§ 7.6 NONGOVERNMENTAL ORGANISATIONS

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BOX 7.6.1 Required Knowledge and Learning Objectives

Required knowledge: Subjects of International Law; Sources of International Law; International Organisations; International Human Rights Law

Learning objectives: Understanding the role of NGOs in international law and different lenses to appraise their functions.

A. INTRODUCTION

Nongovernmental organisations (NGOs) are generally not regarded as formal subjects of international law. However, these actors are active and vital in today's international order. Indeed, one cannot miss the headlines occupied by the several prominent NGOs in the global media: Amnesty International, Save the Children, Doctors Without Borders/Médecins Sans Frontières (MSF), and Transparency International.

NGOs are often hailed as a crucial force to legitimise international law, a forum to voice the concerns of the global civil society, or even the vanguards of a post-sovereigntist, cosmopolitan world. In recent years, however, the world has witnessed criticism against NGOs.[453] This chapter will turn from descriptive to normative to examine NGOs' role in international law.

B. WHAT ARE NONGOVERNMENTAL ORGANISATIONS?

I. DEFINITION

NGOs are generally defined as 'groups of persons or societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit-seeking'.[454] However, this definition cannot provide meaningful information about NGOs' nature, organisation, and function. NGOs as a social phenomenon are complex.

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453 See Kenneth Anderson and David Reiff, 'Global Civil Society: A Skeptical View' in Marlies Glausis, Mary Kaldor, and Helmut Anheier (eds), *Global Civil Society* (SAGA 2004) 35.

454 Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 AJIL 348, 350.

So, what exactly is an NGO? First, it is an organisation made by individuals. It gathers people in one group, regardless of its organisational structure. Second, an NGO is independent of the government. This distinguishes it from international organisations and is one of its most salient features.[455] However, this feature is blurred as government-organised nongovernmental organisations (GONGOs) have emerged recently.[456] Third, an NGO is not-for-profit,[457] relying on voluntary contributions from external parties to ensure its existence. Its operation creates intangible results, such as environmental protection, charity, hobbies or interest groups, human rights, and legal or economic communities.

II. FROM LOCAL TO INTERNATIONAL: NGOS IN THE GLOBAL DOMAIN

We are living in a globalised era. Nevertheless, since people tend to focus on the things around them, civil society has traditionally been local oriented. The earliest form of NGOs that spanned continents was religious groups and secret organisations.[458] The British and Foreign Anti-Slavery Society, established in London in 1839, is often considered the earliest modern NGO.[459]

In the 19th century, we witnessed a boom in the amount and scope of NGOs. The Union of International Associations sought to compile a complete record of NGOs, making the 19th century the starting point of 'globalisation' for NGOs.[460] The development of NGOs on the international stage was not a linear but rather a cyclical process. The NGO sector has been profoundly shaped by the global environment brought out by the end of the Cold War, technological advancement, and globalisation.

C. THE LEGAL STATUS OF NGOS IN INTERNATIONAL LAW

The legal status of NGOs, along with other non-State actors, has been subject to continuous debate. The focus of the discussion centres around the fact that NGOs, according to dominant accounts, do not hold international legal personality. Even though

455 On international organisations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

456 See Reza Hasmath, Timothy Hildebrandt, and Jennifer YJ Hsu, 'Conceptualizing Government-Organized Non-Governmental Organizations' (2019) 15 JCS 267. See also Fiona McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organizations Engaging with United Nations Human Rights Mechanisms' (2018) 36 NQHR 111.

457 It is debatable whether NGOs include profit-making organisations. In this chapter, the author tends not to have those profit-making organisations and focuses on those not-for-profit.

458 See Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 MJIL 184.

459 Charles Chatfield, 'Intergovernmental and Non-Governmental Associations to 1945' in Jackie Smith, Charles Chatfield, and Ron Pagnucco (eds), *Transnational Social Movements and Global Politics: Solidarity Beyond the State* (Syracuse UP 1997) 21.

460 See Thomas Davies, 'Understanding Non-Governmental Organizations in World Politics: The Promise and Pitfalls of the Early "Science of Internationalism"'(2017) 23 EJIR 884.

non-State actors thus occupy an 'inferior' position compared to States, one cannot neglect that the roles played by these actors are becoming increasingly significant.[461]

I. THE UN SYSTEM

In article 71, the UN Charter stipulates that 'the Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence'.[462]

For many, this article signified a great leap forward in democracy on the international stage and initiated an exciting institutional linkage between States and NGOs. It is the first time NGOs can occupy an official place and make their voices heard in an international organisation dominated by States. All NGOs participating in the work of the UN Economic and Social Council, based on the working field and competence, are classified into three types: general consultative status, special consultative status, and roster status.[463]

With the consultative status, NGOs can participate in conferences convened by the UN, including meetings convened by the ECOSOC, its subsidiary bodies, and various UN human rights organs.

More recently, a participatory relationship has been proposed to integrate NGOs even more actively in the day-to-day working of the UN system, moving beyond the consultative status stipulated in article 71.[464] One of the reasons for the UN's welcoming attitude towards NGOs might be that the UN and NGOs can achieve a kind of 'mutual legitimacy', concretising each other's role in the State-centric international society.[465]

II. REGIONAL BODIES

Following the UN, the Organization of American States (OAS), in its Charter of 1948, laid out several provisions concerning NGOs. The Council of Europe established formal working relationships with NGOs as early as 1951.[466] It distinguished international and domestic NGOs and gave the former participatory

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461 On States, see Green, § 7.1, in this textbook; on the pluralisation of international legal personhood, see Engström, introduction to § 7, in this textbook.

462 The Charter of the United Nations (signed on 26 June 1945, entered into force 24 October 1954) 1 UNTS XVI.

463 UN ECOSOC 'Consultative Relationship between the United Nations and Non-Governmental Organizations' Res 1996/31 (25 July 1996) 60–61.

464 UNGA 'We the Peoples: civil society, the United Nations and global governance: Report of the Panel of Eminent Persons on United Nations – Civil Society Relations' UN Doc A/58/817(2004).

465 See Peter Willets, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?'(2006) 12 Global Governance 305.

466 CoE 'Relations with International Organizations, Intergovernmental and Non-governmental' Res(51)30 F(3 May 1951).

and later partnership status. One notable point is that in 1999, the general assembly of the OAS established a commission for civil society participation in the OAS activities within the permanent council and a guideline for civil society participation.[467] One salient feature of NGO participation in the OAS system is its term used. 'Civil society' rather than 'NGO' is used frequently, symbolising an optimistic attitude toward the NGOs, and attaches a progressive narrative towards the role of NGOs in the international arena. This mentality can be summarised as treating NGOs as a force for good.[468]

The African Union (AU) is unique in its relationship with civil society organisations (CSOs).[469] Only some NGOs have been granted observer status, but no explicit legal basis was provided to entitle NGOs to work with the AU at the general level.[470] Article 22 of the Constitutive Act on the AU established an Economic, Social, and Cultural Council (ECOSOCC).[471] The ECOSOCC is an advisory body comprising different social and professional groups. Although the aim and purpose of the ECOSOCC are expansive, what comes with this expansiveness is the vagueness. Evaluating NGOs' roles and actual positions in the AU is challenging. In the meantime, Africa has also been an important place of activity for Western NGOs, which has led to controversial debate.[472]

D. THE ROLE OF NGOS IN INTERNATIONAL LAW

I. INTERNATIONAL LAW-MAKING

NGOs have been increasingly influential in international law-making as a response to concerns about a democracy deficit in international law, for it can supplement the State-centrism of international law and bring more voices into legislative processes. For one, they can influence agenda-setting in international affairs.[473] For example, in the Convention on Biological Diversity drafting process,[474] the World Conservation Union intensely participated in discussing and wording several vital articles and successfully

467 OAS 'Guidelines for Participation by Civil Society Organizations in OAS Activities' CP/RES 759 (1217/99) (15 December 1999).

468 See George Kaloudis, 'Non-Governmental Organisations: Mostly a Force for Good' (2017) 34 IJWP 81.

469 In the AU document, 'civil society organisation' (CSO) is the preferred usage. However, CSO primarily refers to NGOs, and the author uses the two terms interchangeably.

470 On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

471 Constitutive Act of the African Union (adopted 11 July 2000, enter into force 26 May 2001) 2158 UNTS I-37733.

472 See Usman A Tar, 'Civil Society and Neoliberalism' in E Obadare (ed), *The Handbook of Civil Society in Africa* (Springer 2014) 253–270.

473 Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination (1992) 46 IO 3.

474 Convention on Biological Diversity (adopted 5 June 1992, enter into force 29 December 1993) 1760 UNTS 79.

integrated its agenda into the Convention.[475] In some instances, NGOs can even join in the drafting process directly. In negotiating the Ottawa Treaty of the Prohibition of Anti-Personnel Mines,[476] the International Campaign to Ban Landmines followed through.[477] Occasionally, NGOs may furthermore directly join government delegations as counsels or delegates. This happened in negotiating the Rome Statute of the International Criminal Court.[478] Finally, NGOs also engage in advocacy. Even when excluded from the negotiation process, NGOs can exert influence as pressure groups, demonstrating before venues.

II. ADMINISTRATION OF INTERNATIONAL AFFAIRS

NGOs also engage with the daily routines of international affairs. Many international organisations enlist NGOs to provide professional opinions on the issues or discuss policies and documents. In the UN system, various working groups work with relevant NGOs. For example, in the UN Global Compact Initiative,[479] NGOs have been pioneers in taking advantage of the voluntary code of conduct to induce good behaviour of transnational corporations in human rights and the environment. The tripartite decision-making structure in the International Labour Organization gives NGOs critical outlets to participate in global labour rights management.[480] As an NGO specialising in standards-making, the International Organization for Standardization (ISO) provides a case in point of NGOs' role in the administration of international affairs.[481]

Some NGOs are particularly worth mentioning. These are the International Committee of the Red Cross (ICRC); the International Union for Conservation of Nature (IUCN), the Global Fund to Fight AIDS, Tuberculosis and Malaria; Gavi, the Vaccine Alliance (Gavi), and the World Anti-Doping Agency (WADA). The particularity of these NGOs is that they have a hybrid character, and they all share a mission of international interest. To a certain extent, especially in the case of the ICRC,

475 Erik B Bluemel, 'Overcoming NGO Accountability Concerns in International Governance' (2005) 31 Brooklyn Journal of International Law 141, 162.

476 The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction (adopted December 3 1997, entered into force on March 1 1999) 2056 UNTS 211.

477 Williams and Goose, 'The International Campaign to Ban Landmines' in Maxwell A Cameron, Brian W Tomlin, and Robert J Lawson (eds), *To Walk without Fear: The Global Movement to Ban Landmines* (OUP 1998) 20.

478 See Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan 2008).

479 Peter J Spiro, 'New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace' (1996) 18 Cardozo Law Review 962.

480 See Sergey Ripinsky and Peter Van Den Bossche, *NGO Involvement in International Organizations: A Legal Analysis* (British Institute of International and Comparative Law 2007) 67–69.

481 See Karsten Ronit and Volker Schneider, 'Global Governance Through Private Organisations' (1999) 12 Governance 243.

they are deemed as having legal personality and enjoy the privilege of immunity.[482] The reasons for this are closely connected to the functions these institutions played in the administration of international affairs.

III. INTERNATIONAL LAW ENFORCEMENT

Enforcement of international law has long been dubbed as the 'vanishing point of international law'.[483] However, this defect of problematic enforcement can be remedied by the 'soft' enforcement which NGOs lead. With the help of modern information technology, NGOs worldwide can cause a 'boomerang effect' that can equip them with the necessary civil power – public opinion – to compel or even coerce States into compliance.[484]

One can observe these trends in human rights and environmental protection in particular. In the Montreal Protocol on Substances That Deplete the Ozone Layer, NGOs are implicitly tasked to monitor State parties' compliance. If they find any treaty breach, they can notify the secretariat, thus ensuring a quick sanctioning process.[485] In the human rights field, by issuing shadow reports and adopting the 'naming and shaming' strategy, human rights NGOs can pressure States to comply with relevant human rights norms. In the meantime, some judicial or quasi-judicial mechanisms have opened the door to NGOs.[486] For example, in the WTO dispute settlement mechanism, NGOs may submit amicus curiae opinions to assist in resolving trade disputes.[487] NGOs may press States to conform to relevant international standards through domestic litigation.

E. A CRITICAL APPRAISAL OF NGOs IN INTERNATIONAL LAW

Some scholars praise NGOs as the vanguard of global democracy.[488] Acting individually, NGOs have allowed ordinary people to make their voices heard worldwide. NGOs are leading a 'global association revolution'.[489] Organisations such as Greenpeace, Amnesty International, Human Rights Watch, and the recent Nobel Peace Prize winner

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482 The ICRC stands alone among NGOs for it attains *sui generis* status as a subject of international law.

483 On enforcement, see Quiroga Villamarín, § 2.3, in this textbook.

484 See Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

485 Elizabeth P Barratt-Brown, 'Building a Monitoring and Compliance Regime Under Montreal Protocol' (1991) 16 Yale Journal of International Law 564.

486 See Robyn Eckersley, 'A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute' (2007) 13 EJIL 329.

487 See Michelle Ratton Sanchez, 'Brief Observations on the Mechanisms for NGO Participation in the WTO' (2006) 4 Sur 103.

488 See Jan Aart Scholte, 'Global Governance, Accountability, and Civil Society' in Jan Aart Scholte (ed), *Building Global Democracy: Civil Society and Accountable Global Governance* (CUP 2011) 1–40.

489 Lester M Salamon, 'The Rise of the Nonprofit Sector' (1994) 73 Foreign Affairs 109.

International Campaign to Abolish Nuclear Weapons are fighting at the forefront for world peace, a sustainable environment, and human rights. NGOs are not powerless actors protesting in the corner. Constituting the main body of Global Civil Society (GCS), NGOs gained legitimacy and potency to occupy streets, block unfavourable bills, and criticise governments.

However, NGOs, or GCS, have ambiguities. First, GSC is not a bounded 'non-governmental' space but a means of making global politics governable in particular ways. In this regard, NGOs, States, and markets are closely intertwined and mutually constituting. Second, by being nongovernmental, one may presume that NGOs are neutral actors; however, occasionally, NGOs represent certain social groups' interests and potent groups. Third, against NGOs' progressive and empowering image, NGOs also engage in power struggles and cannot escape tensions and contradictions as they try to transform politics.[490]

The term 'NGOisation' is commonly used among many social movements, activist networks, and academics to refer to the institutionalisation, professionalisation, depoliticisation, and demobilisation of movements for social and environmental change.[491] As many scholars have pointed out, NGOisation is a relatively new phenomenon that concurred with the outgrowth of neoliberalism, or, put another way, NGOisation is a 'symptom' desired by neoliberal ideology. Some scholars put it directly: 'The greater the devastation caused by neoliberalism, the greater the outbreak of NGOs'.[492] Only by following the path of NGOisation do some NGOs gain the organising imperative and internal momentum to participate in the world struggle under the disguise of non-government, impartiality, and independence.

F. CONCLUSION

The case of NGOs has provided us with a vivid example to observe the perils of international law. By embracing NGOs or the more intriguing term 'Global Civil Society' without a second thought, international lawyers celebrate the advent of a more democratic, inclusive, and cosmopolitan international law, which can bring hope for a murky world dominated by greedy, aggressive, and violent States. NGOs are caring agents for the sake of humanity, but they can also be shrewd groups with the sheer aim of attracting donors and fulfilling formal obligations, which is far from the real needs of the weak. NGOs are also part of a world of struggle.[493] As international lawyers, we must note the losses and gains that are present in this struggle.

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490 See Sangeeta Kamat, 'The Privatization of Public Interest: Theorizing NGO Discourse in a Neoliberal Era' (2004) 11 RIPE 156.

491 See Aziz Choudry and Dip Kapor (eds), *NGOization: Complicity, Contradiction, and Prospects* (Zed Books 2013).

492 Arundhati Roy, 'Help That Hinders' (2004) *Le monde diplomatique* (English Edition).

493 See David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton UP 2016).

BOX 7.6.2 Further Readings

Further Readings

- A Lindblom, *Non-governmental Organizations in International Law* (CUP 2005)
- BK Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice. Queen Mary Studies in International Law* (Vol. 2, Martinus Nijhoff 2010)
- B Reinalda, M Noortmann, and B Arts (eds), *Non-State Actors in International Relations* (Ashgate 2001)
- D Chandler, *Constructing Global Civil Society: Morality and Power in International Politics* (Palgrave Macmillan 2004)
- J Keane, *Global Civil Society?* (CUP 2003)

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