

Non-State Actors in law-making and in the shaping of policy

**On the legality and legitimacy of NGO participation
in international law**

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Introduction

The role of Non-State Actors¹ is one of the most discussed issues within scientific debates over the globalisation phenomenon. Literature on the theme from international law, political science, sociological and economical perspectives has significantly increased since the turn of the millennium.² In international law the participation of Non-State Actors in evolving the legal system is no new phenomenon. The Red Cross Movement's influence on humanitarian international law or the American Peace Movement's impact on the first drafts for the Covenant of the League of Nations are only two very famous historic examples of a successful lobbying in international politics by Non-State Actors. The recourse to expertise from private actors within the framework of organised intergovernmental tasks has a long tradition, as well. Already international administrative unions in the 19th century, the precursors of today's international organisations, experimented with forms of integrating private expertise into supranational regulating activities.³

Nonetheless, it is justified to presume that processes of economic, political and cultural globalisation have had a dynamic impact on the further development and change of the Non-State Actors' role in shaping politics and law. Literature, with a view to their increased importance, partly refers to an end of state sovereignty due to the process of globalisation.⁴ Therefore the intensive scientific debate at the same time always deals with the influence of government policy on sectoral societal processes, that seem, to a large extent, to have withdrawn from the sphere of influence of individual states due to an internationalisation.⁵

¹ Non-State Actors in the sense of this study are organisations which are independent from the state and have not been established by intergovernmental agreements.

² With an overview on literature from an international law perspective: G. Dahm / R. Wolfrum, *Völkerrecht*, § 107; from a point of view of Governance Research for further reference: G.F. Schuppert, "The Changing Role of the State Reflected in the Growing Importance of Non-State Actors", in: G.F. Schuppert (Hrsg.), *Global Governance and the Role of Non-State Actors*, 2006, 203-239 and D. Held (Hrsg.), *Global governance and public accountability*, 2007.

³ G. Jellinek, *Die Lehre von den Staatenverbindungen*, 1882, 158-172.

⁴ S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, 1996.

⁵ See, on International Economic Law.: A.v. Bogdandy, "Law and politics in the WTO. Strategies to cope with a deficient relationship", *Max Planck yearbook of United Nations law* 5 (2001), 609-674.

Thus, the theme Non-State Actors conflates at least three discourse strands that can be differentiated:

- First, the technical issue, in how far the current integration of NGOs in international law has had an influence on the general legal status of Non-State Actors, and has called into question the conventional teaching from subjects of international law.
- Secondly, within the framework of the governance debate the often raised functional need for an expertise of Non-State Actors in classical intergovernmental institutions and other regulation entities, as e.g. in so-called „Global Public Private Partnerships“ or informal coordination mechanisms. Within this context, it is about new forms of an integration and participation of Non-State Actors in the internationalised law-making and development of policy with the aim of increasing the institutions' efficiency.
- A third discussion strand relates to the issue of democratic governance beyond the classical nation-state. The shift of political decision centers from a sovereign individual state to intergovernmental and supranational institutions has put the issue of legitimacy on the scientific agenda. The more intensive participation of Non-State Actors in these institutions is being evaluated differently in terms of legitimacy. It can be understood as a democratisation and necessary pluralisation of the international law-making process. At the same time such a tendency can as well be regarded as depriving democratically legitimate governments of their power.

This study circumscribes the issue of the role of Non-State Actors as follows: first, large parts of the study merely focus on activities of non-governmental organisations (NGOs), i.e. on non-profit private actors as a sub-group of the category Non-State Actors. Furthermore, it focuses significantly on law-making activities within the United Nations (UN). This area, limited due to organisation matters, and illustrated by an example from real life, however, aims to create a cross section of the above-mentioned debated three question fields (legal status, functional involvement of private expertise/issue of democracy).

The study divides into three parts. In the beginning, in the introduction, functions, strategies and agendas of Non-State Actors are illustrated (I). The main part then deals with the legal status within international law and the current involvement of NGOs in law-making processes within the UN. The results are assessed from a perspective of international law and democracy theory (II). The last part examines NGOs' importance for the validity and enforcement of international law (III).

I. Functions, strategies and agendas of Non-State Actors

The phenomenon „Global Governance“, understood as the proliferation of international and supranational regulation institutes, has opened to Non-State Actors new ways of acting.⁶ Two reasons can be mentioned here: first, the concomitant increase in a functional requirement for private expertise and acceptance due to the emergence of new international and supranational regulation structures; secondly, a more and more clearly articulated counter-reaction from civil society to certain supranational regulation structures, the economic and social consequences of which are being branded by a number of Non-State Actors as “unjust”. The heterogeneous group of Non-State Actors in so far makes a double profit from new governance structures. In a hitherto unknown way, it participates in many intergovernmental and supranational law-making processes, and at the same time organises a political resistance against certain more and more intervening regional and global regulation structures.

1. The functional need for an expertise and acceptance of Non-State Actors

New regulation forms have increased the need to involve Non-State Actors. So-called „Global Public Policy-Networks“, as the „Global Commission on Dams“, the „Global Fund to Fight Aids“, or also the „UN –Global Compact“, are institutions that from the very beginning involve Non-State Actors besides state actors with at least equal rights in the structure.⁷ What these regulation forms have in common is that they refrain from an international foundation statute, thereby withdrawing from state organs the sole rule over the institute's basic structure. International Sports- and Employers'

⁶See G.F. Schuppert, “The Changing Role of the State Reflected in the Growing Importance of Non-State Actors”, in: G.F. Schuppert (Hrsg.), *Global Governance and the Role of Non-State Actors*, 2006, 203-239, (211).

⁷W.H. Reinicke, *Global public policy. Governing without government?*, 1998; on governmental networks: A.-M. Slaughter, *A new world order*, 2004.

Associations are another example for Non-State Actors with their own substantial transnational power of regulation. These are forms of self-regulation through internally defined standards, as for example in combating doping or international treaty and accounting standards, developing without the state's influence.⁸ Often national law takes up these standards due to a lack of one's own norms, and gives them a sovereign power of enforcement.⁹ The need for a specific sectoral expertise becomes especially clear in the various manifestations of "self-regulation".¹⁰

This functional need for the involvement of Non-State Actors can also be seen in classical international organisations, that have an international foundation statute. This requirement is nothing new. The first technical administrative unions of the 19th century, that are regarded as the predecessors of today's international organisations, depended on integrating experts into drawing up standards.¹¹ Since regulation issues within environmental law, economic law and new technologies have become more complex, the private actor's involvement into these areas has also further intensified. The Intergovernmental Panel on Climate Change, established by the United Nations Environment Programme and the World Meteorological Organisation, this year's winner of the Nobel Peace Prize, is, for example, an institution consisting of independent scientists. Their task is to summarise the worldwide accessible knowledge on global warming in politically utilisable reports.

International organisations, like the ILO or the OECD, also engage representatives of trade unions and Employers' Associations in their regulation activities.¹² NGOs with specific expertise also have an advisory status within the framework of the UNESCO Convention Concerning The Protection Of The World Cultural And Natural Heritage, and participate in the award of the World Heritage Status for a specific cultural heritage. The same applies to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Within the UN human rights protection

⁸G. Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, in: G. Teubner (Hrsg.), *Global law without a state*, 1997.

⁹D. Lehmkuhl, "Der lange Schatten staatlichen Rechts. Verrechtlichung im transnationalen Sport", see *Verrechtlichung - Baustein für Global Governance?*, 2004, 179 - 197.

¹⁰ On private regulatory networks: J. v. Bernstorff, *The Structural Limits of Network Governance*, in: C. Joerges (Hrsg.), *Transnational governance and constitutionalism*, 2004, 257-281.

¹¹G. Jellinek, *Die Lehre von den Staatenverbindungen*, 1882, 158-172.

¹²L. Dubin / R. Nogellou, "Public Participation in Global Administrative Organisations", *3rd Global Administrative Law Seminar* (June 15-16 2007).

system, institutions with monitoring tasks are more and more dependent on the expertise and knowledge of a country from international and national NGOs.¹³ Within the European area, the European Commission with the help of the so-called comitology procedure, keeps close working contacts with industrial associations, scientists and, on a larger scale, also with NGOs.¹⁴

In literature on political science, Haas has pointed out that around national and international institutions so-called „epistemic communities“ emerge.¹⁵ These are networks that due to shared scientific and normative premises and in having parallel goals, have an effect on these institutions. An example for such an epistemic community are international experts in the field of bioethics. The UNESCO, for example, has established a Bioethics Committee, where medical experts, biologists, pharmacists and lawyers, who have been delegated by member states, who are, however, not bound by instructions, set up new standards for bioethical research, which are thereafter transformed into universal standards by the UNESCO. What it is mainly about is the expertise of Non-State Actors, but also increasingly, about raising the acceptance for regulation products among the decisive private actors.¹⁶ The involved actors, having a good network, often also participate in setting up standards within the framework of the Council of Europe or other international institutions dealing with bioethics. Afterwards they lobby national specialist bureaucracies to pass these new standards into binding national right.

In summary, it can be said that most global and regional regulation and norm-setting institutions have a strong functional requirement for integrating non-state actors.¹⁷ At the same time, however, particularly NGOs, by differentiating themselves from, and by criticising certain international institutions, as e.g. the WTO or the G8 summits, have gained more influence and sharpened their profile during the last decade.

¹³ E.H. Riedel, „The Development of International Law: Alternatives to Treaty Making? International Organisations and Non State Actors“, in: R. Wolfrum / V. Röben (Hrsg.), *Developments of International Law in Treaty Making*, 2005, 304.

¹⁴ C. Joerges (Hrsg.), *EU Committees. Social Regulation, Law and Politics*, 1999.

¹⁵ P.M. Haas, „Introduction: Epistemic Communities and International Policy Coordination“, *International Organisation* 46 (1992), 1-35.

¹⁶ For general information see, H.H. Koh, „Transnational Legal Process“, *Nebraska Law Review* 75 (1996), 181-207.

¹⁷ L. Dubin / R. Nogellou, „Public Participation in Global Administrative Organisations“, *3rd Global Administrative Law Seminar* (June 15-16 2007).

2. Non-State Actors and the „Universal Justice Agenda“

A second important factor for the increased influence of Non-State Actors within shaping national and international politics is the emergence of a common action programme of civil society, in this paper called „universal justice agenda“. It focuses mainly on the protection of human rights and the protection of environment. The transition, that with the end of the Second World War had been vehemently started in international law, from a primarily transnational law to universally acknowledged individual rights with the therein embodied universal values,¹⁸ has become more dynamic since the turn of the millennium. This process goes back to worldwide mobilising tendencies from civil society, that are accompanied in many countries by traditional social forces, as e.g. Christian churches. National and transnational Non-State Actors, gaining more and more influence, use new globalised means of communication and transportation. The world has become smaller for them too, thanks to technical products and services being offered on globalised markets. The movement that has emerged, deals with issues like the protection of human rights and ecological sustainability, and has a more complex perspective on international law.

On the one hand, civil society organises a resistance against institutionalised law, as for example in the case of the WTO or the OECD¹⁹; on the other hand, civil society claims as vehemently an expansion of institutionalised legal procedures and the implementation of existing obligations in the field of human rights and the protection of environment. For these Non-State Actors there are „good“ and „bad“ international institutions. Human rights and the principle of sustainable development become a universal political benchmark for that movement. NGOs in this way repoliticise the international law discourse.²⁰ International law thus does not anymore develop solely in exclusive, diplomatic negotiations, but, on a large scale, in politics, is initiated outside intergovernmental forums.

¹⁸ M. Zürn, *Global Governance as an Emergent Political Order –The Role of Transnational Non-Governmental Organisations*, in: G.F. Schuppert (Hrsg.), *Global governance and the role of non-state actors*, 2006, S. 31-42.

¹⁹ G. Metzges, *NGO-Kampagnen und ihr Einfluss auf internationale Verhandlungen. Das Multilateral Agreement on Investment (MAI) und die 1997 OECD Anti-Bribery Convention im Vergleich*, 2006.

²⁰ M. Zürn, *Global Governance as an Emergent Political Order –The Role of Transnational Non-Governmental Organisations*, in: G.F. Schuppert (Hrsg.), *Global governance and the role of non-state actors*, 2006, 41.

Governments can not completely withdraw from the political dynamic of this global movement. Amnesty International's Secretary-General is being received worldwide by heads of state. The exchange between ministries and civil society has further intensified especially in Western States. No government in the world would today openly disclose that it deliberately violates human rights and promotes the destruction of the environment. International law-making changes through this process. NGOs meanwhile have become agenda-setters for the grand human issues and claim law-making activities from the states.

Various strategies of direct and indirect influence on political processes are being used by NGOs.²¹ They comprise the classical lobbying of governments and members of parliament, as well as effective publicity campaigns, urgent actions in individual cases, conferences and big events, as e.g. demonstrations and counter summits. Since during multilateral negotiations often several governments face the same pressure coming from civil society, it is often simply a question of time until a state undertakes a diplomatic effort. To reject this concrete proposal on law-making, as a rule, seems to be very hard for other governments, that up until that moment tried to withstand the pressure coming from civil society.

Institutions like the UN have tried to cushion such developments with the help of new participation and decision rights for non-governmental organisations and to use them for themselves. In global and regional institutions that regarded this as unnecessary, the claim for participation changed into a resistance partly taking on violent forms: „You are G8, we are 8 billions“ protest groups scandalised in Genoa. The growing mobilisation caused by civil society thus has disclosed a deeper rooted problem. According to the view of many public interest actors, the classical intergovernmental structure of international policy making now only in a limited way is suited to serve the growing legitimacy claims to transnational regulation and the shaping of politics. The growing regulation depth at international and regional institutions, that, as in the case of the world trade legislation and the European Union has a direct effect down to

²¹See T. Brühl, *Nichtregierungsorganisationen als Akteure internationaler Umweltverhandlungen. Ein Erklärungsmodell auf der Basis der situationsspezifischen Ressourcennachfrage*, 2003, 76-82.

the local level, calls for a suitable democratic control and participation.²² In international law this issue of legitimacy had been handed over to the individual states. In what way the state domestically legitimates its participation actions in the transnational area, according to the classical international law, was left to the discretion of the state itself.²³ Since foreign policy also in western democracies traditionally has been understood as a domain of the executive, parliamentary forms of participation or the participation of civil society, have often been only weakly developed in terms of determining national positions for international negotiations.²⁴

From the point of view of civil societies this created a double participation vacuum. Both nationally and at the international level, institutional participation and decision rights for Non-State Actors with a „Universal Justice Agenda“ have only weakly developed. The situation was different in terms of scope for influence for commercial interests, that through specialised ministries already exerted a strong influence and had a privileged access to governments. NGOs have called for new participation forms at both levels in the last decades. And national parliaments, as well, have called for a direct participation in formulating regional and universal policies.

The following part of the paper examines the consequences of the tendencies described above on the international legal system and the democracy issue.

II. NGOs, International Law and Democracy

1. Definition of terms and Subjectivity in International Law

Non-State Actors in the sense of this study are organisations that are independent of the state and that were not created by intergovernmental agreements. The study shall differentiate within this group between non-commercially orientated NGOs and profit-orientated actors, i.e. particularly from transnationally operating firms and their

²²On the question of democracy: A.v. Bogdandy, “Globalization and Europe. How to square Democracy, Globalization, and International Law”, *European journal of international law* 15 (2004), 885-906.

²³ L.F. Oppenheim, *International law. A treatise*, 1905, 403.

²⁴ On the fewer possibilities for control by national parliaments: R.M. Kößler, Henning, *Chancen internationaler Zivilgesellschaft*, 1993, 211; on the German Bundestag’s participation in international law-making, demanded by the constitutional law, see C. Möllers, *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*, 2005, 422-423.

associations. The study will not refer to the question of the role of individuals and groups as Non-State Actors in the field of human rights, the protection of minorities, the humanitarian international law and the international criminal law.

The scientific definition of NGOs is contentious.²⁵ Underlying this paper are the UN criteria for defining NGOs.

NGOs, according to the ECOSOC principles, must be ideally and financially independent of state organs, and shall strive for welfare aims in conformity with the spirit of the Charter of the United Nations. They are to allow for individual and collective membership and are to have a formalised organisational structure.²⁶ This also concerns particularly churches and other religiously orientated associations, which have gained more and more influence in the field of protection of human rights.²⁷

The issue of subjectivity in international law of Non-State Actors is evaluated differently in the literature on international law. Subjectivity in international law generally implies the capacity of a bearer to have rights and duties.²⁸ Meanwhile it has become recognised that, besides states as the “original” subjects of international law, international organisations and individuals, as well, may have a derived and limited subjectivity in international law. Moreover, a number of “atypical” subjects of international law have become acknowledged, as e.g. the Holy See, the ICRC and the Maltese Order.²⁹

Most of the literature continues to assume that NGOs are ascribed no subjectivity in international law.³⁰ This approach, however, becomes more and more relative.

Delbrück and Wolfrum assume with regard to NGOs’ participation rights within the

²⁵ G. Gremmelspacher, *NGOs und Staaten. Die Partizipation transnationaler nichtstaatlicher Organisationen an staatlichen Entscheidungsprozessen*, 2005, 3.

²⁶ ECOSOC Res. 1296 (XLIV) dated 23 May 1968 §§ 8-14.

²⁷ G. Gremmelspacher, *NGOs und Staaten. Die Partizipation transnationaler nichtstaatlicher Organisationen an staatlichen Entscheidungsprozessen*, 2005, 78-83.

²⁸ A. Verdross / B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, 1984, 22.

²⁹ K. Hailbronner in: W. Vitzthum / M. Bothe (Hrsg.), *Völkerrecht*, 2007, 176-178.

³⁰ M. Herdegen, *Völkerrecht*, 2007, 61.

framework of the UN that, although they are no subjects of international law, an „indirect“ inclusion in the international legal system can still be proved:

„This status could be paraphrased with the term of a confined, secondary and indirect subjectivity in international law.“³¹

Ipsen and Hobe speak of a limited subjectivity within international law³², in so far as it depends upon whether and to what extent a respective NGO, in an individual case, is assigned rights and duties by international law.³³ As is shown in the case of the ICRC, NGOs have already in the past been assigned certain rights by international law treaties. Also at regional level, NGOs in the meantime have been granted own formal rights of complaints in quasi-judicial monitoring processes concerning human rights.³⁴ Although these tendencies, which are to be described in the following part, do not result in a general acknowledgement by international law to constitute a separate subjectivity in international law, an indirect and limited –through international treaties transmitted –subjectivity in international law of NGOs is feasible. As this study is going to show, there are numerous examples in the practice of international organisations for a tendency to grant Non-State Actors participation rights.

2. NGO participation in international law-making - The UN as a trailblazer in the field of NGO participation

a) Overview and principles

Subject to Art. 71 of the UN Charter, the ECOSOC may undertake appropriate actions with regard to consultations for nongovernmental organisations. On this basis, the ECOSOC has considerably intensified its practice of NGO participation. Appropriate rules are laid down in most of the UN special organisations' statutes. More than 1,500 NGOs have a consultative status at the UN, enabling them to have access to documents, and during special conferences, access to the UN building or respective

³¹ G. Dahm / R. Wolfrum, *Völkerrecht*, 240.

³² K. Ipsen / E. Menzel, *Völkerrecht*, 2004, § 1, Rz 14.

³³ S. Hobe, „Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht“, *Archiv des Völkerrechts* 37 (1999), 152-176, (172).

³⁴ Cf. Additional Protocol to the European Social Charter dated 9.11.1995, under Art. 3 granting the right to collective complaints (ILM 34, 1995, p. 4457).

conference rooms.³⁵ NGOs are divided into three different categories by the UN, according to their specialisation and representativeness. There is a general, special and so-called „Roster“ consultative status. The NGO's participation rights within the framework of the ECOSOC depend upon the categorisation into one of these three categories. NGOs with a general consultative status may submit written statements, may give oral presentations during meetings on specific issues upon invitation of the respective UN bodies, and may propose items for the provisional agenda.³⁶

Institutionally especially remarkable are various forms of participation at permanent UN organs in the field of human rights. In this way, NGOs had the possibility on behalf of victims to file complaints that appear to reveal a consistent pattern of gross and reliably attested violations of human rights at the Sub-Commission of the Commission on Human Rights. A comparable possibility for complaints exists at the UNESCO Committee on Conventions and Recommendations. NGO complaints meanwhile also have become acknowledged in the regional protection of human rights, as e.g. in the Additional Protocol to the European Social Charter, and pursuant to Art. 44 Inter-American Convention on Human Rights.³⁷ The introduction of these collective complaints has significantly spurred the dynamic of these mechanisms.

In environmental law, a progressive step has been made by the UN Economic Commission for Europe 2005 concerning the NGO participation. The Commission, in its „Almaty-Guidelines“, has agreed to apply them with regard to NGO participation by promoting the principles of the Aarhus Convention. This Convention, that was developed under the aegis of the UN Economic Commission for Europe too, provides for extensive participation rights for NGOs in the field of protection of the environment, or for other in environmental issues interested persons from the public.³⁸ This encompasses a full and active provision of public information on the objects of negotiation via modern means of media to all interested NGOs and

³⁵ R. Wedgwood, „Legal personality and the role of non-governmental organisations and non-state political entities in the United Nations system“, *Non-state actors as new subjects of international law* (1999), 21-36, (23).

³⁶ ECOSOC-Res. 1996/31 dated 25. July 1996; see B. Simma / U. Nations (Hrsg.), *The Charter of the United Nations. A Commentary*, 1994, 905 ff.

³⁷ G. Dahm / R. Wolfrum, *Völkerrecht*, 241-242.

³⁸ BGBl Volume 2006, Part II, Nr. 31, dated 15 December 2006.

individuals.³⁹ Furthermore, NGOs due to the Almaty-Guidelines now always have free access to sessions and documents during all phases of the decision-making process in international forums on issues of environmental protection. States, in addition, agree to take into consideration the result of the - according to the guidelines as diversely as possible developed - NGO participation.⁴⁰

These newer steps of self-obligation, within the framework of the UN, go back to developments at large UN Conferences on international policy developments in the 1990s. Pacesetters for an intensified participation of NGOs were the Conference on Environment and Development, Rio 1992; the World Conference on Human Rights, Vienna 1993; the World Summit for Social Development, Copenhagen 1995; and the World Conference on Women, Beijing 1995. These conferences raised a hitherto unknown interest in national and international NGOs.⁴¹ More than 4,000 NGOs were represented at the World Conference on Women in Beijing.⁴² In the 1990s, the so-called counter summits or forums established. They constitute independent NGO events besides the actual intergovernmental conference. The events' goal is to monitor the representatives from governments, and to have an impact on national negotiation positions.⁴³ The international media's interest in the big event is used in order to point out the negotiation outcomes, which in the NGOs' view often remain deficient, to national publics. There is also a direct interaction between government representatives and participants in the counter forum through NGO representatives participating in plenary and committee sessions, as well as through invitations of government representatives to events at the counter conference.

The question of precise modalities of the NGO participation at intergovernmental negotiations up to date has been and will be negotiated anew at each UN consultation

³⁹ Almaty Guidelines (IV), UN-Dok. Nr. ECE/MP.PP/2005/2/Add.5

⁴⁰ Almaty Guidelines (V/ 37), UN document Nr. ECE/MP.PP/2005/2/Add.5

⁴¹ F.W. Stoecker, *NGOs und die UNO*

die Einbindung von Nichtregierungsorganisationen (NGOs) in die Strukturen der Vereinten Nationen, 2000, 188-194.

⁴² UN-Chronicle, December, No. 4, Vol 32, 1995, S. 29; see D. Otto, "Nongovernmental organisations in the United Nations system the emerging role of international civil society", *Human rights quarterly* 18 (1996), 107-141, 120.

⁴³ F.W. Stoecker, *NGOs und die UNO*

die Einbindung von Nichtregierungsorganisationen (NGOs) in die Strukturen der Vereinten Nationen, 2000, 187-188.

conference.⁴⁴ It is a question of physical participation in sessions, the access to documents, and the right to speak. At the World Conference on Human Rights in Vienna, in 1993, there were for example harsh political debates between a group of government representatives and NGOs.⁴⁵ Initiatives from states with the aim to fully exclude NGOs from intergovernmental negotiations failed. In summary it can be stated that NGOs with respect to their participation rights can count on bigger support from western states vis-à-vis from most countries of the global South and Asia. In human rights issues, particularly China and many African states, have a critical attitude towards intensive forms of NGO participation. The EU sees itself as a pioneer in promoting participation rights for NGOs in the UN, and in the past has regularly committed itself to promoting participation of NGOs at intergovernmental negotiations within the framework of the UN.

The big UN consultation conferences mentioned above have significantly contributed to an emergence of transnational NGO networks. It is not by coincidence, that this development in terms of time has been accompanied by big progresses in the field of internet technology and falling flight prices. A global civil society, which can interact mainly in a spontaneous way, on certain occasions, however, also in an organised manner, is therefore itself a phenomenon of globalisation.

NGOs have, apart from the grand political consultative conferences, in the 1990s, increasingly engaged in the field of universal law-making. At the Anti-Landmine Conference in Ottawa in 1997 and during the negotiations on the International Criminal Court; Rome 1998, they did not only considerably contribute to the start of negotiations, but also influenced the concrete shaping of these international law treaties. The following example of the draft for a new UN Convention to be signed, at the beginning of 2007, on the rights of persons with disabilities shall demonstrate what forms the NGOs participation in international law-making can develop.

⁴⁴ Only accreditation since 1996 has become standardised (Res. 1996/31), Ibid. at 195.

⁴⁵ F. Azzam, "Non-Governmental Organisations and the UN-World Conference on Human Rights", *The Review (The International Commission of Jurists)* 50 (1993), 89-100, (98).

b) An example from practice: NGO participation in drafting the UN Convention on the Rights of Persons with Disabilities (2001-2006)

This UN Convention on human rights does not only go back to an international political mobilisation campaign from national and international non-governmental organisations, but from the very beginning one of the remarkable features of the UN negotiation process was the intensive participation of groups representing persons affected.⁴⁶ The responsible negotiation panel experimented with innovative forms of NGO participation, which are to be examined closer and evaluated below.

Through a resolution submitted by Mexico to the UN General Assembly⁴⁷, in 2001, an open ad-hoc committee (AHC) in the format of the General Assembly was established as a negotiation panel for all member states and observers of the UN with the purpose to discuss proposals for an international convention. Altogether eight sessions were held in New York, for 2-3 weeks respectively. Already the drafting of the first official treaty blueprint clearly showed the AHC' preparedness to allow new forms of the civil society's involvement. A working group, installed by the AHC and consisting of 40 people, that was in charge of drafting the first blueprint, comprised 27 government representatives, 12 representatives from associations for disabled people, and other NGOs from the field of disability policy, as well as a representative from an independent national human rights organisation. The NGOs, after an internal voting, could appoint respective representatives for the 12 seats allocated to them themselves. The civil society's representatives participating, most of them living themselves with a handicap, had the same speaking and voting rights as the government representatives. Furthermore, some states gave mandates to other representatives of the concerned civil society for the 27 government seats.

This, to a large extent, formal equalisation of civil society representatives in working out the first official draft treaty had a considerable impact on its contents. The working group's progressive draft remained a central point of reference during the

⁴⁶ The author, as a representative of the Foreign Office was a member of the German government delegation at the negotiations to the Convention. Evaluations given here are the author's personal view.

⁴⁷ GA resolution 56/168, going back to a proposal from Mexico

subsequent negotiation rounds at the AHC, that thereafter again took place in the General Assembly format. Government representatives presented there new proposals as amendments to the working group's draft. If no agreement over an amendment could be reached, the chair referred back to the working group's original draft.⁴⁸

Also in the plenum of the AHC, NGOs' representatives during the whole course of negotiations retained an above-average high influence on the negotiations. Already at its first session, the AHC determined the general modalities concerning NGOs participating in its sessions at the General Assembly. According to them, the NGOs accredited for negotiations were hereby enabled to participate in all public sessions of the AHC and to submit statements. In addition, the provision stipulated that in cases of lack of time appointed speakers from civil society could make statements. In practice, during the AHC sessions, the finally more than 600 accredited NGOs often availed themselves of the opportunity. Almost always they also spoke with one voice concerning the contents. Mostly, the NGOs' statement was made by a representative who, due to a specific handicap had himself or herself in the past become a victim of violations. These recurrent voices of people affected or their representatives significantly marked the discourse climate within the AHC.

Concerning the summarised common position of the NGOs on individual articles, prevailing was the voice and final decision of those special associations, to whom the respective regulation was most pertinent. The interest of a specific group of disabled people (e.g. group of blind people, mentally handicapped people living in a disabled people's home) hereby became the common cause of all non-governmental organisations. This internal accomplishment in terms of organisation on the part of NGOs significantly increased their influence on individual regulations in the treaty text.

Obstinacy regarding governmental positions, that had met the resistance of the NGOs, aggregated in this way, ultimately meant that delegations were required to give more

⁴⁸ The giving of additional reasons for every new text and every new amendment, after the first draft had been passed, lay with the state that applied for it. The obligation to give additional reasons, permanently increased with time, in so far as by defining the end of the negotiation, the pressure increases to only submit proposals which have a real perspective of being passed by consensus, and are of vital interest to the state applicant.

additional reasons. Since almost always some states concurred to the NGOs' position, the pressure to change one's position during the course of negotiations constantly increased.

The chair, furthermore, summarised the respective negotiation results on individual articles in the plenum only after not only the states had given their statements, but also, following them, the NGOs. The interim result stated thereafter by the chair, was, as a rule, a synthesis of the majority opinion of government delegations on the one hand, and NGOs on the other. The chair, mostly over night, on the basis of the interim result, set up a new draft version of the negotiated article. This practice significantly differed from other UN bodies, where NGOs could raise their voice only after the operative conclusion of a respective round of negotiation, i.e. at a time when the respective negotiation result had already been decided upon.⁴⁹ The dialectically structured negotiation process and the cooperation on equal terms in working out the first overall draft enabled the chair to represent the view of the concerned much more in the treaty text, than it would have been possible otherwise. The negotiating diplomat is constantly coerced to take the view of the concerned into account. This view is then, although not fully, but to a greater extent than normally would be the case, included into national positions.

The negotiations, however, also revealed disagreements among NGOs, in which mostly those NGOs asserted themselves that were the strongest represented regarding financial and staff resources at their disposal. As a rule, these were NGOs from the West. The underrepresentation of NGOs from developing countries had significant ramifications. To cope with this issue, the UN, as in other conferences too, had created a fund, voluntarily financed by member states, covering the travel expenses for less financially strong non-governmental organisations. This insufficiently financed fund could only in a limited way even out the North-South asymmetry, though.

⁴⁹ For example in the old UN Human Rights Commission

All in all, during negotiations it became clear that charismatic single persons from partly small western special associations could influence the treaty text above-average. So, for example, for one treaty article it had the effect that a proposal to this article, on which consensus might be reached, explicitly stating the - by many NGOs - demanded prohibition for forcing medication on disabled persons, finally completely failed due to the continuous opposition from a small maximise-orientated operating group of NGO representatives.

The UN General Secretariat was in charge of selecting and accrediting NGOs for the sessions, applying the ECOSOC criteria for accrediting NGOs overall very generously.⁵⁰ In order to be able to speak as a concerned person at the negotiations, the first requirement was a UN administrative decision referring to the respective NGO, against which, incidentally, there was no legal protection.

This example from practice shows how intensive the initiative and involvement of Non-State Actors by now have become in international law-making. We almost can not imagine multilateral practice in the field of human rights and environmental law without them anymore. The following part is to discuss abstractedly the issue of participation rights and legitimacy of participation in general. It examines both the already mentioned benefits of diplomats taking over the other part's view and issues of an asymmetric representation in the field of NGOs.

3. NGO Participation and the legitimacy issue

From a perspective of the theory of legitimacy, the involvement of NGOs is often regarded as a means of „democratising“ international law-making processes.⁵¹ The intensified participation of civil society actors leads to a higher transparency in

⁵⁰ critical on the practice: Felix William Stoecker, *NGOs und die UNO*, Frankfurt 1999, 194-210; and general: Caroline E. Schwitler Marsiaj, *The Role of International NGOs in the Global Governance of Human Rights, Challenging the Democratic Deficit*, Schweizer Studien zum Internationalen Recht, Band 121, Genf 2004, § 14.

⁵¹ C.E. Schwitler Marsiaj, *The role of international NGOs in the global governance of human rights. Challenging the democratic deficit*, 2004, 270-272; F.W. Stoecker, *NGOs und die UNO. Die Einbindung von Nichtregierungsorganisationen (NGOs) in die Strukturen der Vereinten Nationen*, 2000, 99-121; on the EU with a vision of a participatory democracy: J. Cohen / C. Sabel, “Directly-Deliberative Polyarchy”, *European Law Journal* 3 (1997), 313-342.

international negotiation forums.⁵² Literature in connection with the legitimacy issue, furthermore, looks into whether a right of participation can be derived from general norms in international law, and if this is the case, what the contents of such a right entails in detail. The following part discusses the issue of participation at these two levels: first, the question whether international law already knows a general right for NGOs to participate in international law-making processes in their specific field of activity; following this, the question shall be examined to what extent, from a democracy theory perspective, the NGO participation increases the legitimacy of international law-making.

a) Does a general right to NGO participation exist?

From a judicial point of view, the above-mentioned participation rights for non-governmental organisations at the UN Convention on the rights of persons with disabilities are internal rules of procedure of a temporary sub-organ of the UN General Assembly.⁵³ The unanimously adopted decision of the organ introduced innovative elements, but on the basis of the respective General Assembly's resolution, i.e. calling upon the AHC to include non-governmental organisations into negotiations. Being special rules of a sub-organ of the UN General Assembly, these innovative rules of procedure can not be generalised per se.

What can be taken into consideration is the right of peoples to self-determination as a general participation right. Since its introduction at the international level by Woodrow Wilson before World War I., it has a democratic, although diffuse, meaning and has been firmly laid down in the joint Art. 1 of both UN Human Rights Pacts dated 1966. The legal entity is not the state, but rather the entity of the „people“ being independent thereof.⁵⁴ How the „self“ or the people are to be precisely defined according to this right is not unambiguous. What is certain, however, is that the right to self-determination according to interpretations so far,

⁵² C.E. Schwitter Marsiaj, *The role of international NGOs in the global governance of human rights. Challenging the democratic deficit*, 2004, 281-282.

⁵³ The respective provision of the AHC clarifies that these rules do not touch upon other general UN provisions on NGO participation.

⁵⁴ Heintze, in: K. Ipsen / E. Menzel, *Völkerrecht*, 2004, §§ 27 ff.

does not include an individual self-determination component encompassing smaller private law organisations, as the NGOs discussed here.⁵⁵

Another way for the derivation of a general participation right for NGOs in international law-making could arise from the guarantees of individual rights in the UN Human Rights Pacts. The right to freedom of expression, the right to freedom of information, assembly and association, as well as the right to equality and non-discrimination, are the legal basis for the establishment of a free civil society. Without a guarantee of these human rights NGOs can not operate. The prerequisite for an emergence of well-developed civil society structures are juridified individual possibilities for an expression of opinion and self-organisation. In the Human Rights Pacts, however, there are no special participation rights in international or national law-making granted to NGOs. Human Rights are primarily just the basis for individual rights for an emergence of civil society structures.

However, an exception from this rule at the universal level is the above-mentioned new Convention on the rights for disabled people. NGOs from the area of disabled people were not only intensively engaged in the negotiations, but laid down in the Convention, they were given the right to be involved in all measures of implementation by the state. For the first time, such a state obligation was enunciated under the general principles of a universal Human Rights Convention.⁵⁶ This progressive step towards a binding obligation to participate in international law can not yet be generalised. It shows, however, a tendency in universal human rights protection to involve representatives from marginalised groups of people in international and national law-making processes in increasingly juridified procedures. Another example for granted participation rights is the above-discussed Aarhus Convention.

⁵⁵ If this, however, is assumed according to Volker Röben, the question arises how in conflicts between non-governmental organisations and government representatives of the same country the individual component and the collective element, which is exercised through representatives legitimised within the state, can be theoretically balanced off. Cf. V. Röben, "Proliferation of Actors", in: R. Wolfrum / V. Röben (Hrsg.), *Developments of international law in treaty making*, 2005, 524.

⁵⁶ Art. 3 of the Convention

Hence, recently, specific participation rights for NGOs, especially in the field of the protection of human rights and environmental law, have become an integral part of progressive international law instruments. Nevertheless, these tendencies hardly allow to derive a general right stipulated in international law for NGOs to participate in international law-making processes. The following part deals with the issue of legitimacy of these involvement tendencies from a democracy theoretical perspective.

b) Is the NGOs' participation legitimate?

The question of legitimacy goes far beyond the scope of the narrow jurisprudential canon of methods. It is not the question of justice and injustice, neither the question of lawfulness of a certain human behaviour, but rather an extra-legal standard that is to be laid down according to the emergence and contents of law. According to Fritz Scharpf's legitimacy concept, that he introduced for the EU, legitimation consists of „Input-Legitimation” and „Output-Legitimation“.⁵⁷ Input-Legitimation is to refer to the procedure during which, in a preparatory stage, decisions are being made within supranational institutions. They are to be assessed with the help of democracy theoretical standards. The term output legitimation, on the other hand, is to define the quality of results of supranational governance acts. It is more than doubtful whether due to the plurality of conflictive interests during practically all political decision-making processes at a global level, a scientific judgment of the „output“ quality or the products of supranational or global regulation can be reached at all.⁵⁸ If this is not the case, though, a connection to a legitimacy judgment seems to be problematic. Due to the lack of a universally shared benchmark for evaluating results of supranational and global decisions, the issue of legitimacy is to be answered exclusively with a democracy theoretical benchmark (input legitimation).

⁵⁷ F.W. Scharpf, *Regieren in Europa - effektiv und demokratisch?*, 1999.

⁵⁸ On jurisprudential criticism: C. Möllers, *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*, 2005, 37-38.

Subject to the traditional model for a national democratic formation of an opinion, NGOs have an important function in the field of aggregation and articulation of interests and claims. They broaden the plurality of represented interests in the „outer“ area of the political system.⁵⁹ The periphery, consisting of associations, parties and NGOs, washes round the center of political decision-making processes with claims, that are sometimes supported with the help of media. In the internal area, those interests and claims are smuggled in through parties into the parliamentary process, where then, in the form of new legal acts, collectively binding decisions are taken.

Sociological research of the 1970s and 1980s has critically examined this model and evolved it.⁶⁰ According to this model, law-making processes are often initiated from and prepared by the political system's centre, i.e. from the governments and administrations themselves. The external area can then only react to these developments. According to that model NGOs only act reactively. Their influence on the themes and the shaping of collectively binding decisions is less vis-à-vis the first model. Luhmann takes these findings as a basis and assumes a power cycle between political decision-makers, the administration and the public. The public influences political programmes, elected politicians take binding decisions, which are then implemented by the administration and are binding for the public.

Habermas acknowledges the role of the political centre in preparing a decision, at the same time he stresses, however, the irreplaceable function of civil society in agenda-setting. The civil society periphery possesses a greater sensitivity versus the political centres in relation to the perception and identification of problematic situations in society.

⁵⁹ B. Peters, *Die Integration moderner Gesellschaften*, 1993, 322-340.

⁶⁰ See G. Gremmelspacher, *NGOs und Staaten. Die Partizipation transnationalen nichtstaatlicher Organisationen an staatlichen Entscheidungsprozessen*, 2005, 88-94.

This concerns particularly the grand ecological and social themes, as e.g. the continuing pauperization of the Third World and problems of the international economic system.⁶¹

„Almost none of these themes has been first addressed by experts of the state apparatus, of big organisations or societal functional systems. Instead they are raised by intellectuals, persons affected, radical professionals, self-appointed advocates etc. From this outermost periphery the themes penetrate journals, interested associations, clubs, professional associations, academies, universities etc., and find forums, citizen’s initiatives and other platforms, before, if necessary, they become the focal point of social movements and subcultures in an aggregated form. They, in turn, can dramatise contributions and stage them so effectively, that the mass media takes it up. Only through controversially being addresses in the media, such themes reach the broader public and are put on the „public agenda“.

Habermas evaluates this influence of civil society on the political system positively. Civil society is the basis for a „liberal public“, that can feed-back the political centre and can prevent the public’s becoming independent.⁶² Public, for Habermas, is conceived of as an intermediary structure, mediating between the political system, on the one hand, and private sectors from the *Lebenswelt* (life worlds) and funktionale Handlungssysteme (functional action systems), on the other hand.⁶³ NGOs, according to this model, are communicative mediators within the medium public between the periphery and the centre of the political system. Without this accomplishment of mediation through a strong liberal public there is no legitimate right according to Habermas’ understanding of democracy.

⁶¹ „This can be proved with the grand themes of recent decades– let us think of the nuclear arms race spiral, of the risks with regard to a peaceful use of nuclear energy, to other industrial facilities or to scientific experiments as genetic research ; let us think of ecological threats caused by an exhausted ecosystem (dying of the forests, water pollution, extinction of species etc.), of the dramatically continuing Third World’s pauperization and problems of the international economic system; let us think of feminism issues, of the increasing immigration with its resultant problems with regard to a changed ethnic and cultural composition of the population etc.“; (analogous translation; remarks from the translator) cited from: J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, 461.

⁶² Ibid., 462-463.

⁶³ Ibid., 451-452.

Even authors like Niklas Luhmann, having a more critical attitude towards civil society groups as a whole than Habermas, do not negate the functional importance of the civil society periphery for the political centre of a representative democracy:

„As state organisations and other political organisations, particularly political parties, permanently coordinate themselves, and as there is a constant change of staff between them, strongly confining the „agenda setting“ and thereby political themes, the necessity for another periphery develops, that sets itself apart from this elaborated centre of the „corporative state“ by higher fragility, but also by greater openness in terms of addressing ostensibly neglected themes“.⁶⁴

In summary, at the national level a correspondence between the system theoretical and the discourse theoretical approach can be noted in so far as NGOs, from a functional perspective, are needed as agenda-setters. Through their cooperation with the media they can broach from the political centre neglected issues in society. The controversial public debates triggered off by this can be taken up by the political centre through parties and parliaments, and can be transformed into political decisions. The periphery, in turn, can react on the implementation of the decision by the administration.

Hence, it is about making visible neglected or, in the political centre deliberately ignored themes.⁶⁵ This assertion is not a normative appraisal of these themes and claims articulated from outside. NGOs prevent that the political system's centre completely seals off and severs connections to private worlds of life. NGOs thus can help to bring dispelled social problems into the focus of the political decision-making process. In this functional sense their activities can have an abstract legitimacy. This weak, and in separate cases refutable, general assumption of legitimacy can even

⁶⁴ N. Luhmann, *Die Politik der Gesellschaft*, 2000, 315.

⁶⁵ U. Beck, *Die Erfindung des Politischen*, 1993, 158; G. Gremmelspacher, *NGOs und Staaten. Die Partizipation transnationaler nichtstaatlicher Organisationen an staatlichen Entscheidungsprozessen*, 2005, 91-94.

then be subscribed to, if the central role for a legitimation of the right, that Habermas ascribes to civil society, is being regarded as normatively overrated.

The presumed legitimacy of NGOs activities in this study refers to their essential role as part of a liberal public in democratic societies. Subject to the assessment made here, the existence of such a strong public is to be preferred instead of its non-existence. As examined above, international law and a big number of national legal systems legalise and stipulate this function of NGOs orientated towards the public by guarantees of human rights freedoms.⁶⁶

In acknowledging this function as a legitimate action within a national framework, no decision has been made so far concerning the issue addressed in the following part, whether NGO participation leads or can lead to a „democratisation“ of international law-making processes in the sense of theories of „deliberative“ democracy beyond the nation-state.

aa) International level – simulated global democracy through NGO participation?

At the international law-making level, the problem of legitimacy of NGO activities is sharper than at the national level. On the one hand, in link with a participation great hopes are attached to a „democratisation“ of international and supranational law-making instances; on the other hand, NGOs become competitors of state representatives who, at least partly, legitimise themselves through a democratically elected government, and whose influence on the negotiation outcome now is not only offset by other state representatives, but also by the NGOs representatives' influence.

The first step therefore shall be to address the question whether the above-examined forms of NGO involvement have the capacity to „democratise“ the international law-making process on their own.

⁶⁶ See above under II. 3 a).

If that were the case, a possible concomitant loss of power of state representatives would be of no consequence anymore. It would be, to a certain extent, replaced by the new, genuine supranational form of democracy.

The most often represented model for democratic policy and law-making outside the nation-state are concepts for a „deliberative“ democracy through a participation of people affected and their representatives in international and supranational law-making activities.⁶⁷ It is not about establishing a world state with a world government and world parliament, where NGOs and individuals could play a role akin to the national level, but about forms of a decentralised institutionalisation of participatory forums as a replacement for the loss of importance of national parliaments in shaping supranational and global policies and law. Deliberation is understood as a public exchange of reasonable arguments at an international level with national and international civil servants and public interest actors on specific political and legal issues. The decentralised and problem orientated deliberation process started by this is to give the decision-makers ideas and is to democratically legitimise the decisions that are to be made in these bodies.⁶⁸ According to advocates of that model of transnational democracy in this way technocratic rule is replaced by „the casual force of the better argument“.⁶⁹

According to such models, intensive forms of NGO participation could democratise supra- and international law-making processes. A partial disempowerment of state representatives caused by this therefore could be get over, since direct deliberative processes become a separate legitimation basis for governance outside the bounds of the nation-state. The examined above intensive participation of public interest actors during drafting the UN Convention on the rights of persons with disabilities could on the face of it serve as an example of such deliberative democratic law-making at a universal level. What speaks in favour of it is that the communication through the

⁶⁷J. Cohen / C. Sabel, „Directly-Deliberative Polyarchy“, *European Law Journal* 3 (1997), 313-342; M. Dorf / F. Sabel, „A Constitution of Democratic Constitutionalism“, *Columbia Law Review* 98 (1998), 267-273; B. Schmalz, „Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaates“, *Zeitschrift für Int. Beziehungen* 6 (1999), 185-244.

⁶⁸ M. Dorf / F. Sabel, „A Constitution of Democratic Constitutionalism“, *Columbia Law Review* 98 (1998), 267-273; B. Schmalz, „Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaates“, *Zeitschrift für Int. Beziehungen* 6 (1999), 185-244.

⁶⁹ For critical reference on this see Alexander Somek, *Demokratie als Verwaltung - Wider die deliberativ halbierte Demokratie*, Sonderband Soziale Welt, im Erscheinen.

perspective introduced by the NGOs has become enriched and more profound. More subtle practices of state violations in homes for disabled persons and other life situations, that often were not known to the diplomats, were suddenly broached. As a matter of fact, during the negotiations happened, what is claimed by representatives of deliberative democracy models, namely, that perspectives were taken over individually and mutually.

Nonetheless, doubts remain. The example of the UN Convention demonstrates that despite the successful experiment of the involvement of representatives of affected groups there is no reason to overrate the NGO participation in democracy theory. What can first be noted is, that within the group of NGOs there were clear asymmetries in power that led to a different weight in negotiations. Certain representatives due to its expertise or their argumentative skills prevailed with their positions, and thereby silenced other voices during the negotiation process. During some phases both the communication between NGOs and state representatives, as well as within either of the heterogeneous groups, had rather the character of a strategic struggle for power than that of a mutual will to persuade one another through better arguments.

Problems voiced by critics of deliberative democracy models also show in practice.⁷⁰ It is mainly the problem of disguised power differentials between participants and the lack of democratic responsibility on the part of NGO representatives. In practice, that is because the choice and participation of admitted NGO representatives always needs to remain selective, and a clear dominance of the West due to a higher financial power can not be eliminated. Whether and in how far the majority of disabled people was really represented by the present NGOs, can simply not be ascertained. You become a representative of concerned people mostly by way of self-appointment. Although, therefore some of the praised advantages of deliberative forums became obvious in the negotiation process, one could hardly speak of a “democratisation” of the whole process.

⁷⁰ W.E. Scheuermann, “Democratic Experimentalism or Capitalist Synchronisation? Critical Reflections on Directly-Deliberative Polyarchy”, *Canadian Journal of Law and Jurisprudence* 17 (2004), 101-127; Alexander Somek, *Demokratie als Verwaltung - Wider die deliberativ halbierte Demokratie*, not yet published manuscript dated 2007

Moreover, so far one can only assume a weak „world public“, onto which NGOs have an impact at global level, and by which they are at the same time kept in check. Such a world public, according to Brunkhorst and Habermas becomes visible by a global accord of moral indignation, for example when grave violations of human rights were committed and when there is evidence for a violation of the prohibition of military attacks. It is limited however to individual political themes, stressed by media.⁷¹ For the breadth of economical, technical and social issues of globalisation, such a world public exists only with respect to certain points. This, however, means for the legitimacy issue that at the global level for many political themes there is still no world public that completely replaces national publics.⁷²

NGO participation in international law-making processes alone – as an interim result – does not lead to a supranational or global democracy. Their involvement in international law-making processes can not be legitimised only through participatory democracy models. The next part therefore refers back to the national level, where we shall have a closer look at the consequences of NGOs' international participation on national publics. The question, that usually is not anymore raised in literature, is to be addressed, whether legitimacy of international involvements can be explained from ramifications of those involvements on the national public.

bb) Legitimation through the effect on national publics

The processes of NGO participation described earlier have the potential to cause ramifications that refer back to national publics concerning activities in terms of shaping norms⁷³ and sharpen the negotiation parties' view for the concerned

⁷¹ H. Brunkhorst, „Globalizing Democracy without a State“, *Millenium, Journal of International Studies* 31 (2002), 675-690; J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, 139-140.

⁷² M. Kettner / M.L. Schneider, „Öffentlichkeit und entgrenzter politischer Handlungsraum: Der Traum von der "Weltöffentlichkeit" und die Lehren des europäischen Publizitätsproblems“, in: H. Brunkhorst / M. Kettner (Hrsg.), *Globalisierung und Demokratie. Wirtschaft, Recht, Medien*, 2000, 369-411.

⁷³ On the importance of „Rückbindung“: *Ibid.*, 370.

people, who are, as a rule, underrepresented in national processes. An existing national participation vacuum in an individual case in shaping international policies thus can be internationally compensated. The international involvement reflects back to national publics in a way that NGO representatives can address the behaviour of their own governments at home. Furthermore, thus the in many western states weak involvement of parliaments in international law-making processes can be stimulated.⁷⁴ NGOs' national role as an essential element of a strong national public, viewed from this angle, comes more into focus.⁷⁵ The interaction of a number of national publics activated in this way can then produce a global emancipatory dynamic that, in turn, is reflected in the negotiation process and promotes a later implementation of new standards.

This is particularly the case when the concerned partial publics are not only included in the international law-making process, but, as has been the case here, in monitoring the Convention are therein ascribed a legally stipulated role in its implementation.⁷⁶ For the implementation of human rights obligations within the state, the Convention for the first time lays down an obligation under international law to consult with representatives of concerned non-governmental organisations, and establishes participation on the level of implementation as binding. The knowledge accumulated by these partial publics during the negotiation process in terms of talking about issues puts them on a par with governments, that, if necessary, can critically address implementation issues in the public at large.⁷⁷

From this angle, the above-demonstrated model for the democratic power cycle should be internationally elaborated and newly conceptualised. The migration of state decisions to a supranational level must be followed by civil society in order to

⁷⁴ Kritisch: C. Möllers, *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*, 2005, S. 422-423; zu den geringen Kontrollmöglichkeiten nationaler Parlamente: R.M. Kößler, Henning, *Chancen internationaler Zivilgesellschaft*, 1993, 211.

⁷⁵ On the national role of civil society: J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 1992, 462-463.

⁷⁶ Art. 33 Abs. 3 des Übereinkommens.

⁷⁷ On the value of expertise from non-governmental organisations: E.H. Riedel, "The Development of International Law: Alternatives to Treaty Making? International Organisations and Non State Actors", in: R. Wolfrum / V. Röben (Hrsg.), *Developments of International Law in Treaty Making*, 2005, 304.

continue exercising their legitimate task at the national level at all. Without an international involvement, NGOs less and less have the possibility to participate in the formation of opinion within the state. What it is mainly about is the knowledge of the object of negotiation and the political situation, in which an international law-making process takes place. Shortcomings and achievements of one's own government only in this light can be properly assessed and broached in the national public. In those states, where NGOs are deliberately prevented from taking part in the process of formation of opinion and in broaching themes by state bodies, they can considerably improve their position nationally by an international engagement and attention.

If we therefore assume that the legitimacy of NGO participation in international law-making processes arises from effects on national publics, that are to be welcomed regarding democracy theory, this has also consequences for the participation forms as such. In terms of legitimacy, it would not be defensible to give NGOs the possibility to participate internationally, who do not at all strive for an activation of national or local publics. NGOs that would merely try to enforce specific interests at an international level, without at least being committed to aggregating interests of political publics, according to this approach, in terms of legitimacy, would have a deficient status. The impact on national publics at the same time has the positive effect, that activities of NGOs at the international level can be addressed and, if necessary, criticised.⁷⁸ Referring back to the national level therefore fulfills a double control function: on the one hand, with a view to governance acts in international forums; on the other hand, for monitoring NGO activities at an international level.

This approach in practice advocates the argument to put national NGOs on the same level as international NGOs in global law-making processes.⁷⁹ Because it is precisely national NGOs that, as a rule, have better chances to have an impact on the domestic public.

⁷⁸ G.F. Schuppert, "The Changing Role of the State Reflected in the Growing Importance of Non-State Actors", in: G.F. Schuppert (Hrsg.), *Global Governance and the Role of Non-State Actors*, 2006, 203-239, (239).

⁷⁹ Has now become a general UN practice after the reform of criteria in the 90s, Cf. ECOSOC Res. 1996/31, § 5, 8.

Such a conception of NGO participation aiming at establishing a public can also be found in the above-examined Aarhus Convention, which is valid for European States, and that in principle grants information and participatory rights within the area of environment to all interested individuals with the aim to become more open to the public. International NGO participation thus comprises the sociological preconditions (strong public) of vigorous representative democracies. This also entails a minimum of public control of governance acts beyond the nation-state. Granting formal decision rights to NGOs in international organisations, incidentally, is not necessary for accomplishing this function orientated towards public. A participation and cooperation of NGOs below that level suffices.

cc) Legitimation through NGO expertise?

As already has been mentioned under I., international institutions by involving NGOs and other Non-State Actors often have hopes of an improvement of their products, i.e. their standardisation, formulation of policy and enforcement. The approach becomes explicit in the Governance – White Paper of the EU Commission⁸⁰:

„The quality, relevance and effectiveness of EU-policies depend on ensuring wide participation of all citizens (...).“

The OECD, as well, follows this approach of an involvement of Non-State Actors with the aim to improve own regulatory activities. In drafting the „Framework of Action for Investment“, that was adopted in 2006, Employers’ Associations and Trade Unions were involved in working out the document. Without NGOs’ expertise international organisations often do not possess the information that they need in order to assess the degree of implementation of their standards at the national level. NGOs thus attain more and more importance on the level of implementation too.⁸¹

⁸⁰ COM (2001) 428.

⁸¹ T. Brühl, *Nichtregierungsorganisationen als Akteure internationaler Umweltverhandlungen. Ein Erklärungsmodell auf der Basis der situationsspezifischen Ressourcennachfrage*, 2003, 80-82.

So, for example, it is indispensable for the procedures for national reports before the human rights treaty bodies in Geneva, that monitor the implementation of human rights obligations by states, that NGOs submit additional information to those reports on the implementation.⁸² And without the special expertise of NGOs it would now be for example also very hard to constantly elaborate the list of endangered species under CITES.

Partly highly specialised NGOs with broad research capacities in many cases submit information for decision-making processes of international committees, that those due to a lack of their own staff and administrative resources can not obtain themselves. This information concerning its contents not seldom stands in contrast to the information submitted by states, and thus increases the plurality of the communication, that is the basis in the internal decision-making process. This undoubtedly vital function should not, however, also lead to an assumption that this aspect increases the democratic legitimacy of international institutes' activities.

To provide special expertise lies in the interest of the concerned institutions with respect to the effectiveness of their own activities. However, it does not contribute to a democratic legitimisation of decisions taken at this level. On the contrary. The selective receipt of an expertise provided by NGOs through informal channels, in individual cases, can even aggravate the democracy problem in so far as transparency and political control of international committees in decision-making processes hereby are further reduced. The provision of expertise by NGOs thus per se is neither legitimate nor illegitimate. It serves the effective discharge of tasks of international institutions, and in transparent procedures can enrich the decision-making process with further perspectives. As a rule the provision of expertise does not contribute to a democratisation according to the above analysis. If a communicative effect into

⁸² E.H. Riedel, "The Development of International Law: Alternatives to Treaty Making? International Organisations and Non State Actors", in: R. Wolfrum / V. Röben (Hrsg.), *Developments of International Law in Treaty Making*, 2005, 304.

national public is not sought for by Non-State Actors, no possible contribution is viable towards preconditions for a democratic legitimisation of political decisions.

dd) Conclusion

The debate over the role, importance and legitimacy of Non-State Actors is a reaction to deeper rooted problems, closely linked to the migration of decisions from the state level to supra-, trans-, and internationally organised spaces. Within this context, various hopes in the field of law and policy are connected to the diagnosed increase in importance of Non-State Actors. On the one hand, an efficiency increase through private expertise for solving the great human kind issues as climate change, poverty, and human rights violations is hoped for. On the other hand, Non-State Actors are expected to offset the so-called „democracy deficit“ in international institutions.

After the analyses made here in light of selected fields of NGO participation in law-making processes outside the bounds of nation-states, both approaches seem problematic. The lopsided stress on efficiency benefits through private expertise of Non-State Actors overlooks that expert consultancy and informal influence outside juridified processes can further aggravate the democracy problem instead of increasing the legitimation of international decision-making processes. The issue of a unilateral involvement and influence by private expertise is known from the national area. It aggravates at an international level, however, in so far as a bureaucracy onesidedly „steered“ by way of a selective influence can not, at regular intervals, be corrected by a new, democratically elected government.

There is a tendency, however, that in terms of hope for forms of global democracy through NGO participation, the problems of power differentials, low representativity, lack of responsibility and hegemonial structures within global civil societies themselves are underestimated. Particularly the mentioned issue of the underrepresented South can not be easily removed. All in all, precisely mainly globally operating NGOs can not surmount the dizzy heights at which international bureaucracies often have to act.

The value of NGO participation – that is the central argument - in supra- and international law-making should rather be placed at the national level. The migration of decisions to transnational and supranational law-making institutions must be followed by new participation forms from NGOs. Otherwise their valuable role as a backbone for vigorous national and local publics would be harmed. This public-oriented role of NGOs by way of universal human rights to freedom can be regarded as laid down in international law.

III. Civil Society Actors as new „guarantors“ in the international legal system

The „Universal Justice Agenda“ represented by many NGOs aims to achieve a mobilisation in civil society in order to attain certain political goals regarding poverty reduction, human rights violations, and the continuing destruction of environment. With respect to the attitude of these civil society forces towards international law, an interesting and may be unexpected tendency can be revealed. On the whole, many of these actors have high hopes for the international law as a legal system. Despite vehement criticism of specific treaty regimes, political claims are brought forward as international law arguments. In the field of protection of the environment a new, more effective international law is demanded and elementary experience with regard to injustice is being addressed as violations of Human Rights Conventions. The protests organised by civil societies against the, as it was called at demonstrations, “illegal” Iraq intervention, also may serve as an indicator for a strong „awareness of international law“ in civil societies.

This is all the more surprising as trust in international law as a „social technique of a universal legal community“ (Kelsen) seems to have decreased in many governments and economic actors. Literature in recent years has written profoundly about the state’s preference for more flexible, disaggregated or privatised forms of cooperations and regulations outside the medium international law.⁸³ If these analyses are to be believed, formal international cooperation forms for many governments have become too ineffective or too unpredictable politically.

⁸³ See I.1.

Important states, as the USA, escape universal treaty regimes, which could limit their capacity to act, and make less and less effort to justify supposed infringements of law with arguments. What can be discerned therefore is a discrepancy between phrased legal claims on the part of civil society on the one hand, and observable tendencies of states renouncing international law. It almost seems as if the legal discourse in international law has obtained a stronger intensity in civil society than between state bodies, the classical law-makers and addressees in international law. What does such a finding mean for the validity of international law at the beginning of the 21st century?

At the end of the 19th century, at the scientific-historical peak of debates over international law on the “validity” of international law, Georg Jellinek evolved a complex answer to the hotly disputed validity issue. International law does not possess a supranational force of coercion, but is, however, binding law, because states „find“ themselves obliged to meet self-binding obligations.⁸⁴ According to Jellinek, international law also constitutes norms, the legal validity of which are based on the „conviction in its validity” in the human community. Law is a part of the human imagination and therefore eventually is based on psychological elements. Nevertheless, “government’s awareness“ to adhere to self-imposed laws has not so distinctly evolved for norms in international law than in national law.⁸⁵

What is the connection between this psychological source of law and the mobilisation on the part of civil society in terms of international law? According to Jellinek, the psychological effectiveness must be guaranteed by strong „social psychological forces“. These „forces“ strengthen the motivating power of regulations, and hereby give them a general power of enforcement, even against opposing individual motives from norm addressees. The law’s validity is dependent on those „guarantees“.⁸⁶

⁸⁴ G. Jellinek, *Die rechtliche Natur der Staatenverträge. Ein Beitrag zur juristischen Construction des Völkerrechts*, 1880, 6-27; on the conception of international law Georg Jellineks: J.v. Bernstorff, “Georg Jellinek - Völkerrecht als modernes öffentliches Recht im fin de siècle?”, in: S.L.S. Paulson, Martin (Hrsg.), *Georg Jellinek, Beiträge zu Leben und Werk*, 2000, 183-206.

⁸⁵ G. Jellinek, *Die rechtliche Natur der Staatenverträge. Ein Beitrag zur juristischen Construction des Völkerrechts*, 1880, 37.

⁸⁶ G. Jellinek, *Allgemeine Staatslehre*, 1905, 324-326.

Much speaks in favour of ascribing, besides to the states, mainly to civil societies this function of a social psychological power of guarantee in international law.⁸⁷ Civil society thus would not only be a crucial guarantee for vigorous national democracies in the age of globalisation, but, to a greater extent, also a vigilant bearer of a global awareness of law. Non-State Actors hereby would attain a role in and importance for international law, that go far beyond the tendencies of participation analysed in this study.

⁸⁷ Without recourse to Georg Jellinek from a political perspective, attempting to prove an importance of civil society for the government meeting its international obligations under Human Rights Treaties, by using case studies: T. Risse (Hrsg.), *The power of human rights. International norms and domestic change*, 1999.