
New Responses to the Legitimacy Crisis of International Institutions: The Role of ‘Civil Society’ and the Rise of the Principle of Participation of ‘The Most Affected’ in International Institutional Law

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Abstract

The article offers a description and assessment of the most important discursive strategies used to enhance and justify various models of ‘civil-society participation’ in international institutions since the late 19th century. It starts from the assumption that the two main rationales for, or concepts of, ‘civil-society’ participation are functionalism and democratization. The article also notes that, as an offshoot of the democratization rationale, a new empirical and discursive 21st-century trend has partially replaced classic non-governmental organizations (NGOs) with so-called ‘affected person’s organizations’ in international institutions. In this context, the article claims that the field of international institutional law is currently witnessing the rise of a principle of participation of ‘the most affected’. This shift arguably is an institutional strategy to respond to a profound legitimacy crisis of both international NGOs and the so-called ‘global governance’ structures shaped over the last 30 years. Against the backdrop of various theoretical approaches to the problem of representation and affectedness in political philosophy and international law, the article critically assesses if, and to what extent, the involvement of ‘the most affected’ in international organizations can alter the legitimacy resources of international law and its institutions.

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1 Introduction

In the 1990s, ‘civil-society’ participation in ‘global governance’ through the involvement of non-governmental organizations (NGOs) was seen as a panacea-like concept meant to ‘democratize’ international institutions and to facilitate the realization of ‘common interests’ in international law.¹ This article starts from the empirical assumption that the idea of NGO representation of abstract common interests, such as environmental protection or fighting impunity from human rights violations, has given way to the more recent principle of participation of ‘the most affected’ in international institutions. Classic NGOs in various fields of law- and policy-making are increasingly being replaced by local and transnational social movements, so-called ‘affected persons’ organizations’ (APOs), in reaction to a perceived crisis of legitimacy and a backlash against both international institutions and international NGOs. This trend has, over the last 10 years, already transformed rules of civil-society participation in at least 20 prominent international organizations.²

For example, members of indigenous groups and peasant organizations have successfully lobbied for new rights instruments and institutional reform to ensure protection, participation and influence.³ Persons affected by HIV/AIDS, tuberculosis and

¹ On NGO participation in international law, see more generally A.-K. Lindblom, *Non-Governmental Organisations in International Law* (2005); A. Vedder, *NGO Involvement in International Governance and Policy* (2007). On legitimacy and doctrinal issues, see Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009), at 263. On the general responsibility regime of non-state actors in international law, see D’Aspremont *et al.*, ‘Sharing Responsibility Between Non-State Actors and States in International Law: Introduction’, 62 *Netherlands International Law Review* (2015) 49.

² On this trend, see von Bernstorff, ‘Authority Monism in International Institutions’, in J. Mendes and I. Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (2018) 88; Sändig, von Bernstorff and Hasenclever, ‘Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected’, 3 *Third World Thematics (TWT)* (2018) 587.

See the following non-exhaustive list of institutions currently using the affectedness concept: Intergovernmental Working Group on a UN Declaration on Rights of Peasants, Working Group on Indigenous Populations (WGIP); Expert Mechanism on the Rights of Indigenous Peoples (EMRIP); United Nations Committee on World Food Security (CFS); Joint United Nations Programme on HIV/AIDS (UNAIDS); United Nations Committee on the Rights of Persons with Disabilities (CRPD); United Nations Permanent Forum on Indigenous Issues (UNPFII); United Nations Environment Programme (UNEP); Global Fund, United Nations Committee on the Rights of the Child (CRC); Climate Investment Fund, Subcommittee of the Strategic Climate Fund for the Pilot Program for Climate Resilience (CIF-PPCR); International Drug Purchase Facility (UNITAID); United Nations Committee on Enforced Disappearances (CED); United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UNREDD); Forest Carbon Partnership Facility (FCPF); Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (WG8j); World Bank’s consultation process for reformed Environmental and Social Framework (WB, ESF consultation); WB Inspection Panel; The Arctic Council; United Nations Forum on Forest (UNFF); Global Environment Facility (GEF); Global Agriculture and Food Security Program (GAFSP). This list was compiled as part of an interdisciplinary research project on civil-society participation in IOs at the University of Tübingen funded by the German Research Foundation. For the concrete forms of participation in the various rules of procedure from a comparative perspective, see Hasl, ‘Shifting the Paradigm: A Typology of Affected Persons’ Participation in International Institutions’, 3 *TWT* (2018) 626.

³ J. Dahl, *The Indigenous Space and Marginalized Peoples in the United Nations* (2012); N. McKeon, *Food Security Governance* (2015).

malaria have been accorded designated seats on decision-making bodies in the Global Fund, UNITAID and other institutions of global health governance.⁴ Organizations that represent disabled people took on a strong role in the negotiations of the UN's Convention on the Rights of Persons with Disabilities.⁵ Working children movements from the Global South challenged the Western understandings of child labour at various intergovernmental organizations (IOs).⁶ Among the first institutions which modified their rules of procedure accordingly were the Committee on World Food Security (CFS) in Rome, the Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities (CRPD) and the World Health Organization (WHO). In the fight against climate change, international institutions are also experimenting with new forms of participation of the most affected in the form of APOs.⁷ Over the last 10 years, powerful global networks of social movements have been created. Via Campesina, a global network of local peasant movements and perhaps the most influential non-state and non-business actor in the UN Food and Agriculture Organization (FAO), is a salient example of a social movement claiming the status of an affected persons' organization. Classic international NGOs are now forced to co-operate with social movements representing 'the most affected', or else they increasingly lose influence. Another example from a different field are the 'White Helmets', a volunteer organization of rescue workers providing help to those affected by the civil war in Syria, who have emerged as a new actor in international humanitarian law.

Activists involved in these movements do not want to exercise formalized decision-making powers. Rather, the general idea is to participate in institutionalized deliberation in order to influence the content of adopted decisions. For social movements, participation in international institutions is one strategy among others aimed at fostering the transnational mobilization of social resistance against perceived hegemonic networks of powerful national administrations, scientific expertise and influential corporate actors. The status of speaking, if credible and well-coordinated, for those who are being negatively affected on the ground by certain norms and policies can give these voices a high moral and empirical persuasiveness in these institutional settings.⁸ Usually, however, positions taken by APOs are more radical and uncompromising than those of classic NGO representatives. Even without formal voting rights, APOs can have a considerable impact on the content of new international norms, standards and decisions; one striking example being the negotiations on the UN Convention on the Rights of Persons with Disabilities, during which many persons

⁴ Fraundorfer, 'Experiments in Global Democracy: The Cases of UNITAID and the FAO Committee on World Food Security', 4 *Global Constitutionalism* (2015) 328; Sändig, von Bernstorff and Hasenclever, *supra* note 2.

⁵ von Bernstorff, *supra* note 2.

⁶ Holzscheiter, 'Representation as Power and Performative Practice: Global Civil Society Advocacy for Working Children', 42 *Review of International Studies* (2016) 205.

⁷ On the institutional arrangements aiming at involving the most affected in international environmental law, see Toussaint, 'Voices Unheard – Affected Communities and the Climate Negotiations on Loss and Damage', 3 *TWT* (2018) 765; Wallbott and Recio, 'Practicing Human Rights Across Scale: Indigenous Peoples' Affectedness and Recognition in REDD+ Governance', 3 *TWT* (2018) 785.

⁸ Bernstorff, *supra* note 2.

with disabilities representing disability APOs participated under the motto ‘nothing about us without us!’ and exerted considerable influence on the content of the new document.⁹

The general concept of affectedness is, of course, not new; nor has it remained unobserved by researchers in social sciences.¹⁰ To start with, it is a basic and longstanding democratic ideal that those affected should have a say on issues that concern them.¹¹ In traditional Western democratic theory, from Kant to Rawls, being affected by rules enforced in a certain delimited territory has been conceptualized as requiring elections of representative bodies on a ‘one citizen, one vote’ basis to ensure equal influence of affected individuals on the composition of parliaments and executive bodies. More recently, global justice scholars have sought to conceptualize an ‘all-affected principle’ (AAP) as a normative expectation for law- and policy-making with transnational effects and extensively discussed its potential implications from the perspective of political philosophy.¹² More relevant to the specific phenomenon under scrutiny here, Nancy Fraser proposed to replace the ‘all-affected principle’ with a more specific principle of involving all those groups ‘subjected’ to a given transnational governance structure (‘all-subjected principle’).¹³ Legal scholars in this context have framed new forms of participatory and multi-level policy-making as ‘global experimentalist governance’,¹⁴ or, like Richard Stewart, have developed normative frameworks from a global administrative law (GAL) perspective in order to scan institutional access norms for unjustified ‘disregard’ of affected interests.¹⁵

While building on some of these strands of scholarship in law and political philosophy dealing with the involvement of social movements in current global governance structures, this article attempts to go beyond the current state of the debate. It starts from the empirical finding that a considerable number of IOs have already changed their rules of procedure in order to involve APOs in their work.¹⁶ Second, this trend will be contextualized with the help of broader historical narratives of civil-society participation in international law. And, lastly, the observed move to involve

⁹ UN Convention on the Rights of Persons with Disabilities, 13 Dec. 2006, United Nations, *Treaty Series*, vol. 2515, at 3.

¹⁰ For a recent study of the concept in international development law, see Jokubauskaite, ‘The Concept of Affectedness in International Development’, 126 *World Development* (2020), available at <https://doi.org/10.1016/j.worlddev.2019.104700>.

¹¹ As a general normative ideal also for international institutions, see Klabbers, ‘Law-Making and Constitutionalism’, in Klabbers, Peters and Ulfstein (eds), *supra* note 1, at 81; Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *American Journal of International Law (AJIL)* (2014) 211.

¹² R. E. Goodin, *Innovating Democracy* (2008); E. Erman and S. Näsström, *Political Equality in Transnational Democracy* (2013). On the relationship between the ‘all-affected’ principle and participation of ‘the most affected’, see below Section 5.

¹³ Fraser, ‘Abnormal Justice’, 34 *Critical Inquiry* (2008) 398, at 411.

¹⁴ Fraundorfer, *supra* note 4; de Búrca, Keohane and Sabel, ‘New Modes of Pluralist Global Governance’, 45 *New York University Journal of International Law and Politics (NYU JILP)* (2013) 723.

¹⁵ Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *AJIL* (2014) 211.

¹⁶ For a non-exhaustive list of international institutions, see *supra* note 2.

APOs in current governance structures is interpreted and will be assessed as a reaction to a current legitimacy crisis of international institutions. The system of global governance structures, which was erected over the last 30 years, has proven to be quite efficient in creating globalized market structures, but is increasingly seen as being more or less dysfunctional with regard to the protection of central social and environmental values of the human beings and other living species inhabiting our planet. Moreover, and despite the high post-1990s hopes connected to NGO participation in global governance structures, this arguably asymmetrical institutional set-up has, all in all, reduced the space for local and national democratic contestation of the 'iron cage' (Max Weber) of globalized market structures. In this context, involving APOs in international organizations is presented by institutional actors as a potential cure for these illnesses.

The remainder of this article will be structured around a historically informed '*grille de lecture*' (interpretative framework) presenting two central concepts of civil-society participation in international law – the functionalist concept (Section 2) and the democratization concept (Section 3) – the latter of which has, more recently, arguably also ushered in the quest for the participation of APOs or 'the most affected' (Section 4). The last and concluding section seeks to assess whether, and to what extent, the rise of the involvement of affected persons' organizations (APOs) will actually alter the contested legitimacy resources of international law and its institutions (Section 5). All concepts presented here are discursive structures which scholars and international institutions use to legitimize the involvement of civil-society actors; these concepts do not necessarily correspond to the understanding or self-description on the part of NGOs or social movements seeking access to international law-based organizations. The following broader narratives of civil-society participation,¹⁷ including their conceptual emanations over time, are portrayed neither as mutually exclusive nor as an overall progress narrative. Instead, these concepts (functionalist, democratic and most-affected) have temporarily co-existed in the scholarly and political discourse, as well as in the legal constitutions, resolutions and rules of procedure of international institutions. Their first appearance on the international scene can, however, be chronologically ordered.

While presenting the changing empirical and normative conceptual landscape of civil-society participation over time, this article will also look into the complex relationship between NGOs and social movements, business organizations and member states within international institutions under the different concepts. The term 'international civil society' will, for the purposes of this article, be understood as an antagonistic space of human association and relational networks – formed for the sake of economic, cultural and political interests and ideologies; it is both a space and an instrument of political battles for leadership and rule within and through international

¹⁷ From a specific international relations perspective, Zürn speaks of 'participatory narratives', related to authority and legitimacy in international institutions, see M. Zürn, *A Theory of Global Governance* (2018), at 70.

institutions.¹⁸ According to this understanding of an ‘international civil society’, there is a focus on private associations but no water-tight separation between private actors, markets and public institutions at the various levels of governance. Instead, their respective actions and utterances are considered to constitute a common, potentially embattled political space. The ability to dominate or influence this space is considered essential to restructuring domestic and transnational socio-economic relationships around the globe.

2 Functionalist Concepts

According to functionalist concepts of civil-society participation, the involvement of private associations is supposed to enhance international co-operation between sovereign states. It is part and parcel of co-operative internationalism, which was, and still is considered to be, a way to advance the common interests of an ‘international community’ of nation-states. Since the early days of international organizations in the 19th century, private transnational initiatives have often preceded co-operation at the inter-governmental level.¹⁹ Once states have been successfully lobbied to take up a certain issue at the international level, private expertise will either be integrated into the work and positions of national delegations to international conferences, or private associations will be given direct access to such conferences. Civil-society participation here follows a functional logic, because it thrives on the assumed and unquestioned benevolence of sectoral co-operation of states on various issues. From this angle, private initiative and expertise are needed to further international cooperation. The fact that private economic, scientific and intellectual elites joined forces for this purpose with either national or international institutions was generally welcomed. This is because international co-operation, according to functionalist approaches, can help states to solve problems, be they of a technical or political nature, and this is therefore seen as an inherently positive development, bringing prosperity, progress and – in Mitrany’s later version – even peace to the world.²⁰ Thus, functional narratives

¹⁸ Cf. the concept of ‘civil society’ developed by C. Buci-Glucksmann, *Gramsci und der Staat: Für eine materialistische Theorie der Philosophie* (1981), at 50, 80ff.; Gill, ‘Globalisation, Market Civilisation, and Disciplinary Neoliberalism’, 24 *Millennium: Journal of International Studies* (1995) 399; Bieling, ‘Die Konstitutionalisierung der Weltwirtschaft als Prozess hegemonialer Verstaatlichung – Staatstheoretische Reflexionen aus der Perspektive einer neo-gramscianischen Internationalen Politischen Ökonomie’, in S. Buckel and A. Fischer-Lescano (eds), *Hegemonie gepanzert mit Zwang. Zivilgesellschaft und Politik im Staatsverständnis von Antonio Gramsci* (2007) 143.

¹⁹ On this late 19th-century phenomenon, see L. C. White, *International Non-Governmental Organizations* (1951), at 245.

²⁰ D. Mitrany, *A Working Peace System* (1944). On the complex and multifaceted concept of functionalism, see I. L. Claude, *Swords Into Plowshares: The Problems and Progress of International Organization* (1964), at 385ff. For a critical reconstruction of functionalist thinking à la Reinsch, one of the founding fathers of the law of international organisations, see Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26 *European Journal of International Law (EJIL)* (2015) 9.

promoting the inclusion of private associations in international institutions date back to the early days of international organizations and were meant to stay.

A Advancing the Nation: International Civil Society as the 'Brain' of the 'Civilized World'

Alfred Fried, a well-known German pacifist, and founder and publisher of the journal *Friedenswarte*, opened his 1908 book *Das Internationale Leben der Gegenwart* with the following words: 'I would very much like to call this book a *Bädecker* [tourist guide book] to the international landscape, and thus express in a precise manner that it is meant to be a guide for our contemporaries to the newly discovered realm of internationalism.'²¹ For Fried, already in 1908 there existed a network of international organizations which were expanding across the 'civilized' world. A 'utopia' had for him become a reality. It is no coincidence that most of the organizations listed in his monograph were private associations. These stood beside a significantly smaller number of organizations founded under international law: the first IOs at the time were still called administrative unions. This 'culture of internationalism', as Fried called it, emerged in the second half of the 19th century, and was predominantly shaped by private associations. It encompassed, inter alia, pacifist associations, women's rights activists, social reformist associations, international trade unions, radical liberal unions against state interventionism, the International Chamber of Commerce, numerous religious associations such as the YMCA, the International League for the Prohibition of Duels, the International Olympic Committee, industrial associations, the International Committee of the Red Cross, the Institut de Droit International, the International Law Association and innumerable international scientific associations.

Around the turn of the 19th century, a number of scholars on different continents discovered a 'wave of internationalism' sustained by private and public co-operation across the borders of the (newly created) nation states. The German author and liberal politician Friedrich Naumann spoke in 1907 of a 'brain of humanity', which purportedly had come into existence in the preceding few decades, and which connected all 'civilized' nations and produced a concomitance of the various worlds of experience.²² To be clear, for most Western authors at the beginning of the 20th century, internationalism was not a cosmopolitan project, but rather, at the peak of European nationalism, a means to enhance national progress in economic, technological, social and humanitarian affairs through closer international co-operation.²³ In the words of the US international lawyer Simeon E. Baldwin in his 1907 *AJIL* article:

It is certain that of late years, as one political society is compared with others, there is noticed a sameness of color and movement, an institutional resemblance, a co-operative tendency, a

²¹ A. H. Fried, *Das internationale Leben der Gegenwart* (1908), at i (translation by author).

²² E. Naumann, *Das Gehirn der Menschheit*, *Süddeutsche Monatshefte* (4th ed. 1907), No. 12, cited in Fried, *supra* note 21, at 28.

²³ On the relationship between internationalism and nationalism during the first half of the 20th century, see G. Sluga, *Internationalism in the Age of Nationalism* (2013).

closeness of relation between citizen and foreigner, not seen before since the division of the Roman empire. In creating this new condition of things, steam and electricity have played a great part. So have wiser philosophies of religion; higher standards of ethics; a wider diffusion of education; a fairer administration of justice by the courts. But had it not been for the actual meetings, of an international character, face to face and hand to hand, of those interested in working out the same world problems, it is safe to say that progress would have been much more slow.²⁴

According to Baldwin, it had been particularly advantageous, especially for the Americans, to participate in these predominantly European networks. Civil-society participation and international co-operation promoted a pragmatic form of international solidarity, which was thought to be in the enlightened self-interest of all ‘civilized’ nations.

Altruism is for individuals. It must ever be prompted by the voice of conscience or sentiment; not by that of law. This is intrinsically necessary. A government represents all and speaks for all who owe it allegiance. It can rightfully compel them all to promote its welfare. It cannot rightfully compel them all to promote the good of other nations, except so far as it may gain something from this for itself. Those who wish to engage in foreign missionary enterprises must not, though a majority in number, sweep into the current, by force of law, an unwilling minority.²⁵

For the German pacifist Alfred Fried, too, the culture of internationalism was first and foremost a method of the advancement of the nation. He distinguished sharply between his own approach and the old cosmopolitan ‘daydreams’ of the Enlightenment era. It was not only in Germany at that time that strong nationalist sentiments excluded neither imperialist ambition nor liberal internationalist convictions:

Internationalism, as we know it today, develops not at the expense of the nation but to its advantage; it does not desire to seat itself in the place of the nation but rather beside it [. . .]. There is no hint of cosmopolitan ideas to be found in these great works of evolution, [. . .] Internationalism as refined nationalism!²⁶

Therefore, in Fried’s view, Germany should have become the centre of internationalism and encourage international congresses and associations. According to Fried, European nations scrambled to become home to the greatest number of headquarters of international associations. Therefore, Germany should have recognized ‘the significance of the new land of internationalism and hurry to colonize it, to establish an intellectual colony’.²⁷

So, concretely, what form did the international legal interaction between these private associations and international institutions take? In the first founding phase of international organizations under international law, from the 1850s to World War I, the differentiation between public and private actors remained rather fluid. Often

²⁴ Baldwin, ‘The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World’, 1 *AJIL* (1907) 565, at 573.

²⁵ *Ibid.*, at 576.

²⁶ Fried, *supra* note 21, at v (translation by author).

²⁷ *Ibid.*, at vi (translation by author); on the necessary ‘cultivation of foreign continents and human races’, see *ibid.*, at 4.

private innovation and privately organized international conferences even preceded international diplomatic conferences.²⁸ In 1907, US scholar Paul Reinsch, one of the founders of the law of international organizations, described the formational phase of the 19th-century administrative unions in the following words:

It is not always easy to tell with certitude whether the formation of a given union is due primarily to public or private initiative. We encounter commonly an interaction of influences. Private associations or groups of individuals may discover the need for international action with regard to a certain interest, and may undertake to urge the establishment of treaty relations and administrative bodies.²⁹

And once a public institution had been created, many official government delegations were still comprised almost exclusively of private experts. At so-called mixed conferences, government officials, diplomats and representatives of private associations participated and negotiated standards and resolutions as equals.³⁰ The participation of private associations was, in the early stages, justified above all else through the technical and scientific expertise of these civil society representatives. In the first administrative unions, which had been initiated by major European powers to enhance the capacities of national administrations in regulating transnational economic, social and technical aspects of governance, interaction between public and private elites thus seems to have been carried out in a rather harmonious, problem-solving atmosphere. As to the geopolitical context, these first international organizations were created at the high-water mark of the so-called first economic globalization and European imperialism. Many of these co-operative endeavours had become necessary in order to stabilize a rapidly emerging 'world economy' and to administrate and enforce European rule and economic exploitation in what contemporaries called 'non-civilized' areas of the world. New technical inventions, and their industrial production in line with co-ordinated standards, not only played an important role as a symbol of European superiority, but were also of utmost practical importance to the expanding European industries and associated colonial endeavours of Europe's major powers.

For example, like other international unions and commissions, from the very beginning, the Permanent Secretariat of the Telegraphic Union involved private expertise in its publication and knowledge dissemination activities.³¹ This was not only the true of unions dealing with technical innovations, but was also very common in the financial, humanitarian and cultural fields. Private associations, scientific institutions and industry representatives thus usually constituted an integral part of the knowledge and policy network, which was at the very heart of the related international

²⁸ M. Vec, *Recht und Normierung in der industriellen Revolution* (2006), at 31ff.; Peters and Peter, 'International Organizations: Between Technocracy and Democracy', in B. Fassbender, A. Peters and S. Peter (eds), *The Oxford Handbook of the History of International Law* (2012) 170, at 186.

²⁹ Paul Reinsch, *Public International Unions* (1907), 144–145.

³⁰ Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Michigan Journal of International Law* (1997) 183, at 199.

³¹ Claude, *supra* note 20, at 39.

organization. Another 19th-century template for a close co-operation between civil society and national administrations in the humanitarian field was the International Committee of the Red Cross (ICRC), which was founded in 1863; not only did it bring forward a whole subfield of international law, but, while so doing, it was even granted limited subjectivity under international law, a special status enjoyed by only select NGOs in the modern history of international law.³² The ICRC is a private association based in Geneva which, in the second half of the 19th century, set itself the goal of alleviating the suffering of wounded soldiers in European battlefields. It was engaged in an early and especially successful form of norm-entrepreneurship through a private association. An important element of this success story is ICRC's close interaction with national administrations of major European powers, including military experts. No wonder that the ICRC's moral cause included neither the pacifist quest for a comprehensive prohibition of war nor the alleviation of suffering of the 'non-civilized' in colonial wars.³³

The relationship between states and international organizations in international relations scholarship has often been depicted as a principal–agent relationship between states and IOs.³⁴ In the early phase of international institutions, European governments indeed used international organizations to co-ordinate diverging domestic standards and to fulfil co-operative tasks. From a historical angle, however, the principal–agent model not only underestimates the role of private associations in the foundation and practice of the first IOs, it also somewhat artificially creates neatly separated actors with specific roles (principal–agent). In reality, the relational networks between governments, private actors and international secretariats in many of these first international institutions were extremely close, often forming a unitary and elitist field of political action with interwoven and recursively structured relationships.

B Advancing International Institutions: With a Little Help from Our NGOs

According to this second strand of the functionalist concept of the role of civil society, NGO participation would primarily help the institution in realizing its purposes.³⁵ In contrast to the above-mentioned rather harmonious relationship between national administrations, 'their' international organizations and private associations, this legitimization narrative focuses on the specific interests of the international institution itself. NGOs are seen as partners of international institutions, helping them to pursue their goals, if necessary also against disruptive governments blocking new laws or policies in the institution. NGOs which have aligned their own political goals with those

³² Charnovitz, *supra* note 30, at 188.

³³ Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Law's "Other"', in A. Orford (ed.) *International Law and its Others* (Cambridge University Press, 2006) 265.

³⁴ De Búrca, Keohane and Sabel, 'Global Experimentalist Governance', 44 *British Journal of Political Science* (2014) 477, at 479.

³⁵ A good example of this narrative is the manual by Edwin A. Bock, *Representation of Non-governmental Organizations at the United Nations* (1955).

of a particular international institution are particularly likely to fit into this narrative. One of the main activities in this context are lobbying activities at international conferences, aiming to isolate those governments that have been identified as impeding the institution from realizing its supposedly benign goals.

Already at The Hague Conferences in 1899 and 1907, numerous meetings between civil organizations, which sought to influence the national delegations, took place in parallel with the negotiations. The American peace activist and publisher William T. Stead became famous for covering both Hague Conferences with the distinct purpose of breaking the diplomats' monopoly on information and denouncing those diplomats who blocked reform projects. His daily conference publication, which as a civil-society initiative was meant to set a precedent in multilateral conferences, criticized negotiation outcomes and, during the conference, became an acclaimed mouthpiece of, and source of information for, peace activists.³⁶ Amongst other things, Stead in his publication criticized the 'standard of civilization', which in his view had led to the Liberian delegation being denied participation in the conference because of their skin colour.

Hundreds of civil-society organizations before and after World War I attempted to influence various forms of inter-state co-operation.³⁷ The International Labour Organisation (ILO) was founded in 1919 and required that national delegations must include seats with individual voting rights for representatives of employers' associations and trade unions. In view of the practice of mixed (public/private) delegations at international conferences in the 19th century, this was less revolutionary than one might think. But before World War I, the trend had indeed begun to move towards a stricter formal separation between public and private representatives. Nonetheless, during the League era, a whole array of new private associations, many of them now from the United States, established themselves in Geneva. Their representatives were part of what contemporaries called the 'Geneva spirit' and not exclusively confined to work behind the scenes lobbying national delegations at receptions. More often than not they had also had access to conference halls and committee meetings, albeit without formal voting rights.³⁸

1 *The UN and the ECOSOC Model of Civil-Society Participation*

The institution-enhancing version of the functionalist concept became enshrined in law for the first time through the UN Charter in 1945 and subsequent resolutions of the Economic and Social Council of the United Nations (ECOSOC).³⁹ Also for the first time, civil-society organizations appear in the text of the Charter as 'non-governmental organizations' (NGOs). According to Article 71 of the UN Charter, the ECOSOC

³⁶ W. T. Stead, *Courrier de la Conférence de la paix* (1907); cf. Charnovitz, *supra* note 30, at 197.

³⁷ For an overview of these organizations, see Charnovitz, *supra* note 30.

³⁸ B. Pickart, *The Greater United Nations* (1956), at 24.

³⁹ United Nations Charter, 24 October 1945, 1 UNTS 15; ECOSOC Res. 3, 21 June 1946; ECOSOC Res. 288(X), 27 February 1950.

is authorized to ‘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’. Two aspects of the wording of Article 71 deserve special consideration. First, consultations with NGOs are, according to this article, only foreseen for the Economic and Social Council, an organ tasked to deal with human rights, social matters and issues relating to the world economic order. A comparable arrangement for the UN Security Council was not provided for in the Charter. Second, it seems characteristic of the functionalist concept that NGOs according to this provision are *international* NGOs, as both Article 71 and the relevant resolution specify. *National* NGOs could be included in this consultation arrangement, subject, however, to the approval of the member states. In the pertinent ECOSOC resolution, the reason given why participation of national NGOs was explicitly labelled as subject to approval was precisely that they were national institutions and, as such, were already being held to be adequately represented by their respective governments.⁴⁰ It is not surprising that the number of accredited *national* NGOs until the 1970s had remained quite small; in 1947, there were only five and in the early 1970s still fewer than 10 accredited national NGOs.⁴¹

In line with the functionalist concept, international NGOs were selected according to whether or not they are able to provide specific expertise which is of import to the ECOSOC.⁴² A further criterion is a ‘recognized international standing’.⁴³ The aim was not to include diverse segments of domestic publics but ‘to enable organizations which represent important elements of public opinion, to express their views’. The references to ‘recognized international standing’ and ‘important elements of public opinion’ allow for a selective approach which confers privileges on already well-established civil-society actors in line with the elitist and functional legacy of early civil-society involvement in international institutions.⁴⁴ In 1955, after the first decade of NGO participation in the United Nations, a US study on NGO participation in the UN written by

⁴⁰ ECOSOC Res. 3, 21 June 1946, Part I, para. 8.

⁴¹ P. Willetts, *Non-Governmental Organizations in World Politics* (2011), at 13.

⁴² ECOSOC Res. 3, 21 June 1946, Part III, para. 3: Decisions on arrangements for consultation should be guided by the principle that consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council, or one of its bodies, to secure expert information or advice from organizations having special competence on the subjects for which consultative arrangements are made, and, on the other hand, to enable organizations which represent important elements of public opinion, to express their views.

⁴³ ECOSOC Res. 288(X), 27 February 1950; changes introduced by ECOSOC Res. 1296(XLIV), 23 May 1968.

⁴⁴ Non-government organizations are categorized by the UN in three groups according to their specialization and representative nature: general, special and roster. The participation rights of the NGOs within the ECOSOC framework are determined by their classification into one of these three categories. NGOs with a general consultative status are, for example, able to submit written statements and clarifications to specific questions at sessions at the invitation of the competent UN organs and to suggest additional agenda items. See ECOSOC Res. 1996/31, 25 July 1996, Part III. See on the procedures, S. Hobe, Art. 71, in B. Simma et al (eds.), *The Charter of the United Nations: A Commentary* (2012), at 1803–1804.

Edwin A. Bock bears witness to the contemporary functionalist mind-set. The study set out

[T]o discuss, on the basis of the experience and experimentation of the past nine years, how NGO consultation can be of greatest value to the public officials – national delegates and international Secretariat – who carry on the work of the United Nations. The underlying assumption is that the more effective NGO's are in consultation, the more the UN may benefit from the expeditious flow of ideas and experiences. The NGO's in turn, will be able to realize a greater proportion of their potential for helping the United Nations.⁴⁵

To summarize, the functional concept, which originated in the late 19th century, saw the work of international civil-society organizations as an important, if not instrumental, element of organized international co-operation between states. Well into the 1970s it was the dominant conception of NGO participation and still is an influential perspective on the phenomenon.

2 Cold War Antagonisms and the 'International Civil Society'

While the early narratives often emphasized a harmony of interests between private actors, national governments and international institutions, the inter-war and post-World War II discourse began to see international NGOs more exclusively as natural allies of international institutions. In the antagonistic Cold War atmosphere, however, both superpowers attempted to push their geopolitical agendas by promoting specific international NGOs and relevant segments of international civil society at home and abroad. Close interaction between NGOs and particular national governments within international institutions was increasingly considered to be problematic and officially ruled out by the relevant ECOSOC resolutions.⁴⁶ The sardonic abbreviation 'GONGO' (government-organized non-governmental organization) was and still is used in order to criticize NGOs that pursue a particular national agenda.

Accredited NGOs, according to the ECOSOC criteria, were primarily meant to enhance the work of the UN as a supposedly impartial forum for universal intergovernmental co-operation. In practice, however, on many economic and educational issues, NGOs from the two antagonistic ideological backgrounds (socialism versus liberal capitalism) attempted to influence the work of the ECOSOC, even though Eastern European NGOs, in terms of numbers, remained under-represented during the Cold War era. A good example are the ideological battles between accredited US trade unions and the more left-leaning World Federation of Trade Unions within the UN.⁴⁷ The relationship between international institutions and business actors was less

⁴⁵ E. A. Bock, *Representation of Non-Governmental Organizations at the United Nations* (1955), at 9.

⁴⁶ See ECOSOC Res. 1296(XLIV), 23 May 1968, Part VIII, para. 24. The controversies about governmental influence were even the major reason for the 1968 review of NGO consultative arrangements. See Gunter, 'Toward a Consultative Relationship between the United Nations and Non-Governmental Organizations', 10 *Vanderbilt Journal of Transnational Law* (1977) 557, at 563.

⁴⁷ On the longstanding UN rivalries between the left-leaning World Federation of Trade Unions and the American Federation of Labor, which began at the San Francisco Conference and also led to the drafting of Article 71 of the UN Charter, see B. Pickard, *The Greater United Nations* (1956), at 30.

straightforward in both the League era and the first decades of the UN ECOSOC consultation regime. While direct and formalized co-operation with for-profit entities was practically ruled out by the ECOSOC criteria for NGO accreditation,⁴⁸ business entities had, from early on, started to found NGOs representing their common interests.⁴⁹ One of the first and highly influential role models in this regard was the International Chamber of Commerce (ICC) which, in the League of Nations era, still played a highly influential role in practically all institutionalized deliberations related to international trade.⁵⁰ Its influence on some League projects had been so strong that it was allowed to sign the relevant legislative outcome documents alongside the member states.⁵¹ Due to the rivalry between two diametrically opposed political and economic systems in the first decades of the UN era, the ICC, with its free-trade agenda, lost influence after the world organization had moved from Geneva to New York.

According to the second strand of the functional concept, to this day NGOs thus perform key functions in institutionalized international co-operation. They become active in agenda setting by bringing new and pressing issues related to ‘common interests’ to the attention of international institutions either in co-operation with or by criticizing specific national governments. Furthermore, through lobbying, information campaigns and their own right of participation in conferences, NGOs themselves influence the drafting of new standards and even binding legislation.⁵² They perform these functions in many international organizations created under international law in an advisory capacity, thus usually without having decision-making powers.⁵³ In the first decades of the ECOSOC consultation regime, which served as the model for basically all UN programmes and special agencies, NGOs had an important role in creating both the treaty- and Charter-based UN human rights machinery. Practically from the beginning, the UN-monitoring bodies were reliant on the expertise and regional knowledge of international and national non-governmental organizations.⁵⁴ In the

⁴⁸ Durkee, ‘Astroturf Activism’, 69 *Stanford Law Review* (*Stanf. L. Rev.*) (2017) 201, at 225. According to Charnovitz, ‘The practice of excluding commercial organizations from the category of “associations” goes back at least to the establishment of the Union of International Associations in 1910’. See Charnovitz, *supra* note 30, at 187. Cf. the definition of NGOs as ‘non-profit-making’ in J. J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities* (1963), at 60. For detailed recent studies, see A.-K. Lindblom, *Non-Governmental Organisations in International Law* (2005), at 39ff.; I. Rossi, *Legal Status of Non-Governmental Organizations in International Law* (2010), at 2ff.

⁴⁹ Durkee, *supra* note 49, at 225ff. Interestingly, the situation seems to be inverse in the European Union. Marxsen, for example, has argued that procedures for EU Commission consultations with for-profit entities in the European Union are traditionally well established, while the influence of not-for-profit organizations is weak: see Marxsen, ‘Open Stakeholder Consultations at the European Level-Voice of the Citizens?’, 21 *European Law Journal* (*ELJ*) (2015) 257.

⁵⁰ For an early study on the involvement of the ICC in the work of the League, see H. R. G. Greaves, *The League Committees and World Order* (1931), at 46ff., 78, 151, 165.

⁵¹ L. C. White, *International Non-Governmental Organizations* (1951), at 19–32.

⁵² D’Aspremont, ‘Non-State Actors from the Perspective of Legal Positivism’, in J. D’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 23.

⁵³ For a good overview, see Charnovitz, *supra* note 30.

⁵⁴ Cf. P. Alston, *Non-State Actors and Human Rights* (2005); C. E. Schwitler Marsiaj, *The Role of International NGOs in the Global Governance of Human Rights* (2004).

monitoring context, NGOs often function as a ‘transmission belt’ for the policies of an international institution and at the same time provide international institutions with the required information regarding the state of implementation at the national level.⁵⁵

Despite a rise of solidarity with the ‘Third World’ in many progressive circles in Western states during the decolonization era, issues of global economic justice and the New International Economic Order figured less prominently on Western NGO agendas. During this Cold War era, most UN organs and agencies were strongly impacted by the East–West confrontation and the process of decolonization leading to a new political configuration in the member-state-driven organs of IOs and also somewhat delayed in the relevant secretariats. NGOs were often forced to position themselves in a highly antagonistic and dynamic geopolitical and ideological environment. When Western states, under the leadership of the United States, started to lose their initially dominant position within the UN, many Western NGOs had to take sides in order to secure funding from Western states and institutions. And they did. Not only did the CIA finance the International Commission of Jurists but Amnesty International, for instance, also excluded the Covenant on Economic, Social and Cultural Rights, and various human rights-related positions of the G-77 in the battle for the New International Economic Order (NIEO), from their campaign agendas.⁵⁶ Many international NGOs withdrew their support for these Third World-initiated UN policies even though they had been adopted by the General Assembly with overwhelming majorities, albeit usually without the votes of the Organisation for Economic Co-Operation and Development (OECD) countries. The ‘international civil society’ became an openly embattled political space.⁵⁷

During this time, perhaps unsurprisingly, the confident early post-war functionalist voices ceased to dominate the scholarly debates around NGO participation. For, in the absence of a joint vision of the right role of the UN in these ideological clashes, the question of whether or not a specific NGO contribution would make the UN more or less effective irrefutably depended on the perspective of the observer. As critics of functionalist legitimation theories for global and regional regimes have pointed out, it is highly doubtful whether, due to the plurality of conflicting interests in practically all political decision-making processes on a transnational level, an inter-subjectively shared judgement on the ‘effectiveness’ or ‘quality’ of the results or products of supranational or global regimes can be reached.⁵⁸

⁵⁵ Kissling and Steffek, ‘CSOs and the Democratization of International Governance: Prospects and Problems’, in J. Steffek, C. Kissling and P. Nanz (eds), *Civil Society Participation in European and Global Governance* (2008) 208.

⁵⁶ On the NIEO, see Venzke, ‘Possibilities of the Past: Histories of the NIEO and the Travails of Critique’, 20 *Journal of the History of International Law* (2018) 263. See also J. Bernstorff and P. Dann (eds), *The Battle for International Law* (2019).

⁵⁷ See, from an autobiographic and outspoken Western perspective, on the close and highly strategic Cold War relationships between CIA and other US funding sources and pro-Western academia and NGOs in Europe and elsewhere, W. Laqueur, *Mein 20. Jahrhundert, Stationen eines Politischen Lebens* (2009).

⁵⁸ Cf. C. Möllers, *Gewaltengliederung* (2005), at 37–38.

From the 1990s onwards, however, with the end of the NIEO project and the demise of open ideological Cold War antagonisms, narratives legitimating civil-society participation resurfaced. A UN expert panel report on civil-society participation in the early 2000s reaffirmed the functional perspective as follows: ‘The most powerful case for reaching out beyond its constituency of central governments and enhancing dialogue and cooperation with civil society is that doing so will make the United Nations more effective.’⁵⁹ The end of the Cold War did not only help to revitalize functionalist approaches to civil-society participation, it also led to the spread of a new democratization narrative.

3 The Concept of Democratization

The 1990s saw the rise of the second concept of civil-society participation, which considered new forms of civil-society participation in international institutions to be building blocks in the democratization of what was then called ‘global governance’. Two elementary shifts had contributed to the creation of this concept: first, the so-called economic globalization gaining ground in the 1980s and 1990s and the related expansion and fragmentation of the international institutional landscape. This era brought about the cherished establishment of ever-more sophisticated and issue-related international regimes which rely on their own mechanisms of adjudication and enforcement. Not only in the fields of international economic law, international criminal law and the law of the sea, new institutions had been established by international law.

Another driver of the democratization-through-NGO-participation concept was the related explosive increase in the number of NGOs during the same period. In the 1980s and 1990s, NGOs like Amnesty International, Human Rights Watch, Greenpeace and numerous others in the field of human rights and in the environmental sector became ever more important actors. Particularly impressive demonstrations of the quantitatively intensified participation of both international and national NGOs were the United Nations Earth Summit in Rio in 1992, the World Conference on Human Rights in Vienna in 1993, the World Summit for Social Development in Copenhagen in 1995 and the World Conference on Women in Beijing in 1995. These conferences were met with unprecedented interest from national and international NGOs. At the World Conference on Women in Beijing, over 4,000 NGOs were represented.⁶⁰ In 1994, the UN Secretary General, Boutros Boutros-Ghali, praised the democratic potential of NGO participation in the UN: ‘Non-governmental organizations are a basic

⁵⁹ Panel of Eminent Persons on United Nations–Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance*, 18 U.N. Doc. A/58/817, 11 June 2004. In this context, Fritz Scharpf coined the term ‘output-legitimation’ for governance structures within the EU, according to which the quality of the results of supranational governance can contribute to the legitimation of collectively binding decisions. See F. W. Scharpf, *Legitimacy in the Multilevel European Polity* (2009).

⁶⁰ 32(4) *UN Chronicle* (1995) 29; Otto, ‘Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society’, 18 *Human Rights Quarterly* (1996) 107, at 120.

form of popular representation in the present-day world. Their participation in international organizations is, in a way, a guarantee of the political legitimacy of those international organizations.’⁶¹

It also became apparent from the mid-1990s onwards that more and more NGOs were taking an ever-more critical stance towards new international organizations such as the World Trade Organization (WTO) and the OECD, as well as towards international financial institutions, such as the World Bank and the International Monetary Fund (IMF). At the same time, in the field of development, national and international donors in the 1990s discovered national and local ‘grassroots organizations’ as helpful partners ‘on the ground’; a trend which led to the creation of numerous national and local NGOs in Africa, Asia and Latin America.⁶² The more diverse nature of civil-society actors seeking influence in international institutions was also mirrored in the 1996 revised ECOSOC criteria for the accreditation of NGOs under Article 71 of the UN Charter. The resolution moved away from its prior focus on international NGOs and now promoted the accreditation of national NGOs alongside the classic big international players.⁶³ Though member states like China have sought, often successfully, to keep critical national NGOs out of the UN through the ECOSOC–NGO Committee, hundreds of new national NGOs were accredited in the last decades of the 20th century.

A A New Source of Legitimacy?

The NGO boom of the 1980s and 1990s also triggered new theoretical debates about the categorization and democratic potential of civil-society participation.⁶⁴ With international organizations regulating or deregulating market economies, domestic budgets, environmental safeguards, social policies, agricultural development or external military interventions (often against, or in tension with, positions taken by national parliaments), the question of democratic legitimacy had become ever more acute.⁶⁵ Moreover, the at-times overly rosy and enthusiastic prospects of a new world of liberal and democratic values after the fall of the iron curtain led many scholars to discuss and assess the democratic potentials and deficits of the international legal order. NGO participation was seen by many as *the* development that could function as a connection between two partners (democracy and international law) that at first sight were

⁶¹ Boutros Boutros-Ghali, Speech at the 47th Annual UN Department of Public Information Conference of Non-Governmental Organizations (20 September 1994).

⁶² An early observer of this trend was J. Fisher, *The Road from Rio: Sustainable Development and the Nongovernmental Movement in the Third World* (1993).

⁶³ ECOSOC Res. 1996/31, 25 July 1996, paras. 4–8.

⁶⁴ Schwitter Marsiaj, *supra* note 55, at 270. For a vision of participatory democracy in the EU context, see Cohen and Sabel, ‘Directly-Deliberative Polyarchy’, 3 *ELJ* (1997) 313.

⁶⁵ For a public law approach to the analysis and evaluation of the modalities of the exercise of international public authority and the participating actors, see A. Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010). For a more general and recent theoretical engagement with the legitimacy problems of global governance institutions from an international relations perspective, see Zürn, *supra* note 17.

not made for one another, be it because of the lack of a global *demos* or because of the enormous discrepancy between the sizes of national populations. For international institutional law, the conceptual marriage between democracy and international law turned out to be a rather complicated and perhaps even unhappy one. To begin with, the democracy problem in the context of international legislation processes obviously could not be analysed against the yardstick of a fully-fledged democratic national constitution. Universal institutions usually do not require that national delegations have been elected democratically or that they act in a representative or responsive manner. Only about half of the member states in the UN can be considered to be democratically constituted.⁶⁶ Instead, the law of international organizations traditionally only works with a minimal internal ‘democratic’ ethos, which lies merely in the fact that most constitutive treaties foresee a general assembly of all member states for majority decisions on a one-state–one-vote basis regarding changes to primary and secondary law, the budget, as well as the election of the chief executive. But these majority decisions necessarily involve national delegations from autocratic regimes. Even democratically elected governments in their foreign policy often act outside effective parliamentary control.

So how could NGO participation become a key issue in these debates about the democratization of international law and its institutions? Theoretical models of democratic politics and legislation beyond the nation state predominantly employed concepts of ‘deliberative’ democracy through civil-society participation in international and supra-national legislative activities.⁶⁷ During the late 1990s, the debate began to take shape in the field of European law.⁶⁸ The question here was not to establish a fully-fledged democratic super-state, in which NGOs could play the same role they play vis à vis domestic parliaments. Instead, the debate had a compensatory focus. NGO participation in sectoral institutions was supposed to compensate for the loss of significance of national parliaments in supra-national and global politics and legislation. Deliberation here is often understood in Habermasian terms as an institutionalized exchange of reasonable arguments between international officials, national delegations and NGOs on specific political and legal questions. The process of deliberation involving NGOs, governments and international civil servants was meant to achieve a reciprocal adoption of other perspectives in a consensus-oriented discursive exercise.⁶⁹ This is how, according to the more enthusiastic advocates of transnational

⁶⁶ ‘Freedom in the World 2019: Democracy in Retreat’, Freedom House, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat> (last visited 23 March 2021).

⁶⁷ Cohen and Sabel, *supra* note 65; Dorf and Sabel, ‘A Constitution of Democratic Experimentalism’, 98 *Columbia Law Review* (1998) 267; Schmalz-Bruns, ‘Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats’, 6 *Zeitschrift für Internationale Beziehungen* (1999) 185; Joerges, ‘“Deliberative Supranationalism” – Two Defences’, 8 *ELJ* (2002) 133.

⁶⁸ For a critique of these approaches in EU governance, see Weiler, ‘Prologue: Amsterdam and the Quest for Constitutional Democracy’, in D. O’Keeffe and P. M. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (1999) 1.

⁶⁹ Dorf and Sabel, *supra* note 68; Schmalz-Bruns, *supra* note 68.

deliberative democracy, technocratic rule was to be replaced by the ‘unforced force of the better argument’ in international institutions.⁷⁰

According to these approaches (which, by the way, Habermas himself had neither developed for nor transferred to international institutions), intensive forms of NGO participation could help to ‘democratize’ supranational and international decision-making processes. The resulting partial disempowerment of (democratic) state representatives in negotiations could be tolerated, as direct-deliberative participation processes would become a distinct basis of legitimation for governance outside the nation state. A particular and related strand of scholarship in the early 2000s introduced the concept of ‘stakeholder democracy’.⁷¹ From an institutional perspective, this idea of deliberative or pluralist interest representation is reflected in the rise of multi-stakeholder models in civil-society mechanisms of various international institutions. Under the so-called ‘major groups’ approach, Rio-Agenda 21 introduced the idea to compartmentalize NGOs into larger stakeholder groups representing important interests within the respective international institution, such as ‘women’, ‘children’, ‘youth’, ‘farmers’ or ‘business’. As a mechanism to organize and coordinate NGO input in international institutions, the major groups approach proliferated during the 1990s and became a standard model of structuring private interest representation in IOs of environmental protection and sustainable development.⁷²

B Structural Impediments to the Realization of the Democratization Concept

Two arguments relating to structural impediments faced by assumptions of an emerging global democracy through private-interest representation and deliberative forums in international institutions are particularly persuasive.⁷³ First, the problem of veiled power asymmetries between the participants in these international deliberations. NGOs can only comment and give advice, but are not involved in decision-making. An

⁷⁰ See Somek, ‘Demokratie als Verwaltung: Wider die deliberativ halbierte Demokratie’, in H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft* (2009) 323. For a more positive approach, cf. Anne van Aaken, ‘Democracy in Times of Transnational Administrative Law: The Case of Financial Markets’, in H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft* (2009) 195.

⁷¹ On stakeholder democracy, see Bäckstrand, ‘Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development’, 12 *European Journal of International Relations* (2006) 467; T. Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (2008); on the underlying stakeholder theory originating in business ethics, see C. Gould, *Globalizing Democracy and Human Rights* (2004), at 219.

⁷² See generally on this model, Gupta, ‘The Role of Non-State Actors in International Environmental Affairs’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 459. Makane Moïse Mbengue interprets the major groups approach and its underlying rationale of ‘partnership’ as evidence for a new ‘sustainable development contract’: see Mbengue, ‘Non-State Actors in International Environmental Law – A Rousseauist Perspective’, in J. d’Aspremont (ed.), *Participants in the International Legal System* (2013) 372. On the relationship between the affectedness concept and NGO participation under the major groups approach, see Hasl, *supra* note 2.

⁷³ For a critical approach, see also W. E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (2004).

imbalance in power exists between the government representatives, who decide, and the NGO representatives who can only deliberate. The result is an asymmetrical communicative situation, which is likely to be obscured through the assumption of a deliberately created democratic legitimacy. Second, the problem of representation and selectivity: classic NGOs do not represent a particular group of people, but rather thematic issues. Their representatives are often not even democratically elected. Instead, they are frequently dependent on large donors and financing parties.⁷⁴

In addition, access and accreditation of NGO representatives in international forums, too, must remain selective. A clear dominance of the Global North, owing to its considerably higher financial strength, often cannot be eliminated. Another aggravating factor, which became particularly visible in the 1990s, was the rise of private sector participation in international institutions, mainly through global business associations, often accredited as NGOs. Both the governance network metaphor, as well as the concept of private self-regulation, called for more direct involvement of business entities in international institutions. The UN in the 1990s under Kofi Annan's leadership paid tribute to the neo-liberal *Zeitgeist* by throwing the doors wide open to direct and indirect involvement of multinational corporations, most of them based in OECD countries, on various levels of the organization.⁷⁵

This is the time of the '*pensée unique*', a time when a close co-operation between multinational corporations and the governments of OECD countries, by way of international institutions, was usually portrayed not as part of the problem but as the solution to basically all social and humanitarian problems of the world.⁷⁶ Like in the early days of international organizations in the 19th century, a rather harmonious group of powerful governments, business associations and scientific institutions was now once again able to exert a particularly high degree of influence on global economic and social structures within and through international institutions. As can now be seen much more clearly, it had been part of the 1980s' and 1990s' 'Washington Consensus' to erect a globally effective regime for property protection, while reducing the space for national democracies to opt out of, or to contest, this global legal framework empowering globally operating companies. For the revitalized Hayek school of economic thought, preserving a right of national constituencies to regulate global market actors was labelled as 'inefficient', 'socialist' or as a NIEO recipe that had to be abandoned.⁷⁷

⁷⁴ For such an early critic of the 'NGO-led democratization model', see Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law', 10 *Indiana Journal of Global Legal Studies* (2003) 25, at 42ff. For a recent critical analysis of the 'NGO democratic legitimacy thesis', see Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law', 9 *Transnational Legal Theory* (2018) 147.

⁷⁵ One of these initiatives was the UN Global Compact; cf. Durkee, note 49, at 236.

⁷⁶ On the inclusion of profit-oriented entities, see Gupta, 'The Role of Non-State Actors in International Environmental Affairs', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 459, at 472ff.

⁷⁷ For an intellectual and institutional history of this project, see Q. Slobodian, *Globalists, the End of Empire and the Birth of Neoliberalism* (2018).

Sectoral deliberative participation of NGOs in so-called global governance structures raises a further structural problem: namely that processes of (general) interest aggregation are largely absent on a global scale. Parliaments take on a central role domestically, ideally by resolving conflicts of interest between different sectoral interests and prerogatives. To this end, parliaments need the input, control and critique of a diverse array of civil-society organizations. However, in a fragmented, internationalized system, such an institution, entitled to aggregate diverse sectoral interests, is missing.⁷⁸ The ECOSOC was originally supposed to develop into such a general forum with a particularly broad mandate encompassing global economic and social policy and law-making. Unfortunately, in the wake of decolonization, powerful Western states virtually abandoned the ECOSOC as a vital global forum and shifted their activities to more exclusive and specialized institutions such as the G7, the World Bank and later the WTO.⁷⁹ According to Saskia Sassen, we saw the emergence of jurisdictional assemblages with distinct, and partially overlapping, claims of jurisdiction of institutions at different levels.⁸⁰ But something like a cross-sectoral global public could have emerged only around a powerful and representative institution with a general mandate. Instead, in practice, specialized NGOs for the most part influence specialized global institutions.

Fragmentation in the shape it took in the 1990s raises further problems for new forms of transnational democracy. Not only that, but in a fragmented institutional landscape, 'common interests' supposedly pursued by one institution can collide with diverging 'common interests' pursued by another international institution. The institutionalized promotion of free trade versus the reduction of greenhouse gas emissions is a case in point. But also, and perhaps more importantly, there were enormous discrepancies in the strength and means of enforcement between the institutions implementing the transnational property regime and those dealing with so-called 'negative externalities' of the newly created global markets.⁸¹ While, in terms of enforcement, new instruments of human rights protection, environmental law and international humanitarian law often remained at a symbolic or aspirational level, institutions like the World Bank, the IMF and the WTO had been equipped with transformative powers and resources. Supported by a new hegemonic set of public and private actors and their common worldview called 'The Washington Consensus', they were not particularly reluctant to use them.⁸²

⁷⁸ Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in H. Brunkhorst (ed), *Demokratie in der Weltgesellschaft* (2009), at 185.

⁷⁹ On forum shopping and strategic usage of various competing institutional fora, see E. Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanf. L. Rev.* (2007) 595.

⁸⁰ S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006), at 401–423. With a new perspective on law and authority in this constellation, see Krusch, 'Liquid Authority in Global Governance', 9 *International Theory* (2017) 237.

⁸¹ von Bernstorff, 'The Decay of the International Rule of Law Project (1990–2015)', in G. Nolte, H. Krieger and A. Zimmermann (eds), *The International Rule of Law: Rise or Decline? Foundational Challenges* (2019) 33.

⁸² Slobodian, *supra* note 78.

To summarize, either deliberative theories of democracy had severe problems in providing a convincing model of democratization of international institutions through NGO participation, or the concrete practices in a fragmented institutional landscape could not live up to the high expectations raised by these theories.⁸³ Related theoretical approaches claiming the ‘democratic’ legitimacy of civil-society participation proved equally disappointing when faced with global institutional structures: ‘pluralist’ approaches, for instance, focus on the ‘democratizing’ effect of involving a diversity of interests through NGO participation, thereby tending to make unrealistic claims about the possibility of controlling asymmetrical interest representation within or between international institutions.⁸⁴ Other theories see a potential for democratic legitimation of NGO participation in the capacity of NGOs to mobilize public opinion.⁸⁵ But even if civil-society actors are able to mobilize large segments of domestic public opinion, without an existing body of (elected) international representatives whose task is to generalize the various particular claims, the move to include such broadly supported NGOs in international negotiations may be a helpful exercise, but these institutional practices should not be equated with ‘democratic’ decision-making.

This rather sceptical reading of the various ‘democratization’ narratives is not meant to deny that the participation of the ever more numerous national NGOs in international institutions can have a positive effect on the transparency of *national* foreign policies. National NGOs can report back from Geneva or New York and inform their domestic audiences about their respective government’s role in international negotiations. This is because many governments, including democratic ones, only occasionally consider it important to inform their domestic constituents about their concrete policy strategies or law-making activities in international institutions. Parliaments are, to this day, often relegated to a mere rubber-stamping role once the international negotiations have been concluded. A prominent example is the 1994 WTO agreement, the ratification of which had been deliberately rushed through national parliaments with an extremely short time-frame.⁸⁶ NGOs can help to put pressure on national governments to disclose and justify their IO activities vis-à-vis national publics at an early stage of the negotiations. Such watchdog exercises,

⁸³ For a critique of these approaches in EU governance, see Weiler, *supra* note 69. For an in-depth discussion of various abstract theoretical models of ‘democratization’ through civil-society participation designed and discussed for the domestic realm, see Marxsen, ‘The Promise of Global Democracy: The International Impact of Civil Society’, 47 *NYU JILP* (2015) 719.

⁸⁴ On EU governance, see Kohler-Koch, ‘Civil Society and EU Democracy: “Astroturf” representation?’, 17 *Journal of European Public Policy* (2010) 100, at 106. For a global level perspective, see, e.g., T. Macdonald, *Global Stakeholder Democracy* (2008); de Búrca, Keohane and Sabel, ‘New Modes of Pluralist Global Governance’, 45 *NYU JILP* (2013) 723, at 785.

⁸⁵ Marxsen holds that with the mobilization model NGO participation could be democratically justified: ‘The degree of democratic justification, however, depends on the level of public support actually mobilized.’ See Marxsen, *supra* note 84, at 781.

⁸⁶ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

including organized national or transnational protests, have, in many cases, proved to be vital civil-society contributions to more vigilant domestic and transnational public spheres.⁸⁷ In 1999, a transnationally organized protest movement managed to derail a WTO ministerial conference in Seattle, thus putting a first visible crack in what had seemed a massive wall around the shiny discursive palaces of the Washington consensus. It is the potential of national NGOs and local social movements for organizing discursive resistance against specific policies of member states and experts networks, within and through international institutions, that is associated with the rise of the principle of involving ‘the most affected’.

4 The Principle of Participation of ‘The Most Affected’

In 2018, Elizabeth Mpofu, a small-holding farmer from Ghana, addressed the 140 member states representatives in the FAO Council:

Right now, while we are sitting here, climate change and agribusiness are threatening us; hunger is increasing around the world and peasants commit suicide every day. We must move into action. It is time to implement solutions. We, the peasants, have these solutions and we have been explaining them for many centuries. The solution is to promote peasant family farming based on agroecology and food sovereignty, including small-scale food producers.⁸⁸

A small-holder herself affected by global agricultural policies and a leading activist of Via Campesina, a transnational peasant movement representing 200 million farmers, Mpofu’s self-understanding arguably represents a new form of civil-society participation in international institutions. According to this most recent (post-2000) conceptual offshoot of the concept of democratization, civil-society participation should primarily involve ‘the most affected’. It can be interpreted as a pragmatic attempt to correct the overly optimistic deliberative approaches, according to which governance would become more democratic by involving as many stakeholders as possible in international institutions. Involving ‘the most affected’ comes with a clear focus on those groups which, based on prior, and often negative, experience, can make a plausible claim to be existentially affected by the concrete repercussions of a certain structure of governance. As a pragmatic derivative of the concept of democratization, involving ‘the most affected’ aims at countering the exclusion of those so-far unheard groups, which find themselves on the receiving end of the fragmented 21st-century international legal order.⁸⁹

⁸⁷ von Bernstorff, ‘Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Experten Herrschaft?’, in H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft* (2009) 277.

⁸⁸ ‘UN Decade of Family Farming; Peasants Voice Their Hopes and Concerns’, La Via Campesina: International Peasants’ Movement (29 July 2019), available at <https://viacampesina.org/en/un-decade-of-family-farming-peasants-voice-their-hopes-and-concerns/>.

⁸⁹ For an international legal anthropology perspective on how international law shapes everyday life in the Global South and elsewhere, see L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015).

The transition from classic NGOs representing ‘common interests’ to participation of the most affected can be identified in a number of international institutions through new regulations governing civil-society participation.⁹⁰ Most of these institutions are from the field of human rights, protection of indigenous peoples, environment and health. While in the last decades of the 20th century, national NGOs became a more important constituency next to the classic international NGOs, the affectedness principle enhances the weight of local and transnational movements. Organizations of ‘the most affected’ are not primarily committed to furthering universal goals or common interests, but openly promote their particular interests and those of persons affected by a given issue. In contrast to classic NGOs, their internal regulations usually require that they be composed of, and to a significant extent led by, directly affected persons.⁹¹ Contributions of these groups to international negotiations are often more rebellious and less polished than those of highly professional international NGOs: these new activists usually come from grassroots organizations involved in local and national protest movements.⁹² So far, in at least 19 international institutions, civil-society mechanisms erected by secondary legislation and rules of procedure foresee the participation of those ‘affected’ or ‘most affected’ by policy outcomes of the institutions.⁹³ Understandably, profit-oriented corporations, in practice, so far fall outside the umbrella of ‘the most affected’, whereas smallholders and small family businesses can, under certain circumstances, be included in this category.

In the civil-society mechanism of the Committee on World Food Security of the FAO, for instance, organizations representing the most affected have largely replaced international NGOs. The founding document of the Committee stipulates that its composition must ensure that particularly the voices of those most affected by food insecurity are heard.⁹⁴ Accordingly, NGOs only represent one out of 11 constituencies in the ‘civil-society mechanism’, which is characterized by the key principle that ‘CSO [civil-society organization] participation in the CFS has to privilege the most affected, including smallholder producers, fisherfolk, pastoralists, indigenous people, urban poor, migrants, agricultural workers etc.’⁹⁵

Likewise, the treaty body of the Convention on the Rights of Persons with Disabilities privileges so-called ‘disabled persons’ organizations’ above mere ‘third-party representation’.⁹⁶ Disabled persons’ organizations, in line with the Committee’s guidelines, are

⁹⁰ On this trend, see von Bernstorff, *supra* note 2; Sändig, von Bernstorff and Hasenclever, *supra* note 2.

⁹¹ See Hasl, *supra* note 3, at 44.

⁹² On ‘affectedness alliances’ between local movements and international NGOs that are based on strategic division of labour, see Schramm and Sändig, ‘Affectedness Alliances: Affected People at the Centre of Transnational Democracy’, 3 *TWT* (2018) 664.

⁹³ For a non-exhaustive list of institutions currently using the affectedness concept, see *supra* note 2.

⁹⁴ Committee on World Food Security, Reform of the Committee on World Food Security, CFS:2009/2 Rev. 2, October 2009, para. 7.

⁹⁵ Committee on World Food Security, Proposal for an International Food Security and Nutrition Civil Society Mechanism for Relations with CFS, CFS:2010/9, October 2010, Annex 3, at 14. On this participatory innovation, see Bernstorff, *supra* note 2.

⁹⁶ For an intensive elaboration on this distinction, see Committee on the Rights of Persons with Disabilities, General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, UN Doc. CRPD/C/GC/7, 9 November 2018.

organizations possessing a majority of members with disabilities, and must also be led by persons with disabilities.⁹⁷ The working methods are further attuned to prefer direct participation of these ‘disabled persons’ organizations’ in the committee meetings.⁹⁸ This move can, in general, certainly be seen as a reaction to the disillusionment and increasing criticism of global governance structures and the involvement of classic NGOs. Legitimacy claims based on better outcomes, as well as those based on alleged democratic contributions to global governance, had come under severe criticism.

A Involving ‘The Most Affected’ as an Answer to the Legitimacy Crisis

Is there one? It can hardly be denied that those approaches to international institutions working on the basis of an implicit ‘the IO can do no wrong’ understanding have seen better days.⁹⁹ International NGOs supporting international institutions have also been portrayed in a more critical light by many observers and by those who are not satisfied by the outcomes achieved by the new plethora of international institutions. Many hopes and aspirations regarding the post-1990s institutional set-up have not been realized, while global threats to security, the environment and health have become more urgent. For instance, over the last 20 years, international institutions have managed neither to significantly reduce global greenhouse gas emissions, nor to stem the increase in the production of small arms or nuclear weapons. The cherished post-1990s global governance era saw a dramatic acceleration in climate change; the extinction of species; the explosion of slum dwellings in the mega cities of the Global South, often lacking adequate water, sanitation and health care; a global HIV epidemic; as well as two genocidal civil wars, a number of disastrous famines in the Global South and various illegal military interventions in foreign states, altogether leading to a combined death toll of more than 20 million human beings.¹⁰⁰ Triumphant post-Cold War Western-led liberal internationalism, including the era of the ‘Washington consensus’, seems to have failed on all major issues relevant to the survival of humankind in the 21st century.

Global economic inequality has further increased,¹⁰¹ and climate-induced transformations will probably lead to new and unprecedented levels of suffering, deprivation and violent conflict over access to habitable territory in the next decades. The global economy is still primarily carbon-based and focused on the unlimited exploitation of natural resources.¹⁰² Some actors, groups or states have certainly profited

⁹⁷ Committee on the Rights of Persons with Disabilities, Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee, UN Doc. CRPD/C/II/2 (2014), Annex 2, para. 3.

⁹⁸ See, e.g., Committee on the Rights of Persons with Disabilities, Working methods of the Committee on the Rights of Persons with Disabilities adopted at its 5th Session (11–15 April 2011), UN Doc. CRPD/C/5/4, 2 September 2011, paras. 41–43.

⁹⁹ Cf. Klabbers, *supra* note 20.

¹⁰⁰ von Bernstorff, *supra* note 82.

¹⁰¹ T. Piketty, *Capitalism in the Twenty-First Century*, trans. Arthur Goldhammer (Harvard University Press, 2014).

¹⁰² On the ‘exploitation bias’ in the law of the sea, see Feichtner and Ranganathan, ‘International Law and Economic Exploitation in the Global Commons: Introduction’, 30 *EJIL* (2019) 541.

from international co-operation over the last 30 years, but many others have not. Overall, the outcome of international institutionalized co-operation in many sectoral fields is an uncertain if not depressing one. While global markets were created rather efficiently through international institutions, ecological and humanitarian legal instruments usually have remained at the level of symbolic or aspirational norm and value promotion. But perhaps it is an idealist aberration to expect the advancement of transnational solidarity and better living conditions for all humankind. As we have seen above, in the early days of international organizations, internationalism was seen by scholars and Western intellectuals as ‘refined nationalism’ (Fried) and as a means of transnational economic expansion, rather than a global solidarity project. It was part of the success story of the post-1980s Washington consensus to portray its transformative global economic programme as leading to more prosperity for all human beings on the globe, thus advancing an appealing claim to universal prosperity strongly promoted by transnational corporations seeking to operate safely and profitably in newly created global markets.

Is it a symptom, a consequence or a glimmer of hope that liberal international civil society, the classic backbone of civil-society participation, is increasingly considered to be an elitist club on the decline? Chatterjee, for instance, speaks without lamentation of the gradual replacement of an elitist ‘civil society’ by a ‘political society’.¹⁰³ One of the reasons for the observed transition to the principle of involving the most affected arguably is that many social movements, especially those from the Global South, did not feel adequately represented by large international NGOs. In the same vein, the concept of democratization through NGO participation had come under significant strain, not only because of the under-representation of the Global South. Good examples for the more sceptical tone in scholarly circles are Kenneth Anderson and David Rieff, who in 2005 pointed to the problematic discursive attempt at mutual legitimization between NGOs and international institutions, even though both lacked a formal mandate based on democratic elections and both struggled with structural transparency and accountability deficits.¹⁰⁴

Moreover, under postmodern conditions, ‘speaking for others’ generally has fallen under the suspicion of being another form of hegemonic paternalism. We are also witnessing a widely perceived crisis of representation in Western societies. It comes with the perception that the articulation of one’s own interests as a general rule has to be as direct as possible. According to this concept, affected individuals should speak for themselves. And yet ‘representation’ in the sense of ‘making present’ something that is literally absent¹⁰⁵ is unavoidable even if the most affected take the floor in international institutions. The most affected are precisely being heard because they also claim to speak on behalf of other similarly affected persons. Employing the categories

¹⁰³ P. Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (2011), at 82 et sequ.

¹⁰⁴ Anderson and Rieff, ‘“Global Civil Society”: A Sceptical View’, in M. Glasius, M. Kaldor and H. Anheier (eds), *Global Civil Society 2004/5* (2005) 26.

¹⁰⁵ H. F. Pitkin, *The Concept of Representation* (1967), at 144. On Pitkin’s theory of representation, and NGO participation in general, see Marxsen, *supra* note 84, at 763.

of representation developed in Hanna Pitkin's seminal monograph, participation of the most affected would fall under forms of 'descriptive' representation resting essentially on the resemblance between the group and its representative.¹⁰⁶

The move to affectedness also has a related performative dimension that is connected to opportunities offered by new media. The authentic testimony of a speaker's own experience of discrimination, violence or impoverishment is now crucial to generating an impact on deliberations in and around international institutions. Current media-driven campaign concepts, even those of classic NGOs, seem to require an authentic and tangible testimony by affected individuals in order to deliver their message effectively. Affectedness in that sense has become an element of the political economy of civil-society activities, which are always dependent on external donors. The existence of multifaceted relationships between large NGOs and most affected peoples' organizations is therefore not surprising.¹⁰⁷ Classic NGOs at times even operate as facilitators behind the scenes and finance certain activities of affected peoples' organizations. Behind the peasant from Ghana speaking at the FAO stands a transnational affected peoples' organization, Via Campesina, which, particularly with regard to its professionalism and resources, is in many ways comparable to a classic international NGO. It should not be overlooked that for the groups of the most affected themselves, there remains the problem of the classic co-operation paradox: through inclusion fundamental protest from outside the respective institutions is consequently becoming more difficult. At the same time, however, participation promises more influence on legislation and policy-making.¹⁰⁸

Participation of 'the most affected' also has a constructivist and self-mobilizing dimension, which in this context should not be overlooked.¹⁰⁹ By rallying and articulating their demands on the streets and in conference halls, affected individuals constitute themselves as a specific collective entity. This self-constitutive mechanism is well known in democratic theory:¹¹⁰ It is no longer 'We the people' but rather 'We the

¹⁰⁶ On the concept of descriptive representation, see H.F. Pitkin, *The Concept of Representation* (1967), at 60–91. Marxsen, *supra* note 84, at 766, applies this concept of representation to civil-society participation at the international level, and notes that: '[A] grassroots organization that claims to represent a specific minority would most likely refer to descriptive and substantive representation by pointing out the organization's rootedness in the relevant group of people, and that it is, in fact, promoting the interests of said community.'

¹⁰⁷ Cf. Hasl, *supra* note 2.

¹⁰⁸ On co-optation in general, see Chimni, 'Co-Option and Resistance: Two Faces of Global Administrative Law', 37 *NYU JILP* (2005) 799. On 'the most affected', see Chimni, 'The Limits of the All Affected Principle: Attending to Deep Structures', 3 *TWT* (2018) 807. On the 'dark side' of the concept of affectedness in a world of powerful governments pulling the strings in international institutions, see Hasenclever and Narr, 'The Dark Side of the Affectedness-Paradigm: Lessons from the Indigenous Peoples' Movement at the United Nations', 3 *TWT* (2018) 684.

¹⁰⁹ Sändig, von Bernstorff and Hasenclever, *supra* note 2, at 592. Schaffer speaks of 'subjective conceptions of affectedness' in the debate on global democracy: see Schaffer, 'The Boundaries of Transnational Democracy: Alternatives to the All-Affected Principle', 38 *Review of International Studies* (2012) 321, at 327.

¹¹⁰ On this constitutive dimension of the 'we', see Butler, "'We, the People': Thoughts on Freedom of Assembly', in A. Badiou, P. Bourdieu, and J. Butler (eds), *What Is a People?* (trans. J. Gladding 2016).

1.2 billion smallholders’ or ‘We the 600 million persons with a disability’. Reflected here on a global level is what Pierre Rosanvallon recently ascertained for the nation state: the people (*le peuple*) nowadays is only a ‘litany of minorities and situations’.¹¹¹ Given that organizations representing ‘the most affected’ do not primarily claim to advance universal interests, the question of how they actually managed to be regarded as an actor that can render the work of international institutions more legitimate deserves closer attention.

B A New Source of Legitimacy?

Affected peoples’ organizations base their special claim to legitimacy on their common identity, on their close ties to a group of existentially affected people; in other words, on belonging to a kind of issue-related community of destiny. This community is a group which, according to its own understanding, has been negatively impacted by societal and economic structures, and therefore strives to be heard in relevant international institutions. But do the actions of international organizations become more legitimate through the participation of the most affected? The limitations of deliberatively produced democratic legitimacy through NGO participation, discussed under the second concept, presumably can be held to apply *mutatis mutandis*.¹¹² The same goes for the meanwhile ubiquitous critique of a lack of formal accountability and transparency mechanisms within civil-society organizations.

As mentioned in the Introduction, more recent theories of cosmopolitan or transnational democracy had already, at the beginning of the millennium, turned to the related ‘all-affected’ concept in order to solve the problem of how to delimit the relevant political community for democratic legitimation of international institutions: the so-called ‘boundary problem’, or in other words the problem of how to delimit the ‘who’ or the ‘we’ of transnational democracy.¹¹³ According to the advocates of the ‘all-affected’ principle, everyone causally affected by a public institution’s decision should have a right to participate in that institution, irrespective of national boundaries or membership categories such as ‘citizenship’. The ‘all-affected’ approach also distanced itself from more substantive approaches referring to all human beings or humanity as the right constituency for transnational democracy and justice. The ‘all affected’ were meant to include everybody who stood in a causal and thus empirically verifiable relationship towards a certain governance regime.

In this debate, Nancy Fraser, with her ‘all-subjected’ approach, has attempted to steer a middle course between membership approaches, on the one hand, and more abstract approaches, be they substantively (humanity) or empirically framed like the

¹¹¹ See P. Rosanvallon and A. Goldhammer, *Democratic Legitimacy* (2011), at 4.

¹¹² Social movements representing the most affected often lack the resources and capacity to mobilize public opinion, which professional NGOs may have acquired over time.

¹¹³ On the boundary problem and the all-affected principle in general, see Whelan, ‘Prologue: Democratic Theory and the Boundary Problem’, in J. R. Pennock and J. W. Chapman (eds), *Nomos 25: Liberal Democracy* (1983) 13. More specifically on the boundary problem at the transnational level, see Schaffer, *supra* note 110.

'all-affected' theories, on the other. She finds the membership approach to be too narrow and inadequate in a globalized political setting, while the 'all-affected' approach is too broad in its focus on causal relationships. Fraser points to the fact that, on a causal understanding of 'affectedness', everybody is somehow affected by everything (the 'butterfly effect'). In her view, being 'subjected' to a certain governance structure refers, instead, to concrete 'collections of people' who can be identified as a *political* group created by a social relation vis-à-vis the imposed ground rules of a governance structure:

On this view, what turns a collection of people into fellow subjects of justice is [. . .] rather their joint subjection to a structure of governance, which sets the ground rules that govern their interaction. [. . .] Not restricted to states, governance structures also comprise nonstate agencies that generate enforceable rules that structure important swaths of social interaction. The most obvious examples are the agencies that set the ground rules of the global economy, such as the World Trade Organization and the International Monetary Fund. [. . .] An issue is justly framed if and only if everyone subjected to the governance structure(s) that regulate the relevant swath(s) of social interaction is accorded equal consideration.¹¹⁴

The empirical and normative phenomenon of involving 'the most affected' in international institutions, analysed here, to a certain extent links up to these theoretical debates, in particular to Nancy Fraser's 'all-subjected' principle. When disabled persons' organizations insisted on 'nothing about us without us' during the negotiations on a human rights instrument for persons with disabilities in the early 2000s, they claimed a right to participate because of particular and somewhat existential experiences of being 'subjected'. Both the 'all-subjected' principle and the pragmatic trend to involve 'the most affected' focus on remedying specific prior exclusions and injustices produced by institutional frames, be they Westphalian, transnational or other forms of governmentality.¹¹⁵ The focus of these two related approaches is much more narrow and more existentialist than the one used by the 'all-affected' principle. Another, somewhat related, proposal in this context refers to actual or potential human rights violations as a criterion for affectedness.¹¹⁶ To define affectedness through human rights, however, comes with a catch. Even existential threats to individual livelihood and well-being can usually be justified under applicable human rights norms if the public aim of the restriction (general welfare, budgetary constraints, economic development, etc.) outweighs the individual interests at stake. If one were to take the state of current human rights doctrine and practice seriously, 'affectedness' would not only be framed in individualistic terms, thereby losing

¹¹⁴ Fraser, *supra* note 13, at 411–412.

¹¹⁵ These debates, in turn, are also receptive to the fact that international law, its institutions and the theories on civil society, democracy and human rights have traditionally and structurally neglected, rather than acknowledged, the resistance of Third World social movements of groups adversely affected by the global economy. For a seminal study, see B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).

¹¹⁶ See, for example, the concept of 'those importantly affected' developed by Gould, *supra* note 72, at 201–216.

much of its collective dimension, it would also end up in more or less open-ended and unpredictable balancing exercises.¹¹⁷

Two prominent legal voices have recently taken a position on the issue of ‘affectedness’ in international institutions. Richard Stewart, writing from a global administrative law perspective, has, in a comprehensive analysis of the problem of ‘disregard’ and various ‘accountability’ mechanisms in international institutions, pointed to the possibility of including what he calls ‘outsiders’ in international institutions, even without giving them the right to take decisions:

The presentation of evidence and argument on behalf of otherwise omitted voices may, by itself, influence decision makers by giving them new information, pinpointing neglected effects and issues, and marshalling reasons for outcomes favored by presenters. Such influences, which can help correct institutional tunnel vision, may be enhanced if the participants have the right to be physically present when decision makers discuss a proposed decision. Presenting evidence and argument through public procedures can also provide a means for exposing and contesting an organization’s prevailing policies and create a platform for media attention, Internet campaigns, and broader public awareness of the issues, which reformers can use to mobilize public and political pressures as well as reputational influences to effect change.¹¹⁸

This can be read as a plea for involving the most affected in international institutions, even though Stewart does not yet take note of the recent institutional reforms towards privileging APOs over NGOs, which inspired this contribution. Instead, he refers to NGOs and ‘the disregarded’. In line with the pragmatic GAL approach, he seems to favour incremental change in existing institutions through a whole range of ‘responsiveness-enhancing’ mechanisms in order to achieve a better representation of ‘disregarded’ interests. Similar to the present article, Stewart sees fragmentation as one of the root causes of what he calls ‘structural disregard’. Yet, for him, as an administrative law expert, there is a potential procedural solution at hand: ‘a combination of transparency, non-decisional participation through submissions on proposed decisions, and reason giving may be regarded as sufficient to constitute a system of administrative law in the context of global regulation.’¹¹⁹

The second international legal scholar who has taken a pointed position on the participation of ‘the most affected’ is B. S. Chimni. He sides with Nancy Fraser’s critique of the ‘all-affected’ approaches, portraying her ‘all-subjected’ principle as being more helpful in identifying affected groups and peoples. While acknowledging the potential value of involving APOs in international institutions, he cautions against overlooking deep oppressive structures, such as global capitalism, as well as class, gender and race ‘fractures’ in domestic and global societies.¹²⁰ Moreover, and in contrast to Stewart’s reformist agenda for more inclusive decision-making and enhanced ‘accountability’

¹¹⁷ von Bernstorff, ‘Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self-Determination’, in L. Lazarus, C. McCrudden and N. Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014) 63.

¹¹⁸ Stewart, *supra* note 15, at 262.

¹¹⁹ *Ibid.*, at 267.

¹²⁰ For an early version of this critique, see Rajagopal, *supra* note 117, at 243.

mechanisms in international institutions, Chimni proposes to privilege the national level for protests against exploitative and discriminatory practices over the global level:

[I]n so far as both deep and intermediate structures are concerned, what is called for in the era of hyper-globalisation, especially from the perspective of affected subaltern groups in the Global South, is the devolution of power to the nation-state to take decisions central to the lives of its people. Indeed, to return policy space lost by postcolonial nations to the operation of international laws and international institutions is the most urgent task. APOs can have a more effective voice only if decisions are taken at the level of the nation-state.¹²¹

Chimni promotes the mobilization of what he calls a ‘Transnational Oppressed Class’¹²² against global capitalist and imperialist structures. Affected persons’ organizations should form part of these struggles to be fought primarily at the national level, however. A prerequisite for improving the lives of ‘subaltern’ groups in the Global South is, according to Chimni, the devolution of power to the nation state. The most urgent task for him is to regain lost domestic ‘policy space’. It should be noted in this context that both Chimni and Stewart in principle do recognize the legitimacy of (non-decisional) participation of the most affected in international institutions. Nevertheless, their visions of the role and future of international institutions in face of an assumed general legitimacy crisis of the current global order differ significantly. An important concluding question resulting from these debates on involving affected persons’ organizations is whether these experiments in (fragmented) civil-society participation in international institutions are potentially capable of addressing the deeper-lying legitimacy problems of the current global order, or whether these problems can only be resolved through activist mobilization in re-empowered national polities.

5 Conclusion

Functional and democratic concepts of civil-society participation have dominated institutional and scholarly discourses over the past 150 years. The democratization concept has more recently ushered in a call for the participation of the most affected, with APOs gradually replacing classic international and national NGOs in an increasing number of international institutions. This institutional trend is also reflected in post-millennium philosophical debates about transnational justice and democracy, in particular in Nancy Fraser’s ‘all-subjected’ principle. Involving the most affected is justified by international institutions and scholars as a compensatory measure for local and marginalized perspectives and interests, which so far had been excluded from international institutions.

The quest for involving affected persons’ organizations can be understood as an attempt to redraw the constructed boundaries between private and public spheres, aiming at expanding the public sphere at the cost of ‘market solutions’ and expert- and

¹²¹ Chimni, ‘The Limits of the All Affected Principle: Attending to Deep Structures’, *supra* note 109, at 809.

¹²² *Ibid.*, at 811.

elite-driven regulation. Take the phenomenon of protests against ‘land grabbing’ as an example. When in some African countries over half of the agricultural land is under the control of a handful of foreign investors as a result of a constructed global market for agricultural land, and considering that this market was actively created in the 1990s by institutions, such as the World Bank, dominated by Western capital-exporting states, then the fact that affected smallholder movements attempt to advocate a global standard against land grabbing in the FAO is not surprising.¹²³ Another example is the Fridays for Future movement, which bases its claim to legitimacy as most affected on the young age of its group members, and which attempts to break up hegemonic discourse formations sustaining the dramatic failure of public institutions over the last 30 years to prohibit carbon-intensive industries and consumption patterns. In a way, we are thus witnessing a struggle for the extension of global, national and local publics, a struggle for attention and visibility in public institutions so-far dominated by hegemonic expert networks.¹²⁴ The move to participation of the most affected does not really aim to democratize international institutions in the sense of equal representation; the aim is, instead, to give a voice to those groups that are existentially affected by policy and rule-making of a particular institution.¹²⁵

In international legal debates, two options for the future of international institutions have been put forward in this context. GAL scholars propose to reform international institutions through greater civil-society participation and various other measures enhancing ‘accountability’ taken from the toolbox of national administrative law. The second option is to dismantle international institutions and to redirect energy and mobilization of affected groups to the domestic level as suggested by Chimni. Both positions on civil-society participation and the legitimacy problem of international institutions have their inherent limitations and drawbacks. For one, the reformist agenda comes with the structural limitations posed by one of root causes of prior exclusions and blind spots of expert-driven global governance: fragmentation. It is no coincidence that the involvement of APOs, including marginalized and impoverished segments of the global society, is already well underway in all those international institutions that deal with the so-called ‘negative externalities’ of globalized markets and property protection regimes, such as the human rights and the environmental law field. But to assume that institutions like the WTO, the World Bank, the IMF or the UN Security Council would give affected persons’ organizations an influential voice regarding their global policies and rule-making seems unrealistic.¹²⁶ As Stewart concedes himself in more general terms, a regime that has been erected to promote free trade will refrain from integrating movements which campaign for reintroducing highly protected and

¹²³ On this struggle, see von Bernstorff, ‘“Community Interests” and the Role of International Law in the Creation of a Global Market for Agricultural Land’, in E. Benvenisti, G. Nolte and K. Yalin-Mor (eds), *Community Interests Across International Law*, Vol. 1 (2018) 278.

¹²⁴ Cf. Brem-Wilson, ‘Legitimizing Global Governance: Publicisation, Affectedness, and the Committee on World Food Security’, 3 *TWT* (2018).

¹²⁵ For a similar understanding in the context of international development, see Jokubauskaite, *supra* note 10.

¹²⁶ See also Hasenclever and Narr, *supra* note 109, at 695.

subsidized national and local markets guaranteeing the survival of smallholders and non-industrial forms of traditional agriculture. The specific regime bias which is inscribed in the rules and practices of an IO will prevent a smooth transition into a new institution suddenly putting the interests of so-far marginalized groups first.¹²⁷ What has been called the 'empire of civil society', namely the public law framework of economic globalization, protecting the operations of powerful private economic actors and a status-quo-oriented distribution of wealth, poverty and adverse environmental effects, will not be fundamentally changed by such measures.¹²⁸ Even if these regimes should introduce the whole GAL accountability agenda, including effective judicial review, their foundational actor- and value-configuration¹²⁹ would not allow for major concessions vis-à-vis the global poor and the climate. More accountability in the form of judicial review could eventually even destroy political concessions vis-à-vis these 'external' or second-order values (exceptions) because of the internal regime biases that have usually been internalized by specialized judges and arbitrators.

At the same time, relegating mobilization of the most affected to the national level, as proposed by Chimni, is by no means a panacea, either. Many of the problems faced by the most affected require global solutions to be developed and enforced by global institutions. The main reason is that without significant redistribution of wealth and resources from the Global North to the Global South, and without restructuring the global economy, climate change-induced catastrophes and deprivations will, in the near future, fundamentally challenge existing living conditions in all parts of the globe. The world is in need of a profound economic and social transformation; a phase which must be driven by new substantive and institutional principles, by something like a 21st-century 'New International Economic and Climate Order'. Some international legal and institutional structures will certainly have to be dismantled during this phase. States will remain crucial actors, but, as the historical reflections in this contribution have shown, global political and economic transformations require a new value configuration promoted by a hegemonic discourse including private actors. This time, however, it needs to be in the form of a solid transnational solidarity movement, involving governments, cross-sectorial international institutions, NGOs and – hopefully setting the tone – the most affected.

¹²⁷ For a critical reflection on hegemony and 'structural bias' in international institutions, see M. Koskenniemi, *From Apology to Utopia* (2005), at 602–607.

¹²⁸ On private economic authority enabled by international relations and international law, see J. Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (1994); C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003).

¹²⁹ On the importance of the foundational act for every form of transnational governance network based on Schmittian insights, see von Bernstorff, 'The Structural Limitations of Network Governance: ICANN as a Case in Point', in C. Joerges, I.-J. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004) 257.

