

# **The 100-Year Story of Ameliorating a Formal Normative Status for INGOs (1912-2012): Contextual Historical Analysis of Past and Present Attempts**

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## **A note to my colleagues at the Global Fellows Forum**

**This is a brief version of an extended work, prepared for the benefit of the Forum.  
The extended version is attached separately, for those interested.  
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## **Abstract**

The discourse regarding the normative position of International Non-Governmental Organizations (INGOs) under international law is not new. In fact, it has already progressed over the last 100 years. However, most of the registered proposals to grant INGOs official legal status, or to otherwise regulate their international activity, are relatively unknown to international lawyers or historians of international law. A perusal of these proposals against their unique historical background will prove highly significant in dissecting the complexities involved in formulating a comprehensive scheme for the regulation of INGOs. In this paper, we endeavor to review and evaluate the sequence of attempts to ameliorate a formal status for INGOs. We demonstrate how this historical contextual evaluation provides an invaluable perspective that is essential for the informed review of contemporary attempts and theoretical trends, relevant to the consideration of the normative position of INGOs. Unfortunately, most contemporary writers, whether jurists, socio-political scholars, or INGO activists, who deal with the normative aspects of INGO activity, neglect this crucial perspective.

Table of Contents

<b>Introduction</b>	1
<b>1. Chronological Synopsis</b>	
<b>1.1 Pre-Second World War Developments</b>	
1.1.1 The 1912 von Bar Proposal (Institute of International Law)	2
1.1.2 The 1923 Politis Proposal ( <i>Institute</i> )	2
<b>1.2 Post-Second World War Developments</b>	
1.2.1 Article 71 UN Charter & ECOSOC Consultative Arrangements	3
1.2.2 Proposal of the Conference of Consultative Status Non-Governmental Organizations (CCNGOs), 1948	4
1.2.3 Proposal of the CCNGOs, 1949	6
1.2.4 The 1950 Bastid Proposal ( <i>Institute</i> )	7
1.2.5 The 1959 Speeckaert Proposal (Union of International Associations)	7
1.2.6 The 1956 Draft Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations (Hague Conference on Private International Law)	8
1.2.7 The 1983 Merle Report, Parliamentary Assembly of the Council of Europe	8
1.2.8 The 1986 European Convention on the Recognition of the Legal Personality of International NGOs	9
1.2.9 The 1986 European Parliament Resolution on Non-Profit Making Associations in the European Communities	10
<b>2. New Developments</b>	
2.1 The International Non-Governmental Organizations Accountability Charter 2006	11
2.2 The Guidelines on International Human Rights Fact-Finding Visits & Reports (The ' <i>Lund-London Guidelines</i> ') 2009	12
2.3 First Report of the Committee on Non-State Actors, International Law Association, 2010	13
<b>3. Analysis and Evaluation of New Developments</b>	
3.1 General Assessment	15
3.2 Doctrinal Evolvement	15
3.3 Resemblance to IGOs	19
3.4 Tensions within the Non-Governmental Community	21
3.5 Authors of Initiatives	22
3.6 INGOs' Disinterest	22
3.7 European Focus	23
<b>4. Conclusion</b>	24

## Introduction

The last decades witnessed a tremendous growth in the number of International Non-Governmental Organizations (INGOs) with world-embracing memberships. Their number grew from 6,000 in 1990 to 26,000 in 1999, and currently exceeds that figure by far, reaching 40,000, according to some estimates<sup>1</sup>. Using the mass media and other channels of information, issue-oriented INGOs have proved capable of forming worldwide coalitions. Consequently, many INGOs claim to act as a 'global conscience', representing broad public interests. In this way, INGOs have allegedly become a source of power and legitimacy in world politics, developing new social, political and legal norms, either by directly pressing governments, intergovernmental organizations and transnational corporations to change policies, or by indirectly mobilizing public opinion. Nonetheless, being unelected, unaccountable, and unrepresentative, their activities raise difficult questions of legality and legitimacy.

Policy and international relations studies have already focused considerable attention on non-state actors and INGOs in particular, as a locus of power outside the state-system. The conceptual transformations in these domains frequently demand the attention of international lawyers, working within interdisciplinary frameworks to adopt a normative agenda that corresponds to perceived changes in the structure of world affairs. The discourse regarding the normative position of INGOs under international law is, however, not new. In fact, it has already progressed over the last 100 years. It is therefore surprising that a systematic analysis of the many attempts to regulate the status of INGOs has never been undertaken.

The need for an international convention regulating the status of INGOs was realized within various international forums as early as 1910, and the first draft proposal was presented in 1912. Apparently, the many stages that followed in the long sequence of juridical developments dealing with the matter were built on lessons drawn from previous attempts. However, most of the registered proposals and related reports are relatively unknown to international lawyers or historians of international law. Nevertheless, a careful review of the proposals to grant INGOs official legal status, or to otherwise regulate their international position or activity, can lead to many important conclusions and observations. A perusal of these proposals against their unique historical background will prove highly significant in dissecting the complexities involved in formulating a comprehensive scheme for the regulation of INGOs.

In this paper, we endeavor to review and evaluate the 100-year sequence of attempts to ameliorate a formal status for INGOs. We demonstrate how this historical contextual evaluation provides an invaluable perspective that is essential for the informed review of contemporary attempts and theoretical trends, relevant to the consideration of the normative position of INGOs. Unfortunately, most contemporary writers – whether jurists, socio-political scholars, or INGO activists – who deal with the normative aspects of INGO activity, either empirically or theoretically, neglect this crucial perspective.

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<sup>1</sup> See J. Nye, *Soft Power – The Means to Success in World Politics*, (2004), p. 90; *Yearbook of International Organizations – Guide to Global and Civil Society Networks 2009/2010*, *Union of International Associations*, Ed. 46, Vol. 1B, App. 2-3, pp. 2999-3003. Evidently, the answer to the question 'How many INGOs are there?' is a complex one, and depends on the mode of classification and criteria applied.

## 1. Chronological Synopsis<sup>2</sup>

### 1.1 Pre Second World War Developments

1910 was a significant year in the history of the evolving discourse regarding the normative position of INGOs under international law. In that year, the newly established Union of International Associations was the first to propose that a '*super-national status* be established through diplomatic convention for the use of international associations'. In the same year, the International Law Association adopted a resolution calling 'to establish by diplomatic convention, an *extra-national statute* or governing law which may be adopted by international associations'. Most significantly, the matter was discussed for the first time by the *Institute of International Law*. Consequently, the first 'Draft Convention on the Legal Status of International Associations' was presented by B. von Bar, during the *Institute's* 1912 Session.

#### 1.1.1 The 1912 von Bar Proposal (*Institute*)

The von Bar draft convention was a significant departure point that set the basis for most future developments. The draft's preamble sets out the aim of the convention, namely, to enable States Signatories to grant 'legal personality' to 'international associations of public utility'. According to the draft, associations seeking recognition as an 'international legal person', had to forward copies of their constitution, as well as a list of officers, to an 'international bureau' – the heart of the registration and supervisory machinery, which was to be established by the States Signatories. Refusal by a Signatory to grant recognition on its territory required no explanation by the refusing government. In the same spirit, revocation of the recognition at any time was to be made by a simple notification to the bureau.

The draft convention seems to have been the first of its kind, dealing directly with the issue of the normative position of INGOs, and the first attempt on record to directly raise the question of INGOs' 'international legal personality' as a major concern. It was therefore indicative of the fact that the problem of legal personality and related topics was indeed the reason for the early legal interest in INGOs. In his written comment, von Bar further elaborated on his intention to find a solution to a reality in which there was no possibility to establish an INGO without being dependent on the requirements of a specific national jurisdiction.

#### 1.1.2 The 1923 Politis Proposal (*Institute*)

Based on the von Bar proposal, in 1923 N. Politis presented to the *Institute* a proposal for a 'Draft Convention Relating to the Legal Position of International Associations'. Significantly, this proposal intended to grant international associations a *universal legal status through an international treaty*. Politis explained that it was not possible to find in those countries where the associations pursued their activities such legal protection as was required by their interests. Further, a legal status recognized by one State was not automatically recognized by other States. Thus, according to Politis, international associations were not able to enjoy an adequate degree of capacity and freedom to pursue their activities everywhere. In view of these problems, Politis suggested a scheme by which States Parties

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<sup>2</sup> Proposals and reports under this section are available on: <http://www.uia.org/legal/index.htm> (Union of International Associations – Selected Reports, Papers and Studies on International Legal Status of NGOs).

would grant legal protection by conferring upon international associations the '*status of legal entities*' or by '*recognizing the legal status acquired by them in another contracting state*'.

The proposed system of recognition was to be administered by a central bureau made up of 'special delegates or diplomatic representatives' of States Parties. It would function as a depository, responsible for registration and communication of relevant documents but did not reserve power to refuse registration of an association. After four months, with effect from the notification by the bureau, the association would enjoy within all States Parties 'the benefits attaching to the legal status acquired'. States Parties nevertheless reserved the right to refuse recognition 'if the nature of its aim or the attributes of its members appear to them to constitute a *danger to the public order* of their countries'. Significantly, refusal motivated in this way could be contested by the refused association by way of appeal to the Permanent Court of International Justice (PCIJ) on the grounds of an *ultra-vires* action. In any case, a definite refusal resulted in deprivation of the relevant association's right to maintain establishments within the refusing country. The Politis proposal further indicated that the international legal status acquired by international associations provided them with certain internationally secured rights.

Compared with the von Bar proposal, the Politis proposal undoubtedly reflected a significant development. Politis was also mainly concerned with the problem of international legal personality. Nevertheless, unlike von Bar, he understood that such a status required the specification of certain secured rights, without which the formulation of the universal status was impossible. Furthermore, Politis clearly realized the need to set up a more balanced universal system of control, providing protection to States and INGOs alike, considered separate though complementary components of the international community. Evidently, this concept was indicated by the significant role envisioned for the World Court in the comprehensive scheme. Nevertheless, it is exactly this notion, taken so seriously by Politis that led commentators to regard the proposal as a premature and largely Utopian exercise. In any case, due to the rapid pace of events in the interval between the World Wars, Politis' proposal was soon put aside and earned little mention or serious consideration by academics, diplomats or even INGO officials.

## **1.2 Post Second World War Developments**

### **1.2.1 Article 71 UN Charter & ECOSOC Consultative Status**

Article 71, under Chapter X dealing with ECOSOC, institutes the formal legal status of INGOs within the UN system<sup>3</sup>. This provision, the single reference in the Charter to INGOs and their first documented recognition as such in international law, enables the Council to establish restricted official relationships with INGOs, and opens the way for their participation in the work of the UN. The unprecedented effect of this article was to formalize the 'extensive consultative relationship', existing during the years of the League of Nations, coupled with a reaffirmation of the value of INGOs' participation. Furthermore, the

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<sup>3</sup> The article reads as follows:

"The Economic and Social Council may make suitable arrangements for consultation with NGOs which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the UN concerned."

provision set up a model for other UN specialized agencies<sup>4</sup>.

Over the years, ECOSOC has considerably expanded the scope of application of Article 71, by adopting authoritative interpretations thereof, and by reviewing and modifying its Rules of Procedure. Noteworthy is Res. 1296(XLIV)(1968)<sup>5</sup>, which established new arrangements for consultation, and formed the legal basis for decisions concerning INGOs' consultative status. According to the resolution, the organizations concerned, which are not established by intergovernmental agreement, should be involved in matters falling within the competence of ECOSOC (para. 1). Furthermore, the resolution provides that the organizations should be international in their structure, thus construing as exceptional the participation of national NGOs. Organizations are required to prove (1) a representative character, (2) a recognized international standing, covering (3) a substantial number of countries in different regions (para. 4). They must qualify as democratic in process, with members exercising voting rights (para.7), and a democratically adopted constitution (paras. 5, 6). Following a review of the rules governing the consultative status arrangements, as reflected in Res. 1996/31<sup>6</sup>, the criteria of Res. 1296 were expanded in a manner that no longer regards as exceptional the access of national NGOs. Whatever the case may be, it is well acknowledged that decisions on admission, incorporation, classification, suspension or withdrawal of an INGO, taken by ECOSOC's Committee on NGOs, are clearly motivated by political considerations. Furthermore, due to the workload of ECOSOC and the growing number of NGOs seeking consultative status, the quality of the accreditation and verification processes taken by the Committee has been highly criticized.

The granting of consultative status to an (I)NGO by ECOSOC does not mean conjointly the transfer of rights, immunities and privileges of a member of ECOSOC or the UN to that organization. Initially Article 71 was viewed as another indirect form of recognition of the importance of INGOs in the opinion of governments. Nevertheless, two or three decades later, it was being increasingly criticized for being based on a past UN-NGO relationship which positioned INGOs as supportive adjuncts to States. Thus, the consultative system is frequently viewed as reflecting a continuing and pervasive tension in the UN arrangements for cooperation between States and INGOs, enshrining a defensive State-centric approach. Further considering that governments are to decide on ECOSOC applications, some commentators conclude that the actual operation of Article 71 is 'simply inconsistent with movement towards recognizing a diversity of NGOs and broadening and deepening their role in the international community'<sup>7</sup>.

### **1.2.2 Proposal of the Conference of Consultative Status Non-Governmental Organizations (CCNGOs) (by Niboyet and Kopelmanas), 1948**

The first session of the CCNGOs was convened in 1948, gathering INGOs which had been granted consultative status with ECOSOC. The Conference decided to examine 'the *desirability* of concluding an International Convention granting *the status of legal entity, under international law, to INGOs having consultative status with the UN*'. An elected

<sup>4</sup> 3500 (I)NGOs are currently in consultative status with ECOSOC – see <http://www.un.org/en/ecosoc/about/index.shtml> .

<sup>5</sup> ECOSOC Res., **Arrangements for Consultation with NGOs**, (23 May, 1968), ESCOR (XLIV), Supp. No. 1.

<sup>6</sup> ECOSOC Res., UN Doc. E/1996/L.25 (25 Jul., 1996).

<sup>7</sup> See, for example, D. Otto, **Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society**, *Human Rights Quarterly*, Vol. 18 (1996), p. 107, 121.

study committee, consisting of representatives of 11 INGOs, reaffirmed the need for an international convention basically along the lines of the von Bar and Politis proposals. However, despite a preliminary decision to cover in general the granting of an international status to *all* private international organizations, it decided to concentrate its work on the status of *consultative* INGOs. This decision was based on the evaluation that the grant of international status to all INGOs was expected to raise difficult problems of control.

According to the scheme set out in a report presented to the committee by its Rapporteurs (Niboyet and Kopelmanas), ECOSOC, functioning as an international registration bureau, would grant requesting INGOs legal personality and related facilities. Notably, ECOSOC would be empowered to exercise full discretion when deciding whether an applicant INGO was qualified to enjoy the benefit of international legal personality. Registered INGOs would then be supervised by ECOSOC, in accordance with rules provided for by a UN General Assembly resolution. Finally, an international UN convention, open to accession by all States, would accord binding force to the recognition of personality and specify its contents and legal implications. Recognition would however be granted ‘only to *truly international organizations of acknowledged importance* which can furnish every guarantee as to their integrity’.

The committee rejected the report, primarily because it could not support a system which granted political control to States and IGOs. Members of the committee, being INGO officials, generally thought that a political organ like ECOSOC could not produce proper decisions regarding INGOs’ entitlement for personality. Consequently, the committee decided to adopt a completely different approach, while renouncing the idea of establishing recognition of legal personality under international law. Alternatively, the committee requested to secure recognition based on *personality recognized in the consultative INGO State of incorporation*, that is to say, recognition in each country, within its confined territory, of the legal status acquired in the country where the organization was legally constituted. This way, the committee decided to avoid the question of recognition of international legal personality, concentrating instead on finding a practical solution to the problem of conflicts-of-laws.

Following discussions by the committee of the first proposal, and upon its subsequent rejection, Kopelmanas prepared a ‘Report on the Legal Status of INGOs’. This report remains significant even today. Acknowledging that a system based on international registration had undeniable advantages, the report noted that the creation of an international procedure had always been one of the main demands of the international associations themselves. Nevertheless, none of the attempts to draft a convention based on this scheme had led to practical results since, according to the report, all suffered from a failure to appreciate the real factors involved. The report explained that it would be impossible to obtain concessions from States for the benefit of *all* associations applying for registration. Thus, no government would undertake such an obligation without being assured that its benefits would only be enjoyed by international associations giving proper guarantees of their importance, usefulness, and legitimate purposes. Kopelmanas explained that, given the fact that international law lacked general organs of control, an effective subjection of international associations to the international system demanded prior authorization and examination by a special international body, which would also be used to supervise the associations’ activities in order to ensure conformity with the initial conditions of authorization. Unlike previous proposals, this task could not be assigned to

a subordinate administrative body, but had to be given to 'an important political body' which could bear sufficient weight with States. The report suggested that the principal organs of the UN were best qualified for this task at the time. And since it was already assigned under Article 71 to arrange consultations of INGOs, 'it would appear reasonable to make ECOSOC responsible for examining applications, for selecting those which should be granted the benefits of international status and for supervising the activities of NGOs enjoying it'.

Recalling however the conclusion of the study committee that most INGOs would object to such far-reaching intervention by ECOSOC, the report then firmly maintained that regarding the actual necessity for effective control, there could be no concession. This conclusion was followed by another decisive observation concerning the overall calculation of interests by INGOs when it came to considering the attachment of international status. The report explained that whatever may be the methods of international control, they will always appear *more onerous* than the corresponding obligations devolving upon NGOs under *certain domestic legislations*; 'for since internal systems have general means of controlling all legal acts performed on their territory, *they can afford to be more liberal than the international legal system*, which would be obliged to stress the specific measures for controlling the NGOs granted the benefits of international status'. It is therefore 'perfectly natural that *INGOs should resign themselves to the practical disadvantages of attachment to a domestic legal system, rather than accept a regime which would result in restriction of their freedom of action*'. Moreover, it may be doubted, according to the report, 'whether the organs of the UN are yet in a position to exercise effective control of the activities of NGOs'.

In this light, the committee had to realize, that the basis of the system of recognition still had to depend on the formal attachment to *national* jurisdictions, while concurrently obtaining, through an international convention, recognition by other Contracting States of the status acquired in the State of constitution.

### 1.2.3 Proposal of the CCNGOs (by Habicht and Kopelmanas), 1949

The CCNGOs' study committee eventually submitted the Conference a draft convention entitled 'Preliminary Draft Agreement Designed to Facilitate the Work of NGOs having Consultative Status with the ECOSOC or an Equivalent Status with One or Another of the UN Specialized Agencies'. The draft convention was based on the *distinction between international and domestic NGOs* established by ECOSOC, thus avoiding the need to create a new international body or to introduce a special procedure. This distinction was necessary in order to distinguish purely national associations from those having national legal status combined with an international character and therefore entitled to enjoy the benefits of the convention. It was believed that adopting the list of ECOSOC's INGOs could ensure authentic confirmation of the international character of a relevant association. Furthermore, it was estimated that limiting the scope of the convention in this way would increase the probability of States acceding to it, as well as its acceptance by the nongovernmental community.

States Parties were requested to extend benefits to INGOs legally constituted on the territory of an acceding State and having consultative status with ECOSOC (or a Specialized Agency). Essentially, the convention established a system by which States undertook to provide entitled INGOs with the same rights enjoyed by them in the country where they were constituted. Nevertheless, States Parties reserved the power to limit these rights to those granted in their respective jurisdictions 'to the most favored category of similar

organizations'. This way, international status under the draft convention was subject to twofold limitations: on one hand, limitation by the legal status of non-profit-making associations in the country of origin, and on the other hand, limitation by the treatment given to similar national associations in the country in which the benefits were claimed. Interestingly, the draft provided that the International Court of Justice would adjudicate disputes arising from the convention.

The CCNGOs adopted a resolution, recommending INGOs to study carefully the preliminary draft agreement and to submit their views to the Conference. However, the CCNGOS received scarcely any responses from INGOs.

#### **1.2.4 The 1950 Bastid Proposal (*Institute*)**

In its 1950 Session, the *Institute* adopted a proposal for an international convention drafted by Prof. S. Bastid (Law Faculty, University of Paris), under the title 'Resolution on Granting of International Status to Associations Established by Private Initiative'. The aim was to grant recognition by Contracting States of *a set of specific rights explicitly defined in the draft, as a minimum standard* not to be derogated from. This basically referred to a most-favored-organization clause, which determined that international associations would receive on the territory of each State Party 'the most favorable treatment granted by ordinary law to national non-profit-making associations'. This privilege was to be granted to associations following their application for recognition of international status. This 'international status' could be denied on grounds of activity contrary to public policy, morality or statutory provisions, or because of representatives who appeared to constitute a danger to the public policy of a Contracting State. Finally, the proposal suggested that disputes should be settled by negotiation, arbitration, 'other procedures', or eventually, by the ICJ.

The proposal was adopted by the *Institute*. States, however, never displayed any publicly registered interest in the draft convention. Although it was based on some elements of the CCNGOs proposals, it is important to note that at the heart of the proposal was the introduction of certain international obligations respecting INGOs by way of *adoption of a most-favored-organization provision, equating INGOs to privileged national NGOs*. This modest approach, concentrating on the *national* rather than the international level, can be explained by Bastid's negative evaluation of previous proposals. Thus, commenting on the Politis proposals, she maintained that these suggestions, which included granting legal personality to international organizations, 'were much beyond positive law and had no practical effect'. Regarding the problem of determining which INGOs should benefit from international status, Bastid explained that her draft was designed to leave the States Parties full discretion on the matter. Accordingly, she avoided the idea of designation by an international diplomatic body.

#### **1.2.5 The 1959 Speeckaert Proposal (Union of International Associations)**

Following consultations with small-group conferences of INGO officials, the UIA proposed the 'Draft Convention on Facilitating Activity of International NGOs'. The draft, presented by G. P. Speeckaert, suggested the establishment of a quasi-diplomatic bureau of INGO officials, nominated in agreement with UNESCO. This scheme was based on the understanding that 'a more effective role could be played by joint representation of the

respective associations from the international angle, with no direct intergovernmental control'. It was thus believed that 'a sort of international 'self-government' of INGOs might in this way be built up progressively', and have 'salutary indirect repercussions'.

The proposal defined INGOs as organizations which had members in at least six countries, possessed a permanent international secretariat and pursued international activity with a non-commercial aim. The draft further required that these INGOs' activities be recognized in one Contracting State or that they alternatively establish consultative status with an IGO. The draft suggested that States Parties would grant privileged INGOs the rights accorded to them in their country of original constitution. States, however, reserved the right to grant INGOs such privileges afforded under national legislation to the most favored category of national organizations of the same character. States Parties and IGOs maintaining consultative relations were to extend lists of recognized INGOs to UNESCO and to the UIA, functioning as an international registrar. An international commission, set up by the UIA, would then issue a comprehensive updated list to UNESCO as well as to the States Parties. This commission was to consist of 15 members holding at least seven different nationalities, nominated by the UIA in agreement with UNESCO.

The draft convention was submitted to UNESCO, which concluded in 1960 that there was little possibility that Member States would adopt a convention of this kind.

#### **1.2.6 The 1956 Draft Convention Concerning Recognition of the Legal Personality of Foreign Companies, Associations, and Foundations (Hague Conference on Private International Law)**

According to convention, submitted for signature by the HCPIL in 1956, 'legal personality, acquired by a company, association or foundation under the law of the Contracting State, where the formalities or publication have been complied with, and where its charter seat is located, shall be recognized as of course in the other Contracting States'. The convention was drafted in broad and vague terms, and failed to provide any definition of the scope of its application in terms of the associations to which rights were extended, or indeed any definition of the term 'legal personality'. Nevertheless, it maintained that recognition of legal personality implied the 'capacity attached thereto by the law under which it has been acquired'. In any case, 'rights not granted by the law of the State of recognition to national organizations of the corresponding type, may be refused'.

The convention further provided that in addition to the capacity to proceed in court the recognized personality implied at least 'the capacity to hold property and to enter into contracts and other legal acts'. The convention suggested that States Parties reserve the right to exclude application of its provisions on a unilateral basis 'on a ground of public policy', however the State defined it. The convention has not yet entered into force.

#### **1.2.7 The 1983 Merle Report, Parliamentary Assembly of the Council of Europe**

During a 'Colloquy on the Role of International NGOs in Contemporary Society', hosted by the Parliamentary Assembly of the Council of Europe (CoE), Prof. M. Merle presented his report entitled 'International NGOs and their Legal Status'. This report was an important milestone in the chronology of the evolving discourse on the normative position of INGOs, which led to the eventual adoption of 'The 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations' by

the CoE (see next section).

Merle maintained that at the present stage of the evolutionary process, ‘the international society movement is making such strong demands that it is no longer content with tolerance on the part of governments and feels uneasy, confined within the limits of ‘consultative status’’. Having no territorial basis of their own, INGOs had to be subjected to national regulation and jurisdiction. According to Merle, this fact led to an inherent conflict between their international vocation and the national legal status to which they were confined. With regard to the progress made by the international consultative status arrangements, Merle noted that not only a minority of INGOs was granted consultative status, but also the term itself was ambiguous, since this status did not confer any right capable of being exercised before any national or international authority except for the granting IGO. Thus, it had merely limited effect, and could not amount to legal status within the full meaning of the term. In most cases, the consultative status was essentially confined to the role of receiving information from an IGO without effective participation in consultation. Finally, this status was granted at the discretion of the IGO and could accordingly be withdrawn at any time, most frequently on the basis of decisions reflecting political disputes between States and temporary majorities and coalitions.

In this light, Merle came to the conclusion that there was no avoiding giving INGOs an international status guaranteeing them minimum rights. However, previous attempts to propose international conventions in this regard have failed. Merle analyzed the reasons for this failure: (1) States were disinclined to grant legal personality since it might prejudice their own authority. This instinct for 'self-preservation' was enshrined in the rules of international law; (2) Even if States could agree to grant international status, the question in what framework and under whose jurisdiction it could be prepared was in itself a major obstacle in view of the various political systems involved, and their opposing conceptions of the role of private enterprise; (3) States realized that INGOs not only differed in size, power and aim, but sometimes also served to cover up subversive or terrorist activities.

Merle concluded that the consequent ‘instinctive mistrust’ on the part of governments could probably, at most, lead to the adoption of what he called ‘outline status’, application of which would be subject to the full discretion of States.

### **1.2.8 The 1986 European Convention on the Recognition of the Legal Personality of International NGOs (CoE)**

The 1986 Convention<sup>8</sup> reflects one of the more interesting and significant endeavors undertaken to regulate the legal status of INGOs. To date, however, the *de-facto* juridical value of the convention is still quite limited. The lessons to be learned from this attempt at regulation, together with the formulations it contains, are nevertheless of considerable importance.

In 1981, conscious of the fact that the head-offices of two thirds of the INGOs were concentrated in the Member States of the CoE, and ‘being equally aware of the absence of any international instrument in force aimed at facilitating their activities’, the Coe's Committee of Ministers entrusted a Committee of Experts with the exploratory mandate to study the possibility of intergovernmental action in this field at the European level. The work resulted in the Draft Convention, later adopted by the Council of Ministers. The Convention

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<sup>8</sup> Eur.T.S. 124, available on: <http://conventions.coe.int/en/Treaties/Html/124.htm> . Entered into force: Jan. 1, 1991. Total number of ratifications (Dec. 2011): 11. Opened for signature by CoE member states and accession by non-member states.

recognizes the desire of Member States ‘to establish *in their mutual relations* rules laying down the *conditions for recognition of the legal personality*’ of INGOs, ‘in order to facilitate *their activities at European level*’.

Four conditions must be satisfied permanently by INGOs for benefiting from the application of the Convention: (1) a non-profit-making aim of international utility; (2) establishment by an instrument governed by the internal law of a State Party; (3) carrying on of activities with effect in at least two States (not necessarily CoE States); and (4) having a statutory office in the territory of a State Party and the central management and control in the territory of that Party or of another State Party.

The fundamental provision of the Convention indicates that ‘the legal personality and capacity, *as acquired by an INGO in the Party in which it has its statutory office*, shall be recognized *as of right* in the other Parties’. No special procedure has to be followed to obtain recognition. Significantly, this formulation acknowledges that the law governing the substance of the legal personality and capacity is *the law of the State in which the statutory office of the INGO* is situated.

The convention's deliberations and *travaux préparatoires*<sup>9</sup> make clear that it was not intended to provide INGOs with any international legal personality or other similar standing. Obviously, such status requires global, rather than regional, arrangements. But the Convention does not even go as far as to recognize the existence of such personality relative to the States Parties. In fact, it only recognizes a *national* legal personality, obtained within any State Party, as having equal effect in another State Party. To that extent, it is based on the well-established legal notions of reciprocity and mutuality, rather than on any acquisition of an autonomous legal status, independent from national will or regional undertaking. Having said all this, the contribution made by the Convention in the context of the present analysis should not be underestimated. It clearly reflects an important regional effort to confront the dilemmas arising from the current legal situation on the global level. Bearing in mind that the Convention is based on the acknowledgment of the absence of any international instrument, the project as a whole should be understood as providing a temporary substitute in the form of transitional machinery on the regional level. Admittedly, even at this level the confined legal regime suggested cannot compensate for the lack of global solutions.

### **1.2.9 The 1986 European Parliament Resolution on Non-Profit Making Associations in the European Communities (EEC)**

In November 1984, MEP L. Eyraud tabled a motion for a ‘Resolution on the Role and Administration of Associations and the Law Governing Them in the European Community’. This motion was clearly inspired by the extensive preparatory work and debates on the CoE Convention as well as the adoption of the EEC Regulation on the Creation of the European Economic Interest Groupings (EEIGs). The latter created a legal framework on the Community level, for natural or legal persons wishing to cooperate in economic matters on a transnational basis, thus contributing to the achievement of Community policies and the 1992 Internal Market. According to Eyraud’s motion, an action in favor of associations would enable the Community to better achieve its fundamental objectives laid down in its constituent documents. The motion was referred by the European Parliament to the

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<sup>9</sup> See M.-O. Wiederkehr, *La Convention Européenne sur la Reconnaissance de la Personnalité Juridique des Organisations Internationales Non-Gouvernementales du 24 Avril 1986*, *Annuaire Francais de Droit International* (Vol. XXXIII, 1987) [French], p. 749, 752, 756.

Committee on Legal Affairs and Citizen's Rights for review, together with a later motion for a resolution on freedom of assembly and association in the Community. The Committee's joint-review produced a 'Report on Non-Profit Making Associations in the European Community' (by Rapporteur N. Fontaine), which included a proposed resolution and an explanatory statement. Subsequently, the resolution was debated and adopted by the European Parliament in March 1987.

The resolution was based, *inter-alia*, on the need to provide the necessary means for the exercise of the freedoms of association and membership, taking note of the size of the 'association movement' within the Community, as well as its 'outstanding service' to it. Therefore, following the logic of the resolution, the European institutions were required to pursue the measures laid down by the Community's constituent documents in order to harmonize legislation required for cooperation on the Community level in respect of these associations. The resolution thus requested the rapid abolition, throughout the Community, of all the discriminatory measures based on nationality that affected the right to belong to, form or administer an association. Moreover, it required the establishment of a system of 'mutual recognition' of associations within the EC Member States. This meant, according to the resolution, the recognition in each Member State of the same level of legal recognition acquired by an association in the Member State where it had its head office. The resolution also required the formulation of a Community-wide statute for associations operating in more than one Member State, regulating their specific requirements. In any case, the main focus of the initiative was evidently the first course of action, and the wish to develop a body of 'European Law on Associations', and establish a single status on the regional level was set aside due to the urgent need to resolve practical questions of conflict-of-laws.

## **2. New Developments**

### **2.1 The International NGOs Accountability Charter 2006<sup>10</sup>**

The Charter initiative was first discussed in 2003 by Amnesty International, Greenpeace, Oxfam and the International Save the Children Alliance, in view of increasing demands for INGOs' greater transparency and accountability. In June, 2006, eleven leading INGOs endorsed the Charter, heralding 'the first international, cross-sectoral code of conduct for NGOs'. The original initiative was aimed at underscoring the legitimacy of INGOs through greater accountability, providing them with a baseline of reliability and an understanding of responsible advocacy. In 2008, the charter was registered as a company, owned by its members, and limited by guarantee in the UK. It was expected that the initiative would attract broad-based support; some even considered it to be a model or beginning point for a Global Civil Society Forum charter or a 'system of global NGO self-regulation'; to date, however, only 17 new INGOs have joined the charter, and three of the founding signatories have chosen to leave. Nevertheless, in 2011, the charter signatories adopted the 'Charter Five Years Strategy', aimed at establishing the charter, until 2015, as 'the sector's overarching accountability framework', having all leading INGOs signing the charter, and smaller INGOs and larger national ones using it as a basis for their own accountability. The charter is based on a foundation of fairly simplistic, broadly-termed declarative statements. Entitling it an 'Accountability Charter' is somewhat misleading, since its core part resembles more a declaration of common perceptions of an ideologically like-minded group of

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<sup>10</sup> Text and related documents are available on the Charter's website: <http://www.ingoaccountabilitycharter.org> .

organizations. The opening statements define the group of signatories as 'independent non-profit organizations that work globally', which 'can *complement but not replace* the overarching role and primary responsibility of governments'. Their 'right to act' is based on 'universally recognized freedoms of speech, assembly and association' and 'the values they seek to promote'. The signatories' legitimacy is derived from 'the quality of their work' and the 'recognition and support' of their stakeholders; therefore they seek to uphold their legitimacy 'through accountability for their work and achievements'. Signatories are committed to 'openness and honesty' regarding their 'governance structures, mission, policies and activities'. The signatories further acknowledge, as a matter of 'good governance', their ultimate responsibility for their actions and achievements.

The charter's main (and almost singular) operational provision is the reporting requirement, which commits all signatories to report annually on their activities and achievements. These reports, submitted to the Charter Company's operating bodies, include description of objectives and outcomes, governance structure and processes, main sources of funding from corporations, foundations, governments and individuals, financial performance, and compliance with the charter. The reports are reviewed by an Independent Review Panel (IRP), which took up its work in early 2011. The IRP produces feedback evaluation, on which the member organizations may comment, before the report and its evaluation are published on the charter's website. It is intended that, in the future, the IRP will also review complaints made against charter members.

## **2.2 The Guidelines on International Human Rights Fact-Finding Visits and Reports (The '*Lund-London Guidelines*') 2009<sup>11</sup>**

Launched by the International Bar Association's Human Rights Institute in conjunction with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University (Sweden), the highly articulated set of guidelines, containing 73 articles, has been drafted over several years of wide consultations and extensive research by legal and human rights scholars with the collaboration of institutional professionals and INGO activists. The clearly delineated mandate of this initiative is to propose a framework for *regulating the fact-finding capacities and reports produced by NGOs*, and frequently referred to by courts and international tribunals, as well as by governments, NGOs and the news media. The project proposal is based on the acknowledgement that, despite much discussion, no *procedural standards* have been universally accepted for the *conduct of fact-finding enquiries* and the *assessment of reports*. The project thus aims at producing 'an agreed *international standard of good practice*', amounting to a 'system of quality control', intended to improve accuracy, objectivity, transparency and credibility in the conduct of fact-finding and the compilation of reports. Currently, the guidelines have been endorsed by only 7 (I)NGOs.

Significantly, the guidelines do not involve any consideration of legal status, or any rights or obligations in the legal sense, in the case of INGOs. Furthermore, the guidelines do not make any effort at defining the '(international) NGO' entity to which they refer. Rather, the project is founded on careful *practical observations* regarding *certain functions* typically fulfilled by INGOs and their consequent normative impact on international (legal) affairs. This way, the guidelines open by defining the *function* to which they relate, stating that 'fact-finding' means

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<sup>11</sup> Text and related documents are available on the Guidelines website: <http://www.factfindingguidelines.org> .

'a mission or visit mandated by an NGO to ascertain the relevant facts relating to and elucidating a situation of human rights concern'. The guidelines' preamble acknowledges the need to respect NGOs' independence and integrity, due to their distinctive position and expertise. The essentiality of their fact-finding and report-writing functions to human rights monitoring is recognized, and therefore 'must be, and be seen to be, conducted in a *bona fide* manner'. This approach clearly takes into account the unique features of INGOs, as being self-appointed and officially unaccountable. However, it also recognizes their general need to gain credibility and legitimacy. With that in mind, the guidelines outline a set of *procedural methods* underlined by several main themes, including, among others, the need to enforce objectivity and eliminate bias. Virtually all of the numerous stages in the work of a non-governmental fact-finding mission are carefully covered in the form of a step-by-step, 'easy-to-use' manual, including: instigation of the mission, articulation of its terms of reference, composition of the delegation, activity of interpreters and other persons associated with the mission, pre-visits, working methods (agenda articulation, interviews performance, information gathering, etc.), drafting of the fact-finding report, its translation and publication, and follow-up activity.

### **2.3 First Report of the Committee on Non-State Actors, International Law Association (ILA) (The Hague Conference, 2010)**

Following the 2010 ILA Conference, the newly established Committee on Non-State Actors (NSAs) issued its Report under the title *'Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues'*<sup>12</sup>. The report outlines the Committee's project of 'evaluating the challenges to international law posed by the proliferation of NSAs in the international political and legal arenas'. According to the Report's working definition of NSAs, expressly included in the Committee's mandate are NGOs 'with some form of recognized international legal status', as well as TNCs, organized armed opposition groups, and organized indigenous peoples' groups. The Committee's declared 'eventual aim' is 'to derive NSAs' legal 'status' or international legal personality (ILP) from empirical studies', whereas its 'purpose' is 'to examine the position of NSAs in international law, in terms of their rights and obligations'.

The Committee notes that a working definition of the legal 'status' that NSAs can have will be developed based upon their perceived activities and functions. This methodology, according to the report, is based on the legacy of the ICJ *Reparations for Injuries Advisory Opinion*<sup>13</sup>, although the Committee's project 'departs from attempts to fit strictly within the international law notion of 'ILP' '. The declared presumption underlying the proposal is that 'as particular NSAs have both a special set of rights and obligations within the frameworks of accreditation relating to particular international bodies, they also have or should have a general set of rights and obligations under general international law'. Methodologically, the Committee thus regards its main tasks as involving both descriptive and normative aspects: (1) determining the actual practice of NSAs in terms of their rights and obligations, and their effect on the functioning of the international legal system; and (2) drawing general conclusions on how NSAs fit in international legal theory and practice and the implications for international law, as well as proposing a theory regarding the international legal status of NSAs.

<sup>12</sup> Available on: <http://www.ila-hq.org> .

<sup>13</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Rep. (1949), p. 174.

The authors of the Report further note that their project 'adopts a particular functional research methodology *with the State as a point of reference to look at NSAs in contemporary global 'governance'*'. This involves, as the Committee notes, determination of *'whether we can acknowledge that States are not the only legitimate actors in the international law arena'*. The Committee's methodology is therefore based on an analogy of traditional state governance functions with such functions existing at the international or global level. These analogous governance functions, framed as legal issues, include norm-creation (legislation or law-making), monitoring compliance (administration or law application), and enforcement (dispute settlement or adjudication on the basis of norms on responsibility), as well as functions such as the protection, prosecution and the provision of 'public goods' (based on an analogy to the hypothetical social contract existing between the state and its citizens). Within this 'qualitative research project', the Committee aims to explore international legal frameworks existing in substantive areas of international law, to be selected from formal or informal arrangements for NSA accreditation and/or participation, mainly within the broad UN system, but also within regional institutions and international conferences and meetings. It is the Committee's intention to use these arrangements as case-studies for ascertaining specific rights and obligations or even 'a set of general rights and obligations under *customary international law*'.

Significantly, the Committee acknowledges that a recurring issue concerning the legal position of NSAs is their accountability under international law. Relating more specifically to INGOs, the drafters note that presently they do not incur legal liability for their actions on the international plane. In any case, in light of 'the services they render for the global public good' and 'laudable goals', the report questions *'whether such liability is actually desirable'*. Dealing with the issue of the immunity of NSAs, the drafters note that if, following the ICJ's *Reparations* case, the nature of ILP 'depends upon the needs of the community', then it may be argued that 'many NSAs should be granted forms of immunity due to their global reach and roles played in contributing to a more effective, legitimate global governance'.

Finally, the report deals squarely with the issue of NSAs' ILP, or the drafters' preferred term, legal 'status'. The drafters admit to adopting 'the view of a growing number of scholars who reject the positivist doctrine of subjects/objects and ILP as having no credible reality and no functional purpose'. The Report acknowledges that the analysis of the legal 'status' of NSAs begins 'with the opening of the door' in the *Reparations* precedent, in which the ICJ 'took a more open approach than under orthodox doctrine, that allows for a changing of who is an international legal person' by making a connection between the doctrine of ILP and the requirements of international life. The report then employs Article 71 UN Charter as a starting point for 'constructing a theory of kinds of NSA legal 'status''. The drafters thus regard the ECOSOC consultative arrangements to be *'the principal means States have employed to formalize the international legal 'status' of NSAs'*. Further mentioned is the CoE's 1986 European Convention as the *'best existing example' of 'States bestowing legal status on NSAs by establishing a treaty creating such legal status'*. Eventually, the Committee articulates its fundamental wisdom regarding the major normative challenges that characterize the relationships between states and NSAs: 'the challenge appears to be to develop attributes relating to their legal position, *so that they can become genuine subjects of international law (implying consent on the part of NSAs to be bound), and de jure participants in international law processes'*.

### 3. Historical-Contextual Analysis & Evaluation of New Developments

**3.1 General assessment** – Evidently, many important observations may be drawn from the analysis of the significant phases during the nearly 100-year sequence of international conferences and forums dealing with the matter.

First, it has been recognized that the overall effort to conclude a multilateral treaty, whether international or regional, can produce one of three legal mechanisms:

(1) A convention creating a *uniform international status* for INGOs that endows them with a *(limited/functional) international legal personality*;

(2) A convention establishing a system of *mutual recognition*, that is, one that recognizes the *status acquired by the organization in its State of registration*; or

(3) A convention listing a closed *set of rights and privileges* which signatories – either States or IGOs – take upon themselves to acknowledge, for the benefit of INGOs.

These three options, or compromise variations of them, which were considered over the years, are based on completely discrete approaches to the question of the normative position of INGOs. The first scheme, in its authentic form, aims at turning INGOs into (limited) *subjects of international law*. The second scheme endorses the jurisdiction of the State of origin, thereby preserving the status of the INGO as a *national NGO*. The third scheme does not deal with the acquisition of status, but rather is based on the acknowledgement of the immediate needs of INGOs, thus resolving specific *conflicts-of-law problems*. These possible variations clearly reflect varying stages of optimism and pessimism in international relations. In any case, as many drafters admitted, and as history clearly shows, each stage built, at least to some extent, on lessons drawn from previous attempts. It is therefore possible to speak about an evolutionary sequence which may further guide us in the future.

Taken together, the new initiatives are a clear indication that there is still much interest in the issues related to the international standing of INGOs. This interest, however, derives from different sources (academia, field activists, international lawyers) and reflects varying, even contradictory, conceptions of the position of INGOs within the international community and its legal order. These initiatives vary further with regard to the outcome they attempt to achieve: while the ILA work is taken first and foremost as an academic endeavor to outline a normative framework, the Guidelines provide a practical governance tool, and the Charter is mainly an attempt to establish a platform for the invention of common principles, and – depending on its future evolution and broad-based adoption – a self-governing accountability framework. Consequently, these initiatives approach different audiences: the ILA reports speak mainly to the academic community, while the Guidelines approach NGO activists and state-officials, and the Charter appeals to INGO representatives as well as the general public and the media. In any case, not all of these schemes take into account the evolutionary sequence of attempts to deal with similar and related issues. Obviously, such an undertaking could have led to more realistic, viable, and effective results. The main observations, ensuing from the contextual historical analysis, which must be taken into account within any contemporary initiative, are as follows:

**3.2 Doctrinal evolution** – Much like the early attempts to ameliorate a formal legal status for INGOs, the ILA Report straightforwardly raises again the question of the ILP of INGOs. In that respect, it can definitely be said that after 100 years, we return to the departure points of von Bar and Politis! The report, however, completely ignores the sequence of previous attempts to deal with the quest for ILP. It may be recalled that the initial interest in the

normative position of INGOs indeed derived from the problem of *international legal personality*. The quest for personality, regarded as advantageous for ‘international associations’, was initially invoked and pursued by writers who were INGO activists and worked under the mandate of INGO forums. This quest was based on the assumptions that (a) the development of ‘international associations’ was essentially beneficial to the interests of the ‘international community’, and that consequently (b) they should be at liberty not to be tied exclusively to a certain state, by reason of their nature or goals. However, the initial quest for a *uniform universal status*, based on a highly optimistic and autonomous view of the position of the INGO community, came under scrutiny, mainly as a result of the unresolved problems of registration, selection and order. Later, the adoption of the ECOSOC consultative arrangements further emphasized the difficulties regarding the definition of a genuine INGO entity – a question which remains unresolved even today – and its specific legal requirements. Nevertheless, in view of these arrangements and the ICJ’s 1949 *Reparations for Injuries* Advisory Opinion, renewed discussions about the normative status of INGOs were underlined by the assumption of INGOs’ functional resemblance to IGOs. Consequently, the general debate was drastically modified, theoretically as well as practically, to focus on *securing recognition abroad* (mainly of consultative status INGOs), *on the basis of the personality in the state of incorporation* (i.e. ‘mutual recognition’). This change in doctrinal focus, based on the need to simplify *rules of conflicts-of-law*, was again the initiative of INGO activists themselves, who wished to thereby lift national restrictions to their operations. Later on, based on the realization that the assumption of INGO resemblance to IGO was politically unrealistic and legally unfounded, a third doctrinal approach was initiated, based on the notion of ‘*a most favored national association clause*’, upholding the status of the INGO entity as a national NGO in the registering state. This approach, *based exclusively on the national rather than the international level*, focused on *particular administrative and fiscal facilities*. This reflected complete repudiation of the original idea of ILP or the need to solve the question of legal recognition.

The ILA report nevertheless attempts to revive this normative discussion, this time based on notions of ‘global governance’, interdependence and the establishment of a ‘global civil society’, borrowed heavily from the fields of political science and international relations<sup>14</sup>. These notions clearly underline the drafters’ fundamental premise that ‘NSAs assume governance roles traditionally performed by States’ and their functional research methodology ‘with the State as a point of reference to look at NSAs in contemporary global governance’. As we saw, the basic conception that status should follow function is not a novelty. Eventually, however, this notion could not have been implemented within the confines of ILP, despite the fact that this was exactly the logic underlying the acquisition of personality in the case of IGOs (as agents of their member states). After all, the development of the consultative status arrangements throughout the years as well as the adoption of the CoE’s 1986 European Convention, were exactly the outcome of the fact that solutions regarding INGOs’ status could not have evolved through the adoption of a formal personality scheme. Ignoring this evolutionary sequence, the drafters of the ILA report draw on these very arrangements to argue that INGOs obtain certain rights and obligations that should reflect on their acquisition of ILP. Unsurprisingly, in the same vein, the drafters return to the

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<sup>14</sup> See, for example, S. Ahmed, D. Potter, **NGOs in International Politics**, (2006), pp. 241-244. For a discussion of the application of the notions of ‘globalization’, ‘global governance’ and ‘global civil society’ to the ongoing discourse on the normative position of INGOs, see R. Ben-Ari, **The Position of INGOs under International Law – An Analytical Framework**, (2012), pp. 163-261, 314-332.

*Reparations* judgment in order to base their methodology and to backup their functional claim for INGOs' personality. Being aware, however, of the fact that the application of this precedent is controversial and legally problematic in the case of NSAs other than IGOs, they declare to 'depart from attempts to fit strictly within the international law notion of ILP'. This requires the adoption of the innovative scheme of 'international legal *status*' which the report cannot clearly define.

This formulation echoes some contemporary writings<sup>15</sup>. Lindblom<sup>16</sup>, for example, based on her standpoint that 'the fundamental legal concepts and rules of international law *adapt to rather than direct developments* of the legal system', and in view of 'the adoption of new legal instruments and formulation of practices which allow for INGOs' interaction with states and IGOs', concludes that 'the international legal *status* of INGOs is equivalent to the sum of those rules and practices'. She further opines that the concept of ILP 'is not particularly helpful in relation to NGOs', and that 'international legal *status*', on the other hand, 'admits openly that *the specific content of this status may vary according to the circumstances*'. This concept should thus be 'broadly defined, as encompassing all kinds of rules which refer explicitly to an entity or which can be used by the entity for acting on the international scene'; it is 'a neutral concept, *meaning only that an entity has some sort of status in some respect, which needs to be specified for each particular entity*'.

Underlying this outline are the same assumptions that inspired earlier writers who wished to establish a functional approach to the question of INGOs' ILP. This approach builds on their particular appraisal of the doctrine of implied/functional/limited personality, and their understanding of the position of INGOs within the international community *vis-à-vis* states and IGOs (i.e. their resemblance to, or partnership with, IGOs, and the UN in particular - see following section). It is based on the understanding that the expanding functions and partnership with states and IGOs may indicate broad acceptance on the part of States, which underlines an acknowledgment of a certain level of personality evolving as a customary rule. This approach was the outcome of a mistaken, and therefore misleading reading of the normative developments at the time, and was rejected by consequent developments. In that respect, it is difficult to see how the ILA scheme can become a progressive stage in the evolvement of the discourse on the normative position of INGOs. It seems that, more than it innovates, it repeats earlier phases of the discourse. The onus is thus heavy on the drafters to explain why, in view of continuous rejection by both States and INGOs, as well as the growing complexity of the unresolved problems of registration, control and order, the discussion of ILP (or otherwise legal 'status') in the case of INGOs is still relevant.

One may further argue that the report's scheme is intellectually unsound, since it argues a normative scheme based on a *pluralist belief in democratic policy-making* on the basis of arrangements that mainly reflect *functionalist appeals for the use of expertise*. These theoretical frameworks are contradictory. As Willetts explains in a similar context<sup>17</sup>, most of the existing INGO institutional arrangements are based on functionalist ideas applied to

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<sup>15</sup> See, for example, B. Maragia, **Almost There: Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Affairs**, *Non-State Actors and International Law*, Vol. 2, (2002), p. 301, 332; P.-M. Dupuy, **Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems which Arise for Legal Scholarship**, in P.-M. Dupuy & L. Vierucci (eds.), *NGOs in International Law – Efficiency in Flexibility?*, (2008), pp. 204-215.

<sup>16</sup> See A.K. Lindblom, **Non-governmental Organizations in International Law**, (Cambridge University Press), (2005).

<sup>17</sup> P. Willetts, **The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism or Global Democracy?**, *Journal of Global Governance*, Vol. 12 (2006), pp. 305-324.

governance systems (the UN in particular), strongly emphasizing the ability of experts to maximize welfare and to depoliticize decision-making. The ILA scheme is, however, essentially based on notions of fairness and democratic pluralism. Thus, the NSA Committee's tentative report (2008)<sup>18</sup> already acknowledged a need for international law norms to be made 'through an inclusive process', which may require 'a fundamental rethinking of international law formation', giving NSAs 'weight in the determination of norms of customary international law'. Law may then become 'transnational rather than international'. The 2010 report further notes the need to determine 'whether we can acknowledge that States are not the only legitimate actors in the international law arena', a normative endeavor which requires an answer to the 'fundamental question of whether the *de facto* reality of interactions between States and IGOs on the one hand, and various NGOs on the other, forces us to shift our thinking about international law, and to the normative question of whether ILP should be re-conceptualized'. The problem is that a belief in democratic pluralism involves the assertion of principles that are not compatible with functionalism, which, by definition, is not inclusive, but 'aims at restricting participation to experts' and the more 'competent and relevant actors'. This may also explain why throughout the years, the early appeals for the acknowledgment of INGOs' uniform universal status (based, like in the case of von Bar and Politis, on pluralistic democratic appeals) had to be withdrawn to allow the adoption of functionalist arrangements. That was also acknowledged by INGO activists, who on many occasions advocated the restricted participation of only certain groupings of (INGOs). It is therefore difficult to see how the drafters of the report plan to base their broad normative democratic-pluralistic scheme on the foundation of existing arrangements that essentially reflect functionalistic notions. This intellectual leap may also be the reason behind the need to discuss legal 'status' instead of ILP, which is one of the most fundamental normative institutions of the existing order, based on the rational of selective functionalism.

The Guidelines and the Charter are not normative schemes. Unlike the ILA report, they do not endeavor to give new or alternative meaning to existing arrangements, but endeavor to complement them by providing practical governance tools, tailored to fit INGOs' perceived functions, taken at their face value. They acknowledge the significance of INGOs' unique contribution to human development in certain fields, but nevertheless recognize the complexities involved in such activity and assist in confronting them. Both initiatives basically focus on issues reflecting on INGOs' legitimacy on the socio-political level, rather than the legal-normative one. In that respect, they are clearly responsive to the recent trend to question the accountability of all NSAs, and INGOs in particular. They are aware of the fact that IGOs and their Member States prefer not to impose accountability mechanisms on INGOs outside the national legal sphere, but instead to encourage self-governance and self-organizing processes in response to existing arrangements' deficiencies. This is clearly in line with the evolvement of the ongoing discourse on INGOs' normative status, showing that issues that may bear direct effect on the formal legal status of these organizations are channeled to the national, rather than the international authorities to be dealt with. In large part, this is the outcome of the fact that INGOs have always been reluctant to resolve the questions of registration, selection and order through an international mechanism that might give states and IGOs some decision-making power and control over their internal matters and activities, as well as the parallel reluctance of states to even consider such arrangements that might eventually lead to an articulation of some degree of ILP for certain INGOs.

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<sup>18</sup> Preliminary Issues for the ILA Conference in Rio de Janeiro (2008), NSAs Com., available on: <http://www.ila-hq.org> .

To an extent, the Charter revives the old idea of INGOs' self-governance through an 'International Bureau'. Since its current 'Charter version' is disconnected from any consideration of official status, such a self-governing body does not pose any normative or political threat to states and IGOs. Depending particularly on the evolvement of its reporting mechanism, as well as its ability to generate sincere commitment on the part of its members, the Charter can thus complement and facilitate the work of existing IGOs' accreditation procedures. The Guidelines, if adopted by inter-governmental bodies and state-officials as well as the NGO community, can quite similarly become a model for self-regulating codes-of-conduct, evolving on a sectoral basis. This can certainly complement existing and less successful inter-governmental codes, such as the UN Code of Conduct for Special Procedures Mandate-Holders<sup>19</sup>, and facilitate the work of inter-governmental bodies that cooperate extensively with INGOs, such as the Human Rights Council and the ICC, as well as national courts. All in all, if broadly adopted and seriously implemented, these initiatives could reflect a significant trend in the evolutionary progression of the discourse on the normative position of INGOs, based on the detachment of questions of accountability and legitimacy from those of status. This may be the most realistic way to deepen the involvement of INGOs in global governance, making it more efficient and meaningful, without altering their current legal status.

**3.3 Resemblance to IGOs** – As the contextual historical investigation clearly indicates, many scholars and activists in the past established their positions on the basis of a conceptual and practical correlation between INGOs and IGOs. The writings of some leading jurists of the period (Kopelmanas in 1949, Pickard in 1956<sup>20</sup>, and especially Rodgers in 1960<sup>21</sup> and Lador-Lederer in 1963<sup>22</sup>) are clear indications of the notion that INGOs' functions complement or even resemble those of IGOs. Consequent documents upheld the notion of a derived formal status for INGOs, based on their perceived international functions and collaboration in the work of inter-governmental bodies. This strategy was initially meant to bypass the old difficult questions of public registration, order and selection, and gain exemptions from national restrictions. Nevertheless, flawed as this doctrinal foundation was, these hurdles remained unresolved in practice and theory, and therefore continue to be highly alarming.

Resemblance to IGOs underlined a claim for legitimacy. It served to anchor INGOs' *normative* legitimacy by showing that their relevance had become as essential for the international community as that of IGOs, following the logic of the *Reparations* precedent. As explained, in the case of *IGOs*, their normative legitimacy was acknowledged under international law by the attainment of their (limited functional/implied) ILP, which in turn paved the way for the development of the body of international institutional law, upholding IGOs' *regulatory* legitimacy. In the case of INGOs, this strategy was unsuccessful. The ILA report, however, readopts the same logic, but goes a step further to claim *resemblance to, and therefore competition with, states*. This claim is based on contemporary neo-liberal

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<sup>19</sup> Res. 5/2 (18 June, 2007), UN GAOR, 62<sup>nd</sup> Sess., Supp. No. 53, A/62/53, p. 74; P. Alston, **Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?**, *Harvard International Law Journal*, Vol. 52 (2011), p. 561.

<sup>20</sup> See B. Pickard, **Greater United Nations**, (1956).

<sup>21</sup> See R. S. Rodgers, **Facilitation Problems of International Associations – The Legal, Fiscal and Administrative Facilities of International Non-Governmental Organizations; An International and Comparative Law, Organization and Policy Study** (1960).

<sup>22</sup> See J. J. Lador-Lederer, **International Non-Governmental Organizations and Economic Entities: A Study in Autonomous Organization and *Jus Gentium***, (1963).

(constructivist) calls for the 'rethinking of the concept of legitimacy and its disconnection with the nation-state'<sup>23</sup>. As Ossewaarde, Nijhof & Heyse explain, this claim for INGOs' *normative* legitimacy entails 'the generalized perception that their actions are desirable, proper or appropriate, within their institutional environment', often 'against the resistance of national and international organizations'. Positioned in competition with, or resemblance to, states, INGOs thus embody the idea that 'the human interest, rather than the nation-state, is the legitimating principle in a global order'. On the basis of this claim, the ILA report wishes to establish an intuitive scheme for INGOs' *regulatory* legitimacy under international law, which concerns the questions of 'who has the right to intervene in local or international affairs, to break the sovereignty principle and how this right can be justified'. This entails that international rules and doctrines (such as ILP and immunities in the case of the report) have to correspond with INGOs' missions and norms, together with a public recognition that INGOs 'are morally entitled to inform and influence international legislators'. But as much as this scheme has proved to be impossible to implement in the past, so it remains today.

As Ossewaarde et al. acknowledge, normative legitimacy is not enough in the case of INGOs. Organizational reality and the fact that the social forces that shape INGO legitimacy patterns are different from those of (inter)governmental institutions (i.e. they are not legitimized through electoral systems and are not necessarily democratic) prove that INGOs further need *regulatory* legitimacy, *cognitive* legitimacy and *output* legitimacy. In other words, their normative legitimacy must be 'institutionalized and organized' in order to show how they strive for the achievements of the laudable goals that underlie their normative legitimacy. *Cognitive* legitimacy derives from the INGO's ongoing ability to conform technical expertise and intellectual knowledge to its stated mission. *Output* legitimacy refers to the INGO's professionalization as organization. It requires the INGO to show how it actually materializes its objectives by being accountable to its stakeholders through transparent decision-making and communication structures. However, in the case of INGOs, the contradictory demands that follow from their global objectives and the organizational necessity to communicate actual performance 'generate a complex position'. The need to organize their motives through professional monitoring and accountability mechanisms requires a technical expertise that typically 'characterizes the processes of an organization, instead of humanity at large'. This way, the more that is demanded from the INGO as an organization (that is, in terms of regulatory, cognitive and output legitimacy), the less the organization's ideal is stamped (in terms of its normative legitimacy). There are thus inherent and increased tensions between the four sources of INGO legitimacy.

Indeed, we saw how in the past, many initiatives based on broad normative legitimacy claims, upholding INGOs' position as global actors resembling IGOs, had to be withdrawn, in the face of their complex organizational reality. The fact that solutions could not have been articulated for the problems of selection, registration and order, as well as for the composition of an 'international bureau', had repeatedly failed these initiatives. This is probably also the reason why the ILA report tends to dismiss questions regarding INGOs' (international) liability in view of the 'services they render for the global public good' and the 'often laudable goals of their actions'. The Guidelines and the Charter, on the other hand, focus on issues of INGOs' *cognitive* and *output* legitimacy, and therefore refrain from making any *normative* legitimacy claims based on the positioning of INGOs in resemblance to, or competition with, states or

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<sup>23</sup> See R. Ossewaarde, A. Nijhof, L. Heyse, **Dynamics of NGO Legitimacy: How Organizing Betrays Core Missions of INGOs**, *Public Administration and Development Journal*, Vol. 28 (2008), p. 42, 43.

IGOs. The Charter thus makes clear that its signatories 'can *complement but not replace* the over-arching role and primary responsibility of governments'. The signatories declare their legitimacy to derive from 'the quality of their work' and achievements (i.e. *output* legitimacy claim) and the 'recognition and support' of their stakeholders (i.e. *cognitive* legitimacy claim). Their *regulatory* legitimacy is mainly grounded in 'universally recognized freedoms of speech, assembly and association' processed through the declared commitment to abide by reporting requirements on the *national* level, and potentially, through the Charter's reporting mechanism. The Guidelines' modest *normative* legitimacy claim, quite similarly, is based on recognition of the significant role of INGOs in the provision of a certain function (fact-finding and reporting). They thus seek to legitimize the activity and not the organization, and are mainly dedicated to the issues of the nature of INGO missions, the wording of their mandates and the selection of personnel – that is, *cognitive* legitimacy issues, as well as the practical production of the fact-finding report, its publication etc., which are *outcome* legitimacy issues.

**3.3 Tensions within the non-governmental community** – Many authors still relate to the non-governmental community as a single coherent body or a distinct regime, with sub-units presumably sharing common features and similar goals. However, proposals and reports of INGO-forums which endeavor to outline positively the typical INGO entity, especially following the adoption of the consultative arrangements with ECOSOC, revealed considerable competition and disagreement within the INGO community. This feature of the non-governmental world worsened over time, with growing numbers of associations competing for limited sources of funding and impacting overlapping areas. Furthermore, proposals regarding the normative status of INGOs exposed significant resentment on the part of 'genuinely composed' INGOs with 'an international staff', towards national NGOs, aspiring to a mere 'international goal'. These features of the non-governmental world further emphasized the old problems of registration, selection and control.

The ILA report ignores this issue altogether. This is not surprising, given that it deals with NSAs as a broad normative group. The decision to adopt such a wide perspective is probably the outcome of a strong influence by international relations theories, focusing on the role of international institutions and transnational actors. In any case, it clearly promises many definitional and conceptual complexities down the road, as various unrelated entities are gathered under the umbrella term 'NSAs', which is one of the reasons for the substantial confusion surrounding this usage. The drafters' initial taxonomy of non-state entities under its mandate does not seem to suggest any solution in this regard, and leaves the ILA NSAs' Committee with an unreasonably wide spectrum of entities to deal with, which have no more in common than the fact that they are 'non-state'. Reading the report, however, one immediately gets the impression that despite its declared mandate, it mainly focuses on (I)NGOs' arrangements. If that is the case, it will be difficult in subsequent reports to ignore the fact that as of today we still do not have a definition of the 'internationality' requirement of *international* NGOs. In view of the data regarding the burgeoning growth in the number of INGOs in the last few decades, and the apparent phenomenon of '*sans frontiérisme*'<sup>24</sup>, describing *national* NGOs' calculated turn to international activity, thus becoming *international* NGOs, it will no longer be possible to ignore the implications of this aspect within any normative evaluation of INGOs' (legal) status.

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<sup>24</sup> See J. Siméant, **What is Going Global? The Internationalization of French NGOs 'Without Borders'**, Review of international Political Economy, Vol. 12, No. 5, (2005), 851, 853.

The Charter initiative also raises difficult questions in this regard. Despite its title – '*International NGOs Accountability Charter*' – it contains no definition of the 'internationality' requirement which underlies its self-selection membership. Nevertheless, judging according to its founding and current membership, the Charter evolves as a highly selective membership framework, tailored to fit the interests and characteristics of the very few prominent and well-funded INGOs. The Charter's 'Five Years Strategy' is indicative in this respect, stating that its primary aims are to sign on 'all *leading international* NGOs', while '*smaller international* organizations and *larger national* ones' will use it 'as a basis for their own accountability' (without actually signing it). Together with the facts that the Charter's Secretariat is owned by six of its founding (and leading) signatories, and that major INGOs (such as HRW) have not joined, while three of its founding signatories have already left it, it may be argued that this initiative could not overcome the tensions within the non-governmental community, but may actually deepen them. Thompson further remarks that uniting the charter's signatories is an ideological like-mindedness. Charter members can thus be found 'on either the center or left-of-center of the political spectrum'. Consequently, being unable to accommodate political, ideological and organizational diversity, the Charter could become highly divisive. All this, of course, diminishes the normative value of this initiative. The Guidelines, on the other hand, bypass these organizational and political hurdles by strictly sticking to function-related matters. That may be the reason behind the fact that although the Guidelines' title mentions '*International Human Rights Fact-Finding Visits and Reports*', its various provisions simply relate to 'NGOs' (as opposed to *INGOs*). The Guidelines can thus potentially be adopted by a wide spectrum of organizations, connected by their unique function and not by their ideological tendencies or organizational features.

**3.5 Authors of initiatives** – The historical survey suggests that all of the significant initiatives, proposals and reports regarding the normative position of INGOs were the work of (European) academic scholars, most of whom were law professors. Some were also INGO activists. The lack of any significant contribution by diplomats, other state or government officials, or even field activists is evident.

By and large, the ILA report is an academic, theoretical initiative. Some of the ILA NSAs Committee members, including its chair, are international relations and political science theorists. None of its members are INGO activists. The authors of the Charter initiative, on the other hand, are all INGOs' activists. In that respect, the Charter initiative may reflect a progressive evolution in the normative discourse regarding INGOs' position. The fact that leading INGOs' officials and activists have decided to come together to initiate a forum, based exclusively on their shared understanding and mutual commitment may point to their disappointment in the ability of academics and state representatives to acknowledge their genuine needs and concerns.

Most interesting and innovative in this regard are the Guidelines. They are the product of a totally private initiative of several international legal experts. The Guidelines' drafting committees combined legal scholars, INGOs' field activists, and international lawyers and practitioners from both inter-governmental and non-governmental professional organizations, with strong emphasis on practical experience. Undoubtedly, this unique combination of experts facilitated an outcome which may broadly appeal to state officials, (I)NGOs' activists, international civil servants, and various institutional professionals at the same time.

**3.6 INGOs' disinterest** – It is highly significant that, generally, members of the INGO

community have shown considerable indifference to attempts to achieve formal recognition of their normative position. Although most of the important proposals were indeed initiated by INGO forums, the INGO community as a whole has almost completely ignored these attempts. Very few proposals earned any serious consideration or were even mentioned by INGO officials. Thus, nearly 40 years after the establishment of the UIA in 1910, it was only the adoption of the UN Charter, establishing consultative arrangements with ECOSOC, that created sufficient momentum for further consideration to be given by the newly appointed CCNGOs. Nevertheless, despite explicit requests, even the CCNGOs' proposals failed to achieve adequate discussion or support from (consultative status) INGOs. Evidently, even with their impressive capacity for networking and lobbying, INGO activists were simply reluctant to invest resources or cooperate on this matter, and demonstrated an interest only in solving specific problems on an occasional basis. Issues of INGOs' normative status, therefore, remained, for the most part, the concern of a few individual legal and socio-political scholars.

There is hardly any reason to believe, therefore, that INGO activists and officials will cooperate with, support, or be interested in the ILA initiative, which resembles, in many aspects, past attempts to formalize the status of INGOs. As was revealed many times in the past, and was even openly admitted by INGO (academic) proponents, such as Crawford and Rodley<sup>25</sup>, INGOs are generally not interested in acquiring formal legal recognition, since many of them 'use methods that would not be acceptable from an entity enjoying formal ILP'. In this regard, the ILA drafters' declared intention to receive the views of states' international law advisers on NSA ILP, as well as the opinions of NSAs themselves, regarding their position under international law, is highly significant and crucial indeed. If such an inquiry were carried out objectively and systematically, it could become the major contribution of the ILA initiative to the ongoing discourse on the normative position of INGOs.

The Charter initiative is further revealing in this regard. Evidently, the fact that the Charter does not involve any consideration or promotion of an acquisition of a formal legal status is a clear indication on the part of some leading INGOs that such a development is indeed unwarranted. If anything, the Charter is yet another clear signal that the INGO community still regards the political and social arenas to be the proper fora for the evaluation of their activity, as opposed to the legal arena. Obviously, translation of their involvement and performance in global governance into strictly defined (international) rights and obligations is considered by them to be counterproductive.

The drafters of the Guidelines were clearly aware of the sensitivity of INGOs towards potentially restrictive legal mechanisms. They therefore appeal to INGOs' need to uphold their public reputation and proficiency, in order to maintain their political and professional legitimacy. In that respect, the Guidelines, as a 'soft law', non-formal code-of-conduct, mirror the concerns underlying the self-governing reporting mechanism of the Charter.

**3.7 European focus** – Failing on the international level, scholars in the past sought support in the regional European arena. Theoretically, the normative regional platform seemed more accessible and attuned to the needs of INGOs. Clearly, INGOs and the supra-national European institutions form a partnership to generate and uphold the integrative momentum,

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<sup>25</sup> N. Rodely, **Human Rights NGOs: Rights and Obligations (Present Status & Perspectives)**, SIM 19 Special, p. 62 & fn. 34.

which leads to mutual political support. Nevertheless, despite the relatively encouraging institutional atmosphere, the initial regional debates almost immediately began to replicate the complexities of the international discourse. Again, the aspiration to establish a single status on the regional level was debated in the light of an urgent need to resolve practical questions of conflicts-of-laws.

Nevertheless, current initiatives seem to indicate that it is still difficult to develop the discourse on the normative position of INGOs outside Europe and European intellectual frameworks. It is remarkable that the ILA NSAs Committee is characterized by a strong West-European academic membership. Furthermore, all the Charter's founding signatories, as well as their head officials, are European, while North-American or other INGOs still do not form part of this initiative. It is only the Guidelines' Steering Committee that has managed to unite behind the project a group of experts and professionals, which cannot be characterized as being European-oriented.

#### **4. Conclusion**

Evidently, the historical path followed in the attempt to secure an international legal status for INGOs has taken many twists and turns. Numerous obstacles have arisen, while few solutions have been found. This paper does not pretend to point at any solutions for these hurdles. However, it endeavors to provide the essential points of context vital for any future evaluation of the complex matters involved in the discussion of INGOs' normative position by either state officials, international civil servants, academics or INGO activists.

The issues of registration, confirmation and selection of organizations, mainly reflected in the years of debates regarding the composition and *modus operandi* of an international 'Central Bureau', gained growing significance over time. These issues repeatedly failed the initiatives to provide INGOs with an international legal personality or a certain status under international law. They proved to be politically and legally insoluble hurdles. They exposed to what extent the underlying views of INGO forums and activists (mostly led by enthusiastic academics) conflicted with those of states and IGOs, in relation to the normative composition of the international (legal) community. Thus, it was generally acknowledged that the problems raised by the legal status of INGOs had to be looked at from the point of view of reshaping the structure and organization of the international community, and that the rise of the 'transnational private sector', characterized by spontaneity and variety, constituted a genuine challenge to the firm association of nation-states.

As we have seen, under present conditions (i.e. the growing numbers of INGOs, the fact that there is yet no common definition for the 'internationality' requirement of INGOs, the growing mistrust of states and the disinterest of INGOs themselves), there is hardly any reason to believe that initiatives that continue to deal head-on with these difficult issues – like the ILA scheme, will gain more success than in past attempts. On the other hand, initiatives such as the Guidelines and the Charter seem to be more adaptable to the sequence of attempts to ameliorate the normative position of INGOs. These initiatives, based on the detachment of questions of role and function from formal legal status, seem to complement each other, as well as existing mechanisms, such as the consultative status arrangements. In this way, these initiatives seem to provide the most practical solutions, under present international circumstances, for the many concerns and complexities incurred due to the growing involvement of INGOs in global governance.