

Although outside specific conventional frameworks it does not matter whether just one state acts for the defence of human rights breached massively by another state, or whether a group of states embarks on that path, the rule of law is of course much better ensured by a collective strategy. Counter-measures individually imposed invariably smack of arbitrariness. Within a group of states, careful preparation of any action is necessary. No decision can be taken merely according to the whims and fancies of domestic public opinion. Measures taken by the Member States of the European Union or of the Council of Europe, for instance, are always preceded by intense diplomatic deliberations. More often than not, the lowest common denominator constitutes the solution eventually found. Caution dominates and rash determinations are not likely ever to occur. For this reason, the charge that can be brought against the European Union is generally rather timidity than excessive boldness.

III ACTION BY NON-GOVERNMENTAL ORGANIZATIONS

Definition of NGOs

In view of the reluctance of states to take up the cause of human rights regarding other countries, non-governmental organizations (NGOs) can play an important subsidiary role. Although NGOs may have widely different agendas, in the field of human rights they essentially pursue altruistic goals. Their general status is normally that of associations under the domestic law of a given country.³³ Although they have been endowed with some rights under international law, they can be classified as subjects of international law only to the same limited extent as individuals.³⁴ It is also clear from the very outset that NGOs lack any real power in economic or military terms. They have no armies, and they depend as to their financing on financial contributions by private donors—and also on states.³⁵ But they can remind governments of the tenets they have pledged to uphold. In a democratic society, where the principle of freedom of expression and of speech obtains, governments must take seriously any criticism directed against them. Neither domestic nor foreign policies can be pursued against the prevailing trends in public

³³ For a study of their status see Kamminga, 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford, Oxford University Press, 2002), at 387.

³⁴ See Delbrück, 'Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System', 9 *Indiana Journal of Global Legal Studies* (2002) 401, at 412–413; Hobe, 'Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht', 37 *Archiv des Völkerrechts* (1999) 152; Tomuschat, *supra* n. 26, at 155–160.

³⁵ Truly government-controlled NGOs are called GRINGOs in UN parlance.

opinion. Potent NGOs know how to avail themselves of the inherent logic and the mechanisms of democratic opinion-making.

As a rule, NGOs set themselves limited goals. There are NGOs with a fairly broad spectrum of tasks, like Amnesty International, Human Rights Watch, or the International Commission of Jurists, and NGOs which concentrate on a small sector in the variegated field of human rights. Thus, the Swiss Association for the Prevention of Torture, whose mandate is indicated in its title, fought for years for the adoption of the Optional Protocol to the UN Convention against Torture. There are groups with an even narrower window to the world. All of them seek to induce states to support the policies pursued by them.³⁶

Legitimacy of NGOs

The restricted terms of reference of the NGOs active in the human rights field constitute a strength, but also a weakness. No NGO has to shoulder a comprehensive responsibility for the society where it has its roots, nor for the societies to which it devotes its attention. Thus, there is no need to balance diverging interests. A NGO can always claim unreserved respect for the interests which it defends. Sometimes, NGOs therefore lose sight of the societal context in which their concerns are embedded. Occasionally, their world view tends to be somewhat simplistic. They believe that a governmental apparatus can achieve anything it determines should be done, without taking into account the difficulties of implementation. On the other hand, one can view this stubborn single-mindedness as a precious asset, which leads to a certain division of labour between governments and NGOs. The NGOs denounce, they present claims, and press for action. Governments, by contrast, evaluate these demands, examine whether they can be translated into reality, and emphasize the difficulties to be surmounted in practice.

A more difficult point is the question of accountability. All NGOs have their programme of action. But they may be small groups of persons, and both their management as well as the articulation of their concerns are generally in the hands of a small élite. No accountability exists towards the public at large, and sometimes even accountability towards the membership is poorly organized. Thus, the legitimacy of NGOs is not beyond doubt, depending on the circumstances of each case.³⁷ This also means that it can

³⁶ An overview is given by Laurie S. Wiseberg, 'Human Rights NGOs', in Alex Geert Casterman et al. (eds), *The Role of NGOs in the Promotion and Protection of Human Rights* (Leiden, Stichting NJCm Boekerij, 1989), at 23-44.

³⁷ See Onuma, 'Towards an Intercivilizational Approach to Human Rights', 7 *Asian Yearbook of International Law* (1997) 21, at 38-42; Tomuschat, *supra* n. 26, at 155-156. Excessively critical is Sur, 'Vers une Cour pénale internationale: la Convention de Rome entre les O.N.G. et le Conseil de Sécurité', 103 *RGDIP* (1999) 29.

hardly be said that the positions defended by a NGO are necessarily better in tune with the philosophy of human rights than the official position of a government.³⁸ NGOs have to convince their audiences by the intrinsic value of their views and practices. The label 'NGO' as such is not a label of quality. But the claim that NGOs must be placed under a system of control seems to be grossly overstated.³⁹

Activities of NGOs

NGOs may deploy their activities within domestic frameworks, or they may seek to influence international decision-making procedures. Many of them combine both approaches. Since at the level of the UN the defining concepts are shaped that later require to be translated into practice, it is understandable that it is attractive for NGOs to be present when in the fora of the HRCion or the General Assembly codification proceedings are carried forward. Of course, the same considerations apply to any legislative projects at a regional level.

The Domestic Field of Action

According to the simplest scenario, NGOs speak out on human rights violations in the country where they have their seat and of which most of their members are nationals. Although simple in conceptual terms, this configuration encounters many obstacles in practice. Dictatorships generally do not accept being criticized by opponent groups. They invariably aspire to have a complete command over civil society. When, after the ratification by Czechoslovakia of the CCPR, an independent group sprang up ('Charter 77') that had no other aim than to remind the government of the country of the commitments which it had thereby undertaken, persecution was merciless. Members of the group were dismissed from their jobs, and the harassment was so relentless that some of them suffered a complete physical breakdown. Members of the HRCee confronted the Czechoslovak representative with these realities. Although they did this in a polite and diplomatic manner,⁴⁰ the Czechoslovak delegation were shocked on that occasion by the simple fact that such occurrences were openly mentioned by an official body. In their answer to the questions put, they avoided making any reference to the taboo title 'Charter 77'.⁴¹ Likewise, the former German Democratic Republic was at loggerheads with non-state-controlled groups which pursued their own

³⁸ Emphasized by Onuma, *supra* n. 37, at 24-25.

³⁹ See González, 'El control internacional de las organizaciones no-gubernamentales', 25 *Revista IIDH* (1997) 29.

⁴⁰ See the summary record of the examination of the first Czechoslovak report on 27 January 1978, *Yearbook of the HRCee* (1977-1978), vol. I, 207-215.

⁴¹ *Ibid.* at 219-224.

agenda of human rights. Thus, the words 'Swords into plowshares', the motto of the peace movement, was viewed by its government as a signal of sedition, the expression of which it persecuted by means of criminal law.⁴² It has also been reported that in the Arab region, NGOs face 'systematic harassment by the majority of the governments'.⁴³

On the whole, it is not uncommon for an NGO to have a different concept of the true value system of its country and people than the government concerned. This divergence has become particularly visible in Asian countries. Whereas the governments of Singapore and Malaysia have on many occasions emphasized the specific nature of the national community concept, the NGOs established in these countries have constantly proclaimed their attachment to the common values embodied in the relevant UN instruments, in particular the UDHR and the two International Covenants. But it is nowhere easy to assume a watchdog function. Even governments emerging from truly democratic societies tend to react angrily when they are confronted with charges of human rights violations.

Because of the well-known difficulties one may encounter in one's own country by making public claims for strict compliance with human rights, some transnational NGOs have adopted rules of strategy which direct national groups to focus their attention primarily on occurrences in other countries. Amnesty International, in particular, invariably assigns responsibility for political prisoners to groups outside the state where the prisoner concerned is held in detention. By inviting its members and friends to express by letters and other messages their dissatisfaction with unacceptable practices, it is in a position both to bring individual cases to the attention of the public at large and to exert considerable pressure on the targeted governments. Letter campaigns may, however, become a blunt instrument after a while. What appears as a routine exercise will soon be ignored. Subordinate civil servants may then be entrusted with throwing incoming messages into the wastebin. Therefore, NGOs must constantly search for new and effective instruments of action. Experience has shown that comprehensive reports on a given country appeal to the media and are deemed to constitute an event worth being mentioned. Greater trustworthiness is attributed to Amnesty International's country reports or similar reports of Human Rights Watch than to the reports of the US government which are never free from political prejudice. In sum, NGOs have become a potent force in the struggle for human rights. But there are certain limits to their influence. All they can do is orchestrate shame. When any government has relinquished all principles of

⁴² See the summary record of the examination of the GDR report on 19 July 1984, *Yearbook of the HRCee (1983-1984)*, vol. I, 537, para. 53.

⁴³ An-Na'im, 'Human Rights in the Arab World: A Regional Perspective', 23 *HRQ* (2001) 701, at 723.

civilized behaviour, and is no longer listening to admonishments addressed to it by the international community, the method of persuasion through compiling a balance sheet of evil and exposing the atrocities that have been committed to the light of the day will fail.

The International Field of Action

In international fora, NGOs have found a promising field of activity as well. Right from its inception, the United Nations provided for cooperation between diplomatic circles and civil society. Article 71 UNCh provides that ECOSOC may make 'suitable arrangements for consultation with non-governmental organizations'. Admission of NGOs to consultative status is governed by ECOSOC Res. 1996/31, which particularizes Article 71 UNCh. According to the rules contained therein, the conferment of such status is decided by ECOSOC upon a recommendation of the Committee on Non-Governmental Organizations, a standing committee of ECOSOC.⁴⁴ Many criticisms have been directed against this Committee which allegedly has sometimes pursued a policy of rejecting groups which too blatantly declare their dissatisfaction with governmental policies.⁴⁵ The Council of Europe, too, has issued rules for the granting of consultative status to NGOs. A limited number of NGOs have even been admitted as observers to the intergovernmental Steering Committee for Human Rights.⁴⁶ NGOs are also involved in the work of the AfHPRCion.⁴⁷

Within the HRCion, NGOs may sit as observers and may also be heard if the Secretary-General so recommends and the Commission so decides.⁴⁸ Similar rules have been framed for the world conferences organized under

⁴⁴ There are three different classes of consultative status: general consultative status for organizations that are concerned with a broad spectrum of tasks corresponding to the activities of ECOSOC, special consultative status for organizations dealing with only a few of the activities of ECOSOC, and listing on a list known as the Roster for other organizations which can make occasional useful contributions to the work of ECOSOC.

⁴⁵ See Aston, 'The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House', 12 *EJIL* (2001) 943, with the caustic remark: 'the fox is guarding the hen-house' (at 950).

⁴⁶ In 1996 these were Amnesty International, the International Commission of Jurists, and the International Federation of Human Rights, see Nowicki, 'NGOs before the European Commission and the Court of Human Rights', 14 *Netherlands Quarterly of Human Rights* (1996) 289, at 292; see also Roth, 'Zur Mitwirkung von Nichtregierungsorganisationen—Gemeinsames Engagement zum Schutz der Menschenrechte', in Uwe Holtz (ed.), *50 Jahre Europarat* (Baden-Baden, Nomos, 2000), 159, at 161-165.

⁴⁷ About this somewhat uneasy relationship see Murray, 'Report on the 1998 Session of the AfHPRCion', 21 *HRLJ* (2002) 374, at 375-377; for the relevant resolutions of the AfHPRCion of 31 October 1998 see *ibid.* at 467-468.

⁴⁸ See Articles 75, 76 of the Rules of Procedure of the Functional Commissions of ECOSOC.

the auspices of the United Nations.⁴⁹ Thus, at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban from 31 August to 7 September 2001, NGOs were allowed to make oral statements on questions in which they have special competence, subject to an invitation of the presiding officer and the approval of that body (Article 66(2)).⁵⁰ It is well known that NGOs had indeed a great impact on that conference, setting the tone for sharp attacks against the human rights policies of the State of Israel.⁵¹

As recognized participants of international meetings, NGOs can effectively stimulate international law-making in the field of human rights.⁵² It stands to reason that they have no formal right to initiate a standard-setting process. But by establishing good contacts with delegations and providing them with briefs or even draft texts of a new desirable instrument they can in fact launch such processes for which a state or a group of states has to assume responsibility. At world level, in 1983 not less than 23 NGOs established the Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child. By submitting to governmental delegations detailed proposals, they were able to exert considerable influence on the ongoing negotiating process.⁵³ Reference has already been made to the efforts of a similar coalition of not less than 11 human rights groups undertaken with a view to complementing the CAT by an optional protocol providing for visits to persons deprived of their liberty. After years of labour which was frequently quite frustrating, this Optional Protocol was finally adopted in December 2002.⁵⁴ At the regional level, the International Commission of Jurists was particularly successful. Together with the Swiss Committee against Torture, it was the driving force behind the initiative to adopt a European convention against torture, an initiative that came to a positive conclusion in 1987.⁵⁵ It was also

⁴⁹ See the reference document on the participation of civil society in United Nations conferences and special sessions of the General Assembly during the 1990s, www.un.org/ga/president/55/speech/civilsociety1.htm (visited December 2002).

⁵⁰ UN doc. A/CONF.189/2, 14 August 2001.

⁵¹ See José L. Gómez del Prado, *La Conferencia Mundial contra el Racismo*, Durban, Sudáfrica 2001 (Bilbao, Universidad de Deusto, 2002), at 39–43.

⁵² For an overview see van Boven, 'The Role of NGOs in International Human Rights Standard-Setting: Non-Governmental Participation a Prerequisite of Democracy?', in Casterman et al., *supra* n. 36, at 53–69; Gordenker, 'NGOs and Democratic Process in International Organisations', in *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (The Hague, Kluwer Law International, 1998), 277; Otto, 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society', 18 *HRQ* (1996) 107.

⁵³ See Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child', 12 *HRQ* (1990) 137.

⁵⁴ GA Res. 57/199, 18 December 2002.

⁵⁵ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS No. 126; see Kamminga, *supra* n. 33, at 396.

instrumental in prompting African nations to accept the idea of a regional treaty for the protection of human rights. Due to its tireless work, with the well-known international lawyer Kéba Mbaye as its president, the AfChHPR was drawn up in 1981 and eventually came into force on 21 October 1986.⁵⁶ In fact, many delegations at international conferences are grateful for input that has been carefully prepared. Smaller states may be much less well-equipped than an NGO that is able to concentrate on specific goals, whereas a small delegation has to deal with a vast array of issues, having little time for any individual topic. Now that the codification work is nearly completed, this aspect of the activity of NGOs tends to recede into the background. The last great success of NGOs was their presence at the world conference where the Rome Statute of the ICC was drafted. The NGO Coalition for an International Criminal Court, which comprised more than 800 groups, emerged as one of the most influential actors, precisely because of their vast and solid expertise.⁵⁷

NGOs have furthermore played an essential role in making the examination of state reports submitted to expert bodies meaningful, as already pointed out.⁵⁸ For the legitimacy of an NGO in this field, it is essential that it act with consistency and free from any bias. Whenever an expert body discovers that an NGO acts selectively, being interested only to assist its political friends while doing everything to denigrate its political foes, its views will automatically fall into disrepute. NGOs operating within the structural framework of the UN must adapt to the philosophy of equality that permeates the entire activity of the UN in the field of human rights.

Rarely are NGOs endowed with formal rights to initiate proceedings. However, as shown in Chapter 8 above, such instances do exist. Two different situations may be distinguished.

In the first place, NGOs may attempt to bring individual cases before an international body by acting as the representative of the victim concerned. On the basis of Article 44 ACHR, the IACionHR has granted NGOs standing to file complaints for alleged victims even in instances where no prior personal contact has been established.⁵⁹ In a similar fashion, the new

⁵⁶ For details see MacDermot, 'The Role of NGOs in the Promotion and Protection of Human Rights', in Casterman et al., *supra* n. 36, at 47; Kéba Mbaye, *Les droits de l'homme en Afrique* (2nd edn., Paris, Pedone, 2002), at 169–183; Howard B. Tolley, *The International Commission of Jurists: Global Advocates for Human Rights* (Philadelphia, University of Pennsylvania Press, 1994), at 178–181.

⁵⁷ See Kamminga, *supra* n. 33, at 398; Pace and Schense, 'The Role of Non-Governmental Organizations', in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), vol. I, 105.

⁵⁸ See Kooijmans, 'The NGOs and the Monitoring Activities of the United Nations in the Field of Human Rights', in Casterman et al., *supra* n. 36, at 15–22.

⁵⁹ See González, *supra* n. 39, at 37.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights provides for complaints by NGOs (Article 5(3)), subject to the condition that the respondent state has made a special declaration to that effect (Article 34(6)). It will depend on the construction of that provision what connotation it will have. On the one hand, the future practice might follow the example of the Inter-American system. On the other hand, however, complaints brought by NGOs could also be understood as complaints legitimated to raise certain general concerns *in abstracto*, without any direct relationship to actual cases.

It is such a power of general scrutiny which has found its expression in the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.⁶⁰ This Protocol deals primarily with organizations of employers and trade unions, but extends also to other NGOs which have consultative status with the Council of Europe. Obviously, its adoption was motivated by a number of pertinent considerations. First, the denial of a right of complaint to individuals makes clear that according to the conception prevailing with the drafters individuals have no subjective entitlements according to the European Social Charter, an assumption which confirms what was said above. Secondly, the drafters were of the view that states parties were not sufficiently interested in defending the pledges set forth in the Social Charter. If they had felt that states parties were vigilant enough, they would have refrained from establishing a specific procedural mechanism which has NGOs as its pivotal element. Lastly, the drafters must have been of the view that NGOs were an appropriate advocate of the common interest embodied in the Social Charter. The establishment of the Additional Protocol is a clear sign indicating that in order to reach the goals of the Social Charter the voice of the groups concerned must be heard. Or to put it bluntly: state bureaucracies are deemed unable to define the common interest of Europe on their own.

Lastly, NGOs have been granted the right to file *amicus curiae* briefs both before the ECtHR (Article 36(2) ECHR)⁶¹ and before the ACtHR.⁶² Thus, they may raise points of general interest in proceedings that might otherwise be focused on more specific issues. No conclusive answer can be given as to whether this right of judicial participation may from time to time lead to conflicts with the interests of the applicant, who may not be anxious to discuss points of principle that could jeopardize his/her claim, preferring instead to have the case adjudicated on the narrowest possible grounds.

⁶⁰ Of 9 November 1995, ETS No. 158.

⁶¹ Nowicki, *supra* n. 46, at 297; Ascensio, 'L'*amicus curiae* devant les juridictions internationales', 105 *RGDIP* (2001) 897, at 901–902.

⁶² Ascensio, *ibid.*; Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings', 88 *AJIL* (1994) 611.

Outside the formal and informal mechanisms of international organizations, NGOs have sometimes established their own international procedures for the attainment of their goals. In this regard, the setting up of 'peoples' tribunals' ('Russell tribunals') may be called the culmination of their strength. The activity of such self-appointed judges raises complex problems. If they conclude their proceedings by statements which they call 'judgments', such attempted usurpation of official authority must cause uneasiness to any lawyer attached to the rule of law. If, however, such a body confines itself to organizing a public forum in order to give a voice to the victims of abuses and atrocities to be clarified, the legal perspective changes. Such exercises are supported by freedom of expression. No criticism could, therefore, be directed against the 'Women's International Tribunal on Japanese Military Sexual Slavery' which convened in December 2000 in Tokyo.⁶³

It is true indeed that NGOs are less prone than states to play the game of power politics. They do not have to take into account economic interests, in contrast to what governments have inevitably to do. Nor do they have to follow other patterns of amity or enmity. It remains, though, that at world level most NGOs are of Western inspiration. Many of them are funded by governmental monies. Therefore, they are often portrayed as a 'fifth column' of the states that support them. One can hardly deny, however, that most NGOs stand for the values embodied in the international instruments adopted by the United Nations. In this sense, it is crucial to note that these values do not have an exclusively Western background, but have their roots in all civilizations of the world. Since universality of human rights is a concept borne out by any serious study of the issue, most attacks on NGOs constitute no more than political strategies resorted to by governments desperately in need of some pretext as justification for their deviant conduct.

The high degree of appreciation of NGOs active in the field of human rights is also demonstrated by the unanimous adoption, by the General Assembly, of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms in 1998.⁶⁴ This Declaration has become the Charter of NGOs in that it not only covers individuals, but also associations for the promotion and protection of human rights (Article 5). Unfortunately it shares the fate of all resolutions of the UN General Assembly in that—as a non-binding instrument—it is neither self-executing nor enforceable. However, it will serve as a yardstick for the HRCee when examining compliance by states with the political freedoms set forth in

⁶³ See Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', 95 *AJIL* (2001) 335.

⁶⁴ GA Res. 53/144, 9 December 1998. On the difficulties surrounding its adoption see Dennis, 'The 54th Session of the UN Commission on Human Rights', 93 *AJIL* (1999) 246, at 246–247.

the CCPR. Likewise, the General Assembly itself and the HRCion will measure the overall performance of a country in the field of human rights by the degree to which it allows advocacy of compliance with the standards binding on that country. Among the factors which induce states to abide by their obligations, NGOs occupy today a leading position.