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The Legal Status of NGOs in International Governance and its Relevance for the Legitimacy of International Organizations

ABSTRACT

This working paper introduces the concept of legal personality of non-state actors as an indicator of the democratic legitimacy of international organizations (IOs). Globalization has led to changes in statehood which are reflected in new democratic forms of participation and new expectations and attitudes towards political institutions. This also affects international politics in that international organizations are questioned with regard to their own legitimacy. In this context, normatively and empirically based policy proposals alike tend to suggest an increased role of new actors, mostly civil society organizations (CSOs) or NGOs, in overcoming the legitimacy deficit of IOs. However, if participation of non-state actors in international governance is to be effective, efficient and have a meaningful and lasting effect, it requires institutional rights and duties – and with it legal personality. Thus, legal personality of non-state actors can be taken as a minimum safeguarding clause for surmounting the legitimacy deficit of international organizations (normative approach). It can also be used as a helpful analytical framework for organizing empirical data on the participation of these actors in IOs (empirical approach). This working paper evaluates the legal rights and duties of NGOs in their cooperation with more than 30 international organizations and seeks to assess whether this implies that they have acquired legal personality and which quality this personality takes on. Such a comparative paper is a novelty in both political science and international law. By combining perspectives from two disciplines, this working paper illustrates the intrinsic empirical and theory-building value of (international) positive law in political science.

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The Legal Status of NGOs in International Governance and its Relevance for the Legitimacy of International Organizations

INTRODUCTION

Political science primarily is concerned with actors. Actors are those persons (individual actors) or organizations (collective actors) which, in the broadest sense, participate through their actions in the decision-making of a political entity, normally the State. The theory of International Relations (IR) in specific is shaped by differing focuses on the "international system" and its principal actors, namely the State, international organizations (IOs), but more recently also non-governmental organizations (NGOs), transnational enterprises or even individuals. The term of "actor" is used in a way to encompass all those agents who matter for (international) politics, and the question is about what the primary actors are in international relations, how they can be described, how they interact with each other and in which way they shape world politics. The notion of "person" rarely appears in international theory, and if, both terms are used interchangeably. In this sense, an international actor, such as the State or an international organization, is treated as if it is an individual – or a person – with some attributes this personhood would bring with it (mostly intentions, but also beliefs and desires).

This foremost realist view of actors in world politics is questioned by others, mostly liberals, who take physicalism as their starting point and argue that only individuals are real. This liberal "reductionist" view is meant to set up barriers against challenges to liberalism (fascism, genocide, etc.). However, there is a strand of social-constructivist international theorizing which tries to reconcile liberal physicalism in a non-reductive sense with the realist view of the State by grounding the latter explanatorily and normatively in real – and not "as if" – personhood. Thus, starting out from an article written by Arnold Wolfers in 1959[1], Alexander Wendt (Wendt 1987) introduced the agent-structure problem into IR theory and picked up the notion of the state as a psychological person in the late 1980s. Having investigated into state theory in social and political sciences, he developed his *Social Theory of International Politics* (Wendt 1999), in which he argues that the State is a real actor with – even though only some – anthropomorphic attributes, such as (corporate) intentionality[2]. The useful concept of state personhood is thus retained without compromising on liberalism or, in other words, by a non-metaphysical, physicalist way to justify liberalism. In sum, however, Wendt's So-

[1] Published in *Theoretical Aspects of International Relations*. This article then was made chapter one of *Discord and Collaboration* with only minor changes in 1962; see Wolfers (1965).

[2] See also a round-table which took place at the 2002 Annual Meeting of the International Studies Association in new Orleans, LA, USA; Jackson (2004) and Wendt (2004).

cial Theory did not change the inter-changeability of the terms of "actor" and "person" in IR theory.

Far away from this discussion, international jurists engage in a debate around the same notions, but with a completely different meaning. In legal theory, the term of "(legal) person" or "subject" is the concept used to describe the main actors – those who matter – in (international) law. A (legal) person is an entity capable of possessing (international) rights and duties, whereas an actor does not necessarily have such a capacity. Legal personality thus is a normative concept with real-world legal consequences, rather than a metaphoric transformation of realities. We do not speak of personhood in this case, but of personality. The debate around those notions is triggered off by developments towards the emergence of new subjects in international law, such as individuals, trans-national enterprises or non-governmental organizations. The State, though, as the main subject of international law, was and unquestionably continues to be an international subject or person, without using the term of actor instead. With regard to non-governmental organizations, however, a debate evolves – though separately within different national legal systems –, around the question whether or not those organizations might qualify as legal persons in international law, or whether they might be treated as "simple" actors[3]. As one author (Dupuy 2003: 262) has recently suggested, there seems to be a dichotomy between "ancient" and "modern" international lawyers, or between Europe and America, with regard to the classification of NGOs. I would add that it also is a rift between lawyers trained in different legal systems, namely, the continental and the Anglo-Saxon (common law) tradition respectively. In continental systems in general and in the French system more specifically, on the one hand, there is a split between different disciplines, namely political science and law, whereas on the other hand, we confront a more sociologically informed English legal tradition (Mosler 1962: 12). In any case, it is not only a linguistic, generational, national, and cultural problem. Whereas "old Europe" keeps firmly attached to those agents which alone seem to qualify for legal personality (States and international organizations) at the expense of considering the increased political weight of new actors, "new America" tries to resituate international law in its social context, at the expense of striving for a sound legal analysis embedded in legal positivism. The solution may lie in a concentration on the legal statute of participation of NGOs in international organizations (Dupuy 2003: 275-277)[4].

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[3] See also below.

[4] Other proposals to forge links between disciplines are less convincing. Thus, Noortmann proposed to focus research on NGOs as a framework of reference rather than making them the subject of research itself. He suggested studying the contribution of NGOs to the legal determination of customary international norms. However, how should they contribute to the interpretation of international law in a legally authoritative way without having any

ACTORS OR PERSONS – DOES IT MATTER?

This having been said, the question remains whether, and in which sense, this legal discussion might matter for political science in general and IR theory in specific. Does it make any difference if NGOs are considered as international legal persons, as actors, or even as something in between? My point is that it does. The reason why this might be the case can be found in the debate on the (missing) legitimacy of international organizations which was instigated within the last decade. Expressed mostly in descriptive, rather than normative or prescriptive[5], terms, be it in the realms of political theory (Dahl 1994; Held 1995; Scharpf 1999) and law (Gramlich 2003), or more powerfully in the streets through "civil disobedience" and far less visible in national parliaments, this debate mainly is about societal acceptance of international organizations and the (missing) belief in their legitimacy on the part of the ruled-over. However, as Zürn, basing himself on Lipset (Lipset 1960), eloquently pointed to, "empirical belief in the legitimacy of an institution closely depends on the normative validity of a political order" (Zürn 2004: 261). Thus, an empirical or descriptive grasp on the question of international legitimacy cannot operate without being grounded in a normative judgement on the rightfulness of a social order, or at least in a prescriptive concept on the rightful grounds which help this order to be labelled "legitimate". This might be the reason for the emergence of more and more normative philosophical claims looking for alternatives to the present international state of affairs in order to resolve the legitimacy problem of international organizations (Habermas 1998; Schmalz-Bruns 1999; Höffe 2002). However, the reversed case is valid likewise, that is, an assessment of the democratic legitimacy of international organizations cannot only be philosophical, but also must be social scientific and empirical (Moravcsik 2004).

Be they exclusively normative-prescriptive or predominantly empirical-descriptive, approaches which include proposals how to overcome the legitimacy deficit in international organizations increasingly tend to refer to an increased role of new actors, first of all of civil society at large (Falk 1995; Nanz and Steffek 2004; Scholte 2004) or of international parliamentary institutions in specific (Blichner 2000; Falk and Strauss 2001; Kissling 2001). The roles assigned to those "new" actors resort to the necessity of their increased "access to" and "participation in decision-making", to their task of "monitoring compliance", of "reviewing decisions taken", and of "seeking redress for mistakes

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legal status? And in fact, Noortman rightly refers only to those entities unquestionably disposing of personality in international law. He thus unconsciously takes reference to the most rigid form of the personality concept (see below), looking at the normative power of NGOs and the assumed transformation of international law into a law of nations; Noortmann (2002: 38-39).

5 For a clarification of the terms normative, empirical, descriptive, and prescriptive, see Steffek (2003).

and harms", but also to catchwords such as the contribution of civil society and parliamentary actors to the "public transparency" or "accountability" of an IO (Held 2004; Scholte 2004: 217). Looking closer at these demands, all of them involve institutional rights on the part of these actors, if the requested procedures are intended to operate effectively, efficiently and to take a lasting effect. However, especially NGOs[6] are also challenged and examined with regard to their own legitimacy[7]. This points to the assumption that the concept of international legitimacy cannot simply refer to rights of new actors without looking for corresponding duties, at least if those actors want to play a role in the process of holding IOs accountable (Scholte 2004: 232).

Thus, (legal) rights and duties, and consequently legal personality, of these new international actors do matter. They can be taken as a minimal safeguarding clause for overcoming the legitimacy deficit of international organizations, be it under the normative claim or with regard to prescriptive policy proposals stemming from empirical research. This even is valid in connection with a specific normative postulate within deliberative theory, namely, legitimate governance through the mediation of a public sphere. Without access of the public to information, without some interaction between civil society and decision-making bodies, a discursive public sphere cannot be informed through the transmission belt of civil society networks – and hence cannot constitute a legitimizing force for international organizations. Thus, Nanz rightly acknowledges that for this legitimizing postulate to work out, institutional arrangements are necessary in order to ensure the accountability of democratic decision-making bodies (Nanz 2003: 78).

In consequence, "[o]fficial rules of engagement can have […] enabling […] effects for civil society activities" (Scholte 2004: 226), but also disabling ones in the case of prohibitions or non-existence of rules. If non-governmental organizations or interparliamentary assemblies could be said to have a certain legal stand in international law, some minimal preconditions for legitimate governing might be guaranteed. This does not mean that legal rights and duties would dispense with the necessity of them being applied or implemented (on the part of the rulers), nor of them being accepted as binding and generally being respected (on the part of the ruled-over), but without their mere existence, there is no guarantee for a non-arbitrary involvement of civil society or parliamentarians, hence an equal opportunity for all. The door would be open to inconsis-

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[6] NGOs are often seen as representing civil society at large or are taken as a proxy for measuring civil society input in international fora. In some contexts, the notion of civil society organization (CSO) is used instead, often with a somewhat larger meaning. In the following, I apply the term of NGOs in its proxy function, encompassing as such also CSOs; see also note 10.

[7] Beisheim (1997), Edwards (2000), Kovach, Neligan, et al. (2003), Held (2004: 385).

tency, subjectivity, chance, and the undermining of the weak, in short, to arbitrariness[8]. Thus, rights and duties here are a *de jure* safeguarding clause for equal *de facto* legitimizing capabilities of both, the legitimizing new international actors and the organization which searches for legitimacy of its international order through according these rights and duties. Therefore, we might take the personality concept as a starting point for operationalizing normative legitimacy claims or prescriptive policy proposals in order to juxtapose them to empirical real world settings. At the same time, the concept might provide a helpful minimal framework of analysis for empirical data on the participation of new actors in international organizations. This points to an intrinsic empirical and theory-building value (international) positive law can take on in political science.

The research project in the context of which this paper has been elaborated has a normative concept of deliberative democracy at its outset[9]. Deliberation, it is claimed, can enhance the legitimacy of rule making in international organizations. The focus here is on the increasing role of civil society in international policy-making and its influence through the mediating function of NGOs[10]. In order to assess the existing democratic quality of decision-making within IOs, the normative concept is operationalized and made accessible to empirical research. Four criteria are proposed in this context, namely, access (of NGOs to deliberation and decision-making), transparency (of the policy-making process), responsiveness (of decision-makers and their agendas to concerns of NGOs) and inclusion (of all relevant NGO concerns) (Nanz and Steffek 2005). The first two as well as in some way also the fourth criteria hinge upon formal institutional procedures, and thus on legal rights and duties, whereas the third, responsiveness, introduces an element of institutional learning through deliberation. The first two procedural criteria are defined as *sine qua non* condition for the third criterion, *i. e.* for institutional learning, and thus constitute a sort of "safeguarding clause" for a full account of democratic legitimacy.

The project's design foresees - as the last methodological step of what is essentially a qualitative research approach - simple ordinal scaling of the different empirical findings.

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[8] This is specifically valid for informal ways of influencing international decision-making. I do not preclude that those ways, *e. g.* lobbying, sometimes might even be more successful; Paech (2001: 11). However, they are open only to the strong and powerful, which discards the democratic postulate of equal opportunity.

[9] For the project proposal, see http://www.staatlichkeit.uni-bremen.de/download/de/forschung/B5_2003_projektantrag.pdf.

[10] In the research project, we use the term NGOs in a wider sense, encompassing civil society organizations (CSOs) in general. By those CSOs we mean non-governmental, non-profit organisations that have a clearly stated purpose, legal personality (in national law), and pursue their goals in non-violent ways; Nanz and Steffek (2005: 2).

However, scaling has to be done for each criterion or indicator separately in order to avoid distortions through computing. This paper proposes to examine the procedural preconditions altogether[11] by taking on a legal analytical approach. This might have the disadvantage of not being able to attribute NGO rights and duties to different normative criteria. However, it could provide an alternative methodological approach, which delivers an encompassing and fine-tuned picture of the empirical existence of preconditions for legitimacy within different IO settings whilst preventing it at the same time from falling into the pitfalls of misinterpretation ensuing from quantitative measurements. Moreover, it adds the criterion of NGO legitimacy through the inclusion of NGO duties. One further clarification yet has to be made: this alternative approach does not cover the criterion of responsiveness of international organizations to NGO concerns, *i. e.* the actual impact of NGO input, including the justification of IOs with regard to acceptance or dismissal of NGO claims. Thus, I do not claim to draw conclusions in relation to the legitimacy of international organizations, but rather concerning the existence of minimal safeguards for the fulfilment of such legitimacy by IOs. What I propose is hence an analysis of empirical data with regard to the degree of international legal status of NGOs within different IOs - comparable to investigations of the status of inter-parliamentary assemblies in international law (Kissling forthcoming: chap. 2.2) - as an analytical framework for answering the question of existence of minimal procedural safeguarding clauses for the legitimacy of international organizations.

CRITERIA OF NGO PERSONALITY

Lawyers in general tend to approach a certain subject by first defining precisely the terms used in their analysis. So do international lawyers when speaking about international personality[12]. What is meant is "das Bezogensein eines Subjektes auf eine bestimmte Rechtsordnung" (Anzilotti 1929: 89). A subject of international law then is an addressee of international legal norms of a specified positive legal order[13]. However, here the definitional consent of international lawyers ends. Even though criteria of international personality have been singled out and precisely formulated especially with

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[11] To some extent, I also include rights and duties in this study which relate to the fourth element, *i. e.* inclusion (positive empowerment of most disadvantaged stakeholders), when it comes to an IO's proactive NGO policy, *e. g.* with regard to financing of NGOs. However, since those rights and obligations do not constitute preconditions for democratic legitimacy *per se*, this approach is not implemented *in extensu*; see below.

[12] Whereas the concept is usually referred to as "personality" ("personnalité", "Rechtspersönlichkeit"), the addressee of the concept preferably is named a "subject" ("sujet", "Rechtssubjekt"). For the distinction between subjects and persons see below.

[13] Inductive approach (prevailing opinion). For a distinction between deductive and inductive approaches, see Hempel (1999: 56-71).

regard to new, non-State subjects in subsidiary sources of international law, such as judicial decisions[14] and teachings of prominent international lawyers, legal doctrine has never agreed upon the exact combination of criteria which would sketch out the scope of the concept. *Grosso modo*, we can distinguish five different criteria which are proposed alternatively or cumulatively. When I speak of the legal status of an entity in international law in this paper, I refer to one or more of those criteria, without, however, being bound by a certain combination. For some, for example, it suffices for an entity to be called a legal subject to be the addressee of one or more rights[15]. In this view, every human person would be a subject of international law in the sense that it is the addressee of international human rights norms. Others proffer to add alternatively or additionally legal duties to the requested criteria (Hailbronner 2001: 169; Epping 2004: 55). However, in both cases, rights and duties alike have to be conferred directly (Nguyen Quoc, Daillier et al. 2002: 403), *i. e.* not through the transmission belt of an intermediary, such as the legal order of a State[16]. Another version is to include in the abovementioned list of criteria that of having the capacity to maintain the accorded rights by bringing international claims (Brownlie 2003: 57)[17]. *Lato sensu*, the procedural extension of this capacity to defend its own rights encompasses a capacity to act in its own

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[14] See the *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949: 174. With regard to the United Nations, the Court used the criteria of "capable of possessing international rights and duties" and the "capacity to maintain its rights by bringing international claims"; 179.

[15] Some distinguish here between the capability ("suitable candidate") of an entity to possess legal rights (and duties) and the *de jure* conferment of those rights to the corresponding entity; see Brownlie (2003) or the Advisory Opinion of the I.C.J., *ibid.*). I do not insist on this distinction since capability is hardly acknowledged for nascent cases of personality and what - in my view - counts in the end from a legal viewpoint is the definite conferment of rights (and duties). Capability may thus only be helpful when distinguishing between general subjects of international law and those with a limited personality.

[16] Here the dispute starts with regard to human rights: Are they directly conferred or only through inclusion in a national legal order? I suggest that they are directly conferred, but what mostly deprives the addressed individuals of a certain level of international personality is the missing possibility to bring international human rights claims; see below.

[17] See also note 14. It has to be added that there is a doctrinal controversy about the necessity of existence of certain legal capacities (minimal functions) in order to claim international personality. Thus, some argue *e. g.* that the capacity to conclude international treaties, the capacity to establish diplomatic relations, and the capacity to be held responsible are minimal conditions for legal status; Dominicé (1996). As this seems to be a minority position; Mosler (2000: 714), I take the stand that the only minimal capacity for the quality as person is that of bringing international claims since otherwise, there is no way to meaningfully enforce rights and duties and to possess full capacity to act; differing Hempel (1999: 70-71).

favour, not only before a court, but also before administrative instances in charge of controlling the implementation of international norms (Dupuy 2003: 265-266). Another strand adds another criterion, namely the necessity of an entity to be hold to account before an international court, corollary of the existence of international duties (Cahier 1985: 93-94). The Restatement of the Law Third, The Foreign Relations Law of the United States seems to take this second group of criteria as a condition for calling the entities concerned international persons. Entities that "have only rights and obligations" ought to be called subjects (The American Law Institute 1987: 70-71). I will use this linguistic distinction in the following when elaborating on a gradual legal approach to international personality. Finally, a minority of international lawyers assume that to speak about personality, an entity has to possess the capacity to create international law, or at least to participate decisively in its creation - directly or indirectly through representatives -, and thus to dispose of so-called "normative power" (Stoecker 2000: 90)[18].

Turning to the specific case of NGOs, most authors of law (Verdross and Simma 1984: 251; Klein 2001: 279; Dupuy 2002: 27-28) and politics (Martens 2003) reject the idea of legal status of those groups. However, dismissal of legal personality of those entities often occurs prematurely, failing any in-depth legal-empirical evaluation. First of all, we have to keep in mind the *dictum* of the International Court of Justice that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community"[19]. Moreover, the question of whether NGOs possess international personality intrinsically is linked to the comprehension we have of the term (Stoecker 2000: 89). Having taken a decision about which concept of personality we apply, a careful investigation has to search for its correspondence to real world settings with regard to the life and activities of NGOs. This is the basis on which some authors recently took the stand that NGOs have acquired legal status in international law. Thus, some, mostly German speaking lawyers begin to talk about partial personality[20]. Others admit a certain international legal status without attributing international personality[21].

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[18] Legal status hence in no way depends on the existence of a legal definition or on a general circumscription of rights and duties of an entity in, or its creation through international law; Mosler (1962: 41 and 45), even though those circumstances undoubtedly would do away with some uncertainties and would greatly enhance general application of the concept to a specific entity. With regard to NGOs, attempts have been made - so far unsuccessfully - to progressively develop the legal status of NGOs through treaty law; see Dahm, Delbrück, et al. (2002: 233), and Wiederkehr (1987: 753).

[19] *I.C.J. Reports 1949*: 178.

[20] Hobe (1999), Nowrot (1999: 614, 631, and 635), Bleckmann (2001: 518), Riedinger (2001: 320-321), Dahm, Delbrück, et al. (2002: 240-242), Hummer (2004: 241) Hempel classifies the personality of NGOs as derived per-

However, further clarifications have to be made with regard to NGO international personality. It is clear that NGOs, in the case we attribute legal personality to them, can never be considered original subjects - a status which solely is reserved to States. Since they derive their personality - if ever - from other international subjects (States or IOs), they can only take on the status of **secondary - or derived - subjects**. Moreover, as Martens rightly acknowledges (Martens 2003: 19), there is no general (global) recognition of NGOs (of their rights/duties and of their legal status in general) in international law, that is in treaty or customary international law[22]. Instead, the status of NGOs differs from IO to IO. In this sense, we can speak of a legal status of NGOs solely within a partial - or functional - international legal order or of **functional personality** targeted towards NGO tasks in relation to a specific IO. In this context, it might make a difference if IOs recognize NGOs through primary international law which sets up their legal order (*i. e.* their founding treaty or other primary international law sources) or through corresponding secondary international rules, namely, their derived legal order (mostly statutes and resolutions). The latter would bestow NGOs with simply **indirect international personality**, whereas the first also would give them **direct international personality**. However, indirect personality might become a direct one when it is contained in soft law which gradually evolves into customary international law through practice reaffirmed by *opinio iuris*[23]. Moreover, since they in no way are the main subjects

sonality; Hempel (1999: 190-192). See also note 23. For an early expression of this view see Kaiser (1961: 614), and more carefully also Mosler (1962: 25 and 45 (indirect inclusion of NGOs in the international legal order)). The latter also gives a detailed analysis of the principal capacity of the international legal order to include other international subjects, *e. g.* what is today called NGOs (esp. 3-5 and 39). For a more extensive view on NGO personality see Lador-Lederer (1963).

21 Lagoni (1991: 869-870), Rechenberg (1997: 617), Stoecker (2000: 98).

22 As States try to avoid conferring group rights in general, they all the more circumvent speaking of NGOs rights and duties in hard and even soft law. Thus, the recent Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Annex to UN GA Res. A/RES/53/144 of 9 December 1998) perpetuates the old language of former human rights law by bestowing rights and duties only to "everyone", that is the individual, and acknowledges NGOs merely with reference to their important role and responsibility in the human rights context. On the other hand, the only general (regional) treaty dealing with NGO status, namely, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations of 24 April 1986 (CETS No. 124), merely regulates mutual State recognition of legal personality of NGOs in national law; see Wiederkehr (1987).

23 For international NGOs at UN Conferences and ECOSOC, Willet acknowledges international personality in form of customary international law; Willets (2000: 205-206).

within that IO's legal order, NGOs see rights and duties attributed in only a limited fashion and not in an all-embracing manner (*in toto*). We may thus conceive of those attributes as **partial personality**. A corollary of NGOs' functional personality – contrary to that of international organizations[24] - finally is its missing objectivity, *i. e.* the absence of opposability *erga omnes*. This means that NGOs may enjoy personality merely with regard to the members of the respective IO's legal order. In order to benefit from it also in other circumstances, they would need to be recognized as subjects by the members of other international organizations or by other subjects of international law. In this way, NGO **personality** can only be **relative**[25]. A last question concerns the role of recognition of an individual NGO within an IO's legal order. In order to obtain relative personality, does an NGO have to be recognized explicitly or implicitly by the IO in question (and/or its members) even though the selection criteria for acquiring a certain status are *prima facie* fulfilled? On the face of it, any single NGO attains legal status when the respective IO admits it to its legal order, mostly by majority vote through general accreditation, by single case decisions or in the way its legal order foresees it. In this way, the corresponding IO's decision functions as an at least implicit recognition of an NGO. Beyond that, no additional recognition (*e. g.* by State members of the IO) seems to be required for rights and duties of an NGO to take effect. Thus, the old quarrel about the constitutive or declaratory function of recognition with regard to States in international law takes on another complexion here. For any single NGO, **IO – but simply IO[26] – recognition is constitutive** for acquiring legal status at all.

DO INTERNATIONAL ORGANIZATIONS ASSIGN LEGAL PERSONALITY TO NGOS? – A GRADUAL LEGAL APPROACH

Since there is no general international law, *i. e.* treaty or customary law, detectable with regard to the legal status of NGOs, I propose to look at the rules concerning the rights and duties of NGOs and their legal situation in each international organization or treaty regime[27] separately (Dahm, Delbrück et al. 2002: 238)[28]. As regards legal status within

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[24] See *I.C.J. Reports 1949*: 185.

[25] In this sense Mosler (1962: 32).

[26] Which, however, is substituted again by States in cases where we do not deal with an international organization in a legal sense; see note 27.

[27] For convenience, I only will speak of international organizations in the following, even though our case studies also encompass treaty regimes, State groupings, or organs/bodies (UN) and policy fields (EU) of international organizations. With regard to law-making power, this does not matter since for those cases which legally do not qualify as an international organization *per se*, State representatives which dispose of law-making power are the main actors. An exception constitutes the OSCE whose IO quality still is controversial, but whose documents also explicitly have only political, rather than legal value.

each organization/regime, I adopt a gradual approach which sets up different degrees of legal status depending on the number of criteria met. Even though I adopt a wide concept of legal status encompassing all criteria discussed in the context of legal personality, I do not think that it does not matter to retain "de façon alternative, tel ou tel critère de dévolution" (Dupuy 2003: 266). Rather, empirical data suggest that the five legal criteria can be allocated to three groups of legal capacities which gradually increase the corresponding legal status. We start with simple rights and/or duties (first group), then add the capacity to enforce these rights and/or to be held accountable for the fulfilment of duties (second group), and finally deal with full normative powers (third group). These capacity groups differ with regard to the legal status they confer, the first group bestowing the status of "subject" on an NGO, the second conferring the status of "person" to it, and the third being classified as encompassing "comprehensive legal status". The gradual approach as described above is illustrated in table 1 below.

***Table 1**: Degree of Legal Status of NGOs According to Legal Criteria*

	Degree of Legal Status	Criteria for Legal Status	Corresponding Legal Rights and Obligations
Legal Status	**Subject**	**Rights**	- Accreditation - Regular access to buildings - Right to have access to documents (background documents/policy papers) (distribution/Internet) - Access to governmental meetings - Right to speak - Right to submit documents - Special meetings for NGO consultation/obligatory consultation - Right to put topics on the IO's agenda - Rights in implementing projects (also financing) - Rights in review of projects - Control and monitoring of governments' compliance - Right to submit briefings in dispute settlement procedures between States or States and IOs
	⇩	**Duties**	- Duty to fulfil certain criteria for accreditation
	Person	**Enforcement Capacity**	- Right to lodge a complaint against IO or State
	⇩	**Accountability**	- Accountability for loss of entitlement to be accredited, checked through re-examination procedure - Accountability before Court - Accountability as part of national delegation or of organs with voting power
	Comprehensive Legal Status	**Normative power**	- Members of national delegations - Drafting rights - Right to vote

[28] I propose to approach each organization directly, *i. e.* through its own rules directly concerning rights and duties of NGOs, and not indirectly through any legal recognition of outside rules attributing NGO rights and duties or of rules elaborated by NGOs themselves which would acknowledge a certain - limited - normative power; see Pauwelyn (2004). Referrals to other legal orders within the so-called "direct NGO rules" are taken into account.

The legal rights and obligations enumerated in column three are not exhaustive, but only a tentative list of common characteristics with regard to NGO rights and duties. They might be supplemented by others. However, the list indicates that the first group entails a far wider amplitude of different legal rights (and duties) than the second and third group, even though rights and duties of the two latter groups are more far-reaching in relation to their legal effects. Since legal status already can be achieved through the conferment of one single legal right or duty, it admittedly seems to be very easy to achieve subject status through one of the above listed rights or duties of the first category. This, however, is a very low level of status. The threshold of person quality then would be at the level of enforcement capacity (second group). This procedure corresponds to the approach taken with regard to individuals before the International Criminal Court was established. As the addressee of human rights norms, individuals usually were considered to acquire (limited) personality in international law only in those legal contexts where they could enforce their rights and duties (Dupuy 2003: 265-266). However, the threshold of person quality has to be investigated very carefully: When we speak of enforcement capacity and accountability, the corresponding capacity to act only makes sense when rights and obligations of NGOs are enforced, not duties of other subjects in international law. When Ipsen (2004: 93) requires controlling, monitoring and implementing rights for NGOs for any legal status to be acknowledged, he falsely misconceives that NGOs in these cases only enforce duties of States, and not their owns. For NGOs, these capacities equal to "simple" rights and duties.

Another implication – evidenced through empirical research – which can be drawn from the table above is the under-representation of NGO duties. The debate on internal legitimacy of NGOs led in the scientific and political community alike might change this obvious bias in the near future. Until today, however, internal legitimacy of NGOs (rules about their establishment, internal organization, requirements for membership and members' rights, definition of an NGO, legal status, independence) mostly remains self-regulatory, *e. g.* through codes of conduct (see Scholte 2004: 232). In some cases, international organizations even openly accredit NGOs which according to some others would not pass the line of legitimacy, *e. g.* when financed by governments[29].

Since I focus on the legal situation of NGOs in international organizations in general, in this study I exclude the attribution of personality to some specific and single NGOs, such as the Red Cross, which takes on a variety of functions under the four Geneva

[29] See the UN ECOSOC criteria for accreditation which only require that financial contributions or other support, direct or indirect, from a Government shall be openly declared to the Committee through the Secretary-General and fully recorded in the financial and other records of the organization and shall be devoted to purposes in accordance with the aims of the UN; see below.

Conventions of 1949 and their two Additional Protocols of 1977 to it (see Nowrot 1999: 630-631). Another NGO, the International Olympic Committee, even has a good level of normative and jurisdictional power (Hobe 1997: 4). I moreover exclude those single NGOs which appear to act as the prolonged arm of State regulation, such as the International Air Transport Association (IATA)[30]. However, an effort is made to single out the first introduction of NGO rights and duties by year at every level in order to draw conclusions about when a certain legal status was conferred. Finally, since international law does not only relate to treaty, but also to customary law, I also include those legal rights and obligations relating to NGOs which seem to have acquired customary law status through practice and *opinio iuris*.

INTERNATIONAL ORGANIZATIONS IN COMPARISON

In the following, I will address the question of NGO legal status in international organizations by grouping IOs alongside specific policy fields[31]. Thus, I broadly distinguish between **Security** (United Nations General Assembly (UN GA), United Nations Security Council (UN SC), Nuclear Non-Proliferation Treaty (NPT), North Atlantic Treaty Organization (NATO), Organization for Security and Co-operation in Europe (OSCE), and European Union, Common Foreign and Security Policy (EU CFSP)), **Economy** (World Trade Organization (WTO), International Labour Organization (ILO), World Intellectual Property Organization (WIPO), G8, Organization for Economic Cooperation and Development (OECD), North American Free Trade Agreement (NAFTA), and European Union, Trade (EU Trade)), **Environment** (United Nations Environment Programme (UNEP), United Nations Framework Convention on Climate Change (UNFCCC), Montreal Protocol, Aarhus Convention, Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), and European Union, Environment (EU Environment)), **Development** (World Bank Group, United Nations Development Programme (UNDP), United Nations Economic and Social Council (UN ECOSOC), Food and Agriculture Organization of the United Nations (FAO), United Nations Conferences (UN Conferences), and World Health Organization (WHO), **Hu-**

[30] It might remain open if this association better is denominated a "QUANGO" (Quasi-Non-Governmental Organizations), *e. g.* a privately organized State administrative entity, or a business organization.

[31] This corresponds to the classification used in the project B5 of the Collaborative Research Center 597 "Transformations of the State" in Bremen. However, I do not evaluate the questionnaires on the UN Secretariat and on the EU Structural Funds. The first does not really fit in our policy fields (cross sectional area). The second does not rest on common legal rules at the European level with regard to participation of NGOs. Member States are free to organize NGO involvement (mainly in Monitoring Committees) and consequently participation depends on national rules and/or practice. A common European practice thus could only be reliably detected when more than two countries (Germany and Sweden) were to be analyzed.

man Rights (United Nations, Human Rights (UN Human Rights), and European Union, Asylum and Migration (EU Asylum and Migration)), and **Financial Affairs** (International Monetary Fund (IMF), Bank for International Settlements (BIS), European Central Bank (ECB), and European Union, Economic and Financial Affairs (EU ECOFIN)).

***Table 2**: Legal Status of NGOs within Different Organizations/Regimes*

Policy field	Organizations/ Regimes	Degree of Legal Status	Intro-duction	Direct/Indirect Personality	Intro-duction
Security	UN GA	Subject	1946	Indirect	1946
	UN SC	Subject	1946	Indirect Direct	1946 1996
	NPT	Subject	?	Direct Indirect	? ?
	NATO	Subject	?	Direct	?
	OSCE	No status	-	-	-
	EU CFSP	Person	1993	Direct	1993
Economy	WTO	Subject	1995	Direct Indirect	1995 1996
	ILO	Comprehensive	1919	Direct Indirect	1919 1919
	WIPO	Subject	1970	Indirect	1970
	G8	No status	-	-	-
	OECD	Subject	1962	Indirect Direct	1962 1997
	NAFTA	Subject	1994	Direct	1994
	EU Trade	Person	1958	Direct Indirect	1958 1958
Environment	UNEP	Subject	1988	Indirect	1988
	UNFCCC	Subject	1994	Direct Indirect	1994 1996
	Montreal Protocol	Subject	1989	Indirect	1989
	Aarhus Convention	Subject	2002	Direct Indirect	2002 2002
	CITES	Subject	1975	Direct Indirect	1975 1975?
	EU Environment	Person	1987	Direct Indirect	1987 1987
Development	World Bank Group	Person Subject	1993 1944 ?	Direct Indirect	1993 1993
	UNDP	Person	?	Indirect	?
	UN ECOSOC	Person	1946	Indirect Direct	1946 > 1946
	FAO	Person Subject	1957 1953	Direct Indirect	1953 1957
	UN Conferences	Person	1950	Indirect Direct	1950 > 1950
	WHO	Person	1948	Direct Indirect	1948 1948

Policy field	Organizations/ Regimes	Degree of Legal Status	Intro-duction	Direct/Indirect Personality	Intro-duction
Human Rights	UN Human Rights	Person	> 1946	Direct Indirect	> 1946 1947
	EU Asylum and Migration	Person	1993	Direct Indirect	1993 1999
Financial Affairs	IMF	Subject	1999	Indirect	1999
	BIS	No status	-	-	-
	ECB	Person	1998	Direct Indirect	1998 2004
	EU ECOFIN	Person	1958	Direct Indirect	1958 ?

The table above shows the legal status acquired by NGOs in the different international organizations and the moment of introduction of that status[32]. Moreover, it is specified when direct (through primary international law) or indirect (through secondary international law) personality was achieved[33]. In this context, we designate those rights/duties as conferring direct personality which directly are contained in international treaties[34] or have developed into customary law out of soft law[35], such as resolutions[36], or out of other practice combined with *opinio iuris*. Indirect personality is based on internal decisions, such as the Rules of Procedure of an organization. It is obvious that many organizations grant a whole range of different rights and/or duties which – taken together – confer direct as well as indirect personality. Some reputed "rights" and "duties", however, do not confer any personality at all. This is the case when we deal with soft law (resolutions/guidelines, etc.) which either has not yet acquired the status of or cannot develop into customary law because State parties want to keep it non-binding. The OSCE constitutes a particular case in this context since all its documents do not have any legal, but only political value. However, since OSCE documents are framed in legal

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[32] Detailed tables per IO specifying every single right or duty at every level of legal status as well as its introduction can be obtained from the author.

[33] Wherever a question mark remains, the introduction of legal status or direct/indirect personality could not be identified.

[34] *E. g.*, the UN's Art. 71 providing for ECOSOC that it "may make suitable arrangements" does not satisfy the requirement of direct introduction of NGO rights in treaty law. All further arrangements are contained in resolutions and thus in secondary, not in primary international law; see also Nowrot (1999: 624).

[35] Here, the conferral of rights/duties does not take place immediately after the adoption of a certain soft law document, but only within a certain time lapse. We therefore mark this by adding ">" before the year of introduction, which means "after" [year].

[36] The question of whether resolutions of IOs might lead to internal or external custom over time has been decided in favour of external custom (= direct personality) in this case since the actors concerned (NGOs) in the resolutions examined are not part of the organization itself.

language and express a clear *opinio politica*, we assume that they at least create soft law. Moreover, no personality is accorded by documents which do not contain any sort of international law because their authors do not have normative power in international law, such as rules or practice of experts or secretariats of international organizations.

LEGAL STATUS AND TYPE OF PERSONALITY WITHIN DIFFERENT IOS

Given the growth in literature on NGOs as new actors in international governance over the last 15 years, we would expect a corresponding increase in new NGO rights and duties during that time period. Since, on the other hand, governments are supposed to be unwilling to confer rights and duties, the hypothesis could be that subject status as well as indirect personality are preferred over person status or direct personality. The results of our enquiry, however, are astonishing.

Of the 31 organizations examined, only three (BIS, G8, OSCE) confer no legal status at all to NGOs. Whereas within the OSCE this is due to the mere political value of its documents, the G8 and the Bank for International Settlements remain pretty closed policy circles not accessible to NGOs. On the other hand, only one organization, namely, the ILO, grants comprehensive status to NGOs also encompassing normative power. Most IOs thus accord either the status of subject or that of person to non-governmental organizations. The proportion yet is fairly balanced, with 14 IOs bestowing subject status, and 13 the qualitatively higher person status on NGOs. However, if we look closer at the results, we detect that the high person status result on the one hand is owed to equal results for all EU institutions. In the European Union (European Communities, EC), NGOs have had person status from the very existence of the EC due to introduction of direct rights to institute court proceedings. The time difference in introducing that status (column 4 of table 2) only depends on the moment of takeover of the respective policy field into Community/Union politics. On the other hand, the high person status result can be attributed to UN organizations working in the field of development or human rights. Apart from the World Bank Group, those IOs similarly conferred person quality to NGOs already during the very first years of their existence, which was long before the 1990s.

Hence, neither within the category of comprehensive, nor within that of person status, we could detect a meaningful increase of IOs granting such a status during the last 15 years. The ILO's tripartite structure already has been in existence since 1919. With regard to person status, we may consider the new EU policy fields (Asylum and Migration, CFSP, and the ECB). Apart from those, it was – unexpectedly – only the World Bank Group which upgraded NGO subject status – mainly characterized by the possibility to ask for implementation of projects and funding before – to person quality in 1993 through the establishment of a right to lodge complaints against the Bank for not following its operational policies and procedures before Inspection Panels of the

International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Since the year 2000, NGOs also can lodge complaints for being affected by the social and/or environmental impacts of projects before the Compliance Advisor/Ombudsman Office of the International Finance Cooperation (IFC) or the Multilateral Investment Guarantee Agency (MIGA). A very new development is the acceptance of the first *amicus curiae* briefs from civil society organizations by the tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in May 2005.

Within the category of subject status, the picture is somewhat different. Here, we have an increase of five organizations newly according status to NGOs, whereas for two (NATO, and the NPT), the moment of status introduction was not detectable. However, NATO is negligible since the only right NGOs have here is access to most of NATO documents. Those IOs which newly instituted NGO subject status encompass NAFTA (1994) and UNFCC (1994), the WTO (1995), the IMF (1999), and the Aarhus Convention (2002). In the case of the Aarhus Convention, NAFTA, UNFCC, and the WTO, however, this is due to the foundation of those treaty regimes or organizations. It should be mentioned that NAFTA also allows for *amicus curiae* briefs in some (chapter 11) cases, and, with regard to the North American Agreement on Environmental Cooperation, for enforcement grievances through citizens' submissions. Similarly, the WTO provides for the possibility to submit *amicus curiae* briefs in WTO disputes to its Dispute Settlement Panel or Appellate Body. At the IMF, rights remain pretty limited and do not go beyond access to some, mostly archived, information and consultation with regard to Member States' formulation of their Poverty Reduction Strategy Papers.

Looking at the type of personality (direct or indirect), two-thirds (20) of all those international organizations which confer legal status to NGOs do that through direct and indirect personality in parallel. Only six (the IMF, the Montreal Protocol, UNDP, UNEP, the UN General Assembly, and WIPO) restrict legal status to indirect personality, only two (NAFTA and NATO) to direct personality. Some of them (IMF, NATO, UN GA) only dispose of a pretty limited range of NGO rights anyway. However, the assumption that international organizations would prefer according indirect personality to NGOs instead of direct one has been refuted by the analysis. Thus, 22 IOs directly grant personality to NGOs through treaty or customary (primary) law, ten of them even before indirectly conferring personality through internal (secondary) rules, 7 others at least at the same time. Ten of those 22 organizations introduced direct status already before 1990, ten others afterwards[37]. Of the 26 organizations according indirect NGO status, even 15 organizations set up that status before 1990, and nine afterwards. Of

[37] With regard to NATO and the NPT, an exact moment of status introduction could not be determined.

course, most of those last organizations or treaty regimes were new. Hence, the immense increase in new rights for NGOs expected for the last 15 years does not seem to have taken place. Nevertheless, we have to keep in mind that the moment of introduction of status does not shed light on the density of rights within an IO or the addition of new rights and duties where status already existed. This will be part of the analysis below.

Finally, if we look at the results from another angle, namely the different policy fields, we can draw the following conclusions. First, all IOs working in the policy fields of development and human rights confer person status to NGOs, and that mostly since the 1940s or 1950s. On the contrary, within the category of environment, a quite new policy field emerging only in the 1970s, NGOs mostly have subject status – in contrast to the widespread conviction that NGO participation in this field is especially effective. This is particularly remarkable since with regard to financial affairs, two of four organizations (the ECB and EU ECOFIN) even grant person status to NGOs. For the other categories, status varies without demonstrating many similarities. One remark shall be added with regard to the EU: We have examined different policy fields, which makes sense when we look at the introduction of direct or indirect personality. At a first glance, NGOs in every policy field have person status from the moment of introduction of that subject area into EC/EU politics. There is no difference with regard to policy fields attributable to the first, second or third pillar. As mentioned above, this is due to NGO rights to introduce court proceedings. Those rights all are contained in treaty law and thus confer direct personality. However, as soon as we consider indirect personality, the picture is somewhat different. Here, we have to distinguish between the first pillar (EU Environment and EU Trade), and the second and third pillar (EU Asylum and Migration and EU CFSP), the first according indirect personality at the same time as direct one, and the second and third only at a later date[38] or not at all. The same, however, applies to EU financial affairs. The ECB as well as EU ECOFIN were to some extent hesitant to give way to indirect personality rights of NGOs.

THE QUALITY OF RIGHTS

The picture we get from table 2 is only a limited one. It only covers the final result of an addition of different rights and duties. Thus, as already mentioned above, no evidence is given of the extent, content, or breadth and density of rights and duties attributed to NGOs. This has to be part of a qualitative analysis which has to track down the complexity of status by a combined approach of looking at the number and the substance of

[38] The partial transfer of Asylum and Migration from the third to the first pillar in 1999 is reflected by introduction of indirect personality the same year.

NGO rights and duties[39]. As expected, the scale of NGO rights and duties varies extensively from organization to organization. It ranges from one single right (NATO: access to documents) to an uncountable number of rights and duties in the United Nations human rights field. Those organizations which definitely grant the fewest rights enclose the ECB, the EU CFSP, EU ECOFIN, the IMF, NATO, the UN General Assembly, and the UN Security Council. Taken together with those IOs which do not confer any status to NGOs, namely the BIS, the G8, and the OSCE, this confirms our view of organizations in the field of security and financial affairs preferably working behind closed doors. In that category, we have organizations only allowing access to documents (NATO, UN GA), others also permitting some more information and consultation rights (IMF, UN SC)[40], and finally the EU policy fields which add enforcement capacity to a few information rights (ECB, EU CFSP, EU ECOFIN)[41].

About half (17) of the organizations provide for accreditation and/or registration of NGOs[42], most of them (15) also asking for the fulfilment of corresponding conditions. However, accreditation is only regularly re-examined in six cases (FAO, ILO, UN Conferences, UN ECOSOC, UN Human Rights, and the WHO). Accreditation mostly leads to participation and speaking and/or submission rights. However, the possibility for NGOs having general consultative status to propose a topic for the agenda is unique at UN ECOSOC (and human rights bodies under ECOSOC). A curiosity is the Aarhus Convention's right for an NGO representative to participate in Bureau meetings as an observer. Moreover, voting power only is attributed to NGOs within the ILO. Almost all (27[43]) organizations allow access to undisclosed documents, whereas the ILO, and partly CITES, UNEP, UNFCCC, the Montreal Protocol, the WHO, and WIPO also distribute negotiation texts. An EU speciality is the right of every citizen of the Union, *i. e.*

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39 A legal analysis in the end always remains a qualitative analysis, even though some quantitative measurements might be taken into account.

40 IMF: access to documents, civil society newsletter, outreach seminars, consultation of NGOs in Member States' formulation of their Poverty Reduction Strategy Papers; UN Security Council: online access to documents, NGO Working Group meetings meant to brief NGOs, submission of written NGO documents to the Council, and Aria Formula meetings allowing NGOs to brief the Council.

41 In all three policy fields, NGOs have the right to receive an answer from an EU organ to a written request, to have access to unrestricted documents, which, however, often are restricted, and to submit complaints through the EU Ombudsman or to institute court proceedings. At the ECB, also open hearings within the framework of macroeconomic dialogue, social dialogue or public consultation take place.

42 Aarhus Convention, CITES, FAO, ILO, Montreal Protocol, NPT, OECD, OSCE, UN Conferences, UNDP, UN ECOSOC, UNEP, UNFCCC, UN Human Rights, WHO, WIPO, and the WTO.

43 Apart from the BIS, the G8, NAFTA, and the OECD.

also an NGO representative, to receive an answer to a written request from any EU institution or body (Art. 21 (3) of the EC Treaty). A similar provision of the UNDP Public Information and Documentation Disclosure Policy allows for reconsideration of a request for a document by the Public Information and Documentation Oversight Panel in case of a denial, in whole or part, of such a request. Project implementation through NGOs of course only is possible when an organization executes projects. The UN and the EU have set up a number of Trust Funds and grants for the implementation of their projects to which NGOs can apply. At the WHO, on the other hand, the part dealing with duties in this regard is especially strong: NGOs in informal and official relations with the WHO have to implement, formulate and to review certain projects. NGOs in official relations have to implement a programme of cooperation, have to inform on the WHO, and to collaborate in WHO programmes and with WHO Member States. Otherwise, they loose their official status. UNFCCC formulates duties in a less binding way: its Guidelines for the participation of representatives of non-governmental organizations contain a sort of code of conduct for NGOs.

Some IOs have set up specific advisory bodies in which NGO representatives partake exclusively or besides governmental members. Thus, NAFTA's North American Agreement on Environmental Cooperation has instituted a Joint Public Advisory Committee, consisting of citizens appointed by governments. The EU disposes of a European Economic and Social Committee (EESC)[44] besides numerous advisory committees of the Commission. The UN human rights Treaty Bodies, the Permanent Forum on Indigenous Issues, or the UN Working Group on Indigenous Populations, as many other bodies within the UN system, are expert member bodies. The UNDP CSO Advisory Committee, composed of 14 leaders of civil society organizations, gives NGOs the possibility to report on Parties' compliance to the UNDP Administrator through the Committee. Admittedly, this is the implicit claim which all NGOs assert with regard to most of their statements submitted to international organizations. But rarely there is an institutionalized monitoring mechanism authorized by an IO. Other compliance monitoring mechanisms exist within CITES, the ILO, and the OSCE. The Aarhus Convention has not yet legally concretized a similar right of the public, foreseen in Art. 15 of the Convention, to be involved in reviewing compliance of States with the provisions of the treaty.

More far-reaching rights of NGOs to be included in monitoring of State's compliance are complaint procedures. Here, we have to distinguish between the possibility to hand

[44] The EESC's 317 members are drawn from economic and social interest groups in Europe. Members are nominated by national governments and appointed by the Council of the European Union for a renewable 4-years term of office. They belong to one of three groups: Employers, Employees, and Various Interests.

in *amicus curiae* briefs in dispute settlement procedures (NAFTA, WTO)[45] or statements in complaint procedures (ILO) between States on the one hand, and an effective enforcement right through becoming a party to a dispute before a court, tribunal or panel, etc. (EU, World Bank Group) or a complainant instigating a complaint procedure against a Member State (EU, ILO, NAFTA, UN Human Rights) on the other. The OECD has a complaint procedure against multinational enterprises through National Contact Points which accept comments and enquiries by NGOs. Similarly, the ICSID of the World Bank Group provides for the settlement of disputes between governments and foreign investors. In May 2005, the ICSID tribunal for the first time decided to accept *amicus curiae* briefs from five civil society organizations on the basis of Article 44 of the ICSID Convention. Altogether, we detect a broad variety of NGO rights and duties in different IOs. In a majority of those IOs, new rights were added over the last 15 years and thus led to an intensified breadth and density of legal status.

One last remark shall be allowed with regard to the density of NGO rights and duties in relation to the legitimacy of international organizations. As this chapter has revealed, extent and content of NGO legal status extensively differs from organization to organization. A comparison of two cases both attributing subject status, namely, NATO and the Aarhus Convention, one allocating just one single right to NGOs (NATO) and the other a palette of those rights and one duty to NGOs (Aarhus Convention), demonstrates to this (see tables 3 and 4 below). Obviously, in the case of NATO, it is questionable if we can still speak of sufficient safeguards for the legitimacy of international organizations. However, since NGO rights and duties are so different even in comparison of most-likely cases, such as the Aarhus Convention and, for example, human rights bodies, I decline to draw any conclusions in relation to the sufficiency of those safeguards, be they rights or duties, for IO legitimacy. This should rather be examined together with the question of NGO actual impact and IO responsiveness to NGO claims, *i. e.* the further criterion necessary for the legitimacy of international organizations. As argued above, legal status can only provide for minimal safeguarding clauses, not for the legitimacy of international organizations itself.

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[45] At the UN's International Court of Justice, NGOs have only once participated in proceedings, namely the International League for the Rights of Man in the advisory opinion on the international legal status of South-West Africa; see Nowrot (1999: 632). The Permanent Court of International Justice, however, allowed for NGO claims before the Court; see Martens (2003: 14). With regard to arbitration, the first case arbitrated by agreement between a State and an international NGO was the Arbitration between France and Greenpeace following the destruction of the Rainbow Warrior; see Nowrot (1999: 634).

***Table 3**: Legal Status of NGOs within NATO*

NATO				
Criteria	**Legal Source**	**Direct/Indirect Personality**	**Content of Legal Rights/Obligations**	**Chronological Introduction**
Rights	Customary	Direct	Access to documents	?
Result: Subject (?)/direct personality (?)				

***Table 4**: Legal Status of NGOs Attributed by the Aarhus Convention*

Aarhus Convention				
Criteria	**Legal Source**	**Direct/Indirect Personality**	**Content of Legal Rights/Obligations**	**Chronological Introduction**
Rights	Art. 2 (4 and 5, and 10 (5 and 6) of the Convention; Rules 5 (2e and f), 6 (2), and 7 (1 and 2) of the RoP	Direct	Right of environmental organizations to ask for registration as observers and to participate in meetings/of members of the public to participate	2001/2002
	Rules 5 (3), 10 and 11 of the RoP	Indirect	Access to the provisional agenda and any supporting documents for observers at least six weeks before the opening of the meeting/access to all official meeting documentation and the notification of any meeting through the ECE web site and upon request (electronic form sufficient).	2002
	Rule 22 (2 and 4) of the RoP	Indirect	Right to send an NGO representative to meetings of the Bureau	2002
	Rule 27 (1) and (4) of the RoP	Indirect	Right of observers to speak	2002
	Art. 15 of the Convention	Direct	Right of the public to be involved, potentially to submit communications, in reviewing compliance of States with the provisions of the Convention	Not yet legally concretized
Duties	Art. 2 (5), and 10 (5 and 6) of the Convention; Rule 5 (2e) of the RoP	Direct	Duty to fulfil certain criteria for registration as observers	2001/2002
Result: Subject (2002)/direct (2002) and indirect (2002) personality				

OUTLOOK

Our inquiry has looked at 31 IOs and their rules on NGO participation in detail. However, there are far more international organizations to be examined. An outlook of inter-

esting cases to be examined shall be given in this section. Some of them seem to promise new and interesting mechanisms for NGO participation. For example, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction of 1997 provides for a role of NGOs in the assistance of the destruction of anti-personnel mines. The International Convention for the Regulation of Whaling and the United Nations Convention to Combat Desertification similarly contain implementation rights for NGOs. Moreover, there are far more organizations and treaty regimes extending rights in complaint procedures or court proceedings to NGOs, either as petition or *amicus curiae* briefing rights[46] or in the form of real enforcement power granting party status to NGOs[47]. In some cases, accredited NGOs can even request interpretation of treaty rules[48].

Yet, if we want to find genuine NGO membership, we often have to leave classical governmental cooperation through international organizations or treaty regimes. An exception is the International Telecommunication Union (ITU) which grants private organizations sector membership. Apart from this, we find membership rights in inter-agency cooperation (Joint United Nations Programme on HIV/AIDS (UNAIDS)/UN Office for the Coordination of Humanitarian Affairs) or hybrid network organizations, such as the World Commission on Dams (WCD) or the International Union for Conservation of Nature and Natural Resources (IUCN). The Agreement Establishing the International Institute for Democracy and Electoral Assistance (IDEA) provides for associate membership with limited voting rights for NGOs besides full membership of governments and inter-governmental organizations parties to the Agreement. In some of those cases (IUCN/WCD), however, it is questionable if the organizations concerned can confer status in international law to NGOs given the non-binding character of cooperation not dominated by governments[49]. In "classical" intergovernmental cooperation, invita-

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[46] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Council of Europe), African (Banjul) Charter on Human and Peoples' Rights (African Union (AU)), American Convention on Human Rights (Organization of American States (OAS)), and (European) Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe). In the case of the European Social Charter itself, NGO participation is foreseen with regard to the governmental reporting mechanism. Protocol No. 2 amending the European Charter of 1991, which is not yet in force, will expand NGO involvement in this supervision, especially at an early stage.

[47] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and (European) Convention for the Protection of Human Rights and Fundamental Freedoms (both Council of Europe).

[48] African (Banjul) Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child (both AU).

[49] In the case of the IUCN, *e. g.*, governments transferred bureau duties to IUCN under the Ramsar Convention on

tion to Executive Committees or Boards (United Nations High Commissioner for Refugees (UNHCR)/United Nations Industrial Development Organization (UNIDO)/World Food Programme) seems to be the utmost. The United Nations Population Fund (UNFPA) allows members of its NGO Advisory Committee to participate in Executive Board meetings as observers. The United Nations Educational, Scientific and Cultural Organization's (UNESCO) Constitution – which in its first draft in 1944 had foreseen membership of individuals serving in their personal capacity and participation of educators, similarly to the ILO structure – provides for collaboration with national educational, scientific and cultural institutions preferably through National Commissions which serve in an advisory capacity to their respective governments. Moreover, the Convention Concerning the Protection of the World Cultural and Natural Heritage makes arrangements for an advisory function of some NGOs to the World Heritage Committee. Besides, we only find accreditation and registration of NGOs as observers (African Union (AU)/Organization of American States (OAS)). Some headquarter agreements confirm the status given to NGOs by a certain IO through expanding protection to them[50].

CONCLUSION

Globalization has led to changes in statehood which also have a bearing on international politics. This paper has started out from the premise that legal personality of NGOs could function as a minimal safeguarding clause for overcoming the legitimacy deficit of international organizations. If NGOs had a certain legal status in international law, it was assumed that some minimal preconditions for legitimate governing might be guaranteed. Our inquiry arrives at the conclusion that in the majority of cases, IOs do confer legal personality to NGOs, mostly in form of subject or person status. Moreover, they predominantly have done so from the early days of their existence. Changes in status over the years from non-status to subject status or from subject status to person status are rare and did only take place within four organizations (FAO, IMF, UNEP, and World Bank). The other IOs which newly introduced NGO status were new organizations or regimes. However, the latter do not seem to be as willing to accord person status – instead of subject status – as were the IOs founded after World War II. Furthermore, IOs did not and do not make a substantial difference between direct or indirect personality and often accord both. Thus, IOs generally seem to be quite sympathetic

Wetlands of International Importance especially as Waterfowl Habitat. We can thus observe the reverse procedure of conferring rights to the IUCN through governments.

50 Thus, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations protect NGOs in consultative status with ECOSOC from any impediments to transit to or from the headquarters district; see GA Res. 169 (II) of 31 October 1947.

to according legal personality to NGOs – and direct and indirect personality alike –, but remain pretty static with regard to the status model once chosen – with a declining affinity of new organizations to introducing person status. The factor, however, which makes the difference is the quality of rights. Over the past 15 years, rights and duties of NGOs have increased significantly in a majority of IOs, even though NGO duties still remain under-represented. Altogether, this has led to an increasing breadth and density of NGO legal personality which might be capable of absorbing some of the critics with regard to the legitimacy deficit of international organizations. The safeguards are there and have been consolidated – the question whether public opinion will expect a large upgrading of NGO status by IOs remains to be seen.

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LIST OF ABBREVIATIONS

A. Journals and Terms

Art.	Article
AVR	Archiv des Völkerrechts
CETS	Council of Europe Treaty Series
CSO	civil society organization
I.C.J. Reports	Reports of the International Court of Justice
IO	international organization
IR	International Relations
NGO	non-governmental organization
QUANGO	Quasi-Non-Governmental Organization
Res.	Resolution
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

B. Organizations, State Groupings, Treaty Regimes, and their Organs and Policy Fields

AU	African Union
BIS	Bank for International Settlements
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
EC	European Communities
ECB	European Central Bank
EESC	European Economic and Social Committee
EU	European Union
EU Asylum and Migration	European Union, Asylum and Migration
EU CFSP	European Union, Common Foreign and Security Policy
EU ECOFIN	European Union, Economic and Financial Affairs
EU Environment	European Union, Environment
EU Trade	European Union, Trade
FAO	Food and Agriculture Organization of the United Nations
G8	Group of Eight
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDEA	International Institute for Democracy and Electoral Assistance
IFC	International Finance Cooperation
ILO	International Labour Organization
IMF	International Monetary Fund
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature and Natural Resources
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NPT	Nuclear Non-Proliferation Treaty
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UN Conferences	United Nations Conferences
UNDP	United Nations Development Programme
UN ECOSOC	United Nations Economic and Social Council
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund

UN GA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UN Human Rights	United Nations, Human Rights
UNIDO	United Nations Industrial Development Organization
UN SC	United Nations Security Council
WCD	World Commission on Dams
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

BIOGRAPHICAL NOTE

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