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0521850886 - Non-Governmental Organisations in International Law

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PART I • THEORETICAL FRAMEWORK

1 The main issues and their context

1.1 Introduction

My aim in this study is to investigate the present legal status of non-governmental organisations (NGOs) in international law, and to discuss this status in relation to the functioning and legitimacy of the international legal system. The seemingly technical issue of international legal status is closely related to broader questions about participation and representation of different groups on the international plane and the legitimacy of international law. The overall perspective chosen here is therefore a systemic one, which sees questions about the role of NGOs as legal actors as issues of how international law functions, and ought to function, as a system. It should nevertheless be clarified at the outset that it is not asserted that NGOs are ‘good’. In fact, NGOs are neither good nor bad. This study concentrates on non-governmental organisation (without an ‘s’) as a form of association, rather than on particular organisations, and on the role of NGOs generally within the international legal context.

Part I contains the theoretical framework of the study. This first, introductory, chapter outlines the political and legal setting in which the study is placed. It deals with a number of basic characteristics of international law as well as international political developments and discusses issues of the legitimacy of international law and the role of NGOs in that context. The chapter also examines different definitions of ‘non-governmental organisation’ and specifies the term for the purpose of the investigation, along with the delimitations which have been necessary. Chapter 2 includes a historical and conceptual background to the issue of the actors of international law, while chapter 3 provides a theoretical and methodological platform for the investigation. Part II

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(chapters 4–9) is the study ‘itself’, i.e. a survey of international legal rules and practices which relate to NGOs. Part III (chapter 10) contains the conclusions of the study.

The topic of NGOs is vast. It should thus be observed that a study on the rather narrow and somewhat dry topic of the international legal status of NGOs can only contribute a detail to the overall picture of the role and work of these organisations. I believe, however, that it is both possible and justified to concentrate on this detail thanks to the impressive and multi-faceted research on NGOs which has already been carried out, and which is growing steadily. The majority of investigations have been conducted within the fields of political science and sociology. There are several studies that focus on the role of NGOs in international relations, on their interaction with intergovernmental organisations (IGOs), on their working methods or on particular NGOs.¹ There is also a considerable number of international legal works, mainly articles, on NGOs but they generally do not discuss the general issue of legal status.² An increasing number of books and

¹ To mention a few books of a more general character (the articles are too numerous to be listed here): John Boli and George M. Thomas (eds.), *Constructing World Culture: International Nongovernmental Organizations since 1875*, Stanford University Press, 1999; Henry F. Carey and Oliver P. Richmond (eds.), *Mitigating Conflict: The Role of NGOs*, Frank Cass, 2003; Ann C. Hudock, *NGOs and Civil Society: Democracy by Proxy?*, Cambridge: Polity Press, 1999; Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, 1998; William Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine*, London: Palgrave, 2001; Craig Warkentin, *Reshaping World Politics: NGOs, the Internet and Global Civil Society*, Oxford: Rowman & Littlefield, 2001; Thomas G. Weiss and Leon Gordenker (eds.), *NGOs, the UN, and Global Governance*, Boulder, CO: Lynne Rienner, 1996; Claude E. Welch, Jr. (ed.), *NGOs and Human Rights: Promise and Performance*, Philadelphia: University of Pennsylvania Press, 2001 and *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations*, Philadelphia: University of Pennsylvania Press, 1995; and Peter Willetts (ed.), *‘The Conscience of the World’: The Influence of Non-Governmental Organisations in the UN System*, Oxford: Hurst & Co., 1996.

² One exception is Rainer Hofmann, *Non-State Actors as New Subjects of International Law: International Law – From the Traditional State Order Towards the Law of the Global Community*, Proceedings of an International Symposium, Berlin: Duncker and Humblot, 1999. See also Yves Beigbeder, *Le rôle international des organisations non-gouvernementales*, Brussels: Bruylant, 1992 and *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance*, Dordrecht: Martinus Nijhoff, 1991; Mario Bettati and Pierre-Marie Dupuy (eds.), *Les ONG et le Droit International*, Paris: Economica, 1986; Theo C. van Boven et al. (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, Netherlands Institute of Human Rights, SIM Special, 19, Utrecht, 1997; Sara Guillet, *‘Nous, peuples des nations unies ...’: l’action des organisations non-gouvernementales dans le système international de protection des droits de l’homme*, Centre de Droit International de Paris I, Perspectives internationales,

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articles examine the influence of NGOs on international law-making.³ The major international legal textbooks, for their part, still seem to regard international legal rules which deal with private actors as anomalies that do not alter the general principle that international law is about relations between states and IGOs. NGOs are in consequence only briefly mentioned in most such textbooks.⁴

10, Montchrestien, 1995; Morita Hiroshi, *International Human Rights and in Particular Reference to the Role of Non-Governmental Organizations*, Dissertation University of Alberta, Faculty of Law, 1993; J. J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities: A Study in Autonomous Organization and Ius Gentium*, Leyden: A. W. Sijthoff-Leyden, 1963; Chiang Pei-heng, *Non-Governmental Organizations at the United Nations: Identity, Role and Function*, New York: Praeger, 1981; Howard B. Tolley, Jr., *The International Commission of Jurists: Global Advocates for Human Rights*, Philadelphia: University of Pennsylvania Press, 1994; Lyman Cromwell White, *International Non-Governmental Organizations: Their Purposes, Methods and Accomplishments*, New Brunswick: Rutgers University Press, 1951. The relevant articles are too many to list here, but are cited throughout the study.

³ Bas Arts, *The Political Influence of Global NGOs: Case Studies on the Biodiversity Conventions*, Utrecht: International Books, 1998; Claire Breen, 'The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict', 25 HRQ (2003), pp. 453–481; Maxwell A. Cameron *et al.* (eds.), *To Walk Without Fear: The Global Movement to Ban Landmines*, Oxford University Press, 1998; Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: Involvement of NGOs', in Theo Van Boven *et al.* (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, Netherlands Institute of Human Rights, SIM Special, 19, Utrecht, 1997, pp. 169–184; Virginia Leary, 'A New Role for Non-Governmental Organizations in Human Rights: A Case Study of NGO Participation in the Development of International Norms on Torture', in Antonio Cassese (ed.), *UN Law/Fundamental Rights*, Alpen aan den Rijn: Sijthoff & Nordhoff, 1979, pp. 197–209; Niall MacDermot, 'The Role of NGOs in Human Rights Standard-Setting', *UN Bulletin of Human Rights*, 90/1, pp. 42–49; Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999*, Cambridge University Press, 2000. See also Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society', 11 EJIL (2000), pp. 91–120, which is mostly a discussion on the (non-)democratic aspects of NGO influence.

⁴ See, e.g., I. A. Shearer, *Starke's International Law*, 11th edn., London: Butterworths, 1994 – no mention, apart from the Order of Malta as a non-state entity, p. 103; Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, I, 9th edn., London: Longman, 1996, pp. 21–22; Malcolm N. Shaw, *International Law*, 4th edn., Cambridge University Press, 1997, pp. 138, 192 – very briefly and p. 171 (the Order of Malta); Iain Brownlie, *Principles of Public International Law*, 5th edn., Oxford University Press, 1998 – no mention at all (as far as I can see), with the exception of the Sovereign Order of Jerusalem and Malta, p. 65; D. J. Harris, *Cases and Materials on International Law*, 5th edn., London: Sweet & Maxwell, 1998, pp. 15, 142–143 (the latter on the Order of Malta); Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 3rd rev. edn., Dordrecht: Martinus Nijhoff, 1999, pp. 32–33, 128–129, 132–133. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn., London: Routledge 1997, pp. 96–100, is more elaborate.

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1.2 The legitimacy of international law

Introduction

Below, I will explore how the issue of the legal status of NGOs is linked to the question of the legitimacy of international law. This is done through placing the issue in a wider context of today's international legal and societal system. The focus will be on three factors, which I believe are of particular relevance to the international legal role of NGOs. These factors are: first, that the rules on recognition of states and government do not, in practice, require democratic government, which means that large sections of the world's population are not represented on the international plane; secondly, the diffusion of state power which is due to a number of factors that can be summarised as globalisation; and, thirdly, a transformation in the way that identities and loyalties are shaped in the globalised society as evidenced by, *inter alia*, the increasing numbers and political influence of NGOs. Bearing these three phenomena in mind, I shall examine different conceptualisations of legal legitimacy and their relation to the individual and to civil society. In the concluding section, I shall suggest that the deliberative model of democracy can help explain the role and function of civil society and NGOs in international law.

Democracy and representation in international law

According to traditional international law, a government in effective control of the territory is generally accepted as the representative of the population within that territory even if it has assumed power through violent or otherwise undemocratic methods. Moreover, the government will continue to be regarded as the people's representative even if it commits serious violations of international rules on human rights. The dominant theory on the recognition of governments and of states rests on the criterion of *de facto* effective control of the government.⁵ As the international representative of the population, a government enjoys an

⁵ There are signs that this is changing, see section 1.2. Moreover, even today one can say that when judging whether the degree of effective control is sufficient for statehood, some consideration can be taken of the manner in which the government came to power – e.g. if there has been a breach of the right to self-determination. James Crawford, *The Creation of States in International Law*, Oxford: Clarendon Press, 1979, pp. 84–118; Sean D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', in Gregory Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, 2000, pp. 125 ff.

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exclusive right from the international legal perspective to perform a number of important acts which will bind the population as a whole, such as to become a member of international organisations, to negotiate and cast the vote of that state in such organisations, to adhere to international agreements and to declare war or peace.⁶

It has, however, been suggested in international legal doctrine that international law does not, or should not, remain unconcerned with the way a people is governed. The major debate was initiated in 1992 by Thomas Franck and his article 'The Emerging Right to Democratic Governance'.⁷ In his article, Franck suggested that democratic governance was gradually becoming a global entitlement in international law. More precisely, Franck described the development of international legal rules defining the minimal requisites of a democratic process capable of validating the exercise of power and measuring the legitimacy of each government.⁸ He suggested that the building blocks of an emerging norm of 'democratic entitlement' were three: self-determination (understood as the right of a people to determine its collective political destiny), the human right of free political expression, and a participatory electoral process.⁹ Franck based these three components mainly on the UN Charter and on the International Bill of Human Rights, but also on certain elements of state practice. He suggested that the *right to self-determination* applied not only in a colonial context, but to peoples everywhere, whether in a dependent territory or an independent state. While the rights of minorities are generally regarded as individual rights, not including any right to secession, Franck proposed that there may be an exception to this rule where a people, which is geographically separate and has its own ethnic and/or cultural characteristics, has been placed in a position or status of subordination.¹⁰ The right to *free*

⁶ According to Article 46 of the Vienna Convention on the Law of Treaties (VCLT) (1969), a treaty is binding upon a state even if the government has acted in breach of national law regarding the competence to conclude treaties.

⁷ Thomas Franck, 'The Emerging Right to Democratic Governance', 86 AJIL (1992), pp. 46–91. See also Thomas Franck, *The Principle of Fairness in International Law and Institutions*, Oxford University Press, 1995, pp. 25–46.

⁸ Franck, 'The Emerging Right to Democratic Governance', pp. 49–50. ⁹ *Ibid.*, pp. 52 ff.

¹⁰ *Ibid.*, pp. 58–59. The character of minority rights is the subject of much debate; see, e.g., Badinter Arbitration Commission, Opinion No. 2, 11 January 1992; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995; Thomas D. Musgrave, *Self-Determination and National Minorities*, Oxford University Press, 1997; Harris, *Cases and Materials*, pp. 113 ff; Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994, p. 124.

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political expression was understood as inclusive of the rights to freedom of thought, freedom of association and freedom of expression as specified in the International Covenant on Civil and Political Rights (ICCPR).¹¹

The third building block of the democratic entitlement, the requirement of a *participatory electoral process*, was according to Franck supported by Article 21 of the Universal Declaration of Human Rights, Article 25 of ICCPR and a UN General Assembly resolution declaring that periodic and genuine elections are a necessary and indispensable element in the effective enjoyment in a wide range of human rights and developments within the regional human rights mechanisms.¹² Franck concluded that:

The democratic entitlement, despite its newness, already enjoys a high degree of legitimacy, derived both from various texts and from the practice of global and regional organizations, supplemented by that of a significant number of non-governmental organizations.¹³

Franck has also later observed that there is a clear development towards a democratic entitlement in the sense that governments are increasingly making legal provisions for determining their governments by multi-party secret ballot elections.¹⁴

Sean D. Murphy has investigated the relationship between national political situations and the recognition of states and governments.¹⁵ On the basis of a detailed review of events in the international arena which need not be repeated here, Murphy concludes, *inter alia*, that (a) while

¹¹ Franck, 'The Emerging Right to Democratic Governance', p. 61. Article 19(2) reads: 'Everyone 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, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

¹² A/RES/46/137, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, 17 December 1991, and Franck, 'The Emerging Right to Democratic Governance', pp. 63 ff.

¹³ Franck, 'The Emerging Right to Democratic Governance', p. 90. It is interesting that Franck here takes account not only of the practice of states and IGOs, but also the practice of NGOs. Franck is of the opinion that, while the United Nations and the regional human rights organisations are regarded as the main actor in validating governments, NGOs have a supplementary role to play, pp. 76, 90. Franck has later specified the relevant practice of NGOs as their 'activities', see *The Principle of Fairness in International Law and Institutions*, p. 138.

¹⁴ According to the Article (which refers to reports in the *New York Times* and from the US State Department, 130 governments were legally committed to such elections in 1997, and most of them had joined the trend during the 1990s. Franck, 'Legitimacy and the Democratic Entitlement', in Gregory Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, 2000, p. 27.

¹⁵ Murphy, 'Democratic Legitimacy and the Recognition', pp. 123 ff.

democratic legitimacy is increasingly becoming a factor in recognition practice, there is no international norm obligating the international community not to recognise an emerging state simply because its political system is undemocratic, and (b) if there is an emphasis on democratic legitimacy as regards the recognition of governments, it arises primarily where a democratic government is internally overthrown by non-democratic forces.¹⁶

Like Murphy, Crawford is sceptical about the relevance of democracy to recognition practice. He points to the inconsistent state practice in relation to undemocratic regimes:

from wholesale regional intervention in Sierra Leone and Liberia, to limited measures of disapproval and economic sanctions in Myanmar and Nigeria, to toleration and acceptance (as with the Kabila government in Congo/Zaire and or that of Buyoya in Burundi), and even to complicity (as with the 'preventive' coup in Algeria).¹⁷

Crawford also refers to the discussion and voting in 1999 in the UN Commission on Human Rights regarding a resolution on the right to democracy.¹⁸ In the resolution, the Commission on Human Rights recalled 'the large body of international law and instruments, including its resolutions and those of the General Assembly, which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society', and affirmed that 'the rights of democratic governance' include a number of human rights, such as the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly.¹⁹ The resolution was adopted by fifty-one votes to none with two abstentions, but the debate on the resolution was lengthy, and a couple of proposals by Cuba on changing the title and the operative paragraph of the resolution were supported by a number of states.²⁰ It can be

¹⁶ *Ibid.*, pp. 146, 153.

¹⁷ Crawford, 'Democracy in International Law – A Reprise', in Gregory Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, p. 117.

¹⁸ Crawford, 'Democracy in International Law', Cambridge University Press, 2000, p. 116.

¹⁹ E/CN.4/RES/1999/57, *Promotion of the Right to Democracy*, 28 April 1999, para. 6 of the Preamble and para. 2.

²⁰ A proposal to delete the expression 'right to democracy' from the title was rejected by a vote of 12 in favour and 28 opposed with 13 abstentions, while the proposal to replace operative para. 3 of the resolution was defeated by 9 votes in favour and 27 opposed, with 17 abstentions, UN Press Release, HR/CN/99/61, *Resolution on Promotion of Democracy Adopted by Commission on Human Rights*, 27.04.1999.

observed that in subsequent resolutions the General Assembly has given some support to the right to take part in elections and in government.²¹

The democratic norm theory has met criticism with regard to its understanding of democracy. Susan Marks asserts that the focus on procedures means that

the extent to which social and material conditions affect the opportunities for political participation is made to appear irrelevant. The real inequality among citizens is masked by the formal equality of participation among voters.²²

Marks contends that the right to democratic governance as proposed in international legal theory has the character of 'low intensity democracy', as it identifies democracy with the holding of multi-party elections, the protection of civil rights and the establishment of the rule of law. It tends therefore to stabilise existing power relations.²³ There are also problems with the international dimension of the democratic norm thesis, as elaborated mainly by Anne-Marie Slaughter, because it is limited in the sense that it is pan-national rather than an attempt to democratise global governance, and aims at a multi-layered process of democratisation rather than promoting the universalisation of national democracy.²⁴ In sum, 'A move to promote democracy through international law becomes a step in securing systematic inequalities among states, within states, and in global governance generally'.²⁵ Instead, Marks proposes a 'principle of democratic inclusion'. She does this to signal a very different conception from that which informs the proposed norm of democratic governance. According to the principle of democratic inclusion, everyone should have the right to a say in decision-making that affects them. The principle includes not only those

²¹ In a 2001 resolution, the Assembly calls upon 'States to promote and consolidate democracy, inter alia, by ... Guaranteeing that everyone can exercise his or her right to take part in the government of his or her country, directly or through freely chosen representatives.' A/RES/55/96, *Promoting and Consolidating Democracy*, 28 February 2001, para. 1d(i). The resolution was adopted by 157 votes to none, with 16 abstentions, A/55/PV.81, 81st Plenary Meeting, 4 December 2000, p. 16. See also A/RES/54/173, 15 February 2000, and A/RES/58/180, 17 March 2004 and, on the other hand, A/RES/58/189, 22 March 2004.

²² Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, Oxford University Press, 2000, p. 61.

²³ Marks is here referring to arguments presented by Gills, from whom the expression 'low intensity democracy' originates, but in her conclusions she basically endorses this reasoning. Marks, *The Riddle of All Constitutions*, pp. 52, n. 8, and 74–75.

²⁴ *Ibid.*, pp. 86 ff. ²⁵ *Ibid.*, p. 101.

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operating within nation-states, but also those that operate among nation-states and in transnational arenas.²⁶ Marks thereby endorses David Held's view that democracy requires 'a model of political organization in which citizens, wherever located in the world, have voice, input and political representation in international affairs, in parallel with and independently of their own governments'. Democracy is thus to be seen as an ideal of popular self-rule and political equality, an ideal that has relevance not only in national, but in also in international political settings.²⁷

It is clear that the right to political participation, to democratic elections and several related rights have a firm basis in international treaty law. The question whether all these human rights together and in combination with state practice provide evidence for an emerging right to democratic governance is however uncertain, for several reasons. There is considerable disparity between, on the one hand, the substantial support in international and regional treaty law for human rights related to democratic governance and, on the other, state practice. While there is indeed a trend towards more democratic systems of government among states on paper, democratic rights are, as we all know, often violated in reality. Also, there is still rather weak support in state practice for the hypothesis that non-democratic states are treated differently in international recognition practice as compared to democratic states and governments.

It can thus be concluded that, in spite of Franck's democratic norm theory, international law excludes large groups from international representation based on popular consent. This also means that international law has internal contradictions. While it guarantees democratic rights in treaty law, the law on recognition of states and governments only incidentally takes a respect for democratic rights on the national plane into account. As is illustrated by Marks' critique, this lack of representation is not really a problem for the democratic norm theory, which is more concerned with the validation of national governments

²⁶ *Ibid.*, pp. 109, 119.

²⁷ *Ibid.*, pp. 109–110, citing Daniele Archibugi and David Held in their introduction to *Cosmopolitan Democracy: An Agenda for a New World Order*, Cambridge: Polity Press, 1995, p. 13. See also, regarding 'the emerging participatory notion of international environmental law', Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* (1997), p. 60, and about public participation in international environmental law generally, Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *AJIL* (1999), pp. 617 ff.