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NONGOVERNMENTAL ORGANIZATIONS AND INTERNATIONAL LAW

*By Steve Charnovitz**

Nongovernmental organizations (NGOs) have exerted a profound influence on the scope and dictates of international law. NGOs have fostered treaties, promoted the creation of new international organizations (IOs), and lobbied in national capitals to gain consent to stronger international rules. A decade ago, Antonio Donini, writing about the United Nations, declared that “the Temple of States would be a rather dull place without nongovernmental organisations.”¹ His observation was apt and is suggestive of a more general thesis: had NGOs never existed, international law would have a less vital role in human progress.

Often it has been crusading NGOs that led the way for states to see the international dimension of what was previously regarded as a purely domestic matter. As new issues arose in international affairs, interested NGOs formed federations or networks with organizations in different countries. This transnationalism has served as a source of strength for NGOs in their various interactions with governments. NGOs act as a solvent against the strictures of sovereignty.

The contribution of NGOs to the vibrancy of international law is a puzzle because, doctrinally, international law is understood to be a product of state positivism. The key to the puzzle lies in the nature of NGOs. Like the state, the NGO is composed of individuals, but unlike the state, the NGO enjoys a relationship with the individual that is voluntary. Individuals join and support an NGO out of commitment to its purpose. That purpose plus organization gives NGOs whatever “authority” they have, and it will be moral authority rather than legal authority.

The self-actuated nature of NGOs distinguishes them from typical IOs, whose mandates are agreed to and limited by states. NGOs do not gain their influence from delegation by states. Rather, whatever influence they have is achieved through the attractiveness of their ideas and values. No NGO is guaranteed influence, not even the most venerable of NGOs, the Red Cross movement. Influence must constantly be earned.

NGOs can change the behavior of states, but very often NGOs fail to do so.² Measuring NGO success has become more complicated because for many important issues, competing NGOs have been positioned on all sides of any debate. Years ago, the most involved NGOs were reliable advocates of a stronger world public order. Today, overwhelming NGO support for the international rule of law can no longer be assumed. NGOs follow their own stars.

Although NGOs have received greater attention in recent years by scholars of international law and international relations, the field of NGO legal studies is hardly new. In the first volume

* Of the Board of Editors. The author thanks Jeffrey Dunoff, Hilary French, Menno Kamminga, Karsten Nowrot, Christopher D. Stone, and Urs Thomas for helpful comments. The author also thanks Christiane Conrad, Joseph Johnson, Antonia Rahneva, Jenn Ritter, and Isabelle van Damme for research and translation assistance.

¹ Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs*, 16 *THIRD WORLD Q.* 421 (1995).

² See Russel Lawrence Barsh & Nadia Khattak, *Non-governmental Organisations in Global Governance: Great Expectations, Inconclusive Results*, in *JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES. ESSAYS IN HONOUR OF ERICA-IRENE DAES* 15, 23–26 (Gudmundur Alfredsson & Maria Stavropoulou eds., 2002) (noting a lack of data for demonstrating NGO effectiveness).

of this *Journal*, in a discussion of “co-operation between nations in the interests of humanity and civilization,” Simeon E. Baldwin observed that

we shall commonly find that the initiative has been found in individual action, prompted by considerations sometimes commercial, sometimes scientific or philosophic, sometimes altruistic. So, and for similar reasons, it has often been found that the public congress of moment to the world has been the immediate consequence of a private congress.³

The appendix to Baldwin’s article contains a ten-page list of official governmental conferences held in the period between 1826 and 1907, followed by a twelve-page list of “international congresses, conferences or associations of the past century, composed of private individuals.”⁴ The private conferences are categorized into thirty-one topics. In presenting this catalog of private international causes, Baldwin invited international law scholars to be attentive to the general phenomenon of groups of individuals working to influence intergovernmental policymaking.

To be sure, Baldwin was not the only legal scholar of his time to reflect upon the blossoming of private transnational associations. In 1908 Wilhelm Kaufmann pointed to three possible purposes of international regulation of nonstate international associations:⁵ (1) to preserve the international general interest; (2) to effectuate the formation and functioning of nonstate international associations; and (3) to ensure that a single state “cannot retard and hinder through state acts or state norms the existence and activity within its competence of the non-state international association.”⁶ In 1911 Elihu Root called attention to the “great number and variety of international societies for specific purposes” and concluded:

Most of them are not consciously endeavoring to develop international law, but they are building up customs of private international action. They are establishing precedents, formulating rules for their own guidance, many of them pressing for uniformity of national legislation and many of them urging treaties and conventions for the furtherance of their common purposes.⁷

An appreciation of Baldwin, Kaufmann, and Root is an appropriate way to begin an analytical survey of international NGO activism spanning the past one hundred years. Earlier than others, Baldwin saw how new modes of transnational “individual action” could change the behavior of states. As the public congresses matured into IOs, the private groups developed more direct forms of advocacy than holding their own assemblies and drafting resolutions for governments. Instead, they found ways to attach themselves to IOs and to be present at international negotiations in order to lobby for manifold causes.

In seeking to map out the most salient issues about NGOs and international law, this article forms an integral part of the overview of international law at the dawn of the twenty-first century written in celebration of the centennial of this *Journal*. Some of the issues to be addressed are old, such as the legal status of NGOs. Others are comparatively new, such as whether NGO lobbying in intergovernmental forums is democratically legitimate. The article draws from the

³ Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World*, 1 AJIL 565, 576 (1907). In 1907 Baldwin was the chief justice of the Connecticut Supreme Court of Errors, and he later served as governor of Connecticut.

⁴ *Id.* at 808, 817. He calls the study of such meetings a “new field.” *Id.* at 817–18 n.8.

⁵ Wilhelm Kaufmann, *Die modernen nicht-staatlichen internationalen Verbände und Kongresse und das internationale Recht*, 2 ZEITSCHRIFT FÜR VÖLKERRECHT UND BUNDESSTAATSRECHT 419, 434–35 (1908).

⁶ *Id.* (trans. by author). Kaufmann takes note of Baldwin’s article. *Id.* at 423.

⁷ Elihu Root, *The Function of Private Codification in International Law*, 5 AJIL 577, 583 (1911). In an earlier study, Root had observed “an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation’s character and conduct.” Elihu Root, *The Sanction of International Law*, 2 AJIL 451, 455 (1908). It may be that Root saw in “international societies” a partial explanation for the “mysterious influence.”

copious scholarship on NGOs to show early expositions of some of the guiding ideas in contemporary debate. This attention to history may serve to buttress future writers against one of the maladies of NGO-related scholarship, which is a tendency to presume novelty in practices that have been going on for decades.

One fairly new aspect of NGOs is their geographic range. Thirty years ago, many countries lacked significant NGO activity. The range of activity was even smaller 145 years ago when Francis Lieber wrote about the role of associations and found that “all-pervading associative spirit” only in England and America.⁸ Today, the associative spirit is nearly universal.

This article proceeds in five parts: Part I examines issues regarding the identity of NGOs and then catalogs the ways that state practice incorporates NGOs into authoritative decision making. Part II looks at the legal status of NGOs in international law. Part III considers how NGOs have transformed international law over the past century. Part IV dives into the ongoing debate about the democratic legitimacy of NGO participation and seeks to clarify the conceptual underpinnings of the legitimacy of such participation. Part V asks whether intergovernmental decision makers have a duty to consult NGOs. Part V concludes with some thoughts on future challenges.

The article focuses on NGO advocacy activities aimed at influencing international relations. For reasons of space, the operational activities of NGOs as contractors and as direct providers of goods and services are not examined. Also excluded is consideration of the dictates of international agreements regarding the participation of NGOs within national political, administrative, and judicial processes.⁹ In addition, the article does not cover market-based efforts such as international standards, labeling, and corporate codes of conduct.¹⁰

I. WHO NGOs ARE AND WHAT THEY DO

The Identity of NGOs

The NGOs that are the subject of this article are groups of persons or of societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking.¹¹ Such NGOs are usually international in the sense of drawing members from more than one country. Although profit-seeking business entities are not NGOs, associations of business entities can be, such as the International Chamber of Commerce.¹²

⁸ FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 129 (enlarged ed. 1859).

⁹ For example, the first treaty promulgated by the International Labour Organization (ILO), the Hours of Work (Industry) Convention, committed governments to engage in “consultation” with worker and employer organizations whenever governments sought to provide regulatory exceptions. ILO, Hours of Work (Industry) Convention, No. 1, Nov. 28, 1919, Art. 6.2, 1 INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1 (1996), available at <<http://www.ilo.org/public/english/standards/index.htm>>.

¹⁰ See, e.g., Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New “Lex Mercatoria,”* in NON-STATE ACTORS AND HUMAN RIGHTS 177, 177–87 (Philip Alston ed., 2005).

¹¹ This definition draws from Article 2 of Professor Suzanne Bastid’s resolution cited *infra* note 58, which sought to establish an international status of associations.

¹² Unlike other analysts, I do not reserve the term “NGO” for organizations that pursue a “public interest,” and I do not exclude from the definition of an NGO the labor unions, professional associations, or other organizations that pursue a “single interest” or a “special interest.” In my view, it is not always easy to distinguish a public interest from a special interest or a public benefit from a mutual benefit. Furthermore, a policy organization typically pursues both a membership interest and the organization’s conception of the public interest.

Everything about nongovernmental organizations is contested, including the meaning of the term. In his 1963 treatise on NGOs, J. J. Lador-Lederer observed that the semantic negation neglects the most significant part of the organizations, which is that their strength comes from “their capacity at continuous existence and development.”¹³ Recently, Philip Alston took note of the widespread use of “nongovernmental organization” and “nonstate actor,” and remarked that the insistence upon defining actors “in terms of what they are not combines impeccable purism in terms of traditional international legal analysis with an unparalleled capacity to marginalize a significant part of the international human rights regime.”¹⁴ During the past two decades, the term “civil society organization” has gained popularity in some circles as an alternative to “NGO.”¹⁵ Recognizing the longtime usage of the NGO acronym, some commentators have suggested keeping it, but changing its meaning to “Necessary to Governance Organization.”¹⁶ That clever wordplay has not caught on.

The UN system continues to use the term “NGO,” and the chief reason for doing so may be because Article 71 of the UN Charter states, “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”¹⁷ The Charter, however, does not define NGO.

Although commentators sometimes suggest that the term “nongovernmental organization” originated during the 1930s or in 1945,¹⁸ it actually goes back to just after World War I. In his 1919 book on international cooperation, Dwight W. Morrow contrasted “non-governmental organizations” with organizations composed of sovereign states.¹⁹ In 1920 Sophy Sanger employed the term “non-government organisation” in her account of how such organizations had not been able to participate in 1906 in the first multilateral negotiations to conclude labor treaties.²⁰ The label “nongovernmental organization” was apparently not used in the League of Nations. Instead, the NGOs of that era were called unofficial, nonpublic, voluntary, or private organizations. By 1943, if not earlier, scholars of international law had begun to use “non-governmental organization.”²¹

Although NGOs are by definition nongovernmental, NGO membership can cover a broader range than just private individuals. A leading example is the IUCN/World Conservation

¹³ J. J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES: A STUDY IN AUTONOMOUS ORGANIZATION AND IUS GENTIUM* 13 (1963). He suggests an alternative term, “International Autonomous Entities.” *Id.*

¹⁴ Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* in *NON-STATE ACTORS AND HUMAN RIGHTS*, *supra* note 10, at 3, 3.

¹⁵ The term “civil society” is more than a matter of nomenclature because some analysts use that term to encompass everything that is not government or business. Thus, religions, political parties, movements, and community groups are part of civil society, even if they are not considered NGOs.

¹⁶ Kerstin Martens, *Mission Impossible? Defining Nongovernmental Organizations*, 13 *VOLUNTAS: INT’L J. VOLUNTARY & NONPROFIT ORGS.* 271, 277 (2002). Martens points out that in some languages, “nongovernmental” is translated as “against the government” or “antigovernment.” *Id.*

¹⁷ UN Charter Art. 71.

¹⁸ For example, Jeremy Rabkin has contended that the term “nongovernmental organization” is “a Stalinist concept” originating in a defense by the Soviet Union of its delegation to the ILO. Jeremy Rabkin, *Why the Left Dominates NGO Advocacy Networks*, written version of paper delivered at conference entitled “Nongovernmental Organizations: The Growing Power of an Unelected Few,” American Enterprise Institute (June 11, 2003), at <http://www.aei.org/events/eventID.329,filter.all/event_detail.asp>.

¹⁹ DWIGHT W. MORROW, *THE SOCIETY OF FREE STATES* 81 (1919). Morrow was later to serve as a U.S. ambassador and U.S. senator.

²⁰ Sophy Sanger, *Practical Problems of International Labour Legislation*, in *LABOUR AS AN INTERNATIONAL PROBLEM* 135, 136 (E. John Solano ed., 1920). Sanger was one of the drafters of the provisions on labor in the Treaty of Versailles.

²¹ See Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 221–22 (1943) (using that term).

Union, with its variegated membership of 82 states, 111 governmental agencies, and over 800 NGOs. Some NGOs, such as Parliamentarians for Global Action, are composed of individuals who are public officials. Other NGOs, such as United Cities and Local Governments, are composed of subnational governments. That organization harks back to 1913, and today has members in more than 100 countries.

The traditional distinction between an NGO and an IO is that IOs are established by inter-governmental agreements and NGOs via cooperation of individuals. That distinction holds even when IOs provide formal institutional roles for NGOs. For example, the treaties establishing the International Labour Organization (ILO) and the World Tourism Organization provide for nongovernmental roles in organizational governance. So do the charters of the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Arctic Council.²²

NGO Functions in International Law

The remainder of part I provides an overview of NGO functions to give context for the ensuing analysis of how NGOs have transformed international law. NGOs contribute to the development, interpretation, judicial application, and enforcement of international law.²³

NGOs may be most prolific when new fields of law are initiated or new treaties drafted. An early example concerns the rights of women. In 1928, after women's groups journeyed to the sixth Pan-American Conference, the governments agreed to hold a plenary session to hear the women's representatives, and accepted their proposal to create the Inter-American Commission of Women.²⁴ Another major milestone occurred when NGOs advanced language on human rights for the UN Charter and then aided the diplomats drafting the Universal Declaration of Human Rights.²⁵ Advocacy by NGOs and indigenous groups has been similarly instrumental in achieving new international protections for indigenous peoples. In recent years, networks of NGOs worked to inspire negotiations for the International Criminal Court.²⁶

Another function engaged in by NGOs is the interpretation of international law. For example, NGOs helped to develop the "Siracusa Principles" in 1984, on the meaning and scope of the derogation and limitation provisions of the International Covenant on Civil and Political Rights.²⁷ Theodor Meron has noted that by championing a broad construction of the Fourth

²² On the UNAIDS Programme Coordinating Board, there are five NGOs, including associations of people living with HIV/AIDS. The Arctic Council includes six permanent participants from organizations of Arctic indigenous persons.

²³ See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW, ch. 4 (2d ed. 2000) (giving examples of NGO functional activities in intelligence, promoting, prescribing, invoking, applying, terminating, and appraising).

²⁴ James Brown Scott, *Inter-American Commission of Women*, 24 AJIL 757, 759–60 (1930); George A. Finch, *James Brown Scott, 1866–1943*, 38 AJIL 183, 210 (1944) (noting Scott's own role in getting the women heard).

²⁵ See, e.g., ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 173 (1990); WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE 29–50 (1998); PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 183, 188–89 (1998); W. Michael Reisman, *Private International Declaration Initiatives*, in LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME 1948–98, at 79 (1998); Louis B. Sohn, *The United Nations at Fifty: How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AJIL 540 (1995).

²⁶ See, e.g., Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, 23–39 (1999).

²⁷ Theo van Boven, *The Role of Non-governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207, 219–20 (1990). The NGOs were the International Commission of Jurists, the International Association of Penal Law, and the Urban Morgan Institute of Human Rights.

Geneva Convention, the International Committee of the Red Cross (ICRC) clarified that rape is a crime under international humanitarian law.²⁸

NGOs seek to contribute to international adjudication by making friend-of-the-court submissions to tribunals. Typically, an NGO initiates action by requesting leave from a court to submit a brief.²⁹ In an authoritative study of NGO participation, Dinah Shelton found that major international tribunals, except the International Court of Justice (ICJ), had developed procedures to enable NGOs to submit information or statements on pending cases.³⁰ Since the publication of Shelton's study in 1994, the trends she documented have continued apace.³¹ For example, organs of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have requested amicus submissions in some cases and received them from individual jurists and NGOs.³² On the other hand, NGOs have not yet sought to submit an amicus brief to the International Tribunal for the Law of the Sea.³³

Although the ICJ remains closed to NGO participation, a useful step toward greater openness was taken in 2004.³⁴ The ICJ adopted Practice Direction XII, which provides that, in an advisory proceeding, when an international NGO submits a statement or document on its own initiative, it will be placed in a designated location in the Peace Palace.³⁵ The paper will not be considered part of the case file but will be treated as a readily available publication and may be referred to by states and IOs in the same manner as publications in the public domain.

Over the past decade, amicus curiae briefs have been admitted into trade and investment adjudication. Although no explicit provision in the Agreement Establishing the World Trade Organization (WTO) permits amicus briefs, the Appellate Body ruled in 1998 that WTO panels had discretion to accept unsolicited briefs, and it ruled in 2000 that it could accept such briefs.³⁶ That development appeared to influence investor-state arbitration under the North American Free Trade Agreement (NAFTA) where, to the surprise of many observers, in 2001 the tribunal in *Methanex* held that it had the power to accept written amicus submissions.³⁷ Thereafter, the intergovernmental NAFTA Free Trade Commission issued a statement officially

²⁸ Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AJIL 424, 426 (1993).

²⁹ Ruth Mackenzie, *The Amicus Curiae in International Courts: Towards Common Procedural Approaches?* in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 295, 302–04 (Tullio Treves et al. eds., 2005) (discussing filtering mechanisms).

³⁰ Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AJIL 611, 641–42 (1994). Her study dealt extensively with the Inter-American Court of Human Rights and the European Court of Human Rights.

³¹ See, e.g., Hervé Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 897 (2001).

³² Christine Chinkin & Ruth Mackenzie, *Intergovernmental Organizations as "Friends of the Court,"* in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 135, 148–49 (Laurence Boisson de Chazournes, Cesare P. R. Romano, & Ruth Mackenzie eds., 2002); Patrizia De Cesari, *NGOs and the Activities of the Ad Hoc Criminal Tribunals for Former Yugoslavia and Rwanda*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, *supra* note 29, at 113.

³³ Philippe Gautier, *NGOs and Law of the Sea Disputes*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, *supra* note 29, at 233, 242.

³⁴ Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 212 (2005) ("Although the Court was initially open to NGO participation in its advisory jurisdiction, in 1971 it locked the door, let some materials slip under the door in 1996, and then since 2004 left it slightly ajar.")

³⁵ ICJ, Practice Direction XII (July 30, 2004), available at <<http://www.icj-cij.org>>.

³⁶ Laurence Boisson de Chazournes & Makane Moïse Mbengue, *The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 205 (2003).

³⁷ *Methanex Corp. and United States, Decision on Petitions from Third Persons to Intervene as "Amici Curiae,"* paras. 33, 53 (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001), available at <<http://www.state.gov/documents/organization/6039.pdf>>. The tribunal explained that "Amici are not experts"; they are "advocates." *Id.*, para. 38. For a discussion of the decision, see Howard Mann, *Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States*, 10 REV. EUR. COMMUNITY & INT'L ENVTL. L. 241 (2001).

recommending a procedure that investor-state tribunals could adopt to guide such private submissions.³⁸ When the *Methanex* tribunal issued its final award in August 2005, the decision contained a reference to the “carefully reasoned Amicus submission.”³⁹ Following *Methanex*, two other investment arbitration tribunals ruled that they had the power to accept amicus briefs.⁴⁰ These developments are significant because amicus submissions in investment arbitration were unknown before 2001.

Despite the initial fanfare regarding NGO opportunities at the WTO, neither the Appellate Body nor the panels have made substantive use of the information in amicus curiae submissions.⁴¹ The Appellate Body’s early procedural decisions continue to be criticized by many governments as *ultra vires*, and consequently, any NGO briefs accepted by WTO panels and the Appellate Body are kept in juristic quarantine away from the proceeding. In some instances, panels have exercised their discretion not to accept an NGO brief. For example, in the *Softwood Lumber* litigation, a WTO panel rejected a brief from an environmental NGO “in light of the absence of consensus among WTO Members on the question of how to treat *amicus* submissions.”⁴²

In contrast to their participation as amici, the ability of NGOs to initiate cases is less extensive. One tribunal that has been open to NGOs is the African Commission on Human and Peoples’ Rights, which has allowed states, individuals, and NGOs with observer status to submit communications alleging a violation of the African Charter.⁴³ The European Court of Human Rights permits an NGO to bring a case if the NGO itself claims to be a victim. Other opportunities present themselves in international administrative entities that permit NGOs to bring complaints. For example, the World Bank Inspection Panel entertains requests for inspection from an organization, association, society, or other grouping of two or more individuals that believes it is likely to be adversely affected as a result of the Bank’s violation of its own policies and procedures.⁴⁴

NGOs are now often engaged in the review and promotion of state compliance with international obligations. Oscar Schachter, a keen observer, detected this budding development in 1960,⁴⁵ and in the following decades, the NGO role flowered in the monitoring of human rights, humanitarian, and environmental law.⁴⁶ In their 1995 book *The New Sovereignty*,

³⁸ Sean D. Murphy, *Contemporary Practice of the United States*, 98 AJIL 841 (2004).

³⁹ *Methanex*, Final Award on Jurisdiction and Merits, para. 27 (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005), available at <<http://www.state.gov/s/l/c5818.htm>>.

⁴⁰ Bartholomeusz, *supra* note 34, at 265–72, 285. One was a case under NAFTA using UNCITRAL rules (the *UPS* case), and the other a case under a bilateral investment treaty between France and Argentina using ICSID rules (the *Aguas argentinas* case).

⁴¹ See Jeffrey L. Dunoff, *Border Patrol at the World Trade Organization*, 1998 Y.B. INT’L ENVTL. L. 20, 22–23 (predicting that the openness to amicus briefs would be illusory).

⁴² United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Doc. WT/DS277/R, para. 7.10 n.75 (adopted Apr. 26, 2004).

⁴³ Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AJIL 1, 2 (2003); Dean Zagorac, *International Courts and Compliance Bodies: The Experience of Amnesty International*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, *supra* note 29, at 11, 34–37.

⁴⁴ Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship to International Law*, 2 HOFSTRA L. & POL’Y SYMP. 61, 66 (1997). Edith Brown Weiss has suggested that the Inspection Panel is part of “growing efforts to provide means to civil society to hold international intergovernmental organizations accountable for their actions.” Edith Brown Weiss, *Invoking State Responsibility in the Twenty-first Century*, 96 AJIL 798, 815 n.119 (2002).

⁴⁵ *Rôle of Non-governmental Groups in the Development of International Law*, 54 ASIL PROC. 194, 220, 221 (1960) (comments of Oscar Schachter).

⁴⁶ See, e.g., David P. Forsythe, *Who Guards the Guardians: Third Parties and the Law of Armed Conflict*, 70 AJIL 41, 44–46 (1976) (discussing the formal role of the ICRC); Harold K. Jacobson & Edith Brown Weiss, *Assessing*

Abram Chayes and Antonia Chayes devoted a chapter to the impact of NGOs on treaty compliance, and pointed out that, “[i]n a real sense, [NGOs] supply the personnel and resources for managing compliance that states have become increasingly reluctant to provide.”⁴⁷ In the decade since that book was published, the NGO role has continued to expand. For example, the parties to the Aarhus Convention agreed to allow NGOs with observer status to nominate candidates for the Convention’s Compliance Committee.⁴⁸ NGOs can also play an important role within a domestic political system in pressing the government to meet its obligations under a ratified treaty.

The last NGO function to be noted is assistance to collective enforcement efforts. For example, in a 1992 resolution regarding the former Yugoslavia, the UN Security Council called on states “and, as appropriate, international humanitarian organizations to collate substantiated information” relating to violations of humanitarian law.⁴⁹ In a 2003 resolution regarding Sierra Leone, the Security Council called on “States, international organizations and non-governmental organizations to continue to support the National Recovery Strategy of the Government of Sierra Leone.”⁵⁰

II. LEGAL STATUS OF NGOS

The analysis in this part examines the legal status of NGOs in two senses—their legal personality and the special capacity they can gain to take part in intergovernmental decision making. Regarding personality, this analysis puts aside the doctrinal question often posed about individuals and NGOs—namely, whether they are “subjects” of international law. As Edwin Borchard wrote in this *Journal*, “Whether the individual is or is not a subject of international law is a matter of concepts, and hardly justifies the metaphysical discussion the question has engendered.”⁵¹ Decades later, Rosalyn Higgins reached a parallel conclusion, “that it is not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings.”⁵²

NGO Personality

Legal personality is a key factor in determining the rights and immunities of an NGO and its standing before courts. In general, an NGO enjoys legal personality only in municipal law, not in international law.⁵³ Yet because NGOs so often operate in more than one country, they face potential problems of being subject to conflicting laws and of inability to carry their legal

the Record and Designing Strategies to Engage Countries, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 511, 527, 529, 533 (Edith Brown Weiss & Harold K. Jacobson eds., 1998); Maya Prasad, *The Role of Non-governmental Organizations in the New United Nations Procedures for Human Rights Complaints*, 5 DENV. J. INT’L L. & POL’Y 441 (1975).

⁴⁷ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS*, ch. 11, at 250, 251 (1995).

⁴⁸ First Meeting of the Parties to the Aarhus Convention, Decision I/7, UN Doc. ECE/MP.PP/2/Add.8, annex, para. 4 (2004). NGOs can also submit communications alleging noncompliance by a party to the Convention. See Report of the Compliance Committee, UN Doc. ECE/MP.PP/2005/13, paras. 24–27. The Aarhus Convention is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 ILM 517 (1999).

⁴⁹ SC Res. 771, para. 5 (Aug. 13, 1992).

⁵⁰ SC Res. 1470, para. 8 (Mar. 28, 2003).

⁵¹ Edwin M. Borchard, *The Access of Individuals to International Courts*, 24 AJIL 359, 364 (1930).

⁵² Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 476, 480 (Richard Falk, Friedrich Kratochwil, & Saul H. Mendlovitz eds., 1985).

⁵³ See generally Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, IND. J. GLOBAL LEGAL STUD., Summer 2003, at 1; Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579 (1999).

status from one country to another.⁵⁴ Aware that this situation could prove problematic for internationally active NGOs, both the Institut de droit international (Institut) and the International Law Association began in 1910 to promote consideration of a convention to grant legal personality to international NGOs.⁵⁵ Almost a century later, advocates have not made much progress toward that goal.⁵⁶

The early efforts to develop international law on NGO recognition were ambitious. In 1923, spearheaded by Nicholas Politis, the Institut adopted a draft Convention Relating to the Legal Position of International Associations.⁵⁷ Under that proposal, international associations were required to register at a permanent commission with specified documentation. If one party nonetheless denied legal status to a registered association, the association could contest this action before the Permanent Court of International Justice. That proposed treaty did not gain any adherents, and governments showed the same lack of interest after another draft convention authored by Suzanne Bastid was approved by the Institut in 1950.⁵⁸ In that proposal, states were to recognize an association on the basis of the standards in the convention without a prior requirement of registration within one party.

Commenting on these efforts to concretize an international legal status for international associations, Wilfred Jenks observed in 1972 that “[w]hile the number, importance, and influence of international associations have continued to increase, the problem of their legal status has not become of such acuteness and urgency as to make a comprehensive solution of it imperative.”⁵⁹ Thirty-plus years later, the lack of an international legal status for NGOs remains a problem, but not an insuperable one.

Transnational NGOs have learned how to maneuver without formal international personality. In some instances, the crucial role that an NGO plays has led governments to accord rights to it that are typically granted only to IOs. For example, the ICRC and the International Federation of Red Cross and Red Crescent Societies have signed headquarters agreements with numerous states that provide for certain privileges and immunities.⁶⁰

Over the years, the efforts to achieve an international legal personality for NGOs have exposed some unresolved tensions. On the one hand, providing such recognition may help prevent interstate

⁵⁴ This problem was recognized by the late nineteenth century. For example, Pasquale Fiore wrote that societies (which are “the result of freedom of association for a common interest”) are granted rights by the sovereignty of a state, and thus that such societies “may not as of right exercise their functions in foreign countries.” PASQUALE FIORE, *INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION* 34–35 n.1 (Edwin M. Borchard trans., 1918).

⁵⁵ 1 UNION OF INTERNATIONAL ASSOCIATIONS, *INTERNATIONAL ASSOCIATION STATUTE SERIES*, app. 4.1 (1988). This and the other documents noted here from the UIA Statute Series are available online at <<http://www.uia.be/legal/>>. The predecessor organization to the UIA was founded in 1907.

⁵⁶ The one concrete achievement occurred in 1986 with the signing of the European Convention on the Recognition of Legal Personality of International NGOs. It requires parties to recognize “as of right” the legal personality and capacity acquired by an NGO in any of the parties. European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations, Apr. 24, 1986, Art. 2, ETS No. 124. The Convention has eight parties.

⁵⁷ Institut de droit international, Draft Convention Relating to the Legal Position of International Associations (1923), *reprinted in* UNION OF INTERNATIONAL ASSOCIATIONS, *supra* note 55, app. 4.5 [hereinafter Draft Convention]; see James Brown Scott, *The Institute of International Law*, 17 AJIL 751, 753–56 (1923).

⁵⁸ Resolution adopted by the Institute of International Law at its 49th Session, *reprinted in* UNION OF INTERNATIONAL ASSOCIATIONS, *supra* note 55, app. 4.8, and in 45 AJIL Supp. 15, 20 (1951).

⁵⁹ C. Wilfred Jenks, *Multinational Entities in the Law of Nations*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 70, 77 (Wolfgang Friedmann, Louis Henkin, & Oliver Litszty eds., 1972).

⁶⁰ Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System? in* NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 10, at 93, 98–99. In addition, the ICRC and the federation were granted observer status in the UN General Assembly in the early 1990s. Note that the ICRC claims to be an entity other than an IO or NGO. ICRC, *DISCOVER THE ICRC* 6 (2005).

conflicts and, in the words of the 1923 draft convention, may further “the general interest of the international community to encourage the development of non profit-making international associations.”⁶¹ On the other hand, states have worried that granting international recognition to NGOs may reduce governmental control over them, and NGOs have worried that such recognition might entail a loss of autonomy. With the increased attention to NGO (mis)behavior in recent years, a new treaty would more likely impose regulation on NGOs than facilitate freedom of association.⁶²

NGOs as Consultation Partners

In the absence of international NGO law as such, Article 71 of the UN Charter has served de facto as a charter for NGO activities. The legal capacity of the NGO under Article 71 might be termed a consultation partner. Although Article 71 establishes consultative opportunities for the NGOs granted status by the UN Economic and Social Council (ECOSOC), an individual NGO does not have a treaty-based right to be consulted in a particular situation.

Article 71, written in 1945, reflected established IO consultative practices regarding NGOs.⁶³ The first treaty to provide for NGO input was the 1905 convention creating the International Institute of Agriculture. One of the duties of the institute was to

[s]ubmit to the approval of the governments, if there is occasion for it, measures for the protection of the common interests of farmers and for the improvement of their condition, after having utilized all the necessary sources of information, such as the wishes expressed by international or other agricultural congresses or congresses of sciences applied to agriculture, agricultural societies, academies, learned bodies, etc.⁶⁴

Thus, the congresses and societies were designated as sources of information for intergovernmental decision making. When participating governments drafted the Covenant of the League of Nations in 1919, they included Article 25, which stated that “[t]he Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations.”⁶⁵ That article was inserted at the suggestion of the League of Red Cross Societies, and led to extensive cooperation between the League of Nations and the Red Cross movement.

By the early 1920s, active collaboration between the League of Nations and unofficial organizations was an established practice and would continue throughout the life of the League.⁶⁶ For example, the League of Nations spearheaded the creation of the International Relief Union, whose founding convention provided a “consultative capacity” for relief organizations

⁶¹ Draft Convention, *supra* note 57, pmb1.

⁶² See Emanuele Rebasti, Workshop Report, A Legal Status for NGOs in Contemporary International Law? (Eur. Univ. Inst. Workshop Report, Nov. 2002), at <<http://users.unimi.it/sociv/documenti/report.doc>> (remarks of Pierre-Marie Dupuy).

⁶³ RUTH B. RUSSELL (assisted by Jeannete E. Muther), A HISTORY OF THE UNITED NATIONS CHARTER 800–01 (1958) (stating that Article 71 “formalized a normal practice under the League of Nations of consulting with interested nongovernmental organizations concerned with pertinent economic and social activities”). Of course, consultations with NGOs had declined in the period preceding 1945.

⁶⁴ Convention on the International Institute of Agriculture, June 7, 1905, Art. 9(f), 35 Stat. 1918, 1 Bevans 436. Unofficial international agricultural congresses had begun in 1878.

⁶⁵ League of Nations Covenant Art. 25; Chandler P. Anderson, *The International Red Cross Organization*, 14 AJIL 210, 214 (1920).

⁶⁶ See, e.g., 29 INTERNATIONAL LAW ASSOCIATION, CONFERENCE REPORT 363–65 (1920) (remarks of Wyndham A. Bewes); Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 AJIL 447, 451 (1930) (noting that organizations of women sent representatives to the conference at The Hague and that a conference committee devoted a session to hearing statements from the organizations).

and other qualified organizations and called for “free co-operation” between the union and “other official or non-official organisations.”⁶⁷ The League of Red Cross Societies played an important role in drafting the convention and presenting it to governments.⁶⁸

Just as the Red Cross societies in 1919 sought to gain a textual foothold in the League of Nations Covenant, a rainbow of NGOs in 1945 sought to gain such a foothold in the UN Charter. The major commentaries on the Charter miss⁶⁹ the entrepreneurial role of the NGOs at the San Francisco Conference in lobbying for and securing Article 71 so as to endow themselves with an official status.⁷⁰ In view of the longtime pre-1945 practice of a consultative role for NGOs in IOs, the legislating of Article 71 was more incremental than transformational.

Nevertheless, Article 71 soon took on an importance far broader than its own text and, for that reason, the status attained by NGOs through Article 71 became a foundation stone for their efforts to strengthen international law. Even though Article 71 refers only to ECOSOC, a consultative role for NGOs gradually became an established practice throughout the UN system.⁷¹ Article 71 was implemented comprehensively by ECOSOC in 1950 (the 1950 NGO Rule) in a resolution that was superseded by a new resolution in 1968, and then again in 1996 by the resolution now in place (the 1996 NGO Rule).⁷²

Although many of these ECOSOC rules have remained constant, some have changed significantly. First, the 1950 NGO Rule required that an NGO be of “recognized standing” and that it “represent a substantial proportion of the organized persons within the particular field in which it operates.”⁷³ By contrast, the 1996 Rule dispenses with this two-part requirement. Now the NGO must “be of recognized standing within the particular field of its competence or of a representative character.”⁷⁴ Second, the preference in the 1950 Rule for international, rather than national, NGOs has now been eliminated.⁷⁵ Third, the 1996 Rule adds a requirement

⁶⁷ Convention and Statute Establishing an International Relief Union, July 12, 1927; Convention Art. 5(2), Statute Art. 1, 135 LNTS 248. The International Relief Union was the first IO to have a provision in its charter providing for a consultative capacity for NGOs.

⁶⁸ LYMAN CROMWELL WHITE (assisted by Marie Ragonetti Zocca), *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS: THEIR PURPOSES, METHODS, AND ACCOMPLISHMENTS* 246–47 (1951).

⁶⁹ *Article 71*, in 2 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1069, 1070 (Bruno Simma ed., 2d ed. 2002) (making no mention of the lobbying by NGOs at the conference); LELAND M. GOODRICH, EDVARD HAMBRO, & ANNE PATRICIA SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 444 (3d & rev. ed. 1969) (mentioning the NGOs but not the active role they played).

⁷⁰ See *Democratic Processes: The Non-governmental Organizations*, 1951 ANN. REV. UN AFF. 165, 182 (remarks of Waldo Chamberlin); DOROTHY B. ROBINS, *EXPERIMENT IN DEMOCRACY: THE STORY OF U.S. CITIZEN ORGANIZATIONS IN FORGING THE CHARTER OF THE UNITED NATIONS* 122–28 (1971) (noting the catalytic role of James T. Shotwell). Robins and Chamberlin were both present at the San Francisco Conference. See also E. Suy, *The Status of Observers in International Organizations*, 160 RECUEIL DES COURS 75, 102 (1978 II) (noting the pressure brought by the NGOs on the drafters of the Charter).

⁷¹ H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 24–26, 63–64 (1950); Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS Q. 107, 127 (1996). For a survey of current UN practices by agency, see UN NON-GOVERNMENTAL LIAISON SERVICE, *UN SYSTEM ENGAGEMENT WITH NGOS, CIVIL SOCIETY, THE PRIVATE SECTOR, AND OTHER ACTORS: A COMPENDIUM* (2005), available at <<http://www.un-ngls.org/publications.htm>>.

⁷² Review of Consultative Arrangements with Non-governmental Organizations, ESC Res. 288 (X), para. 8 (Feb. 27, 1950), reprinted in LADOR-LEDERER, *supra* note 13, app. C, at 387 [hereinafter 1950 NGO Rule]; Arrangements for Consultation with Non-governmental Organizations, ESC Res. 1296 (XLIV) (May 23, 1968), available at <www.globalpolicy.org/ngos/ngo-un/info/res-1296.htm>; Consultative Relationship Between the United Nations and Non-governmental Organizations, ESC Res. 1996/31 (July 25, 1996), available at <http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm> [hereinafter 1996 NGO Rule].

⁷³ 1950 NGO Rule, *supra* note 72, para. 5.

⁷⁴ 1996 NGO Rule, *supra* note 72, para. 9 (emphasis added).

⁷⁵ Compare 1950 NGO Rule, *supra* note 72, paras. 8–9, with 1996 NGO Rule, *supra* note 72, paras. 4–5.

that an NGO given status “have a democratically adopted constitution” and that it “have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.”⁷⁶ This attention to internal NGO governance reflects the growing concerns in the early 1990s about the legitimacy and accountability of NGOs.

The 1996 NGO Rule codified the existing practice of suspending or withdrawing consultative status from NGOs that no longer meet the eligibility requirements or that misbehave as perceived by ECOSOC’s Committee on Non-governmental Organizations. For example, engaging in “unsubstantiated or politically motivated acts” against UN member states can be grounds for losing status.⁷⁷ An NGO challenged by the government-only ECOSOC committee is to be given written reasons and accorded an opportunity to present its response.⁷⁸

The work of the committee in granting and reviewing accreditation of NGOs has been criticized for overpoliticization and lack of due process.⁷⁹ At present, no judicial review is available for a refusal by ECOSOC to grant an NGO consultative status. In my view, ECOSOC could increase the committee’s credibility by permitting some NGOs to serve as members.

The consultation norms underlying Article 71 have influenced institutional developments outside the United Nations. For example, in 1999 the Organization of American States (OAS) adopted the Guidelines for the Participation of Civil Society Organizations in OAS Activities.⁸⁰ In 2001 the Constitutive Act of the African Union called for the establishment of an advisory Economic, Social and Cultural Council composed of different social and professional groups of the member states.⁸¹ Another example of mimesis is the Antarctic Treaty consultative process where designated NGOs, such as the International Association of Antarctica Tour Operators, are permitted to participate.

In the early twenty-first century, NGOs are pervasive. No policy issues are off-limits for government-NGO consultations. As Alexandre Kiss and Dinah Shelton have observed, “Today, purely inter-state development of norms is probably non-existent in most fields of international law.”⁸² This circumstance has been appreciated by the U.S. Congress, which in a November 2005 appropriation defined an “international conference” as a “conference attended by representatives of the United States Government and representatives of foreign governments, international organizations, or nongovernmental organizations.”⁸³

III. HOW NGOS CHANGED INTERNATIONAL LAW

In a recent study, José Alvarez observed: “Although the impact of NGOs on legal development ebbs and flows, no one questions today the fact that international law—both its content

⁷⁶ 1996 NGO Rule, *supra* note 72, paras. 10, 12.

⁷⁷ *Id.*, para. 57(a).

⁷⁸ *Id.*, para. 56.

⁷⁹ See, e.g., Jurij Daniel Aston, *The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House*, 12 EUR. J. INT’L L. 943 (2001). The recent Report of the Panel of Eminent Persons on United Nations–Civil Society Relations (Cardoso Report) stated that “it is essential to depoliticize the accreditation process.” We the Peoples: Civil Society, the United Nations and Global Governance, UN Doc. A/58/817, at 54, para. 127 (2004).

⁸⁰ OAS Permanent Council, CP/Res. 759 (1217/99) (1999).

⁸¹ Corinne A. A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AJIL 365, 375 (2002).

⁸² ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 167 (3d ed. 2004).

⁸³ The definition is found in a funding limitation on the number of U.S. employees who may attend a conference. Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, §634, 119 Stat. 2290 (2005).

and its impact—has been forever changed by the empowerment of NGOs.⁸⁴ Indeed, an extensive body of scholarship now attests to the importance of NGOs to developments in international law.⁸⁵ With the rise of NGOs in international policymaking, thoughtful writers have seen the increasing tensions between reality and international law orthodoxy. For instance, in 1932 political scientist Stanley H. Bailey wrote that “[t]he interposition of the fiction of the personified state conceals the reality that the greater part of the world-order is built out of the innumerable associations of individuals and groups which have not directly entered the sphere of governmental relations.”⁸⁶ Furthermore, he contended, “either the rigidity of international law cannot be much longer maintained or a new form of law applicable to the conduct of non-governmental groups in international society will be necessary to bridge the gulf.”⁸⁷ In 1955 Philip Jessup, Adolf Lande, and Oliver Lissitzyn took note of private international organizations and saw in them “[t]he piercing, but not tearing down, of the governmental wall between private interests and the international society.”⁸⁸ By boldly advocating new forms of cooperation, NGOs helped to make international law more responsive to the needs of the international community.

In a lecture delivered a decade ago, Judge Higgins pointed to NGO demands as one phenomenon in “the reformation in international law.”⁸⁹ An aspect of that reformation is a change in “the concept of international law” and, in particular, “in our notions of” the identity of the users and beneficiaries of international law.⁹⁰ Thus, in taking note of NGOs as players in UN conferences, Higgins wrote that “[t]he interest of NGOs, and indeed their entitlement to be present at these gatherings, has been an important matter for them and for governments alike.”⁹¹ Higgins’s metaphor of “reformation” is appropriate for NGOs. Reformation is the right word because it connotes a return to an earlier doctrine so as to clear away errors, such as the excessive state-centricity of positivist orthodoxy.⁹²

The reformation of international law extends both to content and to process. The vastly expanded content of international law has been stimulated by NGOs, particularly in human rights, humanitarian, and environmental law. Through their focus on the rights of individuals,

⁸⁴ JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 611 (2005); *see also* Eibe Riedel, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 301, 317 (Rüdiger Wolfrum & Volker Röben eds., 2005) (stating that NGO involvement in all processes of IO activities has been crucial and indispensable).

⁸⁵ *See, e.g.*, *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* (John Boli & George M. Thomas eds., 1999); ‘THE CONSCIENCE OF THE WORLD’: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM (Peter Willetts ed., 1996); Tom Farer, *New Players in the Old Game: The De Facto Expansion of Standing to Participate in Global Security Negotiations*, 38 *AM. BEHAVIORAL SCIENTIST* 842 (1995); Anne-Marie Slaughter, *International Law and International Relations*, 285 *RECUEIL DES COURS* 9, 96–151 (2000) (constituting chapter 3, *The Role of NGOs in International Law-making*); *The Growing Role of Nongovernmental Organizations*, 89 *ASIL PROC.* 413 (1995); P. J. Simmons, *Learning to Live with NGOs*, *FOREIGN POL’Y*, Fall 1998, at 82.

⁸⁶ S. H. BAILEY, *THE FRAMEWORK OF INTERNATIONAL SOCIETY* 81 (1932).

⁸⁷ *Id.* at 82.

⁸⁸ PHILIP C. JESSUP, ADOLF LANDE, & OLIVER J. LISSITZYN, *INTERNATIONAL REGULATION OF ECONOMIC AND SOCIAL QUESTIONS* 33 (1955).

⁸⁹ Rosalyn Higgins, *The Reformation in International Law*, in *LAW, SOCIETY AND ECONOMY* 207, 211–15 (Richard Rawlings ed., 1997).

⁹⁰ *Id.* at 212, 215.

⁹¹ *Id.* at 215.

⁹² *See* Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 *AJIL* 533, 534 (1956) (noting the views of Grotius and Pufendorf); Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 *YALE L.J.* 60, 83 (1949) (stating that “[i]t is indeed only from the narrowest perspectives of international law as conceived in the period since Bentham that an observer can claim that even theoretically only states, exclusive of individuals, are the subjects of international law”).

rather than the rights (and sovereignty) of states, leading NGOs surely deserve credit for helping to humanize modern international law, both treaty and customary.⁹³

NGOs helped to transform the processes of international law as they learned how to mobilize states and leverage public opinion. As the mode of diplomacy changed from bilateral contracts to plurilateral law, NGOs invited themselves to the constitutive events, first as petitioners and later as accredited observers. The Congress of Vienna of 1814–1815 was the first intergovernmental conference to feature extensive lobbying by private actors.⁹⁴ The Hague Peace Conference of 1899 attracted a *mélange* of voluntary associations, and inaugurated the idea of the NGO parallel conference.⁹⁵ The League Conference of 1923 to draft the Convention Relating to the Simplification of Customs Formalities may have been the earliest intergovernmental negotiation in which an NGO—the International Chamber of Commerce—was specifically accredited to participate.⁹⁶

NGOs as Competitors

What made international law susceptible to being influenced by NGOs? One of the earliest insights was the NGO advantage in being independent. NGOs can be more creative than government officials because NGOs are not burdened with the need to champion a particular national or governmental interest. As Paul Reinsch explained in 1909, “private initiative” can be “far bolder and more optimistic than that of the state. It is not beset by the ever-present care to preserve national sovereignty intact”⁹⁷ In 1936 Charles Fenwick pointed out that international federations lacked representation in the Council and Assembly of the League of Nations, and suggested that giving such groups representation “might be greatly effective in cutting across national lines.”⁹⁸ In a 1960 study, Quincy Wright observed that “private organizations have many advantages over official organizations in the scientific exposition of international law.”⁹⁹ He reasoned that the private groups “are freer to take a world point of view and to ignore particular, and frequently temporary, national interests which tie down official representatives.”¹⁰⁰

Another factor that may explain the influence of NGOs has been their ability to construct and encourage new norms for an interdependent world. In 1902 Pierre Kazansky perceived that the activities of international societies and associations were leading to the development of “international social interests.”¹⁰¹ This result contributed to what Kazansky called “international administration,” which is “activity of states, international societies and their organs” directed

⁹³ On customary international law, see John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?* 31 LAW & POL’Y INT’L BUS. 221, 244 (2000); Stephan Hobe, *The Role of Non-State Actors, in Particular of NGOs, in Non-contractual Law-making and the Development of Customary International Law*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, *supra* note 84, at 319, 328.

⁹⁴ The issues in play were the slave trade, religious freedom, and intellectual property. Max J. Kohler, *Jewish Rights at International Congresses*, AM. JEWISH Y.B. 5678, at 106, 109–10 (1917); LAUREN, *supra* note 25, at 40; HAROLD NICOLSON, *THE CONGRESS OF VIENNA: A STUDY IN ALLIED UNITY: 1812–1822*, at 132 (1946).

⁹⁵ See David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AJIL 4, 15 (2000). In 1908, in his Nobel Peace Prize lecture, Fredrik Bajer likened the “organization of peace” to a “house of three stories,” including on the first story the peace associations; on the second story, the interparliamentary conferences; and on the third story, the intergovernmental Hague Peace conferences. Fredrik Bajer, *The Organization of the Peace Movement* (May 18, 1908), at <<http://nobelprize.org/peace/laureates/1908/bajer-lecture.html>>.

⁹⁶ International Conference on Customs and Other Similar Formalities: Official Instruments Approved by the Conference, League of Nations Doc. C.D.I.96(1).1923, at 25; GEORGE L. RIDGEWAY, *MERCHANTS OF PEACE* 212–13 (1938).

⁹⁷ Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AJIL 1, 22 (1909).

⁹⁸ C.G. Fenwick, *The “Failure” of the League of Nations*, 30 AJIL 506, 508 (1936).

⁹⁹ Quincy Wright, *Activities of the Institute of International Law*, 54 ASIL PROC. 194, 196 (1960).

¹⁰⁰ *Id.* He also observed that private groups are free to make use of persons from all over the world.

¹⁰¹ Pierre Kazansky, *Théorie de l’administration internationale*, 9 RGDIP 353, 354, 357 (1902) (trans. by author).

to the “goal of protecting international social interests.”¹⁰² During the past decade, scholars looking at NGO and other nonstate participation have employed the terms “transnational advocacy networks,” “transnational norm entrepreneurs,” “nongovernmental norm entrepreneurs,” and “transnational moral entrepreneurs.”¹⁰³ As these terms indicate, the NGO seeks to sell its norms to authoritative decision makers and the public.

In being entrepreneurial, NGOs compete with other actors in a dynamic marketplace of ideas. Writing in 1949 about the “world power process,” Myres McDougal noted that states were the most important participants, but he also called attention to IOs, transnational political parties, transnational pressure groups, cartels, and individuals.¹⁰⁴ In the early twenty-first century, many additional participants can be named, such as multinational corporations and foundations.

The concept of the entrepreneurial NGO animates theories about states and IOs. In an article about why NGOs should be able to participate in the WTO, Daniel Esty contended that nongovernmental “competition” could lead to a richer WTO politics, which could help improve the effectiveness of the WTO.¹⁰⁵ In his Hague Academy lecture, Judge Raymond Ranjeva analyzed the NGO as a “competitor” important to the implementation of international law.¹⁰⁶ The role of NGOs as norm entrepreneurs has also been incorporated into theories of why states obey international law.¹⁰⁷

Successful NGOs have gained advantage through innovation and adaptation. Nobel Prize co-winner Jody Williams famously remarked about the importance of the Internet, electronic mail, and facsimile communication to the land mines campaign. Yet that same story of utilizing technology for publicity can be told about many NGO campaigns—for example, the use of the slide show by the Congo Reform movement in the early 1900s. NGO mobility is another advantage. Being autonomous and nimble, NGOs can travel to trouble spots where governments or IOs fear to go or are slow to reach.

Although the role of NGOs challenges the state-centricity of international law, that does not necessarily translate into a challenge to the state. Thus, this author disagrees with commentators who see the rise of NGOs as leading to the decline of states. A state is not weakened just because its citizens speak through diverse voices. Actually, a more likely impact of NGO involvement has been to strengthen states when the new international legislation promoted by NGOs expands states’ regulatory agendas.¹⁰⁸

Assessing the NGO contribution to the reformation of international law requires special attention to the IO. NGOs were key proponents of establishing some of the earliest IOs. Once an IO is set up, interested NGOs will typically seek information about its activities and access to observe and influence decision making in the IO. Such acts of NGO self-interest need no explanation.

Less obvious is why governments agree to give access to NGOs. Over the years, many rational-choice explanations have been offered for this phenomenon, including that NGOs provide

¹⁰² *Id.* at 361.

¹⁰³ See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 1 (1997); Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 646, 647 (1998); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *INT’L ORG.* 479, 482 (1990).

¹⁰⁴ Myres S. McDougal, *The Role of Law in World Politics*, 20 *MISS. L.J.* 253, 260, 265 (1949); see ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49–50 (1994) (explaining that international law is a dynamic decision-making process rather than merely a set of rules).

¹⁰⁵ Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 *J. INT’L ECON. L.* 123, 135–37 (1998).

¹⁰⁶ Raymond Ranjeva, *Les organisations non gouvernementales et la mise en oeuvre du droit international*, 270 *RECUEIL DES COURS* 9, 23, 100 (1997).

¹⁰⁷ See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 203–04 (1996).

¹⁰⁸ See Reinsch, *supra* note 97, at 15–16; Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 *HARV. ENVTL. L. REV.* 537, 582–84 (1997).

needed expertise, enhance public support for the IO, and assist in the domestic internalization of norms developed in the IO. Analysts have explored “the symbiotic relationship between IOs and NGOs” with the two sides offering mutual legitimation.¹⁰⁹ This relationship is carried out openly. For example, UN secretary-general Kofi Annan has declared: “I see a United Nations which recognizes that the NGO revolution—the new global people-power—is the best thing that has happened to our Organization in a long time.”¹¹⁰

Some scholars have emphasized the symmetry of the IOs and the international-minded NGOs in that both are nonstate actors pursuing international goals.¹¹¹ Although that model is valid, a better model for analysis may be to consider the IO not as an actor to which authority has been delegated but, rather, as a designated arena where various governmental and nongovernmental participants compete and cooperate.¹¹² Appreciating the sites of international decision making as arenas in which NGOs compete for public support avoids a more problematic interpretation of the NGO role, namely, that NGOs represent the public.

The international arena with the thickest nongovernmental participation is the ILO. Over the years, many analysts have suggested applying the ILO’s method of NGO participation to other intergovernmental bodies,¹¹³ but this has not happened. The tripartism of the ILO worked because in 1919 the workers, employers, and governments were the principal stakeholders. In the postindustrial world, however, few important international employment issues involve only three principal stakeholders. Indeed, as Virginia Leary pointed out, the ILO’s tripartism may impede it from offering adequate participatory opportunities to other NGOs, such as human rights groups.¹¹⁴ Beyond the ILO, a tripartite government-business-NGO formula for IOs is imaginable, but surely too compartmentalized for the plethora of market and nonmarket interests in play today.

IV. THE LEGITIMACY OF NGO PARTICIPATION

The question whether the tripartism of the ILO was legitimate did not generate much attention in 1919 in the negotiations that established the ILO. Yet today the legitimacy of milder forms of NGO participation is under attack. In part IV, I address this ongoing debate and, in particular, whether it is legitimate for democratic states, acting in IOs or international negotiations, to consult with NGOs or otherwise give them an opportunity to be heard.¹¹⁵ No systematic exposition has come to my attention of why such a state practice should be considered illegitimate. Various assertions to that effect, however, have been made and are discussed below.

¹⁰⁹ See ALVAREZ, *supra* note 84, at 287, 610, 612.

¹¹⁰ UN Press Release SG/SM/7318, Partnership with Civil Society Necessity in Addressing Global Agenda, Says Secretary-General in Wellington, New Zealand Remarks (Feb. 29, 2000).

¹¹¹ See, e.g., Malgosia Fitzmaurice, *Actors and Factors in the Evolution of Treaty Norms*, 4 AUSTRIAN REV. INT’L & EUR. L. 1 (1999); Volker Röben, *Proliferation of Actors*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, *supra* note 84, at 511, 512. The earliest textbooks on international organization gave attention to NGOs. See, e.g., FREDERICK CHARLES HICKS, THE NEW WORLD ORDER, ch. 20 (1920); PITMAN B. POTTER, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION, ch. 18 (rev. ed. 1922).

¹¹² David Bederman has suggested that IOs be visualized as “communities.” David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte*, 36 VA. J. INT’L L. 275, 371–72 (1996).

¹¹³ See, e.g., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AJIL 259, 280–83 (1992).

¹¹⁴ Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in THE UNITED NATIONS AND HUMAN RIGHTS 580, 585 (Philip Alston ed., 1992).

¹¹⁵ See Bosire Maragia, *Almost There: Another Way of Conceptualizing and Explaining NGOs’ Quest for Legitimacy in Global Politics*, 2 NON-ST. ACTORS & INT’L L. 301, 313 (2002); see also Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 235–36 (1994 VI) (noting the vital role of NGOs and asking whether sovereign states have a moral basis for monopolizing the discourse on the definition and pursuit of community interests in international law).

In the 1996 ICJ *Nuclear Weapons* cases, Judges Gilbert Guillaume and Shigeru Oda separately expressed concerns about the propriety of NGO influence on governments. Judge Guillaume, while agreeing to comply with the request by the UN General Assembly, issued a separate opinion saying that the Court could have dismissed that request (as well as the request by the World Health Organization) as inadmissible because it had originated in a campaign conducted by associations and groups.¹¹⁶ In that regard, he opined: “I dare to hope that Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media.”¹¹⁷ Judge Oda dissented from the Court’s decision to comply with the General Assembly’s request and stated several reasons. One was that “[t]he idea behind the resolution . . . had previously been advanced by a handful of non-governmental organizations (NGOs).”¹¹⁸ Neither judge explained why the influential NGO involvement was problematic or why IOs (or the ICJ) should be impermeable to influence from NGOs.

The clearest argument for the illegitimacy of intergovernmental attention to NGO advocacy is the “second bite at the apple” thesis. Before he joined the Bush administration’s diplomatic team, John Bolton was a leading critic of NGOs. In 2000 Bolton argued that NGO “detachment from governments” was troubling for democracies because civil society “provides a second opportunity for intrastate advocates to reargue their positions, thus advantaging them over their opponents who are unwilling or unable to reargue their cases in international fora.”¹¹⁹ Furthermore, he claimed that “[c]ivil society’s ‘second bite at the apple’ raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided.”¹²⁰ This thesis might be summarized as saying that governmental receptivity to input from NGOs should occur only in domestic fora, not in international fora.

Kenneth Anderson and David Rieff have offered a more detailed analysis of the legitimacy of NGO advocacy.¹²¹ In part, they object to the inflated rhetoric asserting that internationally active NGOs make up “global civil society” and that, as such, speak for the people(s) of the world. Yet their deeper concern involves what they contend are flawed analogies between domestic and international NGO advocacy with regard to both the role of NGOs and the setting for their activities. In domestic democratic society, they say, NGOs are able to “play the role of single-minded advocates . . . precisely because they are not, and are not seen as being, ‘representative’ in the sense of democratic representation.”¹²² Yet in the international realm, they say, NGOs (perceiving themselves as global civil society) aspire to quite different roles, including both representativeness and standing between the people of the world and various transnational institutions. Anderson and Rieff also object to the analogy between domestic democratic society and the international community, saying: “Because, plainly, international

¹¹⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, 287–88, para. 2 (July 8) (Guillaume, J., sep. op.). He suggested “piercing the veil” of the IOs. *Id.* In its opinion, the Court stated “that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.” 1996 ICJ REP. at 234, para. 13.

¹¹⁷ *Id.* at 288, para. 2 (Guillaume, J., sep. op.).

¹¹⁸ *Id.* at 335–36, para. 8 (Oda, J., dissenting). Regarding the World Health Organization’s request, Judge Oda issued a separate opinion agreeing with the Court’s decision to decline to render an opinion, but holding that the advocacy by the NGOs was an additional reason to decline. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 ICJ REP. 66, 92–96, paras. 9, 15–16 (Oda, J., sep. op.).

¹¹⁹ John R. Bolton, *Should We Take Global Governance Seriously?* 1 CHI. J. INT’L L. 205, 217 (2000).

¹²⁰ *Id.*

¹²¹ Kenneth Anderson & David Rieff, *‘Global Civil Society’: A Sceptical View*, in GLOBAL CIVIL SOCIETY 2004/5, at 26, 37 (Helmut Anheier et al. eds., 2004).

¹²² *Id.* at 29.

society is not democratic, international NGOs are deprived of the democratic context in which their (disanalogous) domestic counterparts act.”¹²³ A central argument in Anderson and Rieff’s analysis is that, as the international system is assigned more and more “intrusive” tasks by leading states, “the ever more diluted legitimacy that passes upwards from nation state to international system is inevitably far too attenuated to satisfy the requirements of those new tasks.”¹²⁴ The gravamen of their argument is that international NGOs cannot fill in any missing legitimacy.

In my view, an NGO cannot justify its own activist role on the claim that it represents the public. So Anderson and Rieff are right to criticize the pretentious assertions of some NGOs.¹²⁵ Nevertheless, their argument misses the possibility that more open and inclusive processes of decision making can help to overcome the allegedly attenuated democratic legitimacy of international governance.

Throughout the twentieth century, many commentators have examined nongovernmental participation in IOs and reflected on what that might mean for democracy. For example, in 1927 Georges Scelle chronicled the role of professional interests and private organizations in the ILO and the League of Nations, and saw in that practice an evolution “toward the gradual creation of an international ‘democracy’.”¹²⁶ That same year, Walther Schücking called attention to the League’s “direct collaboration with individuals and social forces in the form of other organizations,” and visualized the League as developing in parallel to states where “democratization started with citizens being invited to participate in different administrative tasks.”¹²⁷ In 1936, in a study of worker organizations, Alexandre Berenstein wrote that “[t]his democratization was easier to obtain by means of the representation of social milieus . . . specially interested in social legislation than by the creation of a truly international parliament.”¹²⁸ In 1954 David Mitrany, taking note of Article 71 of the UN Charter, posited that NGOs “could be made into instruments of real democratic representation where the mass collection of votes by universal suffrage would in truth be meaningless.”¹²⁹ A few years ago, James Crawford and Susan Marks observed that “the vastly enhanced participation in recent years of non-governmental organizations at the international level is one indication of the pressures and possibilities for democracy in global decision-making.”¹³⁰ And Menno Kamminga has written that by contributing the views of civil society, NGOs “confer badly needed legitimacy on the international

¹²³ *Id.* at 30.

¹²⁴ *Id.* at 34.

¹²⁵ Note that the idea of NGOs as serving a representative function at the United Nations goes back to how UN member governments implemented Article 71 in 1950 in calling for an accredited NGO to “represent a substantial proportion of the organized persons within the particular field in which it operates.” See text at note 73 *supra*.

¹²⁶ GEORGES SCELLE, *UNE CRISE DE LA SOCIÉTÉ DES NATIONS* 144–46 (1927) (trans. by author). Scelle’s term for NGOs was extra-state societies. GEORGES SCELLE, *PRÉCIS DE DROIT DES GENS* 288 (1932).

¹²⁷ Walther Schücking, *Le développement du Pacte de la Société des nations*, 20 *RECUEIL DES COURS* 349, 394 (1927 V) (trans. by author). In 1921 Schücking said that “the time had arrived in which it was necessary to create a new international law not only for states but for peoples, in order that the natural law of peoples to govern themselves should penetrate the law positive.” James Brown Scott, *Walter Schücking, January 6, 1875–August 25, 1935*, 31 *AJIL* 107, 109 (1937) (quoting Schücking at Institut de droit international, Rome, Oct. 8, 1921).

¹²⁸ ALEXANDRE BERENSTEIN, *LES ORGANISATIONS OUVRIÈRES: LEURS COMPÉTENCES ET LEUR RÔLE DANS LA SOCIÉTÉ DES NATIONS* 277 (1936) (trans. by author).

¹²⁹ David Mitrany, *An Advance in Democratic Representation*, 6 *INT’L ASSOCIATIONS* 136, 188 (1954). Yet he presciently warned that “if the NGO’s are to become the accepted channel of international public opinion they will have to display a sense of restraint and responsibility in their views and claims; and perhaps also perform among themselves a certain process of selection.” *Id.*

¹³⁰ James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and Its Limits*, in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 72, 83 (Daniele Archibugi, David Held, & Martin Köhler eds., 1998).

system.”¹³¹ A common thread in this stream of scholarship is that the nation-state does not constitute the highest level attainable by democracy.

Intergovernmental consultations with NGOs can enhance the legitimacy of international decision making, but it is the consultation itself that makes the contribution, not the quantity of NGO support obtained. Thus, I disagree in part with what Thomas Franck has stated:

If you continue indefinitely to transfer authority over really important issues that affect people's interests to institutions that do not even have a pretense of representativeness, you will have the seeds of self-destruction. Not only do NGOs not address that problem because they are in no sense a substitute for some direct form of representation of people in the process which normally one thinks of as parliamentary representation . . . NGOs are irrelevant, they do not in any sense legitimate the decision-making process. They may make it better, sometimes they may make it worse, but the legitimacy deficit is not addressed by them . . .¹³²

In my view, Franck does not give enough consideration to the ways that NGOs can improve international decision making. My more serious disagreement, however, is with the arguments by Anderson, Rieff, and Bolton that the democratic context in which NGOs operate internationally differs significantly from the context in which NGOs operate domestically.

Those arguments are wrong because they ignore political reality. Individuals and NGOs must operate in the world as it is. As Florentino Feliciano pointed out several decades ago, our world is “a graduated series of community contexts—each exhibiting a public order system—of varying territorial scope.”¹³³ Every territorial context can be relevant and legitimate for use by an NGO motivated by an international mission. Indeed, the most successful NGOs operate at many levels in localities, national capitals, and international arenas. They play multilevel games.

Because binding international decisions are made by either consensus or prescribed majorities, an individual seeking international collective action wants the assent not only of the government with direct authority over him, but also of many other governments. An NGO can help to amplify the voice of an individual in seeking the support (or opposition) of governments that the individual has no role in electing.¹³⁴ For example, an activist NGO in the Federated States of Micronesia concerned about global warming will not rest simply because it has convinced the Micronesian government to ratify the Kyoto Protocol. Since continuing globalization will require frequent intergovernmental decision making, the difficulty of achieving legitimacy is a challenge to be overcome, not a valid justification for avoiding international commitments.

How is legitimacy attained? A study by Daniel Bodansky, focusing on international environmental law, posits three bases of legitimacy—state consent, procedural fairness, and the

¹³¹ Kamminga, *supra* note 60, at 110.

¹³² Thomas M. Franck, Remarks, *in* NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW 151, 152 (Rainer Hofmann ed., 1998). Professor Franck's views on NGOs have evolved. Several years ago, he wrote that introducing the voice of individuals and interest groups in diplomatic negotiations “ameliorates, but does not cure, the legitimacy-deficit of Vattelian international governance and the modern alienation that ensues.” THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 36 (1999).

¹³³ Florentino P. Feliciano, Book Review, 68 *YALE L.J.* 1039, 1047 (1959) (reviewing C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958)).

¹³⁴ In that regard, the goal of lobbying is functionally the same at the international level as it is at the domestic level, where the individual is typically governed by parliaments containing many members for whom he had no opportunity to vote.

substantive outcomes achieved.¹³⁵ A study by Robert O. Keohane and Joseph S. Nye Jr., focusing on the WTO, suggests that legitimacy at the international level depends on both the procedures followed (“inputs”) and the results obtained (“outputs”).¹³⁶ Keohane and Nye call attention to existing mechanisms for “nonelectoral accountability” through a “communicative environment” that may involve “global publics” such as NGOs, even when there is no “global community.”¹³⁷ They conclude that “some form of NGO representation in the institutions involved in multilateral governance . . . could help to maintain their legitimacy.”¹³⁸ In a more recent study on the sources of normative legitimacy of multilateral decision making, Keohane contends that in the twenty-first century, only democratic principles, appropriately adopted, can confer legitimacy.¹³⁹

Whether NGO participation adds to, or detracts from, the legitimacy of international decision making can be explored through an analysis of inputs and outputs. The input is the process of decision making. The output is the effectiveness of the decisions reached.

NGOs facilitate input legitimacy in several ways. One is to promote accountability by monitoring what government delegates say and do in the IO and to communicate that information to elected officials and the public. Another is to help assure that decision makers are aware of the sympathies and interests of the people who will be affected by intergovernmental decisions.¹⁴⁰

The contribution of NGOs to input legitimacy may depend on several factors. One is the independence and integrity of the NGO. During the past decade, many analysts have pointed to the need for NGOs to be transparent and accountable.¹⁴¹ Another factor is whether a consultation process assures a fair balance of NGOs from different parts of the world.¹⁴² Over the past twenty years, NGOs have joined together more often in large coalitions, a practice that can overcome narrow-minded perspectives.

NGOs can contribute to output legitimacy in several ways. One is to offer their specialized expertise to enable more informed decisions. NGOs can often be sources of information that governments may not have. Another is to raise the quality of policy deliberations so that the choices available are better understood.¹⁴³

¹³⁵ Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AJIL 596, 612 (1999).

¹³⁶ Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 282 (Roger B. Porter et al. eds., 2001). They cite earlier work by Fritz Scharpf on input and output legitimacy. *Id.* at 293 n.40.

¹³⁷ *Id.* at 283–84.

¹³⁸ *Id.* at 289–90.

¹³⁹ Robert O. Keohane, *The Contingent Legitimacy of Multilateralism*, in MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER, AND STRUCTURAL CHANGE (Edward Newman, Ramesh Thakur, & John Tirman eds., forthcoming 2006).

¹⁴⁰ See Frederick S. Dunn, *The International Rights of Individuals*, 35 ASIL PROC. 14, 18 (1941) (suggesting that if international law is to regain its former influence, then it needs to be in harmony with social developments in democracy that entail a right of the individual to be consulted in matters affecting his welfare).

¹⁴¹ See, e.g., MICHAEL EDWARDS, NGO RIGHTS AND RESPONSIBILITIES (2000); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 10, at 37, 48–49; Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT’L L. 161 (2002); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489, 533 (2001).

¹⁴² Christine Chinkin, *Human Rights and the Politics of Representation: Is There a Role for International Law? in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 131, 144 (Michael Byers ed., 2000).

¹⁴³ See CHIANG PEI-HENG, NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS 5 (1981) (suggesting that the most important function of NGOs is “providing alternative programs and ideas, and views in opposition to or critical of official policies and opinions”).

Of course, NGO participation does not necessarily improve the outputs from IOs or multilateral negotiations. Consultation with NGOs takes time, which can exact a cost. Moreover, while inviting the NGOs in makes the entire process more transparent to the public, such transparency can lead to different results than would ensue if governments arrived at agreements behind closed doors. Sometimes the involvement of NGOs in negotiations has led governments to formulate impractical agreements.

Given the many NGO contributions noted above, there are logical reasons for governments acting together to consult NGOs and to perceive such actions as legitimate. Whether or not these reasons are the motivating force behind current state practice I doubt anyone can know. Perhaps the underlying motivation is that government officials deciding whether to consult NGOs believe that such consultation is good politics.

V. TOWARD A DUTY TO CONSULT NGOS

In this part, I consider whether states have a duty to be open to consultation with NGOs in activities of IOs and in multilateral negotiations. The term “consultation” has been defined as “a duty to listen” with a “good faith commitment to consider the information provided by the consulting partner.”¹⁴⁴ In addition to the Article 71 approach, some other forms of consultative good governance include advisory groups, international notice and comment, and multistakeholder dialogues that bring together NGOs and the private sector.¹⁴⁵

The practice of consulting with NGOs is widespread and continues to expand. For most of its existence, the UN Security Council appeared to be off-limits for NGOs, but that insularity ended in 1997 when NGOs began to brief groups of Council members and then, in 2004, the Council itself.¹⁴⁶ NGOs have occasionally addressed special sessions of the UN General Assembly and, in September 2005, two NGO leaders made short presentations to the World Summit.¹⁴⁷ During the 1990s, NGOs gained some limited opportunities to provide input within the World Bank, and to a lesser extent, the International Monetary Fund. The international financial institution for the environment, the Global Environment Facility (GEF), provides for five NGOs to participate in GEF Council meetings and these NGOs are chosen by the GEF’s NGO network.

Only a few multilateral agencies continue to resist adopting an NGO consultation process. In 2006 the most notable holdout is the WTO. The ostensible reason was given in a WTO decision enacted in 1996, which noted “the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a

¹⁴⁴ Mary F. Dominick, *Consultation*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 776, 778 (1992). See generally FREDERIC L. KIRGIS JR., *PRIOR CONSULTATION IN INTERNATIONAL LAW* (1983).

¹⁴⁵ An example of an advisory group is the Business Advisory Council of the Asia-Pacific Economic Cooperation Forum. Notice-and-comment opportunities are provided in several IOs, for example, the Organization for Economic Co-operation and Development. For examples of multistakeholder dialogues, see Monterrey Consensus of the International Conference on Financing for Development, UN Doc. A/CONF.198/11, annex, para. 69 (2002); World Summit on the Information Society, Tunis Agenda for the Information Society, para. 72 (2005), available at <<http://www.itu.int/wsis/documents>>.

¹⁴⁶ At the 2004 meeting, CARE International and the International Center for Transitional Justice briefed Council members on the role of civil society in postconflict peace building. Arria and Other Special Meetings Between NGOs and Security Council Members, June 22, 2004, available at <<http://www.globalpolicy.org/security/mtgsetc/brieindx.htm>>; Ruth Wedgwood, *Legal Personality and the Role of Non-governmental Organizations and Non-State Political Entities in the United Nations System*, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW, *supra* note 132, at 21, 27.

¹⁴⁷ Before the summit, the president of the General Assembly presided over informal interactive hearings with NGOs and the private sector.

forum for negotiations.”¹⁴⁸ The decision went on to state that “there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.”¹⁴⁹ A decade later, that view remains strongly held—even though international NGOs are now exerting more influence on high-profile trade issues, such as maintaining access to pharmaceuticals and reducing trade-distorting agricultural subsidies.

Another (embarrassing) footdragger is the International Law Commission (ILC), which does not provide opportunities for NGO consultation.¹⁵⁰ Yet it seems only a matter of time until a more progressive approach to codification flowers there, too. The ILC already has authority in its Statute to “consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.”¹⁵¹ A good first step for the ILC would be to hold a one-day public hearing during its annual session.

In view of this breadth of practice on consulting NGOs, the question whether states or IOs have a duty to consult NGOs is an interesting one. The answer appears to be no at this time, but a review of the sources of law can be instructive. Below, I will look at treaties, intergovernmental statements, and the teachings of the most highly qualified publicists.

The main human rights treaties do contain some important language on point. The International Covenant on Civil and Political Rights states that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, *regardless of frontiers*.”¹⁵² The American Declaration of the Rights and Duties of Man states that “[e]very person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.”¹⁵³ Yet those provisions may be too general to demonstrate a duty to consult.

A review of specialized treaties shows an incorporation of NGO consultation processes, but the treaties typically do not enthrone a duty. Aside from the special case of the ILO, where employer and worker delegates serve as group representatives on the Governing Body, the usual practice in international regimes is that participation of NGOs is permissive rather than mandatory. For example, the convention on land mines lists relevant NGOs among the entities that *may* be invited to attend meetings of states parties, review conferences, or amendment conferences.¹⁵⁴

Yet there is one important exception: The environment regime has given NGO participation legal mooring. Several multilateral environmental agreements call for the automatic

¹⁴⁸ Guidelines for Arrangements on Relations with Non-governmental Organizations, Doc. WT/L/162, para. VI (1996). Once a year, the WTO Secretariat sponsors a symposium in which invited NGOs participate in panel sessions along with business leaders, government officials, and academics. In addition, NGOs are invited to attend WTO ministerial conferences as silent observers. For example, in December 2005, over eight hundred NGOs attended the Hong Kong ministerial conference.

¹⁴⁹ *Id.*

¹⁵⁰ Christine Chinkin, *Enhancing the International Law Commission's Relationships with Other Law-making Bodies and Relevant Academic and Professional Institutions*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50, at 333, 339–41, UN Sales No. E/F.98.V.5 (1998); HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 101 (2000).

¹⁵¹ Statute of the International Law Commission, Art. 26(1).

¹⁵² International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 19(2), 999 UNTS 331 (emphasis added).

¹⁵³ American Declaration of the Rights and Duties of Man, May 2, 1948, Art. XXIV, 43 AJIL Supp. 133 (1949).

¹⁵⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, Arts. 11.4, 12.3, 13.2, 36 ILM 1507 (1997).

admission of NGO observers. The first to do so was the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973, which provides:

Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the [CITES] Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental¹⁵⁵

After CITES, other major environmental agreements were written using similar language except for “may be admitted” rather than “shall be admitted.”¹⁵⁶ Nevertheless, such provisions still maintain a presumption for granting observer status to NGOs.

A review of nonbinding international declarations shows some support for a principle that NGOs should be consulted. For example, in 1992 a UN conference adopted Agenda 21, which states:

The United Nations system, including international finance and development agencies, and all intergovernmental organizations and forums should, in consultation with non-governmental organizations, take measures to:

. . .

(b) . . . enhance existing or, where they do not exist, establish, mechanisms and procedures within each agency to draw on the expertise and views of non-governmental organizations in policy and programme design, implementation and evaluation¹⁵⁷

In 2005 the Santiago ministerial conference of the Community of Democracies proclaimed a commitment “to enhancing the participation of a dynamic civil society at the domestic and international level.”¹⁵⁸ A duty to consult NGOs can also be characterized as a right of NGOs to speak (their conception of) truth to power. In 1999 the UN General Assembly approved the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which provides that “everyone has the right, individually and in association with others, at the national and international levels: . . . (c) *To communicate with non-governmental or intergovernmental organizations.*”¹⁵⁹

One objection to a claim of an international duty to consult is that there is not yet a binding international norm obliging states to consult with NGOs in domestic legislative, executive, or judicial decision making. That would be a powerful argument, on the assumption that a norm regarding the international level must move up from the national level. Yet that assumption may be unjustified. For example, according to Lyman White, a leading scholar on NGOs in

¹⁵⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, Art. XI(7)(a), 993 UNTS 243, 12 ILM 1085 (1973). The Aarhus Convention of 1998 contains a similar provision. Aarhus Convention, *supra* note 48, Art. 10(5).

¹⁵⁶ That language occurs in conventions regarding the ozone layer, hazardous waste, climate change, biodiversity, desertification, hazardous chemicals, and persistent organic pollutants. In some meetings, NGOs are invited to make oral statements at the invitation of the chair.

¹⁵⁷ United Nations Conference on Environment and Development, Agenda 21, ch. 27.9(b), UN Doc. A/CONF.151/26 (1992), UN Sales No. E.93.I.11.

¹⁵⁸ Community of Democracies, 2005 Santiago Ministerial Commitment, Cooperating for Democracy, §I (Apr. 30, 2005), *available at* <<http://www.state.gov/g/drl/c10712.htm>>.

¹⁵⁹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res. 53/144, annex, Art. 5 (Mar. 8, 1999) (emphases added).

the mid-twentieth century, ECOSOC's implementation of Article 71 culminating in the 1950 Rule "went further in extending to Non-Governmental Organizations opportunities for the presentation of their views than have ever been extended to nongovernmental groups by any national government."¹⁶⁰ The general point is that IOs are not limited to being the lowest common denominator of the states composing them.

The views of publicists should also be examined in ascertaining whether there is a duty to consult. Over the past several years, several commentators have suggested that international decision makers have an obligation to provide consultative opportunities for private groups, or contended that NGOs have a right to render advice.¹⁶¹

Equally or even more noteworthy is the longtime appreciation of a principle of consultation. In his 1795 essay *To Perpetual Peace*, Immanuel Kant posited that every nation should seek advice from philosophers concerning the principles on which it should act toward other nations.¹⁶² He then went on to say that "an arrangement concerning this issue among nations does not require a special agreement, since it is already present as an obligation in universal (morally legislative) human reason."¹⁶³ This obligation does not mean, he explains, that the nation must give the principles of the philosophers precedence over the representatives of national power, but "only that they be *heard*."¹⁶⁴ In 1932, in his Hague Academy lecture *The Petition in International Law*, Nathan Feinberg carefully examined whether there is an obligation in international law for authorities to examine a "petition-voeu," in which the petitioner expresses wishes it has for the public interest.¹⁶⁵ Feinberg concluded that when petitioning to international assemblies first began in the early nineteenth century, it had the character of a simple usage, but with time "developed into an obligatory norm."¹⁶⁶ As he saw it, the "right to petition" is "not so much the right of the individual to send the petitions . . . but the obligation incumbent on international authorities not to refuse to receive them and to follow up

¹⁶⁰ Lyman White, *Non-governmental Organizations and Their Relations with the United Nations*, 1951 ANN. REV. UN AFF. 165, 166–67. At the time that he made this observation, White was a UN staff official working on NGO affairs.

¹⁶¹ JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY 469 (2004) (suggesting that when groups "are silenced or suppressed, the international community has a duty to accommodate these groups on stage and to be an audience to them"); Laurence Boisson de Chazournes & Philippe Sands, *Introduction to INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 1, 10 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (seeing a "growing entitlement of individuals and non-governmental organisations to a more formal and informal involvement in international judicial and quasi-judicial proceedings"); Higgins, *quoted in text* at note 91 *supra* (using the term "entitlement"); Nowrot, *supra* note 53, at 625 (suggesting that the participatory rights granted to NGOs under the internal law of the United Nations are a form of entitlement); Peter Willetts, *From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN*, 6 GLOBAL GOVERNANCE 191, 205 (2000) (suggesting that Article 71 of the UN Charter can now be regarded as part of customary international law and seeing evidence for this in the way that NGOs can gain access even when the political climate turns against them).

¹⁶² Immanuel Kant, *To Perpetual Peace*, in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 107, 126 (Ted Humphrey trans., 1983) (Kant pagination 368–69).

¹⁶³ *Id.*

¹⁶⁴ *Id.* A similar idea was voiced in 1916 by Henri La Fontaine, who wrote that the highest interests of humanity have found their expression in numerous free organizations; the international needs of men have induced them to come into closer relations despite frontiers and to unite in order the better to satisfy these needs. It is natural that they will appeal to the Conference of States and try to obtain its aid; it seems right to allow them to transmit their wishes to the Conference and submit to it the best means of realizing them.

HENRI LA FONTAINE, THE GREAT SOLUTION 65 (1916). La Fontaine does not discuss Kant. On La Fontaine, see *The Award of the Nobel Peace Prize to Senator Henri LaFontaine*, 8 AJIL 137 (1914).

¹⁶⁵ Nathan Feinberg, *La pétition en droit international*, 40 RECUEIL DES COURS 529, 628 (1932 II). Feinberg also discusses the legal status of the "petition-complaint" in which the petitioner demands rectification for an injury to its private interest.

¹⁶⁶ *Id.* at 631 (trans. by author).

on them.”¹⁶⁷ Feinberg foresaw that the petition-voeu “gives to the large private organizations, which represent the vital forces of society, the possibility to intervene in the international organization of the world.”¹⁶⁸

Writing in different centuries, Kant and Feinberg propounded a similar thesis that states have an obligation to listen to nongovernmental opinion and to take it into account when making decisions affecting other nations. What Kant and Feinberg recognized in their times has become a clearer reality in our time.

Looking to the future in 1971, Louis Sohn took note of the fact that UN bodies were assigning a slightly bigger role to NGOs, and suggested that “[i]f this continues over a number of years, their role may become very important.”¹⁶⁹ Sohn’s prediction was so much on target that in recent years, some commentators have worried about the possibility that government consultation with NGOs has become sufficiently extensive to have an adverse effect on international decision making. One such concern is that too much of a good thing leads to NGO congestion. Another of these concerns is that the exertion of pressure on negotiations by single-interest NGOs makes it harder to formulate a genuine common interest.

The concern that the NGO pursuit of a solitary interest can lead to a counterproductive outcome may have some validity, but significant benefits are gained from the robust debate that ensues. For example, whatever the faults of the environment NGOs and development NGOs that criticized international economic policy in the 1990s, they succeeded in exposing the dangers of insularity in the WTO and the Bretton Woods institutions. That experience points to a practical benefit of NGOs, which is that they can help to cross-fertilize norms among IOs. In addition, the traditional political economy concern about partial and special interests will have less applicability to NGOs that espouse process-based causes (e.g., Transparency International).

The pursuit of individual interests by NGOs leaves open the question of how to reconcile competing interests. In a paper presented to the 1939 annual meeting of the American Society of International Law, Roscoe Pound noted the rise of associations and institutions, and identified a need for “[a] theory of interests” to assist in the recognition, classification, comparison, and valuing of “competing interests.”¹⁷⁰ That intellectual task remains. In Pound’s view, a law governing international relations would have to deal effectively with the claims, demands, and desires being asserted, and he pondered whether one should think of world society as an institution “englobing” states.¹⁷¹ Looking ahead, I predict that NGOs will continue to inject competing facts and sentiments into public debate, and that intergovernmental consultations with NGOs will help to achieve more englobing international law in the twenty-first century.

¹⁶⁷ *Id.* at 632.

¹⁶⁸ *Id.* at 638. Feinberg wrote in 1932, a high-water mark for NGO participation in the pre-World War II period.

¹⁶⁹ Louis B. Sohn, Remarks on the role of lawyers and legal resourcefulness, in *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS: PAPERS OF A CONFERENCE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AND THE PROCEEDINGS OF THE CONFERENCE* 488, 491 (Stephen M. Schwebel ed., 1971).

¹⁷⁰ Roscoe Pound, *The Idea of Law in International Relations*, 33 *ASIL PROC.* 10, 18 (1939).

¹⁷¹ *Id.* at 21. Pound says that he borrowed the term “englobing” from the French jurists of the international school.