

## **NON-GOVERNMENTAL ORGANISATIONS (NGOs) AND GLOBAL SOCIAL CHANGE- THEORETICAL FOUNDATIONS AND PRACTICAL CONSIDERATIONS<sup>1</sup>**

### **Abstract**

*Traditionally, both in the domestic and international affairs, nation states are considered the major players in policy formulation for the purposes of international relations and regulation. Thus, it is not out of place to conclude that they are also the movers and shakers of social change. In the absence of fuller integration and representation within the sphere of law making in both domestic and international arrangement, the increasing influence, contribution and work of Non-Governmental Organisations (NGOs) for the purpose of social change, policy formulation and eventual rule making are undeniable. This paper sets down the theoretical frameworks for greater participation of NGO's in international law making and argues subsequently for their fuller integration for the purposes of policy formulation in International Law.*

**Key words:** *Non-Governmental Organisations, United Nations, social change,*

### **1. Introduction**

The nature and the extent of social construction both in the domestic and international scene in contemporary times have apparently transcended the powers of state actors, who traditionally were dictators of change. This development has been attributed to the increasing wave of globalisation that is affecting every aspect of international life. The principles of globalisation have therefore challenged the notion of state sovereignty in their monopoly of legislating and introducing policies that engender change. In an increasingly globalised world, the international society appears stuck in its traditional system of response that undermines social change in the global context. In this vein, Wood states, "What is clear is that globalisation creates problems which require some degree of coordination, cooperation, or regulation beyond nation-state."<sup>2</sup> The presence of non-state actors notably the Non-Governmental Organisations (NGOs') in the scene constitutes an important normative force with regard to the evolving face of the global society. In the words of Mathews, "NGOs' reach behind other states borders, force governments to consider domestic public opinion...At the same time cross border NGO networks offer citizens groups unprecedented channels of influence."<sup>3</sup> It is also said that NGOs increasingly formulate global standards of corporate behaviour.

This essay in recognition of the challenges of globalisation in the contemporary governance of the international community, attempts to evolve the theoretical framework that makes the increasing participation of NGOs in global affairs an imperative. Thus far, it seeks also to assess the impact of NGOs in the trans-national global construction. The essay will proceed in four sections. In section one, the paper is concerned more with the conceptual framework of delimitation of NGOs as well as describing as much as possible their status in international law and raising some unhealthy concerns about their operations. Section two focuses on the theoretical principles adapted to explain the imperative of NGOs in Global policy formulation. In section three, the paper shall engage in a positive assessment of NGOs involvement in global constructions and its normative response to global issues, while in section four, proposal will

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<sup>2</sup>N. Woods, 'Global Governance and the Role of Institutions, in Held David & McGrew (eds), Governing Globalisation, (USA, Blackwell Publ. 2002) p.25

<sup>3</sup> J. Mathews, "Power Shift" (Jan/Feb. 1997) *Foreign Affairs*. p.50

be made in the direction of expanding the participation of NGOs in international law making, especially in the United Nations (UN) and other international organisations.

### **1.1. Delimitation: The Meaning/Concept of NGOs**

The increasing number and participation of NGOs in both domestic and international policy making in recent times has made it imperative to define them and differentiate them from international organisations and other non-state actors. In fact, the multitude of NGOs and the variety of causes and concerns that they promote have even made it more complicated to define them. Attempts aimed at providing a definition ended up describing them through their various activities and involvements. Some have hitherto argued that it is often better to define NGOs by describing their roles and function in the society. But this argument is flawed because the role and function of NGOs is neither defined in any statute book of international law nor set out in any official document; moreover, most NGOs arrogate roles to themselves based on their interests and concerns. Unlike international organisations which are focused and defined by their articles of agreement or the charters that constitute them, NGOs are primarily individual initiatives that are not essentially constituted in law, but which in response to their proliferation and undeniable input in the society, the law has come to conceptualize and accommodate them as a social imperative which cannot be overlooked. In international law, recent scholarship has focused on the legal personality of NGOs and the consideration that is uppermost is their official recognition as actors in many international treaties and conventions. The EU convention on the recognition of their legal personality constituted a remarkable effort to facilitate the work of International Non-Governmental Organisation (INGO) at the regional level and also represents a subtle acknowledgment of NGOs' contribution to state, interstate and regional policy making and this partnership has continued to expand on all fronts.

The term 'NGOs' is a modern term used in describing age old charitable and community organisations which have been in existence in history, but which today have taken various shapes and dimensions that they are no longer just charitable organisations. Apparently then, the concept of NGOs may be said to be a modern phenomenon. The term NGO is a privative concept in the sense that they exercise some privity by their non-alignment with any national government in respect of their foundation, establishment and activities. By ascribing 'non-governmental' to the organisations, it merely designates them as groups not affiliated to any government or not under the influence of the government, and nothing more. But NGOs as we understand them mean much more than that. This explains why the NGOs themselves are not very supportive of that acronym. In most cases, they prefer to be referred to as civil society groups or civil rights movement. Perhaps the reason for that term NGO was an attempt to differentiate them from states which are the official actors in the Westphalia system of international legal system, and thus cleverly make them ineligible partners or actors in the international law making. On the difficulty of giving a comprehensive definition of NGOs, an author comments, "the NGO- sector has been described as extremely diverse, heterogeneous and populated with hugely varied goals, structure and motivations. It is therefore not an easy task to find a common definition of the term 'non-governmental organisation.'" <sup>4</sup> Given therefore the variety of NGOs' activities and interests, the same author chooses to identify them by the common characteristics which they share, namely:

- 1) NGOs are not created to generate personal profit. Although they may have paid employees and engage in revenue-generating

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<sup>4</sup> Prodi & Kinnock, *The Commission and Non-Governmental Organisations: Building A Stronger Partnership*, EU Commission Discussion Paper, available at [www.eu-voluntariada.org/documentos/2AAeu3.pdf](http://www.eu-voluntariada.org/documentos/2AAeu3.pdf) . accessed on 09/11/2012

activities they do not distribute profits or surpluses to members or management; 2) NGOs are voluntary. This means that they are formed voluntarily and that there is usually an element of voluntary participation in the organisation; 3) NGOs are distinguished from informal or ad hoc groups by having some degree of formal or institutional existence. Usually, NGOs have formal statutes or other governing document setting out their mission, objectives and scope. They are accountable to their members and donors; 4) NGOs are independent, in particular of government and other public authorities and of political parties or commercial organisations; 5) NGOs are not self-serving in aims and related values. Their aim is to act in the public arena at large, on concerns and issues related to the well-being of people, specific groups of people or society as a whole. They are not pursuing the commercial or professional interests of their members.<sup>5</sup>

These may be regarded as the major features of NGOs wherever they exist. These characteristics have also formed the criteria for their official recognition in many regimes like the UN and EU. In contrast to International organisation which are the result of agreement among states, NGOs are generally formed on the initiative of private individuals, in most cases subject to and governed by the domestic law of the place under which it was born. Although these features help to form a conceptual frame of the NGOs, a few scholars have also given definition of the NGOs. Olz following the Encyclopedia of Public International Law, defines NGOs as “private organisation (association, federation,, union, groups) not established by a government or by an international agreement capable of playing a role in international affairs by virtue of their activities and whose members enjoy independent voting rights.”<sup>6</sup> This definition follows two approaches: it first of all identifies NGOs by what they are not, which is already expressed in their name, ‘non-governmental’. Thus, in that case it does not convey any new message. Secondly, it merely describes the geographical expanse of their roles, herein making them actors in international politics. But it needs to be observed that this says too much of the basic ideas about NGOs as not all NGOs are engaged in international affairs. Another definition given by Antiphas who adopts the definition given by the national policy on NGOs in Tanzania, regards NGOs as “a voluntary organisation which is autonomous, non-political, organized for the purpose of enhancing the legitimate economic, social, and/or cultural development or lobbying or advocating on issues of public interest or interest of groups of individuals or organisation.”<sup>7</sup>

In these definitions, we could see some re-occurring concepts, namely the idea of voluntary association, autonomy, and public interest which could be social, economic, or cultural or political. Basic to all NGOs is that they have a mission for which they mobilize support, influence governments, raise funds, educate the public, dedicate resources or represent its members. As a result of the broad interest of NGOs, they may be categorised borrowing the terminology of the World Bank, into Operational and Advocacy NGOs. While the former tends to be more involved in development projects and its implementation, the latter focuses on

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<sup>5</sup> *Ibid.*

<sup>6</sup> M. Olz, Non-Governmental Organisations in Regional Human Rights Systems, (1997) 28 *Columbian Human Rights Law Review*, 307

<sup>7</sup> T. Antiphas., *Repackaging Authoritarianism*, available at [www.Leat.or.tz/publications/authoritarianism](http://www.Leat.or.tz/publications/authoritarianism) accessed 09/11/2012.

defending and promoting policies, practices and causes in the interest of the public. Oxfam, MSF, ICRC belong to the first group; while Human Rights Watch, Amnesty International, Green Peace, and Environmental NGOs, belong to the latter. This is not to say that there are no occasions of overlapping interests and identities among them. Sometimes, a distinction is made between international NGOs and merely national or domestic NGOs. As the name implies, to be considered an international NGO, the group must demonstrate a transnational scope of activities, should cover where possible a substantial number of countries in different regions of the world and shall be international in structure.<sup>8</sup>

## **1.2 The Legal Status of NGOs in International Law**

It is increasingly becoming imperative to question the status of NGOs in international law as a result of the global impact of their activities and influence. In domestic terrain, there is no doubt about their legal personality as juridical persons, since they were created by the municipal law and are therefore subject of rights and obligations under the law of the state of their incorporation, notwithstanding whether they are international, regional or national in operation.

The trans-boundary effect of some NGO activities have peaked the fact of their international legal personality. The problem is occasioned by the fact that the states are at the center of traditional Westphalian legal order and continue to be subjects of international law, with limited exceptions to such bodies as the Vatican, or the Sacred Order of Malta and the ICRC whose status are accommodated in conventions. NGOs in the international domain are not created like in the municipal law by a specific legal act. Although, there has been no definitive statement on this subject of the official status in the international law, the UN has increasingly opened its windows to NGO participation and intervention in their deliberations and conferences within the past decade. The first mention of the NGOs by the UN was in Article 71 of the Charter, where the Economic and Social Council (ECOSOC) was enjoined to make arrangements for the consultative status of the NGOs, but this is not a treaty based right for participation in the UN. However, there have been several efforts by the ECOSOC to realize the intention of the Charter in furthering the participatory rights of the NGOs. There was the 1968 Resolution 1296 (XLIV) which has been superseded by the 1996/31 Resolution which added a new perspective and much needed dimension to the UN/NGO relationship. It has been observed that, “one of the most significant accomplishments of the 1996 Review is that it firmly establishes the eligibility of the national, sub regional and regional NGOs... to accede to consultative status.”<sup>9</sup> This Review retained the two categories of consultative status, providing different names for them, namely, the General and the Special Status. While the general status is reserved for “large international NGOs whose area of work covers most of the issues on the agenda of ECOSOC, NGOs that have competence in only a few of the fields of activity of ECOSOC are eligible for special consultative status.”<sup>10</sup> There is also what the Review calls the Roster List which accommodates NGOs that are not qualified for the consultative status, but could make occasional contributions to the work of the Council or its subsidiary bodies upon invitation. While the consultative status confers a political right to the NGO to participate in the Council deliberations, the Roster status merely confers a privilege. The Review further provides room for arrangement for the accreditation of other NGOs for attendance and participation in UN conferences.

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<sup>8</sup> N. Karsten, *The Rule of Law in the Era of Globalisation: Legal consequences of Globalisation: The Status of Non-Governmental Organisation Under International law*, (1996), 6 *Ind. J. Global Legal Stud.* 579

<sup>9</sup> *NGLS Round Up, ECOSOC Concludes NGO Review*, Nov, 1996, p.5

<sup>10</sup> *Ibid.* p.7

The majority of NGOs still feel that the UN needs to expand the NGO participation in the system to transcend ECOSOC matters and extend to other areas and wider bodies of the UN system like trade, security, and humanitarian policies. There is need to interject herein that the state of the law as it is does not explicitly confer (international) legal personality to the NGOs, except under the municipal regimes. It can therefore be maintained that their unprecedented global influence does not at the moment balance out with the state of the law that govern them in the international realm. It is however expedient to mention that there have been regional arrangements in this area of law. The European Union (EU) in 1991, in recognition of the immense contributions of the NGOs, adopted a convention on the legal personality of international Non-Governmental Organisations. Also in the African region, the chapter XIII of the rules of procedure of the African Commission entitled 'Consultation with Non-Governmental Organisation and Representation of these Organisations' provides the basis of formal cooperation between the Commission and NGOs. Herein, observer status is granted to the NGOs on a written application and they can file petitions against states for the violation of certain fundamental freedoms. It is hoped that in no distant time that the UN and other regional bodies may tow similar path.

### **1.3 Negative Concerns about NGOs**

The fundamental nature of NGOs as self-mandating and not operating in accordance with the mandate of any state or international body has made their existence and work highly susceptible to criticisms. The first concern about NGOs especially in the international arena is that they have a capacity to become ungovernable and unaccountable. Unlike states and democratically elected governments, NGOs are accountable perhaps only to their donors and sponsors, whose interest may be prejudicial to the public interest.

NGOs have been accused of promoting individuals in political contests whose political interests do not reflect the public interest, but the interest of the ruling party. There is no code of ethics available to check them from deceiving the public. There is indeed no mechanism to ensure the responsible behaviour among the NGOs. The basis of this concern is that the sources of the funds available to NGOs are donations which in many cases have conditionality attached to them. Thus, in several occasions, these NGOs do not reflect what they profess. There have been instances too where the government through its support to the NGOs hijack them to serve their interest rather than promote the philosophy upon which they are initially established. They stand a high risk of being manipulated by the persons and group that support them financially. This orientation raises a critical question of the independence of the NGOs. Willets observes, "Nominally, NGOs may appear to be independent when they design their own programs, but government influence can arise indirectly if the program is designed to make it more likely that the government grants or contracts will be forthcoming."<sup>11</sup> In this connection too, there is need to recognise that in more authoritarian states, NGOs may find it very difficult to act and remain independent and government funding leads absolutely to state control.

Another concern that is often raised is that the claim that NGOs' voice is representative of the voice of the masses, has often be questioned, whether they do really represent the masses or just the special interest of the individuals establishing them as it has been seen that similar NGOs often present conflicting viewpoints on the same questions or problems. The question is then asked which viewpoint represents the public interest. Esty affirms thus:

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<sup>11</sup> P. Willets, *What is Non-Governmental Organisation?* (2002) London, City University, available at: <http://www.staff.city.ac.uk/p.willets/CS-NTWKS/NGO-ART.HTM> accessed on 27/01/2012

In fact, it may well be difficult to ascertain how many and which people a particular group represent. Non-governmental organisation with ostensibly similar constituencies might present conflicting viewpoint. This raises a number of questions. To whom should officials in international bodies listen?<sup>12</sup>

By extension the claim that NGOs' participation in decision making process makes up for the democratic deficit in international law making, becomes meaningless or loses force by this afore argument. Again, it could be maintained that the overarching interest of an NGO to some cause, to the exclusion of other aspects, can make for the neglect of other important areas of the life in the society. This is what Mathews calls Tunnel Vision of NGOs<sup>13</sup> which is the tendency to judge every public act by how it affects their particular interest. Another concern that has been raised is the tendency for the NGOs' input in the global policy formation to be highly fragmented and essentially pluralistic, giving rise to a more weakened force rather than a stronger force. However, these are fair concerns which have the probability to happen, where the capacity of the NGOs is not positively managed. These concerns do not therefore remove the tremendous impact the NGOs have exerted in international and domestic policy construction. Abuse, they say does not destroy use and we are more interested in the "USE" in this essay.

## **2. Theoretical Foundations for the NGOs' Action in Global Change/Construction**

### **2.1 The Idea of Global Change/Construction**

In international relations, many scholars speak of NGOs as belonging to the class of non-state actors and this term although it potentially refers to trans-national corporations, "suggests NGOs' emerging influence in international policy arena where previously only states played significant role."<sup>14</sup>The idea of global construction introduced in this essay in connection with NGOs therefore means that as opposed to traditional actors in both domestic and international policy making, NGOs now constitute a force that cannot be ignored when it comes to the formulation of policies that rule the globe and affect the individual that live in it. In their various ways of operation, they have forced leaders and policy makers to pay attention to their own side of the story and sometimes they have been called to set agendas for the formulation of certain policies. For instance, just before the collapse of the Soviet Union, Mikhail Gorbachev faced with the deteriorating image of Russia as a result of incidences of right abuses (of prisoners of conscience), felt bound to invite the representative from Amnesty International to discuss reforms that might help restore Russia's image in the larger world. It is undeniable however that the NGOs in both official and un-official categories do indeed contribute immensely to the construction of the human world in terms of policy and value orientation. However, it is another issue whether this influence is a welcome development in many circles. They have been able to do this employing various means and ways. In this regard, Paul observes:

NGOs operate with many different methods and goals. Some act alone, while others work in coalitions. Some organize noisy protests and demonstrations while others prefer sober education or quiet diplomacy. Some name and shame those in power who abuse

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<sup>12</sup> D. Esty, Non-Governmental Organisation at the World Trade Organisation: Cooperation, Competition, or Exclusion, (1998), *Journal of International Economic Law* 1,123-147, p.142

<sup>13</sup> J. Mathews, (n.3) p.64

<sup>14</sup> P. James, *NGOs and Global Policy Making* (2000), Global Policy Forum Available at: [www.globalpolicy.org](http://www.globalpolicy.org) , accessed on 11/9/2012

citizen rights, while others work closely with the authorities. Some simplify the issues for broad public campaigns, while others produce detailed studies to inform policy makers.<sup>15</sup>

Because they operate in many ways not defined by any statute, many organisations and state authorities sometimes find NGOs a nuisance and even threatening to their interests. However, this incursion is fact that states have to live with, rather than avoid, as their judgments can be decisive in promoting or withholding public and political support.<sup>16</sup> So, NGOs have not only become non-state actors, they are also transnational actors, as their involvement in global policy construction cuts across every conceivable aspect of international policy, from environment to development, from human rights to humanitarian law, from disarmament to international trade, to mention but a few. Their interventions have totally changed the face of international relations and law. Their success may be attributable to a wide range of network upon which they operate. Thus, although an action could be initiated in Europe, it will at the same time be sustained with the same strength in Africa by sister NGOs or filial counterparts. Indeed, many international organisations like the World Bank and the World Trade Organization (WTO) in recognition of the impact of NGO in policy construction have increasingly made provisions for them in their deliberations and conferences. The place of NGOs in global policy formulation is a given, but what is not clear is why their unprecedented impact. In the discourse that will follow, the paper shall explore some theoretical foundations for NGOs' impact in global architecture.

## **2.2 The Symbolic Interactionist Theory and NGOs**

The symbolic interactionist perspective is one of the sociological approaches that endeavours to explain social change in the society as well as how values in the society are transmitted to members and how they could change through negotiated meanings and symbols. It focuses on the use of symbols by people and argues that the shared meaning of symbols is basic to clear understanding of social life.<sup>17</sup> Its emphasis is that culture is the product of interaction between people in their everyday social relationships and in these relationships, the culture from the larger society is adapted to daily life and sometimes new ways of doing things are developed. According to Hirsch, from this perspective, human beings are viewed not as products of the social system but rather as active agents that can resist challenge and change social structures.<sup>18</sup> International law as a social phenomenon aims to guide a variety of interactions in the international arena. This perspective therefore explains the social factors involved in the creation and implementation of international rules. Thus, as different social and legal agencies interact and ascribe meaning to their environment; they contribute to the formation of international rules. Civil society organisations, i.e. the NGOs constitute therefore one of the formidable actors in the arena today. As actors, they continually challenge the structures and seek to negotiate the system in their interest and in accordance with their principles. From this point of view, "they contribute to the formation and dissemination of the shared concepts that are essential to stabilize expectations on the international level."<sup>19</sup> Thus, officially or unofficially, they help in constructing the policies that give meaning and legitimacy to the international system. However, their increasing influence in global policy construction could be explained by the fact that new problems demanding new approaches for international

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<sup>15</sup> *Ibid*

<sup>16</sup> P. J. Simmons, *Learning to Live with NGOs* (1998), *Foreign Policy*, Fall, 82-96, p.86

<sup>17</sup> R. Hagedorn, *Sociology* (3<sup>rd</sup> Edition), (Toronto, Holt, Rinehart & Winston, 1986), p.46

<sup>18</sup> M. Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, (2005) 55 *Univ. of Toronto L.J.* 891

<sup>19</sup> *Ibid*

solution are on the rise, and they seem to be the social force, close to grassroots whose inputs immediately shape the understanding of these new global issues as well as formulate policies for its solution. Thus, even before the traditional actors in the international law system, conceive the problems that demand attention, the NGOs would have gone far in analyzing the situation. On this basis, they serve as the channel of information for any international official intervention on the problem, which may come by way of policy or regulation. In the treaties, agreements, and conferences that provide the framework for international relations, we find their influence apparently irresistible. Hence, as suggested, “the critical factor when determining whether an actor has been accepted into the system of transnational law making is thus the influence such an actor has on the shaping of law and policy.”<sup>20</sup> Their existence is therefore born out of the social process of interactions in both domestic and international society, aimed at shaping the symbols and the values of their society by what they do, say, or represent. Overall, these values and symbols are negotiated either through treaties, petitions and activities of these organisations.

### 2.3 The Post Liberal Argument and NGOs

Liberalism, the immediate ancestor to post liberalism, regards individuals and private groups as the fundamental actors in internal relations. While it does not de-center the state as an actor in international policy construction, it believes that the state is not a unitary actor but a conglomerate whose preferences are determined by domestic politics.<sup>21</sup> In this opinion, NGOs are relevant in the international realm to the extent they are represented by their states of origin. They do not have independent voice apart from the state actors that represent them. The theory does not represent the massive impact which the NGOs exert in today’s global policy formulation.

The post liberal thesis appears to offer a more plausible explanation of the present situation. According to Otto, “the Post-Liberal alternative de-centers the states and stresses the importance of local participation in international community.”<sup>22</sup> In this model, the power to legislate devolves equally on the states as well as on the local community as represented among the NGOs. The post-modern concept of power as expounded by Foucault relates immensely with this theory. Modern exercise of power according to Foucault makes meaning within the phenomenon of two poles of Bio-power, namely, discipline and governmentality. While discipline operates on particular individuals in a particular space... governmentality operates on particular group of individuals.<sup>23</sup> In the modern age, disciplinary power is exercised in the families and hospitals, while governmentality operates through legislation and other devices in the society. Governmentality here needs to be differentiated from sovereignty, which according to Foucault targets the inhabitants and the territory as exemplified in the Machiavelli’s- *The prince*. But governmentality targets men as well as things, men in their relation, resources, means of subsistence, men in their relation to other kind of things, customs ,habits, accidents and misfortune.<sup>24</sup> Governmentality therefore is not the exclusive preserve of the sovereign. Governmental power is shared amongst various organs in the society. While there is a direct exercise of governance powers by the states, NGOs in this context exercise the same power

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<sup>20</sup> A. Lindblom, *Non-Governmental Organisations in International Law*, (New York, Cambridge University Press, 2005), p.98

<sup>21</sup> *Ibid.* p.101

<sup>22</sup> D. Otto, *Non-Governmental Organisations in the United Nations System: The Emerging Role of International Civil Society* (1996), *Human Rights Quarterly*,18.1,107-141, p133

<sup>23</sup> V. Tadros, *Between Governance and Discipline: The Law of Michael Foucault* (1998),18.1 *Oxford Journal of Legal Studies*,74-103, p.78

<sup>24</sup> M. Foucault, *Governmentality*, in Colin Gordon et al, (eds), *The Foucault Effect*, (Harvester-Wheatsheaf: Hemel Hempstead,) 1991 p.82



directly, when they implement policies and projects which impact on peoples' lives and indirectly when they put pressure on states and international community to formulate policies or change laws which have the capacity to impact on individuals in their various relationships. The post liberal dimension therefore explains the advent of the NGOs as a mechanism that shares power with the states in the legislative engineering of the global community, upon the belief that the states are not and should not be the center of authority in international policy construction. This approach tends towards the destruction of the Westphalia system, which gave absolute powers of governance and participation to states in the international scene. Thus, in line with power relations in Foucault, "power is conceptualized as dispersed throughout the global polity rather than as constructed by liberal theory, centralized in the state and the economy."<sup>25</sup>

#### **2.4 Legitimacy Factor/Democratic Inclusion**

The thesis being advanced here is that the traditional process of policing the international community through the participation of states in the United Nations assembly and conferences is less effective in impacting the lives of the private individuals who are also subjects of international law by virtue of their citizenships. The legitimacy of international law making via the UN has been put under probe for its non-representativeness of the interest of the people for whose those laws are made. The multi-faceted incursion of the NGOs into the scene is an indication that the democratic deficit apparent in the UN system needs to be addressed, by making for more consultation with civil society groups which serve as the link between the grassroots and the state actors. As observed accordingly, "NGOs are recognized as forming a vital link between the local and the global. The interests of the peoples are acknowledged as having different foundation than the interest of the states, although they are not mutually very exclusive."<sup>26</sup> This principle advances the view that broader public participation in the deliberations by civil society groups not only reduces the democratic deficit of the system but also enhances the legitimacy of the policies resulting from those consultations. Charnovitz rightly points out that "intergovernmental consultations with NGOs can enhance the legitimacy of the international decision making, but it is the consultation itself that makes the contribution, not the quantity of NGO support."<sup>27</sup> So, in the contemporary society, NGOs have come to represent not just the voice of the voiceless, but also self-appointed advocates for causes which seem to have been neglected by state actors, but which have tremendous impact on the welfare of the larger society. It is therefore argued that the greater inclusion of the NGOs would not only lend legitimacy to international policies, but also fortify their binding character. By extension of these principles, Held proposes Cosmopolitanism as system of international governance. For him, "It connotes the ethical and political space which sets out the terms of reference for the recognition of people's equal moral worth, their active agency and what is required for their autonomy and development."<sup>28</sup> He therefore argues that the institutionalisation of cosmopolitan principles requires the entrenchment of accessible and open public forums. The NGOs as well as other non-state actors, as we speak, provide the best available open forum for the exercise of cosmopolitan democracy. On the basis of this, their further recognition by the international community as well as other agents of globalisation like the international financial institutions is not just expedient but irresistible.

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<sup>25</sup> A. Lindblom (n.20), p.133

<sup>26</sup> A. Lindblom (n.20), p.136

<sup>27</sup> S. Charnovitz, Centennial Essay: In Honor of the 100<sup>th</sup> Anniversary of the AJIL and ASIL: Non- Governmental Organisations and International Law (2006), 100 *A.J.I.L.* 348 p.367

<sup>28</sup> D. Held, *Cosmopolitanism: Ideas, Realities and Deficits*, in David Held & Anthony McGrew, (eds), *Governing Globalisation*, (Cambridge, Polity Press, 2002), p.313

## 2.5 The Charismatic Domination / The Foreman Imperative

Just like in the domain of civil engineering/construction, the foreman is an imperative for proper functioning of the international society. The foreman in most cases does not have a defined constituency; he lends his experience and organisational expertise to every aspect of the charge. This theory presents the NGOs as the self-appointed foreman whose role is “to plug gaps and make up for the areas that the government or the international community has neglected for lack of capacity or not paid much attention to.”<sup>29</sup> Again, in this regard it has been recognized that wider participation of NGOs is necessary for development policies to be successfully implemented. Thus, NGOs promote the societal changes needed to make international agreement work. Described otherwise, they play the role of the policeman or gatekeepers. The Max Weber’s theory of the distinction between legal, traditional and charismatic domination/leadership provide an apt relevance herein. Weber recognizes the primary dominations inherent in the society, namely the legal and traditional domination. He observed that both dominations are permanent structures that provide for the everyday needs of the community. However, such structures are not well adapted to the satisfaction of the needs that are out of the ordinary.<sup>30</sup> Agreeing with Weber, it is generally observed that in the contemporary international system, a variety of developments indicates that the classical state-centered conception is no longer sufficient to describe the growing complexity of international relations. Charisma here is used in the sense of ‘extraordinary quality’ possessed by persons or objects or groups that are thought to give them unique or magical power.<sup>31</sup> For Weber, charismatic input is always radical as they tend to challenge established practice by going to the root of the matter. And people surrender to such a leader because they are carried away by a belief in the manifestations that authenticate him. The NGOs personify the principles of this charismatic domination or leadership in the contemporary international society as well as in the domestic arrangement. Thus, in our society, the everyday routine of international life is managed by the traditional and legal dominations as personified in the states, international organisations and the UN, while the NGOs as charismatic icons exist to respond to the crisis in human experience which may not be sufficiently managed by the established structures left on their own, without interventions, as they fall outside the routine of governance. Hence, we see NGOs in moments of humanitarian crisis, in furthering policies of environmental concerns, in relief work, in prosecution of excessive human rights abuse, in human rights advocacy where the state actors are the perpetrators, etc. Their independence makes it possible for them to tread where governments and international organisations are reluctant to go or slow to reach. Their role as charismatic leaders is to negotiate the yearnings of the powerless with the often inconsiderate motives of the all-powerful state in the international policy construction.

## 2.6 De-Territorialization/Band Wagon Effect of Globalisation

The changing fabric of international society is undeniable. We are in the thick era of Globalisation which “refers to a historical process which transforms the spatial organisation of social relations and transactions, generating transcontinental or inter-regional networks of interaction and the exercise of power.”<sup>32</sup> Thus, in almost all aspects of life, from governance to economics, from health to security, from politics to trade, there is greater emphasis on the global impact and regulation more than on the territorial organisation of these structures. The world being increasingly de-territorialised, the state boundaries and powers have tremendously waned, while the global institutions have made inroads into the regulation and control of all human affairs. In response to the trans-nationalisation of human problems and the globalisation

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<sup>29</sup> Lindblom (n. 20), p.29

<sup>30</sup> B. Reinhard, *Max Weber, An Intellectual Portrait*, (Los Angeles, University of California Press, 1977), p.299

<sup>31</sup> *Ibid.* p.300

<sup>32</sup> A. Lindblom, (n.20), p.1

of power structures, NGOs stand out as one of the bodies that cut across political boundaries and are therefore very well adapted to addressing these global problems, first alongside the Westphalia structure of international law making in the UN and other international organisations, and secondly through their spirited advocacy, concrete devices and intangible mechanisms. Esty observes that “in doing so, they offer an alternative form of representation that may, in some instances, allow for a more refined and closely tailored reflection of an individual’s view in relevant decision-making bodies than will be obtained through his or her government.”<sup>33</sup> The point is that because the interventions of the NGOs offer a cut across the grain of territorial representation,<sup>34</sup> they have the likelihood of informing the policies that address global problems. The gist of our argument here is that the de-territorialisation of human problems which has undermined the ability of the sovereign state apparatus to control the activities and events in its territory, calls for the need of institutions like NGOs which are denationalized, to provide solutions to these global issues and formulate attendant sustainable global policies to regulate them. It is on this account that we assert that their increasing participation is not only timely but also a welcome development.

### **3. NGOs and Global Change/Construction in Praxis: Role in Various Spheres of Transnational Governance**

In this section, the paper shall demonstrate the NGOs’ impact on the various aspects of international life, and hence their contribution in shaping and concretely developing the policies meant to regulate transnational issues. The argument carried through here is that NGOs constitute an important normative force on the international scene. It is on this basis that the paper will examine their roles in human rights and humanitarian rules enforcement, in environmental protection, and Trade regulations.

In the field of human rights, NGOs have been recognized in both international and regional instruments as bodies which formulate global standards of corporate behaviour. In the preparatory stages of the Vienna Conference on Human Rights held in 1993, NGOs concerned with human rights were requested in the official resolution of the General Assembly, to assist the preparatory committee and submit recommendations regarding the conference. More concretely, the Vienna declaration and programme of action resulting from the conference underlined that the promotion and protection of human rights is a legitimate concern of international community and NGOs. In that conference, the Amnesty International and other NGOs advocated for the creation of the office of the High Commissioner for Human Rights, which used to be the UN center for human rights.<sup>35</sup> This office in cooperation with NGOs has in an unprecedented fashion intensified the international advocacy for the promotion of human rights over the last two decades.

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<sup>33</sup> D. Esty, (n.12), p.132

<sup>34</sup> The networking of NGOs is a fact that makes their operation very focused and unified. Many NGOs that function in the north also have their posts in the south. Moreover, many Southern NGOs are beneficiaries of the Northern NGOs. On account of that; they tend to address the same causes, although from different geographical locations. So we find that their mutual dependence and operation make it possible for them to have one voice and proper representation throughout the world.

<sup>35</sup> In September 1992, at a large conference in Amsterdam hosted by the Dutch Section of Amnesty International, a number of human rights experts and activists agreed on the need for a new office headed by a high-level UN official to respond promptly and effectively to serious violations of human rights, including 'disappearances' and political killings and to become generally a focal point for UN action on human rights. It was seriously discussed by governments and others at the Strasbourg inter-regional expert meeting hosted by the Council of Europe in January 1993, and endorsed in a number of important NGO declarations including the final report of the NGOs meeting before the World Conference. See Andrew Clapham, *Creating the High commissioner for Human Rights: An Outside Story*, available on line at: <http://ejil.org/pdfs/5/1/1267.pdf> accessed on 11/02/2012.

Besides, the tremendous impact of the NGOs in the development and enforcement of human rights is as manifest as the reality of NGOs themselves. NGOs were instrumental to calling the attention of the World Bank and International Monetary Fund (IMF) to the social impact of their policies, and the need to initiate right based economic policies that will mitigate their impact on the human right concerns of the people. The industry and the influence<sup>36</sup> of the NGOs in the creation and the development of the statute of International Criminal Court during the Rome Conference in 1998 is an undeniable feature in international law. In many regional agreements, NGOs have been seen to provide directions for many policy formulations. For example, within the Council of Europe, the Amnesty International and other NGOs prepared the ground by showing the need for the Convention Against Torture and lobbied for its eventual adoption.<sup>37</sup> Again, the NGOs in their capacity as applicants or friends of the court (*Amicus curiae*), have been involved in many human rights proceedings and that was always an opportunity to make normative contributions to human rights development in the region.

In the African regional arrangements on human rights issues, the NGOs involvement has also been very creative. Not only were they actively involved in the drafting of the African Charter, they also organized a number of workshops which discussed proposals for an additional protocol to the African Charter, which would establish a human rights court in Africa. This African Court on Human Rights has since become a reality after repeated deliberations by the African Commission on these NGOs' proposals. The consequence of these developments is that African governments have comparatively become more sensitive to the rights of the citizens and less prone in violating them. In confirmation of the contribution of the NGOs towards human rights agenda construction, an Wapner observes,

Amnesty international and human rights watch for example constantly lobby states to promote stricter international standards for the protection of human rights. This includes defining human rights in greater specificity and encouraging states to identify and punish violating states...and organize international censure. Such activities have had a significant impact on the activity of states and on further institutionalization of respect for human rights.<sup>38</sup>

NGOs' involvement in the protection of child's rights has also been phenomenal. Together with the states they work to facilitate the implementation of the Convention on the Rights of the Child. They submit independent reports and participate in the pre-sessional working groups where they provide data on the situation of women and children in different countries. NGOs reports are often considered an indispensable source of information, in drafting conclusions or resolutions during the ECOSOC sessions. In field of International Humanitarian Law, NGOs have been very instrumental for its progressive development. Beside the recognition of the role under the Fourth Geneva Convention, which such organisations as the ICRC play in times of armed conflict,<sup>39</sup> they were highly influential despite the United States' objections in the discussion and adoption of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti- personnel Mines and their Destruction.

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<sup>36</sup> It is believed that the role and independence of the prosecutor was a clear example of NGO influence.

<sup>37</sup> M. Olz, (n.6), p.344

<sup>38</sup> P. Wapner, *The Normative Promise of Non-State Actors: A Theoretical Account of Global Civil Society*, in Paul Wapner & Lester Edwin J. Ruiz(Eds), *Principled World Politics: The Challenge of Normative International Relations*, (Lanham MO, Rowman & Littlefield Publ. Inc., 2000), p. 271

<sup>39</sup> Oxfam International provides rapid relief during and after complex humanitarian disaster with or without UN partners. See, P.J Simmons, Learning to Live with the NGOs, *Foreign Policy*, Fall, (1998), p. 87

In the advocacy for environmental protection, the NGO's campaign led to the 1987 adoption of the Montreal Protocol on Substances Depleting the Ozone Layer as well as the Convention on Bio-diversity and particularly the Greenpeace and the Antarctica and Southern Oceans Coalition (ASOC) work to influence international negotiations concerning the protection of the oceans and the Antarctica. In describing their influence, Wapner observes, "Greenpeace and ASOC pressured states to adopt certain policies that through international cooperation, became institutionalised. Key to notice here is that while states ultimately institutionalised these policies, the initiation and articulation of them arose outside the state system, that is, in global civil society."<sup>40</sup> Although in many circumstances, these NGOs are forced to work outside of the domain of governments, but through many maneuvers, they were still able to reconfigure institution which enables them to inform corporate and trans-boundary practices. This was clearly evident in the ICJ Nuclear weapons Advisory Opinion<sup>41</sup> and in the operation of the Coalition for Environmentally Responsible Economies (CERES).<sup>42</sup>

In the area of trade and trade related policies, the NGOs have not been less involved. Their influence in the World Trade Organisation (WTO) negotiations was sufficiently made manifest in the Seattle Round when a number of participating developing countries on the campaign of civil society groups especially from the developing countries threatened to abandon negotiations because of the asymmetry nature of the WTO agreements and policies, which prejudice the development concerns of developing countries. To assuage their grievances, the next round of trade negotiations, the DOHA Round was committed to the development concerns of the developing countries. Again, the NGOs' efforts to make influential inroads into the dispute settlement procedure of the WTO, through the submission of Amicus Briefs have also been phenomenal although it has continued to be resisted by the appellate body who continues to interpret the relevant section of the Dispute Settlement Understanding (DSU) as empowering them with the discretion not to take the amicus briefs into account (as of necessity) in rendering their decision. The jurisprudence around the amicus briefs was expounded in detail in the United States import prohibition of Certain Shrimp and Shrimp products (The Shrimp-Turtle Case).<sup>43</sup> Although it may appear that the brief submitted by the NGOs was not considered, it was discovered that some arguments in the decision were based on those briefs which were environmentally based. In this way, the NGOs succeeded in promoting Bio-diversity with respect to endangered oceanic turtles. The Amicus briefs have therefore become an acceptable way through which they make interventions in the WTO and consequently construct policies that have transnational effect.

#### **4. Conclusion: Expanding the Participation of NGOs in International Decision Making**

This essay examined the convoluted status and nature of the NGOs' participation in the international law making. It also looked at the theoretical foundations for the increasing call for NGOs to contribute to global policy construction. It also undertook an assessment of their

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<sup>40</sup> P. Wapner (n.37), p.271

<sup>41</sup> In the ICJ Nuclear weapons advisory opinion, the NGOs through pressures mounted on both World Health organisation and the General assembly were able to secure the world court opinion on the illegality of the use of nuclear weapon in some circumstances, although some of the judges questioned the appropriateness of the volume of pressure and campaign carried out by the NGOs in that regard.

<sup>42</sup> CERES makes effort to specify a set of guidelines for corporate practices based on a code of conduct that would minimize corporate contribution to environmental degradation. To date a number of MNCs are signatories to the CERES principles including General Motors. In this way they institutionalize guidelines for transnational behavior, with or without the states' cooperation. See (n. 39), p.274

<sup>43</sup> See Lindblom, *Non-Governmental Organisations in International Law*, (n. 20), p.317-327, for a detailed discussion on the jurisprudence of the Amicus Briefs submitted to the WTO by the NGOs.

efforts in generating corporate policies for international behaviour. There is no doubt that the process of globalisation has brought about tremendous power shift from the state actors in international law to non-state actors. Although the Westphalia system continues to recognize the states as the center in international power brokerage, globalisation has threatened towards the acceptance of other actors like the NGOs and international organisation. In recent times, these bodies have more than states contributed to the policy formulation that guides behaviour globally. Indeed, power has been tremendously diffused and the UN system must acknowledge that fact, and begin to adapt itself to such changing circumstances, so as not only to legitimize its activities but also to mitigate any democratic deficit that may have been occasioned by the law making procedures of the system. This proposal ties in with the Habermas' suggestion, that:

Although conventional democratic democracy procedures for decision making and political representation can never be entirely replaced, a discourse-theoretical understanding of democracy means that factors such as a functioning public sphere, the quality of discussion, accessibility and discursive character of opinion and will formation can contribute to strengthen the legitimacy of international decision making.<sup>44</sup>

This advocacy for wider participation of interest groups in the international fora calls for the reform in many sectors for expanded legal status of NGOs and civil society groups. The mere consultative status granted the NGOs is simply inadequate to contain their enormous influence which traverses from provision of expertise in many international subjects to serving as channel of communication through to the grass roots. The difficulty of screening NGOs notwithstanding especially in this time of proliferated terrorist networks, there needs to be a detailed legal framework for their recognition and interventions in international conferences and regional assemblies. We live in a time when the weight of public opinion determines the inclination of the society. NGOs are readily vehicles of these opinions and there is need to provide official avenues for hearing them out. Again, information on ground shows that NGOs are involved in every conceivable concern of human affairs. To limit their consultative status in the UN system with matters pertaining to the ECOSOC tantamount to shutting them out from many other areas of transnational governance like international peace and security, resolutions affecting nations, trade and environmental issues. Although they do indeed participate in these deliberations, they do so subterraneously, hiding under the state's banner, especially where their interest coincides with that of the states. It is the proposal of this paper that their consultative status be expanded beyond the matters coming under the ECOSOC committee. We have to observe that the intrusive pilgrimage of the NGOs into governance and law making is one that should not be resisted, but welcome by the states and international organisation. Despite its potential problems, it has in fact brought about greater dialogue, participation and openness to wider perspectives in policy formulation especially in local, regional and international fora. Consultation with NGOs should therefore be a matter of course, not of choice.

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<sup>44</sup> Ibid. p.524