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The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House

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Abstract

In his recent 'Millennium Report' the Secretary-General of the United Nations spread his arms widely to embrace civil society. Yet the present institutional framework of the UN allows only for limited participation of NGOs, and there is fundamental disagreement between UN Member States on whether participatory rights of NGOs should be extended. This disagreement as well as the weaknesses of the current mechanism are well reflected in the work of the UN Committee on NGOs which, on the one hand, confers consultative status upon too many organizations, thereby endangering a substantive collaboration between the UN and NGOs in very practical terms, and, on the other hand, too often rejects organizations that deal with human rights issues under the pretext of 'misbehaviour', thereby muzzling critical voices at the UN. The challenge will be to find a model allowing for substantial contribution of NGOs while at the same time taking into account the necessary limits of participation. The debate promises to be difficult, not only in light of the current dichotomy between open and closed societies of UN Member States, but also because the issue goes to the very fundamentals of how international law works, who its actors and, in the end, its legal subjects are.

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Today, global affairs are no longer the exclusive province of foreign ministries, nor are states the sole source of solutions for our small planet's many problems. Many diverse and increasingly influential non-state actors have joined with national decision-makers to improvise new forms of global governance. The more complex the problem at hand — whether negotiating a ban on landmines, setting limits to emissions that contribute to global warming, or creating an International Criminal Court — the more likely we are to find non-governmental organizations, private sector institutions and multilateral agencies working with sovereign states to find consensus solutions.¹

In his recent 'Millennium Report' — a document that received considerable attention and from which the words cited above are taken — the Secretary-General of the United Nations, Kofi Annan, spread his arms widely to embrace civil society. In doing so he took account of a multi-faceted advent of non-state actors in the international arena.² Besides inviting the private sector to engage in global partnerships with the UN, the Secretary-General encouraged non-governmental organizations (NGOs) to participate and cooperate more extensively in the decision-making processes of the United Nations.³

Yet, at present the institutional framework of the UN allows only for limited participation of NGOs. An NGO may request accreditation for a special UN conference, establish working relations with special bodies of the UN, associate itself with the UN Department of Information (DPI), or ask for consultative status with the Economic and Social Council of the UN (ECOSOC). Among these four options, being in consultative status with ECOSOC entails the most far-reaching rights and privileges. It is upon the recommendation of the UN Committee on Non-Governmental Organizations (the 'NGO Committee'), a standing committee of ECOSOC, that consultative status is granted by ECOSOC.⁴ When visiting the website of the NGO Committee, one can admire a skilfully designed door opening against a background depicting the

¹ 'We, the Peoples: The Role of the United Nations in the Twenty-First Century', Report of the Secretary-General of 27 March 2000, UN Doc. A/54/2000 ('Millennium Report'), at para. 315. Note that 'We, the peoples' is also the opening phrase of the Preamble to the UN Charter.

² 'The advantages of this increased NGO participation cannot be overestimated. NGOs have introduced additional knowledge and information into the decision-making process; they have raised new issues and concerns which were subsequently addressed by the United Nations; they have provided expert advice in areas where they were the main actors; and they have contributed greatly to a broad consensus-building process in many areas which ensured commitment by all actors to a global agenda. This participation has proven to be a very useful addition to the regular intergovernmental work of the Organization' ('Arrangements and Practices for the Interaction of Non-Governmental Organizations in All Activities of the United Nations System', Report of the Secretary-General of 10 July 1998, UN Doc. A/53/170, at para. 31); see also Otto, 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society', 18 *Human Rights Quarterly* (1996) 107–141, at 127 *et seq.* The notion of the 'non-state actor' is met with reluctance by a number of states, because in the past it has been used to distinguish armed rebel groups from governmental authorities in internal conflicts. It is suggested here, however, that this connotation be overcome. The notion of the non-state actor is more precise and helpful in distinguishing non-governmental from governmental actors in the international sphere than it is with respect to internal conflicts. Besides, it is self-evident that we are not discussing the participation of armed rebel groups at the UN forum.

³ 'Millennium Report', *supra* note 1, in particular at paras 312–361.

⁴ The Committee was established by ECOSOC Resolution 3 (II) of 21 June 1946.

emblem of the United Nations.⁵ However, the perception of the community of NGOs is slightly different. Some NGOs, particularly those dealing with human rights issues, see the entrance door to the UN closing and not opening before their eyes. It is in particular the NGO Committee whose policy receives considerable public attention and, by the same token, harsh criticism. The Committee, or, more precisely, certain states that form the majority of it, are accused of carrying out an unwarranted, unfriendly policy against a number of NGOs.⁶

Two questions arise in light of what has been alluded to above. The first is whether and to what extent there is merit to the criticism regarding the work of the NGO Committee. Secondly, taking into account the current institutional framework of the UN, which allows only for a limited participation of NGOs, the question becomes pertinent whether there is a need to adapt this framework to the new social realities by allowing for more participation of non-state actors, in particular of NGOs.⁷

The present study seeks to link these two questions. Departing from the more specific first question, it aims at moving towards the larger context of institutional adaptation. The reason this approach has been chosen is that not only is the work of the NGO Committee an excellent focal point of analysis to illustrate some weaknesses of the current mechanism of NGO participation at the UN, but it also reveals a variety of problems that have to be taken into account when considering whether to extend the participatory rights of NGOs in the decision-making process of the UN. Beyond that, the work of the NGO Committee reflects very well, and therefore is a useful tool to demonstrate, a fundamental disagreement between UN member states at large on whether and to what extent one should allow for (more) participation of NGOs in general.

In order to be able to understand the work of the NGO Committee it is indispensable to have a basic knowledge of the nature of consultative status with ECOSOC as well as of the procedural and substantive requirements under which it is granted (Part 1 below). It is against this background that the practice of the NGO Committee shall be analysed and an answer to the question be sought as to whether the criticism regarding the Committee's work alluded to above is justified (Part 2 below). The Committee's record shall then be embedded in the larger context of a general conflict

⁵ At www.un.org/esa/coordination/ngo/ngosection, visited on 5 December 2000 and on 14 August 2001. This website is maintained by the NGO Section of the Department of Economic and Social Affairs (DESA) which acts as the substantive secretariat of the NGO Committee and as the focal point within the UN for all matters related to the consultative relationship between the UN and NGOs.

⁶ 'Groups Fear Exclusion from the UN', *New York Times*, 23 May 2000; 'Whose United Nations?', *Washington Times*, 13 June 2000; 'House-Breaking Freedom', *Wall Street Journal*, 22 June 2000; and 'A Charade at United Nations', *Miami Herald*, editorial, 12 July 2000; see also 'NGOs and the United Nations. Comments for the Report of the Secretary-General', Report of the 'Global Policy Forum' of June 1999, at 19 *et seq*; Statement of Danielle Bridel, First Vice-President of the Conference of Non-Governmental Organizations in Consultative Relationship with the United Nations (CONGO), 28 July 1999, at www.conferenceofngos.org/ngopart/bridel, visited on 5 December 2000.

⁷ A question which is, of course, valid also with respect to any international organizations other than the UN.

of views among member states as to what the relationship between the UN and non-state actors should be. It is beyond the scope of this article to answer comprehensively the question of institutional adaptation of the UN framework. The present study, therefore, aims instead merely to shed some light on a variety of problems linked to the existing mechanism of NGO participation, problems that also have to be taken into account when considering an extension thereof (Part 3 below).

1 Consultative Status: An Entrance Door to the United Nations

The basis for the establishment of consultative relationships with NGOs can be found in Article 71 of the UN Charter, according to which:

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

Article 71 of the Charter is specified by ECOSOC Resolution 1996/31 on the ‘consultative relationship between the United Nations and Non-Governmental Organizations’,⁸ which provides a detailed set of rules guiding the work of the NGO Committee. Yet, as is also acknowledged by the Committee’s delegates, Resolution 1996/31 is in many respects insufficiently drafted. Its lacunae and ambiguities frequently leave the members of the Committee in uncertainty and lead to extensive discussions, not only with regard to procedural questions. The ambiguous language of Resolution 1996/31 reflects the disagreement among UN member states on how wide the door shall stand open for non-state actors.⁹ The political compromise found in 1996 after several years of debate merely postponed further controversy to future sessions of the NGO Committee.¹⁰

The basic requirements for the conferment of consultative status are set out in Part I of Resolution 1996/31. Such status may be established with international, regional, sub-regional and national organizations,¹¹ and, in the case of a national organization, only after consultation with the member state concerned.¹² The term ‘non-governmental organization’ itself is not defined by Resolution 1996/31. The

⁸ UN Doc. E/1996/31 of 25 July 1996. For nearly three decades, consultation by ECOSOC with NGOs was governed by Resolution 1296 (XLIV) of 23 May 1968.

⁹ Illustrative in this respect is Hobe, ‘Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht’, 37 *Archiv des Völkerrechts* (1999) 152 *et seq.*

¹⁰ Accordingly, NGOs have called for a clarification of the language of Resolution 1996/31, in terms of objectives, functions, responsibilities and methods of operation: see ‘Views of Member States, Members of the Specialized Agencies, Observers, Intergovernmental and Non-Governmental Organizations from All Regions on the Report of the Secretary-General on Arrangements and Practices for the Interaction of Non-Governmental Organizations in All Activities of the United Nations System’, Report of the Secretary-General of 8 September 1999, UN Doc. A/54/329, at para. 25.

¹¹ Res. 1996/31, *supra* note 8, at para. 5.

¹² *Ibid.*, at para. 8.

organization must be concerned with matters falling within the competence of ECOSOC and its subsidiary bodies¹³ and must be able to demonstrate that its programme of work is of direct relevance to and can contribute to the aims and purposes of the UN.¹⁴ The aims and purposes of the organization must be in conformity with the spirit, purposes and principles of the Charter.¹⁵ The organization must be of recognized standing within its field of competence¹⁶ and must have an established headquarters, with an executive officer.¹⁷ Furthermore, the organization must have a democratically adopted constitution,¹⁸ a representative and accountable inner structure¹⁹ and the authority to speak for its members.²⁰ As regards the funding of the organization, the basic resources must be derived from either national affiliates or other components or from individual members.²¹ Lastly, the organization must attest that it has been in existence for at least two years at the date of receipt of its application.²²

Depending on the nature of the organization, its scope of activity and the contribution it can be expected to make to the work of ECOSOC, an NGO can ask for general consultative status or special consultative status, or can be put on what is called the Roster.

General consultative status can be requested by any organization that is concerned with most of the activities of ECOSOC, from which substantive and sustained contributions can be expected, and whose membership is broadly representative of major segments of society in a large number of countries in different regions of the world.²³ The rights and privileges appertaining to this status are the most far-reaching of the three categories. Any organization enjoying it may designate UN representatives, is invited to UN conferences,²⁴ may attend UN meetings, may speak and

¹³ *Ibid.*, at para. 1.

¹⁴ *Ibid.*, at paras 3 and 8.

¹⁵ *Ibid.*, at para. 2.

¹⁶ *Ibid.*, at para. 9.

¹⁷ *Ibid.*, at para. 10.

¹⁸ *Ibid.*, at para. 10; a copy of which must be deposited with the Secretary-General of the UN.

¹⁹ *Ibid.*, at para. 12.

²⁰ *Ibid.*, at para. 11.

²¹ *Ibid.*, at para. 13.

²² *Ibid.*, at para. 61(h). This requirement has been hidden in Part IX of the Resolution. Some applications indeed fail by reason of not complying with this requirement. Perhaps some NGOs do not read this stipulation carefully enough, if ever. It is the date of submission of the application that imports. Since an application has to be submitted no later than 1 June of the preceding year, the NGO must attest that it had been in existence for two years on this date. The day the Committee deals with the application is irrelevant in this respect.

²³ *Ibid.*, at para. 22.

²⁴ It is important to note that the invitation does not equal accreditation. According to para. 41 of Res. 1996/31, *supra* note 8, where non-governmental organizations have been invited to participate in an international conference convened by the UN, their accreditation is the prerogative of member states, exercised through the respective preparatory committee. However, organizations with consultative status at the UN shall, *as a rule*, be accredited (*ibid.*, at para. 42).

circulate statements of 2,000 words at meetings of ECOSOC and of subsidiary bodies of ECOSOC, and may even propose items for the agenda of ECOSOC.²⁵

Organizations whose scope of competence and activity is limited to only a few of the fields of activity covered by ECOSOC may request special consultative status.²⁶ Organizations with special consultative status enjoy the same privileges as those with general consultative status, except that they can neither propose any item for the ECOSOC agenda²⁷ nor speak at meetings of ECOSOC.²⁸ Also, the written statements it may circulate are limited to 500 words at ECOSOC and 1,500 words at ECOSOC subsidiary bodies' meetings.

Other organizations which do not fulfil the criteria of either of the above-mentioned categories but can make occasional and useful contributions to the work of ECOSOC may ask to be put on a list known as the Roster.²⁹ These organizations are consulted at the request of ECOSOC or its subsidiary bodies. The scope of privileges appertaining to this status is limited to designation of UN representatives, attendance at UN meetings and invitation to UN conferences.³⁰ Many NGOs are on the Roster not because they have fulfilled the ECOSOC requirements, but by virtue of their status with specialized agencies and other UN bodies. This is not unproblematic, for the criteria of establishing consultative relationships vary considerably with respect to the different UN bodies.

As of August 2001, 2,091 organizations had received consultative status with ECOSOC, of which 121 had been conferred general consultative status, 1,085 special consultative status, and 885 Roster status.³¹

Consultative status with ECOSOC is granted upon application. There is no danger of any NGO applying for the wrong category. The NGO Committee automatically reclassifies the application if it considers the requirements of only an inferior status met. In any case, an NGO may at any time request reclassification. Experience has shown that it can be very helpful for an NGO to be represented in the room when the Committee discusses its application. Not only is such presence positively taken into account by the Committee members in their consideration of the application, but the Committee has a consistent practice to deal first with the applications of those

²⁵ See in detail Parts IV and V (at paras 27–39) of Res. 1996/31, *supra* note 8.

²⁶ *Ibid.*, at para. 23.

²⁷ See *ibid.*, at para. 32, which only applies to organizations in general consultative status.

²⁸ They may, however, speak at ECOSOC subsidiary bodies' meetings: see *ibid.*, at para. 38(a).

²⁹ *Ibid.*, at para. 24.

³⁰ *Ibid.*, at paras 29 and 42. However limited the privileges for organizations on the Roster may be in comparison with the other two categories, enhanced access to UN meetings and conferences is an important one.

³¹ According to the information provided to the author by the NGO Section of DESA on 10 August 2001. The latest 'List of the Non-Governmental Organizations in Consultative Status with the Economic and Social Council as at 31 October 2000', UN Doc. E/2000/INF/4, which indicates 1,995 organizations with consultative status is outdated in this respect.

organizations who are represented in the room.³² Being represented in the room also gives the organization an opportunity to respond immediately to objections and to answer further questions that it had not been able to clarify to the Committee's satisfaction before. It is upon recommendation of the Committee that ECOSOC decides on whether or not to grant consultative status. In most cases ECOSOC follows the recommendation of the Committee. Yet, in particular if the Committee's decision was not taken by consensus, this is not always the case, as we will see below.³³

Once in consultative status with ECOSOC, an NGO is under an obligation to submit every four years a report on its activities, the so-called quadrennial report.³⁴ This mechanism aims at enabling the Committee to survey whether the organizations continue to satisfy the substantive criteria of consultative status as set out above. If the Committee is of the opinion that this is not the case, it can recommend reclassification or even withdrawal of consultative status to ECOSOC. The obligation of submitting such quadrennial report, however, does not apply to organizations on the Roster, a fact that renders their surveillance difficult.

Under 'exceptional circumstances', the Committee can ask for such a report from any organization irrespective of the status it enjoys between the regular reporting dates.³⁵ This mechanism of special reports is usually resorted to when the Committee's attention is drawn to an act or a pattern of acts of an organization which could lead to suspension or withdrawal of the consultative status in accordance with Part VIII of Resolution 1996/31.³⁶

2 The Practice of the Committee: Opening or Closing the Door?

The NGO Committee consists of 19 member states which are elected by ECOSOC on the basis of equitable geographical representation.³⁷ As mentioned in the introductory part of this study, the Committee is in particular criticized for its policy towards those NGOs that deal with human rights issues. In light of the membership of the Committee this does not come as a surprise. The key to understanding the policy of the Committee is that those states that are frequently targeted by human rights NGOs are by the same token those that decide on what NGO shall be granted consultative status. An NGO which is known for strong criticism of Cuba's human rights record or of Russian

³² This practice makes sense, since for an NGO (as well as for Committee members) it is almost impossible to predict the exact date when the Committee will be reaching the agenda item of its application. Sometimes by being represented in the room an organization whose application figured at the very end of the Committee's agenda was able to prevent deferment of its application to the following session.

³³ In those cases it is often a Committee member belonging to the outvoted minority that requests reconsideration of the Committee's recommendation by ECOSOC.

³⁴ Res. 1996/31, *supra* note 8, para. 61(c).

³⁵ *Ibid.*

³⁶ Suspension and withdrawal of consultative status will be dealt with in Part 2 below.

³⁷ Res. 1996/31, *supra* note 8, para. 60. At present, the Committee is composed of Algeria, Bolivia, Chile, China, Columbia, Cuba, Ethiopia, France, Germany, India, the Lebanon, Pakistan, Romania, the Russian Federation, Senegal, Sudan, Tunisia, Turkey and the United States.

action in Chechnya is not likely to receive a favourable treatment of its application by those countries. And the wider the scale and geographical focus in which an NGO operates, the larger the coalition of member states in the Committee opposing the application tends to become. In this respect, the fox is guarding the hen-house.

The degree to which the structural problems of the Committee are revealed depends to a large extent on the specific cases it is dealing with. In this respect, the Committee's regular session of 2000 was particularly illustrative. For this reason I have chosen to concentrate the analysis on this session, pointing only in a concluding part to more recent developments.³⁸

In its regular 2000 session, the NGO Committee had before it 37 applications for consultative status deferred from its 1998 and 1999 sessions as well as 80 new applications. Of those applications, the Committee recommended that ECOSOC grant consultative status to 37 organizations,³⁹ not grant consultative status to five organizations, that the applications of two organizations be resubmitted and that the file of one organization be closed; 72 applications were deferred to a later date and the reclassification of one organization from special to general consultative status was recommended.⁴⁰

When trying to make sense of these statistics one first has to filter out what is irrelevant for the purposes of the present study. Asking for resubmission of an application is not suspicious, for the two organizations concerned had not complied with the requirement to be in existence for at least two years at the date of submission of the application.⁴¹ The same is true for the closing of the file in one case, for the organization concerned had withdrawn its application.

The deferment of 72 applications, however, reveals a problem. At first glance, deferment is not suspicious either. It takes place either if the Committee has not had the chance to consider the application⁴² or if further clarification is sought from the organization.⁴³ However, submitting further questions to an organization is a frequent political manoeuvre to win more time and a pretext for postponing a controversial debate within the Committee.⁴⁴ This strategy is often used even if an organization has already provided the Committee with a comprehensive answer.⁴⁵

³⁸ This session took place on 15–19 May and 12–23 June 2000. The Committee has held a resumed 2000 session from 15–26 January 2001 and its regular 2001 session from 7–25 May 2001. We shall come back to the latter sessions in the concluding part of this article.

³⁹ None for general consultative status, 34 for special consultative status, three for Roster status.

⁴⁰ See 'Report of the Committee on Non-Governmental Organizations on the First and Second Part of its 2000 Session', UN Doc. E/2000/88 (Part I) of 5 July 2000 and UN Doc. E/2000/88 (Part II) of 13 July 2000 (hereinafter referred to as 'Report of the Committee').

⁴¹ See *ibid.*, Part I, at 5. See in general *supra* note 22.

⁴² See *ibid.*, Part II, at para. 44.

⁴³ *Ibid.*, at para. 45.

⁴⁴ In most cases, the positions of the different Committee members have long been established and are unlikely to change irrespective of any further clarification provided by the organization in question. A case in point is the application of the Hadassah organization whose application was deferred continuously (see Report of the Committee, *supra* note 40, Part II, paras 20 *et seq.*).

⁴⁵ A case in point is the complaint of China against Freedom House (see Report of the Committee, *supra* note 40, Part II, paras 94–100).

What remains is that 37 organizations were recommended for consultative status whereas five organizations were not. Among these five applications, three were rejected on the grounds that the organizations concerned were politically motivated and had links to terrorist activities,⁴⁶ one on the grounds that it supported the independence of a province of a member state,⁴⁷ and one on the ground that it had no real contribution to make to the work of ECOSOC.⁴⁸ All decisions were adopted by consensus. In light of the requirements that the aim of any organization applying for consultative status has to be in conformity with the principles and purposes of the UN Charter,⁴⁹ that it has to refrain from any internationally recognized criminal activity,⁵⁰ and that it has to be able to contribute to the work of ECOSOC,⁵¹ the rejection of these five applications is justified from a legal point of view.

At first glance, the Committee's record of having recommended 37 organizations for consultative status and rejected five on legitimate grounds does not provide any basis for criticism. The Committee is, however, faced with a dramatic increase of the number of applications which renders almost impossible any in-depth verification of whether the applicants truly fulfil the substantive requirements for the conferring of consultative status.⁵² Hence, there is a considerable danger that too many organizations are admitted which either are government-related ('GRINGOs', in UN parlance), business-related ('BINGOs') or religious organizations ('RINGOs').⁵³ Those that are detected as such are classified as so-called grey area organizations. In the absence of a clear definition in Resolution 1996/31 of what is to be understood by a non-governmental organization, there does not seem to exist any consistent practice of the Committee on how to deal with these organizations.

The Conference of NGOs in Consultative Relationship with the United Nations (CONGO) is afraid of this development, for it fears that it might backfire. The greater the number of NGOs admitted, the less feasible will be a substantive collaboration between the UN and NGOs in very practical terms. Besides, the number of NGOs violating the rules of the game rises proportionally to the number of NGOs in consultative status. An increasing number of such incidents would provide those states that oppose increased participation of NGOs with good arguments.

Another troublesome question is the one of burden of proof. As a matter of principle,

⁴⁶ The Association pour la Fondation Mohsen Hachtroudi (Report of the Committee, *supra* note 40, Part II, at para. 23); the Kazem Rajavi International Association for the Defence of Human Rights (*ibid.*, at para. 25), and the Tamil Center for Human Rights (*ibid.*, at paras 38 *et seq.*).

⁴⁷ The North American Taiwanese Women's Association, *ibid.*, at para. 24.

⁴⁸ The Enchanté répertoire de la tranquillité, *ibid.*, at para. 26.

⁴⁹ See Res. 1996/31, *supra* note 8, at para. 2. An NGO that supports secessionist movements disrespects the territorial integrity of a member state of the UN protected under Article 2(1) and (4) of the UN Charter.

⁵⁰ *Ibid.*, at para. 57(b).

⁵¹ *Ibid.*, at para. 3.

⁵² The number of NGOs with consultative status at ECOSOC has increased from 943 in 1992/93 to 2,091 as of 8 August 2001 and 777 organizations had requested the application material for 2001 (see *supra* note 31; see also UN Doc. A/54/520, Table 1, and UN Doc. E/2000/INF/4).

⁵³ For a critical analysis of these 'NGOs', see 'Sins of the Secular Missionaries', *Economist*, 29 January 2000, at 25 *et seq.*

it is not for the Committee members, but for the organization concerned, to prove that it lives up to the requirements set out in Resolution 1996/31. However, all organizations whose applications were rejected denied the charges against them. The Committee, however, neither has the time nor the means to thoroughly investigate the case.

The statistics dealt with so far are only half of the picture. What has generated the criticism mentioned in the introductory part of this paper is the way in which the Committee carries out its second mandate besides the one of considering applications for consultative status, that is the mandate of monitoring the relationship with the NGOs after they have been awarded consultative status.⁵⁴

Once in consultative relationship with ECOSOC, an organization has to abide by the rules of the game. Under paragraph 57 of Resolution 1996/31, there are three cases in which the consultative status of an organization may be suspended for up to three years or withdrawn.⁵⁵ Only the first case is of interest for the purposes of this study, that is 'if an organization, either directly or through its affiliates or representatives acting on its behalf, clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the Charter of the UN including unsubstantiated or politically motivated acts against member states of the UN incompatible with those purposes and principles'.⁵⁶ In its 2000 session, the Committee's attention was drawn to five cases.⁵⁷ For the purposes of this study we shall focus on those two cases where a final decision was taken and which are most illustrative of the problem.

First, Cuba requested that the consultative status of the International Council of the Association for Peace in the Continents (ASOPAZCO), a Spanish-based human rights organization, be withdrawn.⁵⁸ The letter circulated by the Cuban delegation to the members of the Committee alleged that this organization was engaging in activities aiming at the overthrow of the Cuban Government.⁵⁹ The special report submitted by the organization at the request of the Committee⁶⁰ denied the detailed accusations comprehensively and, in the opinion of some member states, convincingly. Cuba changed its strategy in light of a lengthy debate to request only a three-year suspension of ASOPAZCO's consultative status instead of its withdrawal as previously requested. This strategy was presented as 'flexibility'⁶¹ and was appreciated as such by other Committee members. The strategy paid off. Cuba was able to convince a sufficient number of hesitant members of the Committee to go along with this less

⁵⁴ As to this function of the Committee, see Res. 1996/31, *supra* note 8, at para. 61(b).

⁵⁵ Again, the final decision is taken by ECOSOC upon recommendation of the Committee: see *ibid.*, at para. 58.

⁵⁶ *Ibid.*, at para. 57(a). The two other cases are, first, if there exists substantiated evidence of influence from proceeds resulting from internationally recognized criminal activities (*ibid.*, at para. 57(b)); and, secondly, if, within the preceding three years, an organization did not make any contribution to the work of the UN (*ibid.*, at para. 57(c)).

⁵⁷ Report of the Committee, *supra* note 40, Part II, at paras 70–124.

⁵⁸ *Ibid.*, at paras 71–93.

⁵⁹ *Ibid.*, at para. 72.

⁶⁰ As regards the request of a special report, see p. 949 above.

⁶¹ Report of the Committee, *supra* note 40, Part II, at para. 83.

severe measure. In a last effort, Germany, supported by Chile, France, Romania and the United States, put forward a motion to postpone the action on the grounds that the organization had not been granted sufficient time to respond to the allegations. The motion was defeated and the Committee recommended a three-year suspension of ASOPAZCO's consultative status.⁶² ECOSOC, in dealing with the Committee's recommendation, was sharply divided. By a narrow vote of 25 to 18, with nine abstentions, it followed the Committee's recommendation.⁶³

Secondly, the Committee had before it a request of the Russian Federation that the general consultative status of the Transnational Radical Party (TRP) be withdrawn.⁶⁴ The charges were three-fold: first, the Russian delegation accused TRP of having accredited and given the floor at the 56th session of the Commission on Human Rights to an individual, Mr Igidov, who identified himself as a representative of the President of Chechnya in Europe and to the UN; secondly, that the TRP promoted the legalization of drugs; and, thirdly, that it had waged a campaign against the prevention of paedophilia and child pornography on the Internet. The organization admitted the incident relating to the first charge and offered written and oral apologies for it. TRP stressed, however, that to its knowledge Mr Igidov was neither a terrorist nor had he participated in such activities. Mr Igidov had consistently called for peace in Chechnya, which was the reason why he had been sent to Geneva.⁶⁵ With respect to the drug issue, TRP explained that it had always supported the need to prevent the diffusion of those substances and to remedy the illegal liberalization of the drug market and deficiencies of current prohibitionist legislation.⁶⁶ As regards the question of paedophilia, TRP stressed that it did not at all support paedophilia, but had organized conferences on the issue, one in 1998 in cooperation with the European Parliament.⁶⁷

In light of TRP's responses, any punitive measure would not have been justifiable on the grounds of Resolution 1996/31. The incident at the Human Rights Commission was not foreseeable by the organization, or at least not intended. It had apologized on several occasions. In any event, there was no 'pattern of acts' as required by paragraph 57(a) of Resolution 1996/31⁶⁸ inasmuch as there was no 'clear abuse' of its consultative status. Supporting a liberal drug policy may be the subject of political controversy. However, it does not violate the principles and purposes of the UN Charter.⁶⁹ Lastly, the paedophilia issue was almost not worth

⁶² By a roll-call vote of 11 in favour (Algeria, Bolivia, China, Colombia, Cuba, Ethiopia, Lebanon, Pakistan, Russian Federation, Sudan and Tunisia), five against (Chile, France, Germany, Romania and the US) with two abstentions (India and Turkey): see *ibid.*, at paras 86 *et seq.* Interestingly, Turkey abstained in the vote on the ground that the organizations had not been given sufficient time to explain its position (*ibid.*, at para. 91), but did not support the motion for postponement of action (*ibid.*, at para. 82).

⁶³ Council Decision of 18 October 2000, UN Doc. E/2000/307; see also UN Doc. A/55/3/Add.2, at paras 5 *et seq.*

⁶⁴ Report of the Committee, *supra* note 40, at paras 101–117.

⁶⁵ *Ibid.*, at para. 103.

⁶⁶ *Ibid.*, at para. 104.

⁶⁷ *Ibid.*, at para. 107.

⁶⁸ Noted also by one delegation, *ibid.*, at para. 117.

⁶⁹ Noted also by one delegation, *ibid.*, at para. 105.

consideration. TRP had pointed to the conflict of restricting the use of the Internet with the freedom of speech. From a legal perspective there is merit to this concern. No document submitted by the Russian delegation was able to establish that TRP supported paedophilia and child pornography.

Consequently, a number of delegations were satisfied with TRP's response.⁷⁰ Why then did they join the consensus decision of the Committee to recommend a three-year suspension of TRP's consultative status?⁷¹

Faced with a certain weakness of its case, the Russian Federation had signalled that it would agree to a three-year suspension if the Committee so decided *by consensus*. This again was seen as 'flexibility' by a number of member states which in their view had to be appreciated. Those states that were in principle satisfied with TRP's response now faced a dilemma: If they had gone along with any such consensus, they would have had to do so against their conviction that the Russian claim was unfounded. If they had not, then the Russian Federation would have gone back to its original request⁷² and the chances were high that it would have won the vote to withdraw (and not simply to suspend) TRP's consultative status. There were lengthy informal discussions among the TRP-friendly Committee member states on what to do. Public pressure was increasing.⁷³ At last, it was the informal agreement of TRP itself to accept a three-year suspension that made the TRP-friendly states decide to join the consensus. However, strong reservations were expressed.⁷⁴ The US even dissociated itself from the consensus.⁷⁵

The Russian delegation had hoped that a recommendation by consensus (a three-year suspension) would not be overruled by ECOSOC as easily as one of an internally divided Committee (a withdrawal). This strategy did not pay off, however. Those states that would have voted against withdrawal, but had joined the consensus for suspension, managed to shatter the consensus decision again. Under paragraph 56 of Resolution 1996/31, TRP had to be given written reasons for the decision to suspend its status and an opportunity to present its response for appropriate consideration by the Committee.⁷⁶ In accordance with this rule the Committee held a second resumed session on 27 September 2000 in which the above-mentioned

⁷⁰ *Ibid.*, at para. 106.

⁷¹ *Ibid.*, at para. 112.

⁷² This, of course, is not so clearly expressed in the Report of the Committee: see *ibid.*, at para. 111.

⁷³ The Italian Senate held a hearing on the issue. TRP, and in particular Emma Bonino, lobbied the French and German Foreign Ministers. Newspapers also reported on the matter.

⁷⁴ Report of the Committee, *supra* note 40, Part II, at paras 113 *et seq.*

⁷⁵ *Ibid.*, at para. 115.

⁷⁶ There was a considerable debate among Committee members as to whether or not the mere sending of the Committee's (draft) report on its activities (for ECOSOC consideration) could be considered as 'written reasons' in this sense. Furthermore, it was unclear whether 'appropriate consideration' had to be understood as allowing for reconsideration of the Committee's decision (see UN Doc. E/2000/88 (Part II)/Add.1 of 27 July 2000, at paras 17 *et seq.* (with respect to ASOPAZCO), and UN Doc. E/2000/88 (Part II)/Add.2 of 4 October 2000, at para. 5 (with respect to TRP)). Limited space does not allow for inquiring further into this question. This goes back to what was said at p. 946 above with respect to the insufficiencies of Resolution 1996/31.

Committee members put forward a motion to reconsider the Committee decision. Even though this motion was defeated,⁷⁷ those states were able to stress that they had joined the consensus only hesitantly and, in light of a satisfactory response by TRP, no longer felt bound by the consensus decision.⁷⁸ In the following session of ECOSOC they succeeded in convincing the majority of the Council to overrule the Committee's recommendation.⁷⁹

There seem to be four lessons which we can learn from the two cases discussed above. First, the fact of dealing with several state complaints at the same time generates a political bargain of *do ut des*, a horse-trading, at the expense of the organization concerned. If, as happened in the 2000 session, four complaints are put forward by four different member states of the Committee, each of the complaining states can be sure of the support of the other three regardless of the merits of its complaint. The Russian Federation, Sudan and China supported the Cuban complaint and in return could count on the support of Cuba with respect to their own complaint, and *vice versa*. Such alliances are not limited to those states which have actually put forward a complaint, however: other states are aware of the fact that they, too, might soon be in the same position as those four states. As a consequence, they support the complaint on the table in order to receive support of their own complaints in the future. This alliance of states that are themselves targeted by human rights NGOs forms the majority of the Committee. This goes back to what was said in the first section: the key to understanding the policy of the Committee is to be aware of the states of which it is composed.

Secondly, the minority feels forced to exhaust all procedural means to prevent the Committee from taking a decision, such as motions for postponement of the action⁸⁰ or motions to reconsider the case.⁸¹ This, of course, is legitimate. It is also, from a policy point of view, in the interest of those states to convey a message to the outside world that everything was done to help the organization in question. However, taking into account the workload the Committee is faced with, this leads to an undesirable prolongation of the debate.

Thirdly, it is with great concern that one has to witness an overall tendency towards consensus decisions, and in particular the dilemma the NGO-friendly states are faced with of whether to join a consensus on less severe punitive measures than originally requested. If these states do not join the consensus, the complaining state is likely to resort to its original request for withdrawal and win the vote. If they do join the consensus, then the worst case scenario of withdrawal is prevented. However, this is

⁷⁷ UN Doc. E/2000/88 (Part II)/Add.2, at para. 5.

⁷⁸ See Statement of the Representative of the United States, *ibid.*, at para. 8; Statement of the Representative of France, *ibid.*, at para. 9; and in particular the explanation of the vote of the Representative of Germany, *ibid.*, at para. 20: 'Germany wants to make it clear that it does not feel obliged to go along with this consensus in other United Nations bodies.'

⁷⁹ See UN Doc. A/55/3/Add.2, at paras 7 *et seq.*

⁸⁰ In the case of ASOPA ZCO, see Report of the Committee, *supra* note 40, Part II, at para. 81.

⁸¹ In the case of TRP, see UN Doc. E/2000/88 (Part II)/Add.2, at para. 5.

at the expense of a profound debate and an honest assessment of the case, and leads to shaky compromises that will not stand strong before ECOSOC.

Fourthly, it cannot be questioned that any NGO enjoying consultative status must abide by the rules of the game. However, the ‘misbehaviour’ of an organization brought to the attention of the Committee is often merely a pretext for muzzling critical voices in the UN forum. In reality, it is on the grounds of having criticized the human rights record of a member state of the Committee that withdrawal or suspension of the consultative status of an organization is requested. Such requests find no basis in Resolution 1996/31, however. When it comes to state complaints, the debate in the Committee becomes heavily politicized.⁸²

Neither the resumed 2000 session nor the regular 2001 session of the Committee have changed the picture.⁸³ Despite being less conflict-ridden, which can partly be explained by the nature of cases dealt with, the fundamental problems remain unchanged. The handling of China’s and Cuba’s complaint — supported by Sudan — against the US organization Freedom House, which once more was deferred, is illustrative in this respect.⁸⁴ One should furthermore not be misled by the fact that in

⁸² See, as only one example, the statement made by the Representative of Cuba: She acknowledges, first, that ‘[t]he Committee on Non-Governmental Organizations is not the relevant body to be discussing human rights’. However, she carries on that ‘[t]he United States is not at all an example of good practices in its penitentiary system, as substantiated by various special rapporteurs of the Commission on Human Rights and NGOs. Furthermore, the attention given to the so-called “situation of human rights in Cuba” by the Commission has only been possible as a consequence of the manipulation of that body by the Government of the United States. Although the United States has exerted all kinds of political and diplomatic pressures against the membership of the Commission, the majority of its members have not supported the resolution against Cuba prepared in Washington, DC. The perpetrators of violations of the human rights of the Cuban people are the authorities of the United States, who are maintaining a blockade that qualifies as a genocide.’ UN Doc. E/2000/88 (Part II)/Corr.1 of 25 July 2000.

⁸³ At its 2000 resumed session, the Committee had before it 147 applications for consultative status, including applications deferred from its 1998 and 1999 sessions and the first and second part of its 2000 session. Of those applications, the Committee recommended 52 applications for consultative status, did not recommend six organizations, deferred 87 applications and closed consideration of two applications. The Committee considered seven requests for reclassification, of which it granted two, deferred four, and did not recommend one (see ‘Report of the Committee on Non-Governmental Organizations on Its Resumed 2000 Session’, UN Doc. E/2001/8 of 22 February 2001). At its 2001 regular session of May 2001, the Committee had before it 145 applications, of which it recommended 44, deferred 101, and closed consideration of one (which in fact would make it 146 applications). The Committee reviewed four requests for reclassification, of which it deferred three and closed one (see ‘Report of the Committee on Non-Governmental Organizations on Its 2001 Regular Session’, UN Doc. E/2001/86 of 15 June 2001). The Committee’s recommendations have been approved in their entirety by ECOSOC (see, with respect to the Committee’s resumed 2000 session, Decisions 2001/214 and 2001/215 of 3 May 2001, UN Doc. E/2001/INF/2/Add.1 of 18 June 2001; the approval of the Committee’s recommendations of its regular 2001 session had not been officially released at the time of writing of this paper).

⁸⁴ See Report of the Committee on Its Resumed 2000 Session, *supra* note 83, at paras 82–89, and Report of the Committee on Its Regular 2001 Session, *supra* note 83, at paras 85–104. For a critical analysis of an earlier debate, see ‘House-Breaking Freedom’, *Wall Street Journal*, 22 June 2000; ‘Dictatorships Attack Freedom House at UN’, www.freedomhouse.org/research/freemon/2000/fall/unations, visited on 29 January 2001. Also illustrative of this is the statement of the Representative of Cuba with respect to the application of the International Society for Human Rights (Report of the Committee on Its Resumed 2000 Session, *supra* note 83, at paras 53–55 (54)).

its resumed 2000 session the Committee recommended for special consultative status the American-Jewish women's organization, Hadassah, whose application had been highly controversial for years and had continuously been deferred. This was only thanks to a procedural motion by the US which caught the critical members of the Committee by surprise.⁸⁵ Both cases confirm my findings with respect to the political nature of the controversy carried out in the Committee.⁸⁶

3 An Entrance Door to a Politically Divided House

How can one make sense of the outcome of the analysis in Part 2 above? We have already pointed to the fact that the key to understanding the policy of the Committee is to be aware of the states of which it is composed. Yet, confining the explanation merely to the fact that those states that are frequently the target of human rights NGOs are equally those that decide on what NGO shall be recommended for consultative status falls a bit short of a more complex reality. The explanation must rather be sought in a larger context.

In this context, consensus can be detected with respect to two basic parameters. The first one is that member states agree that the United Nations should remain, in principle, an intergovernmental body. Secondly, there seems to be consensus with respect to the important contribution NGOs can make to the work of the UN.⁸⁷ Yet, as far as the latter is concerned, it is difficult to say whether appearances are deceptive. Some NGO representatives fear that a number of states might only be paying

⁸⁵ On the second day of the Committee's session, the US submitted in writing a request to proceed immediately to a roll-call vote without a prior debate (Report of the Committee on Its Resumed 2000 Session, *supra* note 83, at para. 20). This motion was met by harsh protest by a number of Committee members (see *ibid.*, at paras 21–24 and 30–32). Under the Rules of Procedure of ECOSOC, however, the Chairman had no choice but to accede to the request. Thanks to lobbying carried out on the highest level, the US was able to win the vote by nine votes to five with three abstentions (see *ibid.*, at paras 20 *et seq.*). It was said to be the last triumph at the UN of the former Permanent Representative of the US to the UN, Richard Holbrooke, who was present during the voting. It remains to be seen whether this strategy will backfire in the future. The statement of the Representative of the Sudan indicates such a result: she was of the opinion that the procedure used had set a new precedent and that her delegation reserved the right to follow the same procedure in other cases (Report of the Committee, *ibid.*, at para. 26). Indeed, it can be questioned whether suppression of the debate is desirable. Be that as is may, the case of Hadassah has confirmed our findings that those states that form the minority in the Committee often feel compelled to resort to procedural strategies that might lead to undesirable results.

⁸⁶ See, for example, the statement of the Representative of Israel (observer) after the vote on Hadassah: 'We had hoped that the singling out of Israel and Jewish organizations had become a thing of the past. We are saddened to discover that we were wrong. Thus, while we welcome the Committee's decision, we categorically reject to perpetuate a fruitless campaign of defamation and propaganda.' Report of the Committee on Its Resumed 2000 Session, *supra* note 83, at para. 34. With respect to the case of Freedom House, see the statement of the Representative of China: 'With regard to the issue of freedom of speech, we cannot agree with the view that a non-governmental organization's criticism of a Government constitutes freedom of speech while a Government's criticism of a non-governmental organization constitutes repression of the freedom of speech.' Report of the Committee on Its Regular 2001 Session, *supra* note 83, at para. 97.

⁸⁷ See Report of the Secretary-General, *supra* note 10, at para. 7.

lip-service to an inevitable development while, beneath, they are trying to hamper the process as much as possible. Some even go so far as to believe that the practice of the NGO Committee of admitting more and more NGOs to the forum, mentioned in Part 2 above was a strategy of some states to overcrowd the boat, thereby intentionally rendering impossible any meaningful collaboration between the UN and NGOs in the long run.

Be that as it may, beyond this consensus, deceptive or not, views differ considerably as to the extent to which one should allow for the participation of non-state actors and modify the current institutional framework accordingly. The debate is of recent origin and has not matured at all yet. Only in 1998 did the Secretary-General issue a report on the existing arrangements and practices for NGO participation in the UN system,⁸⁸ followed in 1999 by a report of the views of member states, members of the specialized agencies, observers and intergovernmental and non-governmental organizations on the issue.⁸⁹ The borderline in this debate does not lie so much between developed and developing countries (or countries from ‘the North’ and ‘the South’), an erroneous assumption that is frequently made, but rather between open and closed societies.⁹⁰ Of course, the two categories often correspond, for empirical analysis has shown that there is a close link between the degree of openness of a society and the degree of its economic development. Nevertheless, the North/South category is conceptually incorrect. Chile is a good example in this respect. Despite being a member of the G77, it shows an extremely friendly and open attitude towards NGOs in the NGO Committee. Conversely, those states that carry out a restrictive policy within the NGO Committee are without exception states with no or only little culture of civil society. And in the general debate it is these states which seem particularly reluctant to open a Pandora’s box with respect to a new development they perceive as a threat to their national sovereignty.

When talking about enhanced participation of non-state actors in the UN forum, one can draw two major distinctions. The first one is between NGOs and the private sector in general. With respect to the latter, as briefly alluded to in the introductory part of this paper, the initiative has been taken by the Secretary-General by introducing various initiatives for global operational partnerships with private corporations. The Global Compact, which was introduced at the 1999 World Economic Forum in Davos and elaborated in more detail in the Millennium Report of the Secretary-General,⁹¹ appears to be a first step towards a system of global governance by means of creating a normative groundwork, a sort of value platform. Practice seems far ahead of theory and of legal technique in this respect. According to the UN Secretariat, the Global Compact initiative takes the world as it is, not as it should ideally look like. Unlike, for example, the principle of common heritage of

⁸⁸ See *supra* note 2.

⁸⁹ See *supra* note 10.

⁹⁰ For a comprehensive theoretical and philosophical background on open societies, see Karl Raimund Popper, *The Open Society and Its Enemies* (5th ed., 1966).

⁹¹ ‘Millennium Report’, *supra* note 1, in particular at para. 177 and Box 4.

mankind in the 1960s and 1970s where a fiction was legally established, the current experiments of the Secretary-General are practical concepts by default, not by design (default meaning governance failure). States have been very reluctant to support the Secretary-General's initiative for fear that their role will be decreased in such a system of global governance. The General Assembly Resolution entitled 'Towards Global Partnerships' of 21 December 2000⁹² is illustrative in this respect. In spite of its entirely procedural character aiming merely at opening a debate in the General Assembly on the idea of UN partnerships with non-state actors, in particular the private sector, this resolution, introduced by Germany, was, according to diplomats, the most controversial one of the entire 55th session of the General Assembly.⁹³

Within the context of NGO participation, a second distinction has to be made between what could be called horizontal and vertical enlargement of participatory rights of NGOs. By horizontal enlargement I mean an extension of participatory rights to bodies other than ECOSOC; by vertical enlargement I mean conferring upon NGOs more substantive participatory rights in a given UN body.

With respect to the former, there exists an initiative by NGOs to extend consultative relations to the General Assembly. The founding members of the UN limited the possibility to engage in such relations to ECOSOC⁹⁴ as they were not prepared to allow for participation of NGOs in an organ with a general competence to debate all issues falling within the ambit of the UN Charter,⁹⁵ and even less so to allow for participation in the Security Council. Nevertheless, over time practice has evolved to allow a certain degree of informal participation by NGOs in the work of the General Assembly's Main Committees, several of its subsidiary bodies, as well as in special sessions of the Assembly.⁹⁶ Yet NGOs view the informal character of this participation as detrimental both in light of the inconsistency of the practice and because they often learn only at short notice about their accreditation which renders arranging for participation difficult. An NGO initiative was therefore launched⁹⁷ with the aim of formalizing the existing practice, but also to extend participatory rights to the plenary. Since a similar endeavour failed as recently as 1997, the initiators this time were cautious enough not to push to include it on the agenda of the General Assembly in 2000 without having lobbied for it sufficiently. Instead, it was decided to follow a long-term strategy.

Irrespective of the political opposition which can be expected, the undertaking to extend consultative relations to the General Assembly faces various problems which shall be only briefly hinted at here. First, it is difficult to see how the existing mechanism of conferment of consultative status could be used. ECOSOC could not decide for the General Assembly as to which NGOs should enjoy consultative status, since ECOSOC is hierarchically not superior to the General Assembly and, unlike the General Assembly, is not even a plenary organ. It is equally inconceivable that the

⁹² UN Doc. A/215/55.

⁹³ See also 'UN suchen Nähe zur Privatwirtschaft', *Frankfurter Allgemeine Zeitung*, 23 December 2000, at 6.

⁹⁴ See Article 71 of the UN Charter.

⁹⁵ See Article 10 of the UN Charter.

⁹⁶ For details, see Report of the Secretary-General of 10 July 1998, *supra* note 2, at paras 9 *et seq.*

⁹⁷ By a group called 'International NGO Task Group on Legal and Institutional Matters' (INTGLIM).

NGO Committee, as a subsidiary committee of one main organ, could issue recommendations for another. An implementation of the initiative would therefore require the establishment of a separate or combined system of conferment of consultative status which could be burdensome to implement and produce additional costs. Next, states opposing any extension of consultative status to the activities of the General Assembly could make the argument that, since the UN Charter itself has restricted the possibility of establishing consultative relationships to the activities of ECOSOC in Article 71, any extension would — *argumentum e contrario* — require a revision of the Charter. Such an argument could possibly be overcome by resorting to the doctrine of implied powers.⁹⁸ Limited space does not allow for further inquiry into this question, which could ultimately be resolved only by means of an advisory opinion of the International Court of Justice.

A vertical enlargement of participatory rights of NGOs within ECOSOC, in particular of NGOs with general consultative status, is not presently at issue. States would be very reluctant to reopen the debate on Resolution 1996/31 (which regulates the scope of NGO participation) so soon after the difficult negotiations that led to its adoption in 1996. Moreover, having the right to place items on the agenda of ECOSOC coupled with a right to make oral statements seems to be the most far-reaching right of participation of NGOs conceivable to member states. Indeed, not much more is thinkable until one reaches a right to participate in the voting. At that stage the UN would cease to be a purely intergovernmental body, which would not only run counter to the principal consensus mentioned above, but would also require a revision of the UN Charter. It is inconceivable that an entity could participate in the voting of a body of which it was not a member. Voting power is the essence of membership. Articles 3 and 4 of the UN Charter, however, restrict UN membership to states. In addition, there is a clear distinction between participation without voting in the deliberations of ECOSOC and mere arrangements for consultation. Under Articles 69 and 70 of the Charter, participation in the deliberations of ECOSOC is provided only for states which are not members of ECOSOC, as well as for specialized agencies. Article 71 of the Charter, on the other hand, does not allow for any consultative arrangement such as to accord any NGO the same rights of participation reserved to member states and specialized agencies. Consultative status is, *by definition*, limited to a *consultative* role.

The picture of a dichotomy between open and closed societies with respect to participatory rights of non-state actors has to be put into perspective somewhat, though. Even those states that are generally more open towards the idea of permitting NGOs to the UN forum have a number of legitimate concerns. Many diplomats are afraid of the sheer number of NGOs seeking entrance to the UN, not only with respect to the limited space of the UN premises. In Part 2 of this study we have seen that, in light of the dramatically increasing number of NGOs applying for consultative status

⁹⁸ An approach that is familiar from the Advisory Opinion of the International Court of Justice of 13 July 1954 on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954) 47 *et seq.*, in particular at 56 *et seq.*

with ECOSOC, it is almost impossible to verify whether a given NGO truly qualifies for admission. Any extension of participatory rights, both horizontally and vertically, would have to take into account these difficulties.

Next and more fundamentally, there is the issue of legitimacy and accountability. NGOs are not by necessity altruistic and not always a force for good.⁹⁹ They do not express the *volonté générale* but represent particular interests and often depend on media presence for fund-raising purposes. NGO representatives are at most — this again depending on the inner structure of the organization — only accountable to the members of the NGO on whose behalf they are acting. To put it bluntly, if a society does not want the government it has elected to advocate certain positions, it can vote it out of office. This system of democratic control does not function with respect to NGOs, though. There is no *contrat social* between society and NGOs.¹⁰⁰

The problem of accountability is closely interwoven with the one of monitoring the activities of NGOs. As has been explained in Part 1 of this study, it is the mandate of the NGO Committee to ensure that an NGO, once it has been granted consultative status, continues to satisfy the criteria of Resolution 1996/31. However, the current mechanism of quadrennial reports that is supposed to enable the Committee to carry out this mandate is to a large extent ineffective. The delegates to the Committee admit that, in light of the workload the Committee is faced with and the continuously increasing number of NGOs in consultative status with ECOSOC, it is impossible to read thoroughly the reports, if at all. In 2001, the Committee had some 550 quadrennial reports to deal with.¹⁰¹

Another concern voiced frequently at the UN is that the admission of ever more NGOs to the UN forum threatens to increase even further the existing imbalance between organizations from developed and developing countries. Numerically speaking, this is correct. Yet practice shows that 'Western' NGOs often advocate positions favourable to Third World countries. Of course, with respect to religious, ethical and moral issues (such as family planning and the status of women) the picture might look different again.

The issues raised above have to be taken into account when considering greater

⁹⁹ See, for example, 'Sins of the Secular Missionaries', *Economist*, 29 January 2000, at 25 *et seq.*

¹⁰⁰ It even occurs that NGO representatives take the floor and commence their statement by saying 'We, the people . . .'. These words imply possessing a greater legitimacy than national governments to speak on behalf of their people, whatever people is meant thereby. It remains unclear where the source of such legitimacy could be derived from in the absence of any democratic election.

¹⁰¹ In its resumed 2000 session, the Committee was not able to deal with any quadrennial report (see Report of the Committee on Its Resumed 2000 Session, *supra* note 83, at para. 69). In its regular 2001 session, it took the Committee eight meetings to take note of 172 quadrennial reports (Report of the Committee on Its Regular 2001 Session, *supra* note 83, at paras 79 *et seq.*). Simply limiting the number of NGOs with consultative status is not an option. This would not only send a bad political message to the outside world, but would also result in unequal treatment and exclude newly emerging organizations who could possibly contribute valuably to the work of ECOSOC. It is worth mentioning that, in the context of dealing with the quadrennial report of the Transnational Radical Party, the Representative of the Russian Federation renewed his allegations which had previously served as the basis for the Russian complaint against this organization (see *ibid.*, at para. 83; and Part 2 above).

participation of non-state actors in the UN and in international fora in general. Yet, one cannot deny that the world has emancipated itself from a Westphalian system of juxtaposed sovereign states and developed towards an international community,¹⁰² a community composed not only of states but of a variety of actors each playing a different role in shaping the social reality of today and wielding considerable power in the international arena. How can one position the United Nations accordingly? NGOs are mentioned in the UN Charter only once, the private sector is not referred to at all. If the UN does not want to be pushed to the sidelines of world affairs, then it has no choice other than being inclusive, not exclusive. The fact that recent demonstrations took place, not during the Millennium Summit of the General Assembly, but instead in Seattle, Prague, Davos and Genoa, illustrates that the focus of attention has shifted to other fora.¹⁰³ In the words of the Secretary-General:

The United Nations is committed to seek the participation and contribution of NGOs in its work. New approaches, attitudes, methods and responses are required throughout the United Nations system if we are to meet this challenge effectively.¹⁰⁴

The challenge will be to find a model, on the one hand, allowing for substantial contribution of NGOs and non-state actors in general, while, on the other, taking into account the necessary limits of participation of non-state actors. The debate promises to be lengthy and difficult, not only in light of the current dichotomy between open and closed societies, but also because the issue is not confined to a specific legal regime, but goes to the very fundamentals of how international law works, and who its actors and, in the end, its legal subjects are.¹⁰⁵ Maybe the door on the Committee's website is not so wrongfully designed after all, for it does not stand continuously wide open, but shuts after each time it has opened. What is not depicted, however, is that behind the door there is a Committee controlling the entrance, a Committee which is as politically divided as the house it is supposed to guard.

¹⁰² See, for example, Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994) 217 *et seq.*; Tomuschat, 'Die internationale Gemeinschaft', 33 *Archiv des Völkerrechts* (1995) 1 *et seq.*; and 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours* (1993) 195 *et seq.*, in particular at 209–240.

¹⁰³ A number of these points were raised by Jozias van Aartsen, Minister for Foreign Affairs of the Netherlands, in his address to the 55th Session of the General Assembly of 14 September 2000 entitled 'An Inclusive United Nations'.

¹⁰⁴ Report of the Secretary-General of 10 July 1998, *supra* note 2, at para. 80.

¹⁰⁵ Therefore, it will be an equally great challenge for public international legal theory to grasp conceptually the changing realities, in particular with respect to the question of the legal personality of non-state actors. Certainly, this question is not of recent origin: see, for example, Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 22 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1962) 1 *et seq.*; and von Weiss, 'Die Non-Governmental Organizations und die Vereinten Nationen', 27 *Zeitschrift für Politik* (1980) 387 *et seq.*, in particular at 392–394. The issue remains far from being resolved, however. In addition, it has gained a new dimension in light of the recent multi-faceted advent of non-state actors in the international arena alluded to in the introductory part of this paper. For a reflection on these more recent developments, see Hobe, *supra* note 9; Ranjeva, 'Les organisations non-gouvernementales et la mise en oeuvre du droit international', 270 *Recueil des Cours* (1997) 9 *et seq.*, in particular at 91–100.