

[560] Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, And The State' (2018) 50 The Journal of Legal Pluralism and Unofficial Law; see also, Peter Mahmud Marzuki, 'The History Of Indonesian Law In An Introduction To Indonesian Law' (*Bphn.go.id*) <http://bphn.go.id/data/documents/thehistoryofindonesianlaw.pdf> accessed 30 March 2020.

where stateless legal orders were preeminent. In furtherance of the examination of the existence of legal pluralism within various segments of the international and national communities, is the legal orders in a religious context.

An example is within the Jewish community, which practices the halakha law. The halakha law operates a pluralised system in the dispensing of its law and expectations. Hence, there is an internal adherence to the law and resolving of dispute for the sake of heaven. However, there is the external disposition of the law, which relates primarily with non-Jewish or even anti-Semitic territorial states and empires.[561] The Vatican and the co-existence of its laws alongside the law of Italy as a state is another example. It was before its seeming divorce from the Italian laws. According to a BBC report, Vatican legal experts have expressed their concerns with the multiplicity of laws in Italian civil and criminal codes and the ongoing inconsistency that the laws have with the positions of the Church. They held the view that the laws are sundry and often at variance with the moral teachings of the Catholic Church. For example, if Italy were to legalise same-sex marriages or euthanasia, for example, the Vatican would hardly be disposed to recognise those laws. This discrepancy between both systems led to the decision that the Vatican will no longer automatically adopt laws passed by the Italian parliament, but would now require pensive scrutiny before they are adopted and are applicable in the Vatican.[562] As a result, the Vatican removed from the previous status quo under the Lateran treaties between Italy and the Pope where the Vatican operated something akin to a monist system, where the laws passed in the Italian parliament immediately becomes law in the Vatican.[563]

7.4.2.3. Lex Mercatoria and other socio-economic context

Another instance of legal pluralism exists within a more fluid context – the socio-economic context of the international plane. Most multi-national corporations are motivated mostly by economic standards and regulations beyond states laws. It goes back centuries in history with the '*Lex Mercatoria*' which governed merchants from the medieval age. Merchants came up with what they referred to as the law of merchants, which eventually led to the creation of the English mercantile law, and has evolved to what is today referred to as commercial law. Some scholars have described it as follows -

[561] Seinecke (n 546)
[562] 'BBC NEWS | World | Europe | Vatican Divorces From Italian Law' (*News.bbc.co.uk*, 2009) <http://news.bbc.co.uk/1/hi/world/middle_east/7807501.stm> accessed 7 September 2019.
[563] Ibid

'a form of immemorial custom, which by familiarity was eventually noticed by the common-law judges in the same way as the customs of gavelkind and borough English were judicially noticed, before 1926, without formal proof'.[564]

Another way of putting it is that it is a norm that has been in existence for centuries, and it appears the international legal system within this context is turning full circle. For example, the International Chamber of Commerce, who, being underpinned by economic priorities, have been very pertinent to the creation of global international regulations/ standards that mostly have an 'economic' bend to it.

In the postmodern 'leges' there are some other legal communities, which have erupted organically from the globalised human community, such as the *Lex Sportiva*[565] or *Lex Digitalis*.[566] Although, the *Lex Mercatoria* seem to have transcended ages to maintain its relevance in a postmodern legal order; evolving into organisations like the Intentional Chamber of Commerce and establishing its authenticity autonomously. Today, there are establishments like the ICC International Court of Arbitration in Paris, the Vienna International Arbitration Centre, the Internet Corporation for Assigned Names and Numbers (ICANN), FIFA[567], et cetera. These have been more likely because of the flagless nature of a common cause or of profit. These economic exigencies, whether with the modern-day ICC or the Medieval *Lex Mercatoria,* create these regulatory standards and though they may not necessarily have the force of the law, they are often more effective than the extant law in place. Buttressing the point that there is in existence legal pluralism and the international legal context just need to acknowledge what already is essentially in existence. Hence, it follows the Shakespearian quote in the fiction - that a rose by any other name would still smell as sweet.[568] The essence of the international legal system in the 21st Century operates in a way that in practice, incorporates all players in the legal process but only lacks in appending the accurate appellation to the 21st-century realities on the international legal process.

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[564] J. H. Baker, 'The Law Merchant And The Common Law Before 1700' (1979) 38 The Cambridge Law Journal.

[565] The FIFA Statutes help provide the basic laws for world football, on which countless rules are set for competitions, transfers, doping issues and a host of other concern. – See 'Who We Are - FIFA.Com' (*www.fifa.com*, 2020) <https://www.fifa.com/who-we-are/> accessed 30 March 2020.

[566] Jan Klabbers, *Finnish Yearbook Of International Law, Volume 19, 2008* (Hart Pub 2010) p. 316

[567] The Fédération Internationale de Football Association (FIFA - French for 'International Federation of Association Football), is an NGO which acts as the highest international governing body of association football, fútsal, beach soccer, and efootball – See 'Who We Are - FIFA.Com' (*www.fifa.com*, 2020) <https://www.fifa.com/who-we-are/> accessed 30 March 2020.

[568] William Shakespeare, *Romeo & Juliet*, Act 2 Scene 2

7.4.2.4. Supranational context

Beyond the internal legal systems, there is the supranational context. As was discussed earlier, there is the principle of subsidiarity. It is best seen in the context of the European Union and its relations with the member states.[569] However, there have been significant controversies on the questions of sovereignty. It is another example of contention of states on the notion of sovereignty and legal pluralism.

The complexity of the international legal framework by default is a breeding ground for the plurality of the legal space. Within the existing state-centric structures of international law, some fragmentations inevitably allow for a plurality of the international legal environment. For example, inter-governmental organisations, have created systems within their purview that allow for a pseudo-legal system that operates in a manner akin to the regular state-driven legal systems, structures and hierarchy. Today, there are different types of dispute settlement bodies which have the same force of the law, even though they are not laws, nor are they necessarily creations or initiatives of the nation-states. Most of these inter-governmental organisations have their headquarters situated in Geneva.

The preceding underpins the position that at the very core of human existence, and every stratum of the global community, from the nation-state level to the international level, is the anchor of inter-legality. There is no gainsaying in expecting to see a collection of norms or even like-structures; organised in a way that naturally produces a legal structure which coexists *pari-passu* the state-driven laws, and at times, involuntarily complements or undermine the official state's legal order.

7.5. The desired legal effect of acknowledgement of the role of NGOs as one of the norms or layers of a pluralised international legal order of the Global Community

A good understanding of the concept of legal pluralism, particularly for reconceptualising international law and opening up more room for added layers of today's international legal paradigm is paramount. In doing this, the role and legitimacy of non-governmental organisations and the civil society is a significant milestone to reach in the intended paradigm shift which seeks to underpin an already

[569] Seinecke (n 546)

existing practical venture theoretically. The role of NGOs is yet abstract and still to be legitimised or theoretically acknowledged.

The NGOs, play a pivotal role in determining the character of a pluralised international legal framework, as well as the representative nature of such a framework. This pluralised nature suggests that there would be diverse worldviews and philosophies, and it behoves on a coalition of NGOs to present a clear roadmap for an international legal framework that takes into consideration the diverse global perspectives. The concern is how NGOs could coalesce the length and breadth of a diverse global community. Coalesce into one legal order - the dominated and the dominating societies; the strong and the weak societies; the majorities and the minorities, with each sect of the global community having to justify the legitimacy of their 'otherness' in order to have a clear representation in the refurbished international legal framework.[570] The global relativism is pertinent to the practicality of reconceptualisation in a way that elevates the role of NGOs.

There could be views that a reconceptualisation is a utopian endeavour, which is inherently impossible. A good response will be to avert one's mind to the dichotomy within the UN structure as represented by New York and Geneva. UN New York is reflective of the current theoretical Westphalian legal framework, as headquarters of the general assembly, i.e. the states. UN Geneva is representative of a more pluralised global community. It consists of the headquarters of most of the international intergovernmental institutions. What is sought by this research is to explore ways to enhance and move the 'Geneva' ideology forward and bring it more in sync with the global realities. The current Geneva layout is evidence that there is room for further progress in that direction.

7.6. Chapter 7: Conclusion

The chapter set out to undertake a study on the concept and norms with the focal point being conceptualisation of international law in a way that incorporated 21st-century international norms. It determined law as an ontology of norms which culminate into various legal orders. To this end, the international legal order of the United Nations New York paradigm was compared with the international legal order of the United Nations Geneva paradigm. These two legal environments were observed as a kind of allegory to the paradigms examined in this thesis; the state-centric order as opposed to a multicentric order. So, along these lines, it was shown

[570] Ibid

as a reflection that highlighted the disconnect between the Westphalian international legal order and the realities of the 21st Century legal order. It was revealed in that the state centrism that was obtainable in the Westphalian international legal order is akin to the construct to the United Nations New York construct being the hub of the General Assembly and the Security Council which are essentially a collection of states. On the other hand, there is the non-state multicentric reality that is obtainable under what could be referred to as a 21st-century legal order. It is akin to the United Nations Geneva construct being a hub for non-state actors and intergovernmental organisations.

Additionally, it went on to evaluate the making of customary international law with the view to extrapolating the process of its making to the objective of this thesis, i.e. reconceptualise international law. In this context, it considered the concept of state practice and *opinio juris* as provided on the article 38 of the Statute of the International Court of Justice. The dilemma with both concepts was extensively considered, particularly in resolving the question of how one can have a belief that a pattern of behaviour is already law in order to make it a law. This indeterminacy was also premised on the lack of clarity of the 'thereness' of custom. In that custom is considered law, a source of law, and the process by which international customary law is made. The otherness of custom is reflective of the otherness of the practices of the NGOs and non-state actors in the order of the international legal system. So, it was submitted that the practices of the non-state actors in the international communities already existed and thus should be observed as a custom which further to the concept of *opinio juris* should also constitute an international customary order. To this end, it is the position of this thesis that it does not canvas for a reconceptualisation of international law in a way that constitutes a brand new legal order. Instead, to engage with reconceptualisation from a declaratory perspective. It is a reconceptualisation of international law that seeks alignment with the realities of international practices or customs and legitimises that process.

Along these lines, it observes that today's perception of international relationship and diplomacy no longer conjures an image of a state-centric notion of international relations. Instead, it revealed a multicentric environment where there is an increased relationship between state and non-state actors. These create new norms of multicentricity in the international community. It gives rise to a pluralised international legal framework.

In this process of examining this pluralised international framework, different expressions of legal pluralism were examined. This analysis was done to show the likelihood of a reconceptualisation goes beyond the remit of possible to probable. Examples include legal pluralism in the state context which plays out in systems like federalism and dissolution. Secondly, legal pluralism in the religious context was illustrated in the co-existence of the Vatican law and the law in Italy. Thirdly, legal pluralism in the socio-economic context which goes back centuries in history with the existence of the Lex Mercatoria which governs Merchants from the medieval times. It was observed that this was the antecedent of the standard-setting role of the ICC. This role was discussed more in chapter 4. In the fourth place, legal pluralism in the supra-national context was highlighted, with examples like the United Nations and the EU and the principles of subsidiarity.

Finally, the preceding reiterates the argument of this thesis that the international community is a multicentric community with various layers of legal systems. The plurality of the legal systems around the world lends to the position that international practices, such as the increasing role and practices of the NGOs, should be taken into consideration in the reconceptualising the international law.

8. Chapter 8 – Conclusion

Chapter 8 Contents

8.1. General findings

This research set out to consider the question, whether the reconceptualisation of international law from a state-centric Westphalian paradigm, to a more inclusive concept, is pivotal to making it more fit for purpose in the 21st Century. Further to this question, it also considers how NGOs are central to this paradigm shift.

These questions were posed to establish the need for a paradigm shift in the conceptualisation of international law from its limited state-centric Westphalian design to a more inclusive 21st Century conception using the increasing global presence, work, and contributions of NGOs as an example. To these ends, steps have been taken to systematically resolve these questions; establishing the need for the paradigm shift and the central role of NGOs in this process.

Along these lines, the following steps were undertaken. Firstly, it examined the concept of international law. It investigated its processes and established that traditional-Westphalian inspired paradigm of international law is incapable of providing a contemporary understanding of today's international legal context of increased non-state actors, particularly NGOs.

Secondly, it highlighted the deficits of the Westphalian concept of international law in a 21st-century construct; evaluating the concept of sovereignty and its fitness for purpose against factors calling for a rethink of the concept.

Thirdly, it critically examined the process of reconceptualisation and how it relates to the notion of sovereignty to the end of depicting sovereignty in its full essence; positing that delegated sovereignty does not compromise its efficacy but instead reveals it in its full essence.

In the fourth place, it set out to investigate the emergence of NGOs, their increasing influence, and critique the extent to which they are legitimised on the international plane, particularly in their relations with the United Nations, because of the apparent disconnect between their participation and their influence.

In the fifth place, it showed the International Chamber of Commerce as an example of the growing influence of NGOs, and as one of the increasing informal international lawmaker. It highlighted its composition and workings as an added impetus to the argument that new forms of diplomacy and global governance on the international plane have emerged, and should be considered more seriously.

Finally, it considered the norms of international law and the making of customary international law; with a focus on state practice and *opinio juris*; reconceptualising international law by examining the concept of plurality of norms and the international legal order as a bed-rock for the inclusion of added layers of international law in the 21st Century.

8.2. Breakdown of findings

As was pointed out in chapter 2, the continued relevance of the Westphalian concept of international law is shown to be hinged on the prominence of state on the international plane. This status quo showed in the light of 21st-century realities exposes the inadequacies of that concept. The proliferation of non-state actors emphasises these points. It was shown that NGOs are increasingly taking a more prominent role. The argument that the international legal system is intrinsically different from that of the state, and so the approach to the legal order of the international community should reflect the peculiarities of the international community. Hence the apparent absence of the state-like legislature, executive and the judiciary on the international plane point to the fact that the international order should take into cognisance the multicentric nature of the international community in the constitution of the international legal order.[571]

In the examination of the process of international law, the concepts of state practice and *opinio juris* were assessed. Also, the relevance of the doctrine of consent and the role of politics in making international law was considered. They were considered in light of the expression of sovereignty. These elements of consent and politics were shown to exist exclusively within the remit of states. Also, it was argued that the viability of Westphalian international law is centred on the question on the status of states as the only subjects of international law at the detriment of other actors on the international plane as mere objects. However, the likelihood that such a status quo will thrive in the 21st-century was untenable, as it was found that there is a proliferation of non-state actors, and there is an increase in their global influence. So, although non-state actors are classified as objects at law then *de jure,* they are, in fact operating as subject *de facto*. It gives credence to the argument that the theory of the international legal context is not in keeping with the changing global practices.

Furthermore, on this premise, chapter 3 examined the deficits of the current theoretical basis of international legal relations, being far removed from the practical

[571] Oberg (n 56)

occurrences of the international community is examined. This line of arguments supports the point that arises from the first prong of the research question sought to clarify– whether the current international legal framework is fit for the globalised world. It was shown that the world was progressively departing from the state-centric disposition to a more pluralised outlook with the emergence of globalisation.

Along these lines, the findings revealed that some core characteristics of sovereignty had been ousted by factors of globalisation. Emphasis has been placed on only three core factors - failed states, global health and the internet.

In discussing the notion of failed states, it was pointed out that sovereignty could be attenuated, resulting in failed states. The symptoms of the failure of states were shown in crumbling infrastructure faltering utility supplies, unstable education and health facilities, the deteriorating human development indicators such as infant mortality and literacy rate, and the barely functional government where the lawmakers, courts, civil service and the military lose their capacity and independence.[572] Some instances of failed states were pointed out, such as the cases of Somalia, Afghanistan and Syria. It was shown that the existence of failed states could have dire ramifications for other states. This reality often leads to talks of external intervention, which is in itself akin to arrogating the sovereignty of the failed state, being that one of the core characteristics of sovereignty the right of the state to non-interference. So, when is it okay to disregard such sacrosanct attribute of sovereignty for the benefit of the broader international community? There were arguments made that the risk of non-intervention could have adverse impacts on the global community. For example, the United Nations had estimated that eight of the most expensive cases are of failing state in the 1990 cost the international community over 250Billion dollars. Arguments along this line were also canvassed in chapter 4 concerning the compelling force of *jus cogens* principles. It was argued that *jus cogens* curb the absoluteness of sovereignty. Thus, there are principles of international law which are so compelling that there could be no derogation.[573] These arguments drive home the core arguments of this thesis that a rethink of the Westphalian concept of international law is imperative.

Chapter 3 also evaluated the notion of global health, and the effects of global infectious diseases were analysed to see their impacts on sovereignty. The analysis

[572] Barma (n 120)
[573] Largerwall (n 265)

looks at the relativity of infectious diseases to economic globalisation due to increasing connectivity and interdependence.[574] It was pointed out that the outbreak of infectious disease anywhere in the world could spread uncontrollably across national borders through the continuous movement of people and capital in the name of trade or pleasure. Again, these instances of global health reveal the inadequacies of sovereignty in that microbes do not respect internationally recognised borders.[575] The findings of chapter 3 show that the solution propounded by non-state actors[576] could only flourish amidst the cooperation of sovereign states. It is noteworthy to reiterate the irony of the sovereignty dilemma with global health. It is reflected in the irony that the global health concerns feed off the impotence of state in controlling national boundaries. However, the solution relies on the potency of the sovereignty of the state in consenting to global cooperation and internal implementation of proposed solutions. Again, these points underpin the arguments of this thesis that sovereignty should not be done away with but should be reconceptualised in a way that it is 'pooled' together in the achievement for 21st-century objectives.

Furthermore, the non-territorial nature of the internet and its governance by Internet Cooperation for Assigned Names and Numbers (ICANN), an NGO buttresses the fact that the role of NGOs in the international community cannot be undermined. The construct of the internet is at variance with the contemplations of the Westphalian concept of international order. Also, the increased traffic of human digital interaction on these non-territorial platforms across national borders creates a challenge for governance. It was established that the internet has a global dimension characterised by multiple territorial links.[577] As a result, issues caused by this phenomenon cannot be solved but by cooperating between global states. The emergence of ICANN as the multi-stakeholder governance organisation for the internet, which is essentially an NGO, is emphatic.

These global factors which were discussed in detail in chapter 3 are a persuasive call for a paradigm shift in the perception of the concept of sovereignty.

As a result, the concept of sovereignty was carefully appraised in chapter 4 in consideration of the idea of reconceptualisation. So, in dealing with this, the principles

[574] Roberts (n 130)
[575] Garrett (n 144)
[576] Such as Global Healh NGOs and Universities, which are active in providing solutions to global health concerns, through extensive research.
[577] Moise (n 185)

of subsidiarity and conferral were examined. This examination was to determine whether or not a delegation of sovereign powers will impede the integrity and the concept of sovereignty. Or whether it will facilitate an understanding of the concept in its full essence. Thus, it drew on the similarities between the sovereignty of the state and the sovereignty of a citizen in a free state. This analysis was used to unravel the question of whether collaboration of the sovereign state in the international plan is tantamount to the ceding of their sovereignty. In answering this question, it asks the same question as to whether the sovereignty of the citizen is curtailed by the citizen being subject vertically to the laws of the land or horizontally in contracting bilaterally with fellow citizens. So, where a citizen cooperates with the laws of the land or with a contract entered with a fellow citizen; does that choice to cooperate, inhibit the sovereign will of the individual? These questions underscore the pivotal role of consent to a social transaction between the citizens and the state. This attribute of consent is an indication of sovereignty in its full essence and not a means by which sovereignty is undermined. Thus, it was pointed out that the common denominator to the principle of subsidiarity, federalism and dissolution is the attribute of consent. So, these principles, underpinned by consent, do not negatively impact on the essence of the sovereignty of a state whose authority has been conferred, delegated or allocated whether downwards, horizontally or vertically. As a result, these concepts were explored to be considered as possible prototypes of a reconceptualised international law, whereby some aspects of the sovereignty of state are delegated to non-state actors, particularly NGOs.

In addition to the *jus cogens* principle, which was mentioned earlier and also in chapter 4, the compelling case of *Van Gend en Loos*[578] was critically analysed. The *Van Gend en Loos* case implied that non-state actors could be granted 'subject status' in international law as individuals were granted 'subject status' in European law. It authenticated the core arguments of the thesis that international law could be reconceptualised in a way that takes into cognisance 21st-century global realities. In particular, attention should be given to the need to legitimise NGOs as subjects on the international plane.

The latter parts of the thesis, mainly chapter 5 and 6, deal more with the second prong of the research question; appraising the role of NGOs in the reconceptualisation of international law. So the emergence of NGOs and the significant role they have come to play in global politics and relations were considered carefully. The thesis points to

[578] Van Gend en Loos case (n 269)

the increased visibility and evident participation of NGOs in the process of the international legal order. Nevertheless, it confronts the predicament that NGOs encounter in the conflicts they perpetually face. So while NGOs enjoy some level of political and social ascendancy on the international plane, they lack the corresponding legal ascendancy. Accordingly, this asymmetry between their socio-political stance and their legal stance on the international plane results in a legitimacy deficit.

So, in an attempt to better understand this dilemma, an exposition on the description, classification and function of NGOs was carried out. Therefore, article 71 of the UN Charter and ECOSOC resolution 1996/31 on the Consultative Relationship between the United Nations and Non- Governmental Organisations, were evaluated. This shed light on the various categories available to NGOs in participation with the United Nations. These categories – general, individual and roaster statuses, were then critiqued. This critique examined the inadequacies of the level of participation of NGOs in contrast to the global realities of the increasing influence of NGOs.

Additionally, a critical examination of the findings of the Cardoso Report of the Panel of Eminent Persons on United Nations-Civil Society Relations of 2004 vis-à-vis the cardinal objectives provided by Kofi Anan to the panel was carried out. The findings of the report show that the enhancement of engagement with civil society is in the UN's interest. It was pivotal to sustaining the relevance of the UN; therefore, a rethink of the international legal order was a welcome consideration.

Furthermore, the United Nation's Committee on Non-Governmental Organisation is studied. Their role of assessing the application for consultative status by NGOs as well as monitoring NGOs activities via the NGOs quadrennial reports is appraised and critiqued. So, the political influence in the Committee's discharge of their responsibilities which plays out in unfair and partial decisions or decisions along political stance or ideology were identified and investigated. The findings revealed that the process by which the Committee decides the fate of NGOs seemed arbitrary, and not adequately representing the influence of NGOs.

The influence of NGOs was epitomised in the assessment of the NGO - International Chamber of Commerce in chapter 6. It pointed to the unparalleled influence of the ICC globally, to the extent that it could be referred to as an indirect international lawmaker due to its prevalent standard-setting role which underpins international trade and commerce. Its influence was examined historically. Its role in the aftermaths of the two world wars helped shape the international legal landscape for international

businesses. Its pivotal role to global trade and governance, which earns it an epithet as the world's parliament for business is discussed extensively. It is noteworthy to point the significant role it played during the Bretton Wood's conference in 1944, which effectively is the birthplace of the International Monetary Funds, and the World Bank. It was pointed out as the conceptual originator of the General Agreement on Tariffs and Trade (GATT), which eventually led to the emergence of the world trade organisation. Another point of note is the role it played in revitalising United Nations at the beginning of the 21st Century through the proliferation of the public-private partnership idea during the Geneva business dialogue in 1998. Its significance is also seen in the emergence of the UN Global Compact initiative, which required businesses to align strategies and operations with universal principles on human rights, labour, environment and anticorruption. An attestation to this relevance was the granting of consultative status with UN's ECOSOC, and observer status with UN's General Assembly. The ICC is one of the several other NGOs which effectively design the international legal context, albeit, without the requisite legitimacy.

Chapter 7 examined the plurality of the international legal framework, which lays the premise for the submission that the international legal community already works based on a pluralised system. The development of norms was considered; focusing on the possible conceptualisation of international law in a way that incorporates 21st-century international norms. Again, the concepts of state practice and *opinio juris* in the making of customary international law were considered in more detail.

Additionally, it reviewed in detail the emergence of new international norms. The review entailed consideration of the multicentric nature of the international environment as a pathway to a pluralised international legal context. For instance, in addition to the distinct pluralistic legal context of the EU, legal pluralism in the state context was shown in systems like federalism and dissolution. Secondly, the co-existence of Vatican law and the law in Italy was another example of legal pluralism in the religious context. Matters like *Lex Mercatoria*, or the modern-day expression in the ICC standard-setting, *Lex Sportiva* regarding the global law on sports, or the various protocols of the internet all reflect legal pluralism in the socio-economic context.

It was established that these pluralised international legal contexts evolve organically, and has so evolved with the emergence of non-state actors, and norms of standard-setting or soft law as just observed with the ICC. However, the challenge remains in

the gulf between the theory and practice in understanding the concept of international law.

The 21st-century pluralistic legal environment systematically examined, and the findings revealed that legal pluralism could be the bed-rock of the inclusion of the new layers of global governance in international law. The submission of this thesis is not for a reconceptualisation of international law in a way that constitutes a brand new legal order. Instead, it seeks alignment with the realities of international practices or customs and legitimises that process. It is a reconceptualisation of international law in the light of adding layers to the international pluralistic legal paradigm. In so doing, a justification for the legitimised role of NGOs as a significant added layer of governance to keep international law in step with the 21st-century global realities.

8.3. Summary of the findings

In line with the preceding, the findings of this thesis reveal that the conceptualisation of international law has stayed static to the Westphalian paradigm in theory. However, practically, it has moved with the times, although without the requisite legitimacy; thus staying within the remit of international 'soft' law. The findings also show NGOs as some of the foremost propounders of these soft laws or influencers of behavioural standards across various sectors of the international community. Additionally, the outcome of this research shows that the concept of sovereignty could be understood in its full essence, which includes the power to delegate sovereign powers, empowering other relevant actors and still maintain its integrity. The thesis submits that the 21st-century realities entail a pluralised international legal order. The entrenchment of this pluralism is akin to a reconceptualised international law where sovereignty is pooled in global governance, and NGOs' role is pivotal to this process.

The Westphalian concept of international law, which is hinged on territorial delineations and state-centric legal systems is now simply untenable. The continued existence of states is not in contention here, and such an argument is not relevant to the thrust of this thesis. Instead, the focal point of this work aligns with Berman, that physical location can no longer be the sole criterion for conceptualising legal authority. States must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even non-state communities. Each of these

types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.[579]

8.4. Recommendation

8.4.1. Legitimising new norms

It is recommended that there should be an acknowledgement of the new norms being firmly founded in already existing realities in the relationship between the NGOs, and other non-state actors, with states. Further to the earlier arguments on the making of customary international law, with the examinations of state practices and *opinio juris*, it is recommended that observation of international practices should continue in the 21st Century and new norms of the international community should be legitimised. To continue without a formal acknowledgement which gives further legitimacy to these new forming relationships is to keep the current concept of international law static to the increasing inadequacies of the Westphalian connotation of international law. The need to reconceptualise international law in a way that captures the realities of the 21st Century, including the role of NGOs on this journey, is central to the continued relevance and fitness for the purpose of international law in today's global context. One of many such observations on the relationships between the various actors on the international plane provides as follows -

> '…something is happening in the relationships between governments, NGOs and companies which draws them to engage more closely together to deal with certain issues. There is a desire to understand better the terms of engagement, and an interest in making the engagement constructive – to create social value rather than to destroy it by confrontations which would be costly and risky for all concerned.'[580]

This recommendation primarily campaigns for the enlightenment to the new socio-political reality of the 21st Century international legal framework. A dilemma fixated on the legitimacy and autonomy of the actors in the international plane or the lack of it. Particular emphasis is placed on NGOs. The acknowledgement of these new norms and dynamics of the relationships of influential NGOs do not exist in a vacuum. NGOs have been seen to campaign for their autonomy and legitimacy in their organisational pursuits within the global space. At the same time, observing the

[579] Berman (n 194) p. 485

[580] J.V. Mitchell, 'Editor's Overview', in J.V. Mitchell, *Companies In A World Of Conflict: Ngos, Sanctions And Corporate Responsibility* (RIIA/Earthscan 1998).

boundaries of the sovereignty of states and their traditional role in the international law-making milieu.

8.4.2. Legitimising pluralism

`The concepts of new norms or a pluralised legal order in the international space is not entirely novel. Indeed, it precedes the current Westphalian legal order. Before the emergence of nation-states, there have been tensions across various legal orders that existed at the time. It appeared the globe was governed by commonalities and a collection of interest groups. While some interest or peoples dominated and others obliged. It aligns with the arguments regarding the dichotomy between the terms or concepts - Nations and State.[581]

International law is undeniably law between states. This position has been the case, at least, judging from its Westphalian tradition. However, it is helpful to point out that historically, the concept of state had little influence in the concept of international law, at least concerning the terminology used. According to Fisch[582], the history of the concept of international law shows a clear insistence on the terminology used, and the chosen terminology was dominated by the idea of persons as actors.[583] The term International law goes back to the Latin term *ius gentium.*[584] The root subject is '*gens'*. It is an all-encompassing term, although the term 'States' is not one of such terms contemplated from *gens.* Instead, it connotes a community of common descent. Over time, around the 17th and 18th Century, there was a translation within Latin and the terms *populus* and *natio* was used. It follows that at the core of the terminology of international law, the primary focus is on a group or community, it is not a law between states but a law between a group of human beings.[585] So linguistically, international law represents itself as a law between peoples and/or nations. [586] Along these lines, a state may be defined as a politically organised body of people inhabiting a defined geographical entity with an organised legitimate government. A nation or a people is a group of people with a common race, culture, religion and historical experiences

[581] A state may be defined as a politically organised body of people inhabiting a defined geographical entity with an organised legitimate government whilst a nation is a group of people with a common race,culture,religion and historical experiences but who may not necessarilly live together in a single territory. Anation has no required geographical tie-in (as an extreme example, consider the nation of Roma, or post-Diaspora-pre-modern-Israel Jews).

[582] Jörg Fisch is Professor of History at the University of Zurich. His research focuses on the history of international law and international relations.

[583] Jörg Fisch, 'Peoples And Nations', The Oxford Handbook of The History of International Law (1st edn, Oxford University Press 2012) p. 28.

[584] There is no *Ius civitatum* or *ius rerum publicarum* or any other term derived from state or the equivalent, See Jörg Fisch, 'Peoples And Nations', The Oxford Handbook of The History of International Law (1st edn, Oxford University Press 2012) p. 28.

[585] Fisch (n 583) p. 28

[586] Ibid

but who may not necessarily live together in a single territory. A nation has no required geographical tie-in (as an extreme example, consider the nation of Roma, or post-Diaspora-pre-modern-Israel Jews).

As pointed out in chapter 2, concerning the pre-Westphalian age, at the fall of the Roman Empire in the fifth century AD, power and authority became decentralised in Europe.[587] By 1000 AD, the major civilisations that emerged from the rubble of Rome were the Arabic civilisation which was a religious order with political domination by the Islamic caliphate.[588] Secondly, there was the Byzantine Empire which stemmed from the old Roman Empire in Constantinople and underpinned by Christianity. The governance of the rest of Europe was also underpinned by Christianity.[589] Also, other commonalities, including the *Lex Mercatoria*[590] - the Law of the Merchants, feudal principalities controlled by lords and tied to fiefdoms, also held sway. Feudalism was the response to the prevailing disorder.[591] The disorder of the times was its order.

States, as we know it today, was not the means of global governance, rather governance was pluralised and stemmed from interests, whether religious or otherwise.

Due to the similarity of the plurality of the legal order in the 21st Century with that of the medieval times, it seems that the international legal framework is evolving full circle. The reality of the legal order in the 21st-century globalised space could rightly be referred to as a sophisticated version of what was obtainable in medieval times. Although historically, the term 'pluralism' might not have been used at the time, the polity of the societies of the time and through time, were constructed in ways the legal orders could best be described as pluralistic. The tensions that existed between various facets of the society and their legal systems are evident today. Hence, historically, the indigenous cultures of the people played a significant role and contended with the religious underpinnings of the society and the official law of the land.[592] The concept of legal pluralism expressed itself in history as phenomena such as non-state law, living law, indigenous law, or law in action[593].

[587] Ivan M. Mckibben Arreguin-Toft and Karen A. Mingst, *Essentials Of International Relations* (W W Norton 2019), Chapter 2 generally.
[588] Ibid
[589] Ibid
[590] Discussed as norms of international order, see Baker (n 564)
[591] Arreguin-Toft and Mingst (n 587)
[592] Seinecke (n 546)
[593] Ibid

Therefore, it follows to reach the position that the concept of international law should not only be linked to the Westphalian concept of a state. Law, in its international context, exists outside the paradigm of the concept of the state. So, it is opined that if the state is taken into consideration in understanding the extant law, it should be no more than when any other actor in the international plane is taken into consideration in a bid to understand the terms by which they engage in the international plane. However, as reiterated across this work, it should be emphasised that the context of reconceptualising sovereignty should not encroach on the concept of supremacy of the states.

The preceding underpin the position that pivotal to the concept of legal pluralism is the concept of norms and alternate legal paradigms, which are not necessarily hierarchical.[594] It follows then that, if the traditional concept of state is challenged by the reality of the 21st-century globalised world, then the various structures or attributes of this globalised space should be given a closer look. This pluralised attributes of the global space should be underscored and examined to the end of reaching an understanding of the basis upon which they exist and relate with one another in the globalised world. So, for example, the various streams of order in the international community today include the religious communities, digital communities, social media communities, environmental communities, economic communities, supranational communities and multinational communities et cetera. All of these should be taken into cognisance in a bid to understand how the globalised world operates. Notably, these are often represented by their relevant NGOs. The pluralistic nature of the globalised legal framework, at least in a practical sense, should be given more serious consideration. However, like the pre-Westphalian times, the plurality of the legal space could be described as orderly as it could be described as disorderly. Where the latter is the case, then the outcome is chaos and anarchy. Hence, the importance of the state comes to the fore to provide the needed balance. To achieve a description of an orderly pluralised legal space, then the concept of the sovereignty of state should remain sacrosanct. However, it should be reconceptualised by institutionalising the pluralised legal framework with legitimised layers.

Indeed, challenges will arise with the 'inter-legality' of the various family of laws that could arise in an institutionalised pluralistic legal framework which preserves sovereignty and still seeks to serve the various global communities. The process of

[594] Ibid

institutionalising a pluralistic legal framework will entail a process of tensions in determining what is the grundnorm or the official law of the sovereign? What is the alternative law? Do they complement or compete? Are they independent, interdependent or dependent on sovereign laws? What is the extent of their jurisdiction? Is there a chance to have parallel law for parallel groups?

The response to these questions would necessitate cooperation between the various actors in the international community. Therefore, the states, the inter-governmental organisations, the non-governmental organisations and the multinational corporations should come together and consider a framework that works. There may be no need to reinvent the wheel. A simple evolution of the ECOSOC and the UN Standing Committee on NGOs could provide the desired solution.

It follows then, the findings of this research could reach the position that the emergence of new norms in the international space coupled with the prevalent concept of legal pluralism could form the premise of the new international legal framework.

The expression of legal pluralism recommended is not a redefinition of the concept of law by non-state actors, but an acknowledgement of another layer of the law, in the international legal framework. Added to the various layers of monist and dualist paradigm of domestic legal systems and their international legal relations, alongside supranational laws, bilateral, and multilateral treaties, are other layers which add to the fabric of the international legal system. This recommendation does not suggest that the nomological paradigm of the law undermines or supplants the significance of positive law and established formalised legal institutions. Instead, it insists on the acknowledgement of the dynamism of law. This dynamism should naturally incorporate other aspects of law constituted by perpetually observed social contracts, albeit, unwritten, as part of what should constitute the legal framework, whether domestically or internationally.

8.4.3. Applied pluralism: The establishment of the *People's Assembly* – another organ of the UN-facilitated by NGOs

At the moment, the various arms or organs of the UN include the General Assembly, the Security Council, the Economic and Social Council – ECOSOC, the Trusteeship

Council, the International Court of Justice, and the UN Secretariat[595]. In addition to this structure, a *People's Assembly* should be established. It should operate as a hybrid of the various actors but facilitated and governed by the NGO. The current UN Committee on NGOs and the parts of the ECOSOC should be reviewed and reinstituted as a *People's Assembly*. The Committee on NGOs has been criticised for being time-consuming, inefficient, and frustrating for many NGO representatives. It suggested that $3 million could be saved each year by abolishing the NGO Committee.[596]

So, the UN Committee on NGOs and the ECOSOC should undergo a rethink concerning NGOs. The various categories of accreditation of NGOs should be revamped. Although the current process could still be used as a guideline, a new system should emerge, which will enhance the inclusiveness of NGOs and promote democracy. For instance, the accreditation criteria for the various status is still quite vague on which NGOs are eligible, as it merely requires an NGO in existence for two years and has an office. However, consideration should be given to the general status being used as a guideline for the incorporation of international NGOs to this new proposed organ, the special status for regional NGOs and the roster status for national NGOs. This recommendation is an area for further research. However, this new hybrid of the Committee of NGOs and parts of ECOSOC should re-emerge as a new organ of governance within the UN structure. An organ which represents the predominant demographic and psychographic of the current international community. It would be subdivided into various sectors of the international community. It should cater to the various peoples' constituents as represented by various default interests groups. Examples of these groups include technological advancement interest groups, religious interest groups, entrepreneurial and capitalist interest groups, health and social care interest groups, human rights interest groups, cyber & space engagement interest groups, et cetera. It should be noted that some of these various constituents, already have soft law that regulates their relations, and most of these soft laws or standards are facilitated by NGOs.

However, it is noted that NGOs are very diverse and by no means are all equally laudable. Some NGOs act irresponsibly and undermine the credibility of the broader

[595] 'Main Organs' (*Un.org*, 2019) <https://www.un.org/en/sections/about-un/main-organs/> accessed 10 October 2019, See also Main Organs (n 341)

[596] On the criticisms, see United Nations General Assembly, 'UN Doc A/58/817: Strengthening Of The United Nations System' (2004), pars. 124 and 128-130; on costs and savings, see pars. 129 and 170; see also, Peter Willetts, 'The Cardoso Report On The UN And Civil Society: Functionalism, Global Corporatism, Or Global Democracy?' (2006) Global Governance, Vol 12, Lynne Rienner Publishers <http://www.jstor.org/stable/27800619> accessed 12 June 2018, p 3.

NGO movement. It is particularly problematic when a conservative government's attempt to use these problematic NGOs as justification for severing meaningful future NGO partnerships/initiatives.[597]

Hence the current steps taken in determining the accreditation of NGOs to be granted elevated status with the ECOSOC as discussed in chapter 5, should be reconsidered to the end of measuring this recommendation and maintaining the integrity of this new system.

Today, the UN is structured in a way that allows democratic engagement and consultation with the international community through its various organs. However, the ultimate decisions for the various sectors of the international community remain with the UN and its organs, of which none comprises exclusively of the specific constituency of the sector group and interests. In line with the arguments put forth in chapter 7 relating to the plurality of norms and legal orders in the international context, consideration should be given to the inclusion of NGOs in a declaratory way, and not merely in the current participatory status that they are granted. Along these lines, the Cardoso panel had recommended a new Office of Constituency Engagement and Partnerships. Some of its subheads to the report included the need to "shift the focus from generalised assemblies to specific networks" and to "embrace greater flexibility in the design of United Nations forums.[598] It is submitted that the increased involvement and influence of other actors of the international community in global governance is a boost to the objectives of democracy. It remodels the conceptualisation of multilateralism. So, multilateralism should be perceived beyond engagement with multiple states, but extend to engagement with multiple relevant actors, particularly NGOs. The Cardoso panel argued for greater democratic accountability of international organisations and expanded role for civil society in deliberative processes."

It is also noteworthy that the eligibility for access to the various arms or organs of the United Nations is prescribed and differs from organisation to organisation. Engagement with the various arms of the UN is prescribed to specific requirements. For example, a requirement for access to participating in the Security Council as a member would require that such a participant is a sovereign state. Even among sovereign states, there is a further prescription for eligibility – speaking of the

[597] James Forum, 'Credibility And Legitimacy Of Ngos' (*Globalpolicy.org*) <https://www.globalpolicy.org/ngos/introduction/31439-credibility-and-legitimacy-of-ngos.html> accessed 13 April 2020.
[598] Willetts (n 321), p. 313

permanent members and the rotational members of the Security Council. Concerning eligibility as a member of the General Assembly, the requirement to be a member is simply whether the body is recognised as a sovereign state. However, the closest arrangement to this recommended *People's Assembly* is the ECOSOC. Hence, sufficient time has been invested in discussing the ECOSOC and its relationship with NGOs in chapter 5. However, the limitation of the structure of the ECOSOC is that the best it offers the NGO community and other sectorial constituents of the international community is a consultative status which ultimately is subject to the overriding endorsement or approval of the UN or its organs. Article 18 of Resolution 1996/31 provides that arrangements for consultation should not be such as to accord to non-governmental organisations the same rights of participation as are accorded to States not members of the Council and to the specialised agencies brought into relationship with the United Nations.[599]

Another challenge with the current status of the UN Committee on NGOs is the discretional and unilateral way by which decisions are reached. A point in view is with the process of granting various status to NGOs and the selection of which NGOs are given such elevated status. The workings of the UN Committee on NGOs was highlighted as its decisions have been criticised as being politicised. The decisions are reached in line with political or ideological stance; it justifies the argument for this added layer of governance to the current structure of the United Nations. The concern remains that there is a democratic deficit in the workings of the UN. Willet had stated in his critique of the UN Cardoso report that the only morally sound and politically feasible basis for legitimising broader NGO participation in the UN system is the democratic claim for all voices to be heard in global policy debate.[600] It argues that engagement with the NGOs should be strengthened in order to reduce the democratic deficit in global governance. According to the report, non-state actors were growing in capacity and influence. New information technology and global networks were creating a global public opinion and a cosmopolitan set of norms and citizen demands. The need for requisite representation ever more necessary. Even though there is a UN practice of having consultations, the constituencies which are consulted, do not particularly have a say in what the ultimate decisions are reached. The remit of decision making remains with the UN through its members and organs. The Cardoso panel contends that the UN needed a new approach. It should become

[599] 'Paragraph 18 of Resolution 1996/31. Consultative Relationship Between the United Nations and Non-Governmental organizations' (Un.org, 1996) <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm> accessed 6 August 2018
[600] Willetts (n 321), p. 306

outward-looking and embrace many constituencies, becoming more than an organisation exclusively for states. The UN must lead the initiative that effectively links the local with the global and be at the forefront of tackling its democratic deficit. The report stated as follows –

> '…in practical terms, this means supplementing the "traditional intergovernmental process" and existing consultative arrangements…'[601]

The Cardoso panel had argued that there is little logic for the United Nations to recognise civil society input into the ECOSOC with one breath and with the same breath, resist a similar input into the General Assembly committees that discuss the same subject.

Looking at the current impact of globalisation in workings of the international community, pockets of communities of interests have evolved globally, and their activities and function transcend state boundaries. These global developments give impetus to the position that today, the sense of belonging have moved from a mere sense of common national heritage to other globalised common interests. It further underpins this recommendation that the international legal framework ought to be reconceptualised to reflect the global realities of today. One of the ways by which this could be achieved is to consider the constituting of a *People's Assembly* as another organ of the UN, which represents the 21st-century communities of global interest.

8.4.4. The Location of Paradigm Shift

The argument of the thesis and the above recommendation call for a paradigm shift in the way international law and the international legal system should be perceived. One of the core arguments of this thesis is that the international legal system is structured into two paradigms which have been referred to as the UN New York Paradigm and the UN Geneva Paradigm. The first well entrenched in the traditional Westphalian construct of international law and the second well entrenched in the ever-fluid evolution of the international community and globalisation – reflective of the 'passportless' state of the international community as seen with most of the UN agencies in Geneva.

The Geneva paradigm is more representative of the pluralised international legal system, for which this thesis canvases. The argument is that International law, in theory, is still patterned after the Westphalian concept of UN New York international law. It

[601] Ibid

has not taken into cognizance the plurality of norms that are replete in the UN Geneva 21st-century international community. Hence, the paradigm shift in the way international law is perceived needs to occur.

Often this types of shift, at least in the way international law is perceived in theory, first emanate from the academic circles. Already, as has been pointed out in the UN New York/ Geneva dichotomy, the international community is undergoing the shift, and the politicians, where convenient, are acknowledging it. More academic research and conferences in this area which engage academics and politicians alike, as well as other relevant stakeholders, will facilitate this process. The starting point of this kind of shift will be located in the circles of academic research and activism.

8.4.5. Highlighting the originality

The above recommendations underscore the originality of this thesis, which ultimately is adding to the existing body of knowledge in the subject focus of this work, and extending the parameters of knowledge within the current public international law discipline.

However, to more specifically highlight these points, the contribution includes the arguments on legitimising new norms, which place NGOs in the centre of the new international legal system. The debate across other academic quarters include the necessity to give other global players in the world stage some elevated status in the international community. However, there appears to be a vacuum in the campaign for NGOs, not merely to be given a more recognised legal status, but to be resituated as the socio-legal centre of the international community in the 21st Century.

Additionally, the focus of the ICC as a prime example of NGOs to underscore the point in a way not previously considered by the existing body of works.

Also, there the progression form the recommendation of the examined Cardoso report which was a seminal report premised on an invitation by Kofi Annan at the early parts of his tenure to proffer ways by which the UN would work effectively with NGOs, in furtherance to the mandate of art 71 of the UN charter. So while the Report suggested for new streams of international diplomatic dialogue – they recommended a new Office of Constituency Engagement and Partnerships, this work builds on that and suggest the institutionalisation of the pluralised international legal system with the emergence of the suggested Peoples Assembly.

Furthermore, along these lines, this work identifies that challenges will arise with the 'inter-legality' of the various family of laws that could arise in an institutionalised

pluralistic legal framework which preserves sovereignty and still seeks to serve the various global communities. The process of institutionalising a pluralistic legal framework will entail a process of tensions in determining what is the grundnorm or the official law of the sovereign? What is the alternative law? Do they complement or compete? Are they independent, interdependent or dependent on sovereign laws? What is the extent of their jurisdiction? Is there a chance to have parallel law for parallel groups? Hence, in response to these questions, it is conceded that this shift would necessitate cooperation between the various actors in the international community. Therefore, the states, the inter-governmental organisations, the non-governmental organisations and the multinational corporations should come together and consider a framework that works. There may be no need to reinvent the wheel. To this end, this work recommends a simple evolution of the ECOSOC and the UN Standing Committee on NGOs to a new legal framework that caters for the 21st-century international community. So, the UN Committee on NGOs and the ECOSOC should undergo a rethink concerning NGOs. The various categories of accreditation of NGOs should be revamped. Although the current process could still be used as a guideline, a new system should emerge, which will enhance the inclusiveness of NGOs and promote democracy.

8.5. Limitations of the thesis

This thesis has the following limitations.

8.5.1. The lack of a homogeneous NGO system

Firstly, it is acknowledged that there is a lack of a homogeneous NGO system. Due to this lack, an attempt to elevate the status of NGOs as a single homogeneous unit in the international legal system will lead to considerable controversy erupting from various factions of the international community, including amongst the NGOs. NGOs come in different sizes and wield different extents of influence. The smaller NGOs have criticised the more prominent NGOs, referring to them as clubs for the rich. The more influential ones take attention and relevance from the smaller one. So this lack of uniformity of NGOs could be a challenge.

Additionally, the research method engaged with is essentially a qualitative approach. No empirical data was carried out to authoritatively assess the kinds of NGOs across the world and the extent of their representative capacity. As a result, the findings of this work have been primarily desk-based.

Furthermore, a detailed survey on the perspective of the NGOs and relevant stakeholders concerning a reconceptualised international law which places them as central figures should further authenticate the findings of this work

8.5.2. Representativeness of NGOs

NGOs contend for credible representative rights in the constituencies where they pursue their causes. There are often the divisions within the not-for-profit sector over a myriad of issues. These issues could include economic growth; human rights; religious tenets; environmental conservation; abortion and reproductive health; or the role of women in society among many others. The views of the NGOs are polarising. For instance, for every NGO canvasing against abortion, others are canvassing for the right of the choice for women. The NGO sector is very complex, diverse and divided.

So while some may argue that NGOs are the authentic voice of the people, there are opposing arguments that NGOs represent no more than their supporters, who may be a minority in the general population.

So, this lack of a clear representative mandate from the public at large will pose a challenge as to know which NGO should be elevated in a representative capacity to the global level of decision making.

8.5.3. The continued resistance by the governments

While there had been substantial evolution and innovation in the practice of engagement with NGOs, governments have remained reluctant to allow changes in the rules, for fear of being constrained at some later stage.

Over the years, various thought leaders, including NGOs, governments and other actors on the international plane, have supported the argument that there should be a reform and revitalisation of the United Nations. The position is held that a revitalisation of the UN must include the enhancement of stronger relationships between NGOs and UN policy-making forums. However, there is significant opposition from governments, and this poses a challenge to some of the solutions proffered.

8.6. Areas for further research

This thesis raises questions and recommendations that need further research to ascertain their viability. A significant area of research includes looking into the development of the United Nations and organs of the United Nations; considering the perspective of the current stakeholders of the organisation regarding the viability of a new organ. Assessing the status of the defunct Trusteeship Council and whether steps could be taken to refurbish the UN and introduce another organ of the UN. Further to

the recommendation of a *People's Assembly*, empirical research should be undertaken to ascertain the perspectives of current stakeholders vis à vis the relevance of the UN in the 21st Century.

Furthermore, concerning the proposed *People's Assembly*, a focused research on the ECOSOC and the UN Committee on NGOs will be of significant benefit. Also, to investigate how NGOs could be accredited into that proposed assembly and the means of operation.

An empirical study into global governance and the concept of sovereignty as a separate research will be desirable. It will entail an examination of legal systems around the world where the concept of sovereignty has been applied differently across various levels, whether locally, nationally, regionally or internationally.

Finally, it will be helpful to carry out a study into the uniformity and diversity of NGOs as well as their representative capacity.

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